

Chapter 4

The Analysis to the Problematic Aspects of the Foreign Business Act of 1999

From the previous chapters, foreign direct investment (FDI) has been a pivotal tool guiding the national economic landscape of Thailand in recent decades.²¹³ Nonetheless, when the legal implementations concerning foreign investment are defective, it leads to unrealized potential and a halt in sustainable economic development. The Foreign Business Act of 1999, B.E. 2542 (FBA) is a vital legal framework governing the entry of FDI into the domestic market. This chapter aims to expose some of the hindrances that impede the effective implementation of the FBA, leading to faulty FDI controlling measures.

This chapter analyzes the problematic aspects of the Foreign Business Act of 1999 in three main parts. First, the chapter examines the impact of the history of FBA to the protectionist concept in the law. Secondly, the Restricted Business Lists are introduced to illustrate how controlling measures can impede developmental progression. And thirdly, the chapter analyzes the legal definition and interpretation of ‘alien’ or ‘foreigner’ in the Thai economy, and how such defective implications lead to impractical controlling measures over FDI.

4.1 The Historical Perspective of the Foreign Business Act of 1999 (B.E.2542) and its impact to the Protectionism Concept of the law

As discussed in Chapter 3, the history of FBA emerged from the industrialization period of Thailand during the 1960s. During the time of military government, Field Marshall Sarit Thanarat, formed the Sarit administration (CE 1958 - 1963) and adopted a World Bank comprehensive economic packages to be a tool for the development of Thai economy. The government emphasized on the industrialization-promoting policies through private capital from

²¹³ Wailerdsak, *supra* note 163, at 22.

both domestic and foreign sources.²¹⁴ For the first time, the direction of government economic policy emphasized on a capitalist economy – private ownership of the means of production and an open trading regime.²¹⁵ Thus, it led to the emerging role of FDI in Thai economy as the government transformed its economic policy from Import Substitution Industrialization (ISI) to Export Oriented Industrialization (EOI) as a mechanism to address economic problems. The export manufacturing industry became the main device to propel the Thai economy.²¹⁶

In order to attract more FDI, the government set up the Board of Investment (BOI) to create investment incentive policies to facilitate local and foreign capitals, mostly in manufacturing sector. The Promotion for Industry Act of 1959 was the regulatory platform for the establishment of the BOI. This government agency serves as a symbol of credible state commitment to the investment promotion policies and it gives a positive signal to the foreign investment regime.²¹⁷ With the influence of the 1959 Beitzel Report,²¹⁸ Sarit's administration revises the Investment Promotion Act (IPA) in 1962.²¹⁹ This gives rise to the adoption of *laissez-faire* free market ideology in the national industrialization policy. The government plays role in facilitating private enterprises to generate economic transactions.²²⁰ Moreover, the government focuses on creating an economic infrastructure for a favorable investment climate in the private sector.²²¹ This policy had a positive impact to the growth of MNEs, especially Japanese and the Thai industrial conglomerates, mostly family businesses.²²² This represented the beginning of Thai domestic

²¹⁴ Siriprachai, *supra* note 155.

²¹⁵ *Id.* at 72.

²¹⁶ C Wilde, *supra* note 157.

²¹⁷ Siriprachai, *supra* note 155, at 73.

²¹⁸ GEORGE B. BEITZEL, EXPANDING PRIVATE INVESTMENT FOR THAILAND'S ECONOMIC GROWTH: A SPECIAL REPORT (1959).

²¹⁹ Wilde, *supra* note 157, at 99-103.

²²⁰ Siriprachai, *supra* note 155, at 72-73.

²²¹ RANGSUN THANAPORNPHUN, THE PROCESS OF ECONOMIC POLICY FORMULATION IN THAILAND: AN ANALYSIS ON HISTORICAL AND POLITICAL ECONOMICS (BE 2475-2530) 2-14 (2003).

²²² *Id.* at 37-50.

industries' dependence on foreign investment.

As Somboon Siriprachai suggested, with the emerging role of FDI by the implementation of EOI during 1960s, it is not only creating the boom in Thai economy, but also exacerbate the predatory pattern of the Thai political economy, which influenced by main players at the time; military official, big family business, bureaucrats and foreign investors. The law and policy were implemented by bureaucrats who could abuse their power due to the absence of the constraints of accountability to the civil society.²²³ The legal authority for administrative measures and the operation of the bureaucracy was influenced by vested-interest groups rather than public liability and accountability.²²⁴ This characterizes the Thai political structure as a semi-democracy or the so-called 'soft-authoritarian regime' for several decades.²²⁵

The development of Thai domestic economy has been encapsulated by the elites in Thai society. In fact, economic transformation was somehow being impeded rather than promoted by the government and the consequence is that there were relatively few Thai entrepreneurs in commerce and industry, most of them are big family businesses. Big local Thai entrepreneurs found mutual benefits with the military government and bureaucrats to help them sustain their wealth and power in the society.²²⁶ Thus, the industrialization process instead of facilitating the establishment of

essential economic foundations and developments, it has created uneven development and

²²³ Siriprachai, *supra* note 155, at 9.

²²⁴ Hans Rosenbers, *Bureaucracy, Aristocracy and Autocracy: the Prussian Experience, 1660-1815*, Harvard University Press, Cambridge, MA (1958).

²²⁵ Chai-anan Samudavanija, *Industrialisation and Democracy in Thailand, paper presented at the Conference on the Making of A Fifth Tiger? Thailand's Industrialization and Its Consequences*, Australian National University, December 1992.

²²⁶ Personal Interview with Law Professor from University of Wisconsin, Madison Law School, 15 October 2019; Wailersak, *supra* note 163, at 22-24.

inequality in Thailand.²²⁷

As mentioned in Chapter 3, the Sarit's administration implemented the new industrial promotion policy during 1960s. The Promotion of Industrial Investment Act of 1959 was enacted to create the BOI. Thailand became an attractive investment and industrial production site for FDI. The flow of FDI led to the boom of Thai economy and the economic dependency on foreign investment. The government rather than focused on building stronger national capital and national industrialists, like in the case of East Asian NIEs, the policy shifted toward the reliance on FDI and MNEs for fostering the economic development.²²⁸

BOI was empowered to encourage domestic and foreign investments in industries (mainly manufacturing) or negotiate conditions of investment agreements subject to the cabinet's approval. However, there were evaluations pointing out that the incentives were not enough to induce foreign firms to invest in Thailand.²²⁹ The set of incentives and a high protection rate proposed by BOI gave rise to insufficient promoted manufacturing firms. One simple reason for this is that BOI authority was rarely concerned with public interests. The new bureaucrats were not modern civil servants, but worked for themselves. They were dynastic rather than public servants. The possession of legal and social privilege permitted them to seek economic rents from public policy. Performance standards were loosely imposed by the strongly entrenched officers in BOI on the recipients of investment incentive and protection.²³⁰

With the consequent of economic environment during 1960s, as FDI began to play a major role in Thai domestic market, it raised some concern over the influence of foreign investors and the competitiveness of big local businesses in domestic market. At the time, local family-owned

²²⁷ Siriprachai, *supra* note 155, at 8.

²²⁸ *Id.*, at 9.

²²⁹ *Id.*

²³⁰ Personal Interview with Law Professor from University of Wisconsin, Madison Law School, 15 October 2019; *Id.*

conglomerates also dominated Thai domestic market in several strategic industries, both manufacturing and service sectors. With the increasing role of FDI, the family businesses were adapted their business strategies to become a partners for incoming MNEs in order to maximize their wealth. The family conglomerates also utilized corporate legal devices such as pyramidal corporate structure and cross-shareholding structure to sustain their profits from foreign participations. Moreover, they launched many independent ventures and often acquired technologies from FDI by means of purchasing or licensing.²³¹

It is important to note that the close relationship between the big family businesses and the military government has influenced the protectionism concept towards FDI in domestic business sector. The government then enacted the National Executive Council Announcement (NECA) No. 281 (referred to in Thai as *Por Wor* 281) 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.²³² 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 local businesses, especially family-owned businesses, and to attract foreign investment.²³³ These complex objectives along with the protectionism concept of *Por Wor* 281 has been transferred into the FBA 1999.

Consequently, problematic aspects of the implementation of FBA mainly characterized through the interpretation of 'foreigner' under Section 4 that led to the circumvention of the law

²³¹ Personal Interview with Law Professor from Thammasat University, 25 January 2018; Wailerdsak, *supra* note 163, at 25.

²³² Douglas Mancill, A Brief History of the Foreign Business Act (Nov. 14, 2010).

²³³ Wailerdsak, *supra* note 163, at 20-21.

by adopting nominee method and other legal devices such as pyramidal corporate structure, dual-class share structure and cross-shareholding structure to disguise the nationality of real corporate owner. This problem is caused by the existing interpretation of doctrine of corporate ownership and control in Thailand. Another problem is the concept of restricted business list under the law. The category of the restricted businesses is questionable since its concept of protection is not align with the theoretical legal framework for FDI admission which suitable for the developing economy. It is possible to state that both of these problems are a result of the historical development of FBA and the unique political economy of Thailand as demonstrated. At present, this overarching protectionism conceptual framework still plays a role in the implementation process of the FBA. The problems will be further elaborated in subsequent sections.

4.2 Restricted Business Lists and the Controlling Principle

As explained in this study, the *Por Wor* 281 provided a list of businesses that foreigners were restricted from unless they were licensed. The process of foreigners' license application was also outlined in the statute. The *Por Wor* 281 covered a broad range of activities which applied to more than 60 categories of businesses in three schedules, being List A, List B, and List C.²³⁴ The protectionism concept of restricted business list in *Por Wor* 281 has been transferred to the FBA. Similar to the *Por Wor* 281, the FBA maintains the controlling measures of its predecessor.

The FBA also separated the list of restricted businesses into three schedules (List One, List Two and List Three), though the list of businesses in each category is different from the former. Businesses in List One are categorically prohibited to aliens unless there is an exception contained in a special law or treaty. These include mass media, rice and animal husbandry and other

²³⁴ The National Executive Council Announcement (NECA) No.281 (Por Wor 281), Annex Lists.

resource-based businesses. List Two encompasses businesses that concern national security or safety, or are linked to local art, culture, handicrafts or natural resource and environment. Foreigners are not permitted to conduct businesses in List Two unless they obtain alien business license from the Minister with the approval of the Cabinet. Lastly, List Three is the most defective among the restricted business schedules since it includes (21) all service businesses - businesses that the government view are not yet 'competitive' and thus are vulnerable to foreign competition. These include mining, salt farming, forestry, fishery, professional services, and all services unless specified in the Ministerial regulations. And with the emerging of Digital FDI, it will be mostly categorized in the List Three. Thus, it will be protected to enter into Thai domestic market. Similar to List Two, foreigners may obtain a permission to operate these specified businesses, but the power to grant permission is vested with the Department of Business Development's Director General and the Foreign Business Commission.²³⁵ However, according to the interview with government official, the consideration process might take certain period of time and the result is depend upon the discretion of the Commission. This creates uncertainty to the investment project of foreigner.²³⁶ The ineffective restrictions concept, together with the difficulty and time consuming nature of granting business licenses to foreigners are the main hindrances that lead to the circumvention of the law.²³⁷

Considering the restricted businesses lists, the FBA is considered to be more favorable to foreign business participation than *Por Wor* 281 since the government implemented the liberalization policy after the 1997 financial crisis; however, problems still remain. To begin with,

²³⁵ Personal Interview with the Director of Foreign Business Administration Division, Department of Business Development, 19 September 2018.

²³⁶ *Id.*

²³⁷ The National Executive Council Announcement (NECA) No.281 (Por Wor 281), Annex Lists and Foreign Business Act of 1999 (B.E.2542), Annex Lists.

the basis or rationale for categorizing restricted businesses is ambiguous and lacking comprehensive assessment on its impact to the domestic economy.²³⁸ Moreover, the law in Section 9 of the FBA requires the three business lists be evaluated annually through means of a transparent and effective mechanism. However, the criterion of the consideration has yet to be standardized.²³⁹ Lastly, even though the FBA appears to be more liberal than its predecessor as it applies the principle of a ‘Negative List approach’,²⁴⁰ in categorizing restricted business sectors; however, it fails to eliminate the concept of the ‘Positive List approach’,²⁴¹ since List Three broadly enforces the restriction to all businesses in the service sector. As the study in Chapter 2 refers to Thomas Pollen’s suggestion:

*[The Negative List approach] allows the free flow of FDI as long as it is not subjected by a too far reaching negative list.*²⁴²

Consequently, a too-broad negative list approach in List Three of the FBA has restricted the flow of FDI into the sector, defeating the purpose of the negative list approach. Thus, while foreign participation is relatively accessible in the manufacturing industrial sector, the service sector is still fairly barred, propelling the abovementioned climate of the nation’s semi-separated economies. Considering the emergent of Digital FDI and transformation of MNEs’ business operations, the existing principles of restricted business lists will negatively affect the opportunities of Thailand in boosting the development of new digital industries in Thai economy.

²³⁸ Personal Interview with Partner at C.B. Law Office, 13 March 2018.

²³⁹ Foreign Business Act of 1999 (B.E.2542) §9, “...The Commission shall review the business categories under the Lists attached hereto at least once every one-year period from the date this Act comes into force ...”

²⁴⁰ THOMAS POLLEN, LEGAL FRAMEWORK FOR THE ADMISSION OF FDI 175 (2006), Pollen states that “This [negative]

list enumerates all sectors or activities the host state wants to exempt from the reach of the open admission standards. Sectors or industries on the list are closed to FDI or may only be accessed under special circumstances. Still negative list approach is internationally the most liberal approach to admission.”

²⁴¹ *Id.* at 157, Pollen states that “the positive-list model grants a limited right of admission. FDI is allowed into certain specified sector. Those sectors are enumerated in a so-called positive list. All other sectors are closed to foreign investors. The positive-list model incorporates a cautious approach of selective and gradual liberalization.”

²⁴² *Id.* at 175.

Also, with the new digital technologies, the online platform is the key instrument for enhancing the business operation and it is borderless in nature. Therefore, the outdated FDI controlling measure through the restricted business list is impractical to the current economic situation. As a result, the restricted business lists need to be revised with regards to the current global economic condition and Thailand's domestic market situation.

4.3 The Matter of “Foreigner’s Definition” and Its Legal Interpretation

As highlighted in this study, FDI controlling measures under the *Por Wor* 281 have been enacted during the investment promotion scheme of the Thai government. As the contradictions later transferred to the FBA, one of the main defective aspects is the definition and interpretation of ‘alien’ under the law.

In defining foreigners whose business conducts were limited in Thailand, the *Por Wor* 281 defined ‘alien’ as follows:

‘Alien’ means a natural person and a juridical person not of Thai nationality and including:

- (1) A juridical person which has half or more of total capital owned by any foreigner;
- (2) A juridical person in which foreigner holds shares, be a partner, or be a member more than majority of shareholders, partners, members, regardless of the amount of his capital contribution
- (3) A limited partnership or general registered partnership whose general partner or manager is a foreigner²⁴³

Although, the business restrictions in the Annex Lists discourages foreigners from investing in Thailand, there were still many foreign investors who were interested in investing even though they were limited to own no more than 49.99 percent of the shares in a firm. Being restricted to minority shareholders, foreign investors utilized tactics to circumvent the restriction

²⁴³ The National Executive Council Announcement (NECA) No.281 (Por Wor 281) §3.

of majority ownership through the use of the pyramidal corporate structure,²⁴⁴ the dual-class share strategy a.k.a. *preference share structures* (i.e. superior voting shares) and the cross-shareholding method to assert their control over their business entities.²⁴⁵ This practice appears to have begun in the 1970s but became the norm during the early phase of liberalization in 1991 and 1992, resulting in a flood of foreign firms' participation during Thailand's economic boom period.²⁴⁶ This marks the arrival of so-called *nominee problem* in Thailand.

The nominee problem gained the attention of the Department of Commercial Registration (DCR), which later became the Department of Business Development (DBD). In 1991, the DCR requested the Council of State²⁴⁷ to reconsider and reinterpret the definition of 'alien' in the *Por Wor* 281 as skepticism regarding foreign capitals grew.²⁴⁸ Also, the incident where an alleged foreign company claimed to be a Thai company through its employment of the pyramidal corporate

²⁴⁴ BERLE & MEANS, *supra* note, at 170-73; Randall Morck, Daniel Wolfenzon, & Bernard Yeung, Corporate Governance, Economic Entrenchment and Growth 9-10 (Nat'l Bureau of Econ. Research, Working Paper No. 10692, 2004), One of the main mechanisms in asserting control over corporate management is the employment of the pyramidal device. The pyramid is formed to allow an individual or a group of individuals at the top of the pyramid to gain control of a certain firm via a small capital investment. The structure of the pyramid involves the base of a majority of shareholders in a given company and that company, in turn, owns a majority of shares in at least one other company. The result is that the percentage of shares for those atop the pyramid will be less than 25, 12.5, and 6.25 percent respectively – numbers which are strikingly smaller than the actual control proportion gained. For example, a group of shareholders who directly owns 50 percent of a company that also owns 50 percent of another company can achieve control of the latter company through a 25 percent ownership status. The establishment of intermediate companies, which are legally controlled through majority ownership of its shares by the company higher in the pyramid structure, allows the shareholders at the top of the structure to maintain legal control over an operating company despite the small fraction of ownership interest. It is possible that all of the properties owned by the operating company can be in the absolute control of the shareholders at the top of the pyramid, even without comparable share ownership invested.

²⁴⁵ Randall Morck, *The Riddle of The Great Pyramids*, in THE OXFORD HANDBOOK OF BUSINESS GROUPS 602-628,618 (Asli M. Colpan, Takashi Hikino & James R. Lincoln eds., 2010).

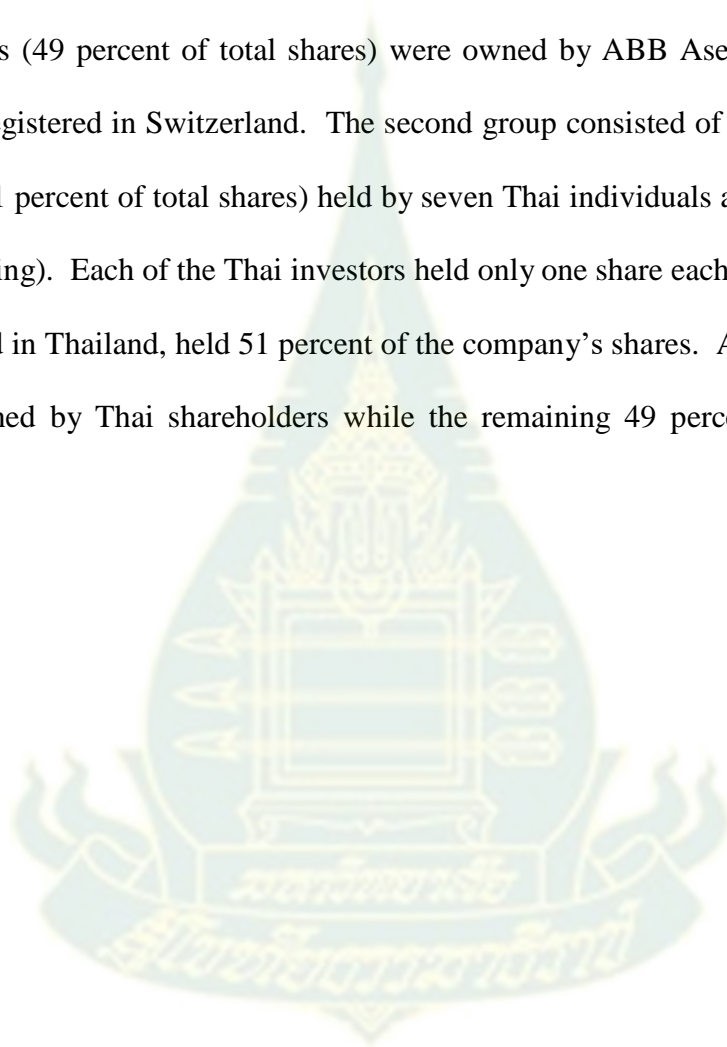
²⁴⁶ Phone Interview with former Inspector General of Ministry of Commerce, Thailand, 20 September 2018; Wailersak, *supra* note 163, at 20-21.

²⁴⁷ The Council of State is a long-established advisory committee of the royal government of Thailand. It is well-recognized that their advisory opinions are prudent and unprejudiced. The Council of State has continuously played a significant role in most political and legal matters where the government seeks to resolve before the court. Hence, the committee is regarded as the most prestigious and authoritative figure in their views and interpretations of laws.

²⁴⁸ Legal Opinion of the Thai Council of State No. 332/2535, Re: Definition of "Aliens" under the Land Code § 97(1) (Thai QP Co., Ltd.) and Article 3 of the National Executive Council Announcement No. 281 (*Por Wor* 281) (ABB Distribution Co., Ltd.) (Feb. 20, 1992) (unpublished comment, on file with the Thai Council of State) [hereinafter *Legal Opinion*].

structure sparked tremendous concern of such practice.²⁴⁹

Empirical evidence concerning foreign investors' misuse of the loopholes in the Thai corporate sector can be best illustrated through the case of ABB Distribution Co., Ltd (ABB Distribution). The company registered its company with the DCR with a registered capital of 60,000,000 Thai Baht and 600,000 shares.²⁵⁰ The company's shares were divided into two groups. First, ordinary shares (49 percent of total shares) were owned by ABB Asea Brown Boveri Ltd. (ABB) which was registered in Switzerland. The second group consisted of preferred shares with non-voting rights (51 percent of total shares) held by seven Thai individuals and ABB Asia Brown Holding (ABB Holding). Each of the Thai investors held only one share each while ABB Holding, which was registered in Thailand, held 51 percent of the company's shares. ABB Holding, in turn, was 51 percent owned by Thai shareholders while the remaining 49 percent was by foreign shareholders.²⁵¹

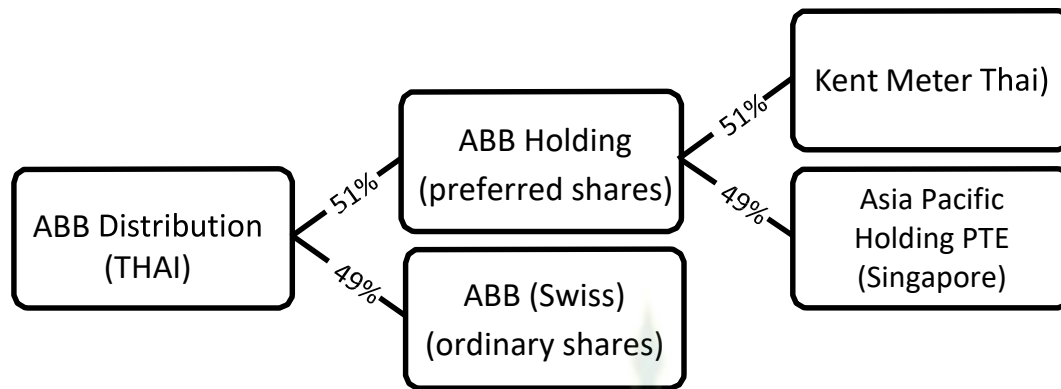


²⁴⁹ Duenden Nikomborirak & Suneeporn Thawannagul, Business Operation of Foreign Companies in Thailand: Material for Academic Seminar on Toward Clarity of the Good Governance Principle: Sequel to the Sale of Shares of Shin Corporation, organized by the Faculty of Economic, Thammasat University 20 (Aug. 25, 2006) (unpublished paper, presented at Imperial Queen's Park Hotel, Bangkok).

²⁵⁰ *Legal Opinion*, *supra* note 248, at 3.

²⁵¹ *Id.* at 4.

Shareholding Structure of ABB Distribution



Source: Legal Opinion of the Thai Council of State No. 332/2535, Re: Definition of “Aliens” under the Land Code § 97(1) (Thai QP Co., Ltd.) and Article 3 of the National Executive Council Announcement No. 281 (*Por Wor* 281) (ABB Distribution Co., Ltd.) 4 (Feb. 20, 1992) (unpublished comment, on file with the Thai Council of State).

To the DCR, the structure was ambiguous in two ways. On one hand, ABB Distribution could not be classified as ‘alien’ under the definition of the *Por Wor* 281 since the proportion of shareholding in ABB regarded it as a Thai company under the statute. With 51 percent of the company’s shares held by Thai shareholders while foreign shareholding was 49 percent, the close proportion categorizes it as a Thai company with Thai shareholders as the majority.²⁵² As a result, ABB Distribution did not fall under the restriction of the *Por Wor* 281. However, viewing it differently, ABB Distribution would be considered alien since the majority of capital was contributed by foreigners. The structure could be conceptualized as having two layers. Even though 51 percent of the share ownership in the first layer was owned by ABB Holding which is considered a Thai company, this portion, in fact, consisted of a 49 percent foreign share ownership when the second layer is incorporated (see Figure 1). Therefore, considering the share ownership of the entire structure, it can be deduced that foreigners’ share ownership was greater than 50

²⁵² *Id.* at 4-5.

percent.²⁵³ Particularly, with the corporate charter pertaining to the power to direct the management and policies of the company, foreign shareholders held greater control. Therefore, this holding structure would be exemplary of the method that foreign investors could follow in order to work around the business restrictions outlined in the *Por Wor* 281.

To decide whether a company qualifies as ‘alien’, the Council of State opined that it was required to consider both foreign capital and the number of foreign shareholders. The reason for considering the number of foreign shareholders is based on the premise that the power to direct the management and policies vested in the board of directors, who are also required to report to shareholders in shareholders meetings.²⁵⁴ The Council of State explained that the objective of the *Por Wor* 281 was to prohibit or restrict foreign investors’ participation in the domestic market on the ground that their business may upset national security or damage the capacity for Thai businesses to compete with them, stating that “[I]t is appropriate to regulate the regulation of the business activities conducted by foreigners for reserving the balance of trade bargain and national economy.”²⁵⁵ Thus, taking the case of ABB Distribution, it was required by law to consider the actual foreign capital in the company or the subsidiary (ABB Distribution) by combining the foreign capital invested in another company or the parent company (ABB Holding) that held share ownership in the company. Because the foreign capital portion in the subsidiary would be used by the parent company, the capital was considered as part of the capital in the parent company. On the contrary, by focusing solely on the foreign capital which was directly contributed to the company or the subsidiary, the actual foreign ownership would be hidden.²⁵⁶ Such circumvention conflicted with the purpose of the law.

²⁵³ *Id.* at 5.

²⁵⁴ *Id.* at 7.

²⁵⁵ The National Executive Council Announcement (NECA) No.281 (*Por Wor* 281) § Preamble

²⁵⁶ *Legal Opinion*, *supra* note 248, at 9.

The opinion of the Council of State marked the first assertion of suggestion regarding the interpretation of the *Por Wor* 281 with regards to the controlling power of foreign shareholders. The Council of State had made an impartial and direct discernment that the evaluation of actual foreign controlling share ownership must be taken into account. Aligning its interpretation with the classic theory of ownership and control separation,²⁵⁷ the Council of State made important strides in arguing that foreign shareholders were able to exert *de facto* control as conferred by the corporate charter. With regards to the share ownership of a company, the Council of State suggested that it was necessary to comprehensively consider the totality of factors in order to determine the actual controlling power that directs the company.²⁵⁸ Control is not solely determined by majority share ownership; the company's majority shareholders may not even possess the capacity to exercise control power over the firm. Hence, the Council of State recommended that the ownership of the entire holding structure must be regarded in order to identify the actual control of the company which may be exercised by the minority.

The Council of State's proposal led to increasing suspicions over existing foreign direct investment at the time. Aside from the widespread use of the pyramidal corporate structure by Thai nominees and foreign investors, share preference strategy was also employed to maintain control power of proxy companies. The complex structure permits Thais to own a majority of the company's capital while foreigners exercised greater voting control disproportionate to their

²⁵⁷ BERLE & MEANS, *supra* note 170, at 66, Berle and Means suggest that the primary objective of a corporation is to adapt all available means to a profitable end. Whether or not this objective is realized depends not only on the pressure of market competition but also on the person who exercises control of the firm. The very existence of corporations has fundamentally altered traditional notions of private property where property can no longer be solely controlled by its legitimate owners. Shareholders own shares in the company and corporate directors control the company's activities. The organizational assumption is that the representatives are regulated by law to serve shareholders' interests. However, the emergence of large corporations causes ownership diffusion as the power of management and directors amplifies and, hence, those in control are able to maneuver capital and resources to their own interests without effective shareholder scrutiny. The separation of ownership and control from the perspective of Western countries results in "ownership of wealth without appreciable control and control of wealth without appreciable ownership.

²⁵⁸ *Legal Opinion*, *supra* note 248, at 11.

investment. The Council of State declared that Thai companies which adopted such strategies in their structural configuration would no longer be considered Thai companies which would subject them to the restrictions of the *Por Wor* 281.²⁵⁹ As a result of this caveat, concerns grew that foreign capital would be navigated elsewhere due to such discouraging restriction from the Council of State. This led to the revision of the *Por Wor* 281 in 1992.²⁶⁰

The revised *Por Wor* 281 limited the scope of the former definition claiming that only *registered share capital* is of concern. By this definition, shareholding percentage will only be calculated for the first tier of the shareholding structure. The modification led to the adoption of a semi-pyramidal structure whereby a holding company, with a majority of *registered capital* held by Thai shareholders equipped with preferred shares, was set up. This type of ownership structure contains conditions that allow owners of shares only inferior controlling power of voting rights and poorer rights in regards to corporate dividend payments. The official recognition and allowance of such structure not deemed in violation of the law suggests the government's implicit relaxation of foreign participation in the domestic market. This manifested in thousands of preference share companies being formed, whose registrations have been routinely accepted by the Ministry of Commerce without strict challenge or review.²⁶¹

After the surge of foreign investment post the 1997 financial crisis, the enactment of the FBA in 1999 in place of the above *Por Wor* 281 carried over the flaws in the interpretation of

²⁵⁹ Nikomborirak & Thawannagul, *supra* note 249.

²⁶⁰ The National Executive Council Announcement (NECA) No.281 (*Por Wor* 281) § 3(1), The revision altered the definition of "alien" proposed in the first provision, stating: "Alien means a natural person and a juridical person who has half or more of registered share capital owned by any foreigner or a juridical person in which foreigners holds shares of half or more of total capital value."

²⁶¹ Douglas Mancill, *The Controversy Over Proposed Changes to the Foreign Business Act*, Thai-American Business Special Report Vol.1 (2007).

alien's definition by ignoring the *actual* corporate ownership and control.²⁶² The legal interpretation is still limited to only *registered share capital*, neglecting the consideration of actual corporate ownership and control power. The definition of 'alien' or 'foreigner' put forth by the FBA is identical to the definition of the term in the amended *Por Wor* 281 which states:

'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 one-half of whose total amount of capital is invested by persons under (1), (2) or (3) ²⁶³

And the FBA defines 'capital' as:

'Capital' means the registered capital of a private limited company or the paid up capital of a public limited company, or the amount of money contributed by the partners or members in such partnership or juristic person.²⁶⁴

The limitation of these interpretations propels a faulty legal system lenient on foreign ownership and control.

In summary, The Foreign Business Act of 1999 (B.E.2542) is the most important law concerning the controlling measure of foreign business participation in Thailand. Not only does the law reflect the attitude of the government towards a foreign investment regime in the country,

²⁶² Stjin Claessens, Simeon Djankov & Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81, 107-09 (2000); Randall Morck, Daniel Wolfenzon, & Bernard Yeung, *Corporate Governance, Economic Entrenchment and Growth* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 10692, 2004).

²⁶³ Foreign Business Act of 1999 § 4, paragraph 1.

²⁶⁴ *See Id.* § 4, paragraph 3.

but also balances the benefit of local businesses and their foreign counterparts for the development of Thai economy. However, such effective implementation of the law has yet to be realized due to the contradictory concept that results in the protectionist notion of the law and subsequent defective legal definitions and interpretations, specifically the inheritance of the impractical definition of 'alien' from the *Por Wor* 281 to the 'foreigner' in the FBA. The implicit relaxation created a loophole in the legal interpretation of *actual* corporate ownership and control power, clashing with the Council of State's former interpretation which was transparent and unyielding. The loophole disregards the notion that, in reality, the legal principle of corporate ownership and control does not necessarily imply majority share ownership since the circumvention of business practices, such as the pyramidal corporate structure and preference share schemes, allows ultimate owners and/or minority shareholders to be in possession of the controlling power over the corporate entity. Hence, such corporate strategies can often work around legal provisions that leave room for maneuvering and manipulation. In order to strengthen the implementation of the FBA, the government needs to recognize those problematic loopholes of the law. The amendment of the FBA will greatly improve the foreign investment controlling regime in Thailand and send a positive signal towards the liberalization of foreign investment, and, at the same time, balance the protection of local businesses for the development of a sustainable domestic economy.