

The problems and obstacles in investigating criminal offenses under Foreign Business Act. B.E. 2542 Committed by Chinese businessmen

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Abstracts

This qualitative research aimed to 1) study problems and obstacles the investigative officers encounter while investigating criminal offenses committed by Chinese businessmen under the Foreign Business Act B.E. 2542. 2) propose guidelines for improving the efficiency of criminal investigations under the Foreign Business Act B.E. 2542 . The in-depth interview was employed to collect data from eight key informants, including two officers from the Department of Special Investigation, one from the Corporate Governance Division and one from the Department of Business Development, two officers from the Immigration Bureau, and two officers from the Economic Crime Suppression Division, the Royal Thai Police. The finding disclosed that 1) problems and obstacles in the criminal investigation process were uncooperative entrepreneurs, delayed information systems, unclear data or information, and ambiguous business terminology stated in the Act. 2) The guidelines to solve the problems included creating cooperation among government agencies, expediting the response to inquiries related to the cases, and developing knowledge and understanding of the Act among relevant officials and the public.

Keywords: Foreign Criminal investigation; Economic Crime Suppression; Foreign Business Act; Chinese businessmen.

Introduction

Foreign direct investment (FDI) has played an essential role in the global economy ever since the 1990s. However, in the past decade, many investors have turned their investments to emerging markets, for instance, Thailand, India, Indonesia, Taiwan, and Brazil, due to attractive returns. (Phuditshinnapatra, Tungbenchasirikul & Sethjinda, 2022 : 20). At the same time, FDI has a remarkable potential to develop the economy, increase productivity, creating better-paying and more stable jobs for the host countries. Moreover, foreign investors have become the premier players in providing global public goods, improving working conditions, setting global industry standards, and handing over infrastructure to local communities (Janda & Nuangjamnong, 2021 : 78).

After the economic crisis in 1997, Thailand's trade policy has been open and outward-oriented. FDI was considered an essential tool for developing the country. Therefore, a trade-oriented reform policy has been continuously renewed during the past few decades to integrate Thailand more into the global economy by reducing investment barriers and promoting economic growth. (Stasi & Tan Weng, 2017 : 181)

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The result of providing the opportunity for overseas countries to invest knowledge and abilities into commercial production and management under the increasing free trade system has stimulated the flow of international resources into Thailand. Report from the International Affairs division in 2021 revealed that 1,017 foreign investors have applied for foreign investment promotion, bringing an investment amount of 433,971 million bath, 42% higher than the number of foreign investors and 36% higher in investment value in 2021. Among those countries, China has the highest investment value of 77,381 million bath, accounting for 18% of overall investment in 2565. (Thailand Board of Investment, 2023 : 82).

Since foreign investment can be either an advantage or disadvantage to local businesses and the economy, Thailand, like other countries, has issued laws and policies limiting foreign juristic entity's right to make investments and operations in some areas that involve national security, culture, tradition, craftsmanship, natural resource, environment, or some business that Thai people are not ready to compete with foreigners. (Gudmundsson, Klyuev, Medina, Nandwa, Plotnikov, Schiffrer & Yang, 2022 : online)

Presently, foreign-owned businesses in Thailand are mainly regulated by the Foreign Business Act B.E. 2542 (1999) (FBA), which came into force on 4 March 2000, replacing the 1972 Alien Business Act. The main objective of the FBA is to regulate most investment activity by non-Thai nationals and open limited additional business sectors to foreign investments. (Saypan, 2020 : 83) Even though China is the top source of investment in Thailand, it was found that Chinese investors have done both legal and illegal actions. For instance, they were nominating a Thai nationality to do the business in disguise, supporting or advising illegal activity or misappropriation in tax avoidance, money laundering, holding ownership, or possessing properties or land. Therefore, the effectiveness of the government agencies responsible for investigating the wrongdoings of foreign business people is crucial in detecting covert illegal actions and coordinating with other agencies to make law enforcement.

This study examines problems and obstacles; the investigative officers encounter while investigating crimes committed by Chinese businessmen under the foreign business Act. B.E. 2542 and propose the solutions to overcome those problems, thus making investigative work more effective and able to stop dishonest Chinese investors from doing illegal business, which will cause damage to Thai 'society and economy in the future.

Research Objectives

1. To study problems and obstacles the investigative officers encounter while investigating criminal offenses committed by Chinese businessmen under the Foreign Business Act B.E. 2542.
2. To propose guidelines for improving the efficiency of criminal investigations under the Foreign Business Act B.E. 2542.

Research Methodology

Scope of the study

This research focuses on problems and obstacles in investigating criminal offenses committed by Chinese businessmen and proposes guidelines for improving the efficiency of criminal investigations under the Foreign Business Act B.E. 2542.

Key informants

A purposive selection technique was employed to select eight key informants who were the officers of the government agencies responsible for foreign business crime investigation under the Foreign Business Act, B.E. 2542, including two officers from the Department of Special Investigation, one officer from the Corporate Governance Division and one from the Department of Business Development, two officers from the Immigration Investigation Division, the Immigration Bureau, and two officers from the Economic Crime Suppression Division, the Royal Thai Police.

Research instruments

An In-depth Interview script was developed based on the officer's investigation manual of the related government agencies to explore problems and obstacles in investigating offenses committed by Chinese businessmen under the Foreign Business Act, B.E. 2542. The interview questions were divided into three parts:

Part 1: Information about key informants such as gender and work position.

Part 2: Problems and obstacles the officers encountered while investigating criminal offenses committed by Chinese businessmen, which were identified in 9 issues;

- 1) Investigation on the shareholder register of a juristic person.
- 2) Investigation on classifying types of the business.
- 3) Investigation of the juristic person's directors and executives
- 4) Investigation of articles of association of the offender juristic person.
- 5) Investigation of the registered capital.
- 6) Investigation of the source of investment funds.
- 7) Investigation of the dividend distribution.
- 8) Investigation of financial statements
- 9) Overall investigation processes.

Part 3: Guidelines to solve the problems and obstacles to improve the efficiency of criminal investigations under the Foreign Business Act B.E. 2542, which were presented in 10 issues;

- 1) Investigation on the shareholder register of a juristic person.
- 2) Investigation on classifying types of the business.
- 3) Investigation of the juristic person's directors and executives
- 4) Investigation of articles of association of the offender juristic person.
- 5) Investigation of the registered capital.
- 6) Investigation of the source of investment funds.
- 7) Investigation of the dividend distribution.
- 8) Investigation of financial statements
- 9) Overall investigation processes
- 10) Guideline for improving the performance of investigative officers and standards for dealing with offenses under the Foreign Business Act B.E. 2542 (1999)

Data Collection

Data collection via in-depth interviews proceeded according to the following steps;

1. The researcher emailed the expected key informants with the recommendation letter from the University, the research proposal, and the in-depth interview script, asking for their cooperation to participate in the in-depth interview on a date and time convenient for both parties.

2. The researcher conducted an in-depth interview with key informants on the appointed dates and times. The interviewees were informed and thus allowed audio recording of the interview.

3. The interview records were transcribed and saved as document files. Then they were sent to the interviewees to check for their correctness before analyzing.

Data analysis

The qualitative data from the in-depth interview was analyzed using the content analysis technique to extract the answers for the research proposals.

Research Results

In this part, the findings were presented per the research objectives as follows;

1. Problems and obstacles of the officers in investigating criminal offenses committed by Chinese businessmen under the Foreign Business Act B.E. 2542 can be divided into nine topics in response to the interview questions;

1.1 Investigation on the shareholder register of a juristic person.

Data from the in-depth interview indicated three significant problems and obstacles the officers encountered while investigating the shareholder register of a juristic person. First was the problem and obstacle resulting from the submission of false information by entrepreneurs, which may need to be verified later. The second topic related to the incompleteness of information and difficulty accessing and monitoring all relevant information. The third topic was the challenges posed by changes in data of a business operator, leading to data mismatches that make investigations difficult.

1.2 Classifying types of businesses operated as reserved businesses according to the attachments attached to the Foreign Business Act B.E. 2542.

From the in-depth interview, the interviewees found two significant problems and obstacles in identifying types of businesses as reserved businesses according to the attachments attached to the Foreign Business Act B.E. 2542. The first topic was the unclear definition of a business model. The second was the issue of incorrect or incomplete information being provided by business owners.

1.3 Investigation of the juristic person's directors and executives

The finding marked two significant problems and obstacles the investigative officers found in inquiring about the juristic person's directors and executives. First, the entrepreneurs did not cooperate with the Department of Business Development officers despite being summoned. Another problem was the misrepresentation of directors' names during registration as directors or executives of a juristic person.

1.4 Problems and obstacles in examining the Article of Association of the Offender Juristic Person.

The interviewees found no problem examining the Article of Association of the Offender Juristic Person since the regulation was quite broad. However, one of the interviewees indicated a complication in document clarity, reliability, and intent.

1.5 Investigation of the Registered Capital of the juristic person

The analysis result expressed two problems and obstacles the investigative officers found in investigating the registered capital of the juristic persons. First, the juristic person failed to notify the Department of Business Development of any shareholder changes. The second was their failure to pay for shares specified in the registered capital.

1.6 Investigation of the Source of investment funds.

The finding from qualitative data disclosed two significant issues. The first was that the source of investment or working capital in the offender's business was complex and challenging to monitor. The second issue was that the Department of Business Development was not legally authorized to investigate the source of investment or working capital expenditures of the offending juristic person's businesses.

1.7 Investigation of accounting performance and business dividends of offender Juristic persons.

The finding expressed three significant problems in investigating offender Juristic persons' financial performance and business dividends. The first issue was the difficulty in diagnosing and indicating some businesses that use Thai people's names as nominees in setting up companies or opening mule accounts. The second one was that perpetrators attempted to distribute or split dividends or earnings, making it difficult for authorities to investigate. The third issue was that most juristic entities that committed offense tend to do accounting by evading corporate income tax, resulting in minimal accounting performance, so there is no dividend payment from the retained earnings".

1.8 Auditing the business's financial statements of the juristic person who committed the offense.

Data analysis from the in-depth interview indicated two significant issues in auditing the business's financial statements of the juristic person who committed the offense. The first issue was that entrepreneurs did not cooperate with Department of Business Development officials to submit essential documents. The second issue was the difficulty in examining financial statement documents.

1.9 Other problems found in the overall processes.

The in-depth interview revealed the problems and obstacles that were found during the investigation of criminal offenses committed by Chinese businessmen under the Foreign Business Act B.E. 2542, including insufficient time for conducting the inquiry; lack of cooperation of other operators; language limitations; the loophole in the law; foreigners cooperate with Thai legal advisor in doing illegal business; and insufficient workforce.

2. Guidelines for solving the problem and obstacles in investigating crimes committed by Chinese businessmen under the Foreign Business Act B.E. 2542 according to the interview questions as follows;

2.1 Investigation on the shareholder registers of a juristic person.

The interviewee's suggestions for solving the problem and obstacles in investigating the shareholder register of a juristic person were to encourage juristic persons or entrepreneurs to submit complete information to the Department of Business Development and to develop cooperation with other agencies in working.

2.2 Classifying types of businesses operated as reserved businesses according to the attachments attached to the Foreign Business Act B.E. 2542.

From the in-depth interview, two recommendations were obtained from the interviewees, which were to request entrepreneurs to explain the nature of the business or clarify additional details of their business model, together with the Department of Business Development must perform internal discussions in the interpretation of the types of the companies that have been notified, such as adding details to create consistency between business codes (The part that entrepreneurs fill out in the electronic system of the Department of Business Development) and attached list of the Act and consult with the Foreign Business Administration Division in various areas, such as the nature of the business to prevent foreigners from registering a reserved business according to the Act". Apart from that, the investigative officers should be authorized to access juristic person information system

2.3 Investigation of the juristic person's directors and executives.

Three guidelines for the investigation of the juristic person's directors and executives were received from the interviewees, which were; the Department of Business Development should enable the authorized investigative officers to access the information of directors and executives of the juristic persons through the department technology information system; The investigative officers should be more cautious in trusting the authentic of the documents to avoid fake document the officers can ask for the certificate body to ensure that the document can be trusted, and The Department should set up the rules for issuing share certificates".

2.4 Investigation of articles of Association of the Offender Juristic Person.

Although all interviewees did not mention problems and obstacles in this process, the person responsible for inspecting the regulations of the juristic persons were required to perform according to the law.

2.5 Investigation of the registered capital.

The Business Development Department should set up additional units to support specific tasks to increase operation efficiency in various areas, such as classifying types of businesses that require a registration permit, monitoring registration, and requiring operators to notify capital increases in case the operator's subsequent change of registered capital (Emphasis on recommending legal steps to entrepreneurs rather than prosecution).

2.6 Investigation of the Source of investment funds.

Three recommendations were obtained from the in-depth interview. The first was that the BDD should ask for cooperation with other related agencies, such as DSI, to investigate the doubtful or suspicious juristic person's source of investments. Second, the BDD should establish regulations to control the transmission of information by entrepreneurs to verify the source of investment or expenditure in the business. Lastly, the BDD should educate the investigative officers about digital assets.

2.7 Investigation of business financial performance and dividends of offender Juristic persons.

From the in-depth interview, the interviewees recommended that the BDD ask for cooperation from other departments, such as the Revenue Department, to verify the juristic's operating performance and dividend distribution. Moreover, the BDD can ask for assistance from other agencies, such as DSI.

2.8 Investigation of financial statements.

Two suggestions were obtained from the interviewees that the BDD should cooperate with other agencies that have expertise in auditing financial statements, and it should develop officer skills and knowledge concerning financial and accounting audit to be capable of the work.

2.9 Other investigation processes include filing, resources, personnel involved, time frame, relevant legal regulations, and litigation results/prosecution.

From the in-depth interview, the interviewees provided five suggestions to be used as a guideline in solving the overall problems in the investigative process. These suggestions were that 1) the DBD should create cooperation with other agencies, such as establishing an MOU with DSI to disclose information about foreign owners' businesses and setting up an MOU with the Immigration Office regarding the foreign businessmen traveling in and out of the country. 2) The DBD should consider establishing MOU with other agencies responsible for other types of business, such as tourism and hotel businesses. 3) Training, especially legal knowledge, is essential in developing officers' competency to keep up with the rapid changes in a global context. 4) Cooperation within and among the departments should be encouraged. 5) the DBD should set up additional units responsible for specific works, such as financial auditing and litigation matters.

2.10 Additional Comments and Suggestions

From the in-depth interview, the interviewees suggested that to improve law enforcement, the DBD should adjust its policy to keep pace with global economic, social, technological, and crime changes.

Discussion

The research finding can be discussed as follows.

1. Discussing with the objective 1 as follows

1) Due to the problem of interpretation or consideration of business types that are operated as a reserved business according to the list attached to the Act, which appeared to all four informants, such problems may be considered very important the most that need to be corrected, followed by the preparation of MOUs between agencies, relevant to solve the problem of investigation duties according to the Act.

2) When it is impossible to increase the investigation period, officials need to quickly access or obtain information from juristic persons accused of committing offenses under the Act. Therefore, the interrelated functions of the various units related to the Act mentioned above, or the preparation of an MOU, are suitable solutions that can be easily implemented.

3) The complexity of the financial pathways, including the source of funds and compensation circulating within the entity's business system, makes verification difficult. Due to some officers' lack of proficiency in accounting, this type of offense can be explained by rational choice theory, in which offenders weigh the disadvantages of the low risk of arrest and common penalties that are not enough to deter them. After comparing the benefits, they will receive, they may determine that the offense is worth committing, resulting in a crime.

4) Based on the data collected, it appears that there are instances of legal advisors of foreign entrepreneurs introducing illegal business channels. This issue can be explained by the Differential Association Theory, which suggests that individuals learn and adopt deviant behaviors by associating with others who engage in such behaviors. It may be challenging to monitor the offenses of counseling, so relevant agencies may need to take additional countermeasures to address this problem.

5) Relevant agencies may find the issue of juristic persons not cooperating with the authorities through the concept of Deterrent Theory, such as pushing for increased penalty rates and investigating and arresting violators quickly and with a specific rate of arrest or prosecution.

This research result consistent with Worawich Wanawit (2014:6) research title "Legal issues in the business of aliens with the ASEAN Community." and Keingsak Pintusornsri (2022: 291-300) research title "Legal Problems and Barriers for Foreigners' Business Operations and Residency in Thailand."

2. Discussing with the objective 2 as follows the guidelines to solve the problems included creating cooperation among government agencies, expediting the response to inquiries related to the cases, and developing knowledge and understanding of the Act among relevant officials and the public. This research result consistent with Nuntiya Mahathien (2007:8) research title "Impact of the Amendment of the Foreign Business Act 1999" and Kissana Boontae (2019:77) research title "The Roles of the State in the Promotion and Monitoring of Undertaking of Businesses by Foreigners".

Recommendation

1. Recommendations from research results

1.1) Relevant agencies should have a discussion to improve the interpretation or provide a more precise definition of the types of businesses that are considered restricted under the Act's annexed list.

1.2) Prepare MOUs between relevant agencies to solve the problem of investigation duties according to the Act. For example, allowing investigative persons to access the information of the juristic person committing the offense.

1.3) Relevant agencies should push for amendments to the law to increase the penalty rate and investigation period and to deter entrepreneurs from committing offenses through fear of legal penalties.

1.4) Relevant agencies must find countermeasures against cases where legal advisors for foreign entrepreneurs advise on illegal business practices, such as conducting seminars on business ethics and disseminating articles about the damage to the country's overall economy in case of foreign entrepreneurs investing and remitting money to the country.

1.5) Relevant agencies with the authority and duty to investigate cases according to the law should hire more officers with accounting knowledge or seek cooperation with trustworthy third-party auditors to examine evidence in the case at the investigation stage, to be fast and up-to-date with the techniques of the offenders.

1.6) Relevant agencies shall also focus on the unregistered events of juristic persons to prevent tax evasion and money laundering issues.

1.7) Relevant agencies shall implement a system for the annual report of foreign companies and make it a mandatory requirement for foreign companies

1.8) Relevant agencies may find ways to prevent the problem of repeating crimes through more stringent prevention, such as monitoring management changes and registered capital, adjusting the business model, or increasing legal penalties in the case of repeated offenses within a certain period.

2. Recommendations for further research

From a research study on problems and obstacles in the performance of investigation officers regarding offenses under the Foreign Business Act B.E. 2542 committed by Chinese businessmen, the researcher has made the following suggestions for further research:

2.1) Data should be collected by increasing the number of key informants or by adding other departments, such as the Revenue Department, to obtain a comprehensive range of information.

2.2) Information gathering should include issues that may not only concern Chinese businessmen (Chinese citizens), as informants may not always be aware of such specific details. Subsequent studies may be expanded to include non-Thai businesspeople as well.

2.3) The following study may focus on issues, forms, or guidelines for establishing cooperation (MOU) between agencies involved in the Foreign Business Act B.E. 2542 to discover ways to improve work according to the problems found in this research in more detail and coverage.

References

- Gudmundsson,T.,Klyuev,V.,Medina,L.,Nandwa, B., Plotnikov,D., Schiffre,F., & Yang.D.(2022).Emerging markets: Prospects and challenges. IMF Working Paper No. 2022/035. *Online*. Retrieved January 23, 2023. from <https://ssrn.com/abstract=4065455>
- Janda.J. & Nuangjamnong.,C. (2021). Motives for Inward Foreign Direct Investment into Thailand: A Quantitative Analysis. *AU-GSB e-Journal*, 14(1), 71-83
- Keingsak Pintusornsri. (2022). Legal Problems and Barriers for Foreigners' Business Operations and Residency in Thailand. *The Journal of Pacific Institute of Management Science (Humanities and Social Sciences)*, 8(2), 291-300.
- Kissana Boontae. (2019). *The Roles of the State in the Promotion and Monitoring of Undertaking of Businesses by Foreigners*. Master Thesis in Law, National Institute of Development Administration.
- Nuntiya Mahathien, (2007). *Impact of the Amendment of the Foreign Business Act 1999*. Master Thesis in Law, Bangkok University.
- Phuditshinnapatra,V.,Tungbenchasirikul,S. & Sethjinda.T. (2022). Factors Affecting the Foreign Direct Investment in Thailand: Do Political Events Play a Role?. *Journal of Community Development Research (Humanities and Social Sciences)*, 15(4), 14-28.
- Stasi, Al. & Tan Weng,C.D. (2017). Protectionism past, present and future: Addressing the legal issues of foreign investment treatment in Thailand. *Naresuan University Law Journal*, 10(2), 171–193.

- Saypan,S. (2020). Legal problems concerning nominee arrangement in relation to foreign business under Thai laws. *Thammasat Business Law Journal*, 10 , 80-94.
- Thailand Board of Investment.(2023). *Foreign direct investment statistics cumulative monthly in year 2022*. Bangkok:Thailand Board of Investment.
- Worawich Wanawit (2014). *Legal issues in the business of aliens with the ASEAN Community*. Master Thesis in Law, Dhurakij Pundit University.