

**Tilleke & Gibbins** INTERNATIONAL LTD.**CRITICAL EVALUATION OF INVESTMENT LAWS AS A TOOL OF PROGRESS
WITHIN THE ASEAN: THAILAND****Cynthia Pornavalai
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Thailand's investment laws have always oscillated between protectionism and liberalization. Recognizing the importance of foreign investment for its economic growth, Thailand has through the years relaxed restrictive investment laws and regulations. At the same time, however, it has stubbornly held on to some antiquated laws restricting foreign participation in industries where Thai nationals are deemed to not yet be competitive. Having the hindsight of the economic miracles brought about by foreign direct investment, as well as the disaster wrought by over liberalization in financial markets as seen in the present global financial meltdown, the policy debate between protectionism and liberalization continues. However, with the looming vision of an age of Asian economic dominance, perhaps the discussion should now be redirected towards regional legal integration and congruence.

I would like to discuss in this paper the principal investment laws in Thailand and how they have evolved to accommodate foreign direct investment, in the hope that such discussion could contribute towards an exchange of ideas among legal practitioners in this region for a framework of legal integration and congruence.

Foreign Business Act

Foreign investment in Thailand is principally governed by the Foreign Business Act, which restricts the participation of aliens in certain business activities. The Act defines an "alien" as a natural person who is not of Thai nationality, a juristic entity that is not registered in Thailand, or a juristic entity incorporated in Thailand with foreign ownership accounting for one-half or more of the total number of shares and/or registered capital. The activities in which alien participation is limited are divided into three groups: List 1 principally contains agricultural and land-dealing activities; List 2 includes businesses related to national safety



or security or involving art and culture, tradition, folk handicraft, or natural resources and environment; and List 3 contains most services, including legal and accounting. Foreigners cannot engage in List 1 activities at all, while the activities under List 2 and List 3 may be pursued if the foreigner obtains an alien business license. Unfortunately, such license is not always easy to obtain and is subject to discretionary decision of the authorities based on the necessity and impact of the particular business to Thailand's economy and culture.

Board of Investment

In an effort to attract foreign investment in the restrictive legal environment of the Alien Business Act, Thailand has carved out exemptions in the form of investment incentives granted by the Board of Investment (BOI). The BOI is a government agency responsible for providing incentives to stimulate investment in Thailand. It is empowered to grant a wide range of fiscal and non-fiscal incentives and guarantees to qualified investment projects. To help revitalize Thailand's economy and to encourage both the expansion of existing investment and the attraction of new investment into Thailand, the BOI has issued various announcements and has developed measures to foster investment. These measures have come in the form of incentive enhancement such as tax holidays; deregulation such as foreign majority ownership in industries under the Foreign Business Act; and facilitation such as expedited processing of visas and work permits.

Corporate Laws

Recent amendments to the chapter on corporate laws under the Civil and Commercial Code (CCC) resulted in streamlining the procedures for setting up a company in Thailand. The major changes to the CCC are (i) the reduction of the minimum number of shareholders from at least 7 to at least 3 shareholders at all times and (ii) the procedural requirements to summon shareholders' meetings. The amended CCC, in general, eases certain procedural requirements such as one shareholders' meeting (instead of two) to adopt a special resolution, shortened waiting period for capital reduction, shortened process of amalgamating two companies, mandatory publication of dividend declaration to all shareholders, and reduced publication in the newspaper for most procedures (except to call for a shareholders' meeting).

Land Law

Direct investment by foreigners in real estate is still limited, as foreign individuals and companies are essentially not allowed to own land in Thailand. Buildings can be owned



wholly by foreigners while condominium units may be owned up to 49% of the aggregate unit space of the condominium. Exceptions are granted for particular investment purposes under certain laws such as the Investment Promotion Act, Industrial Estate Authority of Thailand Act, and property fund regulations. The restrictive land law has not only severely curtailed foreign direct investment in property development in Thailand, it has also given way to undesirable (and illegal) practices of using nominee structures.

Foreign Exchange

Foreign exchange control has been considerably relaxed because of major liberalization by the Bank of Thailand. Thailand's international financial position was elevated to Art. 8 status under the International Monetary Fund Agreement. At present, several transactions in foreign currency are under less strict control and can be performed merely upon obtaining approval of authorized commercial banks. Approval is normally granted if applicants provide reasonable grounds for remittance and properly follow required procedures.

As a general rule, all matters involving foreign currency are regulated by and require permission of the Bank of Thailand. In particular, except for sale of foreign exchange by authorized dealers (i.e. authorized banks, companies, or persons) which have been authorized and delegated certain powers to approve certain foreign exchange transactions on behalf of the Bank of Thailand, no person other than such authorized dealers may buy, sell, lend, exchange, or transfer any foreign exchange without permission of the Bank of Thailand.

The Bank of Thailand, however, has in the recent past exercised its discretion in limiting the influx of foreign currency to control the Thai Baht's volatility. This has resulted in increased uncertainty and transactional costs for foreign investors wishing to remit funds into the country.

Tax Laws

Thailand has entered into a number of treaties for the avoidance of double taxation. The scope of the Thai tax treaties covers taxes on income and on the capital of individual and juristic entities. The provisions of these tax treaties minimize or exempt certain types of income from taxation.

The corporate income tax rate is 30%, imposed with few exceptions on worldwide net profit received by Thai companies and on Thai source net profit received by foreign companies during the given tax year (i.e. accounting period). Reduced rates at the



progressive rates of 15% to 30% are granted to small and medium-sized enterprises. In addition, reduced rates of 20% and 25% are granted to companies listed on the Market for Alternative Investment and companies listed on the Stock Exchange of Thailand, respectively. A company established as a Regional Operating Headquarters providing qualifying services to affiliated juristic companies or partnerships or branches is subject to tax at a reduced rate of 10% of net profits. Foreign companies engaged in international transportation are subject to tax at the rate of 3% of gross ticket receipts collected in Thailand for passenger transportation and 3% of gross freight charges collected anywhere for transportation of goods from Thailand in lieu of tax on net profit.

Bankruptcy and Insolvency Laws

The 1997 Asian financial crisis—more popularly referred to as the “Tom Yum Kung crisis” because it is said to have originated in Thailand—badly crippled Thailand’s economy in its wake, but it also left behind it a lasting legacy. Faced with sharp economic slowdown and a wave of corporate defaults, Thailand revamped its banking and financial institutions, including various legal infrastructures. For one, it made a major amendment to its antiquated bankruptcy laws to allow for corporate restructuring similar to the procedures under Chapter 11 in the United States. The amendment, which took the form of an additional section on Corporate Reorganization under Chapter 3/1, took effect in 1998 and over the years various revisions have been made to fine-tune its provisions and principles.

Thailand is not, however, a member of any treaty or convention for the recognition of foreign insolvencies. The receivership of asset or bankruptcy action under foreign laws has no effect as to the asset of the debtor in Thailand. In a similar manner, Thailand’s insolvency laws have no claims as to jurisdiction over assets of a corporate debtor situated abroad. The Bankruptcy Act states that the Act only applies to property of the debtor within Thailand.

Enforcement of Foreign Judgments and Arbitration

Thailand is not a signatory to any reciprocal enforcement of judgment. Consequently, foreign judgments are neither binding on nor enforceable in Thai courts. At best, a foreign judgment may be recognized as proof of a claim adjudicated abroad, though insufficient to constitute grounds for the forum to attach a judgment-debtor’s assets within the jurisdiction. Foreign arbitral awards rendered in member countries of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 and of the Geneva Protocol 1923 are, however, recognized and enforced in Thailand, which is a member of both conventions.



Regional cooperation in the area of enforcement of foreign judgments and insolvency proceedings would be the most logical step towards legal integration. However, this would undeniably pose a major legislative hurdle among the member countries.

Import and Export Controls

In essence, conducting of international trade in Thailand is regulated by the Act Controlling Importation and Exportation of Goods B.E. 2522 (A.D. 1979), and as a general rule, is subject to controls by the Ministry of Commerce in the form of licensing requirements. The Minister of Commerce has authority to specify classes of goods which are subject to import and export controls. The ASEAN Free Trade Area negotiations, together with the successful conclusion of the GATT Uruguay Round in 1994 and Thailand's accession to the World Trade Organization in 1995, have brought about many changes in Thailand's tariff regime. The number of goods subject to control and *ad valorem* tariff schedule rates has fallen considerably in the past few years.

Conclusion

From the discussion above of the principal investment laws, one can see that Thailand is making a conscious effort to attract foreign direct investment for the primary reason that foreign direct investors are universally recognized as agents of progress and economic growth. However, while improvements and deregulations are marked in areas such as foreign exchange, trade, and company laws, more regulatory reform is needed in areas such as foreign participation in the service sector, property development, and recognition of foreign judgments and insolvency proceedings.

Alvin Toffler, in his recent bestseller *Revolutionary Wealth*, writes that law is the slowest of all our slow-changing institutions. He acknowledges that changes in law should come slowly, as law "provides needed degree of predictability to society and economy, applying brakes in time to overly rapid economic and social change." However, Toffler also poses the question of how "slow is slow." Legal practice has evolved at a comparatively faster pace with advancements in communication, legal research, and the demands of increased cross-border transactions, but the laws themselves have not kept up with this pace. Most of our current investment laws were written for a different time and environment. Recent amendments represent only a small part of what must be changed. As our level of economic integration grows, so must legal infrastructure for cooperation evolve.

