

Doing Business in Thailand

2005

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Table of Contents

INTRODUCTION.....	1
1. THAILAND: AN OVERVIEW.....	2
1.1 Geography and Climate	2
1.2 Population and Language	2
1.3 Religion	2
1.4 The Political System	3
1.5 Currency.....	3
2. THE LEGAL SYSTEM	4
2.1 The Law.....	4
2.2 The Courts	4
2.3 Arbitration	5
3. FOREIGN INVESTMENT	6
3.1 The Foreign Business Act	6
3.1.1 Prohibited and Restricted Businesses.....	6
3.1.2 Exemptions Granted by the Thai Government or by Virtue of a Treaty	7
3.1.3 Exemption for U.S. Companies under the U.S.-Thai Treaty of Amity	7
3.1.4 Exemptions granted by the Board of Investment and the Industrial Estate Authority of Thailand	8
3.1.5 Timeframe for Processing Foreign Business License Applications.....	8
3.1.6 Conditions Attached to Foreign Business Licenses	8
3.1.7 Validity of Foreign Business Licenses and Other Certificates	9
3.1.8 Penalties under the Foreign Business Act	9
3.2 Restrictions on Foreign Participation in Specific Sectors.....	9
3.2.1 The Commercial Banking Act	10
3.2.2 Act on the Undertaking of Finance, Securities, and Credit Foncier Businesses B.E. 2522 (1979) and the Securities and Exchange Act B.E. 2535 (1992)	10
3.2.3 The Life Insurance Act and the Casualty Insurance Act	10
3.2.4 The Thai Vessels Act.....	10
3.2.5 The Employment Provision and Employment Seekers Protection Act	11
4. INVESTMENT INCENTIVES.....	12
4.1 The Investment Promotion Act and the Board of Investment	12
4.2 BOI Incentives.....	12
4.3 BOI Investment Promotion Zones	14
4.3.1 Zone I.....	14
4.3.2 Zone II.....	14
4.3.3 Zone III.....	15
4.3.4 Additional Zone III Privileges	15

4.4	BOI Promotion Eligibility Criteria	16
4.4.1	Projects with Capital Investment not Exceeding Baht 500 Million	17
4.4.2	Projects with Capital Investment in Excess of Baht 500 Million	17
4.4.3	Government Concession and Privatization Projects.....	17
4.5	Priority Activities	18
4.6	Trade and Investment Support Offices	18
4.7	Foreign Shareholding in BOI-Promoted Projects	19
4.8	The BOI Promotion Application Process.....	20
4.9	The BOI One-Stop Service Center	20
4.10	Investment Incentives under Other Acts	21
4.10.1	The Industrial Estate Authority of Thailand Act.....	21
4.10.2	The Petroleum Act	22
4.11	Other Investment Incentives.....	22
4.11.1	Customs Duties.....	22
4.11.2	Taxation.....	22
4.11.3	Packing Credit.....	22
5.	FORMS OF BUSINESS ORGANIZATION.....	23
5.1	Limited Liability Companies.....	23
5.1.1	Private Limited Companies.....	23
5.1.2	Public Limited Companies	23
5.2	Partnerships	24
5.3	Branch Offices.....	25
5.4	Representative Offices*.....	25
5.5	Regional Offices*.....	26
5.6	Joint Ventures.....	26
5.7	Distributorships	27
5.8	Licenses	27
5.9	Agencies.....	28
6.	TAXATION.....	29
6.1	General.....	29
6.2	Corporate Income Tax Categories.....	29
6.3	Corporate Income Tax.....	30
6.3.1	Corporate Income Tax Rates	30
6.3.2	Determination of Net Profit for Corporate Income Tax.....	31
6.3.3	Remittance Abroad of the Profits of a Branch Office.....	32
6.3.4	Withholding of Income Tax on Payments to Offshore Companies.....	32
6.3.5	Dividends.....	33
6.3.6	Other Taxes Withheld on Account of Income	33
6.3.7	Filing Returns and Payment of Corporate Income Tax.....	33
6.4	Personal Income Tax	34
6.4.1	Personal Income Tax	34
6.4.2	Income Exempt from Personal Income Tax.....	34
6.4.3	Deductions of Allowances and Expenses for Personal Income Tax	34

6.4.4	Income from Dividends and Personal Income Tax.....	35
6.4.5	Personal Income Tax Rates	35
6.4.6	Tax Exemption on Bonds	36
6.4.7	Tax Relief for Mutual Fund Investment	36
6.4.8	Taxes Paid by Another Person	36
6.4.9	Filing Personal Income Tax	36
6.4.10	Tax Clearance Certificates	36
6.5	Withholding of Income Tax at Source	37
6.5.1	Overseas Payments	37
6.5.2	Local Employees	37
6.5.3	Local Interest Payments.....	37
6.5.4	Government Payments.....	37
6.5.5	Tax Credits	37
6.6	Treaties for the Avoidance of Double Taxation	37
6.7	Value Added Tax (VAT)	38
6.7.1	VAT Rates	39
6.7.2	VAT Exemptions	39
6.7.3	Zero Percent Rate for VAT	39
6.7.4	VAT Tax Invoice	39
6.7.5	VAT Registration and Returns.....	40
6.8	Specific Business Tax	40
6.9	Municipal Tax.....	40
6.10	Stamp Duty	40
6.11	Appeal Procedures under the Revenue Code	41
6.12	Petroleum Income Tax	41
6.13	Signboard Tax	41
6.14	Excise Tax	41
6.15	Property and Land Taxes.....	42
7.	SECURITIES REGULATION	43
7.1	The Securities and Exchange Commission of Thailand	43
7.2	The Stock Exchange of Thailand.....	44
7.3	Investing in the Stock Exchange of Thailand.....	45
7.3.1	Appointing a Custodian, Correspondent Bank, and Broker	45
7.3.2	Bringing in the Money	45
7.3.3	Buying and Selling	45
7.3.4	Clearing and Settlement.....	45
7.3.5	Repatriation of Funds.....	45
8.	INTELLECTUAL PROPERTY	46
8.1	Trademarks	46
8.2	Patents	48
8.3	Copyright	49
8.4	Plant Varieties.....	50
8.5	Layout Designs of Integrated Circuits	51
8.6	Trade Secrets.....	52
8.7	The Intellectual Property and International Trade Court.....	53
8.8	Controlling Legislation	53

9.	UNFAIR CONTRACT TERMS ACT AND COMPETITION ACT	54
9.1	The Unfair Contract Terms Act.....	54
9.1.1	Scope of Application of the Unfair Contract Terms Act.....	54
9.2	The Trade Competition Act.....	55
9.2.1	Scope of Application of the TCA	55
9.2.2	Abuses of Dominant Position	55
9.2.3	Restrictive Trade Practices Jointly Undertaken by Two or More Business Operators.....	55
9.2.4	Restrictive Trade Practices Jointly Undertaken with Overseas Business Operators.....	56
9.2.5	Anti-Competitive Mergers and Acquisitions.....	56
9.2.6	Other Acts that Restrict Competition.....	56
9.2.7	Permissible Restrictive Trade Practices	56
9.2.8	Trade Competition Commission.....	56
9.2.9	Violation of the TCA.....	57
9.2.10	Exemptions from the TCA	58
9.3	The Prices of Goods and Services Act	58
9.3.1	Scope of Application of the PGSA.....	58
9.3.2	The Central Prices of Goods and Services Committee.....	59
9.3.3	Prohibitions and Control Measures under the PGSA	59
9.3.4	Exemptions from the PGSA	60
9.4	Product Liability.....	60
9.4.1	Civil Liability	60
9.4.2	Criminal Liability with Respect to Products under the Penal Code	61
9.5	Consumer Protection	61
9.5.1	The Food Act.....	62
9.5.2	The Drug Act.....	62
9.5.3	The Consumer Protection Act.....	63
9.5.4	The Industrial Products Standards Act	64
9.5.5	Food and Drug Administration Reward Scheme.....	65
10.	LABOUR LAWS	66
10.1	General.....	66
10.2	Leave and Holidays.....	66
10.3	Severance Pay	66
10.4	Other Regulations	67
11.	IMMIGRATION, VISAS AND WORK PERMITS.....	68
11.1	Entry Regulations	68
11.2	Permits-to-Stay.....	68
11.3	Re-Entry Permits.....	69
11.4	Immigration and Work.....	69
11.5	Work Permits	70
12.	IMPORTING, EXPORTING AND TRADE REMEDIES	71
12.1	Import Controls.....	71
12.2	Export Controls.....	72
12.3	Prohibited Products	72
12.4	Exchange Control	72

12.5	Customs Duty	72
12.5.1	Customs Procedures Related to Taxes and Duties	73
12.5.2	Generalized System of Preferences.....	74
12.5.3	Bilateral and Multilateral Agreements.....	74
12.5.4	The ASEAN Free Trade Area (AFTA).....	74
12.6	The Anti-Dumping and Subsidies Act	75
12.6.1	Dumping.....	75
12.6.2	Requirement of “Material Injury” in Dumping.....	75
12.6.3	Initiation of Dumping Proceedings	75
12.6.4	Provisional Measures	76
12.6.5	Price Undertakings with Respect to Dumping.....	76
12.6.6	Anti-Dumping Duties.....	76
12.6.7	Maximum Time-Limit for Dumping Proceedings.....	76
12.6.8	Review of Anti-Dumping Duties.....	77
12.6.9	Subsidies	77
12.6.10	Specific Subsidies.....	77
12.6.11	Actionable Specific Subsidies	78
12.6.12	Subsidy Consultations/Remedies	78
12.6.13	Calculation of Countervailing Duties for Subsidies	78
12.6.14	Other Procedures Relevant to Subsidies	78
13.	EXCHANGE CONTROL	79
13.1	General.....	79
13.2	Importing and Repatriating Personal Funds.....	79
13.2.1	Foreigners in Transit.....	79
13.2.2	Residents.....	79
13.3	Exchange Control on Trading.....	80
13.3.1	Imports.....	80
13.3.2	Exports	80
13.3.3	Foreign Currency Deposit Accounts	80
13.3.4	Non-Resident Baht Accounts.....	81
13.4	Importing and Exporting Investment Funds.....	81
13.4.1	Importing.....	81
13.4.2	Exporting.....	81
13.5	Exchange Control and Promoted Businesses	82
14.	REAL ESTATE	83
14.1	Foreign Ownership of Land.....	83
14.2	Foreign Ownership of Condominiums	83
14.3	Alternatives to Land Ownership for Foreigners	84
14.3.1	Leases	84
14.3.2	Usufruct Interest	84
14.3.3	Superficies.....	85
14.4	Leasing Immovable Property for Industrial and Commercial Purposes.....	85
	APPENDIX A	86
	Schedule of Businesses Restricted or Prohibited to Foreigners	86
	Schedule One	86
	Schedule Two.....	86
	Schedule Three.....	87

INTRODUCTION

The attorneys of Baker & McKenzie's Bangkok office have prepared this publication for the benefit of foreign individuals and companies who are considering investing in Thailand. The text presents a broad overview of certain aspects of the Thai legal system that significantly affect the way business is conducted in Thailand.

This publication primarily deals with government regulation of and incentives for foreign investment, forms of business organization available to foreign investors and the Thai tax system. The latter half of the text contains summaries of various aspects of Thai law that generally affect most business operations in Thailand, including intellectual property, competition and consumer protection, labour, immigration, import/export, currency exchange and real estate.

This publication is intended only as a summary of certain aspects of Thai law with which a foreign investor should be familiar when initially planning a business venture in Thailand. It is not intended to serve as a substitute for specific legal advice that one should procure before actually investing in Thailand. The materials on each topic do not exhaustively summarize all relevant laws. In addition to the topics covered, it is also important for the investor to consider the laws and regulations that govern the specific type of business activity contemplated. Finally, each of the laws discussed is, of course, subject to change. The overall summary is based on Thai law as of 31 December 2004.

Baker & McKenzie was established in Chicago over 50 years ago and now has 69 offices in 38 jurisdictions, including each of the world's major commercial centers. Today the Firm has over 600 partners and a total of more than 4,000 legal professionals.

With 100 attorneys and 300 total staff, the Bangkok office is more than adequately equipped to offer a full range of commercial legal services. Our clients, which are active in all areas of commerce, include Thai and international public and private companies, professional firms, banks and other financial institutions, governments, trade and industry associations, trustees, joint ventures and partnerships. They include many significant foreign investors and companies doing business in Thailand, as well as major local companies developing markets overseas.

1. THAILAND: AN OVERVIEW

1.1 Geography and Climate

Thailand is strategically situated in Southeast Asia, bordered by Cambodia to the southeast, Laos to the north and northeast, Myanmar to the north and west, and Malaysia to the south. It has extensive coastlines along the Andaman Sea on the west and the Gulf of Thailand on the east.

Thailand covers an area of approximately 515,000 square kilometers and consists of four geographic regions. The north is mountainous and forested; the northeast is semi-arid with poor soil; the central region is a vast alluvial plain; and the southern region is comprised of a narrow tropical peninsula, which is rich in minerals.

The climate is generally hot and humid, but varies from semi-tropical in the north to tropical in the south. There are three seasons: hot from March to May, wet from June to October, and dry and relatively cool from November to February.

1.2 Population and Language

Thailand's population is approximately 63 million. The predominant ethnic group is Thai with minorities of Chinese, Laotians, Cambodians, Malays and various indigenous hill-tribes.

The capital, Bangkok, is its most populous city, supporting over 10% of the total population. Other major cities include Khorat (northeast), Khon Kaen (northeast), Chiang Mai (north), Songkhla/Hat Yai (south) and Phuket (south).

The national language is Thai, with minor regional variations. English is used in certain commercial circles and in tourist areas, but otherwise is not widely spoken.

1.3 Religion

Approximately 95% of the population is Buddhist. Although the Christian calendar is widely used in Thailand, the Thai calendar is also used with the Buddhist Era (B.E.) beginning with the Lord Buddha's birth in 543 B.C. Therefore, the legislation cited in this brief is followed by the year in which the legislation was enacted in Buddhist era terms followed by the Christian calendar equivalent; for example, B.E. 2546 (2003). Minority religions include Islam (approximately 3%) and Christianity (approximately 1%). The Constitution guarantees freedom of religion.

1.4 The Political System

Thailand is a constitutional monarchy that was established in 1932 with the King as Head of State. The King is also Head of the armed forces. The present Monarch is King Bhumibol Adulyadej, also known as King Rama IX of the Chakri Dynasty. King Bhumibol ascended the throne in 1946.

Under the present Constitution, which was promulgated in 1997, the executive powers of the King are exercised by a Prime Minister and a Council of Ministers. The Constitution provides for an elected Lower House, the House of Representatives, and an elected Upper House, the Senate, which together make up the National Assembly. Although Thailand can be described as a unitary state, it is made up of 75 provinces or *changwat*, each with its own governor who is responsible to the Ministry of Interior and Bangkok Metropolitan, which is a local administration headed by an elected governor. The government is served by a large, stable bureaucracy. There are various ministries, including the Prime Minister's Office (concerned with national policies), the Ministry of Finance (revenue and customs), the Ministry of Industry (development and implementation of manufacturing and industrial policies), the Ministry of Commerce (regulation of external and internal trade), the Ministry of Interior (which includes the Land Department), the Ministry of Information and Communications Technology and the Ministry of Social Development and Human Security. Each Ministry is headed by a Minister appointed by the King on the recommendation of the Prime Minister.

1.5 Currency

The local currency is the Baht, which is divided into 100 Satang. Notes are available in denominations of 20, 50, 100, 500 and 1,000 and coins of 1, 5, and 10, as well as 25 and 50 Satang. Foreign currency can be exchanged for Baht at commercial banks, authorized money exchange centers and other authorized agents.

2. THE LEGAL SYSTEM

2.1 The Law

Thailand has a codified system of law as a result of reforms instituted by King Chulalongkorn (King Rama V), at the turn of the nineteenth century. The major legislative codes are the Civil and Commercial Code, the Penal Code, the Civil Procedure Code, the Criminal Procedure Code, the Revenue Code and the Land Code. The content of the Codes was drawn from the laws of other countries having codified systems (e.g. France, Switzerland and Germany), from countries with common law systems (e.g. Great Britain) and from the traditional laws of Thailand.

The supreme law of Thailand is the Constitution. This is supplemented by Acts of the Thai Legislature, Royal Decrees, Emergency Decrees, Ministerial Regulations, Ministerial Notifications, other governmental notifications and local government regulations.

The objectives of the Constitution are outlined in the preamble: to promote and protect the rights and liberties of the people; to provide for public participation in governance and inspection of the exercise of the State power; and to improve the efficiency and stability of the Kingdom's political structure. The measures and principles of the Constitution are all intended to meet these objectives.

2.2 The Courts

Laws are normally drafted in broad terms, especially laws regulating commercial activities. Broad powers are delegated to government ministries or organizations, which are empowered to issue notifications or regulations.

The Court of Justice is divided into three tiers: the Supreme Court (Sarn Dika); the Court of Appeals (Sarn Uthorn); and the Court of First Instance (Sarn Chunton). There are also separate Juvenile, Labour, and Tax Courts. There are also a number of specialized courts: the Central and Regional Intellectual Property and International Trade Court (IPIT) and the Central Bankruptcy Court. All these courts were created under their own enacting legislation, which also established their specialized procedures.

The Constitution established a separate system of Administrative Courts to deal with administrative law and administrative contract matters. The Constitutional Court was also established to deal with governmental matters and constitutional questions. The Military Courts were established to try and adjudicate military criminal cases and other cases as provided by law. All cases are decided by judges, as there are no juries.

2.3 Arbitration

Arbitration is available as a means of dispute settlement. Under the Arbitration Act B.E. 2545 (2002), written agreements to arbitrate a dispute are given binding effect by the Courts of Justice or Administrative Courts, depending on the nature of the dispute. Parties to an agreement may agree that certain types of disputes should be resolved by means of arbitration. If an instance of such a dispute arises and one party brings the matter to litigation in court, the other party has the right to object. In this case, the court will refuse to hear the case and will order the parties to resolve the dispute via arbitration in keeping with the terms of the agreement.

The Arbitration Act also provides that the Courts may enforce foreign arbitration awards if the parties involved are entitled to rely on the terms of relevant international conventions. To enforce such an award, a Court requires that the petitioner submit, as evidence, the originals, or certified copies of the originals, and Thai translations of the agreement and the award.

3. FOREIGN INVESTMENT

3.1 The Foreign Business Act

There are several laws and regulations that govern the extent of foreign participation in business activities in Thailand. The main governing law is the new Foreign Business Act B.E. 2542 (1999) (the “Act”).

3.1.1 Prohibited and Restricted Businesses

The Act limits the rights of foreigners to engage in certain business activities in Thailand. Investors contemplating new business ventures in Thailand must carefully consider the Act before attempting to set up operations. A foreigner may wholly own a business in Thailand, unless the specific activity of that business is restricted under the Act or is otherwise prohibited by another law.

The Act defines “aliens” or “foreigners” as natural persons or juristic entities (companies, registered partnerships, etc.) who do not possess Thai nationality. Companies are considered “foreign” for these purposes if 50% or more of their share capital belongs to foreign individuals or juristic entities. Partnerships are deemed to be foreign if 50% or more of the partners are foreign individuals or if the managing partner or manager is a foreigner.

The Act lists three categories, or schedules, of controlled businesses activities (set forth in Appendix A).

Schedule One consists of business activities from which foreigners are barred for “special reasons” and for which they can not obtain a license.

Schedule Two lists businesses that may affect national security or safety, art, culture, customs, native manufacturing/handicraft production, natural resources, or the environment. Foreigners may only engage in Schedule Two businesses if they obtain permission from the Minister of Commerce, which in turn can only be issued pursuant to a resolution of the Cabinet. In addition, Thai nationals must hold at least 40% of the capital in that foreign juristic person and two-fifths (2/5) of the directors must be Thai. With a resolution of the Cabinet, the Minister of Commerce may alter these requirements, but in no circumstances can the percentage of Thai shareholding in a Schedule Two business be less than 25%.

Schedule Three contains business activities in which Thais consider that they are not adequately prepared to compete on an equal footing with foreigners. Foreigners may engage in these businesses only upon receipt of permission from the Director-General and with the approval of the Foreign Business Board. If the foreign enterprise receives this permission, the foreign juristic person can be 100% foreign-owned and there is no requirement for a minimum number of Thai directors.

The Foreign Business Board must review the businesses listed in the Schedules at least once a year and propose any necessary changes to the Minister of Commerce.

3.1.2 Exemptions Granted by the Thai Government or by Virtue of a Treaty

In some instances, foreigners may be exempt from certain requirements imposed by the Act. These include the following:

- foreigners operating a business under the protection of a treaty to which Thailand is a signatory;
- foreigners who engage in regulated businesses with the permission of the Thai government for a set duration; or
- foreigners operating a business under a treaty imposing obligations to which Thailand conforms, even though Thailand is not a signatory.

The exemptions may include permission to engage in an otherwise prohibited or restricted business free of the requirements respecting percentages of Thai shareholders and directors. Entitled parties must first notify the Ministry of Commerce and procure a Certificate from the Director-General.

The Director-General shall issue the Certificate within 30 days from the date of receipt of the notification.

3.1.3 Exemption for U.S. Companies under the U.S.-Thai Treaty of Amity

Under the 1966 Treaty of Amity and Economic Relations between Thailand and the United States, United States nationals (including companies) are permitted to hold a majority share in Thai companies carrying on certain business activities that would otherwise be prohibited under the Foreign Business Law.

3.1.4 Exemptions granted by the Board of Investment and the Industrial Estate Authority of Thailand

Foreigners that have been granted investment promotion from the Board of Investment (“BOI”) or permission to operate industrial or export businesses by the Industrial Estate Authority of Thailand (“IEAT”) with respect to the businesses described in Schedule Two or Three are also exempted from the Act. In this respect they must notify the Ministry of Commerce and procure a Certificate from the Director-General. The Director-General shall issue the Certificate within 30 days from the date of receipt of the notification.

3.1.5 Timeframe for Processing Foreign Business License Applications

The Cabinet (for businesses in Schedule Two) or the Director-General (for businesses in Schedule Three), must complete consideration of an application for a Foreign Business License within 60 days from the date of receipt. If the Cabinet, in case of necessity, is unable to complete the consideration within such period, it may be extended as necessary but shall not exceed a further 60 days.

The Minister of Commerce or the Director-General, as the case may be, must issue a Foreign Business License within 15 days from the date of the Cabinet’s resolution or the Director-General’s approval, as the case may be.

3.1.6 Conditions Attached to Foreign Business Licenses

Both the Minister of Commerce and the Director-General may be required to attach certain conditions to a Foreign Business License. The Minister of Commerce may be subject to the resolution of the Cabinet or to a Ministerial Regulation in case of Schedule Two applicants. The Director-General may be required by a Ministerial Regulation in case of Schedule Three applicants.

The Minister of Commerce, upon the recommendation of the Foreign Business Board, is empowered to issue Ministerial Regulations imposing any of the following conditions:

- Specified debt/equity ratio;
- The minimum number of foreign directors who must have domicile or address in the Kingdom;

- A minimum level of capital and the period for which it must be maintained in Thailand;
- Required contribution of technology or assets;
- Other necessary conditions.

3.1.7 Validity of Foreign Business Licenses and Other Certificates

Foreign Business Licenses issued by the Ministry of Commerce do not specify any period of validity and are thus valid for as long as the business continues to operate.

Certain foreign entities are permitted to operate businesses in Thailand by virtue of the Thai-U.S. Treaty of Amity, the Board of Investment (BOI) Act (“BOI-promoted companies”), the Industrial Estates Authority of Thailand (IEAT) Act, or by the Royal Thai Government (RTG). The operator can use a BOI, IEAT, or RTG certificate or treaty rights to apply for a certificate through the Ministry of Commerce recognizing the foreigner’s permission to operate a business. The validity of the Ministry of Commerce certificate depends upon the period permitted under the certificate issued by the BOI, IEAT, or RTG. A certificate’s validity automatically expires if the business operator ceases to conduct the business.

3.1.8 Penalties under the Foreign Business Act

Thai or foreign nationals who violate the provisions of this law, which also cover nominee situations to avoid the provisions of this law, are subject to imprisonment for a term not exceeding three years or to a fine of Baht 100,000 up to Baht 1,000,000, or both. A Thai court may also order the violating entity to cease its operations. Any violation of a court order shall be subject to a daily fine of Baht 10,000 to Baht 50,000.

3.2 Restrictions on Foreign Participation in Specific Sectors

In addition to the Foreign Business Act B.E. 2542 (1999), several statutes impose conditions of majority ownership and management by Thai nationals for specific business sectors, as described below. In addition, specific regulations for some businesses, such as hotel operation and pharmaceutical dispensing, require that the individual holder of the operating license be an individual Thai national.

3.2.1 The Commercial Banking Act

The Commercial Banking Act B.E. 2505 (1962) requires that Thai nationals hold not less than three quarters of the total issued shares in a commercial bank and that at least three quarters of the total number of directors be Thai nationals unless the Ministry of Finance relaxes this requirement for a specific bank.

3.2.2 Act on the Undertaking of Finance, Securities, and Credit Foncier Businesses B.E. 2522 (1979) and the Securities and Exchange Act B.E. 2535 (1992)

The Thai ownership and management requirements for finance and credit foncier companies are the same as for commercial banks. There are no such restrictions on foreign participation in securities businesses under this Act, although they are subject to the Foreign Business Act.

3.2.3 The Life Insurance Act and the Casualty Insurance Act

The Life Insurance Act B.E. 2535 (1992) and the Casualty Insurance Act B.E. 2535 (1992) require that Thai nationals hold not less than three quarters (3/4) of the total number of shares sold and that at least three quarters (3/4) of the total number of directors be Thai nationals.

3.2.4 The Thai Vessels Act

The Thai Vessels Act B.E. 2516 (1971) imposes a unique requirement for Thai ownership of a juristic entity that would own a Thai vessel operating in Thai territorial waters, requiring that:

- at least 70% of the capital in a limited company, public limited company or partnership owning a Thai vessel (as defined in the Act) be owned by a natural Thai person or by a wholly Thai-owned juristic entity (company or partnership) organized under Thai law (and all shareholders, directors, and partners of such juristic entity must be natural Thai persons) where the subject Thai vessel will trade in Thai territorial waters; and
- if the Thai vessel will specifically be used in international marine transport, at least 51% of the capital in the company (which must be either a limited company or a public limited company) owning the Thai vessel must be owned by a natural Thai person or at least 51% by a wholly Thai-owned company organized under Thai law with all of its shareholders and directors being natural Thai persons.

The owner must not issue bearer shares. The majority of the directors of such a vessel-owning company, and all of the limited liability partners in the case of a limited partnership, must also be Thai nationals. A Thai national person who, for and on behalf of a foreigner, holds title to a Thai vessel or capital of a juristic person owning a Thai vessel, will be subject to a fine not exceeding Baht 500,000 and imprisonment not exceeding five years.

The juristic entity owning the vessel must be organized under Thai law and have its principal office in Thailand.

3.2.5 The Employment Provision and Employment Seekers Protection Act

The Employment Provision and Employment Seekers Protection Act B.E. 2528 (1985) requires that both the juristic person and the management of any company that will act as a recruitment agency must be of Thai nationality. Recruitment agency work is also reserved for Thai nationals under the Foreign Business Act.

4. INVESTMENT INCENTIVES

4.1 The Investment Promotion Act and the Board of Investment

The Investment Promotion Act B.E. 2520 (1977) provides the legal framework for investment incentives granted by the Office of the Board of Investment (“BOI”). The BOI is responsible for promoting foreign and domestic investment. It has wide discretionary powers to encourage investment in areas considered to be most beneficial for Thailand’s economic and social development. BOI incentives include tax privileges, relaxation (in certain cases) of restrictions on foreign participation and employment, business protection measures etc. The members of the BOI board include the Prime Minister (as Chairman), the Minister of Industry (as Vice-Chairman) and other senior governmental officials appointed by the Prime Minister.

In August 2000, the BOI issued Announcement No. 1/2543, which repealed its April 1993 announcement. Announcement No. 1/2543 changes a number of BOI investment promotion policies. It requires that promoted projects report their operating results annually for review prior to the application of tax and duty privileges for that year. All projects with investment capital of Baht ten million or more (excluding cost of land and working capital) must now obtain ISO 9000 certification or similar international certification. The August announcement also repeals previous conditions on exports and use of local materials to bring promotion criteria in line with Thailand’s commitments under international trade and investment agreements like the WTO and ASEAN. Projects located in areas of low income, or where there are inadequate investment facilities, are eligible for special promotion and the maximum tax and duty privileges. In order to promote small- and medium-sized industries, the announcement lowers the minimum level of requisite investment capital to Baht one million, excluding the cost of land and working capital.

4.2 BOI Incentives

Under the Investment Promotion Act, the BOI is able to provide the following types of incentives to BOI-promoted enterprises:

- **State Guarantees:** Guarantees against nationalization, competition from state enterprises, monopolization of sales of similar products, price control, export restriction, and duty-free imports by government agencies or state enterprises;

- **Business Protection:** Such measures, subject to justification and need, may include: imposing a surcharge on imports of competing products (up to 50% of CIF value for up to one year at a time); banning the import of competitive products; ordering any actions needed to assist the enterprise; and providing tax relief measures for the benefit of promoted projects;
- **Relaxation of Restrictions on Participation by Foreigners:** Allowing promoted companies to bring in foreign nationals for feasibility studies; allowing companies to bring in foreign technicians and experts to work on promoted projects; allowing companies to own land for promoted activities; and allowing companies to receive or remit foreign currency abroad;
- **Taxation:** Various incentives include: exemption or reduction of import duties on imported machinery; reduction of up to 90% of import duties on imported raw materials and components; exemption of corporate income tax for three to eight years from the date income is first earned with permission to carry forward losses and deduct them as expenses for up to five years; and, exemption from withholding tax on dividends derived from taxable income during the corporate income tax exemption period;
- **Special Investment Promotion Zones:** Incentives for enterprises in these Zones include: 50% reduction of corporate income tax for five years after the expiration of the three to eight year corporate income tax exemption; double deduction of the costs of transportation, electricity and water supply; and, deduction of up to 25% of the cost of investment in infrastructure;
- **Export Enterprises:** There are additional incentives for export enterprises: exemption from import duties on raw materials and components; allowance of a corporate income tax deduction of five percent of any increase in export income over that earned the previous year; exemption of import duties on re-export items; and, exemption of export duties; and
- **Special Residence Permits:** Criteria for granting permanent residence to foreign investors, experts, technicians, and their spouses, parents, and children that are aimed at boosting foreign investment and the country's technological development. There are minimum investment requirements for investors to qualify. Experts and technicians must possess know-how or expertise, which is scarce in Thailand.

It must be stressed that the BOI has wide discretionary powers. Therefore, it is not bound by any of the foregoing policy guidelines or financial and ownership requirements. To a certain extent, the BOI may adjust the particular privileges awarded to a given promoted enterprise.

4.3 BOI Investment Promotion Zones

To encourage the industrial development of Thailand's provinces, the BOI grants special privileges to projects that establish themselves in three "Investment Promotion Zones."

4.3.1 Zone I

Zone I encompasses the greater Bangkok metropolitan area, i.e. Bangkok, Samut Prakarn, Samut Sakhon, Pathum Thani, Nontaburi and Nakhon Pathom, and the tax promotion privileges that apply are as follows:

- 50% reduction of import duties on machinery on which normal duties are at least 10%;
- exemption from corporate income tax for three years for a project which exports at least 80% of total sales and is located in an industrial estate or a promoted industrial zone; provided that such project, with a capital investment of Baht 10,000,000 or more (excluding cost of land and working capital), obtains ISO 9000 or similar international standard certification within two years from its start-up date; otherwise the corporate income tax exemption will be reduced by one year; and
- exemption for one year from import duties on raw or essential materials used in products manufactured for export.

4.3.2 Zone II

Zone II covers projects located in Samut Songkram, Ratchaburi, Kanchanaburi, Suphanburi, Anghong, Ayuthaya, Phuket, Rayong, Saraburi, Nakhon Nayok, Chachoengsao and Chonburi, and the tax promotion privileges that apply are as follows:

- exemption of import duties on machinery;
- exemption from corporate income tax for three years extendable to five years if projects are located in industrial estates or promoted industrial zones provided that such project, with a capital investment of

Baht ten million or more (excluding cost of land and working capital), obtains ISO 9000 or similar international standard certification within two years from its start-up date; otherwise the corporate income tax exemption will be reduced by one year; and

- exemption from import duties on raw or essential materials used in the manufacturing of export products for one year.

4.3.3 Zone III

Zone III is comprised of the remaining 58 provinces that are not part of Zones I or II, and the tax promotion privileges that apply are as follows:

- exemption from import duties on machinery;
- exemption from corporate income tax for eight years, provided that such project with a capital investment of Baht ten million or more (excluding cost of land and working capital), obtains ISO 9000 or similar international standard certification within two years from its start-up date; otherwise the corporate income tax exemption will be reduced by one year; and
- exemption from import duties on raw or essential materials used in the manufacture of export products for five years.

4.3.4 Additional Zone III Privileges

Projects may also enjoy tax and duty privileges if they are located in one of the following 36 provinces: Mukdahan, Loei, Khon Kaen, Nakhon Ratchasima, Phetchabun, Pichit, Sukhotai, Chiang Rai, Mae Hong Son, Uttaradit, Tak, Phitsanulok, Kamphaeng Phet, Lamphang, Chiang Mai, Lamphun, Trat, Chantaburi, Prachuab Khiri Khan, Phetchaburi, Prachin Buri, Lop Buri, Sing Buri, Chai Nat, Uthai Thani, Nakhon Sawan, Sa Kaew, Phangnga, Songhla, Krabi, Surat Thani, Chumphon, Trang, Phattalung, Nakhon Si Thammarat and Ranong.

If they are located in an industrial estate or promoted industrial zone they can:

- enjoy a 50% reduction of corporate income tax for five years after the corporate income tax exemption period;
- receive double deduction of the cost of transportation, electricity and water costs for 10 years from the date income is first earned from promoted activities; or for a project located outside an industrial estate or promoted industrial zone:

- a deduction of 25% of the cost of investment in infrastructure, and construction costs can be deducted from the net profit in any one or more years within 10 years from the date of first sales. The deduction is additional to normal depreciation.

Furthermore, a project may still enjoy further privileges if it is located in one of the following 22 provinces: Sisaket, Nong Bualamphu, Surin, Yasothon, Mahasarakham, Nakhon Phanom, Roi Et, Kalasin, Sakhon Nakhon, Buri Ram, Amnat Charoen, Phrae, Phayao, Nan, Sathun, Pattani, Yala, and Narathiwat, Nong Khai, Ubon Ratchathani, Chaiyaphum or Udon Thani.

Those privileges are:

- a 50% reduction of corporate income tax for five years after the corporate income tax exemption period;
- double deduction of the cost of transportation, electricity, and water costs for 10 years from the date income is first earned from promoted activities; and
- a deduction of 25% of the cost of investment in infrastructure, and construction costs can be deducted from the net profit in any one or more years within 10 years from the date of first sales. The deduction is additional to normal depreciation.

To be eligible for BOI-promoted status, a business must be a Thai-incorporated limited company, foundation or cooperative. Typically, only new projects or expansions of existing projects are considered for promotion. The ideal project for promotion will export its product, use domestic materials, be located in one of the outlying provinces and use labor-intensive production processes.

4.4 BOI Promotion Eligibility Criteria

The BOI employs three different sets of criteria to determine whether a proposed project is economically and technologically eligible for promotion: The first is for projects involving Baht 500 million or less in capital investment; the second is used for projects with capital investment in excess of Baht 500 million; and the third is used for government concession and privatization projects.

4.4.1 Projects with Capital Investment not Exceeding Baht 500 Million

For a project with investment capital (excluding cost of land and working capital) not exceeding Baht 500 million, the following criteria are used:

- the value added must not be less than 20% of sales revenue, except for projects that manufacture electronic products and parts or that process agricultural produce, and for projects granted special approval by the Board;
- the ratio of debt to registered capital should not exceed three to one for a newly established project, while expansion projects will be considered on a case-by-case basis;
- modern production processes and new machinery must be used. In cases where old machinery is used, its efficiency must be certified by reliable institutions and the Board's approval must be obtained;
- environmental protection systems must be installed. For projects that may pose a threat to the environment, the Board shall prescribe special conditions on the project's location and the type of pollution treatment.

4.4.2 Projects with Capital Investment in Excess of Baht 500 Million

The above criteria will also be used for projects with investment capital (excluding cost of land and working capital) exceeding Baht 500 million. However, in addition, a feasibility study of the project (as prescribed by the Board) must be submitted.

4.4.3 Government Concession and Privatization Projects

For a concession project or privatization of a state enterprise project, the criteria set forth in the Cabinet's decision dated 25 May 1998 will be used as follows:

- projects of state enterprises shall not be granted promotion;
- for a Build, Transfer, Operate or Build, Operate, Transfer concession project by the private sector, the state agency that owns the project must submit its project for the Board's consideration prior to any invitation to bid, and bidders shall be informed of any promotional privilege to which they are entitled, prior to bidding. In principle, the Board will not consider a project where the private sector pays for a concession, unless such payment is deemed to represent a reasonable investment for the state; and

- for a Build, Own, Operate project, including a lease by the private sector or rental payment to the state, normal criteria are used.

4.5 Priority Activities

The BOI has identified five priority activities; namely, agriculture and agricultural products; direct involvement in technological and human resource development; public utilities and infrastructure; environmental protection and conservation; and targeted industries. Such projects receive the following tax privileges:

- exemption from corporate income tax for eight years, regardless of location;
- exemption from import duties on machinery, regardless of location; and
- other privileges that otherwise apply to each Zone.

4.6 Trade and Investment Support Offices

In order to promote Thailand as a regional center for trade and investment, in April 1996, the BOI announced a new promotional category for trade and investment support offices. Activities eligible for promotion under this new category (as further amended in November 2000) go far beyond the establishment of regional offices. The activities covered are quite broad, ranging from engineering, testing and training services to consulting services and software design and development. To facilitate the application process, clarify the criteria governing this category and expedite the approval process, the BOI has established guidelines for granting investment promotion privileges to trade and investment support offices.

Under the relevant BOI announcement, five general parameters apply to all applicants for BOI privileges relating to promotion of trade and investment support offices. They are as follows:

- operating licenses must have been acquired from government agencies concerned;
- only non-tax privileges will be granted;
- majority or total foreign ownership is allowed;
- operating expenses must not amount to less than Baht 10 million per year; and
- operating plans must be approved.

To be eligible for promotion under the category “Establishment of Trade and Investment Support Offices,” companies’ activities must fall within the following list of categories set forth in the guidelines:

- supervision of and/or rendering services to affiliated companies;
- consulting services, except those involving the trading of securities and foreign currency exchange. Companies must obtain licenses from the Department of Commercial Registration and any other relevant government agency to advise on accounting, law, advertising, architecture, and engineering, and a permit to operate such business must be obtained from the Department of Business Development, or the authorities concerned prior to the submission of application for promotion;
- information services relating to sourcing and procurement;
- engineering and technical services, except those related to architecture and civil engineering;
- testing and certifying standards of products, production, and service standards;
- exporting of products;
- business activities relating to machinery, mechanical equipment, tools and accessories, such as importing for wholesale, training, installation, maintenance and repair, and calibration;
- computer program (software) design and development; and
- wholesale of goods manufactured domestically.

Other activities not covered by this list, which may be deemed appropriate for promotion under this category, will be considered by the BOI on a case-by-case basis. A special application form for this category has been created. After submission, the responsible BOI officer may require the applicant to present himself at the BOI for an interview or to provide further information and documentation as deemed necessary. Consideration usually takes 60 to 90 working days.

4.7 Foreign Shareholding in BOI-Promoted Projects

Foreigners may wholly or partially own a promoted project, and the following criteria are used:

- for a project in agriculture, animal husbandry, fisheries, mineral exploration and mining and service businesses under Schedule One of the

Foreign Business Act B.E. 2542 (1999), Thai nationals must hold shares totaling not less than 51% of the registered capital;

- for manufacturing projects in all zones, foreign investors may hold a majority or all the shares in the promoted projects; and
- the Board may specifically fix the maximum foreign shareholding in some promoted projects as deemed appropriate.

4.8 The BOI Promotion Application Process

To help investors through the application process, the BOI publishes guidelines on its Web site: www.boi.go.th. The application procedures diagram on the Web site explains the routing and timing of applications for BOI promotion. On a standard application form, applicants must describe the project, provide other related data, and check boxes to indicate which benefits they are seeking. There is no cost to apply and no penalty for not proceeding if granted promotion. Applicants usually receive most of the benefits to which they are entitled, but are sometimes subject to specific conditions and/or performance requirements set by the BOI.

It is important for potential investors to designate an appropriate party as the “applicant,” especially for joint ventures. BOI promotion is neither assignable nor transferable, nor is the applicant forced to proceed in the venture with the other parties it may have specified in the application. If the applicant (being one of the parties to a proposed joint venture) should unilaterally decide not to proceed with the project, the other partner(s) to the venture would have to apply separately for BOI promotion.

4.9 The BOI One-Stop Service Center

To expedite foreign investment in Thailand and to reduce the complexity of dealing with multiple government agencies, the Office of the BOI has established an “Investment Service Center” at their offices in Bangkok. This Center is able to issue or obtain various licenses and permits for promoted companies, including permits to establish, operate and expand factories, to construct buildings and to produce and sell medicines and foodstuffs. The Center also offers assistance in obtaining work permits and visas for foreign experts and technicians, assistance with various public utility agencies (water supply, electricity, telecommunications) and advice on taxation, repatriation of foreign currency and sources of loan funds.

At present, investors who are either “promoted” individuals under the Investment Promotion Act or non-promoted individuals who are seeking to establish a factory under the Factory Act B.E. 2535 (1992) are eligible for assistance at the Center. In practice, it is very difficult, however, for non-promoted individuals to qualify for assistance at the Center.

4.10 Investment Incentives under Other Acts

4.10.1 The Industrial Estate Authority of Thailand Act

The Industrial Estate Authority of Thailand Act B.E. 2522 (1979) provides for two categories of industrial estates: General Industrial Estates and Export Processing Zones.

Currently, there are General Industrial Estates in the Bangkok vicinity and various parts of Thailand. These estates are operated by the Industrial Estate Authority of Thailand (“IEAT”), either solely or in joint venture with private companies or government agencies. There are also privately owned Industrial Estates, which are themselves BOI-promoted enterprises.

Location in an Industrial Estate often appears as a requirement for BOI promotion. BOI-promoted industries located within Industrial Estates (whether privately owned or not) are eligible for preferential treatment. By setting up in an Industrial Estate, investors can also satisfy subsidiary requirements of their respective Investment Promotion Zones and benefit from the estate’s established industrial infrastructure and the proximity of complementary industries. Industrialists locating in government-sponsored estates also receive a set of incentives, irrespective of whether or not they are eligible for BOI promotion.

Export Processing Zones (“EPZ’s”) are often located in Industrial Estates. The IEAT can grant certain tax privileges to non-BOI promoted, foreign or Thai investors who establish commercial operations in an approved EPZ. The privileges include exemption from import and export duties, as well as from value added tax on machinery, equipment, tools, raw materials and supplies that are essential for production, and on goods imported for use in production. Such privileges are similar to those provided to promoted companies by the BOI.

4.10.2 The Petroleum Act

The Petroleum Act B.E. 2516 (1971) provides concessionaires with privileges similar to those provided to BOI-promoted projects, such as assurances against nationalization plus permission to own land, bring in foreign skilled workers and experts, and to remit currency abroad, as well as certain exemptions from taxes and duties.

4.11 Other Investment Incentives

Additional incentives are provided under other statutes and organizations if goods are produced for export. The following is a brief summary of some of the privileges available.

4.11.1 Customs Duties

The Customs Department can refund import duties on materials imported for the production of goods, which are then exported. In addition, if a manufacturing firm exports its products, it is possible (against certain guarantees and fees) to procure an exemption from import duties on materials to be incorporated in manufactured products under bonded warehouse status, and there are detailed reporting requirements.

4.11.2 Taxation

Value added tax (VAT) applies at a zero percentage rate to goods produced for export.

4.11.3 Packing Credit

Exporters may obtain financial assistance from a commercial bank in the form of packing credit by means of discounting promissory notes at the rate prescribed by the commercial bank. Half of the funds for the packing credits offered by the commercial bank are provided by the Bank of Thailand (“BOT”) at an interest rate prescribed by the BOT.

5. FORMS OF BUSINESS ORGANIZATION

The principal forms of business organizations are: limited liability companies incorporated in Thailand (either private or public); partnerships; branch offices; representative offices; and regional offices.

5.1 Limited Liability Companies

The nature and form of a limited liability company in Thailand is essentially the same as in many other jurisdictions. The capital of a limited liability company is divided equally and is represented by shares of a designated (par) value. The liability of each shareholder is limited to the unpaid portion of the shares held. Limited liability companies may be either private companies, which are subject to the Civil and Commercial Code (“CCC”), or public companies, which are subject to the Public Limited Companies Act B.E. 2535 (1992).

5.1.1 Private Limited Companies

Seven applicants (“promoters”) must apply to establish a private limited company and each promoter must hold at least one share. Each share must be at least 25% paid up and the company must register its memorandum of association with the Ministry of Commerce. After the share subscription has been completed, the promoters must hold a statutory meeting to adopt the articles of association, elect the first directors, appoint the auditor etc. Generally, there are no restrictions as to the nationality of the directors, except for companies that are engaged in certain commercial activities. Subscription for shares in a private limited company may not be offered publicly and a private limited company cannot issue bonds, debentures or other forms of security to the public.

5.1.2 Public Limited Companies

Fifteen applicants (“promoters”) must apply to incorporate a public company. The promoters must subscribe to at least five percent of the total shares, and the promoters must hold such shares for two years from the company’s incorporation (registration) date, except where approval from the shareholders meeting has been obtained. In addition, at least 50% of the promoters must be residents of Thailand. The shares in a public limited company must be fully paid up. As with private limited companies, the promoters must hold a statutory meeting to elect the directors, appoint an auditor etc. The board of directors must have at least five members, at least

half of whom must reside in Thailand. The directors must make full disclosure of their shareholdings in the company and generally have greater responsibility than directors of private limited companies.

The Securities and Exchange Commission (“SEC”), under the authority of the Securities and Exchange Act, is responsible for approving the offering of securities to the public and for supervising the Stock Exchange of Thailand (“SET”). Only the shares of public limited companies may be offered publicly and traded on the SET. Public companies may also issue bonds, debentures and other forms of security to the public.

5.2 Partnerships

A partnership is a form of business organization in which two or more parties join for a common business purpose and share the profits. Partnerships may be ordinary or limited.

In ordinary partnerships, all partners have joint and unlimited liability for the debts and obligations of the partnership. Ordinary partners may contribute money, other property, or labour to the partnership. These partnerships may be registered or unregistered.

Registering an ordinary partnership provides some protection for the partners. First, a partner in a registered partnership may make a claim on behalf of the partnership against third parties, even if the partner is not named in the transaction giving rise to the claim. Second, the liability of partners in a registered partnership ceases two years after they leave the partnership, while they would be continuously liable in an unregistered partnership. Third, creditors must exhaust all assets of the partnership before they can pursue claims against the individual partners. Finally, creditors of an individual partner, in their individual capacity, may only make claims against any profit that the partnership owes to the indebted partner and not against the property of the partnership as a whole.

* The scope of representative and regional offices described here is based upon the Notification of the Prime Minister’s Office issued under the now repealed Alien Business Law. These criteria are currently being used as guidelines until the government issues a new notification or Ministerial Regulation governing representative and regional offices under the new Foreign Business Act, which repealed the Alien Business Law.

In a limited partnership, some partners may have only limited liability for obligations and debts of the partnership. Limited partners may only contribute money or other property to the partnership, and they may not contribute labour, participate in management of the partnership, or have their name included in the name of the partnership. If they do so, they will lose their status as limited partners and assume full liability along with any ordinary partners. Limited partnerships must be registered.

5.3 Branch Offices

There are no laws or regulations that specifically address the establishment or registration of the presence in Thailand of a foreign-incorporated entity (“branch office”). There is no branch registry. The only filings, registrations, or licenses required for a branch office in Thailand are those prescribed under other relevant laws, such as the Foreign Business Act or the Revenue Code. A foreign-incorporated company wishing to conduct business in its own right in Thailand and licensed under the Foreign Business Act must file its certificate of incorporation, articles of association, and an affidavit from one of its officers providing relevant corporate particulars with the Ministry of Commerce. The company must also grant the manager of its activities in Thailand a broad power of attorney to act on behalf of the foreign-incorporated entity. The power of attorney and other documents noted above must all be certified by a notary public and authenticated by a Thai embassy or consulate. The Revenue Code requires that branch offices obtain taxpayer ID cards and register as value added tax (“VAT”) traders on the same basis as locally incorporated companies.

5.4 Representative Offices*

A representative office is an office of a foreign enterprise that does not engage in commercial activities in Thailand. The primary function of a representative office is to provide information and assistance to its foreign head office. A representative office may only provide support services, such as identifying and verifying the quality of local goods, giving advice about goods sold to agents or customers, providing investment information, etc.

There are three specific types of representative offices that require licensing, i.e. finance, security, and credit foncier offices; foreign bank offices; and international business offices. Companies must satisfy certain foreign capitalization requirements and obtain permission from the Bank of Thailand (“BOT”) and the Office of the SEC to establish finance, securities, and credit foncier offices. Banks must obtain

permission from the BOT to establish foreign bank representative offices. The latter may not conduct commercial banking business and the BOT may impose further restrictions. Permission must be obtained from the Director-General of the Department of Business Development, the Ministry of Commerce, with approval of the Foreign Business Board to establish an international business representative office. Certificates of incorporation, articles of association and memoranda of association, powers of attorney and affidavits stating corporate particulars must be notarized, authenticated by a Thai embassy or consulate and submitted to the Ministry. There are also requirements regarding the remittance of funds into Thailand.

5.5 Regional Offices*

Regional offices are intended to provide liaison, training, and managerial support services between foreign incorporated companies and their branch offices or subsidiaries throughout Asia. Regional offices may contact, coordinate, direct, and supervise operations and provide consulting, management, training, personnel development, and research and product development services. They may not offer goods for sale, enter into business negotiations with customers in Thailand, or accept purchase orders. Income to support the regional office must come from the head office. Permission must be obtained from the Director General to establish such an office.

5.6 Joint Ventures

In general, a joint venture exists when two or more parties work together on a specific project or series of projects or on a long-term and continuous basis. Joint ventures can take many different forms; some in which the parties preserve their own separate legal status and others where they create a new legal entity, separate and distinct from the individual joint venture parties. A joint venture agreement need not be registered with the government, as it is considered to be a private contract.

Most often, incorporated joint ventures are arranged between a Thai company and a foreign company. Often, the Thai partner provides local knowledge and skill and the foreign company, in turn, provides equity, technology, know-how, and patent or trademark licenses.

Non-incorporated joint ventures are often set up for specific, limited-time projects. Each party to a non-incorporated joint venture must separately obtain any registrations or licenses that they may need to conduct the business of the venture. These may include commercial registration, VAT registration, factory licenses etc.

An unincorporated joint venture (“UJV”) can be set up on the basis of the parties sharing the profits and losses. The Revenue Department considers such a UJV as a single entity for tax purposes. Thus, the UJV must file a single tax return supported by a single balance sheet and profit and loss account. If the parties do not want such tax treatment, but wish to remain separate taxpaying enterprises, they must then take, in advance, extreme care to properly structure their proposed contracts and operations in Thailand.

5.7 Distributorships

A distributorship is an agreement in which one party agrees to sell its product to another on a regular (sometimes exclusive) basis in a defined geographical area. There is no specific law that censures this type of relationship. The relationship between the supplier and distributor is governed by the contract provisions of the CCC. There is no requirement or process to register such an agreement.

The distributor, acting solely as a buyer and re-seller, is not considered to be the agent, representative, or go-between of the supplying company. Thus, an offshore company using a distributor for the sale of its goods in Thailand is not subject to any Thai tax on the income from its sales to the distributor.

5.8 Licensees

A business may license the use of its intellectual property rights, including its name, trademark, copyright, patent, trade secrets, technology, or right to manufacture or sell a product based on its intellectual property rights, including a name, trademark, copyright, patent, trade secret or technology.

Licensing agreements pertaining to inventions, designs, trade, or service marks that are patented or registered in Thailand, must be made in writing and registered with the Registrar of the Department of Intellectual Property, the Ministry of Commerce. The Registrar can refuse to register a licensing agreement if it believes that it might confuse the public or conflict with public policy or morality.

The Registrar may refuse to register a patent license agreement that contains a term or condition that could be deemed to violate anti-monopoly or unfair competition stipulations of a relevant Ministerial Regulation. The Board of Trademarks is empowered to revoke registration of a trademark licensing agreement if the licensors are not realistically able to control the quality of licensed products.

Although it is not necessary to obtain regulatory approval to enter into a licensing agreement with a foreign party, there are tax and exchange control ramifications that need to be considered. Thai income tax is levied on license fees paid to a foreign company or partnership by withholding at source at specified rates. Moreover, if the transfer of technology under a licensing agreement is related to the purchase and importation of tangible goods, the fees may be included in the value of the imported goods for the purpose of assessing customs duties.

5.9 Agencies

Agency agreements are governed by the CCC. A principal is bound by the acts of an agent acting within the scope of its actual or apparent authority. The principal is not bound where those acts are outside the scope of the agent's authority, unless those acts are subsequently ratified by the principal.

Tax is an important consideration in an agency arrangement. Income derived in or from Thailand by an offshore principal as a result of an agency relationship with a person in Thailand is usually subject to corporate tax. The appointment of an agent (or an "employee, representative or go-between") in Thailand exposes the overseas business entity to the risk of being deemed as "conducting business in Thailand," with a resulting tax burden. However, where the Thai agent does not act solely for the overseas company, but acts as a general agent for various companies, income tax liability may not be incurred. There may also be relief effective under applicable agreements for the avoidance of double taxation.

6. TAXATION

6.1 General

The principal tax law is the Revenue Code, and five main forms of taxation are imposed under it: corporate income tax; personal income tax; VAT; specific business tax; and stamp duty. There are also a number of specific revenue-collecting statutes that impose taxes such as customs and excise, property and land taxes and petroleum income tax.

Corporate income tax applies to companies (including branches of overseas companies), registered ordinary partnerships, foundations, associations, and unincorporated joint ventures between two or more companies or partnerships, or between companies or partnerships and individuals. Moreover, certain payments, such as dividends, royalties, capital gains, remittance of profits, interest, and fees to non-residents (including overseas companies not conducting business in Thailand) are generally subject to withholding tax.

Personal income tax applies to individuals, including residents and non-residents, and Thailand has treaties for the avoidance of double taxation with a number of countries, which relate to income tax only.

Value Added Tax (VAT) is levied at a flat rate of 7% and is collected on most goods and services. However, from 1 October 2005 onwards, VAT will be increased to 10%.

Specific business tax is levied on several specific businesses, e.g. banking, real estate trading, life insurance etc, whereas stamp duty is imposed on documents that are listed in the Stamp Duty Schedule of the Revenue Code.

Importers are responsible for paying customs duties, which can sometimes be eliminated or reduced under various incentive schemes, notably the Investment Promotion Act, the Industrial Estate Authority of Thailand Act and the Petroleum Act.

6.2 Corporate Income Tax Categories

Corporations are taxed in one of two ways, depending on whether the company is considered to be conducting business in Thailand “onshore” or “offshore.” The definition contained in the Revenue Code of “conducting business in Thailand” is very broad and stipulates that:

“If a juristic company or partnership incorporated under a foreign law has, in Thailand, for carrying on its business, an employee, a representative or a go-between and thereby derives income or gains in Thailand, such juristic company or partnership shall be deemed to be carrying on business in Thailand....”

An independent sales agent will not be regarded as an “employee, representative or go-between” if the agent also engages in business independently of the principal company or partnership and meets other criteria.

A company operating “onshore” pays the normal spectrum of corporate income tax and must withhold certain amounts at source on account of income tax on some transactions. An offshore entity receiving income from Thailand must pay income tax only at a fixed percentage of gross income, and the party in Thailand who pays the income is generally required to withhold the tax at source.

6.3 Corporate Income Tax

Corporate income tax applies to companies and juristic partnerships that are registered under Thai law or that conduct business in Thailand, even if formed under foreign laws. This tax also applies to members of an unincorporated joint venture, registered partnership, foundations, and associations engaged in business activities. If the taxable entity is incorporated or established under Thai law, its worldwide income is taxable in Thailand. If the taxable entity is established under foreign laws, but is conducting business in Thailand, then only income derived or gained in or from Thailand is taxable.

6.3.1 Corporate Income Tax Rates

All companies and registered partnerships regardless of whether they are listed on the SET pay a flat rate of 30% of net profits.

There are special provisions for standard deductions for foreign-incorporated companies or partnerships that conduct business in Thailand but cannot prove their expenses for the tax year. Standard deductions are allowed depending on the type of business activity that gives rise to income. The resultant net profits are taxed at the normal rate of 30%.

Any Thai or foreign-incorporated company or registered partnership conducting business in Thailand that fails to file a return in accordance with the law may, with the approval of the Director-General, be assessed income tax at a rate of five percent of the aggregate of either its gross receipts or total sales, without any deductions.

Certain types of business are subject to corporate income tax on their gross receipts or gross sales instead of net profits. For example, companies engaged in the business of international transportation of passengers or goods, pay a three percent corporate income tax on gross receipts collected on gross freight or passengers carried out of Thailand. Foundations and associations pay corporate income tax at a rate of two percent or 10% of gross income, depending on the type of business activity in which they are involved.

Small- and medium-sized enterprises (“SMEs”) with registered capital not exceeding Baht 5,000,000 are subject to progressive corporate income tax at the rate of 20% for their first net profit of Baht 1,000,000, 25% for net profits over Baht 1,000,000 but up to Baht 3,000,000, and 30% for net profits over Baht 3,000,000. However, in 2005, the 20% tax rate on any SME’s first Baht 1,000,000 net profits will be reduced to 10%.

In order to stimulate the growth of investment in the Stock Exchange of Thailand (“SET”) and the Market for Alternative Investment (“MAI”), the normal corporate income tax has been reduced to 25% for existing SET-listed companies and newly SET-listed companies, and to 20% for newly MAI-listed companies. However, eligible listed companies must satisfy certain conditions.

6.3.2 Determination of Net Profit for Corporate Income Tax

Corporate tax is usually imposed on net profits of the business for the tax year. The tax year can be any 12-month period selected by the company.

Net profits are ascertained according to the conditions imposed in the Revenue Code. An all-inclusive concept of income is used and all realized economic gains are treated as income (including capital gains) whether they occur regularly or only occasionally. Corporate income tax is generally computed on an accrual basis, i.e. income accruing in any accounting period is included as income in that period, whether or not it has been received, and expenses may be deducted as they accrue whether or not they have actually been paid out.

As a general matter, expenses incurred for the purpose of acquiring profits or from conducting business in Thailand (other than those specifically excluded) are deductible for determining net profit. Therefore, normal business expenses, qualifying bad debts and depreciation at maximum rates ranging from five to 20% per annum (depending on the item) are allowed as deductions. Any accounting method may be used to

calculate depreciation, as long as the resulting depreciation is not faster than that provided by using the straight-line method at the rate prescribed in the Revenue Code. The following items, among others, are not allowed as deductions:

- reserves (other than those required by law);
- private expenses, including gifts for customers;
- gifts to charitable institutions exceeding two percent of net profit;
- non-maintenance capital expenditure; and
- corporate income tax, penalties, surcharges and criminal fines.

Entertainment expenses, up to a maximum of between 0.3% of gross revenue or paid-up capital of the company, whichever is higher, are deductible if they are generally necessary for that type of business, but such entertainment expenses can be deductible only up to 10 million Baht.

Certain bad debts can generally be written off if reasonable efforts have been made to recover them or if such action is clearly impractical, such as in the case of the bankruptcy or death of the debtor.

Net losses may be carried forward for five consecutive years. However, there is no provision for the carry-back of losses.

6.3.3 Remittance Abroad of the Profits of a Branch Office

This tax generally applies only to profits transferred overseas from a Thai branch. It is levied at the rate of 10% of the amount to be remitted and must be paid by the Thai remitting office of the company within seven days of the date of remittance.

6.3.4 Withholding of Income Tax on Payments to Offshore Companies

The Revenue Code requires that most payments to an “offshore” company or juristic partnership, paid either from or in Thailand, be subject to income tax. It is the responsibility of the payer to withhold the tax at source. The rates range from 10 to 15 percent, depending on the source of the income. If payments are made to an offshore company or juristic partnership incorporated in a country which has a double taxation agreement with Thailand, then the rate of withholding may be reduced or waived under the terms and conditions of the agreement.

6.3.5 Dividends

Generally, if a Thai limited company pays dividends to another Thai limited company, 50% of the dividends paid are exempt income in the recipient company. If the company receiving the dividend payment is listed on the Securities Exchange of Thailand (“SET”), then the whole dividend is exempt income. The total dividend is also exempt income if the company receiving the payment holds at least 25% of the voting shares and the company paying the dividend does not hold any shares in the receiving company.

In order to qualify for either the 50% or the 100% exempt income status, the receiving company must have held the shares for at least three months prior to the dividend declaration and must have continued to hold them for three months after the dividends were declared.

Dividends paid by a Thai limited company, whether to an onshore or offshore corporate shareholder, are generally subject to 10% withholding at source, unless it is exempt income. For these purposes, the dividend can be treated as exempt income even if the receiving company does not hold the shares for three months before and after the dividends are declared.

6.3.6 Other Taxes Withheld on Account of Income

In addition to the foregoing, the Revenue Code requires the payer of certain income to another company conducting business in Thailand to withhold additional sums on account of corporate income tax at source. These rates vary from 0.75% to 5% depending on the type of income. The amount withheld can be credited against the corporate income tax of the recipient company.

6.3.7 Filing Returns and Payment of Corporate Income Tax

Corporate income tax is payable twice a year. The first installment is 50% of total tax, based on estimated net profits for the year. This is due within two months after the close of the first half of the financial year of the company.

An annual income tax return must be filed within 150 days of the close of the company’s financial year; in case of failure, a penalty of twice the amount of tax due is imposed. If tax is to be paid on the basis of net profits, then the return must be accompanied by an audited balance sheet and a profit and loss account. If tax is to be paid on a gross receipts basis, then a statement of gross receipts must be filed along with the return. Currently, filing can be done either in paper-form or electronic form (“e-filing”).

6.4 Personal Income Tax

Every person, resident or non-resident, who derives assessable income from employment or business conducted in Thailand, is subject to personal income tax, whether such income is paid in or outside of Thailand. Exemptions are granted to certain persons (UN officers, diplomats and some visiting experts) under the terms of international and bilateral agreements.

An individual who is present in Thailand for at least 180 days in any tax year (calendar year) is treated as a resident of Thailand. Residents are also subject to income tax on any income from foreign sources that they bring into Thailand.

6.4.1 Personal Income Tax

Taxable income includes any payment for services and any other money, property, or benefits derived from hire of service or employment. It also includes dividends, interest, and any royalties or technical assistance fees. Capital gains are considered to be normal income except in the case of the sale of movable property acquired with no intention to trade or make a profit.

Personal income tax paid and absorbed by the employer (in effect giving the employee a net salary) is also considered taxable income to the employee, leading to a “tax pyramid” effect. Also included in taxable income are living allowances, the monetary value of rent-free accommodation, school fees paid by the employer, travel allowances for annual leave, and the monetary value of any other benefit provided by the employer.

6.4.2 Income Exempt from Personal Income Tax

Certain types of income are excluded from assessable income, including business travel expenses, work-related moving expenses, interest on savings deposited with banks in Thailand, insurance benefits, inheritances and scholarships.

6.4.3 Deductions of Allowances and Expenses for Personal Income Tax

There are various kinds of allowances (subject to certain limitations) authorized by the Revenue Code, including allowances for personal, life insurance premiums, provident or pension funds, interest payments and charitable donations.

Personal allowances are Baht 30,000 each for the taxpayer and his or her spouse plus Baht 15,000 for each child. There is a Baht 2,000 educational allowance for each child. There is no limit to the number of children born before 1 January 1980 who are eligible for deductions, and only three children born after that time are eligible.

Deductions of allowances for the spouse and children of a non-resident are allowed only if they actually reside in Thailand.

A standard deduction of expense of 40%, but not exceeding Baht 60,000, is allowed against income from employment. Standard deduction of expenses from 10 to 85% is allowed against other categories of income, but for certain types of income, the taxpayer can elect to itemize expenses instead of taking the standard deduction.

6.4.4 Income from Dividends and Personal Income Tax

Dividend income is generally subject to personal income tax. Thai tax residents may choose to have tax withheld at the rate of 10% of the dividend income, without including such dividend payments in their taxable income at the end of the tax year.

Alternatively, Thai tax residents can claim an approximate 42% dividend tax credit if they incorporate such dividend into their taxable income at the end of the tax year. In this case, the corporate income tax rate of the dividend paying company is 30%. The tax credit is determined by dividing the corporate income tax rate of the dividend payer by the output of 100 minus such corporate income tax rate then multiplying the resulting figure by the dividend amount. This tax credit is only available to an individual who is domiciled in Thailand and who has stayed in the country for a minimum of 180 days in a tax year.

6.4.5 Personal Income Tax Rates

Personal income tax rates on net taxable income are as follows:

Amount	Rate
Baht 0 up to Baht 80,000	exempt
Baht 80,001 up to Baht 100,000	5%
Baht 100,001 up to Baht 500,000	10%
Baht 500,001 up to Baht one million	20%
Baht 1,000,001 up to Baht four million	30%
More than Baht four million	37%

6.4.6 Tax Exemption on Bonds

In order to promote the country's Asian bonds, the withholding tax exemption on interest, capital gains, and discounts derived from the bonds are granted to non-tax resident foreign investors (i.e. staying in Thailand less than 180 days in a calendar year) in 2005.

6.4.7 Tax Relief for Mutual Fund Investment

Individual holders investing in a Retirement Mutual Fund (RMF) are allowed to deduct up to Baht 300,000 for the amount of purchase in RMF units, as well as granted tax exemption on capital gains derived from the sale of units, provided individual holders have held such units for at least five years. Similarly, individual investors investing in long-term equity funds (LTF's) are allowed to deduct up to baht 300,000 for the amount of purchase from their taxable income not exceeding 15%, as well as granted tax exemption on capital gains derived from the sale of units held for at least five years in qualified mutual funds. Ultimately, any individual holders investing in RMF's and LMF's can deduct the amount of purchase up to a maximum of Baht 600,000.

6.4.8 Taxes Paid by Another Person

The definition of "assessable income" includes all taxes paid for or reimbursed to the taxpayer by any other person. All such taxes paid by any person other than the taxpayer, at any stage, are in turn subject to tax.

6.4.9 Filing Personal Income Tax

Personal income tax returns must be filed and the tax paid by the end of March in the year following that in which the income was earned. Currently, filing can be done either in paper-form or electronic form ("e-filing").

6.4.10 Tax Clearance Certificates

Foreigners departing Thailand do not have to obtain a tax clearance certificate unless:

- their remittance of taxation to the Revenue Department is either in arrears or required to be paid prior to, or at the time of, departing the country; or
- they are responsible for the submission of the returns and payment of income tax for a company or registered partnership established under the laws of a foreign country but carrying on business in Thailand; or
- they receive income from being public entertainers in Thailand.

6.5 Withholding of Income Tax at Source

6.5.1 Overseas Payments

Income tax must be withheld at source by a corporate or individual payer from assessable income paid to non-residents or persons not conducting business in Thailand. The rates are the same as those set out above.

6.5.2 Local Employees

Income taxes must be withheld at source from employee wages as well. In general, payers of assessable income to individuals who must pay personal income tax are required to deduct tax at source at the time of payment. Assessable income includes payment for services, value for goodwill, patents, trademarks and copyrights, dividends, interest, bonuses, rental fees etc.

6.5.3 Local Interest Payments

Income tax must also be withheld on the payment of interest on deposits and bills by commercial banks, finance, securities and credit foncier businesses to:

- companies or juristic partnerships operating businesses in Thailand, at the rate of 1%; and
- prescribed foundations or associations, at the rate of 10%.

6.5.4 Government Payments

Central government and local government organizations that pay assessable income to companies or partnerships conducting business in Thailand must withhold income tax at the rate of one percent of the total income payable. The withheld tax is credited against the total tax due for the period in which the deduction is made.

6.5.5 Tax Credits

Certain taxes withheld may be used by the recipient of the net income as a credit against year-end taxes. If the credit cannot be utilized, then it is refundable.

6.6 Treaties for the Avoidance of Double Taxation

Thailand has agreements and conventions usually referred to as Double Tax Agreements or DTA's for the avoidance of double taxation and fiscal evasion with 47 countries: Armenia, Australia, Austria, Bahrain, Bangladesh, Belgium, Bulgaria,

Canada, China (People's Republic), Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Korea (South), Laos, Luxembourg, Malaysia, Mauritius, Nepal, the Netherlands, New Zealand, Norway, Oman, Pakistan, the Philippines, Poland, Romania, Singapore, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Arab Emirates, United Kingdom, U.S.A., Uzbekistan, and Vietnam. The provisions of DTA(s) may reduce, exempt, or allow credit or deduction of income tax paid in the respective jurisdictions.

An organization is regarded as a resident of a country if under the laws of that country it is subject to taxation because of domicile, residence, place of management or other similar criteria. The DTA(s) provide additional procedures for dealing with individuals or entities with dual residency.

DTA(s) cover income derived from a range of sources, including immovable property, business profits, dividends, royalties, interest and personal services. The taxation treatment varies with the source of income. Thus, income arising from immovable property is likely to be taxed in the country in which the property is located. However, business profits are taxable only in the country where the entity is a resident, unless it conducts business in the other country through a permanent establishment.

A "permanent establishment" generally means a fixed place in which the business is either wholly or partially undertaken and usually includes a branch, office, factory, warehouse or mine.

Treatment given to income such as dividends, royalties, and interest differs under the various DTA(s). Dividends, for example, may be taxable only in the country from which payment is made, or may be taxable in both but with a credit or deduction allowed in the receiving country.

Each DTA also contains provisions for obtaining a credit in one country where tax has been levied on the income in the other country. The types of income which qualify vary among DTA(s).

6.7 Value Added Tax (VAT)

VAT is essentially a broad-based consumption tax on goods and services operating at each stage of production and distribution. A "trader" is defined as a natural or juristic person or group of persons selling goods or rendering services in Thailand, and

includes the agents of foreign entities. In effect, VAT covers all retailers, manufacturers, wholesalers, producers and importers of goods, as well as service providers, other than those excluded by the Revenue Code.

6.7.1 VAT Rates

VAT is currently levied at a standard rate of 7% (10% from 1 October 2005) and 0% on exported goods and services under the terms and conditions of the Revenue Code.

6.7.2 VAT Exemptions

Certain businesses are exempt from VAT, including the following:

- small enterprises with annual sales of less than Baht 1,200,000;
- businesses producing food or agricultural products other than for the purpose of export;
- domestic transportation;
- private and government health care services;
- educational services;
- religious and charitable organizations; and
- leasing of immovable property.

6.7.3 Zero Percent Rate for VAT

A zero percent VAT rate applies to certain businesses, including the following:

- export of goods;
- provision of services performed in Thailand but used in a foreign country; and
- international transportation services by air or sea

6.7.4 VAT Tax Invoice

Each VAT taxpayer must issue a tax invoice to each customer and must retain copies of the tax invoices. Generally, the VAT taxpayer is responsible for collecting and remitting the VAT to the Revenue Department. A trader residing outside Thailand who sells goods or renders services in Thailand on a temporary basis or provides an offshore service that will be used in Thailand, is subject to VAT. The Thai customer is obligated to remit the VAT on behalf of the foreign trader. The receipt issued by the Revenue Department for the remitted VAT will be deemed as a tax invoice.

The original tax invoice is evidence of the input VAT, which may be claimed back from the Revenue Department or taken as credit by a VAT trader.

6.7.5 VAT Registration and Returns

If it is envisioned that a new business will gross more than Baht 1,200,000 annually, the business operator must apply to be registered as a VAT trader within 30 days of commencing operation. In 2005, the minimum revenue required to be registered as a VAT operator will be increased from Baht 1,200,000 to Baht 1,800,000 per year. In addition, VAT-registered traders must file a monthly tax return and submit monthly remittances to the Revenue Department on or before the fifteenth day of the following month. The amount of VAT due must be remitted at the time of submitting the monthly VAT return, and the registered trader is entitled to a tax credit for VAT paid to another VAT trader.

6.8 Specific Business Tax

There are five categories of businesses that are not subject to VAT, but are subject to Specific Business Tax (SBT): banking and similar businesses; life insurance brokers; pawn brokers, trading in immovable property, and selling securities on the SET. SBT is imposed on gross receipts at a rate similar to the rate under the former business tax system. The rates vary from 2.5% to 3% according to the nature of the services provided.

6.9 Municipal Tax

Businesses that are subject to SBT must also pay municipal tax. For businesses that pay VAT, rather than SBT, the 10% municipal tax is included in the standard 7% VAT rate.

6.10 Stamp Duty

Certain documents and transactions listed in the Stamp Duties Schedule of the Revenue Code are subject to stamp duties. Rates and payment procedures depend upon the type of instrument.

Penalties for failure to stamp documents are very high. Penalties can be imposed at the rate of up to six times the original duty. Furthermore, documents which are not properly stamped are not admissible as evidence in court proceedings.

6.11 Appeal Procedures under the Revenue Code

There is a standard appeal procedure for grievances arising from income tax assessments. To qualify for consideration, an appeal must be filed with the Board of Appeals within 30 days of receiving the notice of assessment. A further appeal can be made to the Tax Court against the Board's decision within 30 days from the date of receipt of appeal decision.

6.12 Petroleum Income Tax

The Revenue Code does not apply to income derived from petroleum operations. Instead, tax is imposed by the Petroleum Income Tax Act B.E. 2514 (1971) on income derived by any company which owns an interest in a petroleum concession granted by the government or purchases oil for export from a concession holder.

Income includes revenue from the production, transportation or sale of oil and gas, as well as the proceeds of a transfer of interests in a concession, royalties, both in cash and kind. Production royalties paid to the government for all petroleum products, including natural gas, are allowable as deductions. A number of items are specifically excluded as deductions, including the cost of property improvements, surface reservation fees and royalty surcharges imposed under the Petroleum Act due to late or insufficient payment of royalties or a failure to cooperate with officials at the Petroleum Authority of Thailand. Losses may be carried forward for 10 financial periods, and the tax rate for most petroleum operations is 50% of net profits.

6.13 Signboard Tax

An annual signboard tax is imposed at various rates per square meter (depending on the language) on signs or billboards that display a name, trademark, or product for the purpose of advertising or providing information about businesses.

6.14 Excise Tax

Excise tax is generally imposed under the Excise Tax Act and other specific Acts on certain commodities, whether manufactured locally or imported, e.g. petroleum and petroleum products, beverages (alcoholic and non-alcoholic), crystal, automobiles, motorcycles, yachts, perfumes, tobacco, etc. Tax liability is incurred when the goods leave the factory (or bonded warehouse, if they are stored upon arrival in Thailand) or are imported, and is payable by the manufacturer or importer concerned.

6.15 Property and Land Taxes

Owners of land or buildings may be subject to annual taxes under either the Local Development Tax Act or the House and Land Tax Act. Both of these taxes are levied by local governments.

The Local Development Tax is imposed on land that is not exempt by the Act, such as land used by government and public organizations. Exemption is also granted if the land connected with the structure is already subject to the House and Land Tax Act. The tax is based on the assessed value of the land, while assessments are based on the area of the land in question and the median value of land within the tax district in which it is located. Generally, this tax is imposed at a very low rate.

The House and Land Tax Act imposes a tax of 12.5% on the annual value of the land with buildings. "Annual value" generally means the annual rent or, if the property is not leased out, the amount that the owner should have received that year if the property had been leased out. Factories and other buildings with fixed industrial machinery attached are assessed at only one-third of the combined annual value of the land, buildings and fixed machinery. The Act also provides tax exemptions for certain kinds of property.

The new land tax, implemented in 2005, will include owners of land and any buildings, as well as those who use government land and property, to be subject to tax of 0.1% per year of the assessed value of the assets.

7. SECURITIES REGULATION

7.1 The Securities and Exchange Commission of Thailand

The Securities and Exchange Act B.E. 2535 (1992) (SEC Act) was promulgated on 16 March 1992 and came into force on 16 May 1992. The SEC Act established the Securities and Exchange Commission (SEC) to oversee all aspects of the securities business in Thailand. The SEC is also responsible for promoting, developing, and supervising securities, securities businesses, the Stock Exchange of Thailand (SET), over-the-counter centers, the issue and offer of securities for sale to the public, acquisition of securities for business takeovers, and the prevention of unfair securities trading practices. The Office of the SEC has been established to implement SEC resolutions. Securities of public companies may be traded on the SET.

A public limited company must obtain prior approval from the Office of the SEC in order to offer shares to the public. A company must also submit quarterly and annual financial reports and annual reports to the SEC. A public company must also inform the SEC immediately of any major event, such as a change of management, takeover, or substantial damage that may have repercussions on the company. Directors, managers, company auditors, and other management personnel stipulated by the SEC must make full disclosures of their shareholding status.

The Securities and Exchange Act imposes certain reporting obligations on persons acquiring or disposing of, in aggregate, any multiple of 5% or more of any type of issued securities, whether or not the transfer has been registered. The report must be made to the SEC during one business day following the transaction. If the securities are listed on the SET, the report must also be submitted to the SET. In addition, if a person, alone or in concert with other parties, acquires enough shares of a listed company to hold 25% or more, 50% or more, or 75% or more of the issued share capital of that company, that person must make a tender offer for all the issued securities of that company. For further information about the SEC, visit their website at: <http://www.sec.or.th>

7.2 The Stock Exchange of Thailand

The Stock Exchange of Thailand (SET) was originally established under the Securities Exchange Act of Thailand and began trading in April 1975. The SET is the key institution permitted to operate a securities exchange in Thailand. (Two other securities exchanges are permitted: the Thai Bond Dealing Center and the Thailand Futures Exchange.) In 1992 the Securities and Exchange Act B.E. 2535 replaced the 1975 SEC Act and the name of the Securities Exchange was changed to the Stock Exchange of Thailand.

To offer shares to the public, a public limited company must obtain prior approval from the Office of the SEC; then a prospectus becomes effective. A public limited company, having offered its shares to the public, must submit quarterly and annual audited financial reports and annual reports to the SEC. Such public company must also inform the SEC immediately of any major event such as a change of management, takeover, or substantial damage that may have repercussions on the company. Directors, managing directors, company auditors, and other management personnel stipulated by the SEC must make full disclosure of their shareholding status.

Trading on the SET takes place between 10:00 a.m. - 12:30 p.m., and 2:30 - 4:30 p.m., Monday to Friday (other than public holidays). There are five separate SET boards on which trading takes place on computerized systems. The Main Board is for the regular trading of ordinary shares, preference share warrants and unit trusts.

The SET requires that bid and offer quotations for shares should be at minimum spreads, depending on the market price per share and in accordance with the table of values which means the minimum spread will usually be within 1% of the market price. The SET permits trading on margin requirements, which are applicable from time to time. A securities futures and option market was established on 17 May 2004 and the operation and trading system is still in the process of being prepared.

Despite the limitations placed on foreign ownership of many Thai enterprises, it is possible for foreigners to invest in Thai securities. As mentioned above, there is a special Foreign Board where shares owned by foreigners may be traded. Foreigners may also purchase shares on the Main Board provided that the purchase does not increase the level of foreign ownership in the company beyond permissible levels.

7.3 Investing in the Stock Exchange of Thailand

The SET has outlined five steps to invest in the SET. This and more information can be found on the SET website: <http://www.set.or.th>

7.3.1 Appointing a Custodian, Correspondent Bank, and Broker

Local commercial banks can provide the first two services and it is recommended that one deal with one bank only.

7.3.2 Bringing in the Money

Investors must use a correspondent bank to remit foreign exchange into Thailand for portfolio investments. The correspondent bank will act as an intermediary with the Bank of Thailand and the clients themselves are not required to file a remittance report. Only Thai Baht can be used in trading on the SET.

7.3.3 Buying and Selling

Buy and Sell orders must be placed through a broker. The SET is fully computerized for execution and confirmation of orders.

7.3.4 Clearing and Settlement

All settlement is done on a T+3 working days basis. T represents the day of the trade. Recently the process has been streamlined.

7.3.5 Repatriation of Funds

Repatriation of investment funds, dividends and profits, as well as loan repayments and interest payments (net of all taxes) can be made through a correspondent bank which will facilitate the outward remittance. The bank can assist by filing the remittance report to the Bank of Thailand (BOT), thus making it unnecessary for the client to deal with the BOT directly. The bank is also responsible for calculating capital gains tax payable on the sale of securities.

8. INTELLECTUAL PROPERTY

In order to satisfy World Trade Organization obligations and to better comply with internationally recognized standards, Thailand amended existing laws and enacted new legislation relating to intellectual property. These changes and further legal reforms, which are currently in the planning stage, will greatly improve the protection of intellectual property in Thailand.

8.1 Trademarks

It is possible to obtain protection for a trademark by registering it with the Department of Intellectual Property, Ministry of Commerce under the Trademark Act B.E. 2534 (1991) as amended by the Trademark Act No., B.E. 2543 (2000). Although unregistered trademarks are also protected under general Thai law, registration under the Trademark Act significantly expedites the enforcement process and gives the trademark owner the surest protection against infringement and counterfeiting.

To qualify for registration, a mark must satisfy the definition of “trademark” in the Trademark Act. Thus, a trademark application must be distinctive and dissimilar from any other previously registered trademark, so that the trademark application will not confuse or mislead the public. The Trademark Act also provides for trademark registration and protection for service marks, certification marks, and collective marks.

Collective marks are defined as trademarks or service marks used or proposed to be used by companies in the same group or by members of an association, co-operative, union, or any other public or private organization.

Once accepted, the trademark application is published in the Trademark Gazette (published only in the Thai language). If no objection is filed within 90 days, the trademark application is then registered.

An application for a trademark filed in Thailand within six months of a corresponding application filed in a foreign country may claim priority based on such foreign application, provided that the corresponding country provides reciprocal treatment to Thai nationals.

The protection lasts for 10 years from the date of application and there is provision for renewal.

There are also specific provisions for licensing registered trademark rights. Licensing can be achieved by contract in accordance with the Civil and Commercial Code of Thailand. However, the license agreement must be in writing and registered with the Trademark Registrar.

Licensing agreements must have terms and conditions that enable the licensor to ensure sufficient quality control of products manufactured under the agreements in order to be registered. The Registrar may refuse to register a licensing agreement if the agreement might confuse the public or run contrary to public policy or Thai standards of morality. The Board of Trademarks is also empowered to revoke a licensing agreement's registration if the licensor is not realistically able to control the quality of licensed products.

Registration is, in itself, no guarantee against infringement. Therefore, the owner of a trademark or the owner's local distributor must monitor for possible trademark infringements. If detected, that party must also be responsible for initiating legal action against the infringing party. This might include filing an objection to an application to register a similar mark, lodging a complaint with the police, directly submitting a criminal complaint to the Court, or initiating a civil action. Penalties for trademark violations under Sections 108 and 109 of the Trademark Act include fines of up to Baht 400,000 and/or four years of imprisonment, provided the trademark is registered in Thailand.

The Trademark Act imposes heavier penalties than those available under the Penal Code.

According to the Trademark Act, if a juristic person commits a criminal offense, the management of that juristic person will also be held liable and will thus be subject to any applicable penalties unless the management can prove that the offence took place without their knowledge or consent.

If a trademark owner discovers that infringing (or "counterfeit") goods are about to be imported into or exported out of Thailand, the trademark owner can petition the Customs Department to make a "stop order" which will result in the freezing of the goods for further inspection and potential prosecution. Specific information to identify the importing vessel or exporting shipping agent is required because the Customs Department does not provide a standing monitoring service for trademark owners.

The Penal Code also offers protection for unregistered trademarks or to foreign registered trademarks, whether they have been registered in Thailand or in a foreign country. For “forgery” the penalties are imprisonment for up to three years or a fine not exceeding Baht 6,000, or both.

8.2 Patents

The Patent Act B.E. 2522 (1979) as amended by Patent Act No. 2, B.E. 2535 (1992) and Patent Act No. 3, B.E. 2542 (1999) protects inventions, product designs, patents or petty patents granted in Thailand. In order to be patented, an invention must have novelty, involve an inventive step and be capable of industrial application. Similarly, a product design must have novelty and be able to be put to an industrial use, which includes handicrafts. Some inventions cannot be patented including those relating to innovations in biotechnology, scientific and mathematical rules and theories, computer programs, and inventions that might constitute a threat to public order, morality, health, or welfare.

A simpler alternative to the regular patent is the petty patent. In order for an invention to be considered for protection by a petty patent, it must have novelty and be capable of industrial application. However it need not involve an inventive step.

The Patent Act only guarantees protection for patents granted by the Thai Department of Intellectual Property, Ministry of Commerce. Therefore, a Thai law does not protect a foreign patent unless it has been registered in Thailand. Moreover, the Department of Intellectual Property cannot patent an invention in Thailand if a patent application has been filed and has been pending for a year or more or been granted for that invention in another country or if the product design has already been disclosed and publicly circulated in documents or printed material.

Patents are valid for 20 years for patented inventions, 10 years for patented product designs, or six years for petty patented inventions. A petty patent is valid for six years; however, it may be renewed twice, the first renewal for two years and the second for two more years (for a total of 10 years).

A patent gives the holder the exclusive rights to produce, import, and sell products using the patented invention, patented design, or petty patented inventions and to use the words “Thai Patent” or “Thai Patent Pending.” The period of validity commences from the date of application. It may take some time for the application to be considered and the patent approved.

Under certain circumstances a patent holder can give a license or a compulsory license may be issued to another party for a patent. This may occur if a patented or patent-pending invention or design is not being produced, sold, or publicly offered or if it is being sold at an unreasonably high price three years after the patent has been issued or four years after the patent application has been pending. The license agreement for and the assignment of the patent must be in writing and must be registered in compliance with the requirements and procedures stipulated in the relevant Ministerial Regulation.

Penalties for infringement of patents registered in Thailand may involve imprisonment for up to two years, a fine not exceeding Baht 400,000, or both.

If the infringing party is a juristic person, the operator or representative may also be subject to punishment unless it can be proved that the juristic person carried out the infringing activities without the operator's or representative's knowledge or consent.

8.3 Copyright

Copyrights in Thailand are governed by the Copyright Act, B.E. 2537 (1994). The Copyright Act provides copyright protection to a range of creative works, expressed in the form of literature, drama, visual and graphic arts, music, audio-visual works, cinema, sound recordings, sound, video, and other broadcasts, or any other work in the literary, scientific, or artistic domain of the author, irrespective of the mode or manner in which the works are expressed, including rights of performers. The Copyright Act provides expanded definitions for each category.

Copyright protection does not extend to steps, processes, systems, organizations, or instructions for use. Nor does copyright protection cover thoughts, principles, findings, or theories in science or mathematics.

The author of a work holds the copyright to that work. The Copyright Act defines "author" as the person who makes or causes to come into being any creative work in which copyright subsists. Under the Copyright Act, the acquisition of copyright is automatic and need not be registered.

Generally the Copyright Act protects against infringement by reproducing, adapting, publishing, or renting a copyrighted work. However, the Copyright Act states that certain uses of a creative work, such as for research, education, teaching, or personal purposes do not constitute a copyright infringement.

The Copyright Act stipulates that Thailand will also accord copyright protection under “National Treatment” basis to citizens of and works created or first published within the countries that are parties to international copyright conventions to which Thailand is also a party. Thailand is a signatory member of the Berne Convention for the Protection of Literary and Artistic Works, the World Trade Organization (WTO) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Under the principle of In general, a copyright is mostly valid for the life of the creator, plus 50 years. When the creator is a juristic person, protection extends for 50 years from the date of creation or first publication. The period of protection is reduced to 25 years for applied artistic work.

A copyright can be transferred or assigned either partially or in whole. It can also be licensed to another person for use or for exercising rights in relation to it.

The maximum penalties for copyright infringement are a fine of up to Baht 800,000, a prison sentence of up to four years, or both. Copyright infringement includes reproducing, adapting, or communicating a copyrighted work to the public without the copyright owner’s authorization. It also includes selling, offering for sale, leasing, importing, publishing or distributing unauthorized duplicates of a copyrighted work.

If the offence is committed by a juristic person, all directors and managers must be able to prove that the act of the juristic person was done without their knowledge or consent. If they cannot satisfy the court accordingly, they will be considered joint offenders.

8.4 Plant Varieties

The Plant Varieties Protection Act B.E. 2452 (1999) defines a plant variety as “a group of plants with the same or similar genetics and botanical description with constant and fixed specific qualities. The subject must be different from any other group of plants of the same kind. This includes plant stems that can be propagated to obtain a group of plants with those qualities.” The Plant Varieties Act goes on to define certain set features that constitute a plant variety, such as morphology, physiology, or other properties that are the result of the genetic nature specific one plant variety. However, it should be noted that novelty requirements must be met.

Priority date can be claimed based on an overseas application to register a new plant variety, provided that an application is filed in Thailand within one year of the overseas application. This provision only applies to applications filed in countries that would extend the same rights to Thai nationals. The period of protection can last from 12 to

27 years, depending on the plant variety. The validity of the certificate of registration of a new plant variety begins on the date on which the certificate is issued. Annual fees must be paid to maintain the registration.

Rights holders can permit anyone to use their rights and can assign the rights to others. Assignment or permission to others must be made in writing and lodged with the competent official. The holder of the rights in a new plant variety has the sole right to produce, sell or dispose of, import and export, and hold the propagating material of the new plant variety for the purpose of doing any of those acts.

A person that holds a certificate of registration for a plant variety is expected at some point to sell the propagating material for the plant variety or to sell, at a reasonable price, enough of the plant variety to satisfy public demand in Thailand. If the certificate holder has not done so within three years of obtaining the certificate, other parties may apply for and obtain the rights to that plant variety.

The penalties for infringement of the rights to a registered plant variety are a term of imprisonment not exceeding two years, a fine not exceeding Baht 400,000, or both. The same penalties apply to anyone that violates community rights to a local indigenous variety or that fails to obtain permission in respect of general indigenous and forest plant varieties.

The penalties for forging a plant variety registration mark are imprisonment for six months to five years, a fine not exceeding Baht 400,000, or both.

8.5 Layout Designs of Integrated Circuits

The Layout Design of Integrated Circuits Act B.E. 2543(2000) defines integrated circuits as “ready or pre-ready products that have electronic functionality, either alone or with other products, and that are composed of electronic-pulsing parts and connecting parts that wholly or partly lay upon or within the same product with semiconductor material.” Layout-designs are defined as a “...pattern, chart or picture that is created in any form to show the overview of integrated circuits in three dimensions.”

In order to be eligible for registration, a layout-design of an integrated circuit must be generally new i.e. unknown to the integrated circuit industry.

Protection under the Integrated Circuits Act is only available for a layout-design that has been registered in Thailand. Therefore, a foreign layout-design has no protection under Thai law unless it has also been registered in Thailand. Moreover, if the layout-design has neither been registered nor exploited within 15 years from its creation, it is not eligible for registration in Thailand. If a layout-design has already been commercially exploited, in order to qualify for registration in Thailand, an applicant must file a registration application in Thailand within two years from the date of its first exploitation.

A layout-design registration, once conferred, is valid for 10 years from the filing date or the date of its first exploitation, whichever ever is earlier.

The license agreement and assignment of a layout-design registration must be in writing and registered in compliance with the requirements and procedures stipulated.

The penalty for infringement of the rights to a registered layout-design is a fine not exceeding Baht 500,000.

8.6 Trade Secrets

Generally, there are two types of trade secrets protected under the Trade Secrets Act, B.E. 2545 (2002): information and data or test results.

Information includes formulae, technical procedures and designs, compiled or assembled works or business operation methods of which the proprietor normally preserves from disclosure. Information must have commercial value. Information must not yet be widely known or known by people in the trade. The proprietor of the information must also have lawfully taken steps appropriate to the situation to keep the information secret.

Data or test results require considerable effort to prepare and are submitted to state agencies as a condition for granting approval to import, export or sell drugs or new agricultural chemical substances.

Generally, infringement under the Act is subject to civil action. Only in certain circumstances will the infringement also be subject to criminal action. All infringement, both civil and criminal under the Act, can be submitted to the Trade Secrets Committee set up under the Act for conciliation or settlement out of court.

The plaintiff or injured party eligible to bring lawsuits is the person who has legitimate control of the trade secret at the time of the infringement, not the proprietor; unless both of them are one and the same person.

The infringement of trade secrets entitles the proprietor to bring lawsuit against the infringers for compensation. Compensation includes the actual damages incurred by the plaintiff, and the legal fees and expenses to enforce the case. Infringement can also be subject to criminal penalties. The penalties are up to 1 year imprisonment or fine of up to 200,000 Baht, or both.

8.7 The Intellectual Property and International Trade Court

Prompted in part by its desire to tighten intellectual property rights protection, the government passed the Intellectual Property and International Trade Court Establishment Act (“IP/IT Act”) in October 1996, which laid out the framework for establishing the Intellectual Property and International Trade Court (“IP/IT Court”). The IP/IT Court was established on 1 December 1997.

The government believed that a specialized judicial tribunal was required because intellectual property and international trade cases generally involve more complex technical issues than do other criminal and civil cases. Proponents of the IP/IT Act also felt that such cases should be considered by judges with expertise in intellectual property and international trade. The IP/IT Court is dedicated to resolving international trade disputes efficiently, to promoting technology transfers, and to ensure justice in cases of intellectual property right violations. The IP/IT Court observes different procedures from those set forth in the country’s civil and criminal procedural codes.

8.8 Controlling Legislation

The IP/IT Court is empowered under the IP/IT Act, which covers copyrights, trademarks, patents, international sale, financial instruments, international carriage, insurance etc. The IP/IT Court’s criminal rulings depend on criminal offences as defined by Articles 271 and 275 of the Penal Code.

For the purpose of expediency and fairness of proceedings, the Chief Justice of the IP/IT Court is empowered, subject to the approval of the President of the Supreme Court, to issue rules of the Court, which are not in accordance with the rules of proceedings of other courts, if such rules do not impair the right of defense of an accused in a criminal case.

9. UNFAIR CONTRACT TERMS ACT AND COMPETITION ACT

9.1 The Unfair Contract Terms Act

The Unfair Contract Terms Act B.E. 2540 (1997) supplements general Thai law on contracts under the Civil and Commercial Code (“CCC”) and other relevant laws in Thailand. Under the CCC, a court would normally determine whether a contract is contrary to public order or good morals. Under the Unfair Contract Terms Act, however, courts are obliged to enforce contract terms to the extent that they are “fair and reasonable,” or in some cases the courts must render unfair terms as void.

9.1.1 Scope of Application of the Unfair Contract Terms Act

The specific types of contracts that are subject to the Unfair Contract Terms Act are: consumer contracts; standard form contracts; sales with right of redemption contracts; contracts in restraint of trade; contracts that limit or exclude liability; and contracts with deposit forfeiture provisions. The Unfair Contract Terms Act broadly defines the terms “consumer,” “trader” and “professional” as parties to contracts to accommodate the multiple agreements that may fall within its scope of “consumer contracts.” Some of these terms are discussed below.

The Unfair Contract Terms Act also provides sample contract terms that may result in a party performing or assuming a burden greater than that which a person of ordinary prudence would normally foresee. Such contract terms would only be enforced by courts to the extent that they are fair and reasonable. Some of these examples are discussed below in reference to consumer contracts.

The Unfair Contract Terms Act allows the court to look at, among other factors, good faith, bargaining power, economic status, and past practice of the party to determine whether a contract term is enforceable only to the extent that it is fair and reasonable.

Furthermore, the Unfair Contract Terms Act allows experts to be involved in the particular case to assist the court in interpreting whether a term is reasonable and to look at the applicable general practice.

The Unfair Contract Terms Act has no retroactive effect and, therefore, does not affect contracts made before 15 May 1998. In addition, a term excluding the application of the Unfair Contract Terms Act to govern the particular contract is void.

9.2 The Trade Competition Act

The Trade Competition Act B.E. 2542 (1999) (“TCA”) became effective on 1 May 1999, replacing the previous Price Fixing and Anti-Monopoly Act B.E. 2522 (1979) (“1979 Act”). The TCA is applicable to all business sectors, unless it stipulates an exemption.

9.2.1 Scope of Application of the TCA

The standards of the TCA are somewhat similar to those found in U.S. anti-trust laws or in competition laws of certain European countries. Unlike the 1979 Act, the TCA generally prohibits all restrictive trade practices in all areas of business that create or might create monopoly and/or reduce competition in trade of goods and services. The TCA also established a Trade Competition Commission (“Commission”) that is authorized to grant exemptions to this prohibition for certain types of businesses.

9.2.2 Abuses of Dominant Position

The Trade Competition Act prohibits business operators from abusing “dominant position,” which is said to exist when one or more business operators controls a certain market share and enjoys a certain sales turnover. The exact levels of dominant market share and sales turnover are defined from time-to-time by the Commission with the Cabinet’s approval. To date, the Commission has yet to prescribe the conditions that constitute dominant position. Business operators that control a dominant position are prohibited from specific activities.

It is important to note that, under the TCA, if a business operator having dominant position has a market share exceeding 75%, the Commission may order such operator to cease, withhold or change its market share by complying with the criteria, procedures, conditions and time periods laid down by the Commission.

9.2.3 Restrictive Trade Practices Jointly Undertaken by Two or More Business Operators

The TCA prohibits any business operator from acting jointly with another business operator to undertake any trade practices that create a monopoly or that reduce or limit competition in respect of any goods or services.

9.2.4 Restrictive Trade Practices Jointly Undertaken with Overseas Business Operators

The TCA also prohibits any business operator in Thailand from using a relationship with an overseas business operator to limit the ability of individuals in Thailand to purchase goods or services directly from the overseas business operator. This provision applies to business relationships formed by contracts, policies, partnerships, shareholdings, or other comparable methods.

9.2.5 Anti-Competitive Mergers and Acquisitions

The TCA prohibits any business operator from effecting a merger, which may result in a monopoly or unfair competition as prescribed by the Commission in the Government Gazette without a pre-merger permission from the Commission. The Commission prescribes the conditions of mergers that are subject to the pre-merger permission requirements, including the combined market share, sales turnover, amount of capital/share or assets. To date, the Commission has yet to prescribe such conditions.

9.2.6 Other Acts that Restrict Competition

As a “catch-all” provision, the TCA generally prohibits any business operator from doing anything, outside the bounds of free and fair competition, that could destroy, damage, hinder, obstruct, or limit the operation of another party’s business.

9.2.7 Permissible Restrictive Trade Practices

Certain restrictive trade practices, if they constitute a monopoly or reduce competition and where deemed necessary commercially, may be undertaken by or between two or more business operators upon obtaining prior permission from the Commission.

9.2.8 Trade Competition Commission

The Trade Competition Commission (“Commission”) consists of representatives of various government agencies, including members appointed from experts in a number not less than eight but not more than 12, with not less than half being appointed by the private sector. The Commission is empowered, among other things, to:

- make recommendations to the Minister on Ministerial Regulations to be issued under the TCA;

- determine the market share and the amount of sales turnover of any business that would constitute a “dominant position;”
- consider complaints in relation to violations of the TCA;
- consider applications for permission for mergers or for permissible restrictive trade practices; and
- institute criminal legal action in respect of violations of certain prohibited restrictive trade practices as petitioned by aggrieved parties.

In addition, if the Commission views that any business operator is acting in violation of prohibited restrictive trade practices under the TCA, the Commission may order such business operator to cease, withhold, or correct such violation. In exercising this power, the TCA clearly provides that the business operator shall have no cause of action for damages against the Commission.

9.2.9 Violation of the TCA

If a business operator illicitly engages in a restrictive trade practice that injures another party, the injured party may seek compensatory damages from the operator. This right to compensation may be interpreted as being extended to any business competitor or individual consumer who has been injured as a result of a violation. The injured party must file a claim within one year after that party learns of or ought to have learned of the violation.

Furthermore, the TCA permits the Consumer Protection Board, or an association established under the consumer protection law, to take legal action on behalf of an individual consumer or a member of the association, as the case may be.

The maximum penalties for a violation of the TCA are imprisonment for up to three years and/or a fine up to Baht six million. A multiple penalty is imposed for repeated commission of such violation. A violation of the Commission’s order is subject to imprisonment of up to three years or a fine ranging from Baht two million to Baht six million, plus a daily fine of Baht 50,000 during the period of the violation.

Furthermore, if a juristic person commits an offense, any managing directors, partners, or persons responsible for the operations of the juristic person’s business are also personally liable to the same penalties. The only defense available to such person(s) is that they must be able to prove that the violation was committed by the juristic person without their knowledge or consent, or that they had undertaken reasonable actions to prevent committing the violation.

9.2.10 Exemptions from the TCA

The TCA is applicable to agricultural, industrial, financial, insurance and other service businesses, but not to:

- central, provincial, and local government agencies;
- state-owned enterprises;
- agricultural cooperatives established by law; and
- other businesses as prescribed from time-to-time in Ministerial Regulations.

As at the time of writing, these regulations have yet to be issued by the Ministry of Commerce.

9.3 The Prices of Goods and Services Act

The Prices of Goods and Services Act B.E. 2542 (1999) (“PGSA”) was passed by Parliament in February 1999 and came into force on 1 April 1999. Together with the TCA, the PGSA replaces the previous Price Fixing and Anti-Monopoly Act B.E. 2522 (1979) (“1979 Act”). The PGSA established a committee called the Central Prices of Goods and Services Committee to exercise the powers entrusted to it. To supplement the Committee’s tasks in other provincial areas outside Bangkok, the PGSA also establishes other provincial committees.

9.3.1 Scope of Application of the PGSA

As with the 1979 Act, the PGSA only applies to goods or services designated by the Committee. That is, the Committee has the power, with the Cabinet’s approval, to announce its control over any goods and/or services so as to prevent price fixing or unfair trade conditions/practices in respect of such goods and/or services. Once announced by the Committee, such control shall continue for a period not exceeding one year, unless extended by another announcement of the Committee.

In respect of any goods or services under its control, the Committee may impose an extensive set of regulatory measures. For example, it may fix the sales/purchase price of a controlled good or service, either as a minimum price to be purchased by the purchaser, as a maximum price to be sold by the seller or as a price fixed at a determined level.

9.3.2 The Central Prices of Goods and Services Committee

The Committee consists of representatives of various government agencies, including members appointed from experts in a number not less than four but not more than eight, with not less than half of whom being nominated by the private sector. The Committee is empowered, among other things, to announce any goods or services to be controlled and prescribe measures to be applied to controlled goods or services.

9.3.3 Prohibitions and Control Measures under the PGSA

The PGSA prohibits:

- any person from hoarding any controlled goods by having them in possession in a volume exceeding the limit prescribed in the Committee's announcement; from storing controlled goods in places other than those notified to the competent officials; and from refusing to distribute controlled goods for sale, or to offer them for sale in the ordinary course of trade; and from delaying the sale or delivery of controlled goods without reasonable cause; and
- any service provider of controlled services from ceasing to provide controlled services in the ordinary course of trade; and from refusing to provide controlled services or delaying the provision of controlled services without reasonable cause.

The PGSA also prohibits any business operator from willfully causing the prices of any good or service to become unreasonably low or high or disordered. The PGSA provides other control measures for controlled goods and services. They include the Committee's power to require manufacturers, sellers, distributors, or importers of controlled goods or services to notify the Committee's Secretary General of sales prices, standards, qualities, sizes, quantities, weights per unit, and composition of controlled goods or services, and to require manufacturers, sellers, distributors, and importers to display prices for any goods or services.

A violation of provisions of the PGSA is punishable with imprisonment ranging from one month to seven years and/or a fine ranging from Baht 2,000 to Baht 140,000, depending on the type of the offense in question. If the violation is committed by a juristic person, its managing director(s), managing partner(s) or other person(s) responsible for business operation may also be personally liable to the same penalties, unless they can prove that such act was done without their knowledge or consent or they have taken reasonable steps to prevent such offence.

9.3.4 Exemptions from the PGSA

The PGSA applies to agricultural, industrial, commercial, service, and other similar business operators, but it does not apply to central, provincial and local government agencies and other businesses as prescribed from time-to-time in Ministerial Regulations.

9.4 Product Liability

Product liability is still in its formative stages in Thailand. Recently, the Liability For Injury From Unsafe Products Bill has been presented for consideration of the members of the House of Representatives. The Bill imposes liability for loss or damage resulting from defects in products. Manufacturers, distributors and others will have a liability for any loss or damages caused by a defect in a product, irrespective of whether they were negligent or not and irrespective of whether they had any contact with the plaintiff. It is necessary and sufficient that there is a defect in a product and that the defect causes loss or damage. It is no longer necessary for a plaintiff to prove an absence of care on part of the defendant. The focus of the law moves from the behavior of the defendant (whether they took due care) to the interaction of the product on the plaintiff. If the product causes loss or damage, there will be “strict” and automatic liability on the manufacturer, and others, unless they can prove the product was not defective. Although there is currently no legislation that directly addresses product liability, there are certain statutes that would support legal claims based upon the concept of product liability. In addition, certain consumer protection laws provide indirect protections against defective products. Finally, the government is currently attempting to enable consumers to seek redress for damages or injuries caused by either low quality products or advertisements that make fraudulent claims.

9.4.1 Civil Liability

As a civil law country, the concept of product liability in Thailand is, in many ways, similar to that of other civil law jurisdictions. Product liability refers to a type of litigation strategy or court claim filed against a defendant in a Thai court. It covers the legal liability of manufacturers, and possibly sellers, to compensate buyers, users, and perhaps bystanders, for damages or injuries suffered because of defective products purchased in Thailand. Although Thailand does not currently have any particular law or act that directly governs product liability, it has an established set of tort principles that provides consumers redress for damages sustained by defective products. Recently, there is a draft bill amending the Civil Procedure Code to enable class action

proceedings. A class action suit is a procedure whereby a single person or small group of parties may represent a larger group, or “class” of persons sharing a common interest in litigation. The representative of the injured persons takes action against a single company seeking compensation.

Class action suits now appear to be on the way to Thailand. The Board of the Stock Exchange of Thailand first initiated this bill for its security fraud cases. However, the Cabinet viewed it as a necessary system for other kinds of cases; subsequently, the Cabinet included other kinds of cases into the scope of the bill. The said bill is now being considered by the Council of State.

9.4.2 Criminal Liability with Respect to Products under the Penal Code

Certain criminal offenses under the Penal Code B.E. 2499 (1956) may apply in a product liability case. These may include:

- offences relating to trade, i.e. sale of products by deceiving the purchaser as to the nature or quality of such products; and
- offences of cheating and fraud; and offences against life and body.

9.5 Consumer Protection

Law covering product liability addresses the legal liability of manufacturers and sellers to end users, and possibly third parties, for injuries caused by defective products. Consumer protection law, on the other hand, usually refers to statutes or government efforts to prohibit or regulate advertising, sales practices, product quality and other aspects of marketing to consumers.

Discussed below are some specific statutes that, while they may not provide direct or appropriate protection to all consumers, do provide some indirect protection against defective products. These laws include the Food Act, the Drug Act, the Consumer Protection Act, and the Industrial Product Standards Act. They all prescribe certain standards or levels of quality for products manufactured or distributed in Thailand. Also provided below are some recent efforts instituted by the government to protect consumers against defective products and false or misleading advertising.

9.5.1 The Food Act

The Food Act B.E. 2522 (1979) imposes various requirements, restrictions, or prohibitions on manufacturers, importers or sellers of food products. The Food Act thus addresses certain issues that relate to product liability. Those who fail to comply with these requirements, restrictions and prohibitions are subject to criminal penalties (fine and/or imprisonment) under the Act. These requirements, restrictions and prohibitions include those relating to the manufacture, importation, or distribution of impure or adulterated food and food that does not comply with standards stipulated by the Thai Food and Drug Association (“FDA”), as well as to false or exaggerated food advertisements.

Section 40 of the Food Act prohibits false or deceptive advertising of the qualities or benefits of food. Individuals wanting to advertise a food’s qualities through audio-visual or printed means must submit the contents of the advertisement to the appropriate FDA official for licensing. The Act empowers the official to issue written orders to the manufacturer, importer, or advertiser to halt production and/or advertisement of the product, based on the Food Board’s decision that the food product does not have the usefulness, quality, or benefit that is advertised. The Food Board established under the Act is comprised of officials from various government sectors. The Food Board is empowered, among other things, to offer opinions and recommendations to the Minister of Public Health about the revocation or cancellation of food licenses.

Similar to the Drug Act, the Act also empowers a competent officer to enter manufacturing, storage, and sales facilities for product inspection. Competent officers can seize food products and their relevant documentation and packaging when they suspect an offense has been committed in violation of the Act.

9.5.2 The Drug Act

Section 88 bis of the Drug Act B.E. 2510 (1967) requires the Ministry of Public Health to license all advertisements for pharmaceuticals conveyed by audio-visual transmission. In addition, the content and pictures used in printed advertisements must receive ministerial licensing before being released to the public.

Among other stipulations, the strongest section of the legislation requires that drug advertisements presented for ministerial licensing must not, for example:

- boast that the drug or its ingredients are capable of miraculous cures or total treatment; and must not state that a drug can relieve, cure, or prevent disease or illness or use other words with similar meaning;

- exaggerate or falsely declare the properties of the drug; or
- create the understanding that the drug otherwise contains any medicinal substance or ingredient or, if it does, in a quantity other than that which it is understood to contain.

Logically, it can be assumed that a drug advertisement that has received a ministerial license would not contain information in violation of Section 88 of the Act. However, consumers could still be at risk because not all drug advertisements have been submitted for ministerial approval. Also, ministerial licensing for the advertisement would remain valid as long as the drug's ingredients or properties remain the same as they were when the license was originally granted. Drug manufacturers, whose advertisements for the sale of drugs transgress Section 88 bis, are liable to a fine not exceeding Baht 100,000, or both, by virtue of Section 124 of the Act.

"Advertisement" here is interpreted along the same line as that under the Consumer Protection Act (discussed below). This is because the Drug Act is promulgated to protect the safety of consumers, and those definitions not prescribed under the Act must be interpreted along the same line as the Consumer Protection Act.

This Act also empowers competent officers, appointed by the minister, among other things, to enter manufacturing, storage, and sales areas for product inspection, and they may seize the drug product and its relevant documentation and packaging when they suspect an offense has been committed in violation of the Act.

9.5.3 The Consumer Protection Act

The Consumer Protection Act B.E. 2522 (1979), as amended in 1998 ("CPA"), aims to protect the interests of consumers, rather than to protect the economy or to preserve business competition.

The Board of Consumer Protection, established under the Consumer Protection Act and chaired by the Prime Minister, is responsible for protecting the rights of consumers and enforcing the CPA. The CPA has established three committees that are responsible for different matters: the Committee on Advertisements, the Committee on Labeling, and the Committee on Contracts.

The Board of Consumer Protection is charged with considering complaints made by consumers, taking action against those that infringe the rights of consumers, and regulating the performance of and hearing appeals from decisions of the three Committees. The Board is also empowered to require a business operator, who wishes to sell a particular product, to conduct tests, at the operator's expense, to ensure that the product is safe.

The Committee on Advertisements is empowered to prescribe text or warnings or advice that must be included in advertisements for given commodities. The Committee may also restrict the use of advertising for a commodity, or may entirely prohibit the use of advertising for a particular product. The CPA is specifically directed at protecting consumers from false, exaggerated, materially misleading, illegal, or indecent advertising, or advertising that may cause harm to the public.

The Committee on Labeling is primarily concerned with ensuring that information necessary to protect the health of consumers is included on labels and to ensure that labels do not contain misleading information. Generally, all goods produced for sale by factories (recognized as such by the Factories Act) and goods imported for sale in Thailand are subject to label control. Labels that are not in conformity with the CPA may be ordered to be discontinued or modified by the Committee on Labeling.

The Committee on Contracts is empowered to declare any business (in respect of which contracts either are required by law to be made in writing or are customarily made in writing) to be a controlled business. If declared a controlled business, a contract used for such business must not contain any terms that create unreasonable advantage over consumers or that are unfair to consumers. Certain businesses, e.g. those relating to credit cards, car hire purchase, and condominium unit sale, have been declared to be controlled businesses by the Committee on Contracts.

The penalty provisions under the CPA are numerous and varied. The penalties may contain provisions for imprisonment and cumulative fines. Penalties range from imprisonment for one month and/or a fine of Baht 10,000 for failing to supply documents or data to the Board of Consumer Protection when so ordered, to imprisonment for not more than five years and/or a fine of Baht 500,000 for manufacturers or importers who bring goods into the country for sale that are prohibited by the Board of Consumer Protection. Where a juristic entity is charged under CPA, the directors and managers may be held personally liable unless they can prove they have taken no part in committing the offence.

9.5.4 The Industrial Products Standards Act

Under the Industrial Products Standards Act B.E. 2535 (1992), “standard” refers, among other things, to the shape, endurance, and safety of and to the method of manufacture, design, and packaging of a product. Standards prescribed by virtue of this Act are either voluntary or compulsory.

The Ministry of Industry may, by issuance of a Notification of the Ministry of Industry, prescribe industrial standards for any industrial product for the promotion of industry, with which the manufacturer or importer may voluntarily comply. Any manufacturer or importer who wishes to comply with such standard must obtain a license from the Ministry of Industry. Once granted, the manufacturer or importer is able to have its products bear the industrial standard logo.

The Ministry of Industry may, by way of enactment of a Royal Decree, prescribe that any industrial product, manufactured or imported, conform to a compulsory industrial standard. Such compulsory industrial standards are issued for the purpose of ensuring safety or preventing harm to the public, to industry, or to the economy. Once any product is subject to a compulsory industrial standard, manufacturers or importers of such products cannot manufacture or import the product unless they first obtain the appropriate license from the Ministry of Industry. Once such license is obtained, manufacturers or importers must show the industrial standards logo on their products.

A licensed manufacturer is prohibited from using the standards logo on products that do not conform to the industrial standards as prescribed by law. In addition, a licensed manufacturer is prohibited from advertising or selling a product knowing that it violates standards defined by law.

In the event of a violation, the Ministry of Industry is empowered by the Act to revoke or suspend the license of the manufacturer or importer. If the Ministry of Industry determines that a licensed manufacturer or importer has unlawfully used the industrial standards logo, the violating party can be imprisoned for a term not exceeding three months and/or fined not more than Baht 20,000. If the Ministry of Industry determines that the licensed manufacturer or importer has sold or offered for sale products that do not conform to particular industrial standards, the violating party can be imprisoned for not more than one month and/or fined not more than Baht 5,000.

9.5.5 Food and Drug Administration Reward Scheme

Thailand's Food and Drug Administration ("FDA") has announced the implementation of a scheme that would provide cash rewards to consumers who assist in targeting manufacturers that violate controlling statutes. According to an FDA official, the scheme is intended to help ensnare manufacturers of food, drugs, cosmetics, medical equipment, and chemicals who make false advertising claims or who sell low quality products that negatively affect the health of consumers. Consumers who file complaints are entitled to a certain amount, prescribed by the Ministry of Finance, of any court fines levied against manufacturers found liable.

10. LABOUR LAWS

10.1 General

The labour force is largely non-unionized. Although labour unions do operate under the auspices of the Labour Relations Law, the working conditions of labour are governed more by statute than by collective agreements.

10.2 Leave and Holidays

Under the Labour Protection Law, all employees, whether full- or part-time, seasonal, casual, occasional, or contract, are entitled to weekly leave and traditional paid holidays. Employees are also entitled to paid annual holiday-leave. There are provisions for certain maximum periods of paid sick leave and military leave (if military service is required by law), and partially paid maternity leave. Maximum working hours are fixed at eight hours per day and 48 hours per week, or seven hours per day and 42 hours per week for work which is considered hazardous to health.

10.3 Severance Pay

Any employee who has worked for a continuous period of 120 days or more is entitled to severance pay if their employment is terminated without cause, and “cause” is very limited under the law.

Employees are not entitled to severance pay if they are hired for a maximum period of two years and for work that is, by its nature, occasional, casual, or seasonal, or for work under a project in respect of which the employee and the employer have executed an employment agreement in writing stipulating the commencement and termination dates of employment.

Severance pay entitlement depends on the period of employment and ranges from 30 days’ wages for service of 120 days to one year, to 300 days’ wages for service of 10 years or more.

Regardless of the amount (if any) of severance pay due to the employee, the Labour Protection Law and the Civil and Commercial Code require the employer to provide the employee with notice of termination. Such notice must be given at or before any time of payment, to take effect at the following time of payment, although not more than three month’s notice is required. Payment for an equivalent length of time can be given in lieu of such notice.

Regardless of the amount (if any) of severance pay and notice or payment in lieu of notice, if the dismissal is unfair, then the employee may claim for damages or reinstatement.

10.4 Other Regulations

Any employer with 10 or more employees must make an annual contribution to the Workmen's Compensation Fund of the Labour Department. The amount due depends on the type of business and ranges between 0.2 - 2.0% of the employees' annual wages.

Every employer who regularly employs 10 or more employees must establish, post, and file work regulations covering working conditions, including such matters as working days, holidays, overtime, wage payment, rules regarding leaves of absence, discipline, submission of grievances and termination of employment.

There are minimum wages prescribed by law (except for agricultural workers), which vary by province, but currently range between Baht 133-170 per day. A penalty of 15% interest on the sum due is imposed for default of wage payment.

11. IMMIGRATION, VISAS AND WORK PERMITS

11.1 Entry Regulations

There are six visa categories. The type of visa granted depends on the purpose of the visit. It is important to obtain the correct visa to minimize difficulties at the port of entry or exit.

Visitors in transit or coming without a visa from most (but not all) nations are normally granted 30-day permits to stay at the point of entry. Visitors from New Zealand and South Korea may be granted transit visas for permits-to-stay of up to 90 days at the port of entry. A transit visa issued outside Thailand will usually enable the holder to obtain a permit to stay of 30 days. In both cases, only a limited extension is available unless there are exceptional circumstances.

Tourist visas are issued for permits-to-stay of up to 60 days and are renewable at the discretion of the Immigration Bureau. Tourist visas must initially be obtained from a Thai embassy or consulate.

The other visa categories are non-immigrant, immigrant and non-quota immigrant. Foreigners intending to remain in Thailand for some time or to work in Thailand should obtain a non-immigrant visa. There are several types of non-immigrant visas: Business (Category B); Dependent/Other (Category O); Education (Category ED); Diplomatic and Consular (Category D); and Official (Category F). The holder of a non-immigrant visa is granted a 90-day permit-to-stay.

11.2 Permits-to-Stay

Unlike in some other countries, in Thailand a “visa” (permit-to-enter) and a “permit-to-stay” are different. A visa must be obtained from a Thai embassy or consulate, whereas a permit-to-stay is granted upon arrival. The length of the permit-to-stay depends on the type of visa held by a foreigner upon entry. The permit-to-stay may be extended, depending on the reason and the type of visa initially obtained for entry. For example, a person who enters on a non-immigrant “B” (Business) visa is initially granted a 90-day permit-to-stay. This type of visa is supportive of a one-year extension of a permit-to-stay if a work permit is procured.

11.3 Re-Entry Permits

Note that a permit-to-stay is automatically cancelled if a foreigner departs the country without first obtaining a “re-entry permit”. A foreigner who intends to exit Thailand and wants to return and stay up to the expiry date of the permit-to-stay previously granted, is required to apply for a re-entry permit before departing. Applications for re-entry permits must be lodged with the Immigration Bureau in Bangkok, and applicants may apply for a single or multiple re-entry permit.

Individuals who depart Thailand using a re-entry permit must return to Thailand prior to the expiry date of their permit-to-stay. If a return journey cannot be made prior to the expiry date, then the individual must obtain a new visa from a Thai embassy or consulate before returning.

11.4 Immigration and Work

A visa from a Thai embassy or consulate or a permit-to-stay does not constitute permission to work. Such permission is only granted by the Alien Occupation Division of the Ministry of Labour and Social Welfare, with the issuance of a work permit, for which entry on a non-immigrant or immigrant visa is a pre-requisite.

On 30 June 1997, the government established a One-Stop Service Center to facilitate the issuance of relevant work permit and immigration authorizations. The center’s service can be extended to investors who meet certain criteria, and only investors from certain countries are eligible to use the Center.

The current process of procuring a work permit and related immigration approvals is extremely complicated and requires continued, separate dealings with the Immigration Bureau of the Ministry of the Interior and the Alien Occupation Division of the Ministry of Labour and Social Welfare. This can be a very time consuming and frustrating process for foreign employees and their families and may, in some cases, require departure from and re-entry into the country.

Visitors to Thailand should be aware that overstaying a visa constitutes a very serious offence. The penalties include mandatory imprisonment in some cases. Another concern to keep in mind is that holders of permits-to-stay must report to Immigration every 90 days to keep their permit up-to-date. Fines are now being levied against foreigners who fail to report to Immigration every 90 days. This requirement is not

enforced against foreigners who exit and then re-enter within the 90 days, because the exit constitutes reporting under this regulation. However, if foreigners reside beyond the 90 days, then they must report toward the end of their current 90-day stay.

11.5 Work Permits

The Working of Aliens Act B.E. 2521 (1978) requires all foreigners to obtain a work permit prior to working in Thailand. The definition of “work” is extremely broad and means “engaging in work by exerting energy or using knowledge whether or not in consideration of wages or other benefits.”

The Act also lists certain occupations that are reserved exclusively for Thai nationals and for which a work permit cannot be granted. Generally, foreigners are prohibited from working in manual and industrial labour and some professional occupations.

With certain exceptions, (diplomats, United Nations officers and individuals performing duties under agreements between Thailand and a foreign government), all foreigners must obtain a work permit from the Foreign Occupation Division of the Ministry of Labour and Social Welfare before commencing work in Thailand. The granting of a work permit is discretionary. However, where government contracts or BOI-promoted companies are involved, there is usually no difficulty in obtaining one.

A foreigner must hold a non-immigrant or immigrant visa before a work permit is issued, and the permit is only valid for the duration of the holder’s authorized permit-to-stay under immigration laws. Work permits are restricted to the particular occupation, employer, and locality for which they were issued, and any change necessitates an application for a new permit, or an amendment of the existing permit, depending on the nature of the change.

It is a criminal offense for a foreigner to “work” in Thailand without a specific work permit or in an occupation or location other than that specified in the individual’s work permit. Working in prohibited occupations can lead to imprisonment of up to five years.

12. IMPORTING, EXPORTING AND TRADE REMEDIES

12.1 Import Controls

The Export and Import Act B.E. 2522 (1979) authorizes the Ministry of Commerce to designate classes of goods that are subject to import and export controls. Control usually takes the form of permission and licensing. Thailand intends to liberalize these import controls. Currently, 56 classes of goods require import licenses from the Ministry of Commerce. The categories of import-controlled goods tend to change frequently under Notifications of the Ministry of Commerce, so any prospective importer should check for the latest Notification from the Ministry. The Export and Import Act established a Foreign Trade Board (FTB).

In addition to the Export and Import Act, a number of goods are subject to import controls under other laws, such as the following:

- The Drug Act B.E. 2510 (1976) stipulates that in order to import a modern drug, one must obtain a license from the Food and Drug Administration, Ministry of Public Health.
- The Minerals Act B.E. 2510 (1967) stipulates that without appropriate permission, an importer is prohibited from importing tungstic oxide, tin ores, and metallic tin in quantities exceeding 2 kilograms.
- The Ancient Monuments, Antiques, Objects of Art, and National Museum Act B.E. 2504 (1961) stipulates that antiques or objects of art, whether registered or not, must not be delivered without permission from the Director-General of Fine Arts.
- The Armament, Ammunition, Explosives, Fireworks, and Imitation Firearms Act B.E. 2490 (1947) prohibits all persons from producing, buying, possessing, using, ordering, or importing military hardware, ammunition, or explosive devices unless without a license from the Ministry of Interior. An importer or manufacturer must also obtain the appropriate license from the Ministry of Defense in order to process military equipment, ammunition, explosive devices, or raw materials for their manufacture.

- The Cosmetics Act B.E. 2535 (1992) stipulates that for the purpose of protection of public health, any importer of controlled cosmetics must provide the name and location of the office and place of manufacture or storage of cosmetics, the name, category, or kind of cosmetics to be imported, and major components of such cosmetics.

12.2 Export Controls

The Export and Import Act B.E. 2522 (1979) authorizes the Ministry of Commerce to subject products to export control. The Act stipulates many classes of goods that are subject to export controls.

Certain goods require export licenses under other laws as well, such as under the Tobacco Act B.E. 2509 (1966). According to the Tobacco Act, seeds, plants, and leaves of tobacco cannot be exported from the Kingdom without permission from the Director-General of the Excise Department.

Certain goods such as sugar and rice are subject to export licenses under the Export Standard Act B.E. 2503 (1960). The purpose of the Export Standard Act is to ensure that such goods exported from Thailand comply with a set quality standards.

In addition, the exporters of agricultural commodities may find that membership in certain trade associations is mandatory. These trade associations may also impose their own regulations for membership, which act as additional export controls.

12.3 Prohibited Products

Importers and exporters are prohibited from importing into and exporting out of Thailand products that infringe copyright, bear the trademarks of others, or bear unregistered trademarks.

12.4 Exchange Control

In addition to the import and export permissions and licenses discussed above business operators must comply with Thai Exchange Control laws.

12.5 Customs Duty

Customs duties are an important part of the Thai taxation system. The relevant governing acts are the Customs Act B.E. 2469 (1926) and the Customs Tariff Decree. Duties are collected on both imports and selected exports.

The classification of goods for duty purposes is based upon The Harmonized Commodity Description and Coding System (commonly referred to as the “Harmonized System”) and is, therefore, consistent with the classifications used by most of Thailand’s trading partners. Duties are levied on an ad valorem basis or at a specific rate, whichever is higher. As of 1 January 2000, Thailand adopted the GATT Valuation Agreement, which satisfies one of the nation’s commitments to maintain certain legal standards as a member of the World Trade Organization.

Imported articles are subject both to duties and to VAT, which is administered by the Customs Department as well. VAT is, in this case, based on the sum of the value of the goods and the duties.

Export duties are imposed on only a few items including rice, scrap iron, rawhide, rubber, wood, raw silk, and powdered fish. Exports are taxable at a zero VAT rate.

12.5.1 Customs Procedures Related to Taxes and Duties

Customs procedures for goods arriving in Thailand in any manner are similar to those existing in most other countries. An importer must file an entry form plus other requisite documents (e.g. bill of lading, invoice, packing list, etc.) with the Customs Department. For certain goods, an import license is required.

Duties and VAT are due upon arrival of the vessel. When total duties have yet to be determined or urgent clearance is required, a deposit may be paid. Finally, landing and storage charges must be paid before the goods are released.

Imported goods can also be stored in bonded warehouses. Although the obligation to pay duties arises at the time of import, stored goods are assessed at the tariff rate in effect on the date of release.

To expedite customs clearance, an advance entry system allows importers to file the required forms, including the bill of lading, prior to the arrival of the goods in Thailand. The amount of duties can then be determined with reference to the bill of lading. Once the goods arrive, the duties and port charges need only be paid before the goods will be released.

It is often worthwhile to use the services of an experienced agent to assist with clearing goods through customs. Shipping agents often provide their own clearing agents.

Where goods accompany passengers arriving by air, sea, or land, a declaration is required. If necessary, a customs officer assesses their value and collects any duties owed.

12.5.2 Generalized System of Preferences

The Generalized System of Preferences (GSP), which was introduced over thirty years ago (1971), allows industrialized countries to grant non-reciprocal tariff reductions to developing countries as an exception under the World Trade Organization (WTO) rules to the principle of most-favored-nation (MFN) treatment.

Under the GSP, tariff preferences have been granted to Thailand by approximately 27 countries including European Union countries, the US, Japan, Canada, New Zealand and Australia. Such tariff preferences consist of:

- duty-free admission of industrial products and semi-industrial products; and
- duty-free or reduced duty admission of certain agricultural products.

12.5.3 Bilateral and Multilateral Agreements

Thailand has implemented and is pursuing various bilateral and multilateral agreements with various countries, such as Australia, Japan, China, New Zealand, India, Peru and Bahrain.

The Association of Southeast Asian Nations (ASEAN) was established in 1967 and currently comprises Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. ASEAN member countries give trade preferences to each other to maximize the use of resources in the region and enhance cooperation in trade, including both tariff and non-tariff preferences. The tariff preference allows for the reduction or elimination of customs duty rates on certain specified goods. Non-tariff preferences include rights to enter into long-term contracts for non-quota importation.

12.5.4 The ASEAN Free Trade Area (AFTA)

The formation of an ASEAN Free Trade Area (AFTA) was concluded in the fourth ASEAN Summit in January 1992 and the Common Effective Preferential Tariff (CEPT) scheme was implemented in 1993 and covers both manufactured and agricultural products. ASEAN leaders aim to eliminate import tariffs on all items in the Inclusion List by 2010 for the six founding members, comprising Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand, and by 2015 for the remaining members.

Similar to the European Union and North American Free Trade Agreement (NAFTA), ASEAN intends to form regional FTA's with key partners such as Japan, South Korea, China, Australia and New Zealand by 2016. The ASEAN-China economic cooperation framework agreement has liberalized the fruit and vegetable trade and is further expected to gradually reduce import tariffs to 0% by 2010.

12.6 The Anti-Dumping and Subsidies Act

The Anti-Dumping and Subsidies Act B.E. 2542 (1999) (the "AD Act") that was promulgated in March 1999 became effective on 30 June 1999. Thailand joined the World Trade Organization on 1 January 1995 and is consequently bound by the "Agreement on Implementation of Article VI of GATT 1994" (the "WTO Anti-Dumping Agreement").

Most of the substantive provisions of the AD Act are compatible with Thailand's international obligations as a WTO member and, in order to deal with procedural and administrative matters relating to dumping/injury investigations, the Ministry of Commerce (Thailand) issues Ministerial Regulations, from time-to-time.

12.6.1 Dumping

Based upon the strict criteria for the determination of dumping, a product is considered to have been dumped when its "export price" is less than the "normal value" (i.e. the price at which the product is offered for sale in the domestic market of the exporting country). The dumping margin is the amount by which the export price is lower than the normal value.

12.6.2 Requirement of "Material Injury" in Dumping

It is essential to establish, through investigations carried out that increased imports of the dumped product are causing "material injury" or a threat of "material injury" to the domestic industry; or "material retardation" to the establishment or development of the domestic industry. Thus, in this context, the AD Act adopts the condition of a "causal link" between the dumped imports and the alleged injury, as required by the WTO Anti-Dumping Agreement.

12.6.3 Initiation of Dumping Proceedings

The Department of Foreign Trade ("DFT"), Ministry of Commerce, may conduct a dumping investigation on its own initiative or if a petition is submitted by or on behalf of the adequate portion of the domestic industry.

The DFT is empowered to conduct investigations to determine the existence of both dumping and injury. Upon the conclusion of its investigations, the DFT must refer its findings and opinions to a body called the Anti-Dumping and Subsidies Committee (the “Committee”) for deliberation and final determination.

12.6.4 Provisional Measures

If it is found in the preliminary investigation that dumping and consequent injury exists, and if it is essential to prevent injury to the domestic industry, the Committee may impose provisional measures by levying a provisional duty or requiring submission of a guarantee for such provisional duty; however, it must not exceed the dumping margin estimated at that time.

12.6.5 Price Undertakings with Respect to Dumping

Pursuant to the preliminary determination, a foreign exporter or the DFT, in order to cease the dumping proceedings, may propose to conclude a price undertaking. However, the DFT may refuse to accept the offer made by the foreign exporter and any price undertaking agreement will be valid only if the Committee approves it.

12.6.6 Anti-Dumping Duties

Pursuant to a preliminary investigation, if the existence of dumping and consequent injury is determined in the detailed investigation, anti-dumping duties can be imposed. The imposition of anti-dumping duties must be made on a non-discriminatory basis, in the amount necessary to remove the injury, and in any case, not greater than the “dumping margin.” Definitive anti-dumping duties may be levied throughout the period of dumping and injury, and in certain exceptional circumstances, may be levied retroactively not more than 90 days prior to the application date of provisional measures.

A definitive anti-dumping duty shall be terminated on a date no later than five years after its imposition or after its most recent review (if that review covers both dumping and injury), subject to other exceptions.

12.6.7 Maximum Time-Limit for Dumping Proceedings

Once initiated, the AD Act requires that the overall dumping proceedings must be concluded within one year. However, if it is deemed necessary, this period may be extended for a period not exceeding six months.

12.6.8 Review of Anti-Dumping Duties

After one year elapses since the anti-dumping duties have been levied, the existing duties may be reviewed by the Committee either at its own initiative or at the request of an interested party. The review must be concluded within 12 months of its initiation.

The Committee's final determination on the imposition or review of anti-dumping duties is subject to judicial review by the Court of Intellectual Property and International Trade, provided that an appeal is made to the Court within 30 days of notification of such determination.

12.6.9 Subsidies

Under the AD Act, a "subsidy" is a benefit received by reason of actions undertaken by the government of the country of origin (or of the exporting country), including the provision of a financial contribution and/or the provision of any form of income or price support, directly or indirectly, to increase exports of any product or to reduce imports of any product.

However, the granting of exemption from or reduction of taxes or duties borne by the like product when destined for domestic consumption, or the granting of tax rebates not exceeding taxes and duties that have accrued, shall not be deemed to constitute a subsidy under the AD Act.

12.6.10 Specific Subsidies

The subsidies that are granted, in law or in fact, to certain enterprises are deemed as "specific subsidies". Nonetheless, subsidies, which are granted pursuant to general criteria or conditions applicable to all enterprises at the same level of trade on a non-discriminatory basis and in conformity with fundamental economic reasons, shall not be deemed to constitute "specific subsidies," provided that such criteria are strictly adhered to.

Further, subsidies that are granted and limited to certain enterprises located within a designated geographical region shall be deemed specific, with the exception of the setting or changes of generally applicable tax rates. The AD Act requires that a determination as to whether there exists a specific subsidy must be directly substantiated on the basis of positive evidence.

12.6.11 Actionable Specific Subsidies

Subject to certain conditions as stipulated under the AD Act and Ministerial Regulations, the specific subsidies that are actionable include subsidies granted, in law or in fact, for exports; for domestic use over imported products; and those granted in a manner affecting the national interests.

However, specific subsidies granted by the Minister of Commerce in relation to assistance for research activities; assistance to disadvantaged regions; or assistance to promote compliance with laws, rules, and regulations concerning the enhancement and preservation of environmental quality, shall not be subject to the imposition of countervailing duties.

12.6.12 Subsidy Consultations/Remedies

Upon receiving a request from a representative acting on behalf the domestic industry, or upon receiving a proposal from the DFT to consider countervailing measures, the Committee notifies and invites the relevant country (country believed to be granting a subsidy to the product in question) for consultations.

If the existence of prohibited and actionable specific subsidies is determined, the DFT notifies the relevant country in order to enter into consultations and to seek settlement of the matter based upon the procedures set forth under the Agreement on Subsidies and Countervailing Measures of the WTO. The Committee shall determine countervailing measures as deemed appropriate and the consideration of countervailing measures is undertaken by imposing countervailing duties.

12.6.13 Calculation of Countervailing Duties for Subsidies

A countervailing duty shall be calculated on the basis of the benefits received during the time in which the subsidy existed and in terms of subsidization per unit of each subsidized product. A countervailing duty may be levied only to the extent necessary to remove injury and not exceeding the amount of the subsidy found to exist. In determining the benefits received, various rules apply as supplemented by rules and procedures stipulated in Ministerial Regulations. Such Ministerial Regulations may also be issued to deal specifically with any case.

12.6.14 Other Procedures Relevant to Subsidies

The procedures applicable to Anti-Dumping in relation to “export price,” “normal value,” “dumping margin,” “material injury,” “domestic industry,” “dumping proceedings,” “investigations,” “imposition of duties,” “period for duty imposition,” and “administrative/judicial reviews,” shall apply to subsidies *mutatis mutandis* except, among other things, that an agreement to cease subsidization between the exporter and the DFT shall also be subject to approval by the exporting country.

13. EXCHANGE CONTROL

13.1 General

The Bank of Thailand (“BOT”) administers the system of exchange controls for the Ministry of Finance.

The BOT has delegated authority to agents, including all commercial banks located in Thailand (commercial banks), to approve many commercial transactions. However, some transactions still require actual BOT approval. While permission is discretionary, approvals are normally given if reasonable grounds for remittance are given and the proper procedures are followed. In all matters involving foreign currency, currency inflows must be properly recorded, and contracts and other legal papers adequately documented.

The government implemented three rounds of foreign exchange deregulation, which took effect on 22 May 1990, 1 April 1991 and 1 May 1992. The deregulation was intended to make funds for international business transactions freely available and remove the requirement for prior BOT approval. Generally, foreign currency exchange transactions may now be processed through commercial banks.

13.2 Importing and Repatriating Personal Funds

13.2.1 Foreigners in Transit

There is no limit on the amount of foreign currency a foreigner, in transit, may bring into or take out of Thailand. There is no restriction on bringing Thai currency into Thailand, but BOT approval is required to take more than Baht 50,000 to other countries per trip or Baht 500,000 to neighboring countries and Vietnam per trip.

13.2.2 Residents

Residents may bring an unlimited amount of foreign currency into Thailand, but must sell it to a commercial bank and converted it into Baht or deposit it in a foreign currency deposit account opened with a commercial bank within seven days from the date of arrival.

Within certain limitations and under certain conditions, a commercial bank may sell foreign currency, but in doing so the bank must scrutinize why the purchaser wishes to purchase the foreign currency.

Transactions involving the purchase of immovable property or securities abroad require the permission of the BOT, except for the purchase of immovable property for residential purposes (not exceeding US\$ 500,000); whereby the purchaser may obtain approval from a commercial bank.

13.3 Exchange Control on Trading

13.3.1 Imports

Most payments for imports can be approved by commercial banks. The banks require that documents such as invoices, bills of collection and, where appropriate, import permits be submitted to ensure that the transaction is bona fide before approving the payments. To pay for imports, importers may make payments by either withdrawing the foreign currency from their own foreign currency deposit accounts at a commercial bank or by purchasing foreign currency from a commercial bank. Importers may now freely purchase foreign exchange from a commercial bank or draw foreign currency from their own foreign currency deposit account in an amount not exceeding the value of the goods imported.

Unless otherwise provided under exchange control regulations, any importation of goods above a certain value requires the importer to submit a bill of lading to the BOT through the Customs Department.

13.3.2 Exports

Exports are now free from exchange restrictions. However, export proceeds above a certain value must be obtained within 120 days and then sold to a commercial bank, converted into Baht, or deposited in a foreign currency deposit account at a commercial bank within 15 days from the date of acquisition. For any export of goods above a certain value, the exporter is required to submit a bill of lading to the BOT through the Customs Department, unless otherwise provided under exchange control regulations.

13.3.3 Foreign Currency Deposit Accounts

Foreign currency deposit accounts (“FCD’s”) may be opened by residents and non-residents at a commercial bank. Non-residents include branches or agents abroad of individuals residing in Thailand, but not branches or agents in Thailand of individuals residing abroad. Residents of Thailand include branch offices of foreign

companies in Thailand, foreign subsidiaries in Thailand and resident individuals. Deposits into a foreign currency deposit account may require BOT approval, unless certain conditions are met.

13.3.4 Non-Resident Baht Accounts

A non-resident may open a non-resident Baht account. Commercial banks can receive Baht into a non-resident Baht account where the money, which represents the exchange value of remitted foreign currency, is transferred from another non-resident account, or is in payment for goods, or is Baht converted from foreign currency upon withdrawal from a non-resident FCD. Baht withdrawals may be made in all cases.

13.4 Importing and Exporting Investment Funds

13.4.1 Importing

Remittances of funds into Thailand for investment and foreign loans are freely permitted. However, foreign exchange inflows in the form of capital and loans must be surrendered to commercial banks or deposited into a foreign currency deposit account within seven days of the date of importation.

13.4.2 Exporting

Repatriation of investment funds, dividends, and profits, as well as repayments and interest payments on loans, may now be freely made by submitting the relevant documentation to a commercial bank and, if the amount to be remitted is US\$ 20,000 or more, a foreign exchange transaction form must be submitted to the commercial bank for approval. However, certain cases require prior approval from the BOT by submitting a foreign exchange transaction form and relevant documents through a commercial bank.

The remittance of offshore loans into Thailand is not subject to any restriction, and repayment of principal and interest can be collected simply by purchasing foreign currency at any commercial bank. A commercial bank is authorized to approve such requests, upon presentation of a foreign exchange transaction form if the amount to be remitted is US\$ 20,000 or more.

A commercial bank may also grant approval for remittances for payments under sale and purchase agreements, hire of work or service agreements, and franchise and license agreements. However, if the amount to be remitted is US\$ 20,000 or more, a foreign exchange transaction form must be submitted to a commercial bank.

Securities, promissory notes, and bills of exchange may be sent abroad without restriction. Dividend payments to foreign shareholders may be processed and authorized by commercial banks, without limit, with the required supporting documents. In addition, commercial banks may also authorize the remittance of branch office profits to its head office and the remittance of capital upon terminating the business. Supporting documentation must be provided.

13.5 Exchange Control and Promoted Businesses

Under the Investment Promotion Act, foreign investments in promoted industries are accorded incentives and privileges, including a guarantee of repatriation of profits, dividends, interest and imported capital.

A promoted individual or investor in a promoted activity can be granted permission to remit or take out foreign currency relating to the return of capital and payment under loans and other contracts.

14. REAL ESTATE

14.1 Foreign Ownership of Land

The Land Code stipulates that foreigners may acquire land by virtue of the provisions of a treaty giving the right to own immovable property, subject to the provisions of the Land Code and, subject to limitations on rights over land for religious purposes, foreigners may acquire land for residence, commerce, industry, agriculture, burial, public charity, or religion under the conditions and procedures prescribed in ministerial regulations and with the permission of the Minister.

Although the Land Code permits non-Thai individuals or companies to own land by virtue of treaty provisions or with ministerial permission, government policy generally does not allow foreigners to own land. Foreigners may now own up to one rai (1,600 square meters) of land for residential use, subject to the permission from the Ministry of the Interior and Ministerial Regulations. Foreign land ownership exceptions are made for businesses with Board of Investment promotion privileges, oil concessions under the Petroleum Act, and businesses located in certain industrial estates, with respect to areas of land needed to conduct the business in question.

It is possible for a company with non-Thai shareholders to own land, provided that not more than 49% of the company is owned by foreigners. Significant penalties may be imposed on any person found to have acquired land as an agent of a foreign person or company. These penalties include a fine not exceeding Baht 20,000 up to two years' imprisonment or both. The same penalties also apply to the foreign individual or the directors of a foreign company that purchase land through the agency of a Thai national.

14.2 Foreign Ownership of Condominiums

Foreigners may own up to 49% of a condominium or up to 100% of a condominium located on a plot of common land not larger than five rai subject to certain ministerial regulations.

With certain exceptions relating to persons with resident status and companies meeting certain conditions, the Condominium Act B.E. 2535 (1992) stipulates that a foreign individual or juristic person wishing to purchase a condominium must remit foreign currency into the country (or withdraw Baht or any foreign currency from

their non-resident account) in an amount not less than the condominium price. Proof of these remittances must be shown to the Land Department at the time of the registration of the transfer of ownership of the condominium unit(s).

When considering the purchase of land, a title search should be carried out at the relevant land office and particular care should be given to verification and examination of the site, its appropriateness for the intended use, availability of utilities, zoning restrictions, and obligations of the purchaser to withhold income tax from, or to pay other taxes on, the sale price.

14.3 Alternatives to Land Ownership for Foreigners

Given the restrictions on the outright ownership of land, foreigners sometimes employ alternative forms of land or building tenure. Forms such as lease, and the Roman law concepts of usufruct or superficies are provided for in the Civil and Commercial Code (“CCC”). Unlike the Land Code, the CCC does not distinguish between foreigners and Thai nationals.

14.3.1 Leases

A lease allows the use of land and buildings for a maximum term of 30 years. In order to be enforceable, any lease for a period of longer than three years must be registered, which involves payment of a registration fee and stamp duty based on a percentage of the rental fee for the whole lease term. The original registered lease remains in full force and effect with respect to the property, even if there is a change in ownership of the land. The parties can contractually agree to renewals, but this right cannot be registered and is not effective against a purchaser of the property.

The lessee can only use the property for the purposes stated in the lease and cannot sublease, sell, transfer interest in, modify, or improve the property without the lessor’s permission.

14.3.2 Usufruct Interest

A usufruct interest gives temporary ownership rights to things on or arising from the land, and the right to enjoy the product of the land, such as crops from a field or rock from a quarry, but does not give ownership in the land itself. In practice, a usufruct is limited to a 30-year maximum period. Similar to leases, the agreement can be successively renewed. In contrast to a lease, a usufructuary interest can be sold or transferred, although it expires upon the death of the holder and therefore cannot be

inherited. Any use is allowed (except destruction) without the land owner's permission. The usufructuary is responsible for routine maintenance and must insure the property for the benefit of the owner. If the property is destroyed, then the usufruct extinguishes. However, the usufruct will be revived to the extent to which the owner restores the land. Upon its return to the owner, the property must be substantially unaltered from its original condition.

14.3.3 Superficies

A superficies is similar to a usufruct, but provides more security for the interests of the holder of the rights. A superficiary has the right to own, on or under the land, buildings, structures or plantations, but not the land itself. A renewable 30-year maximum term applies. Unlike a usufruct, a superficies is both transferable and transmissible by way of inheritance. Further, a superficies is not extinguished by the destruction of the buildings, structures or plantations. The superficiary has the right to remove the buildings, structures or plantations upon the expiry of the superficies, provided the owner of the land is first given the opportunity to purchase them at market value. As with a usufruct, the land must be restored to its former condition prior to it being returned to the owner.

14.4 Leasing Immovable Property for Industrial and Commercial Purposes

The nature and needs of a given business determine which of the various tenures is most appropriate for a foreign enterprise. In addition, the Act on the Leasing of Immovable Property for Industrial and Commercial Purposes allows the leasing of immovable property for a period of more than 30 years, but not more than 50 years, provided that the lease is for industrial or commercial purposes. Such a lease is also subject to certain conditions, which are prescribed in ministerial regulations.

APPENDIX A

Schedule of Businesses Restricted or Prohibited to Foreigners

Schedule One

Businesses that foreigners are not permitted to operate for special reasons:

- Newspaper, radio, and television businesses;
- Lowland farming, upland farming, and horticulture;
- Animal husbandry;
- Forestry and timber conversions from natural forest;
- Fishing for any form of aquatic animal in Thai waters or Thailand's Exclusive Economic Zone;
- Extraction of Thai medicinal herbs;
- Trade in and auctioning of Thai ancient objects or objects of national historical value;
- Making or casting Buddha images and making monk's bowls; and
- Dealing in land.

Schedule Two

Businesses that affect national security or safety:

- Domestic transport by land, water, or air (inclusive of domestic aviation);
- Production, disposal, sale, or overhaul of firearms, ammunition, gunpowder, or explosives;
- Production, disposal, sale, or overhaul of components of fire-arms, ammunition, or explosives;
- Production, disposal, sale, or overhaul of armaments or military vessels, aircraft, or conveyances; and
- Production, disposal, sale, or overhaul of any kind of war equipment or components of war equipment.

Businesses that affect art, culture, customs, and native manufacture/handicrafts:

- Dealing in Thai antiques, objects of art, or handicrafts;
- Production of wood carvings;
- Raising silkworms, producing Thai silk thread, or weaving or printing patterns on Thai silk textiles;
- Production of Thai musical instruments;
- Production of articles of gold or silver, nielloware, nickel-bronze ware, or lacquer ware; and
- Production of crockery and terra cotta ware that may be regarded as a form of Thai art.

Businesses that have an impact on natural resources or the environment:

- Production of sugar from sugarcane;
- Salt farming, inclusive of extracting salt from saline soil;
- Making rock salt;
- Mining, inclusive of stone blasting or crushing; and
- Converting timber to make furniture or articles of wood.

Schedule Three

Businesses with respect to which Thais are not yet prepared to compete with foreigners on equal footing:

- Rice-milling or producing flour from rice or farm plants;
- Fishery, limited to propagating aquatic animals;
- Forestry from replanted forests;
- Production of plywood, wood veneer, chipboard or hardboard;
- Production of (natural) lime;
- Accounting service undertakings;
- Legal service undertakings;
- Architectural service undertakings;
- Engineering service undertakings;

- Construction, except (a) construction of things that provide basic services to the public with respect to public utilities or communications and which require the use of special instruments, machinery, technology, or expertise in construction and a minimum capital of the foreigner of at least Baht 500 million; (b) other categories of construction as stipulated in Ministerial Regulations.
- Brokerage and agency undertakings, except (a) trading in securities or services concerning futures trading in agricultural commodities, financial instruments or securities; (b) trading or procuring goods or services needed for production by, or providing the services of, an enterprise in the same group; (c) trading, purchasing for others, distributing, or finding domestic or overseas markets in which to sell goods made domestically or imports as an international trading business, with a minimum foreign capital investment of at least Baht 100 million; and (d) other lines of business stipulated in Ministerial Regulations.
- Auctioning, except, (a) international bidding that does not involve antiques or Thai art works, handicrafts, or objects of national historical value; and (b) other types of auction as stipulated in Ministerial Regulations.
- Domestic trading of indigenous agricultural produce or products not prohibited by any present law;
- Retail trading of any goods with an aggregated minimum capital of less than Baht 100 million or a minimum capital for each store of less than Baht 20 million;
- Wholesale trading of any goods with a minimum capital for each store of less than Baht 100 million;
- Advertising undertakings;
- Hotel undertakings, except for hotel management services;
- Tourism;
- Selling food or beverages;
- Breeding, propagating, or improving plants; and
- Doing other service businesses except for service businesses prescribed in Ministerial Regulations.

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