Chapter 3

The Historical Development of the Foreign Business Act of 1999 and its Implication to Thailand's Economic Trends

The literatures review in Chapter 2 suggests that FDI is a critical component to the development of a country. It is therefore important to look at the transformation of FDI as well as its controlling measure throughout the history of Thailand to modern times. Significant to note, the data used from the study in this Chapter come from data gathered during the Thaksin administration. This was done so with intent. The reasoning behind this is that for the past several years, Thailand has been suffering from heightened political turmoil. As a result, the governments have been left, more or less, moribund. I have borrowed data prior to this, as it is the most accurate representation of Thailand's investment climate during the period of the 1997 Asia Financial Crisis that led to the enactment of FBA 1999. Also, the data can reflect the impact of the FBA to the FDI activities and economic conditions of Thailand at the time. Data from the current economic situation would thus be rendered inaccurate for the purpose of this research study as many of economic factors, policies and regulations have been considerably changed. Thus, the data during the time of the crisis in 1997 is best studied in order to present us with the best data to consider which factors impact the implementation of the FBA.

The chapter will firstly introduce the current global trend of international investment and the predicament for Thai economy. Second, the study discusses the historical landscape of Thai domestic economy and the emerging role of the Foreign Business Act of 1999. Third, the study analyses the role of family-owned business structures and the doctrine of corporate ownership and control in Thailand to explain the implication of Thai corporate structure to the development of doctrine of corporate ownership and control that influenced the interpretation of the FBA. Forth, the effect of Asian Financial Crisis of 1997 to Thailand will be laid out in order to understand the economic conditions at the time of implementing the FBA of 1999. Fifth, the FBA of 1999 as the main legal instrument in controlling FDI activities will be introduced. And, lastly, the post-impact of the implementation of FBA of 1999 will be analyzed to the impact of the law to FDI in Thailand and the economy.

3.1 The Global Trend of International Investment and the Predicament for Thai Economy

The trend of International investment has declined drastically for the past two decades. The COVID-19 pandemic is worsening the situation for FDI, especial in developing country. From the study of the World Investment Report, the trend of FDI and the activities of MNEs since the year of 2000 has seen the decades of rapid growth followed by one of stagnation.[132] Since the period of 2010s, the flows of cross-border investment in physical productive assets stopped growing, the growth of trade slowed down and the global value chain (GVC) trade declined.[133] The recent crisis of COVID-19 is add-on to the existing challenges of the international production arising from the new industrial revolution (NIR), growing economic nationalism and the sustainability imperative. All of these factors will force developing world to adapt and change their FDI strategies to cope with the transformation of international productions in the next decades.

The new pattern of trade and investment reflects changes in international production dimensions: the degree of fragmentation and length of value changes, the geographical spread of value added, and the governance choices of MNEs that determine the prevalence of arm's-length trade versus FDI. These three important elements of NIR will lead to changes in international production in the next decade: robotics-enabled automation, enhanced supply change digitalization

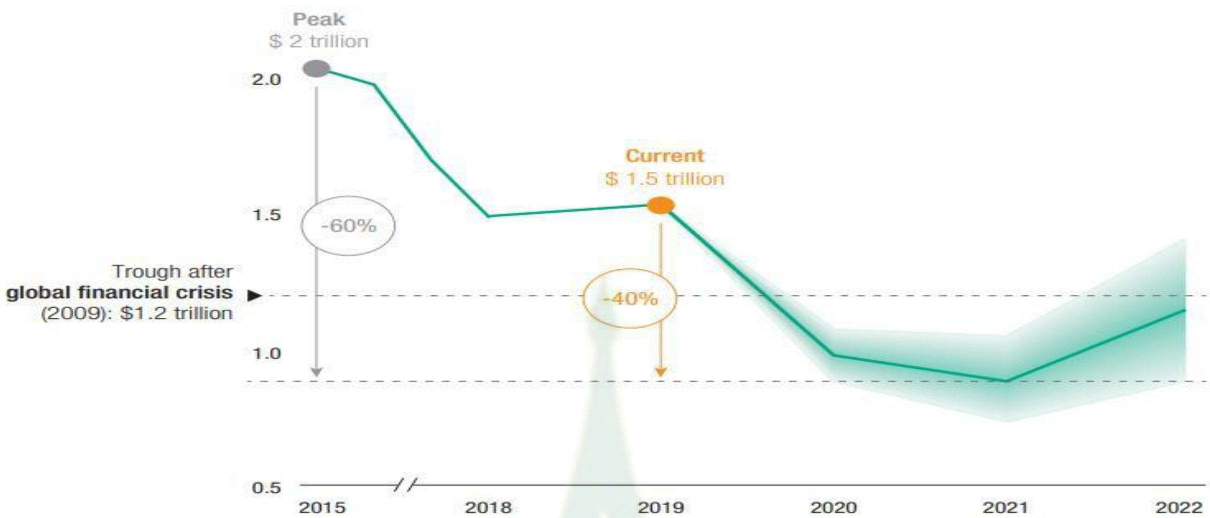
[132] World Investment Report 2020, *supra* note 124, at xii.
[133] *Id.*

and additive manufacturing. As a result, the impact of these elements will disrupt the international production regime by effecting the length, geographical distribution and government of the global value chains.

The impact of the COVID-19 crisis has caused a dramatic drop in global FDI statistic. The statistic in 2020 has shown that global FDI decreased around 40 percent comparing to the number in 2019 (USD 1.54 trillion). This trend is very likely to be continued for the year 2021.[134] The crisis situation will play a major role in the statistic of global FDI performance. The pandemic negatively impacts a supply, demand and national policy for FDI. The lockdown measures are slowing down exiting investment projects. The prospect of a deep recession will lead MNEs to re- assess new projects. The crisis also affects the government measures to implement new investment restrictions. The overall impact of the COVID-19, although it is very severe everywhere, developing economies, like Thailand, are expected to see the biggest fall in FDI because they rely more on investment in GVC-intensive and extractive industries, which have been critically hit. Moreover, the developing countries are not ready to implement the same economic support measures as developed economies.

[134] *Id.*

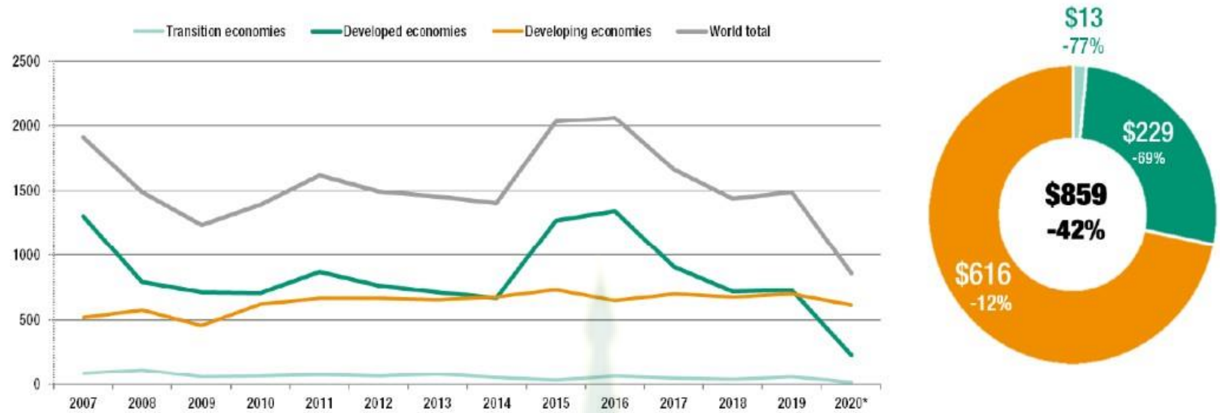
Figure 1: Global FDI inflows, 2015-2019 and 2020-2022



Source: UNCTAD, *World Investment Report 2020*

As for the case of Thailand, FDI is continuing to be a key booster for the national economic development. Thailand is one of the major FDI destination in South-East Asia region. However, the impact of the COVID-19 crisis has caused in the drop of FDI flows to USD 4 billion in 2019, down from USD 10 billion in 2018. This trend was the affect from the general decline trend of FDI in Asia and ASEAN members. The stock of FDI stood at USD 254 billion in 2019. Japan and Singapore are by far the largest investors in the country and account for slightly more than half of FDI inflows. Hong Kong, the USA, the Netherlands, China, and Mauritius are also among the major investors.

Figure 2: FDI Inflows: Global and by group of economies, 2007-2020 (billions of US dollars)



Source: UNCTAD, *"Global foreign direct investment fell by 42% in 2020, outlook remains weak"*, 24 January 2021.

Manufacturing sector and services business, particularly financial and insurance activities attract nearly 70% of all FDI inflows. Investments in real estate, commerce and information and communication are also considerable. According to UNCTAD's latest Global Investment Trends Monitor released on 24 January 2021, Global foreign direct investment (FDI) flows fell 42 percent worldwide in 2020 compared to 2019, and 31 percent in South-East Asia. In this global context, Thailand's FDI fell by 50 percent.[135] This happens as a result of a major disruption of production and supply chains in many industries, especially manufacturing sector. Lockdown measures have halted the factory operation. Major automotive manufactures in the country such as Mazda, Mitsubishi and Nissan have temporarily ceased their productions. Also, Ford and Toyota have temporarily suspended production in Thailand. Supply chains of GVC-Intensive manufacturing industries were already disrupted by lockdowns in China and other countries, which affected the

[135] UNCTAD, *"Global foreign direct investment fell by 42% in 2020, outlook remains weak"*, 24 January 2021.

flows of parts and components to factories in this sub region. Most of the factories in the country source between 40 percent and 60 percent of electronics parts and components from China. In the apparel industry, supply chain disruption of raw materials from China has also directly affected the sub region.[136]

Table 1: Foreign Direct Investment Statistic 2017-2019

Foreign Direct Investment	2017	2018	2019
FDI Inward Flow *(million USD)*	6,661	10,399	4,146
FDI Stock *(million USD)*	221,645	226,302	254,416
Number of Greenfield Investments*	123	189	143
Value of Greenfield Investments (million USD)	5,145	7,186	4,646

Source: UNCTAD, *"Global foreign direct investment fell by 42% in 2020, outlook remains weak"*, 24 January 2021.

Subsequently, the slump in global and regional demand is likely to lead to further scaling down of factory operations in the automotive, electronics and apparel industries. The decline in manufacturing sector is expected to affect international investment throughout 2020 and 2021. According to UNCTAD's report, in South-East Asia region, Greenfield investment in automotive production in the first quarter of 2020 fell by 67 percent to USD 628 million and in computer and electronics by 36 percent to USD 752 million as compared with the quarterly average of 2019. The shrink in manufacturing sector is likely to cause the economic downturn for Thailand as the manufacturing businesses are the key elements in propelling national economic development for many decades.[137] All of these has recently led to the shift in Board of Investment (BOI) policy toward the new investment incentives in high technology industry.

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[136] World Investment Report 2020, *supra* note 124, at 40.
[137] *Id.*, at 41.

Lately, the BOI has redesigned their FDI incentives packages to tackle the changing landscape of global mega economic trends. Green technology and digital transformation are the key elements for future economic growth.[138] As Secretary General of BOI expressed, the emergence of new digital technology such as big data, the internet of things, Artificial Intelligent (AI), machine learning, robotics, 3D printing and biotechnology along with growing concerns over climate change have shaped business's activities worldwide, with rapid changes in consumer behaviors, product innovations and company productivity. Thus, BOI is directing its investment promotions towards helping the country leverage the opportunities arising from global mega trends, while coordinating with other government agencies to strengthen Thailand's position in the new global economic landscape. BOI has introduced new investment privileges aimed at promoting the adoption of digital, automation, and green technology as well as the uptake of sustainability certification technology as well as the uptake of sustainability certification among eligible industries.[139]

The new BOI incentives is also one of an important mechanism to support the Eastern Economic Corridor (EEC), the mega project of special economic zone of Thai government to boost the national economy. In 2018, Thai government has successfully passed the law for trade and investment in the Eastern Economic Corridor (EEC).[140] The EEC includes three eastern provinces of Thailand – Chonburi, Rayong and Chachoengsao – off the coast of the Gulf of Thailand and spans total of 13,285 square kilometers. As of January 2018, the EEC has attracted USD 9.3 billion in promised FDI.[141] The government is currently focusing on developing EEC to be the new

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[138] World Investment Report 2020, *supra* note 124.

[139] Thailand Board of Investment, *Speeding up EV: Imagine ASEAN's Fully-Charged EV Hub*, Thailand Investment Review, Vol.31, 13-14, February 2021.

[140] The Eastern Economic Corridor (EEC) Act of 2018

[141] ASEAN Briefing, Thailand's Eastern Economic Corridor – What You Need to Know, June 29, 2018.

growth hub of the country and ASEAN region. It aims to attract high Technology and foreign talents. The focus of the Thai government on the EEC includes major investment and activities in a number of projects, such as high-speed train linking it with Bangkok, the expansion of deep seaports and airports, along with the development of an innovation hub, or the EECi, which will increase competiveness and support high-technology industries. However, the development of EEC has been disrupted by the COVID-19 crisis which impair the economic trajectory of Thailand.[142]

The discussion in this section intends to shed light on the need for changes in Thailand international investment policy. While the role of BOI and its FDI promotion measures are constantly adapting to the change in global economic situation to drive Thailand's economic transformation to become a more competitive and stronger player in the world arena, the FDI controlling measures under the Foreign Business Act of 1999 (B.E.2542) has yet to be amended for the past twenty years. The current economic predicament of Thailand highlights the need of transformation in current FDI-driven growth policy and reconsideration the regulation concerning the general rule on FDI controlling mechanisms. The legal infrastructures of FDI needs to be adjusted accordingly to strengthening the international investment policy of Thailand. A shift in investment promotion strategies towards digital infrastructure and services is necessary as the manufacturing sector has heavily affected by the crisis. The FDI statistic has shown the emerging role of service businesses and digital industry. For the past three decades, international production and the promotion of export-oriented manufacturing investment have been the pillars of development and industrialization strategies of Thailand. Investment geared towards exploiting factors of production, resources and low-cost labor will remain important, but the pool of such

[142] Bangkok Post, EEC targets thrown out as forecasts fogged by crisis, April 27, 2020.

investment is shrinking. This calls for a degree of rebalancing towards growth based on domestic and regional demand and on services. Investment in the green economy and the blue economy, as well as in digital infrastructure and domestic services, presents great potential for contributing to achieving the current trend of Sustainable Development Goals (SDGs). In the subsequent sections, the study will explore the inheritance problematic aspects of the implementation of FBA as an FDI controlling regulation in Thailand.

3.2 The Historical Landscape of Thai Domestic Economy and the Emerging Role of the Foreign Business Act of 1999

Historically, the Thai domestic economy had been characterized by the *Sakdina* economic system. From Ayudhaya to early Rattanakosin period, the system had influenced the Thai domestic market as well as the allocation of power and players inside it. The *Sakdina* was systematized under the unique relation between the King and his citizens, *phrai*. The citizens had to pay tribute to the King's representative, the comprador capitalists, mostly Chinese, in the form of taxes and duties in return for the King's protection.[143] At this stage of the *Sakdina*'s monopolized system, the comprador capitalists have accumulated their power and wealth in the Thai economy since they are the dominant players in collecting royal revenues both internationally, through foreign trade and investment, and domestically.[144]

The modern era of international trade and investment in Thailand started at the time of the 1855 Bowring Treaty between the Kingdom of Siam and Great Britain. The impact of the Treaty has resulted in the opening of the Thai economy to foreign markets as well as the dependency of Thailand on foreign capital. The British entrepreneurs were allowed to trade directly with Thai

[143] CHIT PHUMISAK, THE FACE OF THAI FEUDALISM, A CRITICAL ANALYSIS OF THAI CONTEMPORARY SOCIETY 294-295 (2007).
[144] *Id.*

citizens. Import duties were also readjusted to three percent for all merchandises, except bullion and opium.[145] The result of the Treaty led to the development of the Thai market economy which is driven by the accumulation of capital from all financial sources, especially foreign capital via export goods.[146] This state of economic dependency was dominated by three main players in the Thai domestic economy: the royal and bureaucrat capitalists, comprador and local capitalists, and western capitalists, as Akira Suehiro noted.[147] These players had influenced the Thai economy which undermined the development of a strong middle class (*bourgeoisie*) in Thailand. The comprador capitalists, mostly Chinese businessmen at the time, instead of developing their businesses to a wealthy middleclass rank, had to serve and reconnect with the bureaucrat capitalists, mainly military leaders, to optimally operate their businesses. This period is characterized as bureaucratic capitalism or *Thun-Niyom Khun-Nang* as Sungsidh Piriyaransan suggested.[148] It was typical for the big businesses to have political or military leaders positioned as directors or shareholders in several companies. The collaboration between political leaders and Chinese businesses can be seen utilizing two techniques. First, the political leader established the state enterprise which they had acquired the position as board members then placed the Chinese businessmen in the management position to operate their company to secure the benefit for them. Second, the Chinese businessmen invited the political and military leaders to be board members of their companies in order to secure political protection of their businesses in return.[149] The dynamic between politics and businesses can be seen in the event of the military coups in 1947

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145 AKIRA SUEHIRO, CAPITAL ACCUMULATION AND INDUSTRIAL DEVELOPMENT IN THAILAND 2-10 (1985).

146 Sirilak Sakkriangkrai, *The Origin of the Capitalist Class in Thailand (1855-1910)*, *in* ECONOMIC HISTORY OF THAILAND UNTIL BE 2484 379-80 (Chatthip Nartsupha & Sompop Manarungsan eds., 1984).

147 AKIRA SUEHIRO, CAPITAL ACCUMULATION AND INDUSTRIAL DEVELOPMENT IN THAILAND 10 (1985).

148 SUNGSIDH PIRIYARANGSAN, THAI BUREAUCRATIC CAPITALISM (BE 2475-2503) 284-92 (1983).

149 CHATTHIP NARTSUPHA, THE THAI VILLAGE ECONOMY IN THE PAST 94-95 (1984).

and 1958 and the prominent role of the Asia Trust Group led by Chin Sophonpanich, the owner of Bangkok Bank, as William Skinner stated.[150]

As mentioned above, the structure of the Thai domestic economy has been characterized by a relationship-based economy among three main players: political or military leaders, Chinese family businesses, and foreign capital. This tripod structure has maintained its predominant role in the transformation of the Thai economy from the Import Substitution Industrialization (ISI) period to Export Oriented Industrialization (EOI) period in 1972.[151] This arrangement resulted in the boom of multinational corporations, such as Japanese firms and Thai industrial conglomerates.[152] Most corporations who invested in Thailand at the time, especially Chinese family businesses, had utilized the benefits under government policies and the new investment laws, namely the Investment Promotion Act, as well as legal loopholes to maximize their business profit and strengthen their respective power in the country.[153] The wealth of leading family businesses is still prominent in the Thai economy today.[154] These legal devices and the corporate structure of big businesses in Thailand will be discussed in subsequent sections.

The history of Foreign Business Act (FBA) of 1999 (B.E.2542) can be traced back to the industrialization period of Thailand during the 1960s. The 1958 *coup d'état* marked an important economic turning point in Thailand. The military leader, Field Marshall Sarit Thanarat, formed the Sarit administration (CE 1958 - 1963) and, for the first time, introduced comprehensive economic planning with recommendations from the World Bank. The government emphasized

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150 WILLIAM G. SKINNER, LEADERSHIP AND POWER IN THE CHINESE COMMUNITY OF THAILAND 8 (1958).
151 PASUK PHONGPAICHIT & CHRIS BAKER, THAILAND: ECONOMY AND POLITICS 239-41 (1996).
152 RANGSUN THANAPORNPHUN, THE PROCESS OF ECONOMIC POLICY FORMULATION IN THAILAND: AN ANALYSIS ONHISTORICAL AND POLITICAL ECONOMICS (BE 2475-2530) 37 (2003).
153 Duangmenee Laovakul, *Concentration of Land and Other Wealth in Thailand, in* UNEQUAL THAILAND: ASPECTS OF INCOME, WEALTH AND POWER 39 (2016).
154 Akachai Apisakkul, A Comparison of Family and Non-Family Business Growth in the Stock Exchange of Thailand, UTCC International Journal of Business and Economics Vol. 7 No.1, 1 (2015).

and proclaimed the *phatthana* (development) slogan, as part of the nationalist mission to shield Thailand from communism, and guided the country to industrialization-promoting policies through private capital from both domestic and foreign sources.[155] Sarit committed Thailand to a path of economic prosperity through what can be essentially classified as a pro-capitalist economy − private ownership of the means of production and an open trading regime. The economy was to function with minimal state or external intervention. The state was to solely serve as a social guardian and to provide a stable investment environment for the private sector.[156]

The boom of foreign direct investment was most noticeable when the Thai government proposed the transformation plan from Import Substitution Industrialization (ISI) to Export Oriented Industrialization (EOI), as a means to solve lingering economic problems. In order to boost the economic development, the government utilized the export industry as a tool to propel the Thai economy.[157] The government agencies were set up to execute this transformation. The establishment of two major state agencies during the Sarit administration was extremely critical to Thailand's economic development and foreign investment landscape, and has continued to play a crucial part in today's economy. The first agency is the National Economic and Social Development Board (NESDB) which is responsible exclusively for carrying out a monumental series of national development plans which, at its early stage, were under financial and institutional support from the United States. The other agency is the Board of Investment (BOI) which is responsible for creating investment incentive policies to attract local and foreign capitals. The new Promotion for Industry Act of 1959 greatly paved way for the establishment of the BOI. The

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[155] Somboon Siriprachai, *Problems in the Industrialization Process in Thailand*, 16 THAMMASAT ECON. J. 70-71 (1998).
[156] *Id.* at 72.
[157] C.D.M. Wilde, Act for the Promotion of Industrial Investment in Thailand, 10 AM. J. COMP. L, 75 (1961), available at http://www.jstor.org/discover/10.2307/838199?uid=3739976&uid=2129&uid=2&uid=70&uid=4 &uid=3739256&si d=21101408558617.

investment incentives outlined in the Act were mainly given to import-substituting industries. The significance of the BOI is not because it grants incentives but because it serves as a symbol of credible state commitment to investment promotion policies.[158] The 1959 Beitzel Report laid the foundation for Sarit's industrialization pursuit[159] and resulted in the government's revision of the Investment Promotion Act (IPA) in 1962.[160] U.S. advisers were able to play a crucial role in the policy-drafting process, particularly with the first three national economic and social development plans (CE 1961-1976) supported by Thai technocrats. The Thai industrialization policy adopted the *laissez-faire* free market ideology. The state focused on production while private enterprises executed economic transactions.[161] The role of the state was confined to providing the necessary infrastructure and to cultivating a favorable investment climate for the private sector.[162]

After the implementation of EOI during the 1970s and 1980s, Thailand became an attractive investment and industrial production site. The economic boom was based upon domestic industries' dependence on foreign investment. To take advantage of the low costs of raw materials and labor, many foreign investors, especially Japanese and other East Asian enterprises, moved their manufacturing bases to Thailand.[163] At the time, local family-owned conglomerates also made sure they participated as leading players locally. They were attractive as joint venture partners for incoming enterprises. The family conglomerates also launched many independent ventures and often acquired technologies by means of purchasing or licensing.[164]

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[158] Siriprachai, *supra* note 155, at 73.
[159] GEORGE B. BEITZEL, EXPANDING PRIVATE INVESTMENT FOR THAILAND'S ECONOMIC GROWTH: A SPECIAL REPORT (1959).
[160] Wilde, *supra* note 157, at 99-103.
[161] Siriprachai, *supra* note 155, at 72-73.
[162] RANGSUN THANAPORNPHUN, THE PROCESS OF ECONOMIC POLICY FORMULATION IN THAILAND: AN ANALYSIS ON
HISTORICAL AND POLITICAL ECONOMICS (BE 2475-2530) 2-14 (2003).
[163] Natenapha Wailerdsak, *Companies in Crisis*, in THAI CAPITAL AFTER THE 1997 CRISIS 22-24 (Pasuk Phongpaichit & Chris Baker eds., 2008)
[164] *Id.* at 25.

As foreign investment increasingly played an important role in Thailand's economy, the Thai government at the time initiated policies to nurture domestic capitalism and provided protectionist measures against foreign investment and participation in the Thai economy. In 1972, following the 1971 *coup d'état*, the government enacted the National Executive Council Announcement (NECA) No. 281 (referred to in Thai as *Por Wor* 281). The statutes were drafted to limit foreign participation in certain business activities. These targeted businesses were sensitive to foreign involvement for several reasons; matters concerning national security, natural resources, infant industries (reserved for building Thai competitiveness), and cultural affairs became the key areas of foreign restriction.[165] Aside from these targeted sectors, several other sectors solely allowed foreign investors to invest as minority shareholders. The objective of the Revolutionary Council at the time was that the law's enactment arose from two contradicting purposes: to reserve businesses for Thai citizens, and to attract foreign investment [166]

In summary, the implementation of the NECA No. 281, along with the Investment Promotion Act of the BOI under an export-led climate, has led to the beginning of Thailand's existing semi-separated economies – the vibrant export manufacturing industrial sector and the relatively entrenched services sector. After the Thai financial crisis of 1997, foreign capital injection has increasingly played a role in bolstering the Thai economy. The government then decided to liberalize domestic regulations in order to attract more FDI transactions. The Foreign Business Act of 1999 (B.E. 2542) was then enacted to replace the NECA No.281 as a positive legal tool towards foreign investment in Thailand. However, the contradictions embedded in the objectives of *Por Wor* 281 have been carried over to the regulatory concept of the Foreign Business

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[165] Douglas Mancill, A Brief History of the Foreign Business Act (Nov. 14, 2010), http://thailawandpolicy.wordpress.com/2010/11/14/a-brief-history-of-the-foreign-business-act/.
[166] Wailerdsak, *supra* note 163, at 20-21.

Act of 1999, hence legal protectionism measures remained. At present, this overarching protectionism framework still plays a role in sustaining the problematic aspects of the law concerning foreign investment control in Thailand.

3.3 The Role of Family-Owned Business Structures and the Doctrine of Corporate Ownership and Control in Thailand: The Matter of Legal Interpretation

The political economy of the Thai domestic market has influenced the development of corporations and foreign investment regime. As previously presented, the military coup in 1932 led to the increasing prominence of military leaders and Chinese businessmen due to their mutual benefits in the market. Family businesses are still the dominant player in driving the Thai domestic market as observed by Rungluck Naksung and Opas Piansoongnern.[167] The fundamental issue to those businesses is how they can manage to sustain and control their wealth from one generation to the other. Thus, corporate devices such as the pyramidal corporate structure, cross-shareholding, and dual-class share strategies are utilized to maintain their controlling power throughout their business conglomerates.[168]

The traditional structure of family businesses have utilized the loophole in Thai corporate law as the doctrine of corporate ownership and control has yet to be successfully developed in Thailand. The doctrine of corporate ownership and control has been well developed and it is the fundamental element to the concept of firms in the West, particularly in the United States. Historically, in the U.S., firms are instruments of investment, with limited shareholder liability. Legal rights and liabilities of incorporated entities are distinct from their shareholders. Effectively

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[167] Rungluck Naksung & Opas Piansoongnern, Nurturing and Transferring Entrepreneurship in Thai Business Families, Journal of Entrepreneurship and Business Innovation, Vol.5 No.1 (2018).
[168] Pasuk Phongpaichit & Chris Baker, *Introduction*, in THAI CAPITAL AFTER THE 1997 CRISIS 4 (2008); Rafael La Porta, Florencio Lopez de Silanes & Andrei Fin Shleifer, Corporate Ownership around the World, 54 J. FIN. 471- 517 (1999).

practiced limited liability leads to the development of a security market and the corporate sector, characterized by the prevalence of dispersed and widely-held corporations.[169] The concept of the separation of corporate ownership and managerial control emerges as the outcome of the "modern corporation" as suggested by Adolf Berle and Gardiner Means.[170] This marks the so-called Anglo-America model of corporate governance. In contrast, Eastern Economies are characterized by a concentrated corporate ownership system where "contrzolling block holders, weak security markets, high private benefits of control, and low disclosure and market transparency standards" dominate.[171] Consequently, the underdeveloped concept of the separation of ownership and control in Thai corporate sphere along with the dominance power of big family businesses in the domestic market have resulted in the adoption of pyramidal corporate conglomerate in Thailand.

Such structure became the most effective tool in securing family control over a business entity. The structure allows families to extract their profit and gives them the ability to access their affiliates' capital to allocate resources accordingly. According to Thai corporate law, the pyramidal business model has yet to be recognized, as the concept of law perceives the firm as a monolithic entity. Therefore, the utilization of such structure is pervasive in the Thai market, leading to the adoption of such structure by foreign investors. The example of pyramidal structure in the big family businesses will be demonstrated through the case of CP Group of the Chiaravanont Family.

In the case of the Chiaravanont Family and their CP Group, the family designed their corporate management structure to retain their controlling power throughout the business group

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[169] Frank H. Easterbrook & Daniel R. Fischel, Limited Liability and the Corporation, 52 U. CHI. L. REV. 89, 89-90 (1985).
[170] ADOLF BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 1933).
[171] John C. Coffee, *The Rise of Dispersed Ownership: The Role of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 3 (2001).

while utilizing modern management schemes of hiring skilled professionals to run their business. The CP group expands its business lines into many sectors, mainly agricultural business and telecommunication business. The family employed the pyramidal structure to control their business by creating two holding companies to hold corporate shares in lower tier firms while the main holding companies were not listed and were controlled by the family through their 89 percent share ownership.[172]

The structure of CP Group is one of the examples of family business model in Thailand as suggested by Natenapha Wailerdsak.[173] The adoption of this structure allows the family to assert their controlling power in a lower-tier firm while maintain a minimal capital investment. This model can also disguise the actual owner of the business entity since the structure allows the ultimate owner to control other company under the pyramid tiers by possessing an insignificant portion of share ownership (cash flow rights). As one of the leading legal expert suggests, this is a critical loophole in Thai corporate sphere as the concept of Thai corporate law views corporations as a standalone entity rather than a business group or a conglomerate.[174] With regard to foreign direct investment in Thailand, the exiting concept of doctrine of corporate ownership and control in Thailand can lead to the problem of nominee as foreign investors and their Thai counterpart can utilize the legal devices such as pyramidal corporate structure, dual-class share structure and cross-shareholding structure to circumvent the controlled business lists under the Foreign Business Act of 1999. The analysis to this problem will be discussed in the next Chapter. The CP Group structure is revealed below as an example of the pyramidal corporate structure in Thai domestic market.

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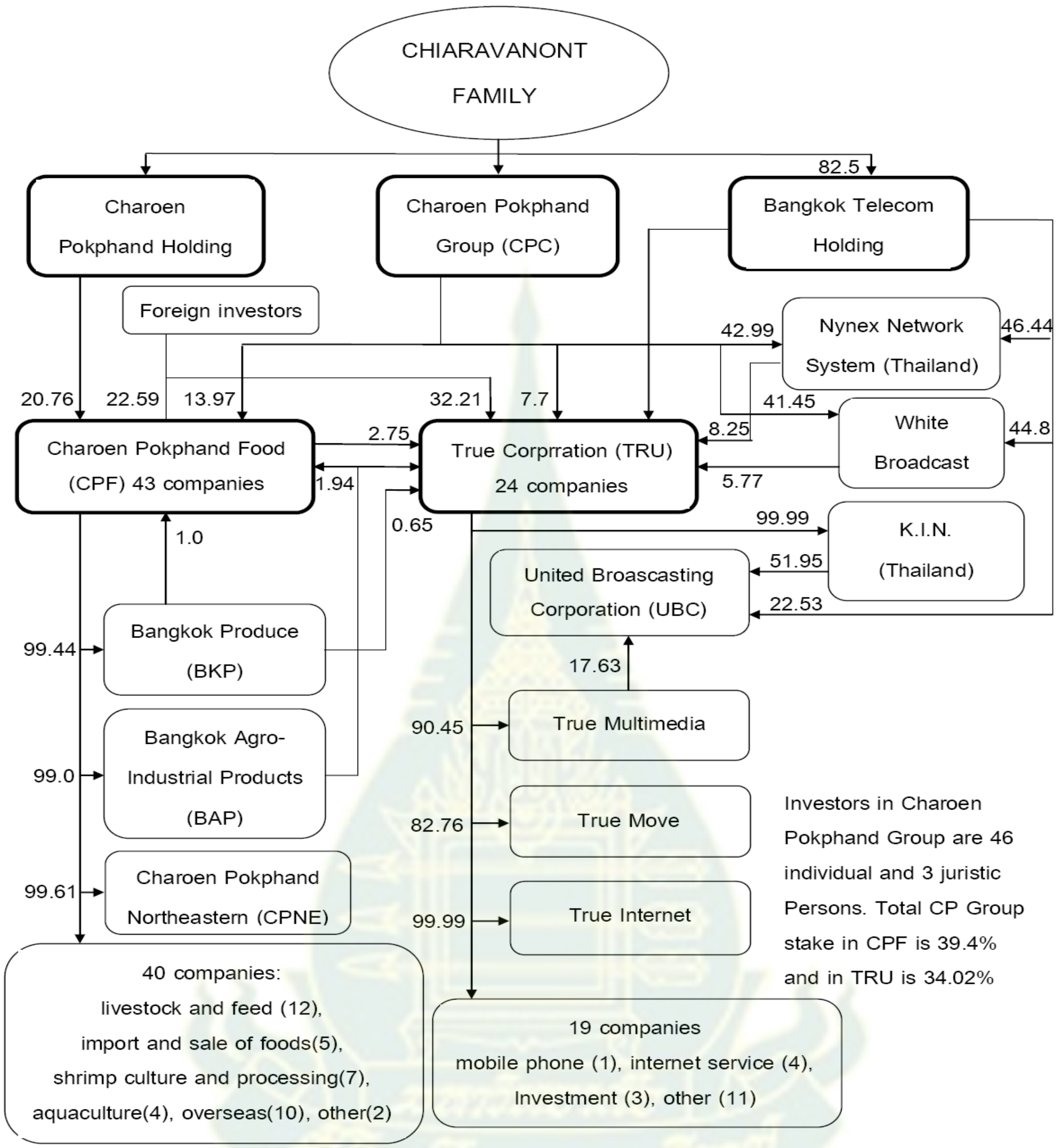
[172] Wailerdsak, *supra* note 163, at 51.
[173] *Id.*
[174] Personal Interview with Law Professor from Thammasat University, 25 January 2018.

The Structure of the CP Group in 2006



Source: Natenapha Wailerdsak, Companies in Crisis, in THAI CAPITAL AFTER THE 1997 CRISIS 51 (Pasuk Phongpaichit & Chris Baker eds., 2008)

3.4 The Impact of Asia Financial Crisis 1997 and Thailand's Economy: The Economic Statistic and Indicators

Before the Asia Financial Crisis in 1997, Thailand established itself to be one of the fastest growing economies in the world during the late 1980s. Unfortunately, with the crisis, Thai economy suffered a massive hit. Ever since then, Thailand has been trying to recover from the debilitating effects of the event. Though, along with Thailand, the whole East Asian region experienced the devastating effects brought upon by the crisis as can be seen in Table 2 below.

Table 2: Recovery of Gross Domestic Product

Country	Year of Recovery	No. Years in Crisis	'Severity' of Crisis (Average GDP Growth 1997-98)
Thailand	2003	6	-6.1
Indonesia	2003	6	-4.6
Malaysia	2000	3	0.3
Philippines	1999	2	2.3
South Korea	2000	3	-1.3
Singapore	1999	2	3.7

Source: World Bank, *World Development Indicators 2006*.

3.4.1 Consequences of the Asia Financial Crisis

The economic crisis in Thailand was characterized by a significant depreciation of the Bath (which led to a depletion of nearly all of Thailand's foreign exchange reserves), a decline in the stock market, and a sharp deterioration of property prices.[175] The combination of these problems led to a major economic decline. After averaging 8.6 percent annual growth between 1990 and

[175] CRS Report 98-438, the Asian (Global?) Financial Crisis, the IMF, and Japan: Economic Issues, by Dick K. Nanto, September 3, 1998.

1996, Thailand's real GDP fell by 1.4 percent in 1997 and then declined by 10.3 percent in 1998 as can be seen in Table 3.

Table 3: Selected Economic Indicators for Thailand's economy from 1996-2003

	1996	1997	1998	1999	2000	2001	2002
Average Exchange Rate (Bath per U.S.$)	25	31	41	38	40	44	43
Real GDP Growth (%)	5.9	-1.4	-10.3	4.4	4.6	1.8	4.8
GDP ($billions)	182	151	112	123	123	115	126
GDP (billions ($PPP)* Per	397	391	349	370	389	404	431
Capita GDP ($PPP)*	6,741	6,580	5,817	6,094	6,350	6,560	6,910
Exports ($billions)	56.0	58.4	54.5	58.5	69.8	65.4	68.9
Imports ($billions)	72.2	63.3	42.4	49.9	62.2	61.8	64.3
FDI ($billions)	2.3	3.9	7.3	6.2	3.4	3.8	3.3

Source: DRI-WEFA Research Report, *Global insight, Thailand, Thailand's Customs Department, and the Economist Intelligence Unit (EIU)*, January 16, 2003.

Trade also suffered, exports in 1998 fell by 6.7 percent, and imports plunged by 33.0 percent.[176] In addition, Thailand's per capita GDP on a purchasing power parity (PPP) basis, a common measurement of a nation's living standards, fell by 12 percent.[177] As a result of the severe

* PPP data are measurements of foreign data in national currencies converted into U.S. dollars based on a comparable level of purchasing power these data would have in the United State. Prices for goods and services are generals lower in Thailand than in the United State, and hence, the PPP measurement of Thailand's GDP is significantly higher than GDP data expressed in nominal U.S. dollars.

176 DRI-WEFA Research Reports, Global insight, Thailand, Thailand's Customs Department, and the Economist Intelligence Unit (EIU), January 16, 2003.

177 PPP measurements attempt to convert foreign currencies into U.S. dollars based on the actual purchasing power of such currency (based on surveys of the prices of various goods and service) in each respective country. They thus give a more accurate measurement of the size of a country's economy and living standards relative to those in the United States.

economic crisis in Thailand, the Thai Government had to seek an advice from international financial institutions, namely the International Monetary Fund (IMF) and the World Bank, in order to recover back to economic stability. As a result, the IMF granted a 17.2 billion Baht in order to stimulate the Thai economy.[178] Though the IMF helped the Thai Government during a time of great economic hardship, the loan brought upon a huge obligation to the government regarding the treatment of future economic development plan.

3.4.2 Road to Recovery

The main purpose of the IMF is economic liberalization. Therefore, many structural adjustment programs had been introduced to Thailand during the period of economic recovery. Attempts were made to implement economic and political reforms simultaneously. Consequently, the Thai Government liberalized their economy in many areas of business (e.g. financial sector, cooperate restructuring).[179] Real GDP grew by 4.4 percent in 1999 and by 4.6 percent in 2000 (although it slowed to 1.8 percent in 2001).[180] Thus, the economic crisis in Thailand reflected the capacity of the government in handling the economy with sufficient knowledge of policies.

The new coalition government administrated by Prime Minister Thaksin Shinawatra and the Thai Rak Thai Party brought into power through the 2001 official election came as no surprise. haksin's economic policies mirrored his career path as a successful businessman. Many wise and well-organized economic strategies were created in order to solve the economic problems present in Thailand. Thaksin launched a series of economic initiatives designed to stabilize the

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[178] CRS Report, Asian Financial Crisis and Recovery: Implications for U.S. Interest, By Richard Cronin, April 6, 2000.
[179] IMF-Supported Program in Indonesia, Korea, and Thailand: A Preliminary Assessment, http://www.imf.org/external/pubs/ft/op/op178/OP178.pdf
[180] The office of the National Economic and Development Board (NESDB) Press Release, Economic Outlook, Thai Economic Performance in 2001 and Outlook for 2002.

economy, boost domestic demand, encourage the growth of small and medium-sized businesses, and improve rural incomes and development.[181]

After Thaksin took office in 2001, he implemented well-organized economic strategies and successfully pulled Thailand's economy back to the path of dynamic stability and sustained growth. The Thaksin administration employed a “dual-track” development approach that combined building domestic economic capacity with facilitation of foreign trade and investment. Thaksin also created a positive environment conducive to FDI inflow in order to establish the Thai market as a leading investment hub for the Southeast Asian region.[182]

Consequently, the FDI inflow was a key instrument to boost the Thailand economy. Since then, Thailand has re-emphasized itself as an export oriented economy in which its economic growth relied more upon an export volume, as well as, a world market situation, as revealed in many National Economic and Social Development Board (NESDB) annual reports. As a result of the Thai government’s new economic policy, real GDP increased by 4.8 percent in 2002, boosted by increased exports and greater domestic demand. The unemployment rate (which has gradually fallen since 1998) dropped to 4.1 percent in 2002. Thailand’s living standards (measured according to per capita GDP in PPPs) in 2002 finally recovered to the level slightly over those prior to 1997. Additionally, Thai exports in 2002 were much higher than 1997 levels, although imports were barely higher.[183] By the year 2003, GDP grew by 6.9 percent as Thailand posted one of the fastest growth rates in East Asia.[184] Even despite the regional SARS outbreak that affected tourism, it had little impact on overall economic growth. Consumer demand and export remained

[181] NESDB, the National Economic and Development Agenda No. 9 (2002-2006); Razeen Sally, *Thai Trade Policy: From Non-discriminatory Liberalisation to FTAs*, The World Economy (2007).
[182] *Id.*
[183] NESDB Press Release, *Economic Outlook, Thai Economic Performance in 2002 and Outlook for 2003*.
[184] NESDB Press Release, Economic Outlook, Thai Economic Performance in 2003 and Outlook for 2004.

strong in the first part of 2004, despite the avian flu, political unrest in the south and rising oil prices. Overall, the economy expanded at an annual rate of 6.2 percent for the entire year.[185] Hence, the systematic and progressive implementation of appropriate policies, were able to boost Thailand's economic performance substantially.

3.4.3 The Exiting Threat after the Crisis

However, despite these improvements to the Thai economy, many economists were concerned over the growing levels of public debt, which rose from 12.6 percent of GDP in 1996 to 60.4 percent in 2002, and over the relatively slow pace of banking reforms and the restructuring of non-performing loans.[186] In addition, Thailand's economy was and still is heavily dependent on international trade. This reliance can be as detrimental as it is fruitful to the Thai economy. The shares of imports in GDP rose to over 50 percent, compared with an estimated 40 percent in 1997. Manufactured goods account for about 45 percent of Thailand's imports. The largest import items include office machines and telecommunications equipment (25 percent in 2001), other consumer goods (10 percent), textiles and clothing (8 percent) and other semi-manufactures (8 percent).[187]

Furthermore, Thailand's top trading partners in 2003 were Japan, the United States, the European Union (EU), and China (*see* Table 4). With around 17.0 percent of Thai exports destined for the U.S. market, the United States is Thailand's largest export market. On the import side, the United States, with an import share of 9.5 percent, was the third largest supplier after Japan and the European Union.[188]

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[185] NESDB Press Release, *Economic Outlook, Thai Economic Performance in 2004 and Outlook for 2005*.
[186] Michael Shari, Thailand's Debt Undertow, BusinessWeek, September 23, 2002.
[187] World Trade Organization (WTO), Trade Policy Review: Thailand, WT/TPR/S/123, October 15, 2003, at. 8.
[188] Bank of Thailand, Thailand's Major Trading Partners in 2003.

Table 4: Thailand's Major Trading Partners in 2003 ($ billions)

	Total Trade	Exports	Imports	Trade Balance
Japan	29.5	11.4	18.1	-6.7
United States	20.7	13.6	7.1	6.5
European Union	19.3	11.8	7.5	4.3
China	11.7	5.7	6.0	-0.3
Singapore	9.0	5.8	3.2	2.6
Thailand's World Trade	155.2	80.2	75.0	5.2

Source: Bank of Thailand, *Thailand's Major Trading Partners in 2003*

Foreign direct investment (FDI) was and still is an important source of employment, new technologies and processes. The cumulative level of FDI in Thailand at the end of 2003 was about USD 31 billion. As said above, Japan is the largest foreign investor in Thailand, followed by the United States. Most FDI inflows are in manufacturing and services, though Thailand has virtually no FDIs in agriculture. In addition, annual FDI flows to Thailand have been relatively flat over the past few years, and in 2003, FDI in Thailand declined by more than half, caused in part by a shift in FDIs to China.[189]

In 2005 the Thai economy was also affected by surging oil prices and negative domestic factors including drought, tsunami, avian influenza and unrest in the southern provinces. As a result, the economy expanded only 3.2 percent during the first quarter and 4.6 percent during the second quarter. However, during the second half of the year, the economy rebounded as a result

[189] WTO Trade Policy Review – Thailand (2003).

of the surge in exports while imports slowed down, and with the recovery of tourism sector. Furthermore, the economy expanded by 5.4 percent in the third quarter and it softened to 4.7 percent in the last quarter. All in all, in 2005, the economy registered an economic expansion at 4.5 percent, lower than the growth rate of 6.2 percent in 2004 due to factors such as a higher oil price, consumer price, and inflation rate.[190] Thus, some economists warned that these factors such as the rise in the public debt, the rise in imports and the overall decline in economic expansion could potentially spark another financial crisis in Thailand.

3.4.4 The Economic Recovery: Ten Years after the 1997 Financial Crisis

The economic momentum of Thailand demonstrated a declining trend since the last quarter of 2005. The economic growth softened from 6.1 percent in the beginning of the year to a 4.2 percent growth at the end. The overall expansion of the year 2006 was at a 5.0 percent growth, which is higher than 4.5 percent in 2005.[191] However, the tide of economic growth both high and low seems to reflect to the political uncertainties at the time, which takes into account the military coup in September 2006 that led to the end of the Thaksin regime.

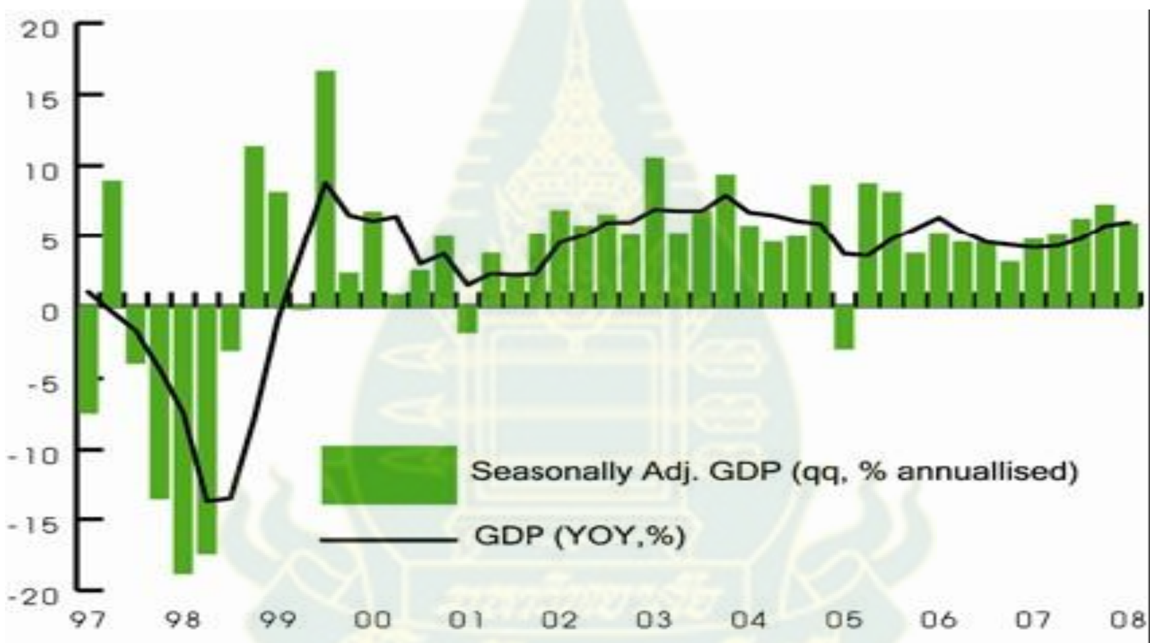
In the period of ten years after the crisis, despite a few economic slumps, the Thai economy has experienced an overall positive trend in economic growth and has thus, far developed since the time of 1997 financial crisis. During the days of the Thaksin administration, Thaksin, with his emphasis on trade and investment liberalization, successfully helped Thailand in becoming the leader of ASEAN. Thaksin's export-oriented policies had been instrumental in stimulating the economic development of Thailand. However, during the year of 2007, after the end of Thaksin's

[190] NESDB Press Release, Economic Outlook, Thai Economic Performance in 2005 and Outlook for 2006.
[191] NESDB Press Release, Economic Outlook, Thai Economic Performance in 2006 and Outlook for 2007.

regime, the Thai economy declined to a 5.0% growth, comparable to that in 2006, due to the resulting impact of the political problems that overwhelmed the nation.[192]

Since the last quarter of 2007, Thai economy has been continuing recovery as the growth rate registered at 5.7 percent at the end of 2007, and grew to 6.0 percent at the first quarter of 2008. The Thai economic expansion from the financial crisis to present-day Thailand can be demonstrated in Figure 3.

Figure 3: The Thai Economic Expansion 1997-2008



Source: The Office of the National Economic and Social Development Board (NESDB), Thailand

The upward trend of economic expansion is supported mainly by an accelerating growth from the manufacturing sector from 5.7 percent in 2007 to 9.7 percent in 2008, which significantly impacted

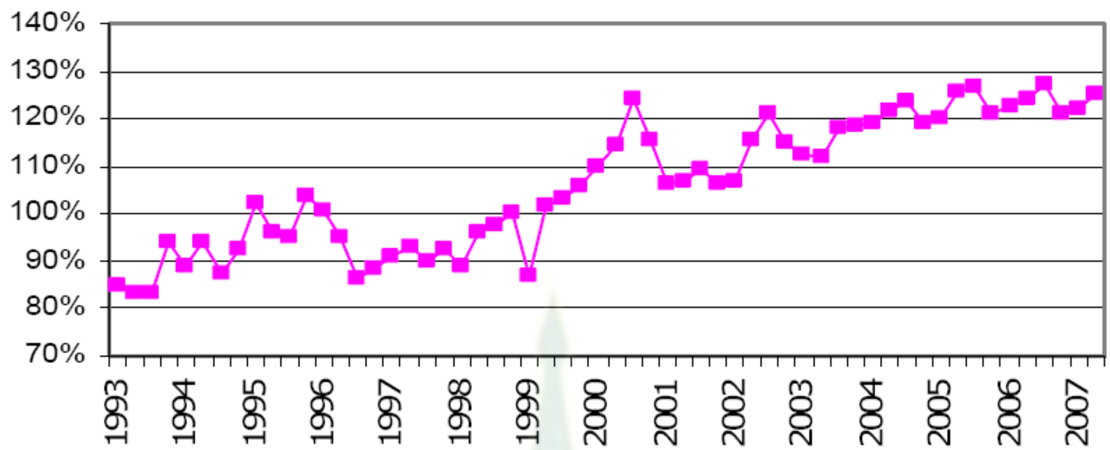
192 *Id.*

the continued expansion of export sectors and the recovery of private investment and consumption.[193]

After having revealed the development of the Thai economy and the recovery period from the financial crisis, one of the main factors that should be considered a major element in playing a crucial role to the direction of the Thai economy is the performance of export capacity. As most Asian countries have been damaged by the 1997 crisis, Thailand has seen exporting policies as a tool for the nation's economic prosperity. Thailand has established itself to be an export-oriented country after the Thaksin administration. Thaksin's policies created Thailand to be an investment hub of MNCs to manufacture as well as export their production to other countries in the world. These policies had a significant positive effect to the Thai economy during his administration. Even though this policy brought the Thai economy back from the crisis in 1997, it can be said that the dependency of Thai economic development has been very much relied on the export performance and the situation of a world market. Even though, macroeconomic indicators have returned to normal as evidenced in Figure 3, the export dependency has thus made a long lasting impact on the Thai economy to date.

[193] NESDB Press Release, Economic Outlook, Thai Economic Performance in 2007 and Outlook for 2008

Figure 4: Real Export + Import as % of Real GDP



Source: The Office of the National Economic and Social Development Board, Thailand 2008

This situation might be caused by a recent low domestic demand in both investment and consumption sectors that result in Thailand having the only option of exporting in order to remain its economic growth. As a result of the limited capacity of domestic investment, the FDIs by foreign investors continues to play a significant role to the future of the Thai economy. However, this economic position, which entails a great deal of reliance on the export performance and manufacturing sector, presents many risks for Thailand. The economic repercussions of these risks may be detrimental to the welfare of Thailand unless the government reconsider their investment policies by beginning to focus attract FDI from other economic sectors such as services businesses and digital FDI to be an engine for growth to Thai economy. The next section will discuss the FDI Controlling regulation in Thailand.

3.5 The Investment Controlling measure in Thailand: an Introduction to the Foreign Business Act of 1999

3.5.1 An Overview of Foreign Business Act of 1999

Generally, in Thailand, three significant laws govern the climate of Thai foreign investment sector: the Investment Promotion Act of 1977, the Industrial Estate Authority of Thailand Act, and the Foreign Business Act of 1999. The first law guarantees investors' protection from undesirable state measures and establishes the investment promotion regime by creating the BOI. The Industrial Estate Authority of Thailand Act 1979 also specifies investment incentives, but specifically for factories located in industrial estates. Lastly but most importantly as it is the most influential law concerning the control of foreign investment in Thailand, the Foreign Business Act of 1999 prescribes the scope of and the conditions under which a foreign entity may participate in local businesses.

For the past years, the Thai government has attempted to amend the FBA in order to develop it in accordance to the current foreign business situation in Thailand. This attempt by the Thai government has led many foreign investors to question Thailand's long investment policy of welcoming foreign investment.[194] Thus, foreign investors are still watching the latest action by the current government towards the amendment of this Act. Although the law should be adapted in accord with changes in the economy, the remaining predicament revolves around the notion of how to amend it in order to make it most profitable to Thailand's economic situation. Nevertheless, the controversy surrounding the FBA overwhelms the foreign investment regime in Thailand

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[194] *See* Laurids S. Lauridsen, *The Financial Crisis in Thailand: Causes, Conduct, and Consequence?*, Roskilde University, Denmark, The World Development 26(1), 1575-1591 (1998); Ammar Siamwalla, *Anatomy of the Thai Economic Crisis*, Thailand Development Research Institute (TDRI), (2000).

today. Thus, the FBA is a valuable source in evaluating the Thai economy and in predicting possible changes in the future. In addition to these general laws, some sectors— such as public utilities; petroleum, gas, and other natural resources; financial services; and certain business services—are covered by sector-specific legislation setting out the criteria for foreign participation. However, FBA is a general rule concerning the Control of FDI in the country.

The Act replaced the former Alien Business Law (National Executive Council Announcement No. 281, *Por Wor* 281) of 1972. Before the introduction of the Alien Business Law in 1972, foreigners were generally permitted to do business in Thailand with few restrictions. With the increasing of foreign participations in Thai domestic market, the government enacted *Por Wor* 281 to protect Thai entrepreneurs from foreign business competitions.[195] The law passed in 1972 classified businesses into three main categories, each with different foreign ownership restrictions. This law applied to all businesses except those that are subject to *suis generis* laws such as public utilities, finance and the media.

In 1999, a new Act was passed, which supersedes the earlier Alien Business Law. The main reason of the amendment was the economic policies at a time rely mainly on the attraction of FDI to propel Thailand's economic development. The new Act entitled The Foreign Business Act (FBA), B.E. 2542 (1999) was passed to be the main regulation to govern the flow of FDI in the country.[196] The FBA also guarantees most favored nation (MFN) treatment for all except American investors, who are covered by the 1968 Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America. Under this bilateral arrangement, with

[195] Thailand Development Research Institute (TDRI) Report, The Research Project on the study of Foreign Business Activities and Listed Controlling Business under Foreign Business of 1999, Department of Business Development, Ministry of Commerce, Thailand, September 2017, at 46.
[196] *Id.*

the exception of seven specified sectors[197], Americans have the same rights as Thai nationals with respect to the ownership and operation of businesses in the country. The same rights are reserved for Thai nationals in the United States, but as the latter country generally does not impose any restrictions on foreign investments, in practice reciprocal treatment does not enjoy any special privileges.

In general, the substance of FBA 1999 is to regulate the market access of foreign business entities. The screen process has been implemented by the law to ensure the benefit of all FDI that enter into the country. The screening of foreign business access can be described in two conditions under the law. The first one is the prescription under Section 4 of FBA concerning the definition of 'foreigner'.[198] The implementation of this Section also highlights the meaning of 'non-foreignness which allow to do business in Thailand freely. Thus, to maximize their profits, the foreign businesses try to utilize corporate legal devices such pyramidal structure or cross-shareholding method to circumvent the law under this Section. This circumvention is possibly by the interpretation of doctrine of corporate ownership and control in Thailand. This problem will be critically analyzed in the next chapter. The second condition in the screening process prescribed

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[197] The seven exceptions are communications, transport, fiduciary functions, banking involving a depository function (including non-bank financial institutions), exploitation of natural resources or land, and domestic trading in indigenous agricultural products.

[198] Foreign Business Act of 1999, Section 4,
'foreigner' means:
(1) a non-Thai natural person;
(2) a juristic person not registered in Thailand;
(3) a juristic person registered in Thailand and having the following characteristics:
(a) a juristic person at least one-half of whose share capital is held by persons under (1) or (2), or a juristic person at least one-half of whose total amount of capital is invested by persons under (1) or (2);
(b) a limited partnership or a registered ordinary partnership whose managing partner or manager is a person under (1).
(4) A juristic person registered in Thailand at least one-half of whose share capital is held by persons under (1), (2) or (3), or a juristic person at least on-half of whose total amount of capital is invested by persons under (1), (2) or (3)

in the law is the licensing process under Section 8 of FBA.[199] The introduction of all restricted business categories will be discuss in the next section. The businesses under the three restricted business lists will be revised annually by the Foreign Business Commission.[200] The Commission considers 4 main dimensions to revise the listed business to facilitate the development of local business and domestic market. Four dimensions are as follow; 1) the business category that does not negatively affect Thai entrepreneurs, 2) business category that important to the development of Thai economy, 3) business category that Thailand has an obligations under international agreements and 4) business category that positively affects the development of economic policy of the government. However, the revision process is proved to be slow and ineffective.[201]

In addition, besides the above mentioned screening process, foreign businesses can also enter into Thai market by utilizing the international agreements between Thailand and other countries such as FTAs or bilateral investment agreements (BITs)[202] and by acquiring the investment promotions under the supervision of Thailand Board of Investment (BOI).[203]

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[199] Foreign Business Act of 1999, Section 8,
Subject to section 6, section 7, section 10 and section 12:

(1) No foreigner may operate such businesses *stricto sensu* not permissible to foreigners by special reason, as prescribed in List One;
(2) No foreigner may operate such 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, as prescribed in List Two, unless upon obtaining permission from the Minister with the approval of the Council of Ministers;
(3) No foreigner may operate such businesses in respect of which Thai nationals are not yet ready to compete with foreigners, as prescribed in List three, unless upon obtaining permission from the Director-General with the approval of the Commission.

[200] Foreign Business Act of 1999, Section 9.
[201] Chula Unisearch, *The Research Project on the study of Listed Controlling Business under Foreign Business of 1999 for the Revision of Business Categories, Department of Business Development, Ministry of Commerce*, Thailand, September 2019, at 2-3.
[202] Foreign Business Act of 1999, Section 11.
[203] Foreign Business Act of 1999, Section 12.

3.5.2 Categories of Restricted Businesses

As mentioned in above section, The FBA 1999 maintains the three restricted business categories, but the list of businesses in each category changed (see complete list of businesses in each category in Annex I).[204] Businesses prescribed in List One are absolutely prohibited to foreigners[205] unless there is an exception contained in a special law or treaty. These include mass media, rice and animal husbandry and other resource-based businesses. Those that appear in the List Two are businesses that concern national security or safety, or are involved with local art, culture, handicrafts or natural resource and environment. Foreigners are not permitted to start new businesses listed in this category unless they obtain special permission from the Minister with the approval of the Cabinet. List Three contains businesses that the government believed is not yet "competitive" and thus, are vulnerable to foreign competition. These include mining, salt farming, forestry, fishery, professionals services, and all services unless specified in the Ministerial regulations. Similar to the previous category, foreigners may obtain a permission to operate businesses listed under this category. The only difference is that the power to grant permission is vested with the Director General of the Department of Business Development and the Foreign Business Commission. To obtain a license, applicants must be able to convince the concerned local authorities that the particular investment project could not be competently conducted by local firms. This creates a burdensome process of foreign business applications in Thailand.[206]

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[204] Thailand Development Research Institute (TDRI) Report, *supra* note 195.

[205] A " foreigner" refers to a natural person that is not of Thai nationality or a juristic entity that: (1) is established under foreign law; or (2) half or more of its capital is owned by foreigners even if the company is incorporated under Thai law, or (3) half or more of the value of the total capital being invested by foreigners even if more than half the capital is owned by Thai nationals. (The third requirement is effectively a bar on the use of Thai national as nominees.)

[206] Personal Interview with the Director of Foreign Business Administration Division, Department of Business Development, 19 September 2018.

3.5.3 The FBA and the Alien Business Law: A Comparison

From the list of businesses appeared in Annex I, it would appear that the manufacturing sector is very much open to foreign investment, bar a few businesses that may concern local small and medium enterprises but are not the major interests of foreign transnational companies. The service sector, however, remain relatively closed. Nevertheless, the new law is generally less restrictive than its predecessor. For example, 21 of the 63 sectors in which foreign majority participation was restricted under the Alien Business Law—including drug manufacture, cement production, and animal feed processing—are no longer restricted under the Foreign Business Act. Certain sectors—construction, broker businesses, auction houses— that were classified under the more restrictive category 2 under the old law were moved to the third category. However, the act still imposes minimum capital requirements for foreign investors; 2 million Baht for businesses listed in category 1 and 3 million Baht or those in categories 2 and 3. The new law also eliminated restrictions on the nationality shareholders and board of directors which the previous Alien Business Law 1972 had required the majority of the directors and shareholders must be Thai for the company to qualify as a local juristic entity.[207]

Unlike the former Alien Business Law 1972, however, the new Foreign Business Act imposes more severe criminal sanctions. Any foreigner who operates a business that are prohibited to foreigners according to the law without an Alien Business License is liable for a fine from 100,000 to 1,000,000 Baht and imprisonment of up to three years. Further, a Thai national or juristic person that assists a foreigner in circumventing the restrictions stipulated by the Foreign

[207] Thailand Development Research Institute (TDRI) Report, *supra* note 195.

Business Act by means of holding shares as a nominee, or being a nominal owner of the company, shall also be liable for a fine of 100,000 to 1,000,000 Baht and imprisonment of up to three years.[208]

3.6 Post-Impact of the Implementation of Foreign Business Act of 1999 to the Thai Economy

After the proclamation of the Foreign Business Act of 1999, the businesses of foreigners were no longer governed by the former Alien Business Law of 1972, the National Executive Council Announcement No. 281 of 1972 (the revolutionary promulgation no. 281). This change alleviated foreign investors from the control of the old regulation. This resulted in a change from controlling all kinds of engagement on business and services to controlling some specific businesses that is prescribed in the Annex list of the Act. Due to this reason, foreigners are able to do any business that is not listed in the Annex as any Thai can do without any permission, conditions or limitations. Therefore, the FBA of 1999 resulted in an increase in the number of foreigners coming to do business in Thailand as evidenced in Table 5.

Table 5: Number of Businesses Permitted According to Annex 3 Based on Types of Businesses

TYPE OF BUSINESS	NUMBER OF PERMITTED BUSINESSES						
	2000	2001	2002	2003	2004	2005	TOTAL
Business on accounting List 3 (6)	1	3	6	7	8	3	28
Business on legislation List 3 (7)	-	-	1	2	3	1	7
Business on engineering	3	11	18	7	5	-	44

[208] *Id.*

List 3 (9)							
Construction list 3 (10)							
1. Construction of electricity Station and job concerned	**7**	**3**	**8**	**2**	**4**	**-**	**24**
2. Construction of roads Bridges, railway	**3**	**12**	**4**	**-**	**2**	**-**	**21**
3. Construction of laying Water-pipe, drainage pipe	**2**	**11**	**2**	**4**	**1**	**-**	**20**
4. Construction concerning Telephone	**-**	**5**	**6**	**-**	**1**	**-**	**12**
5. Other construction jobs	**-**	**2**	**5**	**4**	**2**	**2**	**15**
Business on broker/agent List 3 (11)	**1**	**3**	**8**	**3**	**4**	**2**	**21**
Business on auction List 3 (12)	**-**	**-**	**-**	**1**	**-**	**-**	**1**
Internal business List 3 (13)	**-**	**-**	**-**	**-**	**1**	**-**	**1**
Retails business List 3 (14)	**-**	**1**	**-**	**2**	**5**	**8**	**16**
Wholesaling business List 3 (15)	**2**	**2**	**3**	**7**	**10**	**14**	**38**
Advertising business List 3 (16)	-	-	-	-	**1**	**-**	**1**

Source: Business Development Department, Ministry of Commerce, Thailand

Remarks:

1) List 3 (21) Business service, except representative and regional offices.

2) Number of permitted companies will be the number of companies in each type of business that gets permission to do business.

3) All types of business do not indicate number of foreign companies engage in business according to list 3 of the Foreign Business Act of 1999.

Furthermore, after considering the statistics of the investment promotion before and after the use of the Foreign Business Act of 1999, the study showed that the investment promotion had similar tendencies in both the number of companies and the investment funds. It is clear that during 1996 to 1999 there was the tendency to decrease while during 2001 to 2004 there was an increase. In this regard, there was only the statistics on the foreigners' registered fund that clearly was decreasingly during the whole period of 1996 to 2004 as shown in Table 6.

Table 6: Statistics on Investment Promotion during 1996-2004

	1996	1997	1998	1999	2000	2001	2002	2003	2004
Request for Investment Promotion									
- Number of Requests	1,198	883	687	891	1,030	891	788	961	1,215
- Invested fund (Million baht)	834,673	432,428	241,600	186,600	355,300	190,700	262,500	304,700	645,600
Permission for Investment Promotion									
- No. of Applicants	975	920	647	683	1,116	820	721	840	1,226
- Invested fund (Million baht)	531,950	482,89	287,300	162,400	279,200	266,300	162,500	283,800	600,800
Cards Issued for Investment Promotion									
- No. of cards	942	836	569	554	785	766	797	717	1,053
- Projects for Thais 100%	411	332	145	122	199	216	238	215	369
- Project for Foreigners 100%	126	155	150	191	237	259	262	231	324

Project for joint- Venture between Thai & Foreigners	405	349	274	241	349	291	297	271	360
- Foreigners' registered Fund (million baht)	41,540	40,110	42,932	23,127	21,131	25,833	32,537	16,128	18,846
- Hiring Thai Workers	203,669	176,063	133,747	123,598	189,985	144,552	161,346	133,165	216,125

Source: The Board of Investment of Thailand, information collected from Investment Promotion magazine during 1996-2004

3.6.1 Thailand's Economic Conditions After the Promulgation of the FBA

In order to accurately analyze the effect of the FBA on the Thai economy, the study will focus on the economic statistic during the year of 2000 to 2004 when the total economic status could be considered from the change in Gross Domestic Product (GDP), which is comprised of five factors: Private Consumption, Government Expenditure, Investment, Export & Service and Import & Service. To be noted, the first 4 factors would contribute positively to GDP while Import & Service on the other hand would bring about a negative effect to GDP. This is significant for the consideration of the total economic system since the increase or decrease in GDP can indicate a nation's economic status. In relation to this study, it was found that during the years from 2000 to 2004, the GDP of Thailand had an increase tendency at about a 4-9 percent level (Table 7).

The first factor of GDP is private consumption, which had about a 2.7 million millions baht value in 2000 and a serial increase tendency to 3.6 million millions baht in 2004. Therefore, it can be concluded that Private Consumption in 2000-2004 was about a 56-57 percent ratio of total

GDP. The second factor of GDP is Government Expenditure, following the same trend of GDP progress in 2000 to 2004. Though, in considering the economic status of Thailand, government expenditure was not considered as important a factor as the others comprising GDP since it accumulated a mere 10-11 percent ratio of GDP. On the other hand, investment was the main factor indicating economic progress during the time period specified. In 2000 to 2004, investment had a serial 2-digit increase ratio with the exception of 2001, increasing at only 4.87 percent. The last factor, which comprises GDP, is total net export that contributed 4-8 percent of total GDP. Thus, Thailand's economic status had an overall increase between the years 2000 to 2004 as will be demonstrated in the following tables (Table 7-9).

Table 7: The Total GDP at 2004 *unit: million baht

Year	Private Consump-tion	Govern-ment Expendi-ture	Invest-ment	Export & Service	Import & Service	GDP (not yet made Statistical Discrepan-cy)	Statisti-cal Discre-pancy	GDP
2000	2,762,925	557,807	1,124,164	3,287,284	2,862,305	4,869,875	52,856	4,922,731
2001	2,941,012	581,117	1,237,089	3,380,750	3,047,574	5,092,394	41,108	5,133,502
2002	3,119,979	603,891	1,297,334	3,499,004	3,134,265	5,385,943	64,700	5,450,643
2003	3,388,461	635,251	1,477,507	3,886,566	3,485,272	5,902,513	26,462	5,928,975
2004	3,687,551	721,314	1,761,870	4,587,860	4,281,857	6,476,738	26,750	6,503,488

Source: National Economic and Social Development Committee Office (NESDC), the Economic Outlook, 2004

Table 8: Ratio of GDP expansion *unit: percent

Year	Private Consumption	Government Expenditure	Investment	Export & Service	Import & Service	GDP
2000	6.47	4.65	18.26	21.60	34.99	6.16
2001	6.45	4.18	10.05	2.84	6.47	4.28
2002	6.09	3.92	4.87	3.50	2.84	6.18
2003	8.61	5.19	13.89	11.08	11.20	8.78
2004	8.83	13.55	19.25	18.04	22.86	9.69

Source: NESDC, the Economic Outlook, 2004

Table 9: Ratio of GDP elements *Unit: percent

Year	Private Consumption	Government Expenditure	Investment	Export - Import	Export & Service	Import & service
2000	56.13	11.33	22.84	8.63	66.78	58.14
2001	57.29	11.32	24.10	6.49	65.86	59.37
2002	57.24	11.08	23.80	6.69	64.19	57.50
2003	57.15	10.71	24.92	6.77	65.55	58.78
2004	56.70	11.09	27.09	4.71	70.54	65.84

Source: NESDC, the Economic Outlook, 2004

In addition, when the Degree of Trade Openness or [(Export + Import)/GDP] is considered, the study by NESDC showed that it had about 120-130 percent ratio of GDP. The result of the study had indicated that Thailand in the year of 2004 was a rather open economic system and was dependent mainly on International Trade (Table 13) which was an effect of the country's export-oriented policy.

Nonetheless, the economic expansion might not be the only factor that reflects the efficiency and level of technology development and human resources development in the country.

Those developments could also be considered from the Total Factor Productivity (TFP). The study found that TFP expansion increased 2.95 percent in 2000 to 2004, being more than the TFP in 1990 to 1996, which decreased 0.06 percent as revealed in Tables 10 and 11.

Table 10: Degree of Openness *unit: percent in comparison with GDP

Year	Degree of Openness
2000	124.92
2001	125.22
2002	121.70
2003	124.34
2004	136.38

Source: NESDC, the Economic Outlook, 2004

Table 11: Expansion of Total Factor Productivity *unit: percent

Time Period	Total Accumulation	Agriculture	Industry	Service, etc.
1990-1996	-0.06	-3.34	-0.23	-1.71
1990-2004	0.14	-2.25	1.00	-1.56
2001-2004	2.95	-0.61	3.07	1.61

Source: Sakon Wattana, The Project Study of following and assessing the management according to Government Policy, Full report, December, 2005. [209]

[209] Sakon Wattana, The Project Study of following and assessing the management according to Government Policy, Full report, December, 2005.

In 2000 to 2004, the Total Manufacturing Production Index had an increase tendency from 100 in 2000 (base year) to 141.36 in 2004. Furthermore, the study suggested that the Sector Manufacturing Production Index increased in every Industrial sector, especially in the sector of Vehicle & spare parts and electronic products. In addition, the statistic of the Index in 2004 showed that the mentioned sectors have an index level of 236.91 and 179.76 respectively as can be seen in Table 12.

Table 12: Manufacturing Production Index *Base Year: 2000

	2000*	2001	2002	2003	2004
Total Index	100.00	102.57	111.77	127.30	141.36
Branch Index					
-Food	100.00	96.89	99.83	115.94	111.36
-Drinks	100.00	110.23	128.09	152.60	160.53
-Tobacco	100.00	96.99	100.13	103.82	113.11
-Textile & products	100.00	107.96	115.84	121.26	129.22
-Petroleum products	100.00	102.19	103.99	108.59	117.69
-Construction materials	100.00	110.83	126.32	123.48	136.44
-Iron products	100.00	101.41	131.20	140.69	155.34
-Vehicles & spare parts	100.00	124.73	148.43	196.72	236.91
-Electronics products	100.00	88.67	99.44	139.94	179.76
-Ornaments	100.00	103.93	103.89	105.95	108.88
-Other	100.00	101.49	105.14	116.06	126.28

Source: Bank of Thailand, All Statistic Report, the Manufacturing Production Index from 2000 to 2004.

Regarding the working status of the Thai population in 2000 to 2004, it was found that agricultural employment had no significant possibilities for change but non-agricultural employment had increase tendency in several branches: for example, production, construction, wholesale & retail, hotels and restaurants as indicated in Table 13.

Also, the number of the unemployed in that period had a significant decrease from 1.2 million people in 2000 to 7.3 hundred thousand people in 2004. This made the unemployment ratio in that period reduce from 3.6 percent in 2000 to 2.1 percent in 2004. Therefore, the situation of the employment rate in Thailand during the year of 2000-2004 posted a better position in the statistic. Furthermore, a decrease in the unemployment rate indicates development in a nation's economic status. Thus, the unemployment statistic contributes to the notion of economic development in Thailand during the period from 2000 to 2004.

Table 13: Employment Status of Thai Population *unit: thousand people

	2000	2001	2002	2003	2004
Labor Force	33,223.8	33,813.5	34,261.6	34,901.7	35,717.8
Branch Employment	31,292.6	32,104.2	33,060.9	33,841.0	34,728.8
Agriculture	13,830.4	13,611.8	14,041.8	13,880.1	13,633.9
***Non-Agriculture**	17,462.2	18,492.4	19,019.0	19,960.9	21,094.9
-Production	4,650.1	4,926.9	5,052.4	5,298.7	5,476.1
-Energy	112.1	98.3	88.5	94.8	100.4
-Construction	1,503.9	1,645.2	1,786.6	1,880.7	2,080.4
-Wholesale & Retail	4,373.7	4,687.6	4,945.6	5,199.2	5,540.3
-Hotels & Restaurants	1,810.2	1,918.0	2,043.1	2,147.2	2,255.9
-Transport	964.2	1,004.7	1,008.8	1,049.6	1,100.4

-Financial Institutes	270.1	303.1	272.4	288.9	296.6
-Immovable properties	479.6	494.8	500.1	557.4	623.8
-Official Administrative	1,102.8	1,014.1	973.9	954.0	994.0
-Education	925.4	988.2	954.7	973.0	1,031.4
-Public Health & Society	428.5	485.9	473.8	514.3	546.8
-Community, Social and Personal Service	565.9	605.7	626.0	682.0	725.0
-Maid service	213.0	254.3	233.0	255.6	243.0
-Others	62.8	65.8	60.0	65.5	80.8
Total of the unemployed	1,193.6	1,123.9	822.8	754.2	739.2
Unemployment Ratio	3.6	3.3	2.4	2.2	2.1

Source: Bank of Thailand, Key Economic indicators, Employment status of Thai Population from 2000-2004.

After considering the post-impact of the implementation of the Foreign Business Act to the Thai economy, this research study will continue to analyze the impact of the Act to other Thai economic sectors, including the Thai investment climate, the exportation sector, the service sector, technology transfer, and the remittance by foreign companies.

3.6.2 The Effect of FBA toward the FDI Flows

The Foreign Business Act of 1999 is likely to affect the economic system through various factors such as investment and export, which are further detrimental aspects in determining the national economic status. According to Table 9 above, whether it was investment or export, they were all important factors to the national economic development during 2000-2004 due to the fact that they had a ratio of about 22-27 percent and 60-70 percent of GDP respectively. Thus, these 2 factors had a direct relationship to GDP. Therefore, if investment or export increased, GDP would increase accordingly and thus, positively impact the Thai economic system.

For this research study, investment in Thailand will be divided into two main categories: State Investment and Private Investment in which Private Investment will be further divided into two more parts: the Domestic Private Investment and the Foreign Direct Investment (FDI). To be noted, Foreign Direct Investment is particularly emphasized since it is impacted by the enforcement of the FBA.

Therefore, in order to analyze the impact of the FBA of 1999 to the Thai investment sectors, the statistic of the FDI inflows during the 1995 to 2004 should be considered. The statistic suggests that the FDI inflow during the years from 1995 to 1998 posted an upward trend of inflows, while the period of 1999 to 2004 posted a smaller net increase yet still steady increase of inflow as shown below in Table 14. The smaller net increase may be attributed to factors beyond the enforcement of the FBA such as political uncertainty, shifts in market trend, higher foreign remittance, etc. as will be shown in the later sections. Nevertheless, it can be concluded that FDI inflow has increased with regards to the enforcement of the Foreign Business Act of 1999.

Table 14: Foreign Direct Investment (FDI) from Private Sectors in Thailand during 1995-2004

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Net FDI	49,887	57,472	117,696	209,888	134,592	115,236	172,640	44,929	77,529	33,094
FDI inflow	73,991	99,733	165,143	284,938	200,742	256,282	398,519	322,189	317,718	304,110
FDI outflow	-26,104	-42,261	-47,447	-75,050	-66,150	-140,996	-225,879	-277,260	-240,189	-271,017
Income on Equity	-42,581	-54,305	-47,203	-57,357	-58,367	-61,320	-81,515	-98,811	-121,801	-139,073
Net FDI in the Service Sector	2,186	3,162	9,079	11,475	18,207	18,697	6,922	27,416	-556	9,078
Ratio of FDI Outflow per FDI Inflow	0.34	0.42	0.29	0.26	0.33	0.55	0.57	0.86	0.76	0.89
Ratio of Income On equity per FDI Inflow	0.56	0.54	0.29	0.20	0.29	0.24	0.20	0.31	0.38	0.46

Source: The Bank of Thailand

Remarks: Direct investment is the stability of investment transaction that investor from one country running business in other country and the investor had shares to engage in such business though it is organized as juristic person and personal with 3 types of investment: -

- Equity Capital refers to the investment by holding a share in that business with the ration of 10% shares up or having right to join in running the business.
- Loans from affiliates, except invested company, finance company, which regards as loan.
- Reinvestment Earning refer to income in the form of division of the investors directly from the ration of shares of that shares of that enterprise of income from that the branch that investor does not remit it. However, the information of the bank of Thailand does not include information of part of profit, which does not bring back to invest.

3.6.3 The Effect of the FBA toward the Export Sector

Considering the impact on the Thai export sector, the study found that the significant Thai export commodities before and after the announcement of the FBA of 1999 experienced no critical changes in key export products. The key exports of Thailand in both periods remained: computers & equipment & parts, electric circuits, cars & equipment & part, televisions & part, Para rubber, and plastic pills as can be seen in Tables 15 and 16.

Table 15: Top Ten Thai Exports in 1998-2000 *unit: million baht

Description	1998	1999	2000
1. Computers, equipment & parts	320,525.6	304,982.2	344,048.7
2. Electric circuit	93,833.1	111,767.4	179,302.1
3. Ready-made clothes	123,133.0	110,356.5	124,326.2
4. Cars, equipment and parts	68,348.4	91,954.1	122,445.3
5. Plastic pills	40,786.1	46,025.8	73,975.2
6. Televisions and parts	58,058.2	47,233.4	71,877.1
7. Precious stones and ornaments	57,350.5	59,820.9	66.730.1
8. Rice	86,803.1	73,812.1	65,516.7
9. Para rubber	55,406.5	43,941.7	60,742.7
10. Frozen fresh prawn	58,058.2	48,348.2	60,270.3

Source: Information Technology Center and Communication under a cooperation of Customs Department.

Table 16: Top Ten Thai Exports in 2001-2004 *unit: million baht

Description	2001	2002	2003	2004
1. Computers, equipment & parts	351,797.8	319,127.2	339,939.8	368,875.9
2. Cars, equipment & parts	117,613.9	125,244.3	164,705.8	220,801.5
3. Electric circuit	154,879.5	141,912.4	191,540.3	196,444.3
4. Para rubber	58,708.0	74,603.6	115,796.9	137,465.5
5. Televisions & parts	74,910.2	89,751.6	103,764.7	129,542.5
6. Plastic pills	71,428.7	76,110.9	89,204.8	124,808.6
7. Ready-made clothes	129,128.9	116,589.3	114,744.6	124,267.2
8. Rice	70,095.2	70,004.2	75,776.1	108,351.8
9. Precious stones and ornaments	81,312.3	93,082.2	104,525.6	106,278.9
10. Iron, steel and products	48,300.6	53,600.4	70,222.3	99,588.2

Source: Information Technology Center and Communication under a cooperation of Customs Department.

Though the export commodities did not change, the net exports did change positively. Despite a few fluctuations in export units over the time period, the export units experienced a steady increase from between 1998 and 2004, particularly after 1999, the year marking the enforcement of the FBA, to be precise. Thus, it can be concluded that the FBA affected the Thai export sector positively.

3.6.4 The Effect of the FBA toward the Service Sector

The Foreign Business Act of 1999 intended "to fix the conditions for the entry of foreign dealers in some kinds of businesses" as written in this Act's Annex I, specifically in List Three. In actuality, it refers to the businesses that Thai people were not yet ready to compete in against foreign investors. With regards to the details in Annex I List Three, it was found that businesses in List Three are mostly in the service businesses such as hotel business, tour business, legal service, and accountancy service. Furthermore, List Three states that other unwritten service businesses also belonged to List III while manufacturing industrial businesses were rarely listed in List Three. This means that the manufacturing industrial sector of Thailand is rather open to foreign investors to come to do their businesses freely. However, the service sector of Thailand still remains fairly protected, especially when compared against the restrictions regarding the manufacturing industrial sector. Therefore, in considering the effect of the Foreign Business Act's enforcement towards the service sector, it might be divided into the two following effects.[210]

Firstly, the positive effect towards domestic dealers in the service sector would be that they would receive benefits from this Act's enforcement due to the fact that the Act creates obstacles for the entry of foreign investors in Thailand, despite the request for businesses, the limits of low capitals, etc. Therefore, the level of competition in the Thai market would certainly decrease in comparison to the liberalization of foreign companies to do their businesses.

Secondly, the service protection and industrial liberalization would give negative effects to dealers in the industrial sector due to the fact that the government would have brought resources from other branches (that initially, did not belong to service sector) to support the service sector. Additionally, the service protection would create little competition in comparison to liberalization. As a result, the consumers would get bad results as well. The lack of competition would also certainly lead to a lack of efficiency in the service businesses. The price of services might be higher than during high competition as well as a decrease in the variety of services. This will create the dilemma for the Thai economy as the current global economic trend is shifting toward digital transformation and high technology adoption in business. The track of dependency in

[210] Personal Interview with the Secretariat of the Minister of Industry, 9 January 2021.

manufacturing export industry has come to end. However, the domestic service sector is still highly protected by the FBA from foreign investors. This remaining regulatory conditions will make it difficult for Thailand to attract the Digital FDI that might operate in the service sector.

In conclusion, the study in this chapter has shown the impact of the FBA of 1999 to Thailand's Economy at the time of its implementation after the crisis. The FBA has lessen the controlling measures of FDI comparing to its predecessor, the Alien Business Act of 1972. Though, the protectionism concept is still remained and transferred into the substances of the FBA. This results in the protection of foreign participation in service sector that leads to impractical restricted business list of the law. In addition, the chapter explore the economic impact of the FBA at the time of its implementation by observing the economic indicators and statistics. The result has shown the positive impact over the Thai economy during 5 years after its enactment. Granted, the FBA is considered to be more favorable to FDI than the Alien Business Law of 1972 (*Por Wor* 281). However, problems still remain for the 1999 FBA. To begin with, basis or rationale for categorizing the businesses is ambiguous. Secondly, the FBA is unclear and arbitrary due to one main reason. Article 9 of the Foreign Business Act requires the three categories of businesses in which foreign ownership is banned to be evaluated annually through means of a transparent and effective mechanism. However, in practice that mechanism is proved to be ineffective. This is because the fact that the process of evaluation is very slow and the concept of prohibited business consideration is also not clear.[211] Therefore, it makes the FBA to be ineffective in the matter. Lastly, even though the Foreign Business Act appears to be more liberal that of its predecessor in that it takes a "negative list" approach in defining the sectors subjected to investment restrictions, it fails to eliminate aspects in the "positive list" approach that still apply in services sector. This

[211] Chula Unisearch, *supra* note 201.

is due to the fact that category 3 includes “other categories of service business except those prescribed in the ministerial regulations” (See Annex 1). Consequently, while the foreign investment regime in Thailand is relatively open in terms of the industrial manufacturing sector, the services sector is still fairly closed. In addition, the sector-specific law may even offer a more stringent condition for foreign participation. For example, the Telecommunications Act of 2001 places a limitation on the foreign equity share of a facility-based operator at only 25%.[212] As a result, the relatively closed service sector contributes to inefficiencies, which in turn impose costs on the industrial manufacturing sector and also affect the development of global value chain for Thai domestic market. Therefore, as can be seen through the above factors, the FBA is not yet complete in all aspects. Although, the FBA of 1999 is more lenient in terms of the FDI controlling conditions than the Alien Business Law of 1972, limitations remain in its inadequacies. The chapter also explores the problematic aspects of the FBA which caused by the unproductive interpretation of law regarding the implementation of doctrine of corporate ownership and control which is the result of Thai political economy and the development of family-business corporate structure in the country. All of these problematic factors will be analyzed in the next Chapter.

[212] *Id.*