

FOREIGN INVESTMENT AND THE FOREIGN BUSINESS ACT

A deep dive into understanding Thailand's foreign investment regime, history and priorities.



Tuesday 26 February 0830 – 1130
Radisson blu, Sukhumvit Bangkok

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Introduction

The Foreign Business Act was enacted in AD 1999, with the intent of protecting Thai industries not yet ready to compete. An annual review mechanism was intended to allow industries over time to be opened up to competition, but that system has barely resulted in change. The Foreign Business Act is about commercial presence – ie business activities conducted by entities. Thus a company incorporated in Thailand with less than 50% foreign ownership is a 'Thai company' and would not face restrictions under the FBA, but a company with 50% or more foreign equity would be a 'foreign' company.

It is a generally accepted view that many industries are ready to compete, but they remain officially closed. Most companies would benefit from competition, rather than being harmed by it. The real harm is more likely to be the continued protection, allowing inefficient and non competitive practices. What should be done better to support the Thailand 4.0 vision?

While Investment Promotion via BOI recognizes the value of foreign investment, what about other areas? How is this foreign equity measured and what does it mean for the economy and possible future change? How are licences granted? How are industries defined?

This seminar aims to provide an understanding of the workings of the regulation of foreign investment and insights into what can be done to contribute more to the competitiveness of the Thai economy.

This SEMINAR BOOKLET contains the Agenda, Speaker bios, a Background paper covering a Primer and foreign investment information and recommendations, Sponsor and Supporters information without whom the Seminar would be much less interesting. control v 1.8

Agenda

Time	Item
0800 - 0830	Registration and Refreshments
0830 - 0840	Opening Welcome: MC <i>Opening Remarks: Dr Giuseppe Busini</i> , Minister Counsellor and Deputy Head of Mission, Delegation of the European Union to Thailand MC explains the seminar
0840- 0900	<i>Overview of Foreign Investment in Thailand via the FBA and other means</i> – Mr. Vuttikrai Leewiraphan ; Director-General, Department of Business Development, Ministry of Commerce
0900 - 0925	<i>Foreign Investment economics and regulation</i> Dr Deunden Nikomborirak , Research Director, Economic Governance TDRI
0925-0945	<i>Process and Criteria for Foreign Business Licences and Foreign Business Certificates</i> ; Mr Chaiwat Keratisuthisathorn , Senior Associate, Corporate & Commercial Department, Tilleke & Gibbins
0945 - 1000	<i>Foreign Dominance Notification – what is it, what does it mean?</i> Mr Bob Fox , Chair JFCCT & EABC Digital Economy/ICT group
1000-1015	Break
1030 – 1125	Moderated Business Roundtable – major issues. Dialogue, then Q&A by Pigeonhole and directly. Dr Hwee Khim Boo Dr Jingjai Hanchanlash Mr Nandor von der Luehe Dr Deunden Nikomborirak Mr Chaiwat Keratisuthisathorn Moderator: Mr Bob Fox Questions from floor: Use own handheld device to access the Pigeonhole platform, via your own 4G cellular or the hotel’s WiFi.
1125 - 1130	Closing – MC and EABC.

Speaker Biographies

Dr Giuseppe Busini
Deputy Head of Mission, EUD Thailand

Dr Giuseppe Busini took up duties as Deputy Head of the EU Delegation to the Kingdom of Thailand in September 2018. Dr Busini has worked in the EU External Relations service for more than 20 years, covering, amongst other appointments, South Caucasus, Iran, Central Asia, the Gulf Cooperation Council and India. Before his appointment to Bangkok, he was responsible for the EU's relations with ASEAN and the ASEAN Regional Forum.

Dr Busini holds a master degree with honours in Political Science and a PhD in International Relations and Contemporary History, both obtained at the University of Perugia (Italy). In addition to his Italian mother tongue, Dr Busini is fluent in English, French and Spanish. He is married and has three sons.

Mr Vuttikrai Leewiraphan
Director-General, Department of Business Development, Ministry of Commerce

Mr. Vuttikrai Leewiraphan is Director-General, Department of Business Development (DBD), Ministry of Commerce. DBD has one of the largest areas of responsibility in the Ministry, covering a range of functions in foreign investment and other areas.

Mr Vuttikrai has held various roles in the Ministry of Commerce for over 13 years, including Inspector-General, Office of Permanent Secretary, Commercial Advisor in that Office, Director of Prince Chandaburi Narunath Institute in that Office, and Director of the eCommerce Division in DBD.

Additional experience includes being on the Bank of Thailand's payment systems committee, and its Protection of Credit Information committee, and national committees on ePayments, Start-ups, as well as chairing the Big Data Working Group in the Ministry.

His work has been well recognized, including having outstanding personal study results in the Civil Service Executive Development Program, Office of the Civil Service Commission.

Mr Vuttikrai holds a Master of Science in Administration, Boston University, U.S.A. and Bachelor in Political Science, Chulalongkorn University. He is also the holder of an Advanced Certificate in Public Administration and Law for Executives, King Prajadhipok's Institute as well as a number of other government certifications.

Dr Deunden Nikomborirak
Research Director, Economic Governance, TDRI

Dr Deunden Nikomborirak is Research Director, Economic Governance at the Thailand Development Research Institute (TDRI), an independent economic policy research institution based in Bangkok. She obtained her doctorate degree in Economics from Mc Gill University, Montreal, Canada; MA and BA at Queen's University, Canada. Her area of specialization is services trade, economic regulation, competition law and policy, investment and governance and corruption. In 2007, she briefly assumed a political position

of Secretary to the Minister of Finance before returning to TDRI the following year.

Dr Deunden has a long record of engagement and contribution on various policy committees and contracted advisory work for many government, semi-government and private agencies. These include the Guillotine or 'Simple & Smart Licence' project for reforms of laws and regulations, and extensive analysis and reports on changes to List 3 in the Foreign Business Act for the Ministry of Commerce.

Dr Deunden is well respected for her robust and candid insights into complex situations.

She is currently a member of various government committees including the Subcommittee on International Affairs of the Trade Competition Commission, Subcommittee on Telecom Consumer Protection, under the National Broadcasting and Telecommunications Commission (NBTC) Independent Consumer Organization Committee and Committee Monitoring and Assessing Corruption Situation under the National Anti-Corruption Commission (NACC)

Mr Chaiwat Keratisuthisathorn
Senior associate,
Tilleke & Gibbins

Mr Chaiwat Keratisuthisathorn is a senior associate in the Tilleke & Gibbins corporate services group. He advises clients who wish to establish and operate a business in Thailand (e.g. limited company, representative office, branch office, foreign business license and foreign business certificate, corporate secretary services, etc.) and who seek advice on foreign investment. He has advised on and conducted many applications for Foreign Business Licences and Foreign Business Certificates.

Chaiwat also specializes in property acquisition (land, building, and condominium unit) in Thailand by advising clients on property laws, conducting property due diligence and title searches, reviewing any requisite agreements, preparing required documents, and representing clients at the land office to register property rights.

He regularly contributes his legal expertise to investment and real estate research projects conducted by the World Bank. He is a licensed lawyer, a notarial service attorney, and member of Thai Bar Association.

Dr Jingjai Hanchanlash
Director, Loxley
Plc, Vice
Chairman TCC
Chairman
European
Committee of
Board of Trade
of Thailand.

Dr. Jingjai Hanchanlash is Director, Loxley Plc, Director Muang Thai Insurance Plc, a director of several other public companies and institutions including, Vice Chairman Thai Chamber of Commerce, Chairman European Committee of Board of Trade of Thailand, and a director of the Executive Board of Thai Chamber of Commerce and Board of Trade of Thailand.

He is also Honorary Consul, Honorary Consulate of Jamaica to Thailand, Director of the Executive Board, King Prajadhipok Institute/Government entity, director, Office of the Public Sector Development Commission, Expert Director Member, The Thailand Research Fund (TRF) / Government entity National Reform Council, Education and Chairman, Executive Committee and

Council Member of University of Thai Chamber of Commerce / university council

Dr Jingjai's vast experience reflects a deep understanding of foreign trade and investment issues about Thailand.

Dr Jingjai holds Doctorat d'Universite de CAEN, France, and various certifications from University of Connecticut USA, University of Western Ontario and Thai IoD, amongst others.

Mr Nandor von der Luehe, Owner Metropolitan Jewellery Manufacturing Ltd

Mr Nandor von der Luehe is Owner, Metropolitan Jewellery Manufacturing Ltd. After studying Business Administration at St Gallen, Switzerland, he built a jewellery business in Hong Kong, then founded three jewellery businesses in Thailand, from the late 1980s. He is a former president Swiss-Thai Chamber, and former Chairman JFCCT and Vice Chairman of the Board of Trade.

He has spoken and written extensively on the value in opening up markets in Thailand, in particular in the services sector.

He has both Swiss and Thai nationality.

Dr. Hwee Kim Boo
Advisor and Co-owner of Best Plastics Technology Co., Ltd; Chair, Malaysia-Thai Chamber of Commerce

Dr Hwee Kim Boo is Advisor and Co-owner of Best Plastics Technology Co., Ltd; Chair, Malaysia-Thai Chamber of Commerce and advisor to Kelab Malaysia of Thailand.

Originally from Johor Bahru, Malaysia, her education in the US which included PhD research thesis sponsored by Exxon Chemicals which was awarded Best Student Thesis Award by The Vinyl Division of The Society of Plastics Engineering (USA). After graduation, she joined BFGoodrich as a research scientist for five years. She was granted two US patents and published over 10 publications in the field of PVC.

She and her husband established a manufacturing plant in producing colorants and additives for the plastics industry in 1995, (Best Plastics Technology Co., Ltd. (BPT)). BPT slowly build up from a micro company to a medium size enterprise with annual revenue of approx. 480 Million Baht. Today BPT is one of the leading companies in this area of business.

In addition to her role as Chair of the Malaysia-Thai Chamber of Commerce, she works closely with Malaysians in Thailand and also with Foreign Chambers in Thailand to influence positively the government in improving business practice and ease of doing business in Thailand.

Dr Hwee holds a Ph.D in Chemical Engineering, University of Connecticut, and B.Sc (Hons), Chemical Engineering, West Virginia University.

Mr. Bob Fox
Chairman, JFCCT
& EABC Digital
Economy/ICT
Group; JFCCT
Policy Co-
Ordinator

Mr. Bob Fox is Chairman Digital Economy / ICT group JFCCT and EABC; JFCCT Policy Co-Ordinator and has a consulting business in trade and investment. He is Regional Director Asia Pacific for a technology and services company.

He was group CEO of one of Malaysia's largest listed companies, regional director Asia Pac for business strategy and development for BT (British Telecom), regional director Asia Pac for a NASDAQ listed broadband services company and later a similar role for a US/Israeli consumer analytics company, and one of the founding senior executives for Starhub (Singapore) and du (UAE). He was project director and main board (University Council) member for Bond University, Australia's first private university (now in its 30th year) and CEO of Australia's first high end mail order company. He was with Baker & McKenzie (foreign investment, joint ventures, competition).

He has been involved with regional trade and investment policy for over a decade. In Thailand he has devised and developed policy recommendations on the FBA & services sector liberalization, and other areas including Rule of Law, arbitration, regulator governance, fast track licence reform, SOE and telecoms reform, Cybersecurity and Work Permit & Visa.

He has BA LLB (UNSW), Master's - Stanford University Graduate School of Business (a Sloan Fellow), and various ICT, stock exchange and director certifications. He is a mediator certified by THAC. He was an AFS Scholar.

Primer

This Primer describes terms, acronyms and concepts. Items are roughly grouped by similar concept, not listed alphabetically.

Foreign Business Act (FBA) Enacted AD 1999; successor to the 1972 Alien Business Law. Provides for restrictions on business activity (often called 'sectors' but they are usually more narrow than sectors) by foreign companies. We use 'business activity' in this Primer and Backgrounder.

An entity incorporated in Thailand with less than 50% foreign ownership is often called a 'Thai company'; with 50% or more, a 'foreign company'.

The FBA regulates according to 'commercial presence' (Mode 3 for services – see 'Modes' below), not about individual professionals.

The FBA uses a 'negative list' system (ie identifies business activities which are off limits) of three lists:

List #	Description	Means of allowing participation by foreign companies
List 1	"businesses not permitted for foreigners to operate due to special reasons". Foreign companies are completely restricted from engaging in these activities.	None unless change the law
List 2	"businesses related to national safety or security, or affecting arts and culture, traditional and folk handicraft, or natural resources and environment"	Cabinet approval
List 3	"businesses in which Thai nationals are not yet ready to compete with foreigners".	Foreign Business Committee (sometimes referred to as Foreign Business Commission) approval via a Foreign Business Licence or equivalent.

Foreign Business Committee (sometimes referred to as Foreign Business Commission): body under the aegis of Ministry of Commerce (which includes representatives of other ministries).

Foreign Business Licence (FBL)– Granted through Foreign Business Committee

Foreign Business Certificate (FBC) - Similar to an FBL but for promoted or special areas – eg if under BOI promotion, IEAT, or Treaty of Amity for example. (ss. 11, 12 FBA)

Definition of foreignness (foreign juristic person)– measured by reference to direct shareholding – see more in Backgrounder

FIBA: Financial Institutions Business Act; regulates the finance sector and includes restrictions on foreign equity. More in Backgrounder

FDI Foreign Direct Investment. There is art and science here; the concept is about some kind of control element, even if in minority, contrasted to portfolio investment of minority investments in listed securities for example.

WTO – www.wto.org. Responsible for the world’s trading rules, with 164 members.

CPC – Central Product Classification – a means of defining and classifying goods and services.

GATS General Agreement on Trade in Services.

CTS Council for Trade in Services. Geneva-based meeting of GATS member states to resolve issues on trade in services.

AFAS ASEAN Framework Agreement on Services; as a framework agreement, it relies on specific commitments – eg Thailand’s 9th and 10th packages. When AEC commencement was deferred by 364 days (1 Jan 2015 to 31 Dec 2015), the final 70% limit for all unaddressed sectors was to have come into play.

	Air Transport. e ASEAN. Healthcare. Tourism.	Logistics	All remaining Service sectors
2008	51%	49%	49%
2010	70%	51%	51%
2013		70%	51%
2015			70%

-----Priority sectors-----

The FBA has no specific carve-outs for regional treatment. Some laws may override it through a recognition principle in the FBA (eg to the extent relevant, the Treaty of Amity with the US [note that 7 sectors are excluded from that treaty]).

Thus the permissive regime of an FBL (Foreign Business Licence) has to be relied on – ie permission on a case-by-case basis via an FBL is needed.

ATIGA: ASEAN Trade in Goods Agreement, in force for some time.

ATISA: ASEAN Trade in Services Agreement; not yet finalized. This is a sister agreement to ATIGS and would succeed ATISA.

Services: Broadly, anything which is not goods. For present purposes, a service is traded when supplier and customer are from different countries, regardless of location of the transaction. WTO jurisprudence treats data as a Service.

4 Modes of Supply of Services



Modes	Forms of Service Provided
<p>Mode 1: Cross-Border Supply Consumer and Service Supplier remain in different countries -Only the service crosses the border (E.g. An EU resident uses online services offered by a Singapore-based company)</p>	
<p>Mode 2: Consumption Abroad -Consumers making use of a service in another country (E.g. Tourism services; Customer from the EU travelling to Singapore to consume services from a company based here) -Also covered is the movement of consumer's property (E.g. Sending a ship or other equipment abroad for repair)</p>	
<p>Mode 3: Commercial Presence -Foreign companies setting up subsidiaries or branches to provide services in another country (E.g. Foreign firm from Singapore setting up a branch in the EU to provide wholesale trade services)</p>	
<p>Mode 4: Presence of Natural Persons -Individuals travelling from their own country to supply services in another country on a temporary basis (E.g. Salesperson from Singapore practices in EU)</p>	

Source: Enterprise Singapore, explaining the EU-Singapore FTA; for ‘Singapore’ read ‘Thailand’, for ‘EU’ read ‘foreign’.

Professionals / Professional services/skilled labour

There are three laws or categories of laws restricting participation by foreign professionals:

Layers of regulation (relevant to the context of reviewing the FBA) – simplified

Subject	Effect	Regulatory source
<p>Business activities of entities (eg companies) with more than 49% foreign shareholding</p>	<p>Restricts the business activity of the company using three lists.</p>	<p>Foreign Business Act AD 1999. Foreign Business Licence (s.7) Under IPA (the basis of BOI promotion), IEAT, Treaties, a slightly different process applies – a Foreign Business Certificate (s. 12)</p>
<p>Professions which may not be undertaken by foreigners</p>	<p>Prohibits foreigners (individuals) from carrying out 39 professions. EABC and others have identified 8 of interest</p>	<p>AD 1979 Decree</p>
<p>Professional licensing or permits at sector or individual professional level.</p>	<p>An additional barrier which is often overlooked by regulatory moves to liberalise professions. (A separate document analyses each profession and lists relevant laws).</p>	<p>Various sector or profession-specific laws – eg Engineers Act, Accountants Act, Lawyers Act which typically set up a professional licensing authority.</p>

The FBA is about business activities of entities (first row). The 1979 Decree is about restricting foreigners from participating in 39 professions (second row). EABC and others have recommended that 8 of these 39 professions be removed from restriction. The third row is about profession-specific regulation.

Civil engineering services for example are caught at all three layers.

This information provides context, but the regulation of individual professional activity is largely beyond the scope of this Seminar.

Telecom Business Act (TBA) – three categories of telecoms licence. From 2006, restricts foreign ownership for categories 2 and 3 licences to max 49%, similar concept to FBA standard. Category 1 licence foreign equity limits are covered by FBA List 3 item xxi.

Foreign Dominance Notification (FDN) – regulation made by NBTC in 2013 about additional restrictions on participation in Licence categories 2 and 3 of the TBA. More in Backgrounder.

Investor-State Dispute Settlement (ISDS) How disputes between the foreign investor and a state will be resolved. Typically a whole chapter in an FTA (treaty).

ICSID: International Centre for Settlement of Investment Disputes, a World Bank body. www.icsid.worldbank.org/en. See more in Backgrounder.

Backgrounder

1. Commercial Presence - the big picture

Commercial presence (via a Thailand-based entity), or Mode 3 is one of approximately four modes of participation in Thailand. Commercial presence is possible via:

- A local entity which is at least 51% Thai owned and in some cases, depending on the industry, may have other restrictions.
- A local entity which is up to 100% foreign owned, with a foreign business licence (FBL) under the Foreign Business Act (FBA);
- A BOI promoted entity, or entity promoted under IEAT rules or rules under other legislation, or under a treaty, where a Foreign Business Certificate (FBC) is granted allowing up to 100% foreign ownership.

Ability to hold greater than 49% foreign ownership depends on the sector.

The FBA has three lists describing business activities (sometimes – perhaps too broadly – referred to as ‘sectors’); an FBL or FBC is available for activities under List 3; Ministerial approval is needed for activities under List 2 and List 1 is not open to foreigners.

If the sector is not referred to in the FBA lists – including the ‘catch all’ item xxi of List 3 (or is not otherwise regulated by sector specific legislation), no special administrative process is needed for greater than 49% foreign ownership.

The concept under global rules such as those in GATS is that National Treatment is generally expected. That is, the entity should enjoy the same treatment as if it were a local company.

Much has been published on the importance of service sector liberalization. But there is no material positive movement in terms of List 3 changes; in fact in some respects there is a tightening.

Manufacturing was liberalised in the 1980s. Thailand did well; ESB (Eastern Seaboard) is the result. Economists and many business leaders agree that liberalising services is the key to emerging from the middle income trap. But there is resistance. Many have recommended liberalizing services for a long time, including ABD, World Bank, TDRI, various economists at Thai banks.

2. Sources of Services FDI

Services FDI for 2018 was concentrated in three sectors (Finance/Insurance 32%; Real Estate services 17%; Motor Repair 9%)¹. There is opportunity in higher-end services, logistics, a range of data-related services and other areas. The existence of BOI promotion for some activities does not mean that the relevant ecosystem will be stimulated.

3. Progress with liberalisation

List 3 is required to be reviewed annually (ie removing items from List 3 so that they are open to majority foreign ownership) and while it is understood that List 3 has been assessed at least annually, it has been revised only three times (2013, 2016, 2017) with some 18-20 sectors/business activities released (depending on how they are defined)-mainly in financial services², falling under item 21 (the catch-all) in List 3. The releases are generally considered mainly liberalisation-neutral as there is some sector-specific legislation covering most of the same fields.

The exceptions are arguably for Representative Offices and Regional Offices, which are considered real liberalisations.

An example of sector-specific regulation covering most removed business activities is the Financial Institutions Business Act (FIBA). Originally, FIBA required that Thai nationals hold not less than three-fourths of the total issued voting shares in a commercial bank and that at least three-fourths of the total number of directors be Thai nationals. These rules were relaxed some ten years ago. Bank of Thailand was empowered on a case-by-case basis, on request, to permit non-Thai nationals to hold up to 49 percent of a company's voting shares and to allow foreigners to comprise more than 25 percent, but less than 50 percent, of the directorship of a relevant company.

Press statements in 2018 have indicated other proposed releases:

- i) Some 19 activities in support of the Eastern Economic Corridor (EEC) were reported to have been moved from List 3 of the FBA, reported to have been done on Friday 16 June 2017 but would only be applicable to the EEC. The Minister reportedly said at the time: "The move allows foreign companies to join joint bids on infrastructure projects, but also for other government projects such as rail, the skytrain, airports, power plants and petroleum exploration businesses".
- ii) March 2018: The ten 'S' curve industries,³

¹ Source: Bank of Thailand data year 2018, supplied by TDRI

² There has a separate analysis of these three Decrees

³ Bangkok Post March 26, 2018

- iii) June 2018: five activities, most intra-group or in-house⁴
- iv) September 2018 and October 2018⁵: three activities (intra-group services), out of some 30 which were considered, then reported to be removed subject to being approved by cabinet in 2019, according to the report: lending services to affiliated domestic firms; office building rental services to local affiliate firms; and consulting services to affiliate firms for four activities: management, marketing, human resources and technological consulting. It is not clear why a removal from List 3 needed cabinet approval.

It has been noted that the limited change does not seem to be consistent with the purpose of the FBA List 3 mechanism. The underpinnings of the FBA date back to the early 1970s, almost two generations ago. Since then, significant educational and economic modernization has occurred and it would appear that Thai companies in many industries are competing well in both domestic and international markets, and are doing so utilizing world class technology and products. Yet they are still formally protected from competition on the basis that they are not ready to compete.

Being well-positioned for regional and global trade and investment requires retooling by opening up for modernization and competition, welcoming those companies which can help train Thai firms to deliver world class services and products and also get Thai companies up to speed in areas where in the past they may not have been competitive. Thus, competition should not be shunned, rather many sectors, companies and consumers would do well from competition.

While some Thai brands have established themselves in regional and global markets, an example of policy and action failure is in telecoms. There are two firms which are still 100% state-owned and continue to be used as policy tools, continue to cause market distortions and continue to under-perform. They need to evolve away from 100% state ownership, and undergo major reforms required for Thailand to fully benefit from the 5G technology which has the potential to have major positive impact on the overall Thai industrial sector. Their merger alone will not achieve this. Unlike the vast majority of the world's firms in a similar position in that industry, which have become competitive, value-adding players, adding greatly to national capacity and wealth, the two firms continue to rely on the private sector to rent their allocated natural resources.

As cellular 5G will require investments in frequencies, networks, human capital and products in an unprecedented level and require major industry reforms so that resources are utilized to full potential the current foreign equity limitations and associated dominance restrictions will negatively impact Thailand as an investment and growth market.

a) ASEAN context

AFAS (ASEAN Framework Agreement on Services) is a framework agreement relying on specific commitments. An ASEAN Trade in Services Agreement (ATISA) is planned, the goods agreement (ATIGA) having been in force for some years.

Thailand's 9th and recent 10th AFAS packages have been weak in offering liberalization. In the 10th package, it seems that only six sub-sectors were committed, including:

⁴ Bangkok Post June 18, 2018; Tilleke & Gibbins note www.tilleke.com/resources/liberalization-planned-five-businesses-under-list-3-foreign-business-act

⁵ Bangkok Post, September 24, 2018, p B3; Bangkok Post October 22 2018, under 'labour'

- Telecoms services under type 1 licence for packet switched data, circuit switched data and EDI. (Comment: but Type 1 licences support a 100% , not just 70% foreign ownership, by application, and FBLs have been granted).
- Transport services: goods delivered by vehicle operated by man or animal power.
- Maintenance of LNG ships, with weight not exceeding 500 tonnes
- Clearing of barges.

b) What is services liberalization?

Services liberalisation is not just lifting foreign equity limits (FELs) but has a number of elements; all of which we recommend be pursued:

- Relaxation of FELs
- Facilitation of free movement by changes to Work Permit and Visa rules.
- Sector specific changes and mandates by way of relaxation of restrictions on permits, licences and other barriers to entry, and to mandate access to facilities – such as is done in GATS in relation to telecommunications, and in other FTAs with telecommunications chapters
- Other sector specific reforms or mandates (e.g. structural changes in a sector to make it competitive and innovative, such as recommended for the telecommunications sector).

Data flows/data trade are part of services. (Thus the cross border rules in the Personal Data Protection law are very important).

c) ‘Doing Business’ overhead

The Guillotine project (‘Simple & Smart Licence’) is a positive move to making ‘doing business’ easier and less costly. Included in the EABC Submission on the FBA (see item 7, below). The business overhead of continuing to require licences in areas where Thai companies are ready to compete (and in fact do, but still under some protected terms), is an unnecessary and non value-adding overhead.

Thailand’s ‘doing business’ ranking (World Bank) for 2019 has slipped from 26th (2018) to 27th.

4. Definition of ‘foreignness’ or foreign juristic person

The FBA is the base standard for commercial presence. The ‘FBA standard’ is a test based on first level of shareholding, not on control or other factors.

The issue arose for public discussion in 2007 and 2014.

The basis of the Thai standard is one of ownership, being the immediate owners (shareholders) of a company. It does not include aspects of shareholder control through voting or other elements. That standard is the basis on which specific commitments were made under GATS to support a non-

discriminatory ‘national treatment’ obligation. As the House of Representatives Committee⁶ in 2009, 2010 noted – in that context about the telecommunications sector but the point applies generally:

“the test of [the FBA] only focuses on the number of shares held by foreign shareholder(s), omitting other tests ie management control. On this basis, the Department of Business Development has only apply the test on number of shares held by foreigner by which if more than 50% of the shares are held by the foreigners, such juristic person is deemed a foreign company”.

“Apart from the above relevant legislation, there is no legal provision directly dealt with individual or company concealing its status by taking control over a Thai company through a control over management level, control by holding majority shares’

“.....it seems to be that the current laws and regulations in Thailand do not comply with the General Agreement on Trade in Services. Thailand will need to revise and improve the laws and regulations the Commission viewed that the government and other related government organizations should study and consider pros and cons ... [such] as the improvement and revision of the laws and regulations which limit and obstruct the performance under the agreements between Thailand and other member countries of the WTO in accordance with the schedule of specific commitments. In this regard, if Thailand realizes that Thailand is not ready to open a free trade area for telecommunication business, the government should try to negotiate with other member countries and ask for a waiver of the obligation to perform with the schedule of specific commitments for opening a free trade area for telecommunication business”

In the CTS dialogues, the point was made that adding an additional element such as voting rights (or any other restriction on control over investments) would not be compliant with Thailand’s commitments under GATS.

Standards other than the FBA standard include:

- i. Broadcasting – control and nationality factors, which are used by many states. (The on-line media world brings in new issues such as legitimate concerns about fake news – local and foreign – and improper influence but these social media issues are not dependent on ownership or control).
- ii. Foreign Dominance Notification (telecoms Licence categories 2 and 3)) – a list of connecting factors including control, indirect shareholding, banking relationships, supply relationships, personnel, staff etc, . This makes for barriers to investments, technology and know-how transfers into Thai entities.
- iii. Insurance with some caps at 25% but in practice differently applied
- iv. FIBA – (see Primer)
- v. Aviation services from January 2018, relying on a 46 year old Decree – restricts nationality, control, shareholding for an Air Operating Licences (AOL), on safety grounds.

⁶ “The Problems of Shareholding, Takeover and the Ownership of Land by a foreigner who relates to the Telecommunications Business” by the Communications and Telecommunications Commission, the House of Representatives – EN translation.

and others have cautioned against changes to the ‘foreignness’ definition in the FBA, which as noted in the deliberations in the Council on Trade in Services in Geneva in relation to the Foreign Dominance Notification, is regarded as the basis of the GATS commitment.

Many have commented that the real issue is more productive, economically, if focused on the removal of roadblocks in List 3 rather than bringing in more restrictions in terms of changes to a definition.

5. Foreign Dominance Notification (FDN)

The FDN applies to categories 2 and 3 TBA telecoms licences. Its tests are much more broad-reaching than the FBA standard. Some relevant developments are shown

Time frame	Event / Developments
Late 2005	TBA amended to allow up to 49% (from 25%) foreign equity for Type 2 and Type 3 licences, and removes control/board restrictions
Late 2005/early 2006	Telecom Business Act is changed for category 2 and 3 licences to be in line with FBA
During 2006	NTC shows interest in additional controls on foreign participation
2007	Proposals to change definitions in the FBA
2010 - 2011	Idea of foreign dominance restrictions / views canvassed
Aug / Sep 2011	NTC reduced to few commissioners; split on the FDN; NTC passes FDN by bare majority at 11 th hour (Chairman in minority but obliged to promulgate it)
Later 2011	NBTC comes into being; succeeding NTC (sister organisation NBC had never been formed)
Dec 2011	Public hearing on a revised FDN
May 2012	Further revised FDN proposed. NBTC engages in further dialogue
June 2012	Public hearing; revised FDN issued and comes into force July 2012
July 2012	MOC issues proposed Guidelines for interpreting FBA, similar to FDN. (Later, not proceeded with)
September 2012	Norway initiates agenda item at CTS Geneva on basis that FDN is inconsistent with Thailand’s GATS obligations; watching brief advised by others including EU, US, Japan. Commentary or questions in CTS from others also.
Nov 2014	Reported suggestion by DBD to use FDN type rules, economy-wide
Nov 2014	Foreign business community via Board of Trade working group and others prepare proposals
11 Nov 2014	Hearing on FBA
26 Nov 2014	MOC hearing on FBA – ‘town hall’ style meeting
3 Dec 2014	PM announce no change to FBA for now
2015/2016	Commentary from a DBD spokesperson from time to time about changing definitions
Jan 2017	Relying on a 1972 Decree about safety, AOL issuance terms are revised to restrict holders, using some FDN-type principles
Jan 2018	AOL restrictions in force
March 2018	DBD spokesperson floats ideas for change in definitions, same concept as 2014

Extract from FDN July 2012 – the Schedule

Schedule of Prohibitions of Foreign Dominance Behaviors

(1) Foreign dominance by means of having Foreigner, its agent, or nominee hold shares, either directly or indirectly, with the result of avoiding this Notification.

(2) Foreign dominance by means of shareholding by the Foreigner itself or shareholding through its representatives or agents, whereby such shares have special preferential rights in casting votes at a shareholders meeting greater than the proportion of shares actually held, or the shares have special preferential rights over the shares held by Thai nationals.

(3) Foreign dominance by means of Foreigner having control power or influence, either directly or indirectly, in setting policy, management, operation, or appointment of the board of directors or high-level executives. High-level executives shall mean chairman, managing director, manager, administrator, chief purchasing officer, chief financial officer, or any other person who has control power or influence in the management of the business or telecommunications business operation of the Applicant for License or of the Licensee.

(4) Foreign dominance by means of any legal relations with sources of investment funds and loans from Foreigner or its affiliate, e.g. guarantee of loan, lending money at an interest rate lower than market rates, guarantee of business risk, or granting of credit, as in a preferential manner.

(5) Foreign dominance by means of entering any contract concerning intellectual property, franchise agreement, or exclusive contract to Foreigner or its affiliate, and such contract results in the transfer of expenses and returns to the Foreigner.

(6) Foreign dominance by means of conducting any procurement contract, or management contract with Foreigner or its affiliate, or employee or staff of the Foreigner or of its affiliate, and such contracts result in the transfer of expenses and returns to the Foreigner.

(7) Foreign dominance by means of joint business operation with Foreigner or its affiliate by allocating or sharing investment capital in the business operation in a manner that results in the transfer of expenses and returns to Foreigner.

(8) Foreign dominance by means of the execution of transactions in a manner of transfer pricing or price collusion with Foreigner or its affiliate.

Future of the FDN

The FDN is still in force. Continual compliance with the FDN is required and must be demonstrated when a spectrum auction is being done. This is an on-going administrative overhead for NBTC and a costly business overhead for industry participants.

The industry has developed since 2012. For example, all three major mobile operators now have foreign participation in terms of investment and know-how. A dialogue and review of the FDN would be in keeping with the move to reduce 'doing business' overhead and remove barriers to positive developments such as greater innovation etc.

6. Dispute Resolution

a) Restrictions on the use of arbitration

Trustworthy dispute resolution is an important aspect of investment for foreign investors. The terms of investment including various promotions may change. Investment protection is relevant.

Arbitration is most often the agreed means to dispute resolution. While there are developments to promote Thailand's attractiveness as an arbitration centre (eg recent changes to the smart visa for Alternate Dispute Resolution), arbitration is not allowed for most government contracts.

In July 2015 the Cabinet passed a resolution amending a 2009 resolution which prohibited the inclusion of arbitration clauses in all contracts entered into by private contracts with the public sector unless approved by the Cabinet on a case-by-case basis. Under the 2015 Resolution, Cabinet approval for arbitration clauses will now only be required for three types of contract:

1. Public Private Partnerships ("PPP")
2. Concession agreements
3. Contracts that require Cabinet approval under Royal Decree 2005

b) FDI increases with effective arbitration availability

It is useful to consider the positive correlation between FDI and arbitration availability. A World Bank study (2013) showed this. All investors ask about cost effective, neutral & impartial dispute resolution and by reputation and understanding, an arbitral process is generally the more attractive means.

c) Good support for resolution of Investor-State disputes

Following on from the learnings from the World Bank report, Investor-State disputes need trusted resolution. Most FTAs contain an Investor-State Dispute Settlement chapter. In providing an overview of status of planned bilateral FTAs in the ASEAN region on 1 March 2018, EU Commissioner Malmstrom noted that ISDS is most often linked with ICSID. She also noted that the arbitral proceedings often take place under the auspices or through the seats of LCIA, ICC (ICC's International Court of Arbitration), SIAC and HKIAC.

Thailand may usefully consider why in the context of investor-state disputes, full membership of the World Bank's ICSID is not effected yet. (ICSID is now over 50 years old, with some 166 signatories only 8 of which – Thailand, Russia and some Caribbean and African included – are not full members.). This topic has also been advised to the World Bank in Thailand. <https://icsid.worldbank.org/en/>.

Given the number of FTAs to which Thailand is party and Thailand's aspirations as a regional centre for trade, investment and innovation, and the many incentives for investment, it seems opportune to strengthen capabilities in investor-state dispute resolution in Thailand.

7. EABC's respectful submission to Ministry of Commerce 29 June 2018

a) Quick Summary of Recommendations :

- (i) Removal of many activities which are strategic (for example logistics) which would contribute to Thailand's success as a geographical centre;
- (ii) Removal of other specific areas including Accounting Service Business, Architecture Service Business, Engineering Service Business, Advertising Business, Hotel Business;
- (iii) Removal of item 21 "Other categories of service business" ; if a limited number of service activities can be defended as needing to be retained, there should only be a short, negative list for now.

b) Text of Submission

(a similar submission was made by JFCCT 20 June 2018)

"29 June 2018
Control v 3.6

FOREIGN BUSINESS ACT – UNLOCKING THE ECONOMY

The European Association for Business and Commerce (EABC) is a registered Trade Association in Thailand. It was established as a consortium with sixteen Business Organizations and Chambers of Commerce in Thailand and Europe. In Thailand those chambers and similar organisations have some 2,000 members. With strong support from the European Union, EABC interacts as the unified voice of European business aiming to contribute towards the improvement of trade and investment in Thailand fostering stronger business co-operation between Europe and Thailand.

Due to recent public commentary about the Foreign Business Act, EABC is appreciative of the opportunity to provide recommendations about the Foreign Business Act, in the interests of achieving a number of outcomes which we describe in this submission. All EABC published position papers have recommended the selective removal, over time, of items from List 3 of the Foreign Business Act, the 2018 European Business Position Paper included.

We commend the Royal Thai Government on initiatives such as the EEC which through various incentives and focus, is stimulating investment in ways that should transform the economy. We also congratulate the Thai Government on her efforts to enhance 'Ease of Doing Business' (with an enhanced status in the World Bank 'Doing Business' rankings) which is such an important part of attracting and retaining investment.

Thailand's competitiveness ranking in the IMD Competitiveness index, however, has dropped in 2018 three places (27th to 30th out of 63). Opening up more sectors, especially services, would assist in improving this ranking and could help promote the grand vision of Thailand 4.0.

In order to keep abreast with neighbouring countries which have already successfully negotiated various FTA's covering those sectors in which Thai businesses are thought "not ready to compete", Thailand needs to consider a new package and fresh trade-in-services strategies. Thailand must avoid at all costs the trade and investment diversion of her prominent and successful global value chains (GVCs) – for example in goods: the automotive value chain, and in services: hospitality and tourism.

If sectors don't allow transfer of new technologies or new service industry paradigms in a global environment of ever-changing comparative advantages, they are not likely to ever get ready to

compete. Such sectors will always be behind the rest of the world or preserved eternally in their original forms. Thailand will be outcompeted and will never get out of the "middle income trap".

Getting ready requires retooling by opening up for modernization and competition, welcoming those companies which can help train Thai firms to deliver world class services and products and also get Thai companies up to speed in areas where in the past they may not have been competitive. Thus, competition should not be shunned, rather many sectors and companies would do well from competition.

The underpinnings of the FBA date back to the early 1970s, almost two generations ago. Since then, significant educational and economic modernization has occurred and it would appear that Thai companies in many industries are not only ready to compete and to do well, but can likely achieve world class success.

To build on these already positive developments, and considering the challenges ahead, we seek to make serious and well-meaning proposals about the Foreign Business Act which in our view are essential to unlocking the economy. Our belief and recommendations are guided by five Driving Strategies which directly support or are the same as important government policies:

- 1) **Thailand 4.0** is a bold vision which will transform the economy but will require skills that focus on new activities and industries, and being digital at all levels. The resources for this cannot possibly come from within Thailand alone. The 10 'S' curve industries are one aspect of this.
- 2) **Ease of Doing Business** proposes the need for systematically and surgically cutting down various existing government regulatory and bureaucratic processes, many of which would appear to be redundant and costly. EABC welcomes measures to improve doing business generally. The 'guillotine' project for example should bring positive outcomes. A review of lists in the FBA provides an opportunity to continue contributing to enhanced 'doing business'.
- 3) **Thailand promoted as a hub** and a base for the physical production of goods, manufacturing, and services (including those services, such as education, logistics and others, supporting manufacturing and goods). This would build on Thailand's geographical centrality. Many service activities are needed to support this model.
- 4) **Thailand promoted as a centre of innovation and creativity**, which would build capacity, help re-skill the workforce, transfer knowledge and build knowhow, and create higher-end jobs. A 'Made in Thailand' branding for this enterprise, and leading edge, high quality products and services would support this strategy.
- 5) **Service Sector liberalization**. Although manufacturing of goods was liberalized to great success some decades ago, services liberalization has unfortunately stalled. All leading world economists have recommended service sector liberalization to avoid the middle income trap. It stimulates innovation and creativity, as well as enhancing competitiveness of the economy as a whole.

We are aware of other non-Ministry of Commerce laws and regulations dealing with restrictions on foreigners doing certain jobs, on visas, work permits, and other job-related issues. However, in this letter we will limit our focus in good faith to the Ministry of Commerce Foreign Business Act, specifically about items in the Lists.

Our Recommendations are about the Foreign Business Act

We confine **our recommendations** to the Lists in the Foreign Business Act. Attached in Annex A are our recommendations on List 3. We also include some (limited) observations and recommendations about Lists 1 and 2. In Annex B we provide recommendations about item 21 of List 3.

Narrowing of investment by changing FBA language

- c) We also refer to recent press commentary (Bangkok Post 21 March “FBA upgrades under review” and Bangkok Post 26 March “Service industry may open up to foreigners”).
- d) These press reports included suggestions that steps were afoot to consider revisions of the FBA in order to tighten definitions so as to possibly make them more restrictive.
- e) There are currently many government promotions in Thailand which are designed to attract foreign investment (and specifically foreign investment of the right kind) which would seem not to sit well with the idea of introducing greater restrictions. We thus *recommend* not changing the language in the text body of the FBA concerning how the law defines ownership or being foreign.

Next steps

EABC welcomes a dialogue on the FBA.

EABC

29 June 2018

Annex A to EABC Submission of 29 June 2018 – Lists in the FBA

LIST ONE

The businesses not permitted for aliens to operate due to special reasons:

Item	Description	Recommendation
(1)	Newspaper business, radio broadcasting or television station business	Technologies in on-line multicasting and broadcasting have changed; a review is recommended on how the industry now works
(2)	Rice farming, farming or gardening.	Review which aspects of Farming will benefit from liberalisation. Smart Farming and many agricultural activities are promoted by BOI.
(3)	Animal farming	
(4)	Forestry and wood fabrication from natural forest	
(5)	Fishery for marine animals in Thai waters and within Thailand specific economic zones.	
(6)	Extraction of Thai herbs.	
(7)	Trading and auctioning Thai antiques or national historical objects.	
(8)	Making or casting Buddha images and monk alms bowls.	
(9)	Land trading	

LIST TWO

The businesses related to the national safety or security or affecting arts and culture, tradition, folk handicraft or natural resource and environment.

Group 1: The businesses related to the national safety or security		
(1)	Production, selling, repairing and maintenance of: (a) firearms, ammunition, gun powder, explosives.	If repair and maintenance of aircraft refers to civil aviation, it

	(b) Accessories of firearms, ammunition, and explosive (c) Armaments, ships, air-crafts or military vehicles. (d) Equipment or components, all categories of war materials.	is noted that MRO (maintenance, repair, operation) is a promoted activity for the EEC. If this Group 1 (1) is only about military equipment, that promotion may not apply.
(2)	Domestic land, waterway or air transportation, including domestic airline business.	Recently introduced additional non FBA standard restrictions apply to AOL. We recommend that group 1 (2) should be reviewed within say 12 months to support liberalization.
Group 2 : The businesses affecting arts and culture, traditional and folk handicraft:		
(1)	Trading antiques or art objects being Thai arts and handicraft.	
(2)	Production of carved wood.	
(3)	Silkworm farming, production of Thai silk yarn, weaving Thai silk or Thai silk pattern printing.	
(4)	Production of Thai musical instruments.	
(5)	Production of goldware, silverware, nielloware, bronzeware or lacquerware.	
(6)	Production of crockery of Thai arts and culture.	
Group 3: The businesses affecting natural resources or environment:		
(1)	Manufacturing sugar from sugarcane;	
(2)	Salt farming, including underground salt;	
(3)	Rock salt mining;	
(4)	Mining, including rock blasting or crushing;	
(5)	Wood fabrication for furniture and utensil production	

LIST THREE

Business where Thai entities are not ready to compete

	Activity	Recommendation
(1)	Rice milling and flour production from rice and farm produce	
(2)	Fishery, specifically marine animal culture.	
(3)	Forestry from forestation.	
(4)	Production of plywood, veneer board, chipboard or hardboard.	
(5)	Production of lime.	
(6)	Accounting service business.	Recommend remove from List 3
(7)	Legal service business.	
(8)	Architecture service business.	Recommend remove from List 3
(9)	Engineering service business.	Recommend remove from List 3
(10)	Construction, except for: (a) Construction rendering basic services to the public in public utilities or transport requiring special tools, machinery, technology or construction expertise having the foreigners' minimum capital of 500 million Baht or more.	

	(b) Other categories of construction as prescribed by the ministerial regulations.	
(11)	<p>Broker or agent business, except:</p> <p>(a) Being broker or agent for underwriting securities or services connected with future trading of commodities of financing instruments or securities.</p> <p>(b) Being broker or agent for trading or procuring goods or services necessary for production or rendering services amongst affiliated enterprises.</p> <p>(c) Being broker or agent for trading, purchasing or distributing or seeking both domestic and foreign markets for selling domestically manufactured or imported goods in the manner of international business operations having the foreigners' minimum capital 100 million Baht or more.</p> <p>(d) Being broker or agent of other category as prescribed by the ministerial regulations.</p>	Recommend deleting "having the foreigners' minimum capital 100 million Baht or more".
(12)	<p>Auction, except:</p> <p>(a) Auction in the manner of international bidding not being the auction of antiques, historical artifacts or art objects which are Thai works of arts, handicraft or antiques or having the historical value.</p> <p>(b) Other categories of auction as prescribed by the ministerial regulations.</p>	
(13)	Internal trade connected with native products or produce not yet prohibited by law.	
(14)	Retailing all categories of goods having the total minimum capital less than 100 million Baht or having the minimum capital of each shop less than 20 million Baht.	Recommend remove from List 3
(15)	Wholesaling all categories of goods having minimum capital of each shop less than 100 million Baht.	Recommend remove from List 3
(16)	Advertising business.	Recommend remove from List 3
(17)	Hotel business, except for hotel management service	Recommend remove from List 3
(18)	Guided tour.	
(19)	Selling food or beverages.	
(20)	Plant cultivation and propagation business.	
(21)	Other categories of service business except that prescribed in the ministerial regulations	Recommend deletion of item 21, noting some specific activities which have been removed for the avoidance of doubt.

Annex B – about List 3 item 21

In applying the five Guiding Strategies, our recommendation is to remove item 21 from List 3. The logic is that unlocking services is very important and other Driving Strategies mandate it.

Here in this Annex B, for information we have grouped important activities about item 21:

FIRST GROUP

Many quite specific items have been removed by Decrees in 2013, 2016 and 2017. The effect is in many respects liberalization-neutral due to sector-specific legislation in those sectors.

SECOND GROUP

We draw attention to press reports (eg 26 March 2018, Bangkok Post) about intention to remove from List 3 many items as some are related to manufacturing, or are 'S' curve industries, or will support the EEC. These are essentially the ten 'S' curve industries which should be removed from List 3. We do not recommend a geographical restriction.

It is possible that some activities are not only in the services sector. However by maintaining a negative list approach, these would be permitted.

We also draw attention to a press report (18 June 2018, Bangkok Post) wherein five services were stated to be planned to removed from List 3. As reported, they are accounting, legal services given to subsidiaries, space and facility rental, lending to subsidiaries and consulting services.

THIRD GROUP

In addition are service sectors most of which are strategic in that their good functioning will have a multiplier effect on the economy. We note these as being important and should not be restricted by inclusion in List 3.

- i) Logistics are vital to Thailand capitalizing on its central location in ASEAN. We recommend that all logistics, courier and goods transport be removed from List 3.
- ii) All business support services of any kind (many of which are BOI promoted), including standard and advanced BPO, call centres, fulfillment centres and TISO whether in support of regional HQ and ITC or otherwise be removed from List 3.
- iii) Software development
- iv) Research and Development
- v) Telecoms – we recommend that telecoms services be removed from List 3. Practically this applies only to category 1 licences. EABC has a structured recommendation on this topic.
- vi) In-house and intra-group services, including legal, accounting, finance, leasing, sub leasing and other services not offered outside the company or group.”

--- END OF SUBMISSION ---

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