The Not So Simple Amity Treaty Exception to the Foreign Business Act

Written by: Douglas Mancill and Panpilai Issariyapruit

Thailand's Foreign Business Act, B.E. 2542 (FBA), which repealed and replaced a decree issued by the Thai government in 1972 known as NEC 281 (often also referred as the "Alien Business Law"), provides that "alien companies" – defined solely in terms of foreign share ownership – are not permitted to engage in a wide range of business activities, absent issuance of a foreign business license (which, in practice, can be difficult to obtain). Severe penalties apply to violating the FBA or using nominee shareholding to evade the FBA, such as three years imprisonment or dissolution of a business in violation of the FBA.

The broad sweep of the FBA is a common source of confusion and frustration for foreign businesses, and its counterintuitive application requires detailed review of any business where there is significant foreign shareholding or ownership. For example, the received wisdom is that most manufacturers are not subject to the FBA since most manufacturing is not restricted under the FBA while trading and services are. But the Ministry of Commerce (MOC) contends that a manufacturing business which is not otherwise subject to restriction under the FBA is engaged in service activities restricted under the FBA when it, for example, grants a guarantee (say, to its parent company as part of a lending arrangement), leases its property or engages in what many consider to be OEM manufacturing. The expansive manner in which the MOC interprets the FBA often takes foreign business owners by surprise.

There is a significant exception however to the restrictions imposed by the FBA under the 1966 Treaty of Amity and Economic Relations between Thailand and the United States (Amity Treaty). Japan and Australia also have treaties with Thailand that provide for exceptions to restrictions on ownership and control of businesses in Thailand, but those exceptions are much more limited than those provided by the Amity Treaty.

The Amity Treaty states that "American companies" are entitled to national treatment, meaning they must be treated the same as Thai majority owned businesses, except in the following six areas: (1) communications; (2) transport; (3) fiduciary functions; (4) banking involving depository functions; (5) the exploitation of land or other natural resources; and (6) domestic trade in indigenous agricultural products. And Thai domestic legislation has been enacted restricting foreign, including U.S., ownership and participation in these areas.

Further, the Amity Treaty does not permit an American Company or American nationals to own land in Thailand. Indeed, absent certain exceptions, foreigners are generally not allowed to own land in Thailand.

COMPANIES DON'T CARRY PASSPORTS – WHAT IS AN "AMERICAN COMPANY"?

Article 2 of the Amity Treaty says that: "Companies constituted under the applicable laws and regulations of either Party shall be deemed to have the nationality of that Party and shall have their juridical status recognized within the territories of the other Party," meaning that if a company is incorporated under the laws of the U.S. or one of its states it qualifies as an "American Company" under the Amity Treaty and that the ownership or control of that company should not matter. But the Amity Treaty goes on to provide in Article 12, Section 1, sub-section (f), that a country can deny the advantages of the Amity Treaty "to any company if the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest…" This is read by the MOC to permit Thailand to review parent companies incorporated under U.S. or U.S. state laws to determine if those parent companies are "American" for purposes of establishing that a Thai subsidiary qualifies for Amity Treaty status. That parent entity, of course, must also be established under a U.S. federal or state law.

AMITY TREATY CERTIFICATES UNDER THE FOREIGN BUSINESS ACT (FBA)

The FBA provides that certificates will be issued to companies that comply with treaty exceptions to the FBA and that the Ministry of Commerce (MOC) will issue regulations setting out the requirements to obtain such certificates. The MOC's regulations for the Amity Treaty look at whether the local Thai company is ultimately managed and owned by U.S. nationals. It sounds like a simple test, but in practice meeting the MOC's requirements is often challenging. In brief and high level terms, the MOC requires the following:

1. ***Shareholding:*** Americans must own a majority of the total shares in the company. If a majority of the shares are listed on a U.S. exchange, the MOC deems that a majority of the shareholders are American nationals, provided that an officer of the company so certifies in a sworn affidavit.
2. ***Board of Directors:***
   a. the majority of directors must either be American or Thai nationals;
   b. if any one director is authorized to bind the company by his or her sole signature, this director must be an American or Thai national; and
   c. if several directors must jointly sign to bind the company, then a majority of those directors must be American or Thai nationals.

Seeking an Amity Treaty Certificate tends to be a very document intensive exercise. For example, notarized copies of the signature pages of the passports of the parent company's directors must be submitted to establish that the parent company is indeed controlled by U.S. nationals. Many companies incorporated in the U.S. now have directors who are not U.S. nationals, and the directors of some U.S. companies do not have passports. It is also sometimes difficult to establish that a company is majority owned by U.S. nationals. For example, imagine an employee-owned company

with thousands of U.S. employee-owners.

U.S. OWNERSHIP & CONTROL AT EVERY STEP TO THE ULTIMATE SHAREHOLDERS

Every juristic entity in the chain of ownership of a Thai company qualifying for Amity Treaty status must be incorporated or established under laws of the U.S. or a state within the U.S. and meet the shareholding and board of director requirements described above until the level of the ultimate individual shareholders or a U.S. public stock exchange is reached.

This has increasingly become a troublesome issue as U.S. companies seek to have their shares in Thai companies held by companies formed outside of the U.S. Singapore appears to be a popular jurisdiction for such arrangements, and U.S. companies often want a Singaporean subsidiary to own and control the shares of their Thai company. If, for example, the shares of a Thai company that otherwise qualifies for Amity Treaty status are transferred to a company or other entity formed under the laws of Singapore, that Thai Company is no longer – in the eyes of the MOC at least – qualified for Amity Treaty status. If the Thai company is engaged in activities restricted under the FBA, it has violated the FBA unless it has an exemption from the FBA.

Further, this requirement means that when an expatriate manager is not an American or a Thai national, that expatriate manager cannot act as an authorized signatory director, meaning that this director cannot bind the local company with only her or his signature alone. Instead, she or he will need to co-sign with a Thai or an American director.

THE MINIMUM CAPITALIZATION REQUIREMENT

There is no provision in the Amity Treaty that requires a company seeking Amity Treaty status to meet any minimum capitalization requirements. Since Thai majority owned companies can, strictly speaking, be established with capitalization as low as 15 Baht, imposing higher capitalization requirements on companies seeking Amity Treaty status would seem to violate the national treatment requirements of the Amity Treaty. But FBA Section 14 provides:

> The minimum capital invested by an alien [foreign majority owned business] to commence business operations in Thailand shall not be less than that prescribed in ministerial regulations, which must not be less than two million Baht.

The FBA's minimum capitalization requirements have been controversial, and the MOC has revised its regulations setting minimum capitalization requirements several times. The MOC's regulations provided that minimum capital would be determined as an estimated percentage of the local company's future estimated expenses and required the submission of information on those estimated future expenses. Not surprisingly, many U.S. companies objected to the MOC's requirement by arguing that they not only violate the national treatment provisions of the Amity Treaty, but also require disclosure of their future business plans to the MOC.

The FBA's minimum capitalization requirements have been waived for Amity Treaty status businesses by a MOC regulation announced in 2009, which waiver is effective for 15 years for businesses operating from the time the regulation became effective and for ten years for businesses operating prior to the regulation becoming effective.

WHAT DOES AN AMITY TREATY CERTIFICATE PERMIT?

Up until 1999, an Amity Treaty Certificate simply said that company qualified under the Amity Treaty could do whatever the Amity Treaty permits companies Amity Treaty companies to do. Since 1999, however, Amity Treaty Certificates have very specifically listed the activities permitted by that Amity Treaty Certificate. If a company with one of the newer Amity Treaty Certificates wants to expand its business and engage in other activities permitted under the Amity Treaty it must ask the Ministry of Commerce to issue a new Amity Treaty Certificate to cover these new business activities.

WHEN DOES THE AMITY TREATY END?

The local press and other sources will sometimes talk about deadlines for the expiration of the Amity Treaty. In fact, the Amity Treaty continues until one country gives the other country one year's notification of its termination. Neither the U.S. nor Thailand has announced that such notification has been provided, and the MOC continues to process applications for Amity Treaty certificates.

But many contend the Amity Treaty is inconsistent with WTO obligations. And there is no guaranty that a notice will not be served terminating the Amity Treaty at some future date.

OTHER LEGAL RESTRICTIONS

What about other laws restricting foreign ownership or control? When considering Thai laws that restrict foreign ownership of businesses in Thailand, the FBA is generally the first law that comes to mind. But it is not the only law that does so.

For example, the Guide and Tourism Business Act, B.E. 2535 (Tourism Act), restricts foreign ownership of "tour businesses", a term which is construed broadly. There is no provision of the Amity Treaty that says that U.S. nationals cannot operate tour businesses. The Amity Treaty provides that, unless there is an exception in the Amity Treaty, U.S. nationals are entitled to national treatment in Thailand, meaning they should be subject to the same rules that apply to Thai owned tour businesses.

But the Tourism Act provides otherwise by setting out Thai ownership requirements for tour businesses, and there is no provision of the Tourism Act that allows for treaty exceptions. Further, FBA Section 13 provides that other Thai laws restricting foreign ownership or control of businesses in Thailand prevail over the FBA. This means that the treaty exception provisions of the FBA will not, under Thai domestic law, create an exception under other laws that restrict foreign ownership of businesses in Thailand. In this and other areas, Thai domestic law is sometimes inconsistent with the Amity Treaty. ■

Douglas Mancill is Chair of AMCHAM's Legal Committee and a partner in PriceSanond; he can be reached at: dmancill@pricesanond.com.
Panpilai Issariyapruit is an associate at PriceSanond; she can be reached at: panpilai@pricesanond.com.
General information (not advice) on Thai law is available in the Knowledge Section of the PriceSanond website at: www.pricesanond.com