



APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION

Presentations

Kuala Lumpur, Malaysia
15-19 June 2009

Produced for:
Asia Pacific Economic Cooperation Secretariat
35 Heng Mui Keng Terrace
Singapore 119616
Tel: (65) 68919 600 Fax: (65) 68919 690
Email: info@apec.org
Website: www.apec.org

©2009 APEC Secretariat

APEC#209-CT-01.5

Thailand's Experience on Investor-State Dispute Settlement:

Vilawan Mangklatanakul
17 June 2009

BIT-FTA Experiences

- Thailand concluded 39 BITs and 6 FTAs, containing Investment Chapters (ACFTA, AANZFTA, AKFTA, JTEPA, TAFTA, TNZFTA)
- Ongoing FTA negotiations: Thai-India, Thai-EFTA, ASEAN-India, BIMSTEC

Current Positions of Thailand

- The scope of 'investment' covers only FDI
- Provide investor-state dispute settlement provisions
- Provide protection for post-establishment stage only
- Excludes performance requirements, pre-establishment breaches

Coverage of Protection

- NT/ MFN Treatment
- Fair and equitable treatment
- Expropriation and Compensation
- Free transfer
- Subrogation

Model Clause

- Consultation
- If failed, investors can submit to
 - A competent national court
 - Ad hoc arbitration under UNCITRAL
 - ICSID, in case both contracting parties are contracting states to the Convention on the Settlement of Investment Disputes between states and nationals of Other States, 1965

Model Clause (cont.)

- Decision is made on the basis of
 - National laws and regulations of the Contracting States
 - Provisions of the Agreement
 - Applicable rules of international law
- Decision is final and binding on the parties to the dispute
- Examples: Article 106 of the JTEPA, Articles 28-41 of the ACIA, Article 917 of Thailand-Australia FTA

Relevant laws

- Arbitration Act B.E. 2545 (2002)
 - Adopting UNCITRAL Model Law
 - Recognition and enforcement of foreign arbitration awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958
 - Covering disputes on international civil and commercial matters
 - Arbitration Award
 - Enforceable by the relevant courts
 - Grounds for refusal of foreign award (section 43)

ICSID?

- Thailand is a signatory to the ICSID Convention since 6 December 1985, but has never ratified it.
- Difficulties:
 - Types of dispute/ prior consent (article 25)
 - Enforcement of the award as a final judgment (article 54 (1))

Concession contract

- Concession contract: administrative/ commercial contract
- Section 15 of the Arbitration Act: In a contract between a government agency and private party, whether administrative contract or not, the parties thereto may agree to settle their disputes by arbitration. The parties to the contract shall be bound by such arbitration agreement.

Government policy

- Cabinet decision re: arbitration & concession contract between government agency and foreign investor
 - Administrative contract
 - No prior consent unless approved by the cabinet
 - Adopt Thai law as applicable law

Relation with BIT

- Breach of concession contract is automatically a breach of treaty?
- BIT provision, e.g. Thai-Jordan art. 10(2), Thai-Germany art. 7(2)
 - "Each contracting party shall observe any other obligation it may have entered into with regard to investments of investors of the other contracting party"

Recent Cases

- **Under contract:** Bangkok Expressway Plc (BECL) vs Expressway and Rapid Transit Authority of Thailand (ETA)
- **Under BIT:** the Walter Bau Case

BECL vs ETA

- In 1998, BECL submit a claim against ETA to a Thai arbitral tribunal seeking compensation for its failure to deliver areas for construction an expressway
- In 2003, the Civil Court upheld the arbitral award that the government must pay Bt 6 billion.
- In 2009, the Supreme Court refuse to enforce the award on the ground that they are corruption in the process of approving the concession contract.

Walter Bau Case

- Germany-Thailand BIT of 2002
- Walter Bau is a minority investor in Don Muang Tollway, a local Thai company
- Based on a concession to construct and operate Don Muang highway
- In October 2009 Arbitral tribunal decided that it has jurisdiction over the case
- The case is still pending

Concluding Remarks

- Dilemma: the need to attract FDI VS the need to protect domestic businesses
 - To strike the right balance is difficult
- BIT/FTA obligations are very wide and considered by the government to be favourable to investors
- Increased litigation
- Arbitrators often not taking into account public policy and implementing public international law