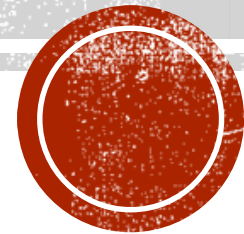


**'NATIONALITY SHOPPING' BIT BY BIT:
THAILAND & MULTINATIONAL ENTERPRISES**



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Thailand's inflows of foreign direct investment 2011-2014

| | 2011 | 2012 | 2013 ^a | 2014 ^a |
|-------------------------------------|----------------|-----------------|-------------------|-------------------|
| Total inflows (US\$ million) | 2,473.7 | 12,899.0 | 14,416.0 | 12,728.1 |
| | (% of total) | | | |
| Inflows by origin | | | | |
| ASEAN | 38.5 | -5.8 | 6.6 | 7.6 |
| Indonesia | -2.5 | 0.9 | 0.8 | 0.6 |
| Malaysia | 0.7 | 3.9 | 2.9 | 0.7 |
| Philippines | -0.7 | 0.1 | 0.3 | 0.4 |
| Singapore | 41.1 | -10.9 | 2.4 | 5.8 |
| EU28 | 34.1 | 11.7 | -8.6 | 13.8 |
| Belgium | 8.4 | 1.1 | -0.2 | -0.3 |
| Denmark | 11.0 | 0.1 | 0.9 | 0.4 |
| France | 8.2 | 2.7 | 1.0 | -0.8 |
| Germany | 18.5 | 3.7 | 1.5 | 2.3 |
| Italy | 0.3 | 0.2 | 0.8 | -0.3 |
| Luxembourg | -1.4 | 2.2 | 0.5 | 1.2 |
| Netherlands | 10.2 | 6.1 | -16.7 | 8.2 |
| Spain | -9.9 | -4.7 | 0.2 | 0.1 |
| Sweden | 3.5 | 0.1 | -1.0 | 0.7 |
| United Kingdom | -11.0 | 0.1 | 4.2 | 1.8 |
| Australia | 0.3 | 2.1 | 1.3 | 0.9 |
| British Virgin Islands | 7.4 | 1.3 | -0.8 | 2.0 |
| Cayman Islands | 25.1 | -6.3 | 0.9 | -1.3 |
| China | 0.8 | 4.6 | 6.4 | 8.8 |
| Hong Kong, China | 11.0 | 5.5 | 1.8 | 10.0 |
| Japan | -55.4 | 28.7 | 62.3 | 33.7 |
| Liechtenstein | 0.0 | 0.1 | 0.0 | 0.0 |
| Mauritius | 29.2 | -1.2 | -2.6 | 0.5 |
| Samoa | 7.2 | -0.3 | -0.1 | 0.0 |
| Korea, Rep. of | 3.9 | 1.0 | 2.7 | 2.8 |
| Switzerland | 12.9 | 2.3 | 1.2 | 0.1 |
| Chinese Taipei | -2.6 | 1.2 | 1.2 | 1.8 |
| United States | 5.8 | 30.8 | 10.7 | 13.3 |
| Others | -18.2 | 24.2 | 17.1 | 5.8 |

Source: Thailand's trade policy review 2015 under the WTO – https://www.wto.org/english/tratop_e/tpr_e/s326_e.pdf



Thailand's outflows of foreign direct investment 2011-2014

| Outflows by destination | | | | |
|--------------------------------|------|------|------|------|
| ASEAN | 31.2 | 19.0 | 12.9 | 48.3 |
| Singapore | 13.5 | 4.9 | -8.3 | 24.4 |
| Myanmar | 4.9 | 2.4 | 6.2 | 5.8 |
| Malaysia | 2.0 | 2.6 | 3.7 | 5.2 |
| Lao PDR | -1.4 | 1.7 | 1.7 | 3.8 |
| Indonesia | 8.1 | 4.2 | 4.7 | 3.2 |
| Viet Nam | 4.9 | 2.0 | 3.2 | 2.8 |
| Cambodia | -0.2 | 0.8 | 1.1 | 2.1 |
| Philippines | -0.6 | 0.4 | 0.7 | 1.0 |
| EU28 | 8.2 | 14.3 | 5.1 | 0.1 |
| France | -0.6 | 0.3 | 2.5 | -0.8 |
| Germany | 0.2 | 6.2 | -5.4 | 0.0 |
| Netherlands | 3.1 | 2.1 | 2.6 | 1.1 |
| United Kingdom | 4.9 | 4.3 | 4.3 | -0.6 |
| Australia | 7.0 | 4.3 | 8.6 | -0.2 |
| Bangladesh | 0.3 | 0.2 | 0.2 | 0.3 |
| British Virgin Islands | 4.6 | 6.3 | 5.7 | -1.6 |
| Canada | 2.8 | 0.9 | 4.0 | 0.1 |
| Cayman Islands | 24.0 | 11.1 | 11.7 | 19.6 |
| China | 1.9 | 3.9 | 3.3 | 0.1 |
| Egypt | -0.1 | -0.8 | 0.0 | 0.3 |
| Hong Kong, China | 3.6 | 12.9 | 1.5 | 12.8 |
| India | 0.9 | 1.1 | 2.1 | 0.4 |
| Japan | -0.8 | 6.1 | 4.0 | 4.7 |
| Mauritius | 8.6 | 4.5 | 22.9 | 13.2 |
| Korea, Rep. of | -0.5 | 0.6 | 1.0 | 0.0 |
| Switzerland | -0.5 | 0.7 | 0.2 | -0.4 |
| Chinese Taipei | -0.2 | 0.3 | 0.4 | 0.3 |
| United Arab Emirates | 0.1 | 0.2 | 0.4 | 0.3 |
| United States | 6.6 | 8.0 | 6.9 | -5.7 |
| Others | 2.3 | 6.5 | 9.1 | 7.5 |

Source: Thailand's trade policy review 2015 under the WTO – https://www.wto.org/english/tratop_e/tpr_e/s326_e.pdf



Thailand as a Host State for MNEs

| Some MNEs in Thailand | Remarks |
|--|---|
| Honda | <ul style="list-style-type: none"> - Expects to start full operations at a \$476 million new plant for four-wheeled vehicles in Prachinburi in 2016 - Plans to construct in 2017 a \$47 million automobile test course in the same province |
| Mazda | Started mass production of transmissions in 2015 at its new established transmission plant in Chonburi |
| China Railway Construction Corporation | Awarded in 2015 the contract to construct an 867 km railway line connecting Nong Khai province, Bangkok and eastern Rayong province |
| Bosch (Germany) | Bosch is building a \$28.5 million R&D plant for gasoline systems in Thailand |
| Marubeni and Toshiba | They jointly won a contract to provide the railway systems and maintenance services of the Purple Line of the Bangkok mass transit railway for 10 years. |
| Alstom (France)/ Marubeni | They signed a \$1 billion EPC contract with the Electricity Generating Authority of Thailand for the construction of a new unit of a lignite- red power plant in Mae Moh, Thailand. |

Source: UNCTAD–ASEAN Investment Report 2016 research, based on country information, industry news, other media and corporate websites/ Company press releases and Marklines.



Japanese auto parts manufacturers: expansion of operations in Thailand, 2015–2016

| Thailand | | | | |
|----------------------------|-----------------|------------------------------------|---|---|
| Aisin AW | New | Automatic transmissions | Toyota. The company aims to expand to other Japanese OEMs (e.g. Isuzu and Mitsubishi) in Thailand and export to other ASEAN countries | The company is building an automatic transmission plant, which is to start production in 2017 |
| Daido Steel | New | Forged transmission parts | Target automotive OEMs and other customers in Thailand | Started production in 2016 |
| Toray Hybrid Cord | New | Fibre materials for timing belts | Target customers based in Thailand | Established a sales office in 2015 in Thailand. Plans to establish a plant in the region within two years |
| Nitta | New | Hose and tube products | Target customers in ASEAN | Plant started operation in 2016 |
| Shin-Etsu Chemical | Expansion | Silicon monomers | Car makers, predominantly in Japan, but aims to diversify customer base | Expansion of Thai plant by 2017 |
| Sumitomo Rubber Industries | Expansion | Tyres | Automotive OEMs in Thailand | Expanded tyres production in 2016 |
| Asahi Tec | Expansion | Aluminium wheels | Most products are targeted at Japanese OEMs in Thailand | Expanding its aluminium plant in Thailand |
| Oiles Corporation | Expansion | Bearings | Car makers, predominantly in Japan | Expanded production in 2016 |
| Sanyo Special Steel | Diversification | Formed bearing materials | Customers in Thailand | Established a new subsidiary in 2015 |
| NGK | Diversification | Ceramics for exhaust gas purifiers | Customers in Thailand and ASEAN | Established new subsidiary in Thailand in 2015 with a plant ready for production in 2018 |



Thailand as a Home State for investors

| Company | Home-country | Investment | Host-country | Remarks |
|----------------------|--------------|---|---|---|
| Bank of Ayudhya | Thailand | Finance (microfinance) | Cambodia | With Mitsubishi UFJ Financial Group, acquired Hattha Kaksekar, a microfinance company |
| Siam Cement Group | Thailand | Cement and building materials | Cambodia Indonesia Lao PDR Myanmar | Plans to expand investment in Cambodia by \$200–300 million between 2016 and 2020 Indonesia plant started operation in 2015, Myanmar plant in 2016 Building a cement plant in the Lao PDR to start operation in 2017 Announced plans in 2016 to expand logistics operations in ASEAN to better serve customers |
| Muang Thai Life | Thailand | Insurance | Cambodia | Established a joint venture with a local partner, Canadia Investment Holding, to provide life insurance products |
| TOA Paint | Thailand | Paint | Cambodia Indonesia Myanmar | Building new factories in each of these ASEAN countries, to start production in 2017 |
| Major Cineplex Group | Thailand | Cinemas and entertainment | Cambodia Lao PDR Myanmar Viet Nam | Plans to expand in the CLMV countries |
| Pestech | Malaysia | Power infrastructure | Cambodia | Building the 230 kV Kampong Cham Kratie Transmission System Project worth \$61 million, expected to be complete in 2017 Also constructing a transmission line from Phnom Penh to Sihanoukville to be completed by 2018 |
| IHH | Malaysia | Hospital | Myanmar | Started construction of a \$70 million hospital in Yangon in 2016, expected to open in 2020 |
| PTT | Thailand | Retail liquefied petroleum gas (LPG) fuel station | Cambodia Lao PDR Myanmar | Plans to expand retail LPG in Cambodia Opened more petrol stations in the Lao PDR in 2015 and a fourth one in Myanmar in January 2016 Plans to open 43 petrol stations in Myanmar by 2020 and grow from the current 20 to 63 stations in Cambodia by that time |

Source: UNCTAD–ASEAN Investment Report 2016 research, based on company information and media.



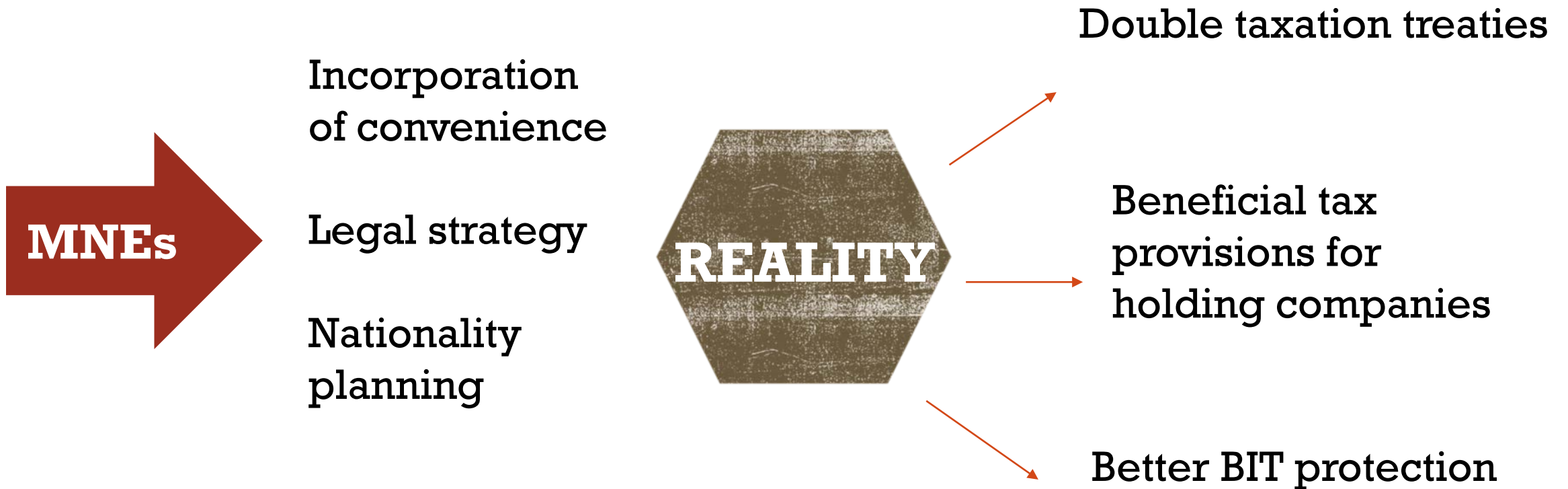
ASEAN companies continued to expand regionally through cross-border M&As, 2015
(selected cases) (Millions of dollars and per cent)

| Ultimate acquiring company | Ultimate acquiring nation | Target company | Target nation | Target industry | Value | Shares acquired |
|-----------------------------------|----------------------------------|--|----------------------|--|--------------|------------------------|
| Bank of Ayudhya | Thailand | Bank of Tokyo-Mitsubishi UFJ Ltd - Bangkok, Thailand Branch | Thailand | Banks | 1,550 | 100 |
| Bangchak Petroleum | Thailand | Galoc Production | Philippines | Crude petroleum and natural gas | 108 | 100 |
| Electricity Generating | Thailand | Quezen Power | Philippines | Electric services | 15 | 2 |
| CIMB Group Holdings | Malaysia | Finansa Asset Management | Thailand | Investment Advice | 7 | 100 |
| iProperty Group | Malaysia | ThinkOfLiving.com | Thailand | Prepackaged software | 6 | 100 |
| Intouch Holdings | Thailand | Playbasis | Singapore | Prepackaged software | 2 | 15.36 |

Source: UNCTAD M&A database.



PRACTICAL CONSIDERATIONS: 'NATIONALITY SHOPPING' AS PART OF MNEs REALITY



LEGAL CONSIDERATIONS

- Determination of a 'nationality' – applicability of an investment protection of an IIA/BIT *ratione personae* (Who enjoys protection?)
- Nationality shopping – towards a 'treaty-based' approach
 - Need to 'belong' to one Contracting State
 - Substantive & Procedural guarantees
 - 'External standards approach' (not rely solely on criteria in BIT, a consideration of a factually effective connection between MNE-Home State)
 - Preference for a treaty-based approach because no legal basis for applying criteria beyond those stipulated in BITs: *Saluka* and *Tokios Tokeles*



POLICY CHALLENGES

- ‘Multiple passport affiliates’ – indirect foreign ownership, transit investment through third countries and round-tripping
- Complex internal ownership structures
- Ubiquity of rules on foreign ownership
- Blurring of investors’ nationality – challenges for an application of rules and regulations
- Multiple claims before diverse tribunals (treaties in the state of the parent company and the state of the intermediate holding company)



POSSIBLE SCENARIO OF NATIONALITY SHOPPING FOR MNES?

- Case 1: Restructuring for benefits



Country B (Host State – No BIT A-B)

Country C (Restructuring to benefit from BIT B-C)

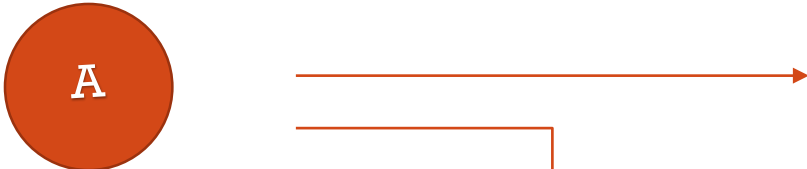
- Case 2: Restructuring for more benefits



Country B (Host State – with BIT A-B)

Country C (Restructuring to benefit from BIT B-C because more advantageous; invoke MFN clause through BIT A-B)

- Case 3 : 'Domestic' Investment



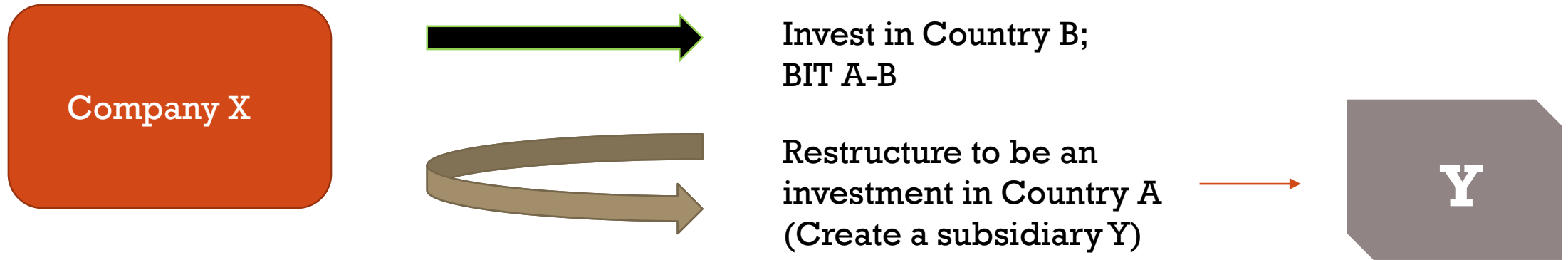
Country A (national investor - no BIT protection)

Country B (Restructuring for BIT B-C)

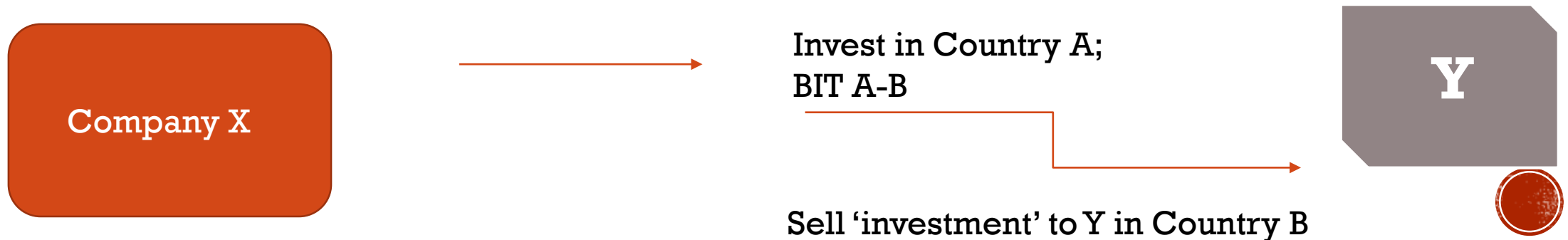


METHODS OF TREATY SHOPPING

- Method 1: 'Mailbox' company

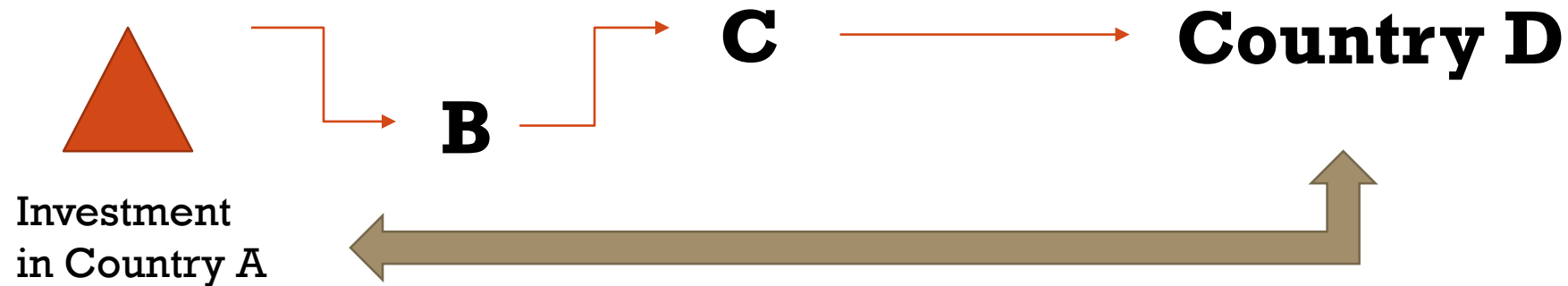


- Method 2: 'Trafficking' in BIT claims



DIFFICULTIES FOR THAILAND AS A HOST STATE

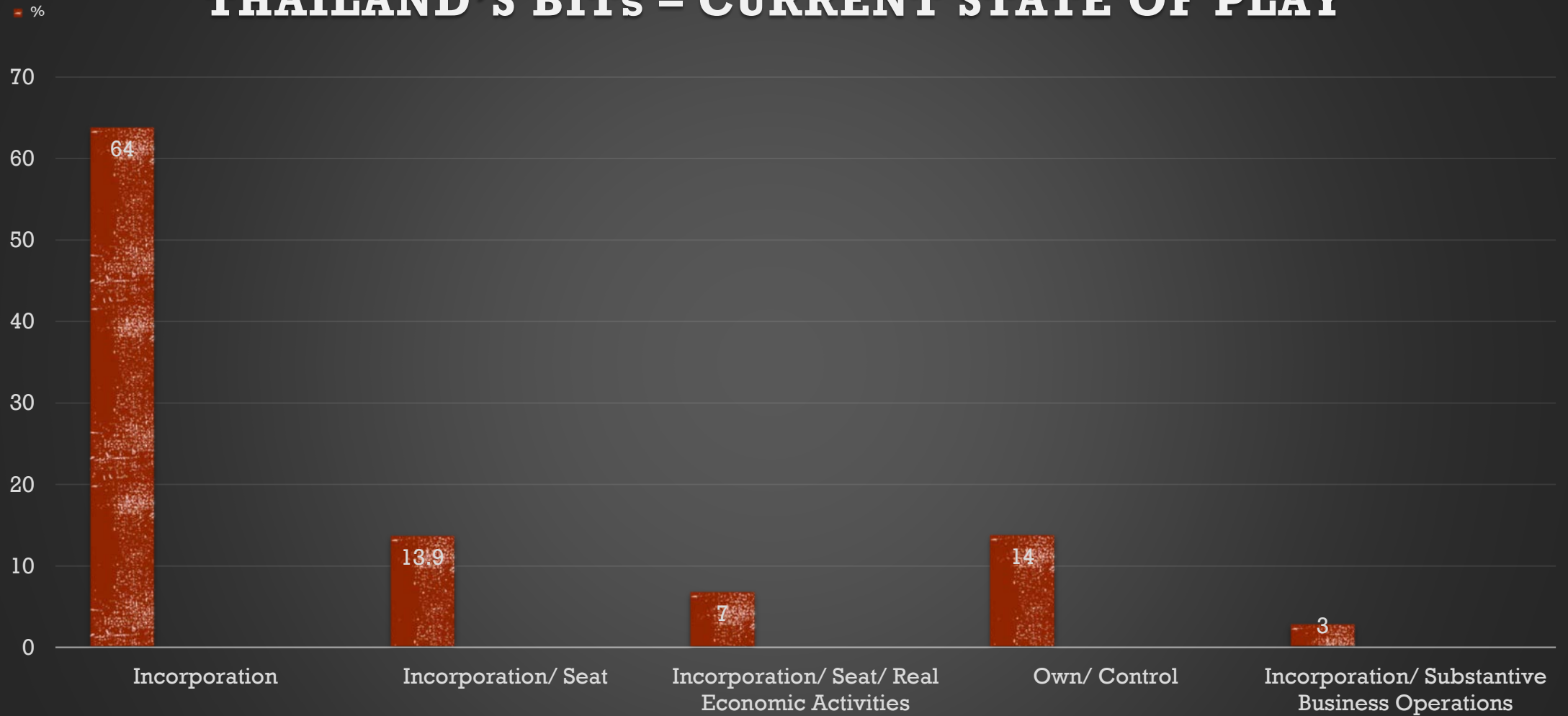
- Chain of investors - Multiple intermediary investors



- Claim protections for majority and minority shareholders?
 - Cover all the nationalities in the world? Unforeseen exposure to investors' claims?
 - A single investment but multiple claims – national and international fora for dispute settlement
 - Risk of conflicting arbitral awards/ legal decisions



THAILAND'S BITs – CURRENT STATE OF PLAY



'NATIONALITY SHOPPING' BY MNES - LEGITIMATE OR ILLEGAL PRACTICE FROM A LEGAL STANDPOINT?

- 'Nationality shopping' seems to be accepted if it occurs before the dispute.
- Not necessary to identify who really controls the enterprise, whether a genuine business link.
 - Tokios Tokelos v. Ukraine
 - Soufraki v. United Arab Emirates
 - Saluka Investment v. Czech Republic
 - Yukos Universal v. Russian Federation
- Claims concerning 'indirect' investments allowed (indirect control by intermediary companies)
 - Tendency in arbitration: Tza Yap Shum v. Peru/ other cases
 - Tendency in some BITs – prioritization of claims, exclusion of indirect ones



WHEN 'NATIONALITY SHOPPING' BECOMES AN ILLEGAL PRACTICE...

- When restructuring MNEs after the dispute – abuse of rights/ procedures
- Arbitration perspective:
 - *Phoenix v. Czech Republic*
 - *Mobil oil v. Venezuela*



THE WAY FORWARD: MULTIPLE YET EFFECTIVE SOLUTIONS?

- Render a definition stricter – combined criteria of nationality
- Define the concept of ‘real economic activities’ – beyond mere formal activities
- Define the concept of ‘substantial business activities’ – through a number of factors, for instance:
 - a substantial and long term commitment of capital
 - a substantial number of employees
 - assumed entrepreneurial risk
 - a substantial contribution to the development of the Host State (i.e. transfer of technological knowhow)
 - operations done in accordance with the law of the Host State
- ‘Origin of capital’ clause: excludes protection from ‘domestic’ investment?
 - Ex. Germany-Costa Rica BIT



THE WAY FORWARD – A BALANCED ‘DENIAL OF BENEFITS’ CLAUSE

- Need a balance: Development of a state practice & legitimate needs of corporations in structuring investments
- Insert a comprehensive ‘denial of benefits’ clause: benefits?
 - Refuse protection when lacking business ties – limit abusive nationality shopping
 - Applicable cases:
 - ➔ Absence of substantive business activities in the State of nationality
 - ➔ Companies controlled by nationals of a non-Party State/ Host State (free-riders)
 - Phrases used in the clause:
 - ➔ ‘No substantial business activities’
 - ➔ ‘Persons of a non-Party, or of the denying Party, own or control’ the MNE
- Arbitration viewpoint: non-automatic effect of the clause
 - *Plama consortium v. Bulgaria* (non-retrospective effect)
 - *Yukos Universal v. Russia*



THANK YOU

