

CHAPTER 2 THE UNITED STATES – THAILAND TREATY OF AMITY

Ownership of businesses by Thais and Americans in the other's country is governed by a special treaty, the *Treaty of Amity and Economic Relations between the United States and Thailand* (1968). The Treaty is still in force today. It may be terminated by either party upon one year's notice to the other.

In 2003, the Thai Government announced that the Treaty would be rescinded as part of the negotiations for a bilateral trade treaty between the United States and Thailand. These negotiations became deadlocked and were discontinued. In 2008 the Thai government announced that it wished to resume negotiations, but as at August 2010, negotiations have not been resumed.

Benefits of the Treaty Subject to seven exceptions, Americans are granted the same rights that Thai nationals enjoy to own and operate businesses in Thailand. Likewise, Thai nationals are granted reciprocal rights in the United States, but since the United States generally does not restrict the right of foreigners to do business there, Thai nationals rarely if ever have the opportunity to directly claim benefits under the Treaty, although they do have the right to apply for Treaty Trader and Treaty Investor visas under United States immigration law.

Proving entitlement In order to claim the benefits of the Treaty, the shareholders in a Thai business entity that are American corporations, must present evidence of incorporation in the United States, together with evidence that a majority of its shareholders and directors are American. If there are numerous shareholders, the company secretary may submit an affidavit describing the number of shares owned by Americans. If the company's shares are publicly traded, the company secretary may estimate the number of shares owned by Americans.

The company secretary must also provide an affidavit, listing all the directors of the company and their nationality. All evidence concerning American companies as shareholders as well as other documents from abroad, including the affidavits, must be notarized or certified to be true copies by a government official and then authenticated by a Thai Embassy or Consulate. Evidence of American ownership must be proved down to the ultimate level of ownership. Thus, if the shareholding company is a subsidiary of another company, then there must be similar evidence provided concerning the parent company's American status.

If an American company desires to do business in Thailand through a branch office (see Chapter 4 *Business Organizations*), it should apply for a Treaty Protection Letter and submit similar evidence concerning its American ownership, as indicated above. All submissions to the Ministry of Commerce must be accompanied by a letter from the Commercial Attaché of the US

Embassy in Bangkok, confirming that the persons and companies involved are in fact American and entitled to protection under the Treaty.

Who may claim Treaty benefits The equal national treatment benefits under the Treaty may be claimed by:

1. American citizens;
2. business entities established under Thai law that are majority American owned; or
3. business entities established under American law (the laws of a state, territory or district) that are majority American owned and managed.

Treaty protection letter In order to do business as a Treaty protected business entity, it is customary that the business applies for a Treaty protection letter from the Ministry of Commerce. This is advisable, since without such a letter, other Thai government offices will not recognize the entity's right to do business.

In order to obtain the Treaty protection letter where the applicant is a natural person or an American owned partnership or company constituted under the laws of Thailand, it is necessary to present evidence that such natural person or a majority of the partners or shareholders are American. For natural persons, this evidence usually consists of a copy of the person's passport.

Excluded business activities The categories of business excluded from protection under the Treaty are:

1. communications,
2. transportation,
3. fiduciary functions (in the Thai text of the treaty the term "*fiduciary functions*" is translated as "*looking after the property of others*," and in the opinion of the Thai authorities, businesses such as warehousing and security services are included in this category, and are thus not entitled to Treaty protection,
4. banking involving depository functions (interpreted to include finance businesses),
5. the exploitation of land or natural resources,
6. domestic trade in indigenous agricultural products, and
7. the liberal professions (such as law).

Although a particular business activity may be excluded from the Treaty, it does not mean that Americans are prohibited from engaging in such a business. For example, banking is excluded from the Treaty, yet there are a number of American banks operating in Thailand.

Land ownership Foreigners may not generally own land in Thailand, with a limited number of exceptions (see further Chapter 7 *Land, buildings and condominiums*). The right to own land is not included in the Treaty. Thus Americans are in the same position as others foreigners in relation to land ownership.

Work permits and visas Although Americans have the right to manage their businesses, the Treaty does not grant Americans unrestricted freedom to work in Thailand, or the absolute right to stay in Thailand if they own a business entitled to Treaty protection. Americans are thus obligated to apply for work permits or visas, in the same way as the nationals of any other country (see further, Chapter 19 *Work Permits* and Chapter 20 *Immigration*).

Double taxation treaty The double taxation treaty between United States and Thailand is entirely separate from the Treaty of Amity. It came into effect on January 1, 1998 (see further Chapter 16 *Double Taxation Treaties*).

Comment As noted above, the Treaty is due to be rescinded as part of the negotiations for a bilateral Free Trade Agreement between Thailand and the United States, although as at August 2010, those negotiations have not been resumed.

Two questions arise. After rescission, will American citizens and companies be made subject to the Foreign Business Act (see Chapter 1 *Foreign Business Restrictions*) in the same way as nationals and companies of all other countries, or will different treatment be applied? Secondly, what will happen with regard to existing companies that are registered under the provisions of the Treaty?

These questions cannot be answered at present. A tentative view is that Treaty companies will eventually be made subject to the Foreign Business Act, and existing Treaty companies will be allowed a grace period to comply with any foreign shareholding and other limitations that arise under the Act. But it will be necessary to await the outcome of the FTA negotiations.

Revised 1 August 2010