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Review

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During the past decades, the Thai government has developed a number of coping mechanisms related to cross-border migration and migrant workers. However, obstacles in implementing these mechanisms still remain. See details in page 12.

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Corporate Fraud in Thailand*

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If the definition of corruption in the public sector refers to the exploitation of public authority for personal gain, then the use of corporate authority by executives of a company to secure personal gain also could be considered as “corruption.” The global anti-corruption forum has been giving increasing importance to corruption and fraud in the private sector, in particular with regard to money-laundering. The United Nations Convention against Corruption, which more than 150 countries ratified as of March 2011, contains clauses addressing preventive and punitive measures to address fraudulent practices in the private sector.

This paper examines the nature of corporate fraud that occurred in the Thai stock market during the period 2000–2011 and assesses the efficacy of relevant laws and regulations for dealing with these practices in order to identify the remaining “gaps” in the supervision of business practices. This report finds that Thailand already has all the necessary rules and legislation required to handle corporate fraud but its enforcement record has been appalling. The financial penalty imposed on an infraction of the securities law in most cases is also insufficient to deter undesirable practices, and lengthy court cases have helped to further undermine the rule of law. Most interestingly, however, examination of selected cases of corporate fraud reveals that those cases that involved well-known politicians did not result in prosecution, indicating that political influence may be an important factor in determining whether the law is enforced or not.

To improve the rule of law regulating corporate practices, it may be necessary to (a) introduce a civil penalty in lieu of a criminal penalty in order to lessen the burden of proof required for legal prosecution; (b) grant the Securities and Exchange Commission (SEC) broader power to impose administrative measures in order to avoid lengthy and often unfruitful pursuit of legal sanctions; (c) provide for restitution/compensation for the injured parties; and (d) legislate class-action lawsuits in order to incentivize action by shareholders.

1. INTRODUCTION

The global anti-corruption forum that has been focusing on corrupt practices in the public sector has recently been paying increasingly more attention to fraud in the private sector. In this context, it may be asked: If the definition of corruption in the public sector refers to the exploitation of public authority for personal gain, could the use of corporate authority by directors and executives of a company to secure personal gain also be labeled as “corruption?” The only difference between the “corrupt” actors is that the damage caused by corruption in the public sector is borne by the entire nation, while that in the private sector is borne by a limited group of stakeholders, such as shareholders, employees or creditors. In the case of a publicly listed company, the range of affected parties can be rather broad. Moreover, systemic corruption in the private sector can have public implications. For example, widespread connected lending in the banking sector can undermine the stability and credibility of a country’s financial system.

The global anti-corruption forum has been giving increasing importance to corruption and fraud in the private sector, in particular with regard to money-laundering. The United Nations Convention against Corruption, which more than 150 countries ratified as of March 2011, contains clauses addressing preventive and punitive measures to deal with fraud in the private sector (United Nations 2003). Preventive measures include, for example, the establishment of good accounting and auditing standards, and punitive measures include the mandatory criminalization of bribery of foreign public officials and officials of public international organizations. The Convention also contains important provisions relating to international cooperation in the enforcement of law across borders, such as extradition, gathering and transferring evidence, seizure of assets and assisting investigations and prosecutions. Thailand ratified the Convention on March 1, 2011.

* This paper is based on the report entitled “Corruption in the Private Sector: Preventive and Remedial Measures,” commissioned by the National Counter Corruption Commission, and conducted by Thailand Development Research Institute (TDRI); it was completed in August 2011.

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This paper examines the nature of corporate fraud in Thailand and the enforcement of the relevant laws. The second section provides a brief overview of the structure of corporate control among Thai companies, which will help explain the nature of fraud elaborated in the subsequent section. The fourth section provides a cost and benefit analysis of committing a corporate fraud in order to elucidate the relevant incentives or disincentives. The final section offers recommendations on how to improve the rule of law governing fraudulent corporate practices.

2. AN OVERVIEW OF THE THAI CORPORATE STRUCTURE

Most companies in Thailand are family owned. A study by the World Bank found that two-thirds of the listed companies in Thailand are controlled by business families, most of which are ethnically Chinese (Claessens and Djankov 1999). The share of family-owned public companies is comparably high in other East Asian countries as well, with the marked exception of Japan. While family-owned companies can make quick and flexible decisions, their management can be opaque and arbitrary, lacking proper checks and balances and participation from stakeholders; hence, they are prone to fraud. Since most publicly listed companies grew out of smaller family-run companies, the way such companies are managed is difficult to change.

During the “bubble economy” preceding the Asian financial crisis in 1997, corporate fraud was widespread as controlling shareholders tried to reap the most financial gain for both the company and for themselves. The most rampant and damaging corporate malpractice at that time was the extension by commercial banks of “clean loans,” loans without any collateral but only personal guarantees, to “connected” individuals or companies. As the economy plunged in 1997/98, that practice led to a rapid accumulation of non-performing loans which crippled many locally owned banks. Siphoning of funds from publicly listed companies to privately owned companies was also extensive in the 1990s because “tunneling” was less evident in the bubble economy when the price of assets continued to climb regardless of the fundamental factors.

The 1997 crisis wiped out virtually all family-controlled commercial banks and financial institutions, the equity of which had to be written down markedly. The SEC and the Stock Exchange of Thailand (SET) at that time passed many rules and regulations that would help prevent the types of corporate fraud and misconduct that had plagued the capital market before the crisis. Has corporate fraud in the Thai stock market been tamed as a result? If not, what is the nature of fraudulent practices today? And why do those practices persist?

3. THE FACE OF CORPORATE FRAUD IN THAILAND

While fraudulent behavior in the private sector can range from tax evasion and falsification of financial reports to non-compliance with state laws and regulations, this study concentrates only on the cases that involved the abuse of corporate control by the executives of publicly listed companies. As mentioned previously, executives of a publicly listed company are very much like *state* officials: they are supposed to protect the interests of all shareholders, just like state officials are accountable to all the people. Hence, the use of executive power in a private company to further win personal gain by company directors and executives can also be considered as “corruption.”

According to the Thai SEC, there were 90 cases of infraction of the Securities and Exchange Act B.E. 2535 (1992). Most of these cases were classified as failure to report vital information; falsification of information constituted 37.8 percent of the total number of violations, siphoning of corporate funds (27.8%), “violation of regulations” (24.4%), price manipulation (6.7%), and insider trading (3.3%). While these figures tell us about the type of corporate fraud that occurred in the Thai stock market, they do not tell the story behind each case. Who were the persons involved? How was the violation detected? What legal measures were taken?

This paper examines four case studies in detail. These cases were widely reported in the media and had a sufficient official documentation trail to tell a story. They are:

1. Sikarin PCL
2. Roynet PCL
3. Picnic Corporation PCL
4. S.E.C. Auto Sales and Services PCL

3.1 Sikarin PCL

Sikarin PCL was founded by the “Wongpaet” family of medical doctors. The company was engaged in a variety of health services, including the supply of medical equipment, hospital catering services and, most importantly, hospital services. In 1994, Juldis Development PCL, a property development business, bought 37 percent of Sikarin’s equity share. The original shareholders had thought that the new major shareholder would contribute to the company’s planned expansion of its hospital chain into provincial areas. Thereafter, the company increased its registered capital twice, reaching a total value of US\$ 26.6 million or about 670 million baht (US\$1 = about 25 baht at that time). The Wongpaet family entrusted the management of this investment to the Juldis Group. Three years later, the Wongpaet family discovered that the Juldis Group had channeled the funds to support its own property development business, which was experiencing severe financial problems as the

economy began its steep decline before turning into the full-blown Asian financial crisis in 1997. Many of these connected transactions, such as the purchase of Juldis PCL equity shares, 85 percent of whose value had to be written off later, the extension of loans to a company affiliated with the Juldis Group, or the purchase of land from the Juldis Group, were never reported to the board of directors.

The SEC found infractions of several sections of the Securities Act and thus referred the case to the Department of Special Investigation (DSI) for criminal action.¹ Charges made against the directors of the Juldis Group included misuse and misappropriation of the company's funds and falsification of the company's financial accounts. Until today, however, after more than a decade has passed, the case is still under investigation by the DSI.

It is interesting to note that in the year 1999, while the SEC was filing charges against the executives of the Juldis Group, a well-known lawyer who was working for Mr. Thaksin Shinawatra, who had been Minister of Foreign Affairs and Deputy Prime Minister during the mid to late 1990s, bought the entire equity share in Sikarin from the Juldis Group. In 2000, Mr. Thaksin became Prime Minister after a landslide victory of the Thai Rak Thai Party. In 2002, the lawyer sold all the shares back to the Juldis Group. Interestingly, the current shareholders of Sikarin consist of the Juldis Group and several prominent former Cabinet members of the Thaksin Government. The Wongpaet family, as expected, has completely divested itself from the company that it had founded.

3.2 Roynet PCL

Roynet PCL was founded in 1997 by the "Yaowapruet" family. Its main business was the retail sale of dial-up Internet cards. The company was listed in 2001 in the newly established "Market for Alternative Investment" (MAI), which is a second stock market then designed for smaller corporations that were seeking funding from the capital market but were not able to meet the stringent listing conditions imposed by the country's main stock exchange, the SET. The listing conditions for MAI were more relaxed; for example, the minimum paid-up capital for a company listed on the MAI was 40 million baht compared with 200 million baht for listing on the SET. The requirement that the listing company must record a profit for three

consecutive years before listing was also relaxed. Thus, Roynet was able to be listed on the MAI with paid-up capital of 40 million baht despite its four consecutive years of no profit.

After listing on the MAI, the company's financial performance improved remarkably. As can be seen from Table 1, the company recorded a net profit of 11.87 million baht in the third quarter of 2002 compared with a loss of 7.29 million baht in the previous year. The figures for the previous nine months are even more startling. The chairman of the executive board justified the massive financial turnaround by explaining that there had been a surge in the sale of Internet cards. The spectacular performance no doubt pushed the price of the company's rosy stock from 0.92 baht to 2.26 baht per share within one week after the disclosure of the quarterly financial report. However, shortly afterwards, the SEC ordered that the company revise the report as it found that the company had registered all Internet cards distributed to various retailers as sales although those cards had not yet been sold to final consumers, with the result that no real income had been earned. The SEC then put up a "notice pending" sign on the company's stock to inform investors about the pending revision of the financial report, but all these moves were too late. The revised report showed a net loss of 36 million baht instead of a profit of 22 million baht for the previous nine months. The stock price fell sharply from its peak of 2.29 baht to 0.79 baht per share.

In February 2003, the SEC filed charges against the company and its Chairman, Kittipat Yaowapruet, for falsification of information, failure to report changes in the company's equity holding and insider trading. In July of the same year, the DSI decided to file a lawsuit for this case. In March 2011, the Southern Bangkok Criminal Court found Mr. Kittipat Yaowapruet guilty and handed him a sentence of 8 years and 8 months' imprisonment and fined him 1.88 million baht. As a result, in view of the Roynet case, the SEC has also revised the listing criteria for the MAI. First, companies that would like to list on the MAI must now register a net profit in the year preceding the application to register and must have been in operation for at least two years before doing so. Second, the company's financial advisor and audit committee are required to scrutinize thoroughly the financial report before its official release. Third, the SEC coordinates with the SET in issuing warnings for financial reports that contain extensive reservations made by the auditor.

Table 1 Financial Report of Roynet (third quarter of 2002)

(unit: millions of baht)

	3 rd quarter		Past 9 months	
	2002	2001	2002	2001
Net profit (loss)	11.87	-7.29	22.08	-18.48
Profit (loss) per share	0.19	(0.89)	0.36	(2.25)

Source: *Bangkok Business Newspaper*, January 22, 2003.

To conclude, the Roynet case illustrates a situation whereby the stock market was used merely as a means by which to make quick financial returns through share price manipulation. The latter was done usually by falsifying quarterly financial reports in order to temporarily inflate the company's stock price, which would enable the instigator to reap capital gains from insider trading.

3.3 Picnic Corporation PCL

Picnic Corporation was founded in 2003 by the Lapwisuthisin family, one member of which, namely Suriya Lapwisuthisin, served as the Deputy Minister of Commerce in the Thaksin Shinawatra Government in 2005. The company's main business involved wholesale distribution of cooking gas. After its listing, the company reported a jump in revenues from 2,263 million baht in 2003 to 7,023 million baht in the following year.

The SEC decided to examine in detail the sources of the surge in revenue and found the following. First, the company had booked the deposit on gas tanks as revenue, thereby artificially boosting the sales figures. Second, the company sold gas to its affiliated gas retailing companies at an elevated price (again, in order to boost the sales figures). The company also inflated its asset value as it appeared on the balance sheet. For example, it bought shares in World Gas Co., Ltd., and an affiliated company at prices that were well beyond their respective book values by booking the difference as "goodwill" that was later written down almost entirely.

Besides uncovering the accounting manipulations used to dress up the income statement and the balance sheet of the company, the SEC also found that the executives of the company had siphoned the company's assets by (a) extending loans to two companies, which later repaid the loans not to Picnic Corporation PCL but to its executives' personal bank accounts; and (b) signing business contracts with terms and conditions that placed Picnic Corporation PCL at a clear disadvantage. For instance, one of the contracts indicated that, if Picnic Corporation PCL failed to repay a loan worth 75 million baht, the creditor would then have the right to confiscate the company's entire shareholding in World Gas Co., Ltd., the second largest distributor of cooking gas in Thailand, which was worth 1.1 billion baht at the time. As expected, Picnic defaulted on the loan and the shares were seized. Several creditor company's and Picnic's directors were later accused by the SEC of colluding to defraud the company.

The SEC filed three separate charges against several executives of the company, only one of which made it to court, while the other two remained under investigation. The charges concerning accounting manipulation to record deposit payments as income and falsification of the loan extension contract, however, were later dropped by the criminal court in 2006 due to insufficient evidence.

3.4 S.E.C. Auto Sales and Services PCL

S.E.C. Auto Sales and Services PCL was founded in 1992. Its main business was the sale of imported luxury cars. The company was listed on the SET in 2006. After listing, its financial performance remained sound with sales of 2.8 billion baht and an annual profit of 121 million baht. However, the company's profit dropped to 62 million baht in the following year amid the rumor that the company was on the verge of bankruptcy owing to a large amount of bad loans and that the chairman of the company had already fled overseas. As a result, the SEC launched an investigation into the matter and found that:

1. The company had extended a loan to an affiliated company called SECC Holding, which in turn lent the sum to four individuals, one of whom was Suriya Lapwisuthisin, a former politician whose name also appeared in the Picnic Corporation PCL case discussed previously. The Board of Directors claimed that it was not aware of the lending as the extension of the loan was never reported to the board. However, the SEC insisted that the directors were nevertheless accountable for the fraudulent practice as they had a fiduciary duty to the company according to the law.
2. The stock of imported cars that constituted the bulk of the company's assets did not exist. According to the balance sheet, there were 501 imported cars parked at a warehouse located in the shipping yard, but the investigating team found only eight cars at that site. The Customs Department also confirmed that the company did not import any cars during the period 2007-2008.

The SEC investigation revealed infraction of several sections of the Securities Act and hence made a referral of criminal charges against the executives of S.E.C. Auto Sales and Services PCL and SECC Holding Company to the DSI. The charges included the siphoning of the company's fund through the falsification of import documents, the extension of loans to four individuals through a subsidiary company and falsification of the company's financial report. The SEC issued an order to freeze the assets of the accused (for the first time) and asked the court to prohibit them from traveling overseas. However, several of the accused had already left the country by that time. As of September 2011, this case is still pending investigation at the DSI.

3.5 Conclusion

The nature of corporate fraud in Thailand has not changed over the years. All four cases involved: (a) the siphoning of a listed company's assets from a public company to family-owned unlisted companies; and

(b) the manipulation of share prices in order to generate capital gains from equity trade.

The tunneling of a listed company is often conducted through (a) connected transactions that disadvantage the company, such as the use of the company's fund to invest in a family-owned business or to purchase overpriced assets owned by the major shareholder, (b) connected lending to related individuals that eventually default on the loan, and (c) the falsification of documents, such as invoices, in order to divert the company's fund to individual perpetrators.

Because siphoning will no doubt lead to a deterioration of the company's financial health, which will be evident to shareholders and potential investors, it is also necessary to cover up the company's financial performance by means of accounting manipulation. Here, from the cases reviewed, several accounting manipulations were used. These include, for example, the booking of unsold products as revenue to prop up sales figures, the exploitation of "goodwill" to justify purchases of "overpriced" assets and to inflate the company's asset value, or the outright falsification of non-existent revenue or inventory through fake order forms or import documents. When misleadingly optimistic financial reports result in higher stock prices, the perpetrator would then capitalize the gains by selling off the equity shares before the actual financial situation of the company is revealed to other shareholders or investors.

It is interesting to note that, of the four cases examined, only one case was subject to a court decision. The others are still pending investigation even after the passing of many years. It would appear that, although the SEC found infractions of the law, for most of the cases, a formal criminal complaint was never filed. This is because, when a matter is referred for criminal action, it must be reviewed by the DSI because, under Thai law, SEC staff are not considered criminal investigators. SEC estimates that approximately 20 percent of SEC criminal referrals are dropped at this stage. A case may also be dropped by the Public Prosecutor on the basis of insufficient evidence.

4. INCENTIVES TO COMMIT FRAUD

In order to understand why corporate fraud persists despite the myriad of laws and regulations designed to prevent and combat the undesirable behavior, it is

necessary to examine the costs and benefits of committing a corporate crime.

The incentive to commit fraud is determined by the size of the financial gains that the perpetrator expects to reap. However, this must be weighed against the possibility or probability of being convicted of the crime and the severity of the relevant sanctions, as shown in equation 4.1.

From the four case studies, one can approximate the "actual" size of the financial gain generated by the fraudulent behavior, as shown in Table 2.

As for the probability of conviction, p , that variable can be calculated from the number of directors and executives whose names have been referred by the SEC to the DSI for criminal action. Statistically, for the past 17 years since the implementation of the Securities Act in 1992, the SEC has filed charges against 212 executives of listed companies. Among those, only 12 (or 5%) received a court sentence. One third of them are still pending investigation by the DSI or are under consideration by the public prosecutor regarding whether or not to launch a lawsuit; for 40 percent of the executives, charges were never filed because the Public Prosecutor dropped their cases on the basis of (a) insufficient evidence (usually in the case of stock price manipulation, which is difficult to prove "beyond reasonable doubt") (about 27%), and (b) the accused fled the country (13.18%), as shown in Table 3.

When substituting the value of the actual financial gains and the probability of being convicted, p , into equation 4.1, the size of the financial penalty that would deter fraudulent behavior can be calculated. As can be seen in Table 4, the minimum financial penalty is in the millions of baht. However, the size of the financial penalty as stipulated in the law is much lower than the calculated threshold shown in Table 5. The maximum penalty is normally only twice the size of the benefits gained, which does not compensate for the very low probability of being convicted. It should also be noted that private actions for violations must be brought as breaches of contract or breaches of fiduciary duty rather than private rights of action under the securities law. One exception is the right of a shareholder in a publicly listed company to bring private action against the company or its directors. Class-action lawsuits are not authorized. Because of the limitations on private legal action, the expected cost of contravention of the securities law in Thailand is rather low.

$$\text{Fraud will be committed when } E(\text{gain}) > E(\text{loss}) \quad (4.1)$$

Where $E(\text{gain})$ = financial gain from fraudulent conduct
and $E(\text{loss})$ = p (penalty), where

p refers to the probability of being convicted, and
penalty refers to the legal sanctions if convicted.

Table 2 Financial Benefit from Fraudulent Conduct

Cases/amount involved	Financial benefit
Sikarin PCL (1,003 million baht)	– The purchase of the Juldis Group's equity share of 214.05 million baht
	– The extension of loans to a company affiliated with the Juldis Group (total = 758.85 million baht)
	– The provision of a deposit to guarantee an affiliated company (total = 20 million baht)
	– The transfer of shares in an affiliated company to an individual (in the amount of 10 million baht)
Roynet PCL (24.6 million baht)	– The value of shares sold by the director and his family (in the amount of 24.6 million baht) to reap capital gains from insider trading through falsification of a quarterly financial report
Picnic Corporation PCL (3,019 million baht)	– Extension of loans to two companies which later repaid the loans to the executive's personal bank account (total = 85 million baht)
	– Writedowns of initially inflated valuation of small gas tanks (valued at 1 billion baht) and of non-performing loans (valued at 454 million baht)
	– Embezzlement of the company's shares and assets and signing of business contracts that put Picnic Corporation PCL at a disadvantage (total = 761 million baht)
S.E.C. Auto Sales and Services PCL (914.9 million baht)	– Falsification of purchase of imported cars (in the amount of 597.9 million baht) in order to trigger payment from the company
	– Extension of loans to four individuals (total = 245 million baht)
	– Embezzlement of assets of a subsidiary company (in the amount of 30 million baht)
	– Embezzlement of the company's cash to purchase equity shares (total = 42 million baht)

Source: *The SEC Newsletter*, Vols. 34/2544, 6/2546, 67/2548, 49/2549, 69/2549, 84/2551, 28/2552, 78/2552.

Table 3 Total Number of Executives Accused from 1992 to 30 September 2009

Criminal action	Accused (number)	No prosecution			Pending investigation	Dismissed by court		Penalized by court	
		Barred by prescription	Fled	No prosecution order		Pending	Final	Pending	Final
A director and an executive who did not perform duties with responsibility, due care and loyalty (Section 89/7)	3	-	-	-	3	-	-	-	-
Falsification of information (Sections 238-240)	5	-	-	-	1	-	-	4	-
Insider trading (Section 241)	5	-	-	4	1	-	-	-	-
Price manipulation (Section 243)	79	-	15	39	4	-	13	6	2
Improperly taking over a business (Section 247)	3	-	-	2	-	-	-	1	-
Corruption in corporate administration (Sections 307-312)	75	-	-	15	45	10	-	2	3
Doing business without permission (Section 289)	50	-	14	-	22	7	-	-	7
Total	220	-	29	60	76	17	13	13	12

Note: This information excludes the whistle-blower notification to inquiry officials.

Source: Securities and Exchange Commission.

Table 4 Financial Benefit and Penalty Comparison

(unit: millions of baht)

Cases	Financial benefit	Penalty
Sikarin PCL	1,003.0	18,403.7
Roynet PCL	24.6	451.4
Picnic Corporation PCL	2,300	46,000
S.E.C. Auto Sales and Services PCL	914.0	16,770.6

Source: Data collected by the authors.

Table 5 Penalties According to the Offense Committed

Offense(s)	Provisions	Penalties
Siphoning of corporate funds	<p>Sections 307, 308, 311</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who is entrusted to manage the property of such juristic person, or property of which such juristic person is a co-owner, who dishonestly violates his duties by any means and causes damage to the usefulness in the nature, as being a property, of such juristic person,</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who possesses property belonging to such juristic person, or of which such juristic person is a co-owner, and dishonestly converts such property to himself or a third party,</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who acts or omits to act in order to obtain unlawful gains for himself or another person and causes damage to such juristic person,</p>	<ul style="list-style-type: none"> - Imprisonment for a term of 5-10 years - Fine from 500,000 baht to 1 million baht
	<p>Section 313</p> <p>Any director, manager, or person responsible for the operation of a company or a juristic person whose securities are listed in the Securities Exchange or traded in any over-the-counter centre, and who contravenes Section 307, Section 308, Section 309, or Section 311,</p>	<ul style="list-style-type: none"> - Imprisonment of 5-10 years - A fine of two times the price of the property or benefit which the person obtains through the contravention of such Sections, as the case may be, but such fine shall be not less than 500,000 baht
Falsification of information	<p>Section 56</p> <p>A company which issues securities in accordance with Section 32, Section 33 or Section 34 shall prepare the following financial statements and reports concerning the financial condition and the business operation of the company and submit them to the Office,</p>	<ul style="list-style-type: none"> - Fine not exceeding 100,000 baht and a further fine not exceeding 3,000 baht for every day during which the contravention continues (Section 274)
	<p>Section 238</p> <p>No securities company or any person responsible for the operation of a securities company or company which issues securities or any person having an interest in the securities shall impart any false statement or any other statement with the intention to mislead any person concerning the facts relating to the financial condition, the business operation or the trading prices of securities of a company or juristic person whose securities are listed in the Securities Exchange or are traded in an over-the-counter centre,</p>	<ul style="list-style-type: none"> - Imprisonment for a term not exceeding two years, or - Fine not exceeding an amount two times the benefit received or which should have been received by such person as a result of such contravention but such fine shall be not less than 500,000 baht, or both (Section 296)
	<p>Section 312</p> <p>Any director, manager, or person responsible for the operation of any juristic person under this Act, who commits or permits another to act so as to:</p> <ol style="list-style-type: none"> (1) Damage, destroy, alter, abridge, or falsify accounts or documents or collateral of such juristic person or one related to such a juristic person; (2) Make false entries or fail to enter any material statement in the accounts or documents of such a juristic person or one related to such a juristic person; or (3) Keep incomplete, incorrect, out-of-date, or inaccurate accounts, 	<ul style="list-style-type: none"> - Imprisonment for a term of 5-10 years - Fine of 500,000 baht to 1 million baht
Insider trading	<p>Section 241</p> <p>In the purchase or sale of securities which are listed in the Securities Exchange or traded in an over-the-counter centre, no person, whether directly or indirectly, shall purchase or sell, offer to purchase or sell or invite any other person to purchase, sell or offer to purchase or sell securities which are listed in the Securities Exchange or traded in an over-the-counter centre in such a way as to take advantage of other persons by using information material to changes in the prices of securities which has not yet been disclosed to the public and to which information he has access by virtue of his office or position, and whether or not such act is done for his own or another person's benefit, or to disclose such information so that he will receive consideration from the person who engages in the aforesaid acts.</p>	<ul style="list-style-type: none"> - Imprisonment for a term not exceeding two years - Fine not exceeding two times the benefit received or which should have been received by such person as a result of such contravention but such fine shall be not less than 500,000 baht, or both (Section 296)

Source: Securities and Exchange Act B.E. 2535.

5. WHAT HAS BEEN DONE AND THE WAY FORWARD

Since the start of the Asian financial crisis in 1997, the SEC and SET have put in place many rules and regulations to prevent corporate fraud, such that Thailand received a ranking of fourth place in corporate governance (CG) from *CG Watch 2010* compared with a ranking of eighth in 2007, or just three years earlier, as shown in Table 6. Thailand's score improved by 8 points from 47 to 55, the largest improvement among the 11 Asian countries surveyed. The SEC has done much to improve accounting and auditing, which in this study was identified as the weakest regulatory link. However, the score for enforcement, 42, remains low, indicating that the enforcement problems revealed in this report have not yet been solved. It should also be noted that the score for CG culture is also rather low. This seems to indicate that the drive for better corporate management will rely heavily on state supervision rather than the initiation of the businesses themselves. However, this phenomenon is common among all countries surveyed.

Much of the improvement in the CG score for Thailand can be attributed to the revised Securities Act, which was passed during the government administration in 2009, which had been put into place following the 2006 coup d'état. The new Act contains several provisions to facilitate the detection and exposure of corporate fraud. However, the legal amendment has had only a limited effect, as will be elaborated in greater detail below.

5.1 Whistle-blower Protection

In the past, the SEC often received anonymous letters revealing fraudulent practices, which are helpful in detecting fraud; however, because criminal

enforcement requires a high standard of proof, cooperation from a company's insiders is essential for successful prosecution. Since Section 89/2 of the amended Securities Act provides a whistle-blower protection clause whereby employees, auditors or advisors of a company that cooperate with the SEC in the investigation into an alleged corporate fraud will be protected against possible retaliation, such as unfair transfers or dismissal. However, an interview regarding this matter with responsible persons at the SEC revealed that most informants were anonymous or former employees of the company concerned, indicating that the provision has not succeeded in empowering the current employees of a company to step forward to report a fraudulent practice in their respective work place.

5.2 Accounting Audit

From the case studies presented, it can be observed that the falsification of financial statements and manipulation of accounting techniques are commonplace in committing a corporate crime. Section 89/25 of the amended Securities Act stipulates that auditors must report the preliminary result of the audit to the company's audit committee if fraud is suspected. The committee must then inform the SEC of the matter within 30 days. If the committee fails to do so, then the auditor is obligated to report the matter directly to the SEC. This additional provision was put into use in the case of Blisstel PCL. In 2010, the auditor of that company notified the audit committee about a suspiciously large cash payment for advertising services. Although the audit committee investigated that matter and tried to clarify the auditor's concerns, the latter maintained reservations as appeared in the auditor's report. As a result, the SEC ordered the company to carry out a "special audit" and disclosed the result to the public online.

Table 6 *CG Watch Scores by Category*

Ranking	Country/area	Overall scores	CG rules & practices	Enforcement	Political & regulatory environment	Accounting and auditing	CG culture
1	Singapore	67	65	60	69	88	53
2	Hong Kong	65	59	63	67	80	54
3	Japan	57	45	53	62	75	53
4	Taiwan	55	50	47	56	78	46
4	Thailand	55	56	42	54	73	49
6	Malaysia	52	49	38	60	80	32
7	India	49	46	36	54	63	43
7	China	49	47	36	56	75	30
9	South Korea	45	43	28	44	78	33
10	Indonesia	40	39	28	33	67	32
11	Philippines	37	35	15	37	75	25

Source: CLSA Asia-Pacific Markets in collaboration with the Asian Corporate Governance Association, *CG Watch 2010: Corporate Governance in Asia*.

5.3 Shareholders Empowerment

Sections 89/18 and 89/19 of the revised Securities Act allow shareholders, whose collective voting share amounts to not less than 5 percent of the total voting shares, to take action against the directors and executives of any company that has violated its fiduciary duty should the company fail to do so after one month. Expenses related to the pursuit of legal measures will be reimbursed if the court decides that the action was taken in good faith. However, until today, there have been no known cases which invoked these particular provisions. This is because remedial measures prescribe only financial compensation to the company and not to the particular shareholders that made the effort to take legal action. However, Section 89/20 allows investors to file for private damages from executives and directors in cases where the losses made were associated with the disclosure of false statements or concealment of material facts. In the absence of a class action lawsuit, however, the provision has had a limited impact on deterring fraudulent behavior.

In addition to Sections 89/18, 89/19 and 89/20, Section 89/28 also allows shareholders, whose collective voting share amounts to not less than 5 percent of the total voting shares, to propose an agenda for the shareholders' meeting. This particular provision was taken up by 75 shareholders of the Thoresen Thai Agencies, a strategic investment holding company with three primary business groups: transport, energy, and infrastructure. Those shareholders, whose combined shareholding amounted to 10.2 percent of the company's total equity share, requested an extraordinary shareholders' meeting to consider matters concerning the issuance of warrants to existing shareholders and a change in the accounting year.

Besides the previously mentioned sections, the amended Securities Act 2007 also contains additional provisions designed to prevent or detect corporate fraud. For example, a director's fiduciary duty was codified and made more stringent, and the board of directors is obligated to appoint a "company secretary" to prepare and maintain the register of directors, the minutes of meetings, and the company's annual report, as well as report on directors and executives who have a vested interest in relation to a resolution. Also, an additional provision was provided to entitle persons who furnish information and those involved in the prosecution — bar the SEC officials — on insider trading and market manipulation to a monetary reward funded by the settlement fine or the financial penalty ordered by the court in an amount not exceeding 30 percent of such fine or penalty.

5.4 Promotion of Better Enforcement

The revised Securities Act did not solve the enforcement problem, however. If the rate of prosecution

remains extremely low and the penalties are not sufficiently high to compensate, then the incentive to commit fraud will remain intact. If so, prescribing more stringent fiduciary duties for directors, empowering small shareholders to take legal action against directors and executives, or imposing additional duties on the auditors to raise a "red flag" would be futile as, in the end, the perpetrator will go free. To promote better enforcement, it is necessary to:

(a) Introduce civil penalties and authorize the SEC to file civil charges without the need for referral to any other organization;

(b) Broaden the SEC's authority to impose administrative sanctions (currently, administrative fines can be used for violations where the jail term does not exceed two years). An out-of-court settlement can be a more efficient alternative to criminal sanction, and would help increase the prosecution rate while reducing the time delays involved in the referral of the criminal process. Ultimately, however, this would raise the expected cost of corporate fraud;

(c) Legislate class action lawsuits and amend the Securities Act to allow the SEC or the civil court to order restitution/compensation for injured parties for all types of corporate fraud committed;

(d) If enforcement remains ineffective, even after the above recommendations have been implemented, then it may be necessary to consider allowing individual shareholders/investors to file private lawsuits for any contravention of the Securities Act in order to bypass the bottlenecks that stand between them and the court of justice. However, this alternative will place heavy demands on the resources of the court and thus must be thought out very carefully.

ENDNOTE

- ¹ SEC does not have civil enforcement authority. Although it has the authority to impose administrative sanctions for minor violations of the law, all corporate fraud cases that are subject to criminal prosecution must be referred to the Department of Special Investigation (DSI), which then refers such matters to the Public Prosecutor.

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Management of Cross-border Low-Skilled Workers in Thailand: An Update

Yongyuth Chalamwong*

1. OVERVIEW

Cross-border migration into Thailand has steadily increased since the mid-1980s and early 1990s. During these periods, the country moved from low-end, labor-intensive operations to more capital- or technology-intensive manufacturing industries. As a consequence, a large number of Thai workers sought work in the skilled labor market to support the country's rapid economic growth. This, in turn, created labor shortages at the low-skilled level. As a result, during the past decade the private sector put pressure on the government to allow industry to employ migrant labor (Supang 2007, 2-10).

Currently, it is less likely to be argued that migrant workers have played a very important role in the Thai labor market, especially at the low-skilled level, and at a time when the government is trying to place more emphasis on advanced skilled workers to support the development of a "creative economy," that is, economic activity which will overcome the "middle-income trap" so that the country can remain "competitive on the global market." This phenomenon is actually due to the Thai labor market being characterized structurally by low-skilled labor as well as the attitudes of employers. Therefore, the influx of millions of migrant workers has been seen as an obvious consequence.

Migrant workers from neighboring countries, namely Cambodia, the Lao People's Democratic Republic and Myanmar, are characterized as "irregular or undocumented" workers because most of them entered Thailand illegally. About 80-90 percent of such migrant workers are from Myanmar. Figure 1 illustrates that the total number of migrant workers from the three neighboring countries has been growing over the past five years, especially in 2009; the total number of migrant workers who obtained work permits was 1,314,382. In 2010, the total number of migrant workers who obtained work permits decreased slightly from that of the previous year; however, it is estimated that the

actual figure for irregular migrant workers in Thailand, including registered (with work permit) and non-registered workers, is over 2 million (Yongyuth and Prugsamatz 2009).

Traditional "Push" and "Pull" Theory

The increase in migrant workers from neighboring countries can be explained by push and pull factors. Different internal push and pull factors exist that eventually influence migrant workers from neighboring countries to migrate to Thailand in search of work (Yongyuth and Prugsamatz 2009, 4-5).

Push Factors

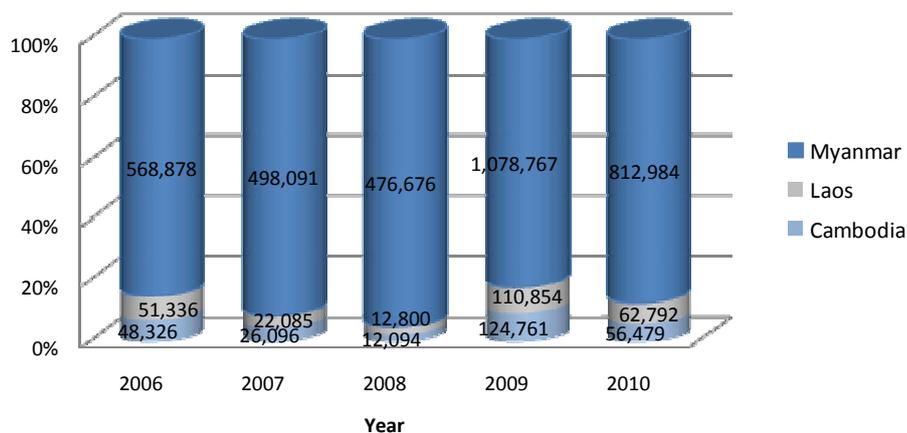
Political instability and the economic situation within the countries of origin are major push factors: migrant workers from low-income and poor households feel that they must look elsewhere for a better life.

Political unrest is a major push factor for migrant workers from Myanmar. Most such migrant workers had been living in areas of internal armed conflict where fighting still exists between ethnic minority-based armed opposition groups and the central Myanmar government. As political unrest creates traumatic experiences, such as unemployment, forced labor and poverty, then people affected leave their homes in Myanmar. In effect, they have been "pushed out" by those factors.

Pull Factors

It is clear that wage differentiation between countries of origin and destination influences cross-border migration. Despite the fact that some migrant laborers working in Thailand earn wages below the standard minimum wages set by the Thai government, the migrants are still able to earn more than they would usually get back home (Yongyuth and Prugsamatz 2009, 4-5).

* This research paper was prepared by Dr. Yongyuth Chalamwong (Research Director, Labor Development, Human Resources and Social Development Program, TDRI). Some parts of this paper have been drawn from an article entitled "Management of Cross-border Migration: Thailand as a Case of a Net Immigration Country," which was presented at the Workshop on Exit and Integration Strategies for Labour Migration in South East Asia: Putting Principles into Practices; the workshop was organized by Monash University, in Malaysia, in November 2011.

Figure 1 Statistics on Irregular Migrant Workers Obtaining Work Permits during the Period 2006-2010

Source: Office of Foreign Workers Administration, Department of Employment, Ministry of Labour. Statistics on irregular migrant workers obtaining work permits during the period 2006-2010.

Social networks and migrant-relation institutions are other pull factors influencing cross-border migration. Our study found that many migrant workers decided to leave their country because of the information received from their relatives or friends already working in Thailand. Not only do such networks and institutions influence cross-border migration, but they can also help potential migrants cope with problems of incomplete and asymmetric information. They help increase the safe movement of migrant workers by providing information on the destination country (Pungpond 2009, 4).

Impact of Cross-border Migration and Migrant Workers

It is indisputable that cross-border migration into Thailand has produced positive effects for the country. Although only limited study has been undertaken on the actual economic contribution of migrant workers to Thailand, different perspectives exist on the types of positive effects migrant workers have had on the country's economic growth and success at the sub-regional level. Migrant workers contribute to Thailand's national output, and this is especially true for sectors such as agriculture and construction (Pungpond 2009, 6-7). The value of Thailand's agricultural exports has increased significantly over the years, by 75 percent in 2005 to reach 280 billion baht. Migrant workers contributed greatly to this sector as well as to the manufacture of garments and textiles worth 175 billion baht (Martin 2007).

Moreover, with the increase in the number of migrant workers in Thailand, employers in labor-intensive sectors have access to the workers that they need. Since most of the jobs taken by migrant workers are considered as dirty, dangerous, and difficult, employers do not have to worry about being able to hire

sufficient numbers of workers for such jobs. Hiring migrant workers in Thailand also means lower costs for employers. It is evident that migrant workers are much cheaper to hire than local Thai workers given the wage differentials and the output gained from hiring migrant workers versus Thai workers. Lower costs incurred by employers translate into lower prices for goods sold, which helps to keep the national inflation rate low.

Opportunities to exchange knowledge and information are also another benefit of migration. These include the sharing of specialized skills, knowledge, working methods, and new working processes. Moreover, with the availability of migrant workers in the country and employers to hire them in labor-intensive sectors, Thai workers are able to move up to sectors that require higher skills and benefit from the work and training gained from working in those sectors (Yongyuth and Prugsamatz 2009, 6-7).

Labor migration also has negative impacts. While some of these negative impacts are accounted for in view of their nature, others are more difficult to pinpoint but often result in social costs that affect the migrant worker as well as those involved in the labor migration process. With the continued availability of migrant workers in the country as well as the easy, albeit illegal, access to migrant workers, employers have been known to prefer hiring migrant workers rather than local Thai workers and this has implications for the utilization of the skills of Thai workers (Pungpond 2009). The high number of migrant workers in Thailand (registered and unregistered) can also have negative implications that result in social problems/costs: migrant workers who work in the sex industry, engage in drug trading, human trafficking, and other forms of crime; it may also result in the transmission of dangerous diseases endemic to the neighboring countries. Irregular migrant workers also lose out on benefits that could help protect them.

Vulnerabilities of Migrant Workers

As previously noted, most migrant workers from neighboring countries are irregular migrants; they therefore become the group most vulnerable to rights violations owing to their invisibility in destination countries. Regular migrant workers generally encounter fewer problems than irregular migrants who have limited legal status and are continually subject to arrest, extortion and deportation.

To prevent exploitation and protect migrant workers from such abuse, the Royal Thai Government initiated the Anti-Trafficking in Persons Act B.E. 2551 (2008), which is aimed at preventing and suppressing trafficking in persons (Box 1).

However, migrant workers, especially irregular migrant workers, still remain vulnerable to being trafficked. In 2009, 103 cases of trafficking in persons

were reported to the Mirror Foundation. “*Trafficking in persons*” is basically at one end of a range of exploitative situations confronting migrants in Thailand; it results partly from the inability of workers to formally cross borders to meet market demand for low-skilled labor. Molland (2010) pointed out that human trafficking is “*the perfect business*” because the supply of persons in the vulnerable group is constant. Enforcement of the law means that the vulnerable group can be exploited for years on end.

These trafficking patterns, including sexual abuse, physical violence, and hazardous working conditions without any protection or recourse to labor laws, can also break hearts. This is consistent with a report of World Vision International, which pointed out that victims are often physically and mentally abused and lack medical treatment, health care and social services. They are forced to work to pay off inflated

Box 1: The Anti-Trafficking in Persons Act, B.E. 2551 (2008)

The Anti-Trafficking in Persons Act contains certain provisions in relation to the restriction of rights and liberties of persons, in respect of which section 29, in conjunction with section 32, section 33, section 34, section 35, section 36, section 41 and section 45 of the Constitution of the Kingdom of Thailand so permit by virtue of law.

Section 4 defines the characteristic of trafficking which comprises exploitation, sexual exploitation, slavery, causing another person to beg, forced labor or service, coerced removal of organs for the purpose of trade, or other similar practices resulting in forced extortion, regardless of such person’s consent.

Sections 14-26 mention the “Anti-Trafficking in Persons Committee” and responsibilities of the committee which are as follows:

- To make recommendations to the Cabinet concerning the policy on prevention and suppression of trafficking in persons;
- To make recommendations to the Cabinet on the revision of laws, rules, regulations or the restructuring of any governmental agency responsible for the prevention and suppression of trafficking in persons to enable more effective implementation of this Act;
- To lay down strategies and measures for the prevention and suppression of trafficking in persons;
- To prescribe guidelines and monitor the implementation of international obligations, including cooperating and coordinating with foreign bodies in relation to the prevention and suppression of trafficking in persons;
- To direct and supervise the arrangements of study or research projects and the development of an integrated database system for the benefit of prevention and suppression of trafficking in persons;
- To issue regulations relating to the registration of non-governmental organizations with a view to preventing and suppressing trafficking in persons, and to prescribe rules for assisting such organizations in carrying out their activities;
- To lay down rules, with the consent of the Ministry of Finance, concerning the receipt, payment, keeping, fund-raising and management of funds;
- To lay down rules concerning reports on financial status and the administration of funds for the purpose of implementing this Act;
- To give instructions and supervise the performance of duties of the Coordinating and Monitoring of Anti-Trafficking in Persons Performance (CMP) Committee;
- To perform any other acts as entrusted by the Cabinet.

Sections 42-51 mention that the “Anti-Trafficking in Persons Fund” was found for the purpose of:

- Providing assistance to trafficked persons;
- Providing safety protection for trafficked persons;
- Providing assistance to trafficked persons in a foreign country to return to the Kingdom or domicile under section 39;
- Preventing and suppressing trafficking in persons according to the regulations prescribed by the CMP Committee;
- Managing the Fund.

Sections 52-56 describe the penalties to punish offences of the Act.

Source: [http://www.baliprocess.net/files/Thailand/1.%20trafficking_in_persons_act_b.e%202551%20\(eng.\).pdf](http://www.baliprocess.net/files/Thailand/1.%20trafficking_in_persons_act_b.e%202551%20(eng.).pdf) (accessed on November 8, 2011)

“debt” and are generally not allowed to leave their work premises or contact anyone outside the workplace (Björk and Gulzar 2010, 4-5).

In fact, women migrants and children, in particular girls, are more vulnerable to trafficking than men because most of them work in domestic services or service sectors, which make them more invisible than men. Human Rights Watch (2010) reported that they are vulnerable to physical and social isolation in their place of employment. This is because they often work in jobs in the domestic and service sectors which may not afford them contact with other migrant workers (see Box 2).

Though male migrants seem to be less vulnerable to trafficking than women and children, the study found that most of the male victims were trafficked in the fishing industry (Box 3). Some of them, when they reach the destination country, are locked up and sold to fishing boat captains. Workers on fishing boats are deprived of food and sleep and have to use dangerous, heavy equipment. They are often forced to be out at sea for months or years at a time. In addition, physical abuse and threats are common and workers who try to resist or who become sick have been killed or thrown overboard to die (Björk and Gulzar 2010, 9).

This illustrates that migrant workers crossing borders illegally commonly become vulnerable to human trafficking. Most of them find work in slavery-like conditions, i.e., long hours of work, low-wages, and restricted freedom of movement. Furthermore, most of them are in debt to their agents or employers.

In addition, migrant workers also experience a range of barriers to cultural and social integration in

Thai society and in the world of work. These include restrictions attached to their ambiguous immigration status, discrimination, negative public attitudes, information gaps and linguistic difficulties. Unlike countries with well-planned immigration management, Thailand does not prescribe any program for the integration of the migrant workers into its social, cultural and working environments. Alarming, the growing number of foreign migrants is prone to occupational and health hazards and is largely outside the coverage of the national social security program and the Workmen’s Compensation Fund.

Some of the vulnerabilities are due to government officials who lack an understanding about migrant workers’ basic rights. Their ignorance sometimes undermines the efforts of workers in non-governmental organizations (NGOs) to provide assistance to these people and also undermines the quality of their legal support. A large number of Thais, including officials, employers and lay people, do not understand the different immigration status of migrant workers and classify all of them as “illegal aliens” or “second-class citizens” coming to earn money in Thailand. In addition, they usually fail to recognize the positive contribution that migrant workers make to Thai society.

In view of the traumatic problems described, this study therefore is aimed at assessing the management of cross-border migration and migrant workers in Thailand in order to increase the effectiveness of the mechanisms concerned with the management of cross-border migration and migrant workers in Thailand. The study emphasizes migrant workers from Cambodia, Lao PDR and Myanmar.

Box 2: Examples of Trafficking in Women and Child Migrant Workers in the Past Few Years

- **The rose seller:** When Mya Islam was seven years old she was sold by her mother to a trafficking agent for just under US\$ 100. She was destined for Bangkok, to sell roses in Ekamai. Her first Thai word was “20 baht” which she was taught by her boss.

According to her testimony, her parents were illegal migrants from Myanmar living in the border town of Mae Sot. Her mother agreed to the sale because she was promised that around US\$ 200 a quarter would be sent back to the family. However, the situation turned bad when she found that Mya had a debt to work off first, because it had cost 10,000 baht (US\$ 285 at that time) to get her to Bangkok. She worked from 9 pm to 6 am each night. She recalled that in the beginning she had cried a lot, and wanted to go home for her parents. It took her a year to get used to the feeling.

During her fourth year of working on the streets of Bangkok, Mya and another Burmese child were arrested on their way home with the daughter of the employer. She was first sent to the capital’s Immigration Detention Center and later transferred to Kredtrakarn Protection and Occupational Development Center. She was sent back to her parents four months later.

- **Life a nightmare:** A 17-year-old ethnic Mon from a poor family in Myanmar, Ma Suu, paid a facilitator to help her cross the border and find employment as a domestic worker. In July 2002, after a year of living and working in Thailand, she was accused of stealing by her employers. When she refused to confess, she was severely beaten, set on fire and left for dead in a ditch. A man found her and took her to hospital in Nakhon Sawan where she died a couple days later, but not before she was able to tell her story and identify her murderers.

The employers, an Air Force officer, his wife, and another accomplice, were not charged until 2004, and proceedings were delayed several times thereafter. Finally in March 2007 the case concluded in Uthai Thani Provincial Court with the officer being convicted of murder and handed down a life sentence. His wife was given a five-year sentence for depriving the victim of her freedom and for hiring an illegal migrant.

Source: Björk and Chalk. 2009. *10 Things You Need to Know about Human Trafficking*. Bangkok: World Vision Asia-Pacific, pp. 9-13.

Box 3: Example of Old Stories about Trafficking in the Thai Fishing Industry in Recent Years

- Between June 2007 and December 2008, 49 trafficked Cambodian fishermen were interviewed after they had all been trafficked onto fishing vessels and either had been rescued or had escaped. Of these, 18 percent had been children when they were recruited and forced onto the vessels. All of them had experienced debt bondage to Cambodian and Thai brokers.
- In February 2010, five trafficked Cambodian men jumped into the sea to escape a fishing boat after one of their fellow Cambodian workers was murdered on board; they were assisted by the International Organization for Migration (IOM) after reaching Timor-Leste. They had been promised construction jobs in Thailand, but found themselves trapped on board. In this case the men were able to escape and find assistance, but countless others suffer unnoticed, with no way out of their dire situations.
- Some employers threaten their employees with oppressiveness and unfairness. The employees are not allowed to use the telephone, ask for their leave/rest day, speak to neighbors, change employers, mix with men, or leave the house without their employer's permission.

Source: Björk and Gulzar. 2010. *10 Things You Need to Know about Labour Trafficking in the Greater Mekong Sub-Region*. Bangkok: World Vision International, pp. 9-14.

2. MANAGING CROSS-BORDER LOW-SKILLED MIGRANT WORKERS IN THAILAND

Cronology of Managing Cross-border Migration and Migrant Workers in Thailand

With regard to the development of managing cross-border migration and migrant workers in Thailand, some scholars, namely Kritaya and Hall (2011), Supang (2007), and Vitit (2005), classified the development on managing cross-border migration and migrant workers as shown in Figure 2.

During the past decades, the Thai government developed a number of coping mechanisms, both internal and external mechanisms, related to cross-border migration and migrant workers, including the more serious implementation of bilateral cooperation measures, especially with neighboring countries, as well as international mechanisms.

Internal Mechanism

Law is a major internal mechanism in regularizing and controlling migrant workers, particularly irregular migrant workers. For decades, Thailand has enacted many laws to protect migrant workers and prevent them from becoming victims of human traffickers, or suffering abuse and exploitation; examples are the 1996 Prostitution Prevention and Suppression Act, Labour Protection Act B.E. 2541 (1998), the 1997 Act concerning Measures to Prevent and Suppress Trafficking in Women and Children, the Alien Employment Act B.E. 2551 (2008), and the Anti-Trafficking in Persons Act, B.E. 2551 (2008).

Theoretically, the principles of the laws are aimed at protecting all migrant workers, including legal migrant workers and irregular migrant workers; however, irregular migrant workers seem less able to access the protection the laws afford than legal migrant workers, which is due to irregular migrants being less visible than legal migrant workers.

In addition, there are various memorandums of understanding (MOUs) between Thai government agencies and NGOs. Vitit (2005) mentioned that a new trend is for MOUs to focus not only on protection but also on prevention, that is, to help the workers not to become victims of human trafficking and exploitation.

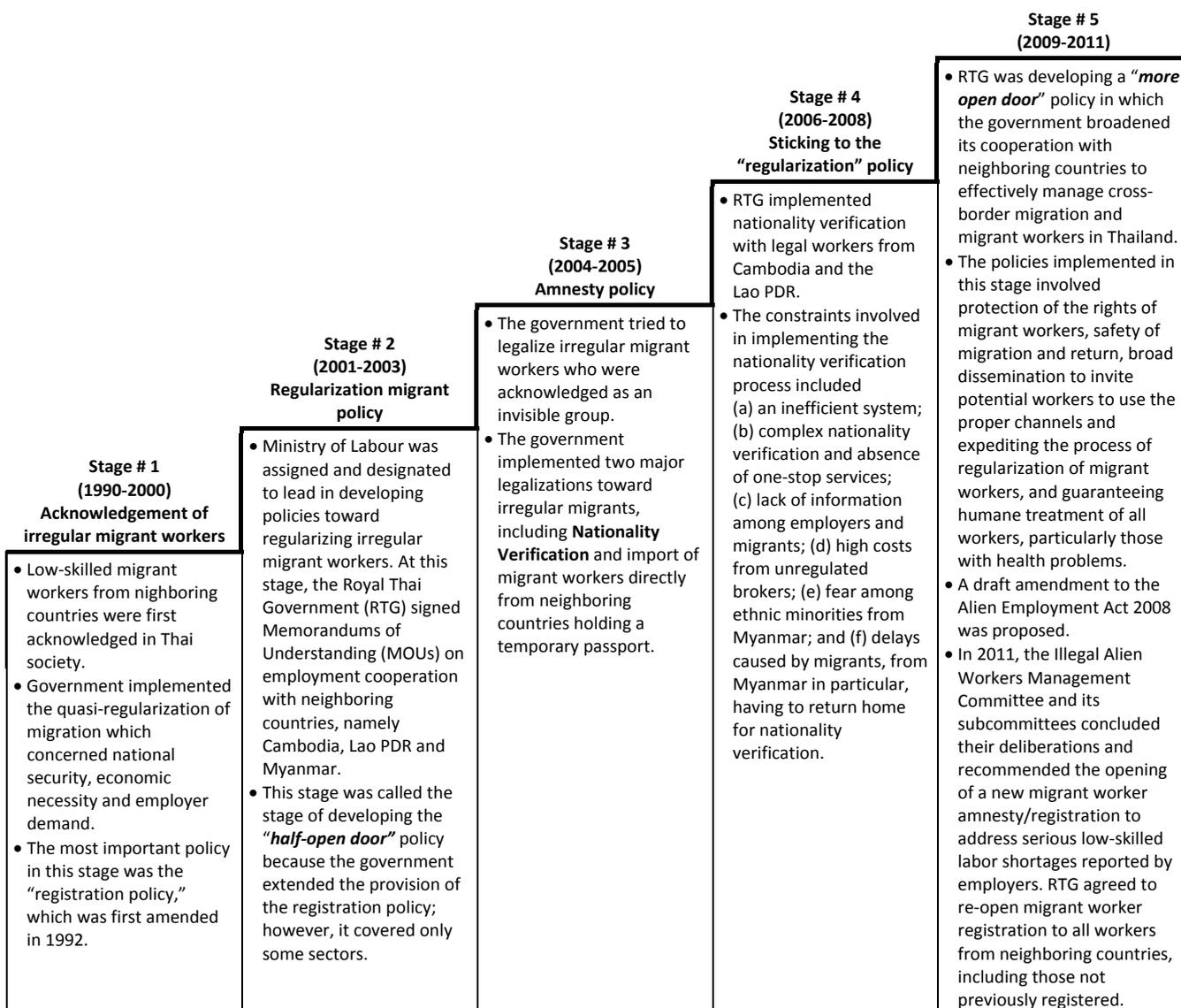
Bilateral Cooperation and an International Mechanism

In past decades, the government has also signed MOUs with neighboring countries and two other economies in the Greater Mekong Subregion, China and Viet Nam. It also has ratified some conventions that have implications for the labor migration situation in Thailand. A major objective of the MOUs is to broaden the cooperation on prevention and on the protection of the rights of migrant workers. However, implementation of MOUs has been limited owing to their lack of consistency and of mechanisms to monitor their implementation.

To enhance the effectiveness of managing cross-border migration and migrant workers, Thailand has ratified 14 conventions of the International Labour Organization (ILO). According to Vitit (2005), Conventions No. 29 (on forced labor), 105 (on abolition of forced labor), 100 (on equal remuneration), 122 (on employment policy) and 182 (on the worst forms of child labor) have greatly influenced national laws. For instance, Convention No. 138 has influenced Thailand's employment protection law and Convention No. 182 led to the Anti-Trafficking in Persons Act B.E. 2551 (2008) (Vitit 2005, 21).

Obstacles still remain in implementing these bilateral agreements, some of which include the legal status of migrant workers; their recruitment under the framework; the recruitment expenses incurred; trends in illegal labor migration; conflict among workers, employers, and recruitment agencies; and the protection of the rights of migrant workers (Pracha 2008, 3-34).

Figure 2 Mechanisms toward Managing Cross-border Low-skilled Migrant Workers in Thailand



Source: Kritaya and Hall 2011.

Constraints in Managing Cross-border Migration and Migrant Workers in Thailand

Thailand has constantly used the registration of migrant workers as a tool to enable them to work legally. From the first registration in 1996 to the most recent one in 2009, the process covers the registration of migrant workers by employers, the conduct of a health examination, preparation of a photo identification card and fingerprint procedures, and the issuance of a work permit. In each registration, the government announced its policy through Cabinet resolutions; the process requires the concerted effort of various government offices.

1. Registration System

Although Thailand has had a decade of experience with the registration system, the system has a number of pitfalls and obstacles as described below:

Registration Fees: In order to register migrants, as of 2009 employers had to pay fees of 3,780 baht for each worker, including 80 baht for photographs and registration documents (Tor Ror 38/1), 600 baht for a medical check-up, 1,300 baht for medical insurance, 100 baht for a work permit application and 1,800 baht for a one-year work permit. Many employers were not willing to pay such amounts because they found the fees too expensive and the registration process a waste of time even though they deducted monthly instalments from their employees to cover those costs.

Awareness of Registration: Awareness of the registration system is low, depending on the decision of employers. Most migrant workers have no access to information on registration due to the problem of language and lack of information. The Ministry of Labour has tried a promotion campaign through the media, which could lead to higher registration numbers.

Discontinuity of the Measures in the Registration Policy: For registration between 1992 and 2009, the government policy on registration continued but in different measures. There was no standard with regard to area; the only specifics were related to occupation or industry, resulting in alien workers being spread throughout Thailand, which is a difficult situation to manage.

Inadequate Capacity of Government Officials: In 2006, about 500,000 migrant workers from the so-called CLM countries (Cambodia, Laos and Myanmar) illegally crossed borders into Thailand. In 2009, such workers increased to 1.31 million. The figures would seem to suggest that the trend in irregular migration has been rising every year, although the number of irregular migrants being arrested in Thailand and deported was increasing only slightly every year.

Corruption among Government Officials: Owing to bribery, some government officials turn a blind eye to employers who hire illegal migrant workers.

Ineffective Mandates: Every time there is a registration, there is always a mandate regarding registration time, duration of work permits, repatriation warning, etc. However, these mandates have been ineffective, never having been implemented successfully.

2. Memorandums of Understanding

The MOU process is also facing some problems in implementation. The system requires consultations at the level of senior officials and/or ministers. Temporary employment of workers is allowed through the granting of permission by authorized agencies in the respective countries. The MOUs state the terms and conditions, such as the employment of the worker shall not exceed a period of two years, although it may be extended for another two years. A worker who has completed a four-year contract must take a three-year break, before he or she can apply for another round of work. According to the MOUs, the employing country has to set up and manage a savings fund, so that every worker would contribute 15 percent of his/her monthly wage to such a fund. The savings plus interest earned would be given back to the workers within 45 days of the completion of their period of employment. In addition, the governments of origin and destination are responsible to ensure the return of workers to their permanent address at the end of the employment period.

In addition to these aspects, the entry of alien workers under MOUs entails relatively high costs. For example, agency and management fees in Laos are about 10,000 baht. Addition expenses of about 5,000 baht are incurred when the migrants arrive in Thailand: 1,800 baht a year for a work permit, 100 baht for an application fee, 600 baht for medical check-up, and the cost of transportation from the border to the workplace. Although it is required that prospective employers assume all costs, all the expenses are transferred to the migrant who pays them off in instalments.

Of the three MOUs, the most difficult to implement is the one between Thailand and Myanmar owing to the precarious political situation in Myanmar. There is also the fact that, since there is an ongoing struggle between various minorities and the Myanmar authorities, it is improbable that migrant workers from minority communities will come forward to be managed by a regime with which they disagree. Collection of fees under all three MOUs also needs to be realistic, and the bureaucratic “red tape” needs to be minimized; if the fees are too hefty and if there is too much red-tape, potential applicants may be driven underground, which would again fuel illicit channels of migration.

The numbers of workers from Lao PDR and Cambodia brought into Thailand under MOUs up to December 2009 were 11,957 and 15,230 respectively. Between 2006 and 3 December 2009, a total of 121,203 migrant workers had their nationality verified. Of these, 58,430 were Laotians and 59,238 Cambodians; however, only 3,535 nationals of Myanmar successfully completed the process. Although more than 80 percent of legal migrants were from Myanmar, only 0.4 percent of them got approval for nationality verification.¹ Among the important causes of the limited progress were rumours among migrants and employers concerning (a) an unofficial tax collected from the relatives of migrants in the community of origin; and (b) the possibility that migrants would be arrested by the government of Myanmar. As there was no evidence of an unofficial tax or the possibility of arrest, the Thai and Myanmar governments launched various campaigns to eradicate these rumours.

As is the case with the registration system, the effectiveness of MOUs is also questionable. Obstacles still remain in implementing these bilateral agreements, including the following:

- High recruitment expenses and fees;
- Long and complex procedures in processing/obtaining documents within and between the receiving and the sending country, especially identify verification, passports, and other documents;
- Lack of experience among agencies;
- Inadequate capacity of government administrative organs to provide support both in the host and origin countries;
- Agencies in the origin country do not have networks in villages;
- Restrictive regulations in the labor-sending country;
- Premature return of migrants; and
- Migrant workers having no or limited experience in working in a factory environment.

With a view to improving policy implementation, the Thai Cabinet on April 26, 2011, approved five

measures to tackle the problems faced by illegal migrant workers from the CLM countries submitted by the Ministry of Labour. The measures are as follows:

(a) Registration measures: Reopening registration for those who missed the February 2010 deadline. Under new guidelines, the registration includes immigrant workers' children under 15 years of age. Legal migrants and their children can stay temporarily in Thailand for one year while waiting for repatriation. Those due for repatriation are allowed to work temporarily in Thailand with permission given on a case-by-case basis.

(b) Measures for prevention and suppression: These will be strengthened with serious and continued enforcement both before and after the new round of registration and target both illegal migrants and the unlawful employers of such migrants.

(c) Measure to encourage the legal migration of workers: By a Cabinet resolution of December 20, 2005, the legal importation of workers from CLM countries is encouraged and will be expedited.

(d) Measure to restructure the Committee on Illegal Migrant Workers Administration (CIMWA): The major change involves adding CIMWA subcommittees at the central and provincial levels.

(e) Measure to upgrade the CIMWA secretariat: The secretariat will be upgraded to department status from its current status as a division within the Department of Employment.

Kritaya and Hall (2011) pointed out that the management of immigration of CLM migrants is poor and involves a circle of exploitation, corruption, and unrealistic targets for migrant repatriation as well as for the importation of and protection for about 2-3 million migrants. They also maintain that the current situation undermines assistance for good employers and national economic and human security for Thailand and its people. They further noted that the situation has been the same since the 1980s, with the exception being an increased focus on workers from northern Viet Nam. While re-opening registration for up to 1 million CLM migrants is commendable, the migration management system creating all these measures is clearly not working. Thailand remains without a long-term migration policy that would integrate human, national and economic security. They conclude that the re-opening of migrant registration approved by the Cabinet on April 26, 2011 demonstrated that the Thai government's previous migration management strategies had failed dramatically.

3. CONCLUSION AND RECOMMENDATIONS

In conclusion, Thailand's migration policy is inconsistent but pro-employer. There have been endless rounds of registration which do not promote a good climate for the regularization of migrant workers and do not allow the MOU or levy systems to work. There have

been neither effective preventive and/or suppressive measures nor other supporting measures to discourage dependency on migrant workers. In addition, the regulation of the labor protection law is always questionable with regard to migrant workers.

In order to mitigate the problems of labor immigration management, the following steps are recommended:

(a) Formulate a long-term consistent foreign labor policy and related measures;

(b) Take strong leadership and establish an effective secretariat for CIMWA;

(c) Obtain adequate financing for the management of migrant workers;

(d) Seriously punish and eliminate the trafficking of migrant workers;

(e) Strengthen and build up law enforcement regarding the management of cross-border migration and migrant workers in Thailand;

(f) Reform laws and policies which are not yet consistent with international standards;

(g) Advocate effective management of cross-border migration and migrant workers in government sectors and broaden cooperation with non-governmental organizations;

(h) Strengthen cooperation in-country and at the international level, through bilateral cooperation and regional cooperation; and

(i) Investigate, formulate and implement international policy for low-skilled workers in the countries of the Association of Southeast Asian Nations (ASEAN).

ENDNOTE

- ¹ As of 2010 the statistics from the Department of Employment indicate that more than 60 percent of immigrant workers from Myanmar passed national verification.

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