Protectionism Past, Present and Future: Addressing the Legal Issues of Foreign Investment Treatment in Thailand

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Abstract

The aim of this paper is to discuss and critically analyze the legal hurdles posed by Thailand's Foreign Business Act B.E. 2542 (A.D. 1999) in the light of the relevant international legal framework. The first part of the paper reviews the three lists of business activities which are regulated under the Foreign Business Act and outlines the types of activities in which foreign participation is restricted or prohibited. It points out the several conditions that a foreigner must fulfill in order to operate a business in Thailand if the business activity falls under the scope of the Foreign Business Act B.E. 2542 (A.D. 1999).

The second part of the paper discusses the engagements of Thailand in a number of international agreements which grant special exemptions to the Foreign Business Act with particular focus on the key legal issues related to the Treaty of Amity and Economic Relations between Thailand and the United States, the ASEAN Framework Agreement on Services and the ASEAN Comprehensive Investment Agreement.

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The third part of the paper looks at some of the practical issues which arise when foreign investors design preference share structures which are believed to be in compliance with the requirements of the Foreign Business Act and the Civil and Commercial Code. More precisely, it focuses on the three most common share structures (i.e. nominee shareholding, preference shareholders schemes and super minority quorum rules) and suggests that the preference share scheme appear to provide a perfect combination between Thai ownership and foreign control of the business activity.

As there are high chances that new protectionist measures will be adopted in a near future, the last part of the paper assesses the effects that these amendments may have on existing Thai registered juristic persons with foreign participation and control as well as their impacts on international treaties.

Keywords: Foreign Business Act, Treaty of Amity and Economic Relations between Thailand and the United States, Nominee Shareholding, Preference Shareholders, Super Minority Quorum.

1. Introduction

Since the significant modification of economic policy to export promotion in 1972, Thailand's trade policy has always been open and outward-oriented, an essential tool to achieve developmental goals as set by the government.[3] Despite the main economic crisis in 1997, a trade-oriented reform policy has been continuously renewed during the last past few decades.[4] Important steps have been taken to integrate Thailand more into the global economy in order to reduce investment barriers and promote economic growth. Although the beginning has been made, much more remains to be done to attract foreign capital and create adequate market competition. In this context, an essential aspect to be considered is the regulation of foreign ownership and its impact on economic growth.

The objective of this article is to consider and discuss the current legislation regulating the operation of a foreign-owned business in Thailand after the financial crisis of 1997. Section I of the paper provides a review of the prohibited and controlled business activities under the Foreign Business Act B.E. 2542 (A.D. 1999) (FBA). The FBA prescribes a wide range of business, commercial and industrial activities that may not be carried out by "foreigners" unless a relevant licence has been obtained or an exemption applies. Section II of the paper review and evaluate international agreements which grant special exemptions to the FBA. The most significant of these agreements is the Treaty of Amity and Economic Relations between Thailand and the United States (AER). Emphasis is also placed on the role of the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Comprehensive Investment Agreement (ACIA) in promoting free regional trade.

Section III of the paper is directed at assessing the inadequacy of the current legal framework and argues that Thailand should open up business sectors, in particular the services sector. It discusses how foreign investors often design share structures which are wrongly believed to be in compliance with the requirements of the Foreign Business Act and the Civil and Commercial Code. It explains that the nominee shareholding is an increasingly challenging problem in Thailand and has been the object of several investigations. It suggests that if the investors intend to depart from the general rule of

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[3] Pawin Talerngsri and Pimchanok Vonkhorporn, "Trade Policy in Thailand: Pursuing a Dual Track Approach," *ASEAN Economic Bulletin*, (2005): 60-74.

[4] Ibid.

equality of shares, they can distinguish between common shares (also known as ordinary shares) and preference shares. Also, a viable alternative to the preference shareholders scheme is represented by the super minority scheme which may be constituted by fixing a greater-than-majority shareholder's or director's quorum (or voting rights) in order to give foreign minority participants a veto power. This means that a shareholder can choose to exercise his veto over any decisions other shareholders or directors might want to make.

As there are high chances that new protectionist measures will be adopted in a near future, Section IV consider the effects that these amendments may have on existing Thai registered juristic persons with foreign participation and control as well as their impacts on international treaties.

2. Review of the Prohibited and controlled Business Activities under the Foreign Business Act

The operation of a foreign-owned business in Thailand is mainly regulated by the Foreign Business Act B.E. 2542 (1999) (FBA) which came into force on 4 March 2000 replacing the 1972 Alien Business Act.[5] The previous law, in fact, had been in force for a long period of time and some of its regulations were not appropriate for the current economic and investment situation. [6] The main objective of the FBA is to regulate most investment activity by non-Thai nationals and open limited additional business sectors to foreign investments.[7] "Foreigner" is defined under Section 4 of the FBA and applies both to natural persons and juristic persons. Specifically, with regard to natural persons, a foreigner

[5] Before the enactment of the Alien Business Act BE 2515 (National Executive Council Announcement No. 281) in 1972, foreigners were permitted to carry business in Thailand with few restrictions. The Alien Business Act was adopted as part of an export-push trade strategy of the Thai government during 1972 to 1992. This export oriented policy was conducted because of the balance of payments issues that Thailand faced during 1960s. These issues were the result of a significant increase in the importation of electronic products and raw materials. Therefore, the Alien Business Act did not contain any limitation in terms of foreign equity ownership but it significantly limited foreign investments in non-tradable sectors. On this point see Sudarat Ananchotikul, *Does Foreign Investment Really Improve Corporate Governance? Evidence from Thailand* (Berkeley: University of California, 2007), 4.

[6] Dennis Campbell, *Comparative Law Yearbook of International Business Cumulative Index*, vol. 25 (The Hague: Kluwer Law International, 2006), 398-402.

[7] Ibp Inc, *Thailand: Doing Business and Investing in Thailand Guide, Volume 1 Strategic, Practical Information and Contacts* (Washington, DC: Int'l Business Publications, 2012), 104.

is defined as a person who is not a citizen of Thailand. In case of juristic persons, a foreigner indicates a juristic entity that is not registered in Thailand or registered in Thailand but with foreign shareholding, accounting for at least half of the total number or value of shares. Also, a limited partnership or registered ordinary partnership whose managing partner or manager is a foreigner is considered as a foreigner.[8] Section 8 of the FBA contains three lists of regulated activities in which foreign participation may be restricted and provides several conditions that a foreigner must fulfill in order to operate a business in Thailand if the business activity falls under the scope of the FBA. Some business activities require authorization before commencing operations; others are entirely prohibited to foreigners.[9]

As a general rule, it is possible to say that the vast majority of manufacturing for export activities are open to complete foreign ownership while in contrast, all service businesses are limited to 49% foreign ownership under the FBA or industry-specific legislation, unless a licence for majority foreign ownership is successfully obtained.[10]

2.1 List one

Foreigners cannot engage in any of the nine business categories mentioned in List one. Business categories under List one are businesses involving national media, land, historic, religious, agricultural, forestry, and natural resources. For example, a foreign company cannot broadcast radio and television programs, publish newspapers, or trade in Thai national historical objects.

2.2 List two

With regard to the business activities that are covered by List two, foreigners require a license from the Minister of Commerce and approval from the Cabinet. This includes 13 business activities related to national safety and security; art, culture, tradition, and folk handicraft; and natural resources or the environment. A foreigner, for example, is not entitled to produce explosives, sell firearms, produce Thai silk yarn, or manufacture sugar from sugarcane.

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[8] Alessandro Stasi, *Principles of Thai Business Law* (Singapore: Cengage, 2015), 263-267.

[9] Ibid..

[10] Stephen Frost, "Bangkok International Associates Thailand's Foreign Business Act - Will It Ever Change?," last modified 2013, accessed April 28 2017, http://www.bia.co.th/legalupdates2013.html

In addition, foreigners are allowed to operate the activities under List two only if Thai nationals or Thai juristic persons hold at least 40% of the shares. The Minister with the approval of the Council of Ministers, however, may reduce this percentage if there is a reasonable cause (Section 15, FBA).

2.3 List three

List three includes twenty-one business activities in which Thai nationals are not yet ready to compete with foreigners. Thus, foreigners require a license from the Director-General of the Commercial Registration Department of the Ministry of Commerce (Ministry of Commerce) and approval from the Foreign Business Board. These activities include sale of food, sale of beverages, wholesale, retail, hotel business, service businesses.[11] construction, and others.

This list represents a veritable barrier to the free trade and inhibits private international financial investment. It must be pointed out that in 2013, the Ministry of Commerce issued a Ministerial Regulation removing certain categories of business activities that were under the scope of the FBA. Under the Ministerial Regulation, foreign individuals and companies will no longer need a FBA license to conduct certain service businesses in Thailand that were regulated under List Three of the FBA, including securities dealing, investment advisory services, securities underwriting, securities borrowing and lending and related business activities under the Securities and Exchange Act, trustee business under the Trust for Transactions in Capital Market Act, derivatives dealer, derivatives advisor and derivatives capital manager according to the Derivatives Act. Although these restrictions have been removed and foreign investors are now entitled to engage in the abovementioned business activities without obtaining a Foreign Business License as in the past, this does not mean that full liberalization has been achieved in these sectors. In fact, all these service businesses still require a license to operate according the Derivatives Act Securities, Exchange Commission Act and other securities legislation.

[11] It must also be pointed out that intragroup support services of multinational companies such as common facility sharing of office spaces or cross-affiliate employee arrangements to support business operations of the affiliates is prohibited under the FBA since these types of activities are considered to be “service business” under the List Three annexed of the FBA. Since 1999, the Ministry of Commerce has issued a number of rulings as to define in which case foreign entities are prohibited from providing these types of intragroup services. Sukontharat Nobnom, “What Management Should Know,” *The Nation*, August 4, 2016, accessed January 8, 2017. http://www.nationmultimedia.com/news/business/EconomyAndTourism/30292078(7)

It is important to note that if the business activity is not listed under the FBA, this means that it can be carried out by foreigners without applying to the Ministry of Commerce for a foreign business license. Besides, it is possible to set up business activities mentioned under List two and three without a license, in cases where the business of a foreigner is promoted under the Investment Promotion Act or is permitted in writing to operate the industry or trade for export under the law governing the Industrial Estate Authority of Thailand or other laws (Section 12, FBA).

Apart from the FBA, business activities may be subject to special laws that prevent a non-national from engaging in specific sectors, such as banking, insurance, land, and telecommunications as provided by the Land Code B.E. 2497 (1954), Condominium Act, B.E. 2522 (1979), Life Insurance Act B.E. 2535 (1992), the Non-Life Insurance Act B.E. 2535 (1992), Telecommunications Business Act B.E. 2549 (2006) and the Financial Institution Business Act B.E. 2551 (2008), among others.

3. Special Privileges Granted under International Agreements

There are a number of international agreements which grant special exemptions to the FBA. The most significant of these agreements are the Treaty of Amity and Economic Relations between Thailand and the United States (AER), the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Comprehensive Investment Agreement (ACIA).

3.1 The Treaty of Amity and Economic Relations between Thailand and the United States

The Treaty of Amity and Economic Relations between Thailand and the United States grants special rights to Thai companies-businesses in the U.S. as well as American companies-businesses in Thailand. Under the Treaty, American citizens and businesses incorporated in the US have the right to maintain a majority shareholding or to own 100% of any category of business in Thailand, except for seven particular sectors including communications, transportation, fiduciary functions, banking involving depository functions, exploitation of land & natural resources, land ownership, domestic trade in indigenous

agricultural products.[12] It follows that American investors are entitled to engage in business on the same basis as would a Thai investor whilst all other nationalities are subject to the more onerous restrictions of the FBA. Whilst List three of the FBA establishes that the businesses listed are those in which "Thais are not yet ready to compete", in fact, Thais have been competing with American investors in all these sectors since 1966; thus such a declaration cannot be reconciled with preferential rights granted to one nationality only.[13] Despite several attempts to replace the AER between Thailand and the United States with a new Thai-US Free Trade Agreement, no accord has been signed as yet.

3.2 The ASEAN Framework Agreement on Services

An important part of the ASEAN Economic Community (AEC) Blueprint towards a single market and production base is the 'free flow of services' in the member countries. In order to support this objective, ASEAN has introduced two agreements: the ASEAN Framework Agreement on Services (AFAS)[14] and the ASEAN Comprehensive Investment Agreement (ACIA).[15]

AFAS promotes liberalization of FDI in services and operates through a positive-list framework similar to the General Agreement on Trade in Services (GATS) under the World Trade Organization, which clearly lists sectors to be opened.[16] AFAS aims to enhance

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[12] Michael R. Reading, "The Bilateral Investment Treaty in Asean: A Comparative Analysis," *Duke Law Journal* 42, no. 3 (1992): 679-705.

[13] Frost, "Bangkok International Associates Thailand's Foreign Business Act - Will It Ever Change?".

[14] Association of Southeast Asian Nations, "ASEAN Framework Agreement on Services" last modified 15 December, 1995, accessed April 28 2017, http://asean.org/news/item/asean-framework-agreement-on-services

[15] Association of Southeast Asian Nations, "ASEAN Comprehensive Investment Agreement," last modified February 20, 2009, accessed April 28 2017, http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf

[16] On this point it is interesting to point out that Findlay, Stephenson, and Prieto analyze the application of negative and positive lists in international agreements and argue that "agreements based on a negative listing provide information in a transparent form on the existing barriers to trade in services, thus giving service providers precise knowledge of foreign markets. In agreements based on positive listing the sectoral coverage of commitments, as well as the type and comprehensiveness of information provided on the commitments may vary significantly between the members. Neither modality guarantees open markets. The establishment of an agreement might be easier using a positive list approach, because of the degree of flexibility and options it provides to participants in the negotiating process. But once in place, our expectation is that the negative list is the superior method for carrying out liberalization because of the higher degree of transparency and lower level of uncertainty that it provides." Christopher FindlaySherry Stephenson and Francisco Javier Prieto, "Services in Regional Trading Arrangements," in *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer, 2005), 1888-1907.

cooperation in services amongst Member States in order to improve the efficiency and competitiveness, diversify production capacity, and supply and distribution of services of their service suppliers within and outside ASEAN (Article 1, paragraph 1, letter a). In other words, it focuses on removing discrimination against foreign service suppliers, for example through limits on market entry, or limits on the scope and nature of operations after entry, and targets specific barriers to market access.[17] According to Article 2, paragraph 2, Member States have to strengthen and enhance existing cooperation efforts in service sectors and develop cooperation in sectors that are not covered by existing cooperation arrangements, through inter alia: (a) establishing or improving infrastructural facilities; (b) joint production, marketing and purchasing arrangements; (c) research and development; and (d) exchange of information.

Under the AFAS, a foreign-majority owned juristic person established in Thailand is entitled to conduct business activities after a Foreign Business Operation Certificate has been granted.[18] Specifically, if the shareholder is a natural person, he must be a citizen of Brunei Darussalam, Cambodia, Indonesia, Malaysia, Laos, Myanmar, Philippines, Singapore or Vietnam. In contrast, if the shareholder is a juristic person, it must meet the following requirements: (a) it must be incorporated in one of the ASEAN member states; (b) more than 50% of the capital must be held by ASEAN nationals; and (c) the majority of the directors must be ASEAN nationals.

In general terms, the lists under the AFAS and the ACIA open ASEAN ownership to 51% or 70% of the total shares in the locally incorporated entity. These lists include construction and other engineering services (e.g. construction of buildings, industrial plants, mines, harbors), professional services (e.g. accounting services for companies, legal services, international law advice, architectural services), computers and related services (e.g. hardware, database and software consultancy services, data processing

[17] The World Bank, "East Asia and Pacific Economic Update April 2014: Preserving Stability and Promoting Growth," last modified April 7, 2014, accessed April 28 2017, http://documents.worldbank.org/curated/en/256651468248662652/East-Asia-Pacific-economic-update-April-2014-preserving-stability-and-promoting-growth

[18] The issuance of a foreign business operation certificate is made upon notification of the applicant to the General Director of the Commercial Registration Department and the Ministry of Commerce. Within 30 days from the date of the application, the applicant will receive the certificate from the General Director of the Commercial Registration Department.

services, and maintenance of office equipment), real estate services (e.g. condominium management services), leasing services (e.g. space transport lease service, computer server lease service, leasing services concerning furniture), tourism services (e.g. theme park, tourist information services, hotel business which offers 6 star or superior deluxe hotel), and other business services including interpretation and interpretation services, sale of services related to management consulting, marketing research services, sale of advertisement space on the internet, administration consulting services.

3.3 The ASEAN Comprehensive Investment Agreement

The ASEAN Comprehensive Investment Agreement (ACIA) is an ASEAN instrument that aims to promote liberalization of FDI in goods through a negative-list approach and enhance the competitiveness of the ASEAN as an open investment.[19] ASEAN Ministers signed the ACIA in Cha-Am, Thailand, on 26 February 2009 (although it did not take force until 29 March 2012) with a view to creating a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the AEC in accordance with the AEC Blueprint. Under the ACIA, member countries select the sectors they intend to keep closed and specify the levels of liberalization they intend to achieve in all those sectors not on the list. The progressive reduction or elimination of reservations is detailed in the "Strategic Schedule" of ASEAN Economic Community (AEC) and is achieved over three phases (2008–2010, 2011–2013, and 2014–2015).

ACIA consists of five main programs covering the 'five pillars of investment', namely, liberalization, protection, facilitation, promotion, and cooperation. In addition to the five pillars, the ACIA also contains new provisions which aim to encourage investors who are not yet in ASEAN to do business in the region. As established in the ACIA agreement, "investor" means a natural person of a Member State or a juridical person of a Member State that is making, or has made an investment in the territory of any other Member State (Article 4). It follows that a person can be considered as an ASEAN investor as long as he establishes a juridical entity in one of the ASEAN countries even though the person comes from a non-ASEAN country.[20]

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[19] The negative-list approach is an effective way of promoting free trade as it identifies specific business sectors that are restricted for investment. It follows that everything is liberalized unless otherwise specified.

[20] Nanda Nurridzki, *Learning from the Asean+ 1 Model and the Acia* (Indonesia: ERIA, 2015), 4.

As regards the subject matter, the ACIA is expected to remove three types of restrictions: foreign ownership restrictions, national treatment, and inflows of key foreign managerial and senior management personnel.[21] It covers the following sectors: manufacturing, agriculture, fishery, forestry, the mining and quarrying sectors, and all services incidental to these sectors as well as any other sectors may be agreed upon by all Member States. Conversely, Article 4 of the agreement states that it does not apply to any taxation measures, subsidies or grants provided by a Member State, government procurement, services supplied in the exercise of governmental authority by the relevant body or authority of a Member State, and measures adopted or maintained by a Member State affecting trade in services under the AFAS.

4. The Boundaries of Legality: The Struggles for Effective Legal Control

It happens often in Thailand that foreign investors design preference share structures which are wrongly believed to be in compliance with the requirements of the Foreign Business Act and the Civil and Commercial Code. The most common share structures are three: nominee shareholding, preference shareholders schemes and super minority quorum rules.

4.1 The practice of Thai nominee shareholding

Nominee shareholding is an increasingly challenging problem in Thailand and has been the object of several investigations. In fact, many foreign investors prefer to adopt the simple but illegal practice of nominee shareholders in order to establish a regulated business activity in the country.

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[21] The World Bank, "East Asia and Pacific Economic Update April 2014: Preserving Stability and Promoting Growth," last modified April 7, 2014, accessed April 28 2017, http://documents.worldbank.org/curated/en/256651468248662652/East-Asia-Pacific-economic-update-April-2014-preserving-stability-and-promoting-growth

A nominee shareholder with Thai nationality may be a natural person or a juristic person with 51% or more of its capital owned by a Thai citizen or a company with 51% or more of its capital owned by Thais or a Thai company. The nominee is defined as a person who holds shares in his own name on behalf of another person who is not the registered holder but beneficial owner of the shares. Therefore, a nominee shareholder is a shareholder in name only. In reality, it is the beneficiary who has the effective ownership and control of the shares. The purpose of the nominee shareholder is to shield the foreign owner of the Thai company from being recognized as the real shareholder of that particular company.

In Thailand, foreign investors sometime use this technique to operate their business activity within the country in breach of the provisions of the Foreign Business Act to avoid the limitations associated with being legally classified as a "foreign company".[22] In fact, many companies in Thailand offer to supply Thai nominee shareholders. Under these types of arrangements, the nominee shareholder and the true owner stipulate a secret and concealed agreement stating that the nominee shareholder holds the shares in name only, and that the true owner will retain all rights of ownership and control of the shares (e.g. voting rights, rights to transfer, and rights to receive dividends).[23]

This investment scheme, however, is strictly forbidden under Thai law since it creates an illegal imbalance between profit sharing rights, voting powers and voting interests between the Thai and foreign shareholders. The FBA provides severe sanctions for Thai citizens who act as nominees as well as for foreigners who use Thais nominees to set up a business activity in Thailand. More precisely, under Section 36 of the FBA, any Thai national or juristic person who illegally hold shares for a foreigner to enable the operation of a foreigner's business is liable to imprisonment for a term not exceeding three years or to a fine of one hundred thousand Baht to one million Baht or to both. This may be the case of a Thai national who operates a business jointly with a foreigner in the manner holding it out as the former's sole business or who acts as a foreigner's nominee in holding shares in a limited company with a view to enabling the foreigner to operate

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[22] Albert Vincent Y. Yu Chang and Andrew Thorson, eds., *A Legal Guide to Doing Business in the Asia-Pacific* (Chicago: American Bar Association, 2010), 417.

[23] Ibid., 418.

the business in violation of the provisions of the FBA.[24]

Furthermore, in the absence of an appropriate legal tool for the protection of the foreign minority shareholder, a foreign investor who uses a Thai nominee may face several problems in managing and controlling the company. It may happen, for instance, that the foreign investor loses the management control over the company despite the fact that he provides all the necessary funds to establish the company. In fact, the Thai shareholders may control voting rights in shareholder's meeting given the fact that they have the majority ownership of the company in spite of the fact that all funds have been invested by the foreign shareholders.[25]

In order to balance these risks which may arise in the future of the company, there are several mechanisms which foreigners illegally use to control the company. In many cases, foreigners ask the nominee to sign an undated share transfer document which allows the foreigner owner to change the nominee shareholder at any time. For example, if a nominee shareholder dies, then a new shareholder easily takes over by using and dating the share transfer document. The transfer of shares has the full effect against the company and third parties only when it is recoded in the register of the shareholders. The transferor is considered to be the holder of the shares until the details of the transaction are recorded in the register of shareholders.[26]

Usually, foreigners ask the Thai nominee to sign proxy document which appoint the foreigner himself to attend general meetings and vote on his behalf in order to get full control the company. It may also be decided in the Articles of Association that all decisions must be signed by the sole managing director which is represented by the foreigner shareholder.

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[24] Also, the list of shareholders is not considered to be unique and exclusive proof that the shareholders are the real owners. In the decisions No. 10274/2551 and No. 6735/2548, the Thai Supreme Court has stated that "In order to prove the real identity of the actual owners of the company, the Court admits as evidence the proof of the source of the funds which purchased the shares".

[25] In the case that this illegal mechanism is torn down, the foreign shareholder may be precluded from asserting his rights in court.

[26] Under the Thai Civil and Commercial Code, shares are treated as property and cannot be left without an owner.

4.2 Preference shareholders schemes

Under Thai company law, the ownership of a limited company is divided into equal parts called shares and each share entitles the holder to the same voting rights, dividends, and liquidation rights in the event of winding up, dissolution, or liquidation of the affairs of the company. If the initial investors of the company intend to depart from the general rule of equality of shares, they have the right to distinguish between common shares (also known as ordinary shares) and preference shares. According to Section 1108 of the Civil and Commercial Code, the statutory meeting of the company has the right to fix the number of preference shares to be issued, and the nature and extent of the preferential rights accruing to them. This investment right is used to protect foreign investors by giving the foreign shareholder a greater voting right in the shareholders' meeting of the company and by limiting the Thai shareholders' voting rights in the meeting. Once the statutory meeting of the company has decided to differentiate common shares from preference shares, the preferential right(s) attributed to preference shares cannot be altered subsequently (Section 1142, Civil and Commercial Code).

As a general rule, holders of common shares are typically entitled to one voting right per share and have the right to receive dividends and company benefits in the case of liquidation. Preferences shares, in contrast, are treated as "golden shares" which give to their holders a higher ranking than common shares. Holders of preferences shares, in fact, are entitled to preference voting rights as well as preferential rights to the dividends. According to this investment scheme, the 49% of the shares hold by foreigners (i.e. minority shareholdings) may be registered as preference shares in the memorandum of association and may provide 10 votes per share, so that the 51% Thai shareholding is a de facto minority.

This investment scheme, however, has a number of negative aspects and does not represent a viable solution in the long-run. This scheme may be considered to be against the FBA if the preference shareholders appear to have advantages without almost any disadvantages. It seems unusual from a commercial perspective to have the preference voting rights in favor of foreign investors and direct all dividends to the foreign shareholders.

Therefore, Thai shareholders may be considered as acting as nominees of the company.[27] Based on the considerations mentioned above, many foreign investors are advised to set up a reverse preference share scheme with Thai preference shares where the Thai shareholders own 51% preference shares and the foreign shareholders hold 49% of common shares: ordinary shareholders have 1 vote per 1 share while preference shareholders have 1 vote per 10 shares. Accordingly, the corporate documents and the statutory meeting must provide that preference shares have a priority claim over ordinary shares for the company to pay preference dividends before ordinary dividends are paid. This preference share scheme appear to provide a perfect combination between Thai ownership and foreign control of the business activity.[28]

4.3 Super minority quorum and voting rules

A viable alternative to the preference shareholders scheme is represented by the super minority scheme. This is defined through the Articles of Association by fixing a greater-than-majority shareholder's or director's quorum (or voting rights) in order to give foreign minority participants a veto power. This means that a shareholder can choose to exercise his veto over any decisions other shareholders or directors might want to make.

Under a "superminority" quorum rule, more than a majority of the shareholders must be present (or represented) at a meeting in order for the quorum to be met while under a "superminority" voting rule, more than a majority of the shareholders must vote at a meeting. For instance, a 65% shareholder's vote at meetings may be necessary to approve particular matters such as authorizing new series of shares appointing officers, decreasing the number of directors on the board, fixing dividends, or voting mergers. Or, it can exist for all matters coming before the shareholders or directors, though this risks deadlock.[29]

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[27] In the Shin corporation case, for example, the Business Development Department of the Ministry of Commerce stated that "it does not make any sense from a commercial perspective, for the Thai investors who actually owned the majority shares to agree to accept less voting rights and dividends than foreign shareholders."

[28] However, with the foreigners having a greater voting right through ordinary shares, a resolution by a shareholders' meeting to pay dividends will probably not arise.

[29] Lewis D. Solomon and Alan R. Palmiter, *Corporations: Examples and Explanations* (New York: Aspen Publishers, 2009), 506.

Superminority quorum and voting rules also play an anticircumvention role by safeguarding crafted minority rights. For example, if the Articles of Association of a company provide a five-person board and cumulative voting—thus ensuring board representation for any 17% shareholder—the Articles should also require an 84% vote for any charter modification otherwise the promise of board representation for a minority shareholder (with more than 17% shares) could be circumvented by a simple majority-approved charter amendment.[30] The Articles of Association usually also provide for a special shareholder quorum in order to modify a superminority voting rule and the managing director's powers; for instance, a 65% shareholder vote may be required to modify a 65% shareholder voting rule. In these cases, bylaws can only be changed if a specific shareholder quorum is met.

5. Future challenges of the Thailand's Foreign Business Act: policy and legal conjectures

In recent years, lawmakers have made several attempts to modify the FBA and supplement the existing foreign shareholding test with a foreign control test in order to close the loophole which allows foreign investors to use preference share schemes in order to gain control of Thai companies despite not having the majority shareholding. In 2007, the Ministry of Commerce proposed an amendment to the FBA, but it was not approved by the Council of State before the assembly was dissolved and it did not become the law. They tried and failed again in late 2014 when the government declared that it intended to extend the definition of 'foreign company' in order to include any company where foreigners have a majority of the voting rights. More precisely, Section 3 of the 2014 draft aimed to modify the definition of "foreigner" in Section 4 of FBA in order to include any juristic person having "half or more of the total capital shares ... or ... investing with a value of half or more than half of the total capital ... or ... having legal authority or the regulation or the settlement for half or more than half of the voting powers controlled, held or exercised by a foreign natural person or juristic person whether in application of the law, or of the Articles of Association of said juristic person or through an agreement." This would have applied without regard to whether foreign shareholders controlled

[30] Ibid., 507.

the majority of the votes through shareholder contracts, preference shares or by using Thai proxies to operate on their behalf. As a direct consequence of this proposal modification of the law, a high number of foreign juristic persons that are currently considered to be Thai juristic persons would be considered as foreign juristic entities under the new section 4 of the Act.

After opposition was expressed, this amendment draft was then withdrawn. On Wednesday 3 December 2014, Prime Minister General Prayuth Chan-ocha told the Joint Foreign Chamber of Commerce that "the FBA will be left untouched for now, and any potential future change will be for the better".[31] This statement alleviated foreign investors' concerns regarding future moves of the government to revise the FBA.

It must be noticed, however, that the possibility of these protectionist measures being adopted in a near future is relatively high. Thus, it is important to consider the effects that these amendments may have on existing Thai registered juristic persons with foreign participation and control as well as their impacts on international treaties.

5.1 Effects on Thai registered juristic persons with majority foreign participation and control

The change in the definition of foreign juristic person to also include voting rights amounts to a significant shift in the objective of the Foreign Business Act and would have important consequences on existing companies. More precisely, a modification of the FBA would significantly impact companies which operate business activities falling under Lists two and three of the FBA.[32] A high number of existing Thai companies operating under Lists two and three with majority foreign participation and control, in fact, would be forced to restructure themselves as foreign companies and apply for a foreign business |license to conduct their business. Other businesses may decide to follow a different route by getting Thai business investors to register the company as a Thai entity. These businesses, however, would be confronted to the difficult task to find Thai investors with

[31] Nop Tephaval, "Prayut Backtracks on Fba Changes. Some Work Permit Rules to Be Altered," *Bangkok Post*, December 4, 2014, accessed April 27, 2017. https://www.pressreader.com/thailand/bangkok-post/20141204/282003260749024

[32] A modification of the FBA would not have short-term repercussions on companies operating under List 1 of the FBA or other specific laws (i.e. Telecommunications Business Act, BE 2544 (2001) through the practice of Thai nominee shareholding, since these mechanisms are already illegal in Thailand.

enough capital to invest and expertise to conduct the economic activity. This will likely have an impact on share prices of the company. Companies with foreign participation would also risk to be left without protection against the Thai majority voting powers.

Another option for foreign investors would to set up a Thai registered juristic person with foreign participation and control by finding new loopholes in the law. This could be done through more elaborated mechanisms of control which would not simply rely upon contractual agreements between shareholders but on economic dependence between companies through the retention of intellectual property legal rights (e.g., company's trade symbols, copyrights, patents and trade secrets).

Another mechanism which could be used to pass the control test is represented by the super minority scheme. As discussed above, such scheme could be constituted by fixing a greater-than-majority shareholder's or director's quorum in order to give foreign minority participants a veto power.

5.2 Effects on bilateral investment treaties

The government's plan to modify the definition of foreign juristic person to include voting rights would not have any significant impact on the forty-two bilateral investment treaties that Thailand has concluded with other countries. Bilateral investment treaties that Thailand has signed so far aim to encourage and protect investments in the territories of the contracting States but do not require equal treatment of foreign firms with domestic investors. As a general rule, these treaties contain comprehensive protection measures for foreign investors of one Contracting Party in the territory of the other Contracting Party, and also provide that investors should receive treatment which is fair and equitable and not less favorable than that accorded in respect of any third state. It follows that the shareholding criteria and limits applied under the FBA to foreign juristic persons have not constituted a violation of the bilateral investment treaties.

The introduction of a new definition of foreigner aiming to include real management control and voting rights as criteria to determine the nationality of a juristic person, would not infringe any of these bilateral treaties since it would be considered as an equal foreigner discrimination. Thailand, therefore, would be entitled to legislate in this field to the extent that the new measures apply indiscriminately to all foreign countries. In fact, in the

absence of any specific provisions providing protection for foreign investments against a modification of the FBA, an additional control test would be considered as reasonable, legitimate and consistent with the treaties in the measure that foreign investors are treated equally and are eligible for the same benefits.

5.3 Effects on the General Agreement on Trade in Services (GATS),

The matter is very different when it comes to the obligations Thailand has under the World Trade Organization (WTO) system. The WTO's General Agreement on Trade in Services (GATS) is first and only set of legal agreements governing international trade in services amongst WTO Members.[33] Article XXVII (l) of the GATS establishes that "juridical person means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association". Furthermore**,** Article II of the GATS provides for most-favored-nation treatment, Article XVI for market access, and Article XVII for national treatment.[34] Article XVI, paragraph 2, of the GATS states that "In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."

Under the GATS, however, members may decide to take these obligations based on an "opt-in" mechanism. Thailand has made commitments in respect of many of the sectors which it restricts under the Foreign Business Act. The sectors for which Thailand is bound to provide market access and national treatment are ten and include business, telecommunication services, construction and related engineering, distribution, environmental services, financial services, education, recreation, culture and sport, tourism and certain

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[33] Joy Kategekwa, *Opening Markets for Foreign Skills: How Can the Wto Help?* (New York: Springer, 2014), 24.

[34] On this point, see Markus Krajewski, *National Regulation and Trade Liberalization in Services: The Legal Impact of the General Agreement on Trade in Services (Gats) on National Regulatory Autonomy* (The Hague: Kluwer Law International, 2003), 75.

transport services.[35]

With regard to services provided through commercial presence, Thailand has the obligations to accord foreign firms the right to establish a commercial presence, although foreign equity participation is limited to 49 percent and the number of foreign shareholders must be less than half of the total.[36] Article XXVII (m) of the GATS applies the notion of nationality to juristic persons as it states that "juridical person of another Member" means a juridical person which is established under the laws of a member state provided that it engages in substantive business operations in that territory. It follows that the introduction of a new definition of foreigner aiming to include real management control and voting rights as criteria to determine the nationality of a juristic person, would be considered as a violation of the GATS provisions.[37]

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[35] Suthiphon Thaveechaiyagarn, "Wto Application in Thailand : Right Direction Towards Fair Trade Liberalization," *The Intellectual Property and International Trade Law Forum* Seventh Anniversary Current Issue, (2004): 301-323.

[36] United States International Trade Commission, *General Agreement on Trade in Services: Examination of the Schedules of Commitments Submitted by Asia/Pacific Trading Partners*, vol. 3053 (Collingdale, PA: DIANE Publishing, 1997), 332-374.

[37] In this regard, it is interesting to note "Thailand is legally bound to provide full "national treatment" for companies with foreign ownership "as long as foreign equity participation does not exceed 49%", regardless of voting rights. If Thailand adds the voting rights requirement as a condition for receiving the same treatment as a Thai company, Thailand adds a condition that does not appear in its GATS commitments. In doing so, it violates its GATS obligations." – Herbert Smith, Freehills. "Foreign Investment Attractiveness, Improving the Foreign Investment regime." http://www.swecham.com/news/all-latest-news/item/download/22_bd7178a71eb960ed20ec37bd0e5c22d7.html (accessed Apr. 28, 2017).

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