Vol. 22 No. 3 Thailand Development Research Institute September 2007

TDRI Quarterly Review

Contents

Recent study shows that existing statistics on maternal mortality ratio (MMR) in Thailand are different due to data collection system and production of statistical report. This difference is one of critical factors leading to success or failure in improving maternal health. A new approach for calculating MMR that can reflect the true situation is thus proposed on page 13.

ISSN 0857-2968

A Foreign Worker Levy for Thailand

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1. WHAT IS A FOREIGN WORKER LEVY?

A levy is the imposition of a fine or a tax. Thus, a foreign worker levy is the imposition of a fine or a tax on an employer for employing imported or foreign workers. Examples of economies charging employers a levy on foreign workers include Singapore, Malaysia and Hong Kong.

Because of Singapore's shortage of manual workers and its high dependence on foreign workers, the country has a set of policies for controlling the number of foreign workers recruited into various sectors of its economy. The employment of foreign workers is restricted to only those sectors or industries which are vital to the development of the economy, and where there is a shortage of local manpower. For the past two decades, the employment of foreign workers has been allowed, but their recruitment is considered an interim measure (see Ofori 1996). The long-term policy for foreign workers is clear in that Singapore would progressively reduce its dependence on foreign workers. It is reasoned that, although foreign workers help contribute to Singapore's economic growth, the presence of a large number of such workers can pose social and other problems in host countries, as has been experienced by some European countries.

The Singaporean government policy on the employment of foreign workers has revealed its early efforts to reduce the number of foreign workers. The level of dependency on foreign workers and the comprehensive foreign worker levy, both important aspects relating to the control of foreign workers, were introduced in 1982. For the Singapore government, the foreign worker levy is used as a pricing mechanism to regulate the number of foreign workers in Singapore. Employers who hire foreign workers under a work permit or S Pass are required to pay the monthly foreign worker levy.

To date, a revolving pool of foreign workers on short-term work permits is allowed in order to overcome temporary shortages in Singapore. Only those who have critical skills of economic value to Singapore would be considered for employment on a longer basis. This policy is in line with the national policy relating to foreign workers in all sectors of the economy. Table 1 illustrates a very recent set of regulations regarding the level of dependency on foreign workers and the foreign worker levy.

The Malaysian government has also adopted the foreign worker levy as a policy instrument for regulating the employment of foreign workers. The government allows the entry of 12 nationalities to work in four approved sectors, namely export-oriented manufacturing, plantation, construction, and service.

In Malaysia, foreign workers are initially allowed to work for three years and may be extended, from year to year, to the fifth year. Having been granted the license and employment quota, an employer must submit an application for Temporary Employment Visit Pass (PLKS) and pay the levy according to the sector. Table 2 shows how the foreign worker levy is applied.

2. JUSTIFICATION FOR A FOREIGN WORKER LEVY IN THAILAND

In spite of its abundant supply of workers, Thailand has been inundated by a large number of foreign workers, particularly from three neighboring countries, Cambodia, Lao People's Democratic Republic, and Myanmar (together known as CLM). By and large, three major types of foreign migrants have been identified. The first group is the lifetime migrants who entered Thailand before 1972 and received the status of permanent residents — 85 percent of 270,000 such foreigners are Chinese nationals living in the Bangkok area. The second group is skilled foreign workers employed in the professions specified in Royal Decree 281 in 1972. In 2001, there were 99,656 legal foreign workers, most of whom were professionals living in Bangkok. Almost 25 percent were Japanese. The third group comprises mostly unauthorized foreigners from CLM. Since around the end of the 1980s, there have been constant inflows of migrant workers from the three neighboring countries illegally entering Thailand for employment. An unofficial estimate places the total number of illegal immigrants at 1.5-2 million persons (Anusith 2007).

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Table 1 Foreign Worker Levy in Singapore

Sector	Dependency ceiling	Category of foreign worker	Levy rate (S$)[a]	
			Monthly	Daily
Manufacturing	Up to 40% of the total workforce	Skilled	150	5
		Unskilled	240	8
	Above 40% to 50% of the total workforce	Skilled	150	5
		Unskilled	280	10
	Above 50% to 60% of the total workforce	Skilled/unskilled	450	15
Construction	1 local full-time worker to 5 foreign workers	Skilled	150	5
		Experienced & exempted from Man-Year Entitlement	300	10
		Unskilled	470	16
Marine	1 local full-time worker to 3 foreign workers	Skilled	150	5
		Unskilled	295	10
Process	1 local full-time worker to 5 foreign workers	Skilled	150	5
		Experienced & exempted from Man-Year Entitlement	300	10
		Unskilled	300	10
Services	Up to 30% of the total workforce	Skilled	150	5
		Unskilled	240	8
	Above 30% to 35% of the total workforce	Skilled/unskilled	280	10
	Above 35% to 45% of the total workforce	Skilled/unskilled	450	15
Harbor craft	- 1 local full-time worker to 9 foreign workers - No. of crews (shown on MPA[b] Harbor Craft Licence) x 2 - The lower quota will apply	Certificated crew	150	5
		Non-certificated crew	240	8
Domestic worker	NA	Normal rate	265	9
		Concessionary rate	170	6
S Pass holder	15% of the total workforce	Skilled	50	2

Notes: [a] Singapore dollar = 23.02 baht.
[b] MPA: The Maritime and Port Authority of Singapore.

Source: Ministry of Manpower, Singapore, July 2007.

Table 2 Levy and Processing Fees in Malaysian Ringgit[a]

Payment	Levy (1 year)	PLKS[b]	Processing
Manufacturing, service, and construction sectors	1,200 (Peninsular Malaysia) 960 (Sabah & Sarawak)	60	50
Plantation sector	360	60	10

Notes: [a] Malaysian ringgit = 10.1 baht.
[b] PLKS: Temporary Employment Visit Pass.

Source: Immigration Department of Malaysia, 2007.

Thailand's policy toward illegal migrant workers has been lenient, with a series of registrations to pardon illegal migrants so that they would be encouraged to come out into the open and become more manageable. The first registration of undocumented migrant workers took place in 1992, allowing employers in seven provinces along the border with Myanmar to bring into the country migrant workers for registration. Later in 1993, there was an amendment of the law allowing foreign workers to work for Thai fishing boats in 22 coastal provinces, provided that their employers registered them. In 1996, there was another round of foreign worker registration: 293,652 foreign workers reported, and were granted work permits. In 1998, a much lower number (90,911) of foreign workers were brought for registration by their employers, probably because they were fearful of repatriation as a result of the financial crisis and high unemployment in Thailand

that occurred that year. The number of migrant workers registered increased from respectively 99,974 and 99,656 in 1999 and 2000 to 568,249 in 2001, thereafter declining to 409,339 and 288,780 in 2002 and 2003.

The most recent figures on illegal migrant workers from CLM during the period 2004-2007 are given in Table 3. The table shows a big difference between the quota of foreign workers requested and the number actually granted work permits. The differences were about 0.75 million, 0.92 million and 0.67 million during the three-years from 2004 to 2006. Such differences pose a problem for the administration of foreign workers in terms of planning, misallocation of required foreign manpower, operational costs, etc. It can also be noted that in this table there are two types of work permits, new and renewed work permits. New work permits were granted to newly registered foreign workers, particularly in 2004 and 2006 (under a bail system), while the renewed work permits are those granted to foreign workers who were allowed to continue their stay in Thailand for a given period of time. For example, in 2005, the Cabinet allowed foreign workers who had received work permits in 2004 (849,552 persons) and their dependants to stay and work for one more year. A total of 705,293 foreign workers were extended work permits, although employers had been granted a quota of 1.77 million foreign workers. For the gap of 1.07 million, the government, however, granted an increase of only 500,000 persons: 300,000 through the bail system under sections 17 and 54 of the Aliens Act of 1978 and 200,000 through importation under a memorandum of understanding (MOU). This number was not, however, realized. Only 256,899 illegal foreign workers showed up for bail registration while the MOU allowed only the bringing in of about 20,000 workers from Cambodia and Lao PDR.

In 2006, the government granted those who had received a work permit in 2005 (705,293 persons) an extension of another year. Only 460,014 foreign workers came. At the same time, the Cabinet abandoned the bail system and allowed the group concerned (256,899 persons in 2005) to stay until February 28, 2007. A total of 208,562 persons came forward. Hence, the total number of undocumented migrant workers from CLM reached 668,576 persons.

In 2007, the government has allowed both groups to extend their work permits to February 28, 2008 and June 30, 2008, respectively. As of August 23, 2007 the number of foreign workers who showed up was 535,732 persons.

Table 4 gives the total number of foreign workers who had been granted renewal of their work permit together with those granted a new work permit in 2006, by their industry of employment.

In the process of illegal migration, many migrants become victims of human smuggling and trafficking. There is no guarantee of their safety and dignity. In fact, the illegal immigrants have a number of impacts on Thailand economically and socially, and can be detrimental to national security. Moreover, because of the big gap between the quota for foreign workers and the number of work permits actually applied for, measures are needed to close the gap. In this regard, the Office of Foreign Workers Administration, Department of Employment, Ministry of Labour, as the secretariat to the Committee on Illegal Migrant Workers Administration (CIMWA), has been prompt in finding suitable measures for managing migrant workers efficiently. In this connection, it has commissioned the Thailand Development Research Institute to develop a guideline for setting foreign worker levy rates in Thailand, as a preparatory measure.

Table 3 Number of Migrant Workers in Thailand, 2004-2007

	2004	2005	2006	2007[a]
Quota requested[b]	1,598,752	1,881,529	1,333,703	1,028,365[c]
Quota granted	1,512,587	1,773,349	1,226,106	n.a.
Migrant worker registration	1,284,920	-	-	-
Migrant workers issued identification card (38/1)	1,161,013	-	-	-
Number of migrant workers registered under bail measure	-	256,899	208,562	-
Newly issued work permits	849,552	256,899	208,562	-
Renewed work permits	-	705,293	460,014	535,732
Total number of migrant workers with work permits	849,552	962,192	668,576	535,732
Difference between quota and registration	749,200	919,337	665,127	492,633

Notes: [a] Data in year 2007 are as of August 23, 2007.
[b] Quota requested is the number requested by prospective employers, which is different from the quota actually granted.
[c] Estimated by Yongyuth et al. 2007.

Sources: 2004 data from Department of Employment, Ministry of Labour.
2005 data from Srawooth et al. 2007, Table 2.5.
2006 and 2007 data from Yongyuth et al. 2007, Anusith 2007, and Office of Foreign Workers Administration.

Table 4 Number of Foreign Workers from CLM Granted Work Permits in 2006

Industry	Number of employers who employ migrant workers	Number of migrant workers			
		Total	Myanmar	Lao PDR	Cambodia
Total	***185,876***	***668,576***	***568,878***	***51,336***	***48,362***
1. Fisheries	4,535	23,708	15,177	1,602	6,929
2. Fishery-related	4,267	80,743	77,612	607	2,524
3. Agriculture & livestock	39,048	127,028	107,946	9,156	9,926
3.1 Agriculture	34,141	108,523	93,097	7,265	8,161
3.2 Livestock	4,907	18,505	14,849	1,891	1,765
4. Rice-milling	1,035	6,134	5,814	154	166
5. Brick-making	918	4,153	3,849	195	109
6. Ice-making	984	4,524	3,857	323	344
7. Stevedore	319	2,469	1,710	104	655
8. Construction	15,837	106,614	92,465	4,921	9,228
9. Mining/quarrying	232	1,373	1,293	24	56
10. Housemaids	66,776	84,996	67,825	13,545	3,626
11. Others	51,925	226,834	191,330	20,705	14,799

Note: Data as of June 30, 2006.

Source: Office of Foreign Workers Administration, 2006.

3. SETTING FOREIGN WORKER LEVY RATES FOR THAILAND

(a) Objectives and Methodology

The main ideas are to develop a guideline for setting levy rates on unskilled[1] foreign workers by industry, to review the experience of the foreign worker levy system in Singapore and Malaysia as well as to identify the possible impacts of such a levy in Thailand. The study focuses on migrants who enter the Kingdom without a visa from CLM, in 11 industries as follows:

1. Fisheries
2. Fishery-related
3. Agriculture (plant farming)
4. Livestock
5. Rice-milling
6. Pottery (brick-making)
7. Ice-making
8. Stevedore
9. Construction
10. Mining/quarrying
11. Housemaids

For the purpose of the calculation of foreign worker levy rates which should be acceptable to stakeholders, particularly levy payers and unskilled Thai workers, the study reviews some theoretical concepts and the experience of Singapore and Malaysia with regard to the setting and application of a foreign worker levy, the labor-market situation of Thailand. It also involves the conduct of a survey of industrial establishments that employ migrant workers to determine their knowledge or awareness of, attitude on, and acceptance of a foreign worker levy, and interviews key informants in the labor market. The whole process is followed by the calculation of acceptable rates of levy and a series of public reviewing seminars in six regions of Thailand as well as the final consideration from the Thai authority concerned.

(b) A Survey of Establishments and Interviews with Key Informants

A survey of establishments using a mailed questionnaire was conducted; of the 12,680 enterprises[2] contacted, 2,120 of them responded. The surveyed establishments employed workers from Myanmar, which was the most highly represented country, accounting for 51 percent, followed by Thai workers, with 42 percent. Most respondents were not aware of the legal import of migrant workers (on the basis of the MOU). None of them have ever imported migrant workers using this approach.

With regard to the foreign worker levy, 75 percent of the establishments stated that they would be willing to pay, provided that they could employ migrant workers more openly and conveniently. It has been strongly suggested that the government consult with them in designing the levy regulations in detail. However, about 65 percent said that, if migrant workers can be brought into Thailand on the basis of the MOU, they see no need for a foreign worker levy. About 85 percent of the respondents expressed interest in learning

more about the details of a foreign worker levy, while 74 percent would like to see the proposed levy used for income tax reduction. Many respondents (72%) thought that a levy would add to the cost of employing migrant workers, but that the levy may help the employers find migrant workers more easily (62%) and in locating run-away workers as they could do so more openly (74%).

If the levy system is put into effect, about 65 percent of the respondents stated that they expected that the number of illegal migrant workers would decrease. With regard to the levy rate, about 51 percent of the respondents agreed to the proposed crude rate of 10 percent of each migrant's wage income. When asked about a rate of about 5 percent which would have to be paid all at once at the time of the quota application, the proportion of the respondents agreeing to the terms increased to 54 percent.

Interviews with a few key informants were conducted concerning the need for a foreign worker levy in Thailand. Although most of them believed that most employers apply for foreign worker quotas in excess of what they actually need, the informant from the private sector did not agree with the idea of instituting a foreign worker levy in Thailand. He was of the view that it would be unfair to the good employers who would pay the levy, while some bad employers would avoid this extra cost. Besides, the government could not ensure that, if employers pay the levy, they could get the number of workers for whom they paid the levy. Some industries such as marine fishing could not bear additional costs. He thought that the proposed foreign worker levy was redundant if the MOU and registration systems work.

In conclusion, it has been emphasized that the proposed levy would be useful if, and only if, it can distinguish between the employers who pay and those who do not, in terms of status, protection and the benefits to employers, employees and the government. The criteria and the calculation of the levy should be clearly defined and the rate should be different among different industries. More importantly, the levy should be able to eliminate the illegal migrant workers because the system will not work if there is still a black market for illegal migrant workers. Last but not least, it is likely that the levy burden will be passed on to the migrant workers who are already troubled by poverty. Humanitarian measures to alleviate the workers' burden should therefore be considered.

(c) Calculation of the Levy

The experience of Singapore and Malaysia shows that the levy on foreign workers is used for the purpose of preventing wage rates and local employment from being undercut by the cheaper cost of hiring foreign workers. In addition, the levy is also used to discourage recurring use of unskilled and cheap labor, which could hinder investors from improving technology and labor productivity. A foreign worker levy is a useful policy handle for applying selective measures in favor of foreign skilled workers against low skilled ones, as well as to reduce the pressure of low-skilled foreign workers on domestic workers. The experience of these countries indicates that different levy rates have been applied to various industrial sectors, occupations, and areas.

However, there is no such thing as a fool-proof formula that can be drawn from those countries for adoption in Thailand. First their industrial classification is different, and second, the levy rates applied in those countries are too high to be accepted by Thai employers. The steep levy rates may arise from the fact that the labor shortage of those countries is more severe than that of Thailand. Therefore, it is essential to develop an appropriate set of levy rates for foreign workers that can be more comfortably accepted in Thailand, given its social and economic background, database, and readiness to adopt such a measure.

The idea of applying a levy on foreign workers in Thailand basically comes from the need of the government to solve the problem of exaggerated applications for quotas to hire foreign workers. Another agenda for applying a levy is related to a principle of welfare economics. The consumption of Thai public utilities and infrastructure by foreign workers should be compensated. Since employers of foreign workers benefit from using the workers, they should bear the costs related to that compensation.

In brief, the objective of the levy would not be to raise government revenue but to regulate or discourage the employment of undocumented migrant workers by narrowing the wage gap between migrant workers and Thai workers, to compensate for migrant workers' use of Thailand's public infrastructure, and to regulate the quota for the employment of migrant workers. The variables taken into account for the calculation of levy rates included the degree of labor shortage and the necessity to employ migrant workers (represented by dependency rates and number of foreign workers employed (Box 1)), wage differences between migrant and Thai unskilled workers, the ability of employers to pay the levy, differences among types of industries and work conditions, the levy rate as stipulated in the draft Labour Act on the Employment of Migrant workers B.E. ..., and the envisaged impact of migrant workers on Thailand's resources, society, and security.

Accordingly, an eclectic model consisting of such variables can be postulated as follows.

$$\mathbf{LEVY = \mathit{f}\{DEP, NUM, WD, ATP, TYP : e\}}$$

Where
- LEVY = Levy rate
- DEP = Dependency on foreign workers
- NUM = Number of foreign workers employed
- WD = Wage differences between foreign workers and unskilled Thai workers
- ATP = The ability of employers to pay for the levy
- TYP = Type of business

Box 1 Dependency Rates and Employment of CLM Foreign Workers in Thailand, 2006

Industry	Thai workers (1)	Foreign workers (2)	Number of total workers (3) = (1)+(2)	Dependency rate (4) = [(2)/(3) x 100]
Total	**3,722,649**	**437,218**	**4,159,867**	**10.51**
1. Fisheries	83,091	23,708	106,799	22.20
2. Fishery-related	110,783	80,743	191,526	42.16
3. Farming	1,961,666	108,523	2,070,189	5.24
4. Livestock	69,891	18,505	88,396	20.93
5. Rice-milling	40,029	6,134	46,163	13.29
6. Brick-making	37,386	4,153	41,539	10.00
7. Stevedore	2,023	2,469	4,492	54.96
8. Construction	1,258,667	106,614	1,365,281	7.81
9. Mining/quarrying	22,480	1,373	23,853	5.76
10. Housemaids	136,633	84,996	221,629	38.35

Notes: (1) Sub-classification of Fisheries is not possible due to the lack of data;
(2) Ice-making industry is not included because the Labor Force Survey does not provide this category.

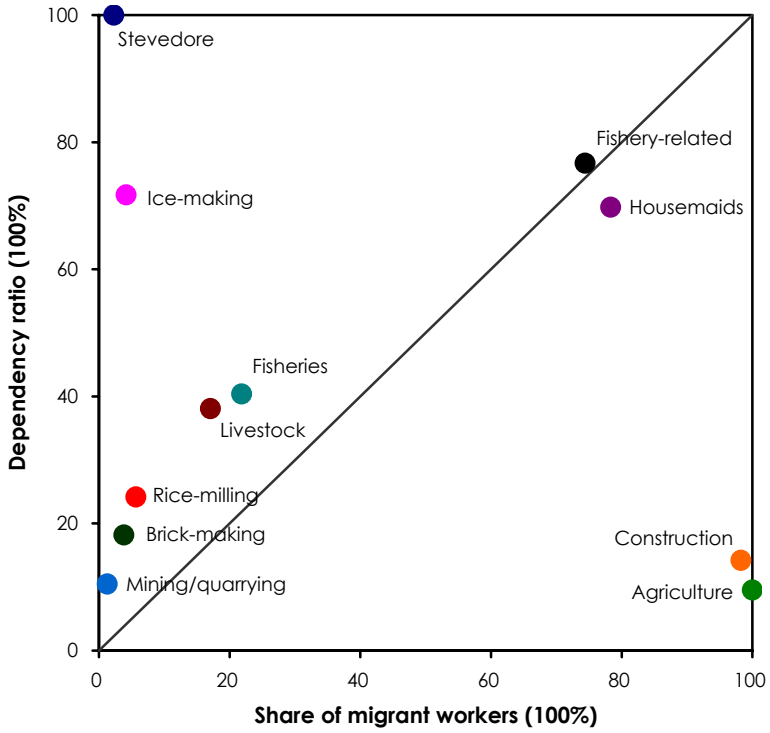
Source: Calculation from data from the Office of Foreign Workers Administration and the Labor Force Survey.

In 2006, the dependency rate of an average foreign worker was about 10.51 percent. The highest dependency rate was found in the following industries: stevedore (54.96%), followed by fishery-related (42.16%), housemaid (38.35%), and marine fishery (22.20%), respectively. The rates have been decreasing not because of decreasing dependency, but because there were fewer illegal migrant workers coming forward for registration for a number of reasons.

Due to the data constraint, instead of using regression analysis, an incomplete data technique was employed in seven steps as follows.

1. Grouping employers according to their dependency on and the number of foreign workers employed, by using indices of dependency and employment of foreign workers.[3] As a result, the study classifies employers into three major groups (Figure 1):
   - First group: high dependency and high employment of foreign workers in the following industries: fishery-related, housemaids, fisheries and livestock.[4]
   - Second group: either high dependency or high employment of foreign workers in the following industries: construction, agriculture, stevedore, and ice-making.
   - Third group: low dependency and low employment in the following industries: rice-milling, pottery, and mining/quarrying.
2. Assigning arbitrary low rates of levy to each group representing their differences: the first group with a levy rate of 1 percent of each foreign worker's wage income; the second group with a levy rate of 2 percent; and the third group with a levy rate of 3 percent. The arbitrary rates are chosen to be the lowest, but different from zero.
3. Calculating primary levy rates for each type of employer basically by multiplying the rate by the wage income of the foreign workers. However, because of the lack of reliable data on the wage income of foreign workers, the provincial minimum wages are applied (with reference to the Labour Protection Act of 1998 (B.E. 2541)) (Levy 1 in Table 5).
4. Calculating another set of primary levy rates by applying the differences in the wage rate between foreign workers and unskilled Thai workers (the difference is based on data from a TDRI survey). By applying the percentage difference of the wage income for each type of employer to the wage income of foreign workers, we obtain a set of proximate levy rates for each type of employer (Levy 2 in Table 5).
5. The average of the levy rates obtained in (3) and (4) is considered the levy rate that incorporates the impact of dependency, the quantity of foreign workers employed, and the wage differentials (Levy 3 in Table 5).

Figure 1 Dependency Index and Migrant Workers, by Industry in Thailand



Note: Dependency ratio in ice-making enterprises were determined by TDRI survey, 2007.

Sources: Migrant worker data from Ministry of Labour, 2006.
Thai worker data from the National Statistics Office, Thailand.

Table 5 Proposed Primary Levy Rates in Baht, by Industry

	Industry	Levy 1	Levy 2	Levy 3 (average)	Adjusted rates to given maximum		
					Levy 4	Levy 5	Levy 6
	1	2	3	4=(2+3)/2	5=(4)(1,500/2,700)	6=(4)(1,200/2,700)	7=(4)(1,000/2,700)
1	Fisheries	500	2,100	1,300	722	578	481
2	Fishery-related	500	2,650	1,575	875	700	583
3	Farming	900	2,200	1,550	861	689	574
4	Livestock	500	1,700	1,100	611	489	407
5	Rice-milling	1,400	2,100	1,750	972	778	648
6	Brick-making	1,400	1,800	1,600	889	711	593
7	Ice-making	1,000	2,500	1,750	972	778	648
8	Stevedore	1,000	2,900	1,950	1,083	867	722
9	Construction	1,000	4,400	2,700	1,500	1,200	1,000
10	Mining/quarrying	1,400	2,250	1,825	1,014	811	676
11	Housemaids	500	2,900	1,700	944	756	630

Source: Srawooth et al. 2007, Table 5.4.

6. To include the employers' ability to pay, three sets of maximum rates accepted by employers (from the study's survey of employers for this purpose) is applied in the form of correction factors, as shown in Table 5 (Levy 4, 5, and 6).

7. The levy rates proposed in Table 5 were submitted to the Steering Committee of the Office of Foreign Worker Administration for comment and a final decision. The view of the Committee is that the rates are still too high and should be grouped into only three major groups. Accordingly, the levy rates suggested by the Committee are shown in Table 6. These rates are then used for reviews in public hearings in six regions of the country.

Table 6 Levy Rates in Baht on the Employment of Migrant Workers, by Industry

Industry	(1) Not more than 1,000 baht	(2) Not more than 800 baht	(3) Not more than 700 baht
Fisheries	600	500	400
Fishery-related	600	500	400
Farming	600	500	400
Livestock	900	500	400
Rice-milling	900	700	600
Brick-making	900	700	600
Ice-making	1,000	700	600
Stevedore	1,000	800	700
Construction	1,000	800	700
Mining/quarrying	1,000	800	700
Housemaids	900	700	600

Source: Srawooth et al. 2007, Table 5.5.

(d) Public Hearing Forums

Public hearing forums have been organized in six regions of the country: northeast, north, south, west, east, and central. The objective of the study, the need for a levy, the calculation method, and the proposed levy rates were explained at the forums. In general, the participants agreed with the concept of and the need for a levy as well as the least proposed levy rate. However, the levy rates acceptable to the participants at the forums were between 400 and 700 baht, according to the industry of employment. The participants urged that, in order for the levy to work effectively, the government must strengthen the administration of migrant workers. Among the recommendations made at the forums were the following: more registration of migrant workers, prevention of migrants running away from their employers, and the facilitation of employment services.

4. CONCLUSION

The overall results of this study are considered successful in terms of theoretical review; surveys of policy and the administration of foreign workers in Thailand; and the experience of enforcing the levy system in Singapore, Malaysia, and Hong Kong. In addition, the survey of industrial establishments and key informant interviews also provide useful data and information, leading to the calculation of proposed levy rates. Most importantly, the public has become more aware of the foreign worker levy. The proposed levy figures and principles involved are rationally supported and generally accepted by the stakeholders. The levy rate calculated and reviewed by the Department of Employment authority and at public hearing forums is a maximum of 700 baht.

5. RECOMMENDATIONS

Based on the synthesis of the findings from every step of the study, including the public hearing forums, in order for the levy to be effective, the following are our recommendations:

(1) Basic Guideline

(1) The objective of the levy is not to raise government revenue but to regulate or discourage the employment of undocumented migrant workers by narrowing the wage gap between migrant workers and Thai workers, to compensate for migrant workers' use of Thailand's public infrastructure, and to regulate the quota for the employment of migrant workers.

(2) The procedure for collecting the levy and the establishment of the levy rate should be clear-cut, unambiguous and on a regular schedule, taking into consideration the convenience of the levy payers with regard to date, time and place.

(3) The levy rate should minimize the levy payers' burden.

(4) The levy should be based on sound taxation principles, particularly the following:

- (a) Equity principle: Those who benefit from any services from the government should be taxed for the costs of such services according to the amount of the benefits received;
- (b) The ability-to-pay principle: The tax levied should be based on the payers' ability to pay or on their income.

(5) The levy is to be collected once, or once a year, at the time of the application for a migrant employment quota, and not again until the migrant's work permit expires (for not more than two years).

(6) The levy is not refundable after a grace period of 30 days (the grace period may be reconsidered later).

(7) The levy is charged on top of other expenses such as work permit, social insurance, etc.

(8) The levy shall be paid by the employer who applies for the migrant employment quota.

(9) The quota is not transferable. Any change of employer is subject to another levy.

(10) The levy rate may be adjusted by the Minister of Labour or an authorized person. The adjusted rate is not retroactive.

(11) The levy is collected for the employment of unskilled migrant workers classified by industry of employment.

(2) Additional Guideline for Consideration

(1) To encourage the legitimate employment of migrant workers, more extensive registration of undocumented migrant workers is recommended.

(2) In some industries characterized by seasonal or irregular activities, the levy payment can be made by month or quarter.

(3) The use of the levy fund should be for the benefit of employers and migrant workers, for example, for social protection and the welfare of migrant workers, for public relations with employers, for the development of a data bank and system on migrant workers, with a view to facilitating the systematic monitoring of migrant workers.

(4) The levy may be based on geographical areas.

(5) Employment services for the quota recipients should be more proactive, e.g., not only based on or limited to the job applicants at the Department of Employment's employment service offices but also on motivating the advertising of unpopular jobs in order to create more job applications.

(6) The government should strengthen the enforcement of immigration laws in order to make visible the differences between the right and the wrong-doers, with a view to encouraging the legitimate employment of migrant workers. Serious punishment of corrupt government officials involved in human trafficking and distortion is recommended.

(7) The government should encourage and support more efficient human resources management as well as technological improvement in private sector production in order to reduce the chronic dependency on migrant workers.

(8) The government should introduce a levy collection system only after a clear policy on the management of undocumented migrant workers has been adopted. Business sectors must have knowledge of the direction of consistent governmental policy in this regard.

(9) The participation of local administrative authorities and business sectors in the process of managing migrant workers is recommended because of their knowledge and interest in local economic activities.

ENDNOTES

[1] The term "unskilled workers" refers to manual laborers in industries such as housemaids, cleaning, agriculture (farming and livestock), fisheries, mining, construction, and other labor-intensive work.

[2] Only enterprises whose addresses are valid and contactable.

[3] Achieved by rescaling the dependency rates and the number of foreign workers employed, as shown in Box 1 as 100 for each category. The rescaled indices are then plotted in Figure 1.

[4] Fisheries and livestock were included in the first group according to the so-called "3D" working conditions (dirty, dangerous, and difficult).

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Using Multiple Data for Calculating the Maternal Mortality Ratio in Thailand

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INTRODUCTION

Thailand was one of the 189 countries that endorsed the United Nations Millennium Declaration, which is aimed at promoting human development and reducing global inequalities. That Declaration contains what are known as the Millennium Development Goals, or MDGs, comprising eight ambitious goals to be achieved by 2015. The goals are to eradicate extreme poverty and hunger; to achieve universal primary education; to promote gender equality and empower women; to reduce child mortality; to improve maternal health; to combat HIV/AIDS, malaria and other diseases; to ensure environmental sustainability; and to develop a global partnership for development.

In order to monitor progress toward achieving the MDGs, each signatory country has to have reliable baseline statistics. For some countries, this requirement is as ambitious as achieving the MDGs.

In Thailand, the statistical system is decentralized. Each public organization conducts its own data-collection system and the production of statistical reports. When the definition of a statistic is unclear or ambiguous, two public organizations can end up with two varying statistics for a single variable. A good example of this is the maternal mortality ratio, or MMR, reported by the Bureau of Health Promotion (BHP) (2006). As shown in Table 1, maternal deaths in 1990 were 36 per 100,000 live births using the BHP statistic and 25 per 100,000 live births using the Bureau of Policy and Strategy (BPS) statistic. In the same year, the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF) reported that Thailand had 200 maternal deaths per 100,000 live births.

Using such widely different statistics in the implementation of policy could lead to different emphasis and program direction, or success or failure in achieving MDG to improve maternal health by reducing MMR by three fourths. In this example, we do not know which statistic is factual. What we do know is that each of them provides different targets for the achievement of MDG for improving maternal health (Table 2). If Thailand uses the WHO/UNICEF statistic, the MMR target would be 50. However, in 2000 Thailand's MMR according to WHO/UNICEF was already below 50. In this scene, achieving the MDG target is not an issue: the issue would be why is Thailand's MMR so high? If we use the statistics of either BHP or BPS, the target to be achieved would be very ambitious indeed. To achieve an MMR of 6.25 or 9.0 per 100,000 live births is very difficult for a developing country to do. Moreover, to achieve an MMR of 50 requires a different strategic policy and level of public spending than it does to achieve an MMR of 6.25. Given that Thailand has scarce resources, the country might end up doing things that may not be cost-effective in attempting to achieve this Goal.[1]

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The authors would like to thank Auraphin Sublon and Raveewan Thongsanit, who contributed enormously to the time-consuming data-pulling process. We also got useful information from discussions with Dr. Siripon Kanshana and Nuchpiya Riewpitak. The support we received from Dr. Ammar Siamwalla is highly appreciated. This study was inspired by a study entitled "An Evaluation of the Safe Motherhood Hospital Program," funded by the Global Development Network (GDN). The views expressed in this study do not represent those of the organizations for which the authors work or have worked.

Table 1 Maternal Mortality Ratio Reported by Different Sources

	1990	1995	1997	2000	2002	2004	2005
BHP, MOPH	36.0	16.8	14.2	26.9	22.1	19.8	18.2
BPS, MOPH	25.0	10.7	9.7	13.2	14.7	13.3	12.2
RAMOS[a] method, BHP		44.3	36.5				
WHO/UNICEF	200.0			44.0			

Notes: BHP = Bureau of Health Promotion.
BPS = Bureau of Policy and Strategy.
MOPH = Ministry of Public Health.
[a] The reproductive age mortality studies (RAMOS) method identifies and investigates all deaths of women of reproductive age (15-49 years) using multiple data sources. This method includes interviewing household members and health-care providers; it is considered a complex, costly and time-consuming method.

Source: Bureau of Health Promotion, 2006.

Table 2 Target of Millennium Development Goals for Improving Maternal Health by 2015, Using Different Baselines

	1990	2015 (reduce 1990 level by three quarters)
BHP, MOPH	36.0	9.0
BPS, MOPH	25.0	6.25
WHO/UNICEF	200.0	50.0

Notes: BHP = Bureau of Health Promotion.
BPS = Bureau of Policy and Strategy.
MOPH = Ministry of Public Health.

Getting the true statistics on MMR is very important for policy planning and implementation purposes, not to mention its importance in the context of safe motherhood, which is perceived as a human right. The health of mothers is a major determinant of their children's health. Therefore, in this study, we introduce a new approach for calculating Thailand's MMR, by making use of multiple data sources. It should be mentioned that this approach would not have been possible without the collaboration of the Ministry of Public Health and the Central Office for Health-care Information.

HOW TO MEASURE THE MATERNAL MORTALITY RATIO BY THE INTERNATIONAL STANDARD

The MMR implies the risk of death a woman faces once she has become pregnant. The ratio is the number of maternal deaths during a given year per 100,000 live births during the same period, calculated as follows:

$$\frac{\text{Number of maternal deaths}}{\text{Total number of live births}} \times 100{,}000 = \text{MMR}$$

The tenth revision of the International Classification of Diseases (ICD-10) defines a maternal death as the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by pregnancy or its management, but not from accidental or incidental causes (WHO 2004, 3). The maternal death can be the result of direct obstetric or indirect obstetric causes. Direct obstetric death includes that resulting from obstetric complications of the pregnant state (pregnancy, labor and the puerperium) from interventions, omissions, or incorrect treatment, or from a chain of events resulting from any of the above: for example, death caused by hemorrhage, sepsis, eclampsia, obstructed labor, unsafe abortion, and the complications of anesthesia. Indirect obstetric death is that resulting from previous existing disease or disease that developed during pregnancy and that was not due to direct obstetric causes (e.g., rheumatic heart disease, congenital heart disease, malaria, AIDS, diabetes, malignant neoplasms, aneurysm, nephritic syndrome and systemic lupus erythematosus (SLE)) but was aggravated by the physiological effects of pregnancy.

Various definitions of the indirect and incidental causes of death across countries make it difficult to compare the prevalence of maternal death internationally. In Thailand, malignant neoplasms used to be treated as an incidental cause of maternal death if the pregnant women were in the age group 45-49 years. Later, all pregnant women who died of malignant neoplasms were grouped under the indirect maternal death category. Incidental death is usually defined as that due to conditions occurring during pregnancy, even though the pregnancy was unlikely to have contributed significantly to the death. Most deaths due to accidents, murder, intentional self-inflicted injury or poisoning, and genocide are considered incidental. To cope with this variation, ICD-10 introduced pregnancy-related death, which is defined as the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the cause of death. However, pregnancy-related death has not been used as frequently as maternal death when measuring safe motherhood.

To measure the number of maternal deaths, it is necessary to obtain accurate data from vital registration, including medically certified causes of death. According to WHO (2004), only 60 countries had complete vital registration with good attribution of the cause of death. Another 51 countries reported MMR using other data, such as vital registration with uncertain attribution of the cause of death, direct sisterhood estimates, RAMOS,[2] household surveys and census. There were 62 countries without national data on maternal deaths; WHO, UNICEF and UNFPA used adjusted available country data and a simple logit model to estimate MMR for those countries.

The WHO (2004) estimate of the number of maternal deaths in 2000 was 529,000. The country with the highest estimated number of maternal deaths that year was India (136,000). In terms of MMR, the global estimate was an average of 400 per 100,000 live births. The ratios were highest in Africa and Asia at 830 and 330 per 100,000 live births respectively.

That study showed Thailand as a country with an MMR below 50 per 100,000 (Figure 1). The method used for making the estimate for Thailand was RAMOS, which is considered a costly and time-consuming method. For this reason, it is unlikely for any country to conduct RAMOS effectively every year.

NEW DATA SOURCES FOR CALCULATING THE MATERNAL MORTALITY RATIO IN THAILAND

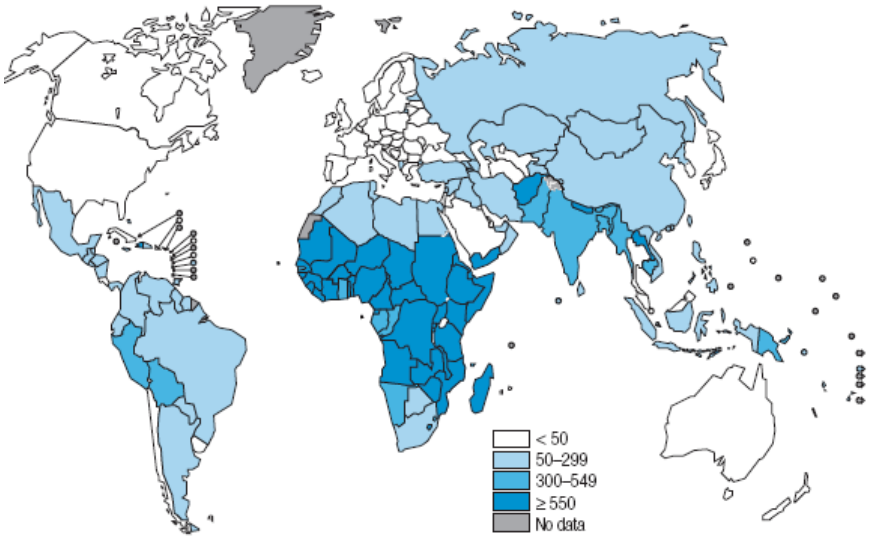
Vital registration in Thailand covers birth, death, marriage, and house registration. Every Thai citizen and household must have an identification number. A newborn child receives a personal identity number (PID) once his/her parent(s) report the birth to the registration office within 15 to 30 days of the birth. For reporting a death, a relative of the dead person must report it to the registration office within 24 hours of the person's death. If a patient dies in the hospital, a physician must issue an official form certifying the death, giving the physician's opinion of the cause of death. In cases when a corpse is found outside a registered house, the person who found the body should report its presence to a police officer or administrative office within 24 hours, but not exceeding seven days. Once a person's death has been reported to an administrative office, the PID of the dead person is coded as "deceased" and it cannot be used by someone else afterwards. Then, a death certificate is issued to the relative concerned. An autopsy is not required following the report of a death.

With technological advances, the reports of births and deaths and the issuance of death certificates have been computerized, which enabled us to use these data sources in order to count the number of mothers. The key basis for defining a maternal death used here is the timing of the death related to pregnancy and the ICD definition of maternal death. We propose two methods for determining the number of maternal deaths. Method 1 searches for the dead mothers who gave live births, while Method 2 searches for the pregnant women who had died without giving live births.

Method 1

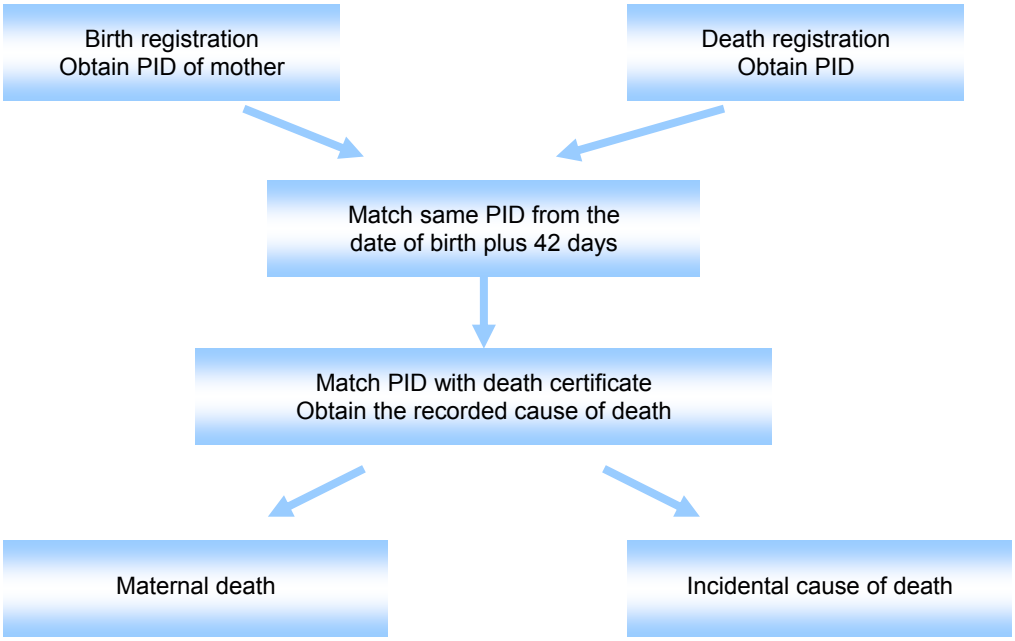
The first step in Method 1 (Figure 2) involved pulling the PID of all mothers, as stated on the birth certificates, in a given period (e.g., a year). Approximately 800,000 births occur each year in Thailand. The second step involved pulling the PID of reproductive-aged dead women. Approximately 30,000 women of reproductive age die each year. We used the PID from two sources as a key matching variable from the two data sets. If PIDs overlapped in the two data sets, we kept the records. Up to this point, we identified the mothers who had died within one year of giving a live birth.

Figure 1 Maternal Mortality Ratio per 100,000 Live Births Worldwide in 2000



Source: WHO (2005).

Figure 2 Method 1: Mothers Who Died after Giving a Live Birth



Note: Using this matching method enables only the determination of the number of now dead mothers who gave a live birth.

The next step was to delete the records whose date of death was beyond 42 days of the date of birth of the women's newborns. To determine the causes of death, the PID was used to match with records in the death certificate data set. The final step was to investigate the causes of death carefully to separate the incidental causes of death from maternal death. In this study, we did not separate direct and indirect causes of death since that would have required extra assessment by experts and careful investigation. However, separating the incidental cause was straightforward as the ICD definition is clear.

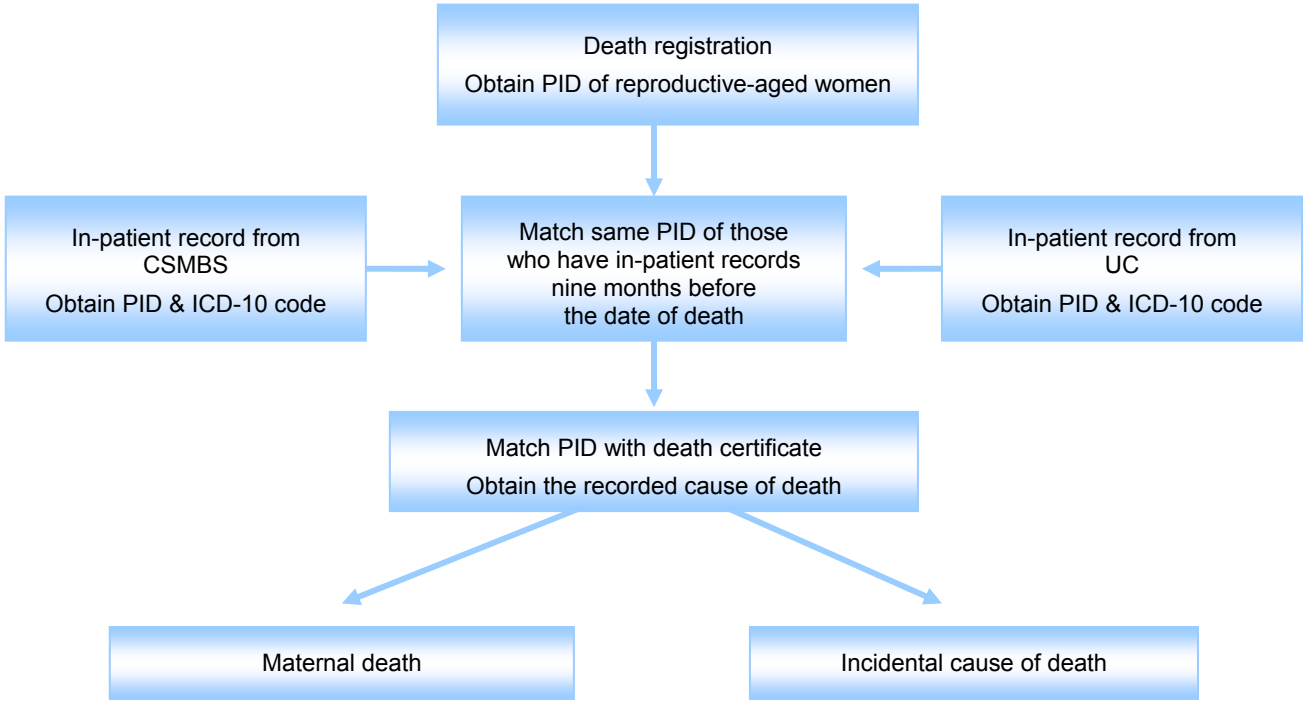
Method 2

Method 1 covers only the death of women who successfully gave live birth. It misses pregnant women whose pregnancy was terminated as a result of stillbirth, and neonatal death.[3] Although it is difficult to determine the number of women who died without giving a live birth, there is a way to deduce some proportion of that number.

Method 2 uses in-patient data of two health-care schemes. Currently, Thailand has three main public health-care systems: the Civil Servant Medical Benefit Scheme (CSMBS), the Social Security Scheme (SSS), and the Universal Health-care Coverage Scheme (UC). The first-named scheme covers approximately 5.6 million civil servants and their dependants (approximately 9% of the country's total population). The second scheme covers approximately 8.8 million private employees in the non-agricultural sector (approximately 14% of the population). The third scheme covers all who are not covered by the first two schemes, or approximately 77 percent of the population. Because of the payment mechanism of the CSMBS and UC schemes, that is, the diagnosis-related groups (DRGs), all in-patient records in public hospitals have been computerized. Method 2, therefore, uses the DRG data set, which is composed of data on 21 million admissions between 2004 and 2006, in order to determine the number of pregnant women who had died without giving live birth.

In our study, the first step of Method 2 (Figure 3) was to obtain the PID of dead reproductive-aged women from the death registration. The second step was to match each PID from the first step with the DRG records between the date of death and 270 days before the date of death (58,270 women with 193,579 admissions in the period 2004-2006). There were no in-patient records in this DRG data set for approximately 35 percent of the reproductive-aged dead women in the period 2004-2006.[4] The in-patient records were kept if their ICD-10 codes contained the code O00-O99 (pregnancy, childbirth, and the puerperium). This step produced a list of dead women who were in-patients under the CSMBS or UC schemes and were pregnant within a period of nine months prior to their death (1,650 women with 3,513 admissions). The last step was to verify whether those deaths were maternal deaths.

Figure 3 Method 2: Women Ending Pregnancy with Stillbirth or Neonatal Death



The last step of Method 2 is rather time-consuming because each in-patient record contains many ICD-10 codes. We had to search each in-patient record with any of the following codes: S00-S99, T00-T79, T90-T98 (injury and poisoning of external causes), V01-X59 (accident), X60-X84 (intentional self-harm), X85-Y09 (assault), or Y10-Y36 (event of undetermined intent and legal intervention and operation of war). They were labeled as death caused by some incident and thus excluded from the maternal deaths.

The remaining records were not all maternal deaths. Those who died before the discharge date, on the discharge date, or within 42 days after the last discharge date were classified as maternal deaths (A in Figure 4). Of those who died after 42 days but within nine months of the discharge date (B in Figure 4), we did not know whether they were maternal deaths. As a result, we did not include them in the MMR formula.

Table 3 shows the final result of both methods. It shows that Method 1 contributes about half of the picture while Method 2 can do a better job. Using both methods, we determined that the number of maternal deaths in 2004 and 2006 were 362 and 330 respectively. In applying the previously mentioned formula, these figures produce MMRs of 44.5 and 41.6 per 100,000 live births for those years. However, the lower figure for 2005 is a little suspicious to us; thus, further investigation on the death record for 2005 should be carried out.

This new method is expected to cover most maternal deaths. The missing deaths are pregnant women under the SSO scheme whose pregnancy resulted in stillbirth or neonatal death. We also miss pregnant women who had no in-patient record in the UC and CSMBS schemes or had records but died between 42 days and nine months after the discharge date (again B in Figure 4). These missing deaths may be missed as well using an approach, such as RAMOS, since they disappeared from the public health-care system. To make an ad hoc adjustment, we may multiply the MMR in Table 3 by 1.5, the multiplier used to adjust the MMR using the vital statistics found in WHO (2004).

Figure 4 Timing of Maternal Deaths

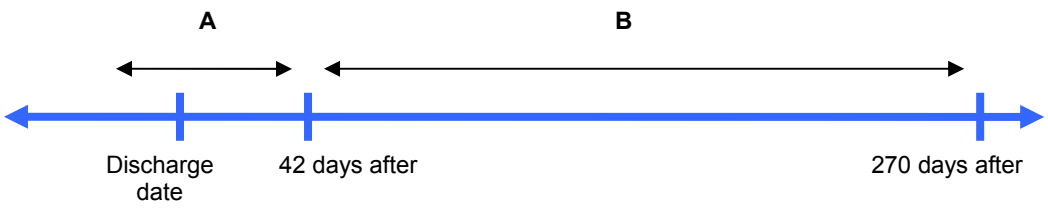


Table 3 Maternal Mortality Ratio Using New Approach

	2004	2005	2006
No. of deaths: women aged 15-49	32,658	29,398	27,934
No. of live births	813,069	809,485	793,623
Method 1			
Maternal deaths	182	126[1]	185
Incidental causes of death	15	6	18
Method 2			
Maternal deaths	286	249	250
Incidental causes of death	9	8	19
Overlapping of Method 1 and Method 2			
Maternal deaths	106	72	105
Incidental causes of death	8	5	12
Summary (Method 1 + Method 2 – Overlapping)			
Maternal deaths	362	303	330
Classified by health-care scheme			
- UC	269	241	235
- CSMBS	17	8	15
- Others[2]	76	54	80
Incidental causes of deaths	16	9	25
Pregnancy-related deaths	378	312	355
MMR (per 100,000 live births)	**44.5**	**37.4**	**41.6**
Pregnant in-patients who died within 9 months after being discharged from the hospital (B in Figure 4)[3]	110	246	174

Notes: [1] This figure is suspicious. We checked to ensure that there was no error in data processing. We found that 100 percent of these deaths happened in the hospital in 2005. However, in 2004 and 2006, approximately 65 and 80 percent respectively of the numbers on the same row happened in the hospital.
[2] Others include the deaths without in-patient records under UC or CSMBS.
[3] These deaths are not included in calculating the MMR.

CONCLUSIONS AND POLICY REMARKS

Maternal mortality is an indicator of disparity and inequity between men and women. It implies the place of women in society and women's opportunity with regard to health-care access and economic activity. Societies with a high MMR may well have a high infant mortality rate; conditions in such societies may also lead to family and social disorder as well. Therefore, getting statistics on MMR that reflect the true situation in Thailand will support the formulation of effective policies for promoting access to, and good quality of, health care, improved social prospects, and human rights.

In this study, we used multiple data sources to calculate Thailand's MMR. This approach can also be applied to calculate other statistics, such as the infant mortality rate (IMR). The major benefit of using this approach is the ability to draw out policy implications from the data. Some examples which are not related directly to this study but are implied from the data are as follows.

- The occurrence of death among pregnant women is higher than among those giving live birth, i.e., the number obtained from Method 2 is higher than that from Method 1. Many of the women died as a result of illegal abortion. While public health policy is needed to deal with this problem, we cannot deny that social policy is urgently required to deal with unwanted pregnancy.
- The average age that maternal death occurred in the period 2004-2006 is 31. Because about 6.3 percent of the maternal deaths occurred in the teenage age group, more and effective education on pregnancy should be provided to youth.
- Many maternal deaths are among HIV-positive women and are preventable. Following-up the cause of death in detail can provide information that will help in taking the right action for reducing the risk of losing life.
- Data from birth and death certificates indicate that about half the mothers who successfully committed suicide did so within 10 days of giving birth. In all such cases, the women chose either hanging or drinking pesticide. Their infants and society have lost a great deal from such incidents, which are preventable.

- It has been alleged that people under the CSMBS scheme get better quality medical treatment than those under non-CSMBS schemes. The number of eligible people under CSMBS was 5.6 million in 2006. The number of people not covered by CSMBS was approximately 56.4 million, which is 10 times higher than the number covered by CSMBS. In 2006, the number of maternal deaths among women covered by CSMBS was 15, while that of their non-CSMBS counterparts was 315. This indicates that maternal deaths among non-CSMBS women were 21 times higher than among those covered by CSMBS. Even though there might be some other factors at work, we think that something has to be done to improve the equity of health-care quality among Thais.

Many more policy implications can be drawn from the data if we investigate the causes of death in detail, a step that should be done after calculating MMR. From our initial investigation of maternal death, we recommend that health, economic and social interventions across organizations be implemented simultaneously in order to reduce maternal deaths. In attacking this issue, horizontal cooperation will achieve interventions more effectively, as we have learned from this study, that is, multi-organization cooperation could improve understanding of the issue, reduce the knowledge gap across organizations and produce a more cost-effective way of doing the same thing.

ENDNOTES

[1] Thailand has admitted that the MMR target of 9 per 100,000 live births is too ambitious (NESDB 2004, 30). According to WHO/UNICEF and the United Nations Population Fund (UNFPA), the following countries and territories with good death registration and good attribution of cause of deaths have MMRs of 9 or lower (figures in parentheses are maternal deaths per 100,000 live births): Australia (8), Austria (4), Canada (6), Croatia (8), Czech Republic (9), Denmark (5), Finland (6), Germany (8), Greece (9), Iceland (0), Ireland (5), Italy (5), Kuwait (5), New Zealand (7), Portugal (5), Qatar (7), Slovakia (3), Spain (4), Sweden (2), and Switzerland (7) (WHO 2004, 23-24).

[2] See footnote [a] in Table 1.

[3] A stillbirth is defined as the death of a fetus at any time after the twentieth week of pregnancy. Neonatal death is the death of a live-born infant within 28 days of its birth.

[4] The 35 percent cohort could include the following: those who died outside public hospitals or in private hospitals, those who were under the SSS, or those who paid for their medical care as an out-of-pocket expense.

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Protecting Foreign Investments against Expropriation Measures: Risks and Concerns Related to the New Draft Amendment of the Foreign Business Act of 1999

Kiratipong Naewmalee*

1. INTRODUCTION

Thailand has long been recognized as one of the countries most open to foreign investment, especially foreign direct investment (FDI). Owing to the growing significance of foreign trade and investment, the Thai government has, in recent years, signed many bilateral and regional trade and investment agreements that guarantee to protect foreign investments against certain government measures that may unduly harm the investment.

Most investment agreements contain three major substantive provisions. First, the obligation of the host country toward investors and investments of the Party to the agreement is defined. Second, in case the host country is alleged to have breached such obligations, the affected private investor may settle the dispute through an international arbitration forum rather than through the domestic judicial system. Third, in case that a particular government measure is considered to be an act of "expropriation" or that which is "indirect or tantamount to expropriation," the private investor shall be promptly and adequately compensated as decided by the arbitration.

The rapid proliferation of investment protection agreements worldwide has resulted in surging investor-to-State investment dispute cases. The total number of known treaty cases between 1987 and 2006 reached 255; the majority of which (about 156 cases) were filed with the International Centre for the Settlement of Investment Disputes (ICSID) (UNCTAD 2006). According to UNCTAD (2006), of the seven decisions involving alleged expropriation rendered in 2006, just one was decided in favor of the investor.

Although past statistics may underscore the host country's continued sovereign rights to impose domestic regulations despite the investment protection agreements, a host country government nevertheless needs to spend time and resources in defending dispute cases and risks losing the confidence of other foreign investors. Thus, one of the most critical questions being addressed is how a government of the host country can avoid investor-to-State disputes arising from state measures that may have unintentionally negative impact on the interests of foreign businesses and thus be perceived to be an act of "expropriation" by a foreign investor.

In line with the aforementioned development in the global investment environment, it is the aim of this article to study the meaning of the phrase "expropriation and measures tantamount to the expropriation," as contained in the investment chapter of most bilateral trade and investment agreements. To do so, it is important to investigate legal decisions that have evolved over time.

In order to illustrate the issue at hand, it would be useful to examine whether the draft amendment of Thailand's Foreign Business Act of 1999 (B.E. 2542), which imposes stricter operating conditions on foreign businesses, can be taken as a measure tantamount to expropriation that breach the Thai government's obligation under various bilateral investment treaties (BITs) and free trade agreements (FTAs) to which Thailand is a signatory.

* *The author, who is a Senior Researcher in the Sectoral Economics Program, Thailand Development Research Institute, would like to express his heartfelt gratitude to Dr. Deunden Nikomborirak for valuable comments and final editing of the article and Assist. Prof. Dr. Jantajira Iammayura, Faculty of Law, Thammasat University, for constructive discussion on this topic. This article was prepared for academic research purposes only; no part of this work may be cited as a legal opinion. The views expressed in this article are those of the author, and do not necessarily reflect those of TDRI. The author is responsible for any errors.*

2. IMPORTANCE OF INVESTMENT PROTECTION AND THE RELEVANT PROVISION IN THE EXPROPRIATION REGIME

Dee and Kevin (2000) found that liberalizing investment could help lower a country's production cost and hence, boost a country's comparative advantage, provided that supporting infrastructure, such as high-standard facilities, qualified human resources, and stringent laws and regulations, is adequate. Overseas investors would also benefit from increased cost competitiveness such that they could accumulate more capital and reinvest on a larger scale.

However, most direct investments involve large sunk costs – i.e., costs that cannot be recovered when operation ceases. Foreign direct investors cannot easily liquidate their assets and leave the country when regulatory environment of a host country unexpectedly becomes unfavorable, or even harmful, to investment. Therefore, many countries have tried to minimize the regulatory risks faced by investors as they relate to unpredictable changes, as well as any unfair practices by the host country governments, by signing agreements with their trade counterparts in order to preclude such regulatory uncertainties and their potentially unfavorable impacts.

Although private property rights are extremely important, a customary international law does not preclude host country governments from imposing regulations to protect the public interest. In this regard, the States concerned should have the power to "expropriate" those foreign investments provided that they do so:

(1) For public purposes only;
(2) On a non-discriminatory basis;
(3) With due process; and
(4) By providing sufficient compensation for the expropriation without delay.[1]

Failure to meet any of the above conditions may provide grounds for a foreign investor to file a case against the host State with an international arbitration forum, as stipulated in the agreement mutually accepted by both Parties.[2]

Although investment protection obligations in FTAs and BITs clearly specify that the States must pay compensation for carrying out any expropriation, the width and depth of its applicability depend on two crucial factors: the class of assets entitled to protection under the agreements and the criteria by which to identify the meaning of indirect expropriation or the measures tantamount to expropriation, which is governed by international law with regard to the investment protection regime.

3. SOME CRITICAL LEGAL ELEMENTS CONSTITUTING INDIRECT EXPROPRIATION OR MEASURES TANTAMOUNT TO EXPROPRIATION

3.1 Scope of Protected Assets under Investment Protection Laws

The class of assets protected under the investment agreement in most FTAs and BITs today is relatively broad, covering both tangible and intangible assets such as property rights, movable property, immovable property, intellectual property, equities, bonds, money claims, concessions, and permits, as well as contractual claims. However, certain agreements place restrictions on the type of investment that will be eligible for the protection.

For example, in the Agreement between the Kingdom of Thailand and Japan for an Economic Partnership (JTEPA)[3] protection applies broadly to both tangible and intangible assets. However, only assets associated with "FDI" are entitled to such protection. That is, assets associated with portfolio investments and any other forms of short-term loans made by foreign investors or other contracting parties are not covered in the investment protection clause.[4] This is different from that of the North American Free Trade Agreement (NAFTA)[5] and the BIT between Thailand and Germany, for instance, which provide protection for assets of all types of investment.[6]

3.2 Meaning of Indirect Expropriation

Generally, expropriation refers to the use of any measures by the host country government which result in the transfer of property rights from the private owner to the government itself or a third party for any purpose. Normally, the term "expropriation" appearing in the investment chapter of BITs and FTAs can be classified into two main categories: direct expropriation and indirect expropriation or any measure tantamount to expropriation.

Direct expropriation, or the actual taking of property, may occur in many ways and forms, such as the nationalization, confiscation, and dispossession of an investor's assets, as long as it involves directly taking control of the rights belonging rightfully to the private owners. On the other hand, indirect expropriation, or any measures tantamount to expropriation, does not involve a seizure of control over the rights of the investor. Rather, it may involve a government measure that may "interfere" with the usage of the property rights instead of taking direct control of the assets. Also, on many occasions, it has been construed by international arbitral tribunals that indirect expropriation could cover a wide range of policy measures, such as the imposition of an

arbitrarily disproportionate tax rate, the forced sale of equity, and the denial of access to legal materials and labor supply by other juristic entities.

Although most international investment protection agreements contain provisions regarding indirect expropriation, not many of them provide guidelines or principles on how such measures can be identified in practice. An OECD study (2004) and Reinisch (forthcoming) indicate some crucial legal elements that identify whether or not a government is engaged in an indirect expropriatory action. The three common criteria by which a government measure may be considered an act of expropriation are:

(1) degree of interference with property rights;
(2) legal transparency and consistency; and
(3) consistency with investor's reasonable expectations.

3.2.1 Degree of interference with property rights

Most international decisions treat the severity of the economic impact caused by a government action as an important element in determining whether it rises to the level of expropriation requiring compensation. International tribunals have often refused to require compensation when the government action did not remove essentially all or most of the property's economic value. There is a broad support for the proposition that the interference has to be "substantial" in order to constitute expropriation; for example, when it deprives the foreign investor of fundamental rights of ownership, or when it interferes with the investment for a significant period of time.

For example, in the Pope & Talbot case, the Canadian government's export restrictions on softwood lumber were alleged by American softwood lumber exporters to be an act of expropriation as it resulted in reduced profits. In this specific case, the NAFTA tribunal noted that despite the said restriction, the American investor continued to export considerable quantities of lumber and to earn substantial profits on those sales. It was thus concluded that "the degree of interference with the investment's operations due to the Export Control Regime did not rise to the level of expropriation."[7]

Similarly in Feldman case, the NAFTA tribunal held that Mexican's government measures that denied an American cigarette producer certain tax refunds did not constitute an expropriation although it acknowledged that the investor effectively lost the ability to export cigarettes and any profits derived as a result of the tax regulation. However, the panel viewed that since exports played only a minor role in the American company's overall business undertakings, the particular government measure did not substantially affect the interests of the private investor.

3.2.2 Legal transparency and consistency

The degree of transparency with which the government measure was implemented and the consistency of the disputed rules or regulations with the country's other laws and its legal system constitute another criterion for determining whether a government measure can be considered expropriatory.

For example, in the Metalclad case, the Mexican municipal government refusal to grant a permission to construct and operate an underground landfill to an American company, Metalclad, was found to be non-transparent and inconsistent. First, the municipal's decision to declare the area where the landfill was going to be constructed as wildlife preservation was non-transparent in that the decision appeared to be rushed and very sudden. Furthermore, such a denial of the use of the land was inconsistent with the written assurance of the company's right to operate the landfill without the need of municipal's approval given by the Federal Government, on which the claimant had initially relied before the commencement of the construction.[8] As a result, the tribunal concluded that the measure can be considered to be an indirect expropriation for which the firm must be properly and duly compensated according to NAFTA.

After the Metalclad case, tribunals have become more cautious in finding expropriation on the basis of non-transparent government behavior. For example, in the Feldman case the tribunal did not find indirect expropriation in bureaucratic behavior that fell short of what one would reasonably expect. An implicit transparency obligation was discussed in the case where certain actions of the Mexican tax authorities were allegedly "so arbitrary as to constitute expropriating action." The tribunal, however, rejected this claim, not because it did not believe in the non-transparency of the governmental actions, but rather because it considered "doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law, particularly given the complexities not only of Mexican but most other tax laws."[9]

According to the finding of the Feldman case, the tribunal found it undeniable that the claimant found it difficult to deal with the tax officials and in some respects had been treated in a less than reasonable manner. However, the tribunal thought that such treatment did not rise to the level that could violate international law under Article 1110 of NAFTA.

3.2.3 Consistency with investor's reasonable expectations

A country may indeed impose any regulatory changes that may have adverse effects on the investment returns of a foreign investor. The critical issue is whether the rules or regulations introduced are within

the scope of an investor's legitimate and reasonable expectations.

In the Metalclad case, the tribunal's finding of an indirect expropriation was based on the fact that the denial by the local government of a construction permit necessary to operate a waste disposal facility contradicted with the investor's legitimate and reasonable expectations. This is because the investor had obtained an official letter from the central government indicating that only a permit from the federal government is required to launch the landfill project.

4. GOVERNMENTAL ACTION CONTRADICTING INTERNATIONAL LAW ON INVESTMENT PROTECTION: A CASE STUDY OF THE NEW DRAFT AMENDMENT ON THE FOREIGN BUSINESS ACT

The Foreign Business Act of 1999 (B.E. 2542) spells out the conditions under which foreign persons may operate businesses in Thailand. In particular, it prescribes businesses that are prohibitive to foreign persons contained in three separate lists.

List 1 determines businesses that are sensitive to local culture. There are nine businesses on this list, such as farming, publication of newspapers, and radio and television broadcasting. Aliens are strictly prohibited from operating in these businesses.

List 2 includes businesses relating to national safety, security, art and culture, traditional and folk handicraft, natural resources, and the environment. This list consists of 13 business operations.[10] Foreign persons are prohibited from operating in these businesses unless permission is obtained from the Minister of Commerce.

List 3 prescribes businesses that required protection on the ground that local operations are not yet competitive. There are 21 business categories on this list, including "all service business except those prescribed in the ministerial regulation," which makes the list extensive. Foreigners are allowed to operate in these businesses with permission from the Director-General of the Commercial Registration Department, with the approval of the Foreign Business Committee.

Given that the law imposes many restrictions on the scope of operation of a foreign entity, the definition of a "foreign person" is indeed extremely important in determining the scope of rights of a particular juristic person. The current law defines a foreign entity as follows:

(1) A natural person who is not of Thai nationality;

(2) A juristic entity that is not registered in Thailand;

(3) A juristic entity incorporated in Thailand with foreign ownership accounting for one-half or more of the total number of shares and/or registered capital; or a limited partnership or ordinary registered partnership whose managing partner or manager is a foreigner.[11]

The above definition of a foreign entity that relies solely on direct equity holding allows foreigners to assume "effective control" of a legally Thai company by:

(a) arranging preferential shares through articles of association or agreement that grant "preferential voting rights" to foreign investors so that a foreign shareholder may own only 49 percent of the equity share but control almost two thirds of the voting shares if each preferential share carries two votes. Such an arrangement is commonplace (Sopon 2002; and Deunden, Suneeporn and Sarinee 2006).

(b) arranging for additional indirect equity holding by buying up equity shares in the Thai partner.

After the military coup d'état in September 2006, the provisional government of Thailand, under the leadership of Prime Minister Surayud Chulanont, proposed an amendment of the Foreign Business Act of 1999 to close the legal loophole. The draft amendment of the Foreign Business Act defines a foreign company as a legal entity in which the majority of either the direct equity share or the **voting share is held by foreign natural or legal persons**.[12] Consequently, a company in which foreign shareholders hold a minority equity share but a majority voting share through preferential share arrangements would now be considered a foreign rather than a Thai juristic person. And, if the particular company happens to be operating in one of the businesses that appear in lists 1 to 3, the foreign shareholders would be forced to sell down their shares in order to reduce their voting rights to a minority share unless there is a grandfathering clause that shields all incumbent investments from this major regulatory change.

According to the provisional clause in the draft Foreign Business Act, all companies operating in one of the three lists of prohibited business that became a foreign juristic person under the new law will be granted a permit to operate automatically, but must be obtained within one year from the date in which new Act comes into force.[13] However, for those operating in businesses in lists 1 and 2 must also reduce their equity and voting shares to comply with the new law in three years.[14] For those operating in businesses in list 3 may continue to operate with existing equity structure until its cessation.[15]

It is uncertain whether the mandatory divestiture affecting investors operating businesses on List No. 1 and List No. 2 could be construed as an indirect expropriation, which requires compensation. However, from an affected party's point of view, the legal

amendment may be considered an act of indirect expropriation due to the following reasons.

First, the loss of effective corporate control resulting from the mandatory divestment of the voting share may be considered as a serious deprivation of property rights tantamount to an indirect expropriation.

Second, the proposed change in the Foreign Business Act may be perceived to be "beyond" reasonable expectations of an investor for two reasons. First, the proposed amendment was tabled by an unelected government established by the military authorities that undertook the coup d'état. The sudden shift in the country's political environment and hence, its economic policy directions, was unexpected by most investors. Second, the legal amendment, which represents a roll back in Thailand's investment liberalization, is inconceivable for most foreign investors as Thailand, as a member of the WTO, has made binding commitments in the General Agreement on Trade in Services (GATS) that guarantee foreign investors market access not less than that stipulated under the Foreign Business Act of 1999. The issue whether such an amendment constitutes a violation of Thailand's commitments in the GATS, however, is still an on-going debate. In this regard, it is likely that the claimants could challenge the government for interfering with business conditions and their objective investment expectations.

Third, the transitional provision that provides for a more generous grandfathering provision for foreign businesses operating in list 3 can be seen as unreasonably discriminatory and non-transparent.

5. CONCLUSIONS AND RECOMMENDATIONS

The investment protection obligation in bilateral investment agreements and the investment chapter of various free trade agreements provides that the State must pay compensation for both direct and indirect expropriation.

Although the line between what is considered to be a legitimate regulatory measure and what is considered to be a measure that is tantamount to an indirect expropriation requiring compensation has not yet been clearly articulated, some criteria have emerged from past arbitral decisions.

When analyzing the international law governing expropriation and the awards rendered by arbitral tribunals on international investment protection, a careful review of much of the research carried out so far has found some important criteria that commonly form the basic foundation for actions which are presumed to result in indirect expropriation requiring compensation. The conditions are, for example, (1) the degree of interference with property rights, (2) legality, transparency, and consistency, and (3) the interference with an investor's reasonable investment expectations.

Based on the list of criteria and based on State practices and existing jurisprudence, which is not exhaustive and may evolve over time, there is a risk that the new draft of the Thai Foreign Business Act (No…) B.E…. might be construed as a measure effecting expropriation that would require the host country government to pay compensation without delay to foreign investors subject to forced divestiture who are protected under the investment chapter of various international agreements, e.g., BITs and FTAs.

To avoid private to State disputes arising from the proposed legal amendment, the Thai government should make sure that (1) the new draft Act applies only to the new investors, (2) all business operations are equally grandfathered, and (3) the proposed legal change has been subject to thorough cost and benefit assessment and sufficient public scrutiny with a greater dissemination of the findings for further public debate in order to boost greater transparency and due process to the legislative procedure.

ENDNOTES

[1] Article 102.1 of the Agreement between the Kingdom of Thailand and Japan for an Economic Partnership (JTEPA), Article 1110.1 of the North American Free Trade Agreement (NAFTA) or Article 4 of the Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (effective on 20 October 2004).

[2] Article 106 of JTEPA, Section B of Chapter 11 of NAFTA or Article 9 of the Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (effective on 20 October 2004).

[3] This agreement had not yet been signed at the time of this writing, although the official text of the basic agreement has been agreed by both Parties.

[4] Article 91 (j)(i)-(iii) of JTEPA.

[5] The member countries are Canada, Mexico and the United States of America.

[6] Article 1139 of NAFTA and Article 1.1 of the Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (effective on 20 October 2004).

[7] Pope & Talbot, Inc. v. the Government of Canada, UNCITRAL, Interim Award on Merits, June 26, 2000, para. 96, http://www.investmentclaims.com/decisions/Pope-Canada-InterimAward-26June2000.pdf.

[8] Metalclad Corporation v. the United Mexican States, ICSID Case No. ARB (AF)/97/1, Award August 30, 2000 (NAFTA), paras. 106-107, http://www.investmentclaims.com/decisions/Metalclad-Mexico-Award-30Aug2000-Eng.pdf.

[9] Marvin Feldman v. Mexico, ICSID Case No. ARB (AF)/99/1, Award, December 16, 2002 (NAFTA), para. 100, http://www.investmentclaims.com/decisions/Feldman-Mexico-Award-16Dec2002-Eng.pdf.

[10] These businesses include manufacture of firearms, ammunition, gunpowder, explosives, domestic transportation, production of carved wood, silkworm farming, weaving of Thai silk, production of Thai musical instruments, mining and rock quarrying.

[11] Article 4 of the Foreign Business Act of 1999 (B.E. 2542).

[12] Article 3 of the Foreign Business Act (No…)(B.E…).

[13] Article 10 paragraph 1 of the Foreign Business Act (No…)(B.E…).

[14] Article 10 paragraph 2(1) of the Foreign Business Act (No…)(B.E…).

[15] Article 10 paragraph 2(2) of the Foreign Business Act (No…)(B.E…).

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