

Thai and Australian Foreign Business Law and the Impact of the Thailand Australia FTA

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Abstract: When Thailand and Australia entered into a Free Trade Agreement in 2005 the public focus was largely on the trade in goods and the benefits that would accrue to each country with a more open market. What appears to have been largely neglected is that the Thailand Australia Free Trade Agreement also covers trade in services, foreign direct investment including commercial enterprises, and the movement of persons. This paper describes the foreign business laws that operate in each jurisdiction. It will be seen that those of Thailand are much more restrictive of foreign entry than those of Australia. Thailand provided additional concessions to Australian companies allowing them to operate in selected sectors such as consulting services, communications and education. Australia in its response reiterated that Australia was already a largely open market and Thailand was welcome to establish businesses and invest in Australia subject to the limited restrictions that apply to all foreign investors. Both countries agreed to facilitate the movement of persons associated with businesses established in the country of the other party. It is clear that Australia was the major beneficiary from these initiatives. This needs to be balanced against the fact that Australia had granted Thailand major concessions in opening its market to tariff and duty free entry of most Thai goods.

1. Introduction

When laypersons think of a free trade agreement they focus immediately on the impact on the trade in goods. If it is a developing country there may also be some discussion of foreign direct investment (FDI). There would be much less focus on trade in services. This appears to be the case with the Thailand Australia Free Trade Agreement (TAFTA) which entered into force in 2005. What appears to have been largely neglected is that TAFTA also covers trade in services, foreign direct investment including commercial enterprises and the movement of persons. This paper focusses on these aspects.

As will be seen, the approaches adopted by Thailand and Australia to the regulation of foreign business are quite different. As result of the TAFTA negotiations, Thailand granted concessions to Australia in relation to a commercial presence in Thailand and in the movement of key personnel between Australia and Thailand. Australia's response was to reiterate its fairly liberal foreign regime but offered concessions in relation to movement of persons.

2. Thai Foreign Business Law

Foreign businesses in Thailand are governed by the Foreign Business Act B.E.2542 (1999).¹ This Act was proclaimed on 4th March 2000 replacing an earlier Act which was seen as inadequate to meet Thailand's current legal obligations as a member of the WTO and its commitments under GATT. The Act requires foreigners to obtain a permit before they can operate their business in Thailand.

Section 4 of the Act² identifies a foreigner as a *natural person* who is not of Thai nationality; a *juristic person* which is not registered in Thailand; and a *juristic person* which is registered in Thailand and in which 50% or more of the shares are held by a non-Thai or by a juristic person which is not registered in Thailand or 50% or more of the capital was similarly invested. Finally, it is a foreign business if it is a limited partnership or partnership which has as its registered manager a natural person who is not of Thai nationality.

¹ Foreign Business Act also called Alien Business Act BE 2542 (1999) at <http://www.thailawonline.com/en/thai-laws/laws-of-thailand/96-foreign-business-act-1999.html> accessed 15 October 2011.

² Ibid.

Interestingly, the rule to identify a *juristic person's* status under this law has as its focus the number of shares held in the *juristic person* instead of the number of shareholders as was the case under the old legislation.

Examples of Australian companies that have established in Thailand are:

- Linfox is a large Australian privately owned transport logistics and supply chain management company that operates in Australia and New Zealand, China, Hong Kong, India, Indonesia, Malaysia, Singapore, Thailand, Vietnam with its Asia Regional Office in Bangkok.³ Linfox entered the Thai market in 1992 and now operates through a local subsidiary, Linfox M Logistics (Thailand) Ltd., which also has Thai investors.⁴
- Toll Holdings Ltd, Linfox's larger transport logistics and supply chain competitor in Australia, is a public company and operates in over 50 countries. It operates in Thailand through seven Thai subsidiary companies, six of which are 100% owned and one, Oil-Tex (Thailand) Co. Ltd Shipping & Marine Supplier is 60% owned.⁵
- Blackmores Limited, an Australian public company entered the Thai market in 1997 with a wholly owned subsidiary Blackmores (Thailand) Ltd which markets Blackmores' Australian manufactured natural health products.⁶ It is the product market leader in Australia and Thailand.⁷
- Visy, an Australian privately owned company is one of the world's largest privately owned packaging and recycling companies.⁸ In 2009 its wholly owned subsidiary Visy Foods Plastic (2009) commenced manufacturing in Thailand for local use and export to Japan, China and USA.⁹

There are significant restrictions on the types of foreign businesses which can operate in Thailand. The Act reserves 43 business categories for Thai people. The businesses reserved for Thais are described in Annexes of the Regulation, namely:

- Businesses in Annex One are reserved for Thai people only. Foreigners are excluded from these categories of business for what the Thai law calls a "special reason".¹⁰ The schedule includes newspaper publishing, radio and television broadcasting; rice farming, farming or gardening; forestry and wood processing; fisheries in Thai waters and within Thailand's specific economic zones; extraction of Thai herbs; trading or selling Thai antiques or historical objects; manufacturing or casting of Buddha images or alms-bowls; and operating as real estate agent.

Annex One businesses tend to be those associated with culture and the traditional Thai way of life.

One of the outcomes has been that at the current time Thailand has only two major English daily newspapers. The Bangkok Post commenced publication in 1946¹¹ and the Nation in 1971. The Post Publishing Public Company Limited has a fairly concentrated ownership with the top three shareholders controlling over 50% of the company. The largest shareholder is the foreign owned South China Morning Post Publishers Limited with a shareholding of over 21%.¹² The Nation Multimedia Group Public Co. Ltd has a broader shareholder base with no shareholder controlling more than 10% and the top 10 shareholders controlling less than 40% of the shares.¹³

³ Linfox at <http://www.linfox.com/> accessed 14 August 2014.

⁴ Members, British Chamber of Commerce, Thailand at <http://members.bcccthai.com/BCCT/asp/corpdetail.asp?CorpID=273> accessed 14 August 2014.

⁵ Toll Holdings, Annual Report 2013 at www.tollgroup.com accessed 14 August 2014.

⁶ Blackmores Annual Report 2013 at www.blackmores.com.au accessed 14 August 2014.

⁷ Chris Last, Blackmores Ltd, Investor Presentation Goldman Sachs Conference, 18 May 2011.

⁸ Visy, Our History at <http://www.visy.com.au/about/our-company/our-history/> accessed 16 August 2014.

⁹ Visy saves costs in Thailand, Foodmagazine, 16 June 2010, at <http://www.foodmag.com.au/news/visy-saves-costs-in-thailand>, accessed 14 August 2014.

¹⁰ Ibid. at business list annexes.

¹¹ A Brief History of the Post. Bangkok Post 8 November 2006 at http://www.bangkokpost.com/new_post_press/new_post_press02.pdf

¹² The Post Publishing Public Company Limited, Annual Report 2013.

¹³ Nation Multimedia Group Shareholding Structure at http://nationgroup.com/invester_3.php accessed 9 August 2014.

- Businesses in Annex Two relate to national safety or security, culture, tradition, handicrafts, natural resources or environment and which are not open to foreigners unless the Minister of Commerce allows it on a case by case basis. However, it requires a minimum Thai shareholding of not less than 40% of Thai natural or juristic persons and requires that no less than two thirds of the Board members are Thai.¹⁴ The schedule includes the following:
 - Manufacturing, selling and repairing of firearms and the like;
 - Domestic land, waterway or air transportation, including domestic airline businesses;
 - Trading of Thai antiques or artefacts;
 - Manufacturing of woodcarving products;
 - Silkworm raising, silk products and the like;
 - Manufacturing of Thai musical instruments;
 - Manufacturing products from gold, silver, neillo [Black metallic alloy of sulphur with silver, copper, or lead that is used to fill designs that have been engraved on the surface of a metal (usually silver) object], lacquer or bronze;
 - Manufacturing of pottery or earthenware which are Thai cultural arts;
 - Manufacturing of sugar from sugarcane;
 - Salt farming and rock salt farming;
 - Rock salt mining;
 - Mining, including rock blasting or processing; and
 - Wood processing to make furniture and utensils.

Some of the restrictions on businesses in the Annex Two reserve list are similar to those that apply in other countries and some were added more due to their role in Thai history. For example, manufacturing of sugar from sugarcane and rock salt farming developed in times of economic hardship and war and met a basic need of the Thai population.

- Businesses in Annex Three are not open to foreigners to do business in as they are in areas in which Thai people are considered not ready to compete. However a foreigner can ask permission from the Director General of Department of Business Development to conduct this kind of business.¹⁵ The schedule includes the following:
 - Rice milling and flour production from rice and farm produce;
 - Fisheries, specifically marine animal culture farming;
 - Forestry from re-afforestation;
 - Production of plywood, veneer board, chipboard or hardboard;
 - Production of lime;
 - Accounting services;
 - Legal services;
 - Architecture services;
 - Engineering service business;
 - Construction, except for public service infrastructure, public utilities or transportation requiring special tools, machinery, technology or construction expertise;
 - Brokerage or agency business [although some exceptions apply];
 - Auction house [although some exceptions apply];
 - Internal trading in local agricultural products or produce;
 - Retailing of all types of products with total minimum capital less than THB 100 million or having the minimum capital of each shop less than THB 20 million;
 - Wholesaling of all types of products with minimum capital of each shop less than THB100 million;
 - Advertising;

¹⁴ Ibid. at Section 15.

¹⁵ Foreign Business Act, op. cit. at Section 8.

- Hotel business, except for hotel management services;
- Tourism;
- Selling food or beverages;
- Plant breeding, reproduction and improvement of plant species; and
- Other services businesses except those described in the Ministerial regulations.

In general foreigners are able to undertake any business beside those on the reserve lists. The Foreign Business Act B.E.2542 (1999) provides some privileges to foreigners who have been granted a special status to undertake a business on the reserved list for a definite period. The special status is provided in Section 10 of the Act for such foreigners.¹⁶ Special status is also provided to foreigners who undertake a business by virtue of a treaty to which Thailand is a party or is bound by obligations.¹⁷

Before undertaking a business on the first reserve and second reserve businesses list, the proprietor requires a ratification document from Ministry of Commerce.¹⁸ Foreign business owners must also bring in capital to establish their business in the country. The regulations require a minimum foreign business establishment under the reserve business list of not less than THB 3 million [around USD 100,000].¹⁹ For businesses not on the reserved businesses list the minimum capital requirement is THB 2 million.²⁰ These minimum capital requirements can be increased by ministerial regulation.

Thailand does not prohibit a foreigner doing any business beside that on the reserve businesses list. Such business applications are processed under the general Thai regulations.

3. Movement of Persons under Thai Law

The standard work permit in Thailand is controlled by an immigration measure. Foreigners have to be processed under the immigration rules before they can enter Thailand under the Migration Act B.E.2551 (2008).²¹ Every foreigner must have a valid passport or other document which is equal to a passport and have a valid visa at the time of entry and exit. Foreigners who work or do business in Thailand are bound by these rules.

Thailand has set standards for the issue of work permits to foreigners to prohibit them from entering careers or businesses that are, for a variety of reasons, closed to foreigners. These include, for example, religious, cultural, economic and security activities. For employment outside the reserved list foreigners can apply for a work permit under the Alien Employment Act 2551 (2008).²²

The Act prohibits foreigners from working in 39 occupations reserved for Thai nationals. The list of reserved occupations was issued in a Royal Decree of 1979 and covers the following occupations²³:

- manual work;
- work in agriculture, animal husbandry, forestry or fisheries excluding specialized work in each particular branch or farm of supervision;
- bricklaying, carpentry or other construction work;
- wood carving;
- driving mechanically-propelled or non-mechanically-propelled vehicles, excluding piloting international aircraft;
- shop attendant;

¹⁶ Ibid. at Section 10 Para. 1.

¹⁷ Ibid. at Section 10 Para. 2.

¹⁸ Ibid. at Section 12.

¹⁹ Ibid. at Section 14 Para. 2.

²⁰ Ibid. at Section 14 Para. 1.

²¹ Migration Act at http://www.immigration.go.th/nov2004/en/doc/Immigration_Act.pdf accessed 16 October 2011.

²² Alien Employment Act B.E. 2551 (2008) (unofficial translation) at <http://www.lawreform.go.th/lawreform/images/th/legis/en/act/2008/30442.pdf> accessed 16 October 2011.

²³ Office of Foreign Workers Administration Department of Employment Ministry of Labour Royal Decree Prescribing Works Relating to Occupation and Profession in which an Alien is Prohibited to Engage, B.E. 2522 (1979) at <http://wp.doe.go.th/sites/eng/eng-royaldecree.html> accessed 16 October 2011.

- auctioneer;
- supervising, auditing or giving services in accountancy excluding internal auditing on occasions;
- cutting of polishing jewellery;
- haircutting, hairdressing or beauty treatment;
- cloth weaving by hand;
- weaving of mats or making products from reeds, rattan, hemp, straw or bamboo pellicle;
- making of Sa paper by hand;
- lacquer ware making;
- making of Thai musical instruments;
- niello ware making;
- making products from gold, silver or gold-copper alloy;
- bronze ware making;
- making Thai dolls;
- making mattresses or quilt blankets;
- casting alms bowls;
- making silk products by hand;
- casting Buddha images;
- knife making;
- making paper or cloth umbrella;
- shoemaking;
- hat-making;
- brokerage or agency excluding brokerage or agency in international trade business;
- engineering work in civil engineering including designing and calculation, organization, research, planning, testing, construction supervision or advising excluding specialized work;
- architectural work including designing, drawing of plans, estimating, directing construction or advising;
- garment making;
- pottery or ceramic ware making;
- cigarette making by hand;
- guide or conducting sightseeing tours;
- street vending;
- type-setting of Thai characters by hand;
- drawing and twisting silk-thread by hand
- office or secretarial work; and
- legal or lawsuit services.

Foreigners can work in careers other than those on the reserved list, but the Act requires them to inform the Thai authorities of their employment. The foreigner must also be of good character, have suitable knowledge and be of sound mind.

4. Thai Customs Law

The two basic Customs Laws are the Customs Law, B.E. 2469 (1926)²⁴ as amended, and the Customs Tariff Decree, B.E. 2530 (1987)²⁵, as amended. Thai import tariffs are based on the Harmonised Commodity Description and Coding System²⁶. Export tariffs apply to goods such as rice, iron scraps,

²⁴ Customs Act B.E. 2469 (1926) (consolidated as of 2005) at <http://www.wipo.int/wipolex/en/details.jsp?id=6815>, accessed 18 September 2014.

²⁵ Customs Tariff Decree, B.E. 2530 (1987) at [http://igtfc.customs.go.th/igtfc/uploads%5Cfiles%5CInformation%5CBB1EN%5CGENERAL%20PROVISION%202530%20UPDATE%202548%20-%20EN%5CGENERAL%20PROVISION%202530%20UPDATE%202548%20-%20EN.pdf](http://igtfcustoms.go.th/igtfc/uploads%5Cfiles%5CInformation%5CBB1EN%5CGENERAL%20PROVISION%202530%20UPDATE%202548%20-%20EN%5CGENERAL%20PROVISION%202530%20UPDATE%202548%20-%20EN.pdf), accessed 18 September 2014.

²⁶ Hunt & Hunt and Blumenthal Richter & Sumet, (n.k.), Thai Customs Law. In Australian Industry Group (n.k.), A Guide to Doing Business with Thailand, p. 33. At <http://pdf.aigroup.asn.au/trade/TAFTA%20Guide%20FINAL.pdf>, accessed 18 September 2014.

rubber, wood, raw silk and silk yarn²⁷. Customs duties are based on Cost Insurance and Freight (CIF) for imports and Free on Board (FOB) for exports²⁸.

Under TAFTA certain 'Australian Originating Goods' are entitled to entry at preferential reduced rates of customs duty provided the goods satisfy prescribed 'rules of origin'²⁹.

5. Concessions granted to Australian Businesses under TAFTA

TAFTA provides special privileges to Australian foreign businesses by allowing access to an additional 12 areas of business³⁰:

- *Business Services* including general management consulting services; convention services excluding catering and beverage services; and international exhibition services.
- *Communication Services*;
- *Construction services* relating to basic services to the public in public utilities or transport requiring special tools, machinery, technology or construction expertise;
- *Retailing and wholesale trade services* relating to the distribution and installation of products manufactured by Australian juridical persons established in Thailand;
- *Tertiary education services* provided only by institutions specialising in sciences and technology including life sciences, bio-technology and nano- technology;
- *Tourism Services and Travel Related Services* including luxury hotels and resorts including hotel management services; and full restaurant services (food and beverage preparation and serving services with or without entertainment).
- *Recreational, Cultural and Sporting Services* including theme park services; zoological garden services; and aquariums services;
- *Transport Services* including support services for maritime transport (excluding cargo handling); and port and water waterway operation services including Marina facilities.

At this juncture there is a major obstacle for Australians to conduct business in Thailand as the Foreign Business Act B.E. 2542 (1999) has not been amended since 1999 (i.e. before TAFTA was negotiated). This means that the additional business opportunities for Australian companies listed above are unavailable as businesses have to operate under the current Thai law until such time as it is amended to reflect the agreement of the parties. However TAFTA still provides benefits to the parties by reducing the tariff on goods, services, investment and providing special exemptions as required under the commitments to the World Trade Organisation (WTO) of which Thailand and Australia are members.

6. Australian Foreign Business Law

Australia's Foreign Investment Policy³¹, published by the Australian Foreign Investment Review Board (FIRB) provides an overview of Australia's foreign investment regime.

The How to Apply Guides provides administrative guidelines to assist foreign applicants.

The government controls foreign businessmen doing business and investment in real property in Australia through the Foreign Acquisition and Takeover Act (1975) (FATA) as well as through a number of other industry specific Acts.

In summary, the requirements are:

- Foreign persons should notify the Government before acquiring an interest of 15 per cent or more in an Australian business or corporation that is valued above \$231 million;³²

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Thailand's Schedule of Commitments at <http://www.dfat.gov.au/fta/tafta/Annex8-Thailand.pdf> accessed 19 October 2011.

³¹ Foreign Investment Review Board Policy and Supporting Documents at <http://www.firb.gov.au/content/policy.asp> accessed on 16 October 2011.

³² Ibid.

- All foreign persons need to notify the Government and get prior approval to make investments of 5 per cent or more in the media sector, regardless of the value of the investment;³³
- foreign investment in the banking sector must be consistent with the *Banking Act 1959*³⁴, the *Financial Sector (Shareholdings) Act 1998*³⁵ and banking policy;
- total foreign investment in Australian international airlines (including Qantas) is limited to 49 per cent;³⁶
- the *Airports Act 1996*³⁷ limits foreign ownership of airports offered for sale by the Commonwealth to 49 per cent, with a 5 per cent airline ownership limit and cross ownership limits on Sydney, Melbourne, Brisbane and Perth airports;
- the *Shipping Registration Act 1981*³⁸ requires a ship to be majority Australian owned to be registered in Australia;
- Aggregate foreign ownership of Telstra, which was formerly a government owned telecommunications company, is limited to 35 per cent of the privatised equity and individual foreign investors are only allowed to own up to 5 per cent;³⁹
- Foreign persons generally need to notify the Government to take an interest in residential real estate, vacant land or to buy shares or units in Australian urban land corporations or trust estates;⁴⁰ and
- Foreign persons also need to notify if they want to take an interest in developed commercial real estate that is valued at \$50 million or more – unless the real estate is heritage listed, then a \$5 million threshold applies. Foreign persons should also notify if they have any doubt as to whether an investment is notifiable.

The Foreign Acquisition and Takeover Act give power to the Australian Treasurer to investigate and reject any foreign investment that is regarded as in conflict with the national interest.⁴¹ Moreover, the Treasurer has to consider whether foreign investment projects conform to the standard of the Foreign Acquisition and Takeovers Act 1975⁴² and Regulations. In practice the Treasurer assigns the 'Foreign Investment Review Board (FIRB) to examine a foreign investment and provides advice, however FIRB has no power to reject the foreign investment'.⁴³ The decision made by the Treasurer is final. If investors do not conform to the notification requirements of Section 26 and Section 26A the Treasurer can prosecute an individual or juristic person and require divestment of assets or shares.⁴⁴

As can be seen Australia has a fairly open investment environment. Examples of Thai corporations operating in Australia include:

- Ratchaburi Electricity Generating Holding Public Company Limited (RATCH) entered the Australian in 2010 by purchasing shares in the ASX-listed Transfield Services Infrastructure Fund through a Deed of Arrangement.⁴⁵ It is a Thai company which focuses on investing and developing electricity generating businesses based on a diversity of resources such as gas, oil, hydro and wind power both within Thailand and internationally.⁴⁶ It has a paid-up capital

³³ Ibid.

³⁴ Banking Act 1959 at http://www.austlii.edu.au/au/legis/cth/consol_act/ba195972/ accessed 16 October 2011.

³⁵ Financial Sector (Shareholdings) Act 1998 at http://www.austlii.edu.au/au/legis/cth/consol_act/fsa1998281/ accessed 16 October 2011.

³⁶ Foreign Investment Review Board Policy and Supporting Documents, op. cit.

³⁷ Airports Act 1996, at http://www.austlii.edu.au/au/legis/cth/consol_act/aa1996129/ accessed 16 October 2011.

³⁸ Shipping Registration Act 1981, at http://www.austlii.edu.au/au/legis/cth/consol_act/sra1981254/ accessed 16 October 2011.

³⁹ Foreign Investment Review Board Policy and Supporting Documents op. cit.

⁴⁰ Ibid.

⁴¹ Summary of Australia's Foreign Investment Policy 2013 at https://www.firb.gov.au/content/downloads/AFIP_2013.pdf accessed 9 August 2014.

⁴² Foreign Acquisition and Takeovers Act 1975 http://www.austlii.edu.au/au/legis/cth/consol_act/faata1975355/ accessed 18 October 2011

⁴³ Foreign Investment Review Board: FIRB, Who are we?, <http://www.firb.gov.au/content/who.asp?NavID=48>, accessed 26/10/11

⁴⁴ Section 26, Para.2, Foreign Acquisition and Takeover Act 1975

⁴⁵ Ratchaburi Electricity Generating Holding Public Company Limited Press Release RH238/2010 dated 3rd May 2010.

⁴⁶ Electricity Generating Authority of Thailand Annual Report 2010 at 24.

equivalent to THB 1,450 million with 45% of the shares held by the Electricity Generating Authority of Thailand (EGAT) and 55% of shares held by the public.⁴⁷ EGAT is a state-owned enterprise which is under the supervision of the Ministry of Energy and the Ministry of Finance.⁴⁸ RATCH is therefore a subsidiary of a state-owned enterprise.⁴⁹

- PTT Exploration and Production Public Company Limited (PTTEP). In 2009, Australian publicly listed company Coogee Resources Limited was acquired by a subsidiary of PTT Exploration and Production Public Company Limited (PTTEP) and renamed PTTEP Australasia Limited (PTTEP AA). PTTEP is Thailand's national petroleum exploration and production company and is one of the nation's largest publicly-listed companies, with more than 40 projects around the world. PTTEP AA will continue the development of the Montara and the other projects in the Timor Sea. PTTEP is 65% owned by PTT Public Company⁵⁰ which in turn is owned over 51.5% by the Thai Ministry of Finance.⁵¹ PTT is currently company 155 on the Forbes 500 list.⁵²

7.0 Movement of Persons under Australian Law

Australia's policy on foreign workers is very rigorous. There is a policy to allow foreign workers to come into Australia provided they have a valid visa. Basically Australia will not allow foreigners with a criminal record to enter the country. In addition foreigners have to follow the condition of immigration rules as set out in the Migration Act 1958⁵³ and the Migration Regulations 1994⁵⁴.

The Migration Act 1958 regulates the entry of non-Citizens entering Australia. It classifies types of visas and includes the requirements for migration and deportation. The Act requires a person to enter with the correct type of passport and visa.⁵⁵

The Migration Regulations 1994 set the conditions for the issue of a visa. The Department of Immigration and Border Protection acts as the key organisation to regulate working permit policy. The Minister has overall authority to consent for foreigners to enter into Australia, to travel and stay for the period of time stated in the visa. A foreigner who comes into Australia is granted one of two types of visas. The first is a Permanent Visa and the second is a Temporary Visa. The visa also states the conditions of entry including any restrictions on working.

The Department of Immigration and Border Protection is the organisation that enforces the regulations. The usual rules are:

- If the foreigners stay in Australia over the time as stated in the visa, that person is classified as an unlawful non-citizen and must leave Australia;
- If a foreigner enters Australia without permission, an officer has the power to order detention and deportation; and
- A foreigner who has a status as a permanent resident who commits a crime that carries a term of imprisonment of not less than one year will be deported immediately from Australia.

The Australian government will give a temporary Business Visa to a person such as an executive, manager and expert who transfers a business to Australia and allow that person to work in Australia. This type of visa has a duration not exceeding four years. A foreigner with a work permit must meet the primary criteria or secondary criteria depending on what kind of work is allowed under the visa. Beside this a person who holds a Temporary Visa can work in some employment. In contrast a person who holds a Visitor Visa is not allowed to work in Australia.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid at 27.

⁵⁰ PTT Exploration and Production Public Company Limited Shareholder Information at http://www.pttep.com/en/InvestorRelations_ShareholderInformation.aspx accessed 10 November 2011.

⁵¹ PTT Public Company Limited Annual Report 2010 at 111.

⁵² Ibid at 19.

⁵³ Migration Act 1958 at http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/ accessed 18 October 2011.

⁵⁴ Migration Regulations 1994 at http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/ accessed 18 October 2011.

⁵⁵ Migration Act 1958 op. cit. at Section 13.

In addition Australia operates a Temporary Work (Skilled) visa (subclass 457) scheme which lets a skilled worker travel to Australia to work in their nominated occupation for their approved sponsor for up to four years.⁵⁶

8.0 Australian Customs Law

Customs procedures in Australia are regulated by the Customs Act 1901⁵⁷, Commerce (Trade Descriptions) Act 1905⁵⁸, Copyright Act 1968⁵⁹, Trade Marks Act 1995⁶⁰, Customs Regulations 1926⁶¹, Customs (Prohibited Exports) Regulations 1958⁶², Customs (Prohibited Imports) Regulations 1956⁶³, and Commerce (Imports) Regulations 1940⁶⁴.

The Customs value for determining duty or other taxes including Goods and Services Tax does not include freight and insurance costs in transporting the goods from the 'place of export' to Australia. Inland freight and inland insurance costs incurred to the place of export are included in the Customs value.⁶⁵ The value of exported goods is the FOB value.⁶⁶

9.0 Concessions Offered to Thailand under TAFTA

Australia's Schedules of Commitments in Annex 8 of TAFTA reiterated Australia's fairly open Foreign Business regime without granting any additional concessions to Thailand.⁶⁷

Concessions were granted, however in relation to the movement of persons. Thai nationals will be permitted to enter Australia and work without labour market testing under the following conditions:

- business visitors are permitted to stay for up to three months;
- service sellers are permitted to stay initially for six months, with a maximum stay of 12 months;
- intra-corporate transferees permitted to stay initially for up to four years with a total period of up to 10 years;
- contractual service suppliers permitted to stay for up to three years. Specialist Thai chefs entering as contractual service suppliers are permitted to enter and stay for up to four years;
- executives and managers of a business with its head of operations in Thailand seeking to establish a subsidiary in Australia are permitted to enter and stay initially for up to four years; and
- spouses and dependents of intra-corporate transferees are permitted to stay and work for the period of the intra-corporate transferee's visa.⁶⁸

In addition Australia agreed to support discussions between the Thai profession and relevant Australian professional bodies with a view to establishing a standard for recognition of Thai qualifications for traditional Thai massage therapists.⁶⁹

⁵⁶ Department of Immigration and Border Protection, Temporary Work (Skilled) visa (subclass 457) at <http://www.immi.gov.au/Visas/Pages/457.aspx> accessed 18 August 2014.

⁵⁷ Customs Act 1901, at <http://www.comlaw.gov.au/Series/C1901A00006>.

⁵⁸ Commerce (Trade Descriptions) Act 1905, at <http://www.comlaw.gov.au/Series/C1905A00016>.

⁵⁹ Copyright Act 1968, at <http://www.comlaw.gov.au/Series/C1968A00063>.

⁶⁰ Trade Marks Act 1995, at <http://www.comlaw.gov.au/Series/C2004A04969>.

⁶¹ Customs Regulations 1926, at <http://www.comlaw.gov.au/Series/F1996B03893>.

⁶² Customs (Prohibited Exports) Regulations 1958, at <http://www.comlaw.gov.au/Series/F1996B03403>.

⁶³ Customs (Prohibited Imports) Regulations 1956, at <http://www.comlaw.gov.au/Series/F1996B03651>.

⁶⁴ Commerce (Imports) Regulations 1940, at <http://www.comlaw.gov.au/Series/F1996B01319>.

⁶⁵ Australian Customs and Border Protection Service (2011), Valuation of Imported Goods, at <http://www.customs.gov.au/webdata/resources/files/ValueofImportedGoodsApril2011WEB.pdf>, accessed 18 September 2014.

⁶⁶ Australian Customs and Border Protection Service, Export Declaration, at <http://www.customs.gov.au/webdata/resources/files/B957.pdf>, accessed 18 September 2014.

⁶⁷ Australia's Schedule of Commitments at <http://www.dfat.gov.au/fta/tafta/Annex8-Australia.pdf> accessed 19 October 2011.

⁶⁸ Ibid.

⁶⁹ Ibid.

10.0 Australia Thailand Double Taxation Agreement

Australia and Thailand signed the Australian Thailand Double Taxation Agreement⁷⁰ on 31 August 1989. It was adopted in the Australian Parliament by passing of the Income Tax (International Agreements) Amendment Act (No. 2) 1989⁷¹ and entered into force on 27 December 1989 follow exchange of letters between the parties.⁷²

11.0 Discussion

The legal standards for business and working permits in Thailand and Australia have some similar features. The rules of each country controlling a foreigner who wants to do business in its country and requires them to ask permission from the relevant government agency.

The difference is that Thailand controls the businessmen by having a reserve business list. The businesses under this list are not open to foreigners. On the other hand, a foreigner may undertake any businesses beside those on the reserve list without asking permission. At the same time, Australia controls foreign business by capital limit.

It is clear that the limitations of the law in Thailand are greater than under Australian law. The reasons are that Thailand tries to reserve some careers for Thai people, national security and protects businesses that have no capacity to compete. However it allows a foreigner to undertake that business should the government grant permission.

One area of potential concern to foreign investors in Australia is the operation of the Foreign Investment Review Board (FIRB) which determines whether an investment is in the national interest provisions of the Foreign Acquisition and Takeovers Act 1975.⁷³ In 2012-2013 there were 12,731 approvals of which 11,840 were approved by delegation and 891 by a Treasury minister.⁷⁴ There were no rejections. The potential area of concern is that the ministerial approval process is less transparent than the administrative/delegated process as it can be significantly influenced by political considerations. In fact, however, less than 0.5% of applications have been rejected annually over the six financial years up to 2012/2013.⁷⁵

Significant Thai investments in Australia are spasmodic. In 2010-2011 the FIRB approved 33 projects with significant investments in mineral exploration and development (AUD 2.566 billion) and manufacturing (AUD 250).⁷⁶ In 2008-2009 there were nine approvals with significant investments in mineral exploration and development (AUD 1.115 billion) and tourism (AUD 155).⁷⁷ Clearly Thai investors are targeting projects that satisfy the FIRB requirements.

As noted earlier there is an obstacle to Australian to obtain the business opportunities in Thailand offered under TAFTA as the Foreign Business Act B.E. 2542 (1999) has not been amended since 1999 (i.e. before TAFTA was negotiated). Businesses have to operate under the current Thai law until such time as it is amended to reflect the agreement of the parties.

⁷⁰ Agreement between Australia and the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income at <http://www.austlii.edu.au/au/other/dfat/treaties/1989/36.html>, accessed 18 September 2014.

⁷¹ Income Tax (International Agreements) Amendment Act (No. 2) 1989) at http://www.austlii.edu.au/au/legis/cth/num_act/itaaa21989459/longtitle.html, accessed 18 September 2014.

⁷² The Revenue Department. Tax Knowledge and Code at http://download.rd.go.th/fileadmin/download/nation/australia_e.pdf, accessed 18 September 2014.

⁷³ Foreign Acquisition and Takeovers Act 1975, at http://www.austlii.edu.au/au/legis/cth/consol_act/faata1975355/ accessed 18 October 2011.

⁷⁴ Australian Government, Foreign Investment Review Board (2014), Foreign Investment Review Board Annual Report 2012-2013, at 9.

⁷⁵ Ibid. at 20.

⁷⁶ Australian Government, Foreign Investment Review Board (2012) Foreign Investment Review Board Annual Report 2010-2011, at 31.

⁷⁷ Australian Government, Foreign Investment Review Board (2010) Foreign Investment Review Board Annual Report 2008-2010, at 37.

The World Bank ranked Australia 11th out of 189 countries for ease of doing business in 2014 and 10th in 2013⁷⁸, whilst Thailand was ranked 18th in both years.⁷⁹ Whilst these rankings appear to be close there is a significant difference. The Thai approval process can be quite bureaucratic and opaque. The complexity of regulating new entrants to the Thai power industry as described by Smith et al. is just one example of many.⁸⁰

12.0 Conclusion

It must be remembered that regardless of the different standards of development of the parties the concept of an FTA is a partnership in which each party has the opportunity and obligation for “give and take”. This is complex, however, as each party expects to access the other party’s market whilst at the same time protecting its own industries including the financial and services sectors.

It is quite evident that Australia was the major beneficiary in relation to foreign business access as there were no special privileges granted to Thailand except in relation to the movement of persons. This must be balanced against the access provided to Thai goods in accessing the Australian market. Such access was quite significant.⁸¹

As has been seen the current Thai foreign business regime is quite restrictive. If no benefits are provided to the other negotiating partner then an FTA is an unnecessary objective as the same benefits would accrue to the parties through membership of the WTO. This is, however, not a desirable outcome as developing economies such as Thailand must gradually adjust their domestic market to meet the greater, and more complicated, challenges associated with trade in services which if managed correctly will lead to a strengthening of the overall Thai economy. For this to occur there must be a political will to commit Thailand to progressively adjust its rules to meet the spirit of the agreement. Australia on the other hand must not use its dominance in the services sector to destroy this sector of the Thai economy. Rather Australian companies should work in partnership with Thai companies to strengthen the Thai services sector to the benefit of both parties.

In summary, Thailand provided access to Australian service providers in return for access to the Australian market for Thai goods.

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⁷⁸ World Bank Group (2014), *Doing Business in Australia*, at <http://www.doingbusiness.org/data/exploreeconomies/australia/> accessed 18 September 2014

⁷⁹ World Bank Group (2014), *Doing Business in Thailand*, at <http://www.doingbusiness.org/data/exploreeconomies/thailand/> accessed 18 September 2014

⁸⁰ Smith, R.B., Smith, N. N., & Smith, D. R. (2014). Chapter 6 FiT and its Implementation in Thailand: Legal Measures, Implementation, Challenges and Solutions. In A. M-Z. Gao, & C-T. Fan, (Eds), *Legal Issues of Renewable Electricity in Asia Region: Recent Development at a Post-Fukushima and Post-Kyoto Protocol Era*, (pp. 127-146). The Netherlands: Kluwer Law International.

⁸¹ Smith, N.N. (2014), Potential impact of Thailand-Australia Free Trade Agreement on Thailand, *Int. J. Public Law and Policy*, Vol. 4, No. 2, at 210–220.