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Foreign Companies, WTO and the revised company law - some thoughts

Nathan KAISER

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I. A BIT OF HISTORY, AND THE CURRENT STATUS

Until recently, Taiwan still knew cumbersome investment restrictions of the traditional kind: For some key industries, foreign investment was restricted to a limited participation of the foreign investors, with other words, requiring a certain percentage of shares held by Taiwanese nationals or Taiwanese companies (for reference, see also the now somewhat historical "Negative List for Investment by Overseas Chinese and Foreign Nationals"). This requirement often did not correspond to the economic facts, where the foreign investor, in some cases, accounted for 100% of the total investment, and in fact contributed 100% of the company capital. Further, and also until recently, the Taiwanese Company Law (article 2 item 4 and article 128) required a minimum of seven shareholders for a so-called "company limited by shares", which has traditionally been the most popular company type especially for larger foreign investors, due – among other reasons – to its flexibility and the simple transferability of shares. Finally, the Company Law stipulated that the majority of the shareholders must be domiciled in Taiwan (article 128), and that (FIA exemptions notwithstanding) both the chairman and the vice-chairman of the board of directors must be R.O.C. nationals, equally with domicile in Taiwan (article 208).

The legal restrictions described above lead to the result that today, subsidiaries of foreign companies in Taiwan typically have the following structure: a company limited by shares, with the foreign parent company (or holding company) holding the majority of shares, the exact percentage depending on the applicable foreign investment restrictions in the given industry. The remaining six shareholders each hold a minimum amount of shares, often one single share: Two shareholders sometimes are other foreign affiliated group companies (e.g. from Hong Kong), or foreign individuals employed within the foreign parent company. Finally, the remaining four shareholders, in other words the required majority, are Taiwanese individuals, often either local employees or even professional fiduciaries, such as lawyers. It is clearly understood that in this classic structure, all individual shareholders, foreign and local, only held symbolic shares on a purely fiduciary basis, meaning: on behalf of the foreign parent company as the actual investor.

Naturally, such a setup leads to additional costs in form of fees payable to the fiduciaries. Further, such structure presents inherent risks, because the relation between the foreign company and the fiduciary is only based on a contract (rather than equity). In case of non-compliance of a fiduciary shareholder (or, if applicable, of a fiduciary director), with the instructions by the foreign company, the latter may ultimately only exercise control of the shares and the corresponding votes by taking legal action in the competent court.

II. SUBSTANTIAL CHANGES…

The recent entry of Taiwan into the WTO and the related legislative and administrative measures have in essence eliminated most of the previously existing restrictions on market access through commercial presence of foreign companies in Taiwan. In other words, foreign companies are now largely free to have wholly foreign owned (100%) subsidiaries in Taiwan. Exceptions remain mainly for certain professional services and in the telecommunication and the agricultural sectors.

About concurrently with the entry into the WTO, and related to it, Taiwan has implemented a major revision of its Company Law. This revision includes truly substantial changes, two of which shall be looked at briefly: First, the Taiwanese Company Law now provides for the possibility of a company with one single shareholder ("oneman company"), under the condition that the single shareholder is itself a company (rather than an individual). Regarding this change, Taiwan's Company Law is now clearly up to international standards. Second, the revised Company Law has purely and simply eliminated the previous domiciliation requirement for shareholders. Equally, the nationality and domiciliation requirements regarding the chairman and the vice-chairman of the board of directors were deleted without replacement.

III. …SUBSTANTIAL ADVANTAGES

As a result of the comprehensive legal overhaul of the past few months, it is now possible for foreign companies to hold 100% of their Taiwanese affiliated companies, and to hold all corresponding shares as one single shareholder. Further, the foreign company may now designate the members of the board of directors without regard to their nationality and place of domicile. As a result, it is no longer necessary for a foreign investor to mandate individuals on a fiduciary – and therefore fictional – basis, neither as shareholders, nor as directors. Thus, a consequent company restructuring based on the above saves costs, decreases risk, and brings the legal structure of the foreign investment in line with the underlying economic reality.

IV. ON THE RIGHT TRACK

The exact conditions and the legal feasibility of a company restructuring shall still be subject to prior research on a case-by-case basis. The legal check must mainly be done regarding the current status of the implementation of WTO commitments by the Taiwanese authorities. This implementation is under external monitoring by WTO members, but also for example by the ECCT. Taiwan has already been relatively open for foreign investment. Now, it will finally allow some foreign investors to legally implement their previous de-facto full ownership of local subsidiaries. This recent development of the legal environment substantially increases legal security and transparency for foreign companies having a commercial presence in Taiwan.

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