

Chapter 5

Conclusion: Recommendations for FBA Amendments

The analyses presented in this study serve as an alternative explanation for the remaining flaws in Thailand's FDI policy – flaws that characterize the challenges to the development of regulatory measures to facilitate the maximization of FDI benefits in Thailand's economy. The study in Chapter 2 has first laid the foundation for its subsequent analyses by reviewing the theory of foreign direct investment (FDI) and its implication to the economic development of country. The study then highlights the role of legal institution or regulatory measure as the importance factor to maximize the beneficial aspects of FDI.

However, as Chapter 3 presented, the development and efficiency of such FDI controlling measure have been influenced by the inheritance factors of country, particularly, the country's historical context, sociocultural norms, and its political and economic landscapes. Theoretically, these social elements are intertwined with the conception and evolution of the implementation of law, in the case of study, the application of Foreign Business Act of 1999. Since the FDI controlling measure is the importance regulation governing the entry foreign investors, the prescription under the law affects their business behaviors as well as the related players inside Thai market. As the firm or corporations, both domestic and foreign, are the fundamental units that guide an economy, their operational structures dictates the allocation of resources and the pattern of cash flows. Economic inequality inarguably arises from such allocation. The efficient distribution of resources creates a society where its members are able to enjoy the fruits of their labor, where their efforts are not deprived, and their economic standings not jeopardized by the control power of vested-interest group. Therefore, as the economic statistic in Chapter 3 suggests, FDI has been the engine of growth for the Thai economy, the amendment and implementation of FBA in 1999 had led to

the positive numbers toward Thailand's economic conditions. Still, the FDI policy and its controlling regulation are the key to the effective extraction of beneficial aspects of FDI. For the purpose of this research the implementation of FBA 1999 as the main FDI controlling rule must, thus, be critically assessed in order to pinpoint the loopholes and solve the remaining problematic aspects of the law.

The analyses in Chapter 4 highlights the main problems the FBA. This mainly due to the contradictory concept of the law from its predecessor, the National Executive Council Announcement (NECA) No.281 or '*Por Wor 281*' that transmitted the protectionism concept toward foreign investor participation. The protectionist notion has manifested in the model of restricted business lists and the impractical legal interpretation of the foreigner's definition under the law. Therefore, the foreign investors and their local business counterparts can utilize the defective legal devices such as pyramidal corporate structure, dual-class share or *preference share* structure and cross-shareholding structure to circumvent the FDI controlling mechanism under FBA. Thus, to strengthen the implementation of FBA 1999, there are main elements that the government should critically consider as follows.

5.1 Re-conceptualize the model of FDI admission and the revision of restricted business lists

To strengthen the application of the FBA, the understanding of FDI admission model needs to be realized. As the enactment of FBA 1999 has implemented a new restricted business lists. The new concept of FDI admission model has also applied by changing from the positive list approach to negative list model to categorize businesses that are protected from foreign participations. However, with the transmission of protectionism concept from *Por Wor 281*, the extended-negative list approach has been utilized to control the participation of foreign business in Thai market. This can be recognized by the restricted businesses in List Three where all business in

service sector has been barred from foreign participations. Even though, the negative list approach allows the free flow of FDI, a too-broad negative list approach will restrict flow of FDI into the sector, defeating purpose of the model.

As evidenced in this study, developed countries tend to restrict FDI only in businesses that jeopardize national security. All other business sectors tend to be open to foreign investors. This liberal posture on FDI stimulates the host country's economy, induces technology spillovers, enhances human capital, is conducive to international trade engagement, and lastly increases competition and thus lowers prices for consumers among many other benefits. Thus, liberalization can bring many more advantages than harm to Thailand's economy. The FBA can foster these benefits should it revise the content of law and the restricted business Lists, which list categories of businesses that foreigners engage in business in without permission and set out procedures for foreigners to obtain such permission.

The Lists in the current FBA essentially states the following: List One refers to businesses that are protected for special reasons, List Two refers to businesses that are reserved due to national security concerns, security, culture, and natural resources and the environment, List Three refers to businesses that Thais are not ready to compete. Interestingly, the Article 21 of List Three identifies: "Other categories of service business except that prescribed in the ministerial regulations", making it a 'catch-all' clause.

While List One and List Two are up for the reconsideration, it is List Three that must be most addressed. The following recommendations for the implementation of FBA should be espoused. Businesses, which Thailand is not yet ready to compete in, prohibited under List Three, a 'catch-all' clause should be relaxed at minimal if not completely lifted and deleted. Restrictiveness does not advantage Thailand's competitiveness. Rather, this insulation inhibits Thailand from receiving technology transfers among other benefits that FDI generates. As

exemplified by many regimes, closed societies never prosper. Thailand has enjoyed the economic benefits of liberalization of the manufacturing industrial sector, but as the economy has developed the liberalization of the service sector seems to have stalled. No businesses have been released for foreign participation under the mechanism afforded by the FBA, which poses a significant problem to the current investment climate of Thailand. While there has been debate about which sectors are ready for competition, some important sectors, which would allow for national skills development, remain closed to foreign participation. Moreover, it does not seem practical that Thailand can develop its domestic industries without the help of others. Consequently, Thailand must veer from this protectionist stance by reconsidering the restrictions on service sectors identified in List Three. The restricted businesses Lists need to be revised, as it needs to be more attuned to Thailand's current level of economic development and its legal setting.

Considering the digital FDI trend of 2021, the exclusion of service sector from foreign participation will likely to damage the growth of new FDI to propel Thai economy as well as the inclusion of local Thai business into the current global value chain (GVC) since the MNEs have modified their business operation by shifting toward the business on the digital platform. Also, with the digital technology, the controlling of FDI in service sector is difficult, if not impossible, as the digital technology is borderless in its nature. Thus, the government should reconsider to open up this sector for foreign participation by creating the FDI policy to attract more foreign digital businesses to help boosting the development of digital technology in Thailand. The digital FDI can be an opportunity of the country to utilize it as the engine of national growth for the next decades.

5.2 Re-conceptualizing the definition of ‘foreigner’ under the FBA: The recognition of the effective implementation of doctrine of corporate ownership and control

From the analyses in this study suggests that there has been a main method to circumvent the FBA - by means of the adoption of legal devices such as pyramidal corporate structure, dual-class share or preference share structure and cross-shareholding structure. This defective business norm is more powerful by the assistance of Thai Nominee. This has allowed foreigners to engage in restricted businesses, which are regulated in the FBA, without actually having to apply for a foreign business license. Thus, the implementation of the FBA should critically reconsider this main legal loophole.

As the study suggests, the adoption of complex corporate legal devices, such as pyramidal structure, dual-class share or preference share structure and cross-shareholding, is pervasive in Thai domestic market. The enforcement of complex structure devices has enable foreign businesses and their Thai counterparts to accumulate private benefits and circumvent the law, producing negative implications for the enforcement of the FBA. The utilization of those corporate legal devices has resulted in the disproportionate of corporate cash-flow ownership and the actual corporate controlling power. The effect demonstrates the sharp divergence between ownership (cash flow rights) and control (voting rights) among Thai firms – that is, the ultimate controlling person can exercise control over a firm’s operation through a relatively and incommensurably small direct investment in its cash flow rights. An OECD study terms this phenomenon the lack of proportionality between corporate ownership and corporate controlling power.²⁶⁵ The characteristic of corporate legal device, particularly pyramidal structure allows the actual controlling persons or the ultimate owners, the foreign businesses, disguise their actual

²⁶⁵ Organization for Economic Cooperation and Development (OECD), Lack of Proportionality between Ownership and Control: Overview and Issues for Discussion (2007).

authoritative position, allowing such individual to circumvent the FDI screening mechanism under the FBA. Considering the uniqueness of Thai political economy, the corporate structure effect of the corporate ownership and control separation is intensified.

The dual-class share or *preference share* structure has also been utilized as a device to bypass the FBA. The adoption of pyramidal structure and preference share structure has made the circumvention of FBA more effective. In this case, foreigners hold preferred shares that give them voting power over Thais. Even if foreigners were to own only 49.99% share, they may have effective control of the company. Generally, holding preferred shares is allowed under commercial laws in Thailand. However, with the appointment of Thai Nominee, the defective preference share structure become more effective. In this case, foreigners arrange to appoint Thais to act as their “nominee” shareholders who would act in accordance to the foreign shareholders' instructions. However, nominee shareholders are not the true investors as they are essentially controlled by foreigners. Foreigners thus exploit nominee shareholders who are Thai in order to make the company a domestic company. Nominees do not have any real power as they are subject to the authority of foreigners who in practice have free reign in the Thai domestic company. Although nominee shareholding is currently an offense under Section 36 of the FBA, this practice is ubiquitous in Thailand’s investment climate. All in all, the preference share structure and the adoption of nominee should not be used in a way that would enable foreigners to engage in businesses, which are restricted under the FBA. Preferred shares grant foreigners advantaged voting rights to Thais, allowing foreigners to, in practice, control a domestic company. Thus, the use of preferred shares has also become a means for foreigners to circumvent the FBA, and should be addressed as to not compromise the integrity of the law in regulating FDI.

In conclusion, the study in Chapter 4 presents that the concept of Thai doctrine of corporate ownership and control, created by the government policy, serves as an obstacle to the implementation of the FBA as the main FDI controlling mechanism. The doctrine has long been ill-conceived and neglected by the authorities in the implementation of the law, resulting in the circumvention of the FBA. This study argues that such defective concept of the doctrine is inefficient and ill-equipped to defend the necessary enforcement of the FBA. The adoption of numerical test approach to interpret the *registered share capital* of the company, further confirms the inefficient implementation of the doctrine as the Thai authorities' simple consideration of the first tier of corporate share ownership structure could not have justified any inherent misdemeanor in the complex corporate ownership structure. Such interpretational approach clearly accentuates the rigidity and impracticality of the Thai authorities' assessment of corporate matters, particularly its conceptualization of corporations as stand-alone entities. Thus, the interpretation of foreigner's definition under the FBA should apply the effective doctrine of corporate ownership and control by emphasizing on the identifying the actual controlling owner of the business entity. With this legal implementation approach, along with the effective revision of restricted business lists, the problematic aspects under the FBA will be diminished and the law will be an effective legal mechanism for the controlling of foreign investment in Thailand.