

The Thai Foreign Business Act
An Analysis of Pathways and Obstacles for Foreign Investors

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Fabian Sonntagbauer: The Thai Foreign Business Act: A Survey of Pathways and Obstacles for Foreign Investors

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In our increasingly globalized world, countries rely on foreign direct investment to spur economic growth. Nevertheless, Thailand wants to protect its traders and service providers from foreigners taking over the market. This fundamental idea took root 50 years ago and characterizes foreign business law to this day. The Foreign Business Act was enacted to promote competition and support the economy. Trade and services are severely restricted for foreigners though.

This leads to the following research question: Are the business restrictions to foreigners proportional to reach the aim of the law? For this purpose, the aim of this paper is to answer the criteria by which foreigners are granted market entry and how far-reaching the prohibitions are. After a comprehensive analysis of the Foreign Business Law its scope of prohibitions is evaluated based on the adequacy to reach its objective.

This research identifies the options by analyzing the Thai Foreign Business Act and determining the prerequisites for obtaining a Foreign Business License. The BOI promotions that authorize certain activities and grant incentives are presented. This research uses comparative analysis with Austrian and EU legislation and supports the easing of the foreign business restrictions.

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Chapter 1 Introduction

The Thai legislator does not yet consider the Kingdom ready to open its market to foreigners. The reason for this is that, in its view, the country's economy cannot keep pace with Western or more developed economic markets. Therefore, in order not to be taken over by the foreign market with the loss of domestic values, Thailand allows foreign economic activity in the domestic market only under certain conditions. Foreigners shall only be permitted to engage in trade and services if it is in the overriding interest of “national safety and security, economic and social development of the country, public order or good morals, national values in arts, culture, traditions and customs, natural resources conservation, energy, environmental preservation, consumer protection, employment, technology transfer and research and development”.¹

1.1. Background of the study: The restrictions on foreign business activities

The legal basis for restricting foreign economic activity is the Foreign Business Act, B.E. 2542 (1999).² The predecessor of this act was the Alien Business Act of 1972, also known as National Executive Council Decree 281. Prior to its adoption foreigners were generally permitted to do business in Thailand without restrictions.³

The Thai Juridical Council had to give an opinion about how the Alien Business Act 1972 is to be interpreted when determining whether or not a company is a foreign company even if registered under Thai law. It was possible to establish an operating company in which 51% of the shares were owned by a Thai holding company. This holding company, however, was in turn 49% owned by foreign shareholders. In the end, about 74% of the operating company's capital was owned by foreigners. In this way it was possible to set up a Thai company which was mainly controlled by foreigners but still allowed to conduct business that was primary prohibited to foreigners.⁴

¹ Foreign Business Act, B.E. 2542 (1999) Section 5.

² Published in Government Gazette, Vol. 116, Part 123a, dated 4th December 1999.

³ See Foreign Business Act, B.E. 2542 (1999) Section 3.

⁴ See “The foreign business act” accessed 16 February 2022, <https://asialaw.tripod.com/articles/forbusiness.htm>.

If the capital of the parent company had been taken into account, it would have been concluded that the operating company was a foreign company. However, after a long discussion, the Ministry of Commerce decided not to implement this ruling.⁵ They did not want to risk the expatriation of thousands of companies that were set up under this scheme.

With time, the regulations of the National Executive Council Decree 281 were no longer suitable for the changing world economics. Certain principles enshrined in it were no longer compatible in the existing realities of the economy, investment and international trade and had to be revised. Furthermore, international trade agreements were to be implemented in a new law. The overall goal was to promote the Thai economy and support international and local competition, which should be of value to Thailand as a whole.⁶ The legislative process that resulted from this consideration led to the passage of the Foreign Business Act, B.E. 2542 (1999), which is still valid in this version today.

There had always been ideas and suggestions to change or tighten the law. Especially the definition of the term "foreigner" was suggested to also include the actual control and not only the ownership of share capital. After such proposals had been made by the Ministry of Commerce in 2007 and 2014, the Thailand Department of Business Development again suggested tackling the nominee problem in 2018.⁷ In addition to the extension of the penalty provisions and the adaptation of List 3, the most controversial planned amendment was to include foreign voting and management control to define "aliens" within the meaning of the FBA.

As with efforts in previous years, there was considerable opposition from the foreign business community, with many arguing that the application of such criteria would constitute mandatory divestment or expropriation of foreign-owned assets. Concerns were also raised about whether such measures would be consistent with Thailand's obligations under the WTO and its bilateral investment treaties.

⁵ *Id.*

⁶ See Notes to the Foreign Business Act, B.E. 2542 (1999).

⁷ See "DBD Proposes Amendments To Thailand's Foreign Business Act – Déjà Vu For The Foreign Business Community" published 21 March 2018, <https://www.pricesanond.com/knowledge/investment-related-laws/dbd-takes-initiative-proposing-amendments-thailands-foreign-business-act-although-weve-seen.php>.

While Ministry of Commerce and Business Development Department continue to believe that the FBA does not strike the right balance between protecting Thai investors and attracting foreign investors, the Thai Chamber of Commerce disagrees with the proposals of amendments towards stricter provisions: It believes that while Thailand is trying its best to draw foreign direct investment the authorities shouldn't do anything that makes the investment atmosphere more precarious.⁸

However, the proposal from 2018 to amend the law was also not implemented. The discussion about the removal of some services from List 3 continued and was supported from the Joint Foreign Chambers of Commerce in Thailand. The Ministry considered it as imperative to remove telecommunications, finance and software development from List 3, as these sectors were already subject to specific laws or agencies.⁹ But no adjustment has yet taken place in this regard either.

1.2. The statement of the legal problem: The Proportionality of the Foreign Business Law

In the twenty-first century, proportionality analysis, which originated in German law, has become a ubiquitous legal doctrine worldwide in its various manifestations.¹⁰

With the introduction of the 1997 Constitution the principle of proportionality was invoked at a constitutional level. Its key element of necessity was assured. Although the country has experienced political riots and the constitution has been replaced twice, the mechanisms for constitutional review persisted.¹¹ In 2018, all three elements of the proportionality doctrine were finally established:

⁸ See "FBA upgrades under review" *Bangkok Post*, 21 March 2018, <https://www.bangkokpost.com/business/1432110/fba-upgrades-under-review>.

⁹ See "3 removals from FBA's List 3 rules" *Bangkok Post*, 2 Nov 2020, <https://www.bangkokpost.com/business/2012287/3-removals-from-fbas-list-3-rules>; "Foreign firms ask for List 3 change" *Bangkok Post*, 6 Nov 2020, <https://www.bangkokpost.com/business/2014787/foreign-firms-ask-for-list-3-change>.

¹⁰ See *Stone Sweet, A. and Mathews, J.*, 'Proportionality Balancing and Global Constitutionalism' (2008) 47, *Columbia Journal of Transnational Law* 72.

¹¹ See *Srukhsit, N.* Manifest Disproportionality and the Constitutional Court of Thailand in *Yap, P.*, *Proportionality in Asia* (2020) 192f.

*“In enacting legislation to restrict a person’s rights and liberties, the Legislature or other bodies exercising the State’s power must respect a fundamental principle, that is, the principle of proportionality. (...) In enactment restricting the rights and liberties of people under the proportionality principle, the restriction as such must be **appropriate, necessary and proportional** or balancing between the public interest or general welfare to be attained, on the one hand, and the right or liberty of the people to be sacrificed due to such legislation, on the other.”¹²*

The substantive legal protections of individuals are in an instinct conflict with the interests of the regulations of the national foreign business law. It discriminates by citizenship, size, category and industry and restricts investors' rights and liberties. While at the international level the European Court of Human Rights has perfected the proportionality test, arbitrators in international investment disputes are already applying the principles, even if this is currently done without a deeper systematic approach.¹³ This suggests that the proportionality analysis should apply even more to the national investment law.

The principle of proportionality has only recently been adopted as a Western transplant. The Thai Foreign Business Act, on the other hand, has existed in unchanged form for over 20 years. Therefore, the concern is that this act may not be proportionate in the sense of the Proportionality Doctrine recognized today.

1.3. Research question and hypothesis

Since the Thai Foreign Business Act establishes extensive restrictions on foreign investments to promote the Thai economy, the research question is: Are the restrictions of the Foreign Business Act proportional to the stipulated policy objective of promoting the Thai economy?

Due to the Foreign Business Act's approach of protecting domestic businesses, foreign competition and economic growth are hindered, making the act unsuitable to achieve the stated goal of promoting the Thai economy and therefore it is not proportionate and should be amended.

¹² CCD No.8/B.E.2561 (2018), 26 December 2018, 11–12.

¹³ *De Brabandere, E. and Baldini Miranda da Cruz, P.* “The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective” in *Nordic Journal of International Law* Vol. 89 (2020) 491.

1.4. Scope of the research

In this paper, the basics, requirements and opportunities for foreign investment in Thailand will be presented. Furthermore, weaknesses and uncertainties in the current system will be highlighted. A legal comparison with European legislation will be made, using Austria as an example. Finally, the amendment of the FBA is proposed.

1.5. Contribution

This research will contribute by providing a survey of the Foreign Business Law and identifying and evaluating its existing legal options of foreign investment in Thailand.

At a practical level the paper will offer a guideline for foreign investors including consideration of the advantages and opportunities of each pathway but also the impediments. Notes about the common practice complete the contribution to the decision-making process.

On a policy level, the paper will contribute by encouraging reflection on the purpose of the Foreign Business Act and reconsideration of existing regulations.

Chapter 2 Analysis of the Foreign Business Act

The Foreign Business Act is the legal basis for the Thai foreign business law. It describes the major prohibitions, establishes administrative jurisdiction for exceptions to the prohibitions and contains annexed the lists of prohibited businesses for foreigners. These lists have grown historically from the motivation of protecting cultural values on the one hand. In addition, the preservation of natural resources and the environment is as much a concern as national security and safety. While certain Thai cultural occupations, such as painting Buddha images, have little impact on the country's economic performance, the sectors included in List 3, in which lawmakers consider Thailand not yet competitive, are more important in this regard.

2.1. „Businesses stricto sensu“ (List One)

Business activities that are stated in List 1 are named “*businesses stricto sensu*” and referred as “businesses not permitted for foreigners to operate due to special reasons”. Foreigners are completely restricted from engaging in the activities contained in List 1.¹⁴

LIST ONE

BUSINESSES STRICTO SENSU NOT PERMISSIBLE TO FOREIGNERS BY SPECIAL REASON

- (1) The Press, radio broadcasting station or radio and television station business*
- (2) Rice farming, plantation or crop growing*
- (3) Livestock farming*
- (4) Forestry and timber processing from a natural forest*
- (5) Fishery, only in respect of the catchment of aquatic animals in Thai waters and specific economic zones of Thailand*
- (6) Extraction of Thai medicinal herbs*

¹⁴ FBA Section 8 (1).

(7) Trading and auction sale of antique objects of Thailand or objects of historical value of the country

(8) Making or casting Buddha Images and monk alms-bowls

(9) Land trading

2.2. Businesses that need Cabinet approval (List Two)

List 2 businesses related to “national safety or security, businesses having impacts on arts, culture, traditions, customs and folklore handicrafts or businesses having impacts on natural resources or the environment” may not be conducted by foreigners without a Cabinet approval.¹⁵

LIST TWO

BUSINESSES RELATED TO NATIONAL SAFETY OR SECURITY OR HAVING IMPACTS ON ARTS, CULTURE, TRADITIONS, CUSTOMS AND FOLKLORE HANDICRAFTS OR NATURAL RESOURCES AND THE ENVIRONMENT

Chapter 1: Businesses related to National Safety or Security

(1) Production, distribution and maintenance of:

(a) firearms, ammunition, gun powders and explosives;

(b) components of firearms, ammunition and explosives;

(c) armaments, ships, aircraft or vehicles for military use;

(d) equipment or components of all types of war materials

(2) Domestic transportation by land, water or air, including domestic aviation

¹⁵ FBA Section 8 (2).

**Chapter 2: Businesses Having Impacts on Arts, Culture, Traditions, Customs and Folklore
Handicrafts**

- (1) Trading of antiques or artistic objects that are artistic works or handicrafts of Thailand*
- (2) Production of wood carvings*
- (3) Silkworm raising, production of Thai silk yarn, weaving of Thai silk or printing of Thai silk patterns*
- (4) Production of Thai musical instruments*
- (5) Production of goldware, silverware, nielloware, bronzeware or lacquerware*
- (6) Production of crockery or porcelains representing Thai arts and culture*

Chapter 3: Businesses Having Impacts on Natural Resources or the Environment

- (1) Production of sugar from sugar cane*
- (2) Salt farming, including non-sea salt farming*
- (3) Production of rock salt*
- (4) Mining, including rock blasting or rock crushing*
- (5) Timber processing for production of furniture and utensils*

2.3. Businesses in which Thai Nationals are not ready to compete with foreigners

LIST THREE

*BUSINESSES IN RESPECT OF WHICH THAI NATIONALS ARE NOT READY TO COMPETE WITH
FOREIGNERS*

- (1) Rice milling and production of flour from rice and economic plants*
- (2) Fishery only in respect of the hatching and raising of aquatic animals*

(3) Forestry from a grown forest

(4) Production of plywood, veneer wood, chipboards or hardboards

(5) Production of lime

(6) Provision of accounting services

(7) Provision of legal services

(8) Provision of architectural services

(9) Provision of engineering services

(10) Construction, with the exception of:

(a) Construction of structures for delivery of infrastructure public services in the sphere of public utilities or transportation requiring the use of special apparatuses, machines, technology or expertise, with the minimum capital of five hundred million Baht or upwards from foreigners;

(b) Construction of other types as prescribed in the Ministerial Regulation

(11) Brokerage or agency businesses, with the exception of:

(a) being a broker or an agent in the sale or purchase of securities or in services related to futures trading of agricultural commodities or financing instruments or securities;

(b) being a broker or an agent in the sale, purchase or procurement of goods or services necessary for the production or the provision of services amongst affiliated enterprises;

(c) being a broker or an agent in the sale or purchase, procurement, distribution or acquisition of domestic and foreign markets for the distribution of domestically manufactured or imported goods, which is in character the operation of international trade, with the minimum capital of one hundred million Baht or upwards from foreigners

(d) being a broker or an agent of other types as prescribed in the Ministerial Regulation

(12) Sale by auction, with the exception of:

(a) a sale by auction which, in character, involves international bidding of items other than antiques, objects of antiquity or artistic objects that are artistic works or handicrafts or objects of antiquity of Thailand or of historical value of the country;

(b) sales by auction of other types as prescribed in the Ministerial Regulation

(13) Internal trade related to traditional agricultural products or produce not yet prohibited by law

(14) Retail sale of goods of all types with the total minimum capital in the amount lower than one hundred million Baht or with the minimum capital of each store in the amount lower than twenty million Baht

(15) Wholesale of all types with the minimum capital of each store in the amount lower than one hundred million Baht

(16) Advertising business

(17) Hotel business, with the exception of the hotel management service

(18) Guided touring

(19) Sale of food and beverages

(20) Cultivation, propagation or development of plant varieties

(21) Other service businesses, with the exception of service businesses as prescribed in the Ministerial Regulation

2.4. Definition of foreigners

The Thai foreign business law is applicable to foreigners within the definition of the FBA:

A foreigner is a natural person who is not or not anymore of Thai nationality and a juristic person not incorporated in Thailand. Further, a foreigner is a juristic person incorporated in Thailand and being one of the following natures¹⁶:

¹⁶ FBA Section 4.

- a juristic person of which one-half or more of the capital is held by non-Thai person(s) and/or juristic person(s) not incorporated in Thailand.
- a limited partnership or a registered ordinary partnership whose managing partner or manager is a non-Thai person

Foreigner is also a juristic person incorporated in Thailand and having one-half or more of the capital held by;

- non-Thai person(s) and/or
- juristic person(s) not incorporated in Thailand and/or
- juristic person(s) incorporated in Thailand but being listed in the previous paragraph.

2.5. Penalty Provision

FBA Section 37 sets the penalty provision for the alien's violation of the work ban. Those who violate the ban may face a prison sentence of up to three years and a fine of between one hundred thousand and one million THB. In addition, the company will be closed down or ordered to terminate the foreigner's participation

With the penalty provision in Section 36, the legislator aims to avoid circumvention of the regulations and makes nominee business a criminal offense. The widely offered¹⁷ so-called Payroll Service, where foreigners are employed and billed through an accounting, recruiting or law firm, is considered a nominee business and is therefore prohibited.

If a Thai is caught supporting the prohibited business activity of a foreigner within the meaning of the law by offering his own company to the foreigner or buying shares in a company on behalf of a foreigner, the nominee will be sentenced to a fine of one hundred thousand baht up to one million baht. In addition, a 3-year prison sentence may be imposed.¹⁸

¹⁷ A simple Google search will show many offers.

¹⁸ FBA Section 37.

2.6. Non-prohibited economic activities

2.6.1. Sales for entities with registered capital of more than THB 100,000,000.

Paragraph 14 of List Three annexed to the FBA states the trade prohibition for companies with a total minimum capital lower than 100 million THB. More precisely, the capital needs to be registered and paid in.

To emphasize the relevance of this provision, it should rather be said that it represents a general ban on trade with the exception of large enterprises.

Foreign SMEs are thus completely excluded from trade - within the limits of the FBA and with the exception of promotions explained later. This means that Thailand does not consider the country's own traders and small and medium-sized trading companies to be ready for international competition.

2.6.2. Manufacturing is not prohibited

As already explained in the introduction, business activities of foreigners are severely restricted in general. The limitations mainly affect trade in goods, services and agriculture. However, the manufacture of products is allowed provided that the products are not listed in List 2.

The main industries in Thailand are electronic (export value in 2021: 42 billion USD), automotive (42 billion USD), electric appliances (16 billion USD) and plastics (12 billion USD)¹⁹ In these fields many foreign owned companies perform production.

Although the manufacturing of goods in Thailand can be interesting for producers, it has to be pointed out that only the manufactured products may be sold. The trade of additional goods, for example to supplement the product range, is further prohibited. The general trade prohibition for companies with less than 100 million THB of paid-in capital exists independently of the production activity launched in Thailand.

¹⁹ See *Bank of Thailand*, National Statistical Office, published 28 February 2022, https://www.bot.or.th/App/BTWS_STAT/statistics/BOTWEBSTAT.aspx?reportID=748&language=ENG.

Chapter 3 Legal options to conduct Trade and Services

It is permitted to establish a company in Thailand that is 100% foreign owned. As mentioned above, business activities are severely limited to these Wholly Foreign Owned Enterprises. However, there are a number of options to conduct trade and provide services that are permitted by the FDA and promotions by administrative regulations. These will be explained in this chapter.

3.1. The Foreign Business License

A Foreign Business License (FBL) is a license issued to companies that are majority-owned by foreigners or foreign investors and wish to engage in business activities that are prohibited to foreign nationals under Thai law.

A foreigner intending to apply for a license must be of not less than twenty years of age, having a residence in Thailand or having been permitted to enter the Kingdom temporarily under the law on immigration, must not be an incompetent or a quasi-incompetent person and not be a bankrupt. Further, the applicant must not have been punished by a court judgment or ordered to pay a fine in settlement of any offence under the FBA or its predecessor. The applicant must not have had a license revoked and not been sentenced to imprisonment for certain criminal offenses within the period of five years prior to the date of the application for the license. If the applicant is a juristic person, the foreign directors, managers or persons responsible for the operation must also have these qualifications.²⁰

According to Section 14 the minimum capital for the commencement of a business operation shall not be less than two million Baht. Businesses listed under List 2 and List 3 require a minimum capital of three million Baht.

The products and activities provided by an applicant corporation must provide significant benefits to the Thai economy and/or society. Typical activities supported by an FBL are infrastructure projects, Public Private Partnerships (PPP), or Build Operate Transfer Agreements (BOT). Common practice is rather restrictive.

²⁰ See FBA Section 16.

The process of obtaining a Foreign Business License is often expedited²¹ and the chances for approval might be increased²², if a BOI approval is obtained in advance.

Generally, the application process for a Thai Foreign Business License is very lengthy, complex and uncertain in outcome. In practice, such application procedures can easily take 9-12 months at great financial cost without achieving the desired goal.²³ Therefore, the application entails an economic risk and it is not recommended to attempt market entry with the FBL at first.

3.2. Contractual Solutions enable business options

3.2.1. Sale through an Importer and Distributor

A foreigner who distributes his products to Thai importers does not himself perform any economic activity in Thailand and is therefore not subject to the Thai law. Sale through a distributor is the classic way to sell foreign-produced goods in Thailand.

This legal solution does not incur direct costs. However, lower margins reduce the profit and the supplier is limited to the sales performance of the distribution partner. Disadvantage is also that there is no direct contact with customers and no business relationship can be established with them. The contractual arrangements are made in an exclusive or non-exclusive distribution agreement. Basically, the distributor is free to market the goods in his own way.

3.2.2. Business Unit

A Thai import & export company and a foreign producer set up a Business Unit, which is not a legal entity but a contractual agreement. One or more employees of the Thai entity are assigned for the sales & services of the principal's products. The salespersons or technical consultants work legally for the foreign manufacturer and are integrated into the service

²¹ See "Foreign Business License in Thailand" published 27 April 2021, <https://thailand.acclime.com/guides/foreign-business-license/>.

²² See "Case Study: Legalization of sales in Thailand" accessed 03 April 2021, <https://sanet.eu/case-study-legalization-of-sales-in-thailand/?lang=en>.

²³ See *Denk, G*, "Mit Sanet den Markteintritt nach Thailand organisieren", published 16 July 2019, <https://www.openpr.de/news/1055101/Mit-Sanet-den-Markteintritt-nach-Thailand-organisieren.html>.

provider with complete infrastructure. These then look after customers or guide distributors on site.²⁴

3.3. Joint Venture

As written in Chapter 2, the FBA defines a juristic person of which one-half or more of the capital is held by non-Thai person(s) and/or juristic person(s) not incorporated in Thailand as a foreigner. A joint venture with Thai majority and foreign minority is therefore not a foreigner and excluded from the scope of application of the FBA. Most business activities can thus be performed by these joint ventures with foreign equity investment.²⁵

Typically, joint venture parties set up a new entity. Since there is no distinctive type of legal entity for it, the joint venture can be incorporated as private limited company which is the most common form in the practice.²⁶

The interaction of the various competencies of the partners should optimally become an economic symbiosis. For a trading company for instance the local Thai partner might be responsible for marketing, distribution and customer service. The foreign investor could bring in technical expertise, know-how and the final products that were manufactured outside Thailand.

Also, IT companies, manufacturing and heavy industry, and other industries that require a high capital expenditure are well suited to joint ventures.²⁷

Given that foreign investors are minority shareholders, the question arises as to how to protect their investment assets. From the perspective of the foreign investor, the joint venture agreement should therefore include the right to agree on the number and nomination of directors as its representatives on the board of directors. They should also have comprehensive rights in the appointment of key executives. An affirmative right in favor of the minority

²⁴ See *Denk, G.*, „Export ist tot. Die Zukunft heißt Präsenz“ published 29 March 2022 at OpenPR.

²⁵ Some operations need a higher equity participation of Thai investors and/ or a specific minimum of directors of Thai nationality e.g. activities according to the Financial Institutions Businesses Act 2008 and the Land Transport Act 1979.

²⁶ See *Sarntikasem, A. and Sriwat, J.* „Joint Ventures in Thailand“, accessed 22 April 2021, <https://www.lexology.com/library/detail.aspx?g=d6ef7c22-de16-4d9c-a573-820182b3d88a>.

²⁷ *Id.*

shareholders may be agreed upon, which obliges the majority shareholders to obtain the prior consent of the minority shareholders before taking decisions on matters that are not part of the ordinary course of business but generally affect the interests of all shareholders in the company.²⁸

Especially when the local partner takes over the distribution, some dangers arise in the operational business. There is a risk of abuse by the local partner, who feels safe from the distant business partner. He could exploit his unawareness and rent overpriced real estate that belongs to his relatives. Another conceivable example would be the erosion of profit margins by selling goods at a special price to friendly or family intermediaries rather than to end customers. Afterwards, the goods are distributed at a large markup and the lush margin is shared by the unofficial middleman and the joint venture partner.²⁹ Therefore, I believe that a close monitoring by the foreign partner and his proactive contribution is of key importance for the success of the founded entity.

Finally, it should be outlined that using a Thai nominee partner is subject to criminal prosecution.³⁰

3.4. Cross Shareholding

"Cross-shareholding" means mutual holding of equity interests between two or more companies. While it can be a common instrument in group structures, it also offers interesting opportunities to circumvent the restrictions of Thailand's foreign investment law.

A Thai parent company holds 51% of a subsidiary, which is also Thai. A foreign investor holds 49% of the remaining shares in the subsidiary. The same investor also owns 49% of the parent company. Thus, both companies are majority Thai-owned but the foreigner has the actual control over the subsidiary. If the subsidiary now buys shares of the parent company, the

²⁸ See *Chaiparinya, B.* "Invest in Thailand: Joint Venture Agreement as an Option" published 2 June 2021, <https://www.ecovis.com/global/invest-in-thailand-joint-venture-agreement-as-an-option/>.

²⁹ See "How to sell successfully on the world's biggest growth market – Southeast Asia" published 29 Oct 2015, <https://sanet.eu/asean-sales-management-and-structure-part-1>.

³⁰ See FBA Section 36.

foreign investor also gains control over this entity. As the companies are considered Thai companies the Foreign Business Act is not applicable to them.³¹

It is important to note that in this constellation there is a tax liability on the dividends paid to each other.³² The tax exemption for dividends paid to parent companies does not apply in the case of mutual shareholdings, and half of the dividends are therefore taxable at the dividend tax rate.³³

At all events, the legality of this form of cross-shareholding cannot be guaranteed for the future. For instance, the Ministry of Land is already refusing to recognize this structure as a Thai company.³⁴ An amendment could bring the operating permission of companies of this structure to fall.

3.5. The Thai Board of Investment (BOI)

The Thai Board of Investment is a government agency that operates directly under the Prime Minister's Office and promotes investment in Thailand. It provides general investment information and services to Thai and foreign corporations and offers certain promotions for investors.

The BOI's objectives are to strengthen Thailand's competitiveness in the global market and to prevent Thailand from being stuck in the 'middle income trap'³⁵ by contributing to balanced and sustainable economic growth in the country.³⁶

The BOI Promotions consist of two categories of incentives: **Tax benefits** (Group A) such as tax holidays and duty exemptions and **non-tax benefits** (Group B) including:

³¹ See "Cross-Shareholding and Taxation of Dividends in Thailand" Newsletter No. 6, published 16 October 2019, <https://lorenz-partners.com/download/thailand/NL006E-Cross-Shareholding-and-Taxation-of-Dividends-Oct19.pdf>.

³² See Revenue Code Section 65 (10) b.

³³ See Revenue Code Section 65 (10) sentence 1.

³⁴ See "'The business unit' as a low-cost entry into the ASEAN markets" accessed 17 April 2022, <https://sanet.eu/the-business-unit-as-a-low-cost-entry-into-the-asean-markets>.

³⁵ Term introduced by the World Bank defining an economic development situation in which a country that attains a medium income gets stuck at that level.

³⁶ See "Five decades of supporting investment promotion", accessed 09 April 2022, https://www.boi.go.th/index.php?page=our_history2.

- possibility of 100% foreign ownership
- the right to own land;
- the ease of obtaining of visas and work permits for foreign employees
- special guarantees and investment protections.³⁷

These benefits are awarded to a variety of specific business activities and merits.³⁸ Following activities will be pointed out:

3.6. Trade and Investment Support Office (TISO):

3.6.1. Scope of benefits

The Trade and Investment Support Office is a category³⁹ of the BOI Promotions of interest for wholly foreign owned enterprises.

The TISO falls into the Group B and therefore doesn't allow for reduction or exemption on corporate income tax. However, it may be useful for technical manufacturers due to a number of advantages⁴⁰:

- Permission to provide and invoice services as for consulting, maintenance, calibrating, repairing and related.
- Servicing the affiliated companies on marketing & sales and monitoring affiliated companies.
- Providing digital services such as order processing, accounting, and other digital support.
- Import and wholesale goods (machinery/dies and tools) to wholesalers and to export customers ("Wholesale" means only selling to wholesalers not users).
- Right to own land
- Facilitate Visa and Work Permit for Foreigners

³⁷ See Investment Promotion Act B.E. 2520 (1977).

³⁸ defined in the Announcement of the Board of Investment No. 2 /2557.

³⁹ See Announcement of the Board of Investment No. 2 /2557 Category 7.7.

⁴⁰ See "Trading and Servicing Thai Customers – BOI related options" accessed 10 April 2022, <https://sanet.eu/handel-und-service-durch-auslaender-in-thailand-so-geht-es/?lang=en>.

However, the sale of imported goods from stock to end customers (including industrial customers) is prohibited, unless they are spare parts that can be considered part of the repair and maintenance services provided.

3.6.2. Requirements

Requirement for the promotion as TISO is a detailed business plan outlining the planned activities, investments and revenue development.⁴¹ The planned business operations must be within the framework⁴² set by the BOI. Furthermore, the minimum registered capital requirement is THB 1,000,000 for Thai companies and THB 3,000,000 for foreign companies. In addition, there are minimal annual administrative and selling costs of THB 10,000,000, which do not include salary costs for service employees.⁴³

3.6.3. Conclusion

Although no tax incentives are granted the permitted operation with 100% foreign ownership makes this promotion interesting for foreign service providers and traders who are not eligible for any other investment promotion. While the fields of operation of the TISO are quite broad, the biggest hurdle is the requirement of selling and administrative expenses of more than THB 10 million per year. Therefore, only companies of a certain size can profit from the TISO Promotion.

The TISO is a common solution for machine builders, because technical services of almost any kind are permitted, including the import and sale to of machinery and equipment to distributors.

3.7. The International Business Center (IBC)

In order to establish Thailand as a hub for business investment at the regional and global levels, as in promoting and supporting the establishment of international business centers, the IBC was added to the BOI's catalog of promotions in December 2018. The BOI thus followed the

⁴¹ See "The broad overview: The options for entering the Thai market" accessed 10 April 2022, <https://sanet.eu/the-broad-overview-the-options-for-entering-the-thai-market/?lang=en>.

⁴² See *Thailand Board of Investment, A Guide to The Board of Investment 2021 (2021)* 98 f, https://www.boi.go.th/upload/content/BOI_A_Guide_EN.pdf.

⁴³ See "Trading and Servicing Thai Customers – BOI related options" accessed 10 April 2022, <https://sanet.eu/handel-und-service-durch-auslaender-in-thailand-so-geht-es/?lang=en>.

government's drive to promote more international business centers in Thailand, with the aim of providing management and other related or necessary services for associated companies or for international commerce.⁴⁴ The IBC has thereby replaced the Regional Operating Headquarter (ROH), the International Headquarter (IHQ) and the International Trade Center (ITC), as the Board of Investment's promotion category.⁴⁵

3.7.1. Permitted activities in the IBC

The IBC is a company incorporated under Thai law for the purpose of providing administrative services, supporting services, technical services, or financial management services to its associated enterprises, or conducting international trade. Recently, certain loans⁴⁶ to affiliated companies have also been promoted, provided that at least one or more other IBC activities, other than the treasury center or the conduct of international trade, are carried out.

Importantly, permission to assist affiliated companies with their marketing and sales promotions is granted. However, direct sales activities with end customers are not subject of an IBC. Provided that the services are not paid for by the Thai customer but exclusively by the parent company, the IBC can also perform installation, repair and maintenance for the parent company's products.⁴⁷

3.7.2. Tax promotion

If the IBC has annual expenses of at least THB 60,000,000 it will be granted a reduction of corporate income tax for up to 15 years. According to the amount of expenses the CIT will be reduced to 3% to 8%.⁴⁸

CIT for dividends received from affiliates and specific business tax on income from financial management services are exempted⁴⁹. Exemption occurs also on withholding tax for payments

⁴⁴ See Announcement of the Board of Investment No. Sor 6/2561.

⁴⁵ See Announcement of the Thai Cabinet 26 March 2019.

⁴⁶ See Announcement of the Board of Investment No. Sor 3/2564 Section 7.34.1.12.

⁴⁷ "Trading and Servicing Thai Customers – BOI related options" accessed 12 April 2022, <https://sanet.eu/handel-und-service-durch-auslaender-in-thailand-so-geht-es/?lang=en>.

⁴⁸ See Royal Decree issued under the Revenue Code governing reduction of tax rates and exemption of taxes (No. 674) B.E. 2561 (2018) Section 7.

⁴⁹ *Id.* Section 8.

to companies established abroad and not doing business in Thailand on dividends paid to the IBC's corporate shareholders abroad and on interest paid to companies abroad.⁵⁰

Personal income tax can be set to 15% flat for well-paid and highly skilled expatriates who work for the IBC.⁵¹

3.7.3. Requirements for the IBC⁵²

Requirement is a paid-up registered capital of at least THB 10,000,000 but unlike the TISO no proof of an annual administrative and selling costs.

A particular prerequisite is the employment of at least 10 qualified and "knowledgeable" staff for the services provided, which are audited annually as part of the reporting process to the BOI.

3.7.4. Critics

Thailand applies the so-called "Residential Tax System". which means that enterprises that are registered in Thailand have to pay CIT on their worldwide profits. Neighboring countries which are considered tax havens such as Hong Kong use the "Territorial Tax System" which levies CIT only on income sourced within the country. By granting tax incentives to IBCs Thailand grants an exemption from the Residential Tax System. Therefore, the reduced CIT rate applies to both domestic and foreign affiliates to same extent.

In that way Thailand has been able to attract more foreign investment. However, the tax reductions under the IBC scheme are nowhere near as beneficial as the previous schemes, and Thailand may become less appealing to foreign investors looking to establish their headquarters in South East Asia.⁵³

⁵⁰ *Id.* Section 14.

⁵¹ *Id.* Section 4 ff.

⁵² See Announcement of the Board of Investment No. Sor 6/2561.

⁵³ See "Investment Promotion for International Business Centers (IBC)" Newsletter No. 2019, published 11 March 2022 <https://lorenz-partners.com/download/thailand/NL219E-Investment-Promotion-for-International-Business-Centers-IBC-Mar22.pdf>

3.8. International Procurement Office (IPO)

The International Procurement Office⁵⁴ is an opportunity for wholly foreign owned companies to gather permission for import and sales to domestic industrial customers and overseas (end) customers of raw materials, parts, and components used in manufacturing industries and intended for export.

Requirements are a paid-in registered capital of not less than 10,000,000 THB and appropriate activities of merchandise procurement and management such as Quality Inspection and Packaging/ Repackaging. A modern IT-based warehouse management system must be set up as well. The establishment must have several procurement resources, but at least including a domestic resource.

The investor is rewarded with exemption of import duty on raw material imported for use in production for export and exemption of import duty on machinery used in the IPO project. In addition, non-tax incentives include the right to own land and facilitation of visas and work permits for foreigners.⁵⁵

⁵⁴ See Announcement of the Board of Investment No. Sor 1/2564 Section 3.37

⁵⁵ See *Natkhosit W.*, International Procurement Office: IPO, presentation accessed on 16 April 2022, https://www.boi.go.th/upload/content/IPO_IBC_English.pdf

Chapter 4 A Legal Comparison with the Austrian foreign business law.

In this chapter, I would like to make a legal comparison with the Austrian foreign investment law.

A distinction must be made between intra-EU investments and investments from third countries.

4.1. Investments within the European Union.

4.1.1. The Freedom of Establishment

“Article 49 Treaty on the Functioning of the European Union

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

The beneficiaries of the freedom of establishment are the nationals of the Member States, but also juristic persons, namely companies incorporated under the laws of a Member State which have their registered office, central administration or place of business within the Union.⁵⁶

Like all fundamental freedoms, the freedom of establishment also stipulates a directly applicable prohibition of discrimination. Thus, direct and indirect discrimination on the basis of

⁵⁶ See *Leidenmühler, F.*, *Europarecht: die Rechtsordnung der Europäischen Union*³ (2017) 207.

the nationality of the self-employed person or the beneficiary company as defined in Art. 54 is generally prohibited.⁵⁷

Through the case law of the ECJ⁵⁸, the freedom of establishment, like all freedoms of the internal market, has been extended beyond primary law requirements to a comprehensive prohibition of restrictions. All national measures are prohibited which may hinder the exercise of the fundamental freedoms guaranteed by the Treaty or make it less attractive.

The freedom of establishment shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.⁵⁹

4.1.2. The Free Movement of Capital

In the case of foreign investments, protection under the free movement of capital could also be considered. In order to distinguish between the free movement of capital and the freedom of establishment in the case of the acquisition of shareholdings in companies, it is important to know whether a share purchase serves an investment purpose as a portfolio investment or whether it is intended as a direct investment to acquire control over a company.⁶⁰ If the investment leads to the possibility of exercising entrepreneurial influence, which is certainly the case with a shareholding of more than 50%, then the freedom of establishment alone is relevant. However, a distinction must always be made for the specific individual case.⁶¹

As interpreted by the ECJ, the free movement of capital under Article 63 TFEU includes, as with all fundamental freedoms, a prohibition of direct and indirect discrimination and of all indiscriminate restrictions on the movement of capital between Member States and between Member States and third countries.

Member States are only authorized to take indispensable measures to prevent infringements of national laws and regulations, in particular in the field of tax law, under the supervision of

⁵⁷ *Id.* at 210.

⁵⁸ ECJ, 30 November 1995, Case C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 I-04165.

⁵⁹ See Art 51 TFEU.

⁶⁰ See ECJ, 6 June 2000, Case C-35/98, Staatssecretaris van Financiën v B.G.M. Verkooijen, 2000, I-4071.

⁶¹ See *Leidenmühler, F.*, *Europarecht: die Rechtsordnung der Europäischen Union*³ (2017) 234.

financial institutions, and to provide for reporting procedures for capital movements for the purpose of administrative or statistical information or to have recourse to measures justified on grounds of public policy or public security.⁶² However, according to established case law, any unwritten compelling reasons of general interest can only justify indirect discrimination.

4.2. Investments from non-EU Jurisdictions

After a considerable increase in direct investments in the form of company and share acquisitions by non-European investors in the EU and also in Austria in recent years, concerns increased about unwanted dependence on non-European owners and the sell-off of European key technologies and the associated Know-how transfer to non-EU countries. Chinese investments in particular were criticized.

In response to this, the EU issued Regulation (EU) 2019/452 of 19th March 2019 establishing a framework for the screening of foreign direct investments into the Union (“EU-FDI-Screening-Regulation”).⁶³ This does not force the member states to set up investment controls, but only sets minimum standards that may have to be complied with and provides for a cooperation mechanism within the EU. It also represents the legal basis for national investment control, because this would otherwise fall under the competence of the EU.⁶⁴

In the course of the implementation of the EU-FDI-Screening Regulation 2019/452, the new Austrian Investment Control Act (ICA)⁶⁵ was enacted, which came into force on July 25, 2020. New control mechanisms have thus been established on foreign direct investments (“FDI”) from outside the EU/EEA and Switzerland. The new ICA will replace the Foreign Trade Act (“Außenwirtschaftsgesetz”) whose scope of application was very limited and less than ten permits have been issued since 2013.⁶⁶

⁶² See Art 65 TFEU.

⁶³ Official Journal of the European Union, L 79 I, 21 March 2019.

⁶⁴ See Weiss V. and Fladerer C., Unionsrechtliche Schnittstellen des InvKG, *ecolex* 2020, 867.

⁶⁵ Federal law enacting an Investment Control Act and amending the Foreign Trade Act 2011, BGBl. I No. 87/2020.

⁶⁶ See *Zandler, D. and Horaceck, V.*, “The new Austrian Investment Control Act - increased supervision of foreign direct investments in Austria” published 07 July 2020 https://www.cms-lawnow.com/ealerts/2020/07/the-new-austrian-investment-control-act?cc_lang=en.

4.2.1. Definition of Foreign Direct Investment

A foreign direct investment within the meaning of ICA⁶⁷ is the direct or indirect acquisition of an Austrian company

- of voting rights in such company;
- of a controlling influence over such company; or
- of essential assets of such a company by a foreign person.

4.2.2. Scope of application

A "foreign direct investment" is subject to approval⁶⁸ if

- the target company operates in a control-relevant area (listed in the Annex to the ICA); and
- the investment reaches or exceeds a minimum percentage of the voting rights or otherwise gains a controlling influence or through the acquisition of essential assets a significant influence over a part of the company is acquired.

According to the ICA, the approval requirement also applies to indirect acquisitions and so-called asset deals in which the company or individual essential assets of the company are acquired rather than company shares.

4.2.3. Exemption of micro enterprises

Foreign direct investments in which the target undertaking is a micro enterprise, including start-up enterprises, with fewer than ten employees and an annual turnover or an annual balance sheet total of less than two million Euros shall not be subject to any authorization requirement.⁶⁹

4.2.4. Sensitive areas

The Austrian target company must be active in a security-relevant area in which takeovers can endanger security or public order.

⁶⁷ See ICA Section 1 (3) and (6).

⁶⁸ See ICA Section 2 (1).

⁶⁹ See ICA Section 2 (2).

Part 1 of the Annex defines especially sensitive areas in an exhaustive list:

- 1. defense equipment and technologies
- 2. operation of critical energy infrastructure
- 3. operation of critical digital infrastructure, in particular 5G infrastructure
- 4. water
- 5. operating systems guaranteeing the data sovereignty of the Republic of Austria
- 6. research and development in the fields of pharmaceuticals, vaccines, medical devices and personal protective equipment.

Other areas in which there is a risk to security or public order, including crises prevention and services of general interest, are listed as examples in part 2 of the annex.

4.2.5. Minimum share of voting rights

There is already an approval requirement in sensitive areas if the participation reaches or exceeds 10%, 25% and 50% of the voting rights. All areas not listed in Part 1 of the Annex only require approval when a voting share of 25% and 50% is reached or exceeded.⁷⁰

Once a complete application has been received by the Federal Ministry for Digital and Economic Affairs, a notification must be issued within one month as to whether an examination can be omitted due to a lack of objections to the purchase or whether an in-depth examination procedure will be initiated because a more detailed analysis of the impact on security or public order is required. If no decision/notification is sent within the deadline, the approval is deemed to have been granted.⁷¹

4.3. Summary of the comparison

The freedom of establishment grants nationals of all member states of the European Union the right to work self-employed and to set-up their company in every member state. For investments in other member states that purpose as a portfolio investment and not a direct investment to acquire control over a company the free movement of capital prohibits any discrimination and all indiscriminate restrictions on the movement of capital between Member

⁷⁰ See ICA Section 4.

⁷¹ See ICA Section 7.

States and between Member States and third countries. EU citizens can therefore engage in unlimited entrepreneurial activity within the EU.

The EU-FDI-Screening-Regulation sets minimum standards for screening foreign direct investments of significant size and in critical areas. General restrictions on certain business areas or for investors of certain nationality do not exist.

Chapter 5 Conclusion and Recommendations

5.1. Does the FBA promote competition in business operations?

The declared goal of the FBA is to promote competition in the business sector, both nationally and internationally, thus benefiting Thailand as a whole. It is indisputable that increasing a country's economic performance leads to greater prosperity for a nation through multiple factors, such as lower unemployment, higher tax revenues, and rising wages. Good competitive conditions, an innovation-friendly climate and investments contribute to this.

At the first glance the FBA looks very restrictive on paper. Hence, in practice foreign investors have explored various exemption channels and used legal limbos so that Thailand has been more open than reading the act would suggest. According to the research conducted, considering the tolerated practice and weighing the benefits and risks, there are some business models where entering the Thai market could be worthwhile from a foreign investor's perspective. For some businesses the expansion to Thailand is either impossible or connected to so many obstacles and risks that the approach to another Asian jurisdiction seems more inviting. The requirements of obtaining the Foreign Business License are vaguely defined. The BOI promotions may grant tempting incentives but only for certain business fields and with considerable financial, structural or personnel requirements. In summary, despite the exemptions created by ministerial regulation, the attractiveness to invest in Thailand is severely limited.

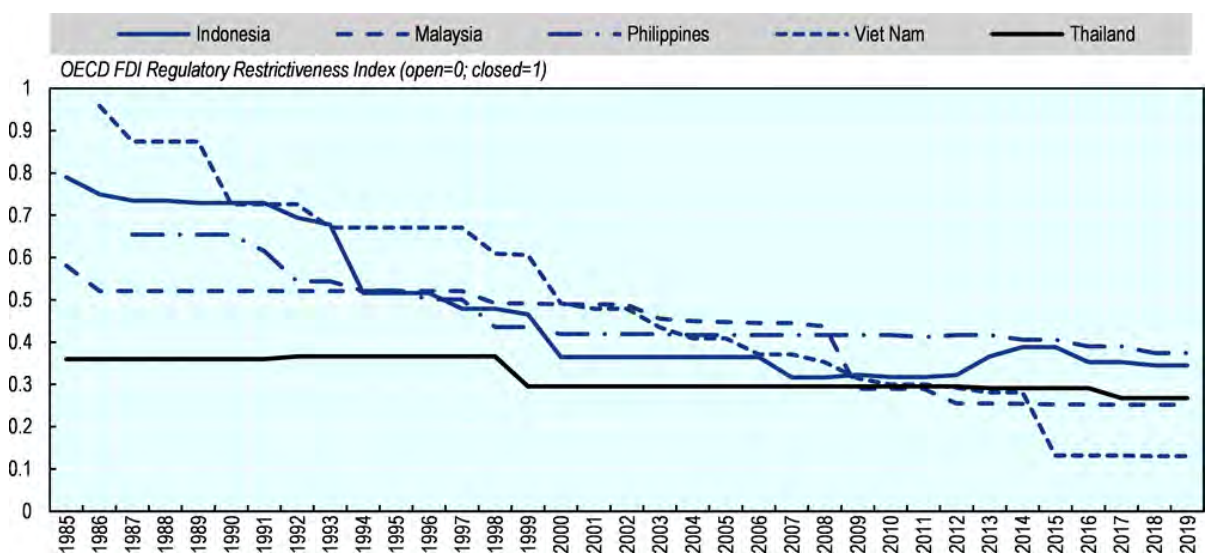
Most important, the ban on services performed by foreigners and the trade prohibition for companies with a total minimum capital lower than 100 million THB in Paragraph 14 of List Three annexed to the FBA is, in my opinion, counterproductive to the purpose of the FBA:

First, the trade permit for large companies is apparently because Thailand does not want to miss out on the really big foreign investments. The reason for restricting the operations of foreign businesses under List Three is to avoid being overrun by foreign businesses that Thais cannot yet compete with. However, it is hardest to compete with the business giants, and the

feared decay of own values⁷² is most likely to occur if they are allowed to do business in the country.

Second, the provision is intended to ensure that foreign small and medium-sized enterprises cannot develop in the country. Yet, the purpose of the FBA is to promote competition in business operation both at domestic and international levels.⁷³ Wouldn't it be exactly the international SMEs trying to develop which promote competition?

Finally, business restrictions on foreigners have been in place for 50 years, and the FBA has not been amended since its promulgation in 1999⁷⁴, even though the government promised to periodically review and reduce the scope of List 3.⁷⁵ The FBA states that Thais are “not ready yet” to compete in trade and the other activities of List 3. From the wording, one can see the prediction that Thailand would be competitive in the future. Now the law has been in effect for many years and its repeal is not being considered. If the country assumes a positive prognosis, it should also strive for it. A restriction of foreign economic activity due to momentary disadvantage should therefore be temporary or degressive. Indefinite protection leads to the opposite of the desired goal: unrivaled stagnation within a shielded bubble resulting in the failure to catch up with foreign innovation.



Source: OECD, "Improving Thailand's foreign investment regime", in OECD Investment Policy Reviews:

⁷² Values given in Section 5 Foreign Business Act, B.E. 2542 (1999).

⁷³ See Notes to the Foreign Business Act, B.E. 2542 (1999).

⁷⁴ See Chapter 1.

⁷⁵ See Douglas Mancill "The Controversy Over Proposed Changes to the Foreign Business Act" published in Thai-American Business Volume 1/2007 (25).

Thailand (2021), <https://doi.org/10.1787/93d56bd0-en>, based on the OECD FDI Regulatory Restrictiveness Index database.

Since the 1970s the Thai Foreign Business Law was only reviewed a few times with its main amendment in liberalizing manufacturing through the FBA 1999. The FBA might have been suitable to reach its goal at the time of its promulgation. The economic situation has altered since then and while other developing countries in the region were gradually opening up for foreign investments Thailand lost its competitive advantage which had enabled it to become one of the largest recipients of FDI in the 1990s.⁷⁶

It is accepted practice to favor some investors over others in order to achieve social, economic, or environmental goals, but any policy that favors some firms over others may impose costs in the form of less competition and thus lower efficiency at the firm level. Discriminatory measures serve the general public interest only to the extent that their potential costs are offset by broader economic and social benefits. Constant re-evaluation is necessary to determine whether their original motivation remains valid.⁷⁷

Accordingly, in an overall consideration of its provisions, the FBA in its current form is not suitable to serve its purpose in today's environment. Therefore, the FBA is not appropriate to the desired goal. With the first element of the Proportionality Analysis not being fulfilled, necessity and proportionality *stricto sensu* don't need to be examined further.

5.2. Recommendations for a new legal framework

Restrictions on FDI are not bad per se and need not be discarded outright. Rather, the challenge is to adapt the measures to current economic conditions in order to achieve the set goals. In this way, discriminatory restrictions can contribute to the overall welfare of society.

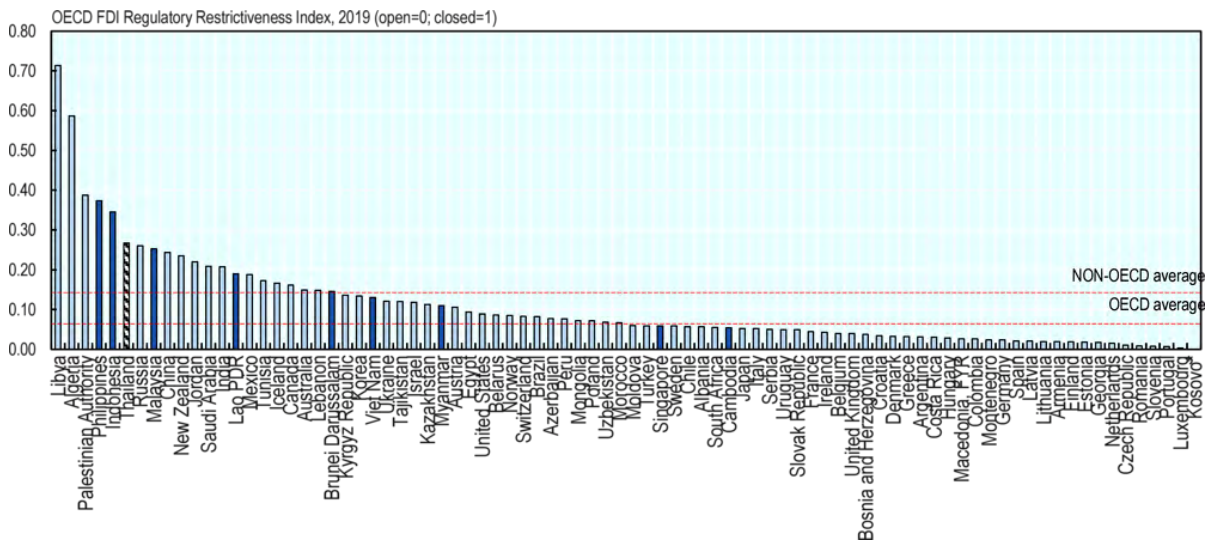
Since the purpose of the FBA is to promote competition domestically and internationally, the mission is to promote FDI while preserving the values of the country and security.

According to the OECD most ASEAN economies are restrictive towards foreign direct investments. While governments around the world discriminate between investors, the level of

⁷⁶ See *OECD*, "Improving Thailand's foreign investment regime", in *OECD Investment Policy Reviews: Thailand* (2021), <https://doi.org/10.1787/93d56bd0-en>

⁷⁷ *Id.*

regulatory restrictions on FDI observed in Thailand, however, is much higher than in most other emerging and developing economies such as for example the direct ASEAN competitor Vietnam:



Source: OECD FDI Regulatory Restrictiveness Index database, <http://www.oecd.org/investment/fdiindex.htm>

5.2.1. Liberalize Trade to aim for the ASEAN Internal Market

In Chapter 4 a legal comparison was conducted to show how Austria as member of the European Union regulates FDIs. Thailand is part of ASEAN, which is a different association of states than the EU. ASEAN does not have any collective legislative competence. Even though the ASEAN Charter obliges member states to align their national legislation with the principles of the Constitution, the lack of mechanisms and sanctions for non-compliance or non-fulfillment of these obligations nullifies them. On the other hand, based on the Asean Free Trade Area, the member states decided to establish the Asean Economic Community (AEC) on 22 November 2015. This paved the way for a common internal market and production location for goods, services, capital and labor. In light of the background of the FBA, opening up the labor and capital markets on the EU model would represent a radical turnaround in the foreign business law.

The decay of values would probably be no less condemnable from a Thai perspective simply because economic activity is "taken over" by individuals and juristic persons from ASEAN and not from other countries. Using the example of EU foreign investment law, it can be seen that

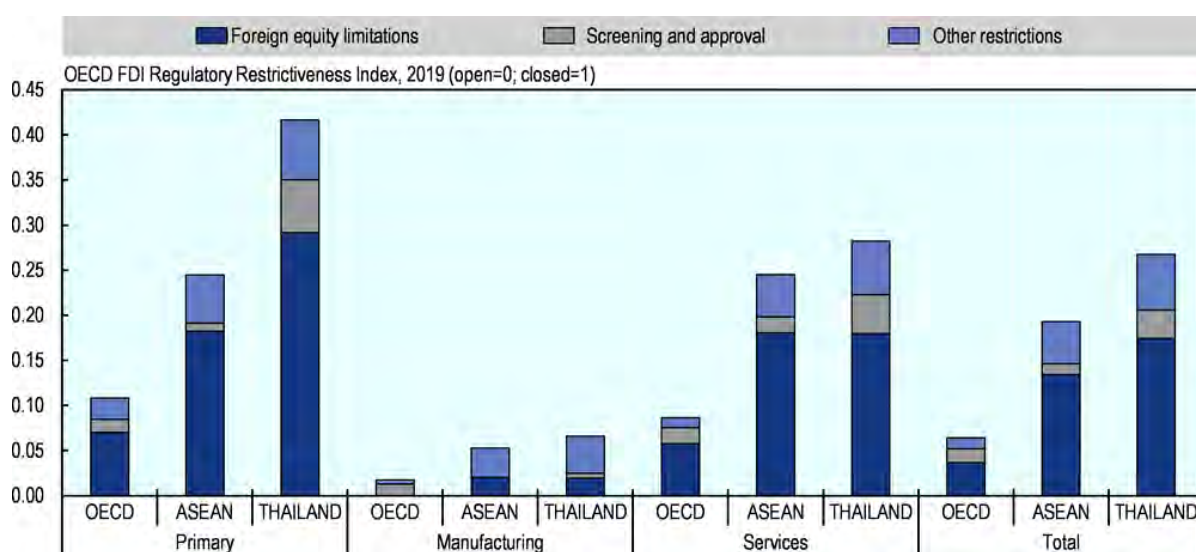
extensive rights must also be granted for investments from third countries in order to remain in line with the intra-community regulation.

It is therefore time for Thailand to consider how long it will continue to "protect" its traders from foreigners when targets within ASEAN are pushing to open up the market.

In light of the above thoughts, exempting the trading restriction for companies with, for example, less than THB 30 million capital would be more appropriate than a trading permit for large companies. Startups generate innovations, while business giants often dominate the market with a head start.

5.2.2. Reforms in the service sector boost manufacturing productivity

Thailand adopted an export oriented FDI strategy which worked well in the past. While the manufacturing sector had been opened up to foreign investors comparatively early, the primary and service sector remain particularly restrictive in Thailand according to the OECD FDI Regulatory Restrictiveness Index.



Source: OECD FDI Regulatory Restrictiveness Index database, <http://www.oecd.org/investment/fdiindex.htm>

Thailand’s current vision is to become a value based, high income economy within the next 15 years (“Thailand 4.0”). Many service sectors are still not eligible to foreign investments though. In a world of intensified regional and global value chains, FDI restrictions cannot treat services and manufacturing separately.⁷⁸ Further, restrictions on FDI in services possibly lead to higher

⁷⁸ See OECD, "Improving Thailand’s foreign investment regime", in OECD Investment Policy Reviews: Thailand (2021), <https://doi.org/10.1787/93d56bd0-en>

service fees and discriminate against domestic producers and end consumers⁷⁹ Empirical literature⁸⁰ published in 2016 has identified a clear association between services reforms and productivity growth in the economy. Especially in manufacturing the effect is remarkable. A number of studies⁸¹ demonstrate the correspondence between anticompetitive upstream regulations in services and other sectors outside manufacturing and hindered productivity growth in downstream sectors.

In order to provide the named benefits to the entire economy, Thailand would be well advised to make a far-reaching reduction in the scope of List 3 businesses. In this way the actual purpose of the FBA, namely to promote competition, and to set the course for economic growth by taking opening steps could be met.

5.2.3. Implement a Screening Model for FDI in control relevant areas

With the proposal of reducing the restrictions on FDI in trade and services new risks arise. The Thai legislator justifiably fears for the loss of national safety and security, public order or good morals, national values in arts, culture, traditions and customs, and natural resources conservation.⁸²

In order to ensure the preservation of these values, a screening model for foreign investments in particularly critical business areas could be implemented using the Austrian model as an example. Especially critical sectors as the ones named in List 2 Chapter 1 could remain restricted to foreigners. Thailand could benefit from the implementation of such an approval system in the services sector in exchange for the liberalization of services.

Reforming the FBA using the presented recommendation as a guideline could promote competition and strengthen the market without compromising the nation's values and security.

⁷⁹ *Id.*

⁸⁰ *Low, Patrick* (2016), "Rethinking Services in a Changing World", E15 Expert Group on Services – Policy Options Paper

⁸¹ *Bourlès, R., et al.* "Do Product Market Regulations in Upstream Sectors Curb Productivity Growth?: Panel Data Evidence for OECD Countries"(2010);

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