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# Arbitration as an Alternative Means of Settlement of Disputes Arising Out of Thailand's State Contracts Involving Foreign Direct Investments

Patcharang Chaiworamukkul  
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# **GOLDEN GATE UNIVERSITY SCHOOL OF LAW**

## **ARBITRATION AS AN ALTERNATIVE MEANS OF SETTLEMENT OF DISPUTES ARISING OUT OF THAILAND'S STATE CONTRACTS INVOLVING FOREIGN DIRECT INVESTMENTS**

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**SUMMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW,  
DEPARTMENT OF INTERNATIONAL LEGAL STUDIES,  
IN FULFILMENT OF THE REQUIREMENT FOR THE CONFERMENT OF  
THE DEGREE OF SCIENTIAE JURIDICAE DOCTOR (SJD).**

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**NOVEMBER 2009**

## **Dedication**

This dissertation is dedicated to Mrs. Chaloy Sungnoi Ketkludyoo, my beloved grandmother.

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## **Abstract**

This dissertation examines how the Office of the Attorney General of Thailand's mandates in reviewing state contracts might be improved in order to help enhance greater FDI flow toward Thailand. International arbitration would be stipulated within the "settlement of disputes" clause included in a state contract so as to assure and gain foreign investor's confidence. This dissertation has been conducted by examining all levels of relevant national legislation as well as international law, especially those international obligations that Thailand has entered into. Based upon such examination, there are at least two (2) problems and obstacles that make the application of arbitration for state contracts in Thailand a continuous struggle: the initial impediment to the arbitration system and the contradiction and inconsistency of the arbitration system. Given the findings, there should be a mechanism, namely, a Testing Process that would help differentiate a "state contract relating to qualifying FDI" from others. Only the defined state contract relating to qualifying FDI subject to the Testing Process will be governed by a proposed Uniform and Standard Methodology of Arbitration, encompassing the ratification of the ICSID Convention on part of Thailand; the establishment of the Special Method; and the modification of the existing arbitration laws and regulations.

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## Abbreviations

AALCO	ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution
AIN	ASEAN Investment Area
ASEAN	Association of South-East Asian Nations
ASEAN+3	ASEAN plus China, Japan and Korea
AUSBIT	Argentin United States Bilateral Investment Treaty
BBCD	Bilfinger, Berger Bauaktiengesellschaft, CH. Karnchang Public Company Limited, and Dyckerhoff & Widmann AG
BD3	Benchmark Definition of Foreign Direct Investment: Third Edition
BECL	Bangkok Expressway Company Limited
B.E.	Before Buddhist Era
BITs	Bilateral Investment Treaties
BMA	Bangkok Metropolitan Administration, Thailand
BPM5	Balance of Payments Manual: Fifth Edition
BOI	Board of Investment, Thailand
BOT	Build-Operate-Transfer
BTO	Build-Transfer-Operate
CAP	Certificate of Approval for Protection
CCC	Civil and Commercial Code, Thailand
DMT	Don Muang Tollway

DSI	Department of Special Investigation, Thailand
ETA	Expressway and Rapid Transit Authority of Thailand
FCN	Treaties of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FPO	Fiscal Policy Office, Thailand
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GPA	Government Procurement Agreement
IBRD	International Bank for Reconstruction and Development
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
IDA	International Development Association
IEAT	Industrial Estate Authority of Thailand
IFC	International Finance Corporation
IFCT	Industrial Finance Corporation of Thailand
IMF	International Monetary Fund
JSEPA	Agreement between the Republic of Singapore and Japan for a New Age Economic Partnership
MFN	Most-Favored Nation Treatment
MIGA	Multilateral Investment Guarantee Agency
MITs	Multilateral Investment Treaties
NAFTA	North American Free Trade Agreement
NESDB	Office of the National Economic and Social Development Board, Thailand

NGOs	Non-Governmental Organizations
NIEO	New International Economic Order
OAG	Office of the Attorney General, Thailand
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
SDRs	Special Drawing Rights
TAI	Thai Arbitration Institute
TIFA	Trade and Investment Framework Agreement
TOR	Terms of Reference
TOT	Telephone Organization of Thailand
TPRB	Trade Policy Review Body
TRIMs	Agreement on Trade Related Investment Measure
TRIPs	Agreement on Trade Related Aspects of Intellectual Property Rights
U.N.	United Nations
UNCITRAL	United Nations on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VAT	Value Added Tax, Thailand
WBG	World Bank Group
WTO	World Trade Organization

## **Introduction**

FDI is of great importance for Thailand since Thailand as a host state needs foreign capital flowing into her territory. In Thailand, FDI can be found in various forms but one of the most efficient means to promote FDI is often found through state projects. To attract FDI, the State encourages private foreign investors to participate in state projects that offer incentives and certain protection on investments. FDI invested in state projects are likely operated through state contracts (for example, construction contracts, concession contracts, or management contracts).

The OAG acting as a state attorney has authority to review drafts of state contracts that Government Agencies are hoping to enter into with the private parties. Therefore, the OAG must ensure that the terms and conditions of each state contract serve the parties' agreement and accordingly, that those terms are binding and enforceable under relevant laws and regulations. In addition, the OAG must ensure that a state contract functions well according to its purposes. This is particularly true for a state contract carrying the function of FDI. With this regard, the OAG must be aware that such a state contract contains FDI-friendly clauses to facilitate and enhance FDI flow toward the country. If the state contract carrying FDI functions well, the state contract could contribute to the influx of foreign investments into Thailand.

This dissertation is, therefore, to seek how the OAG's mandates in reviewing state contracts can be improved in order to enhance FDI flow into the country. A well-written contract is not, however, the only answer to improve the effectiveness and function of a state contract in carrying FDI incentives. A contract must contain FDI-friendly clauses to assure and gain the investor's confidence. One of the foremost FDI-friendly clauses enhancing FDI inflow is the availability of

arbitration (including international arbitration), that is included in the “settlement of disputes” clause. The reason is that a method for dispute settlement becomes a great concern among foreign investors who might be uncomfortable and reluctant to settle disputes in domestic judiciary system – the cause of doubt for some foreign investors skeptical about the impartiality of local courts and local administrative bodies. Therefore, to help foreign investors gain more confidence in their investments made in Thailand, Thailand is compelled to seek a measure to ensure that their investments will be protected, especially when disputes arising out of investments occur.

As a consequence, there should be a method of dispute settlement that satisfy foreign investors in terms of the impartiality and reliability of the methods available for them. This dissertation proposes that there should be a Uniform and Standard Methodology of Arbitration for disputes arising out of state contracts relating to qualifying FDI available for foreign investors that is consistent and compatible according to relevant domestic law as well as international obligations that Thailand has entered into. If the effectiveness and efficiency of a state contract is enhanced and promoted so as to bolster the investor’s confidence, the state contract relating to FDI would contribute to the flow of FDI moving toward the country to greater extent.

Given the foregoing facts, presumption, and proposition, this dissertation comprises:

Chapter one. This chapter provides the overview and relation of FDI and Thailand’s state contracts. This chapter emphasizes the importance and development of FDI (especially for the fact that the development of FDI was derived from the state responsibility rule and resulted in the emergence of current BITs). The chapter also describes Thailand’s state contracts, the Administrative Structure of the

Government Organizations of Thailand, types of state contracts, FDI in Thailand, and the involvement of the OAG's in the review of state contracts.

Chapter two. This chapter describes the OAG's practice and process of reviewing draft state contracts. This chapter explores how the OAG performs the function of scrutinizing state contracts by looking at all levels of relevant legislation. Basically, this chapter clarifies relevant domestic laws, regulations, cabinet resolutions, and the OAG's internal practice together with relevant international obligations that Thailand has entered into, especially UNCITRAL, the New York Convention, the MIGA Convention, and Thailand's BITs with other countries.

Chapter three. This chapter examines categories of state contracts under the Thai legal system and finds that indistinguishable categories of state contracts is the initial impediment to the arbitration system governing disputes arising out of state contracts. In order to find a solution to this problem, the study considers the meaning, scope, and expansion of the terms "investment," and "FDI" from international perspective (both customary international law and modern international instruments). In this chapter, the dissertation proposes that the testing process defining the terms, "state contract relating to qualifying FDI" should be established rather than putting countless efforts to redefine and re-categorize the current contract types in order to differentiate a state contract carrying or representing FDI from the other. This is to ensure that a state contract carrying or representing FDI as a so-called "a state contract relating to qualifying FDI," whether or not it is named as such shall be differentiated from other types and shall be accordingly treated appropriately under relevant domestic and international law.

Chapter four. This chapter is the main focal point of the dissertation, and is devoted to demonstrating that the arbitration for disputes arising out of a state

contract is inconsistent, incompatible, and contradictory. This analysis is a result of scrutinizing arbitration law domestically and internationally. Given the in-depth analysis, it finds that the domestic arbitration law is not harmonious partly due to the confusion of the jurisdiction between the Court of Justice and the Administrative Court over disputes arising out of a state contract relating to qualifying FDI. In addition, it also finds that domestic arbitration law still stands in stark contrast with the legal methodology for arbitration under international law: namely UNCITRAL, the ICSID Convention, the New York Convention, the MIGA Convention, and Thailand's BITs with other countries.

Considering Thailand's international obligations under these conventions, it is surprising to find that Thailand signed the ICSID Convention in 1985 but that Thailand has not ratified the Convention yet. The non-ratification of the ICSID Convention on the part of Thailand renders the arbitration system in Thailand even more inconsistent and incomplete. What puts Thailand in an awkward and unpleasant position is that Thailand has already committed herself to recognize and enforce arbitral awards made outside her territory under the New York Convention as well as that Thailand has already committed herself to comply with the arbitral awards where MIGA is one of the disputing parties under the MIGA Convention but Thailand herself is not eligible to submit a dispute to international arbitration under ICSID due to non-ratification of the ICSID Convention even though ICSID is the most appropriate means providing an investor-state settlement of disputes.

Chapter five. This chapter proposes that a Uniform and Standard Methodology of Arbitration governing disputes arising out of a state contract relating to qualifying FDI should be established. The dissertation first proposes that Thailand should ratify the ICSID Convention with a reservation and condition. Second, the

Special Method governing disputes arising out of a state contract relating to qualifying FDI should be adopted. Third, based upon the preceding proposals, domestic laws and regulations on arbitration should be modified in a manner consonant with the ratification of the ICSID Convention, the establishment of the Special Method and the existence of the Administrative Court.

Conclusion. This chapter emphasizes the main purpose of this dissertation, namely, to review the OAG's roles and mandates in scrutinizing a state contract relating to qualifying FDI in order to improve and increase the effectiveness and efficiency of the function of a state contract relating to qualifying FDI. In doing so, the hope is to help promote and motivate FDI flowing into Thailand. To achieve this, the OAG must ensure that in addition to a well-drafted contract concerned (especially a state contract relating to qualifying FDI), the contract itself should also provide a reliable and effective mechanism of a dispute settlement resolution for foreign investors under a Uniform and Standard Methodology of Arbitration as proposed by this dissertation. It is strongly believed that such a Uniform and Standard Methodology of arbitration becomes one of the key factors that can help stimulate and enhance FDI inflow into a country.



## **Chapter 1 Foreign Direct Investment (“FDI”) and Thailand’s State Contracts**

### **1. The Significance of FDI to Developing Nations like Thailand**

#### **1.1. FDI and State Responsibility in respect of Foreign Investments and the Use of “Self-Help” Measures**

Foreign investments (including FDI) have been part of the history since ancient times, and flourished most notably between the eighteenth and nineteenth century. During those periods, foreign investments often flowed from imperial states to colonial states. Under the colonial periods, colonial states were not required to provide protection of property owned by foreign investors because the protection had been already given to them by their colonizing states. However, in a case where foreign investments took place outside colonized countries, protection of foreign investments became a great concern to foreign investors. As a result, any loss of investment, especially in cases of “sovereign default,” could give rise to an injured state (a home state in terms of FDI) claiming the principle of “state responsibility” against a host state (in terms of FDI).

“Sovereign default” was a circumstance where a debtor state (a host state) failed under its contractual obligations to repay debt due to nationals of a creditor state (a home state). The sovereign default could be a cumulative event<sup>1</sup> or a combination of factors that included a high level of foreign debt, sluggish domestic growth, problems in domestic economic policy, rising interest rates, currency devaluations, a collapse in commodity prices for commodity-exporting countries, or instability of the domestic political situation.

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<sup>1</sup>M. Miller, The Backgrounder: Sovereign Bankruptcy.

Under a circumstance of sovereign default, the injured state might bring a claim against a host state under the state responsibility principle because the injured state had power to protect its citizens outside its national boundaries where the offending state failed to meet the minimum international standards for the treatment of aliens. As a consequence, the injured state would exercise its power to demand compensation or reparation for personal injuries (including loss of life, economic or financial injuries) as well as loss of property of assets or property damages (including loss of investments, expropriation, nationalization and requisition or confiscation of property belonging to foreigners). Under such a circumstance, the home state could apply any means (including the use of armed forces) against the host state to compel the host state to pay debts owed to its nationals.<sup>2</sup>

However, before the principle of state responsibility was raised, it was a common practice and requirement that foreign investors had to seek their own redress within domestic mechanisms of the host state. Only after local remedies had been exhausted and foreign investors had ended up with nothing or inadequate compensation, they would then turn to their respective government (their home state) to pursue their claims against the host state by means of subrogation.<sup>3</sup> By doing so, the individual claim by foreign investors would be passed on to their home state in order to deal with the pursuit of justice for them.

Interestingly, in the eighteenth century, a method that a home state of a foreign investor chose to deal with the pursuit of claims on behalf of its citizens was military intervention. It was legitimately accepted during this era that in a case of sovereign default, a creditor state --by giving protection to its nationals' investment in

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<sup>2</sup> Sompong Sucharitkul, State Responsibility and International Liability under International Law, 18 Loy. L.A. Int'l & Comp. L.J.821 at 823.

<sup>3</sup> Sompong Sucharitkul, Mediation and Conciliation as Alternative Means of Settling International Disputes, ICSID Review (1995).

a debtor country-- could use armed forces to intervene in a debtor state's territory to collect default payment. From the creditor states' perspective, it was justified to do so. The intervention in weaker states' territory by using military force to collect default debt in the pursuit of justice for their citizens was a so-called "self-help" mechanism used by states with greater military and economic strength.<sup>4</sup>

Prior to 1907, the use of military force became common practice, particularly for stronger states, known as the Northern states, in order to collect debts owed to their citizens by weaker states. By such common practice, it seemed that loans granted by nationals of the Northern states to the Southern states would be guaranteed by government troops.<sup>5</sup> Furthermore, a legal interpretation that permitted stronger states to intervene against weaker states for other reasons made a mockery of sovereignty and independence; it made weaker states no better than colonies.<sup>6</sup>

The justified use of force can be illustrated in a case where France sent military troops to Vera Cruz in 1838 to collect debt owed by the Mexican government. This continued during the periods between 1861 and 1863, as Britain, Spain and France sent collective military troops to intervene in Mexico's territory for the purpose of debt collection. In this case, France had an ulterior motive for intervening in Mexico since the French stayed and appointed Maximilian as Emperor for a brief and disastrous reign in 1864. In 1902, Germany and Britain engaged in joint military action to force the Venezuelan government to pay default debts incurred by German and British corporations. By doing so, five (5) Venezuelan ports as well as the mouth of the Orinoco River were blockaded by German and British ships.

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<sup>4</sup> Martha Finnemore, Department of Political Science, George Washington University, Sovereign Default and Military Intervention, Address at the 1996 Annual Meetings of the American Political Science Association, August 28 – September 1, 1996 in San Francisco, California, available at <http://www.stanford.edu/class/polisci243b/readings/v0000113.pdf> (last visited Apr. 20, 2009).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

Venezuelan gunboats and bombarded forts at Puerto Cabello were sunk by Germany and Britain's action. When the case was brought to arbitration, the Hague Court reaffirmed that the intervention of Germany and Britain was justified because their intention to use military force was to secure justice for their citizens.

The turning point began in 1902 when Latin American countries fought back by arguing that all states--weaker or stronger--had equal sovereignty over their territories under international law. With this regard, Professor Christian N. Okeke, added, any nation was considered sovereign "if it governed itself, under whatever form, and did not depend on any other nations."<sup>7</sup> As a result, sovereign equality of each state was seen as a fundamental principle of international law and states should be restrained from using military force against other states except for "self-defense."<sup>8</sup> The most important critic of the prevailing state of affairs, Argentina's Minister of Foreign Affairs, Luis Drago, an Argentine ambassador in Washington, asserted that the sovereignty must be reinterpreted in a way that the use of force by military intervention could not be justified by the collection of debts. Drago emphasized that the sovereign equality of states should be recognized and adopted in all of modern law. The concept had been subsequently accepted as Drago Doctrine.

Therefore, to put the forcible debt collection by military intervention to an end, the creation of a mechanism in a form of compulsory arbitration to deal with disputes arising from such trade and investment had been made a priority in the Second Hague Peace Conference in 1907, which replaced the Hague Convention in 1899. The 1899 Hague Convention had adopted institutional arbitration for the

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<sup>7</sup> Christian N. Okeke, INTERNATIONAL LAW IN THE NIGERIAN LEGAL SYSTEM, 27 Cal. W. Int'l L.J. 311 324. See also S. Prakash Sinha, New Nations and the Law of Nations 13 (1967).

<sup>8</sup> E. Malory Cousens, Self-Defense as A Justification for the Use of Force between States (1995) (unpublished Ph.D. dissertation, Oxford University) (on file with author).

Pacific Settlement of International Disputes and established the Permanent Court of Arbitration (PCA),<sup>9</sup> which was seen as the oldest arbitration body in the world.<sup>10</sup>

Given such a long history of state responsibility regarding foreign investment and the FDI, those concerns regarding minimum standard of treatment and protection on foreign investment, capital and property, dispute settlement resolution and so on have played an important part of negotiations between host states and home states in various forums and on various levels. Some are seen in forms of bilateral investment treaties or BITs whereas some are found in forms of multilateral investment treaties or MITs. For example, the development of those negotiations on investment protection can be found in the Association of Southeast Asian Nations (“ASEAN”), the Asia-Pacific Economic Cooperation (“APEC”), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID”) and so on. Especially for the latter, ICSID is created to serve as dispute settlement mechanism where one party is a host state and the other party is a national of another state.

## **1.2. Investment Treaties**

The consequences of the “sovereign default,” the “self-help” measure, and the “sovereign equality” of all states in those days brought about the negotiation between host states and home states and gave rise to international trade and commercial treaties during the eighteenth century called the “Friendship, Commerce and Navigation” (“FCN”) treaties.<sup>11</sup> However, the objectives and purposes of FCN treaties were not confined to or exclusively aimed at investment or commerce. On the contrary, they were extended to other concerns such as the use of military force, the

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<sup>9</sup> Rosenne, S. (ed). “The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents.” The Hague, T.M.C.; Asser Press 2000.

<sup>10</sup> G. Biggs., Settlement of International Trade and Investment Disputes.

<sup>11</sup> K.J. Vandeveld, The Bilateral Investment Treaty Program of the United States, 1988, 21 Cornell International Law Journal 201.

access and usage of internal ports and lands of a host state, charters on an alien's exclusive rights to enjoy in a host state or criminal procedure when arrested. FCN treaties in those days were seen as measures for spreading the influence of the major powerful states in host states. For example, the United States made alliances with other states of the world through FCN treaties.<sup>12</sup>

Nonetheless, FCN treaties were considered to be the precursors of our present bilateral investment treaties or BITs.<sup>13</sup> FCN treaties came to be used with the more specific purpose of investment and lead to the creation of bilateral investment treaties or BITs due to social and economic changes after decolonization. Generally, BITs are based on the notion of reciprocity and mutual interest between a host state (capital-importing state) and a home state (capital-exporting state). As a result, they are considered to be international legal instruments by which two countries set down rules that would govern investments by their respective nationals in the other's territory.<sup>14</sup> Basically, the present BITs are agreements based on an "ad hoc" basis depending on mutual interest, expectation and bargaining power between the host state and the home state.

By means of an ad hoc BIT, both host and home states bring their concerns to the table for negotiation. From the host state perspective, the capital-

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<sup>12</sup> *Id.* at 209.

<sup>13</sup> M. Sornarajah, The International Law on Foreign Investment, 208 (2<sup>nd</sup> ed. 2004) (1994).

<sup>14</sup> The literature and doctrinal commentary on BITs are abundant and have expanded over the years as the number of Bilateral Investment Treaties ("BITs") has grown. See generally, e.g., RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 225-76 (1994); U.N. CONF. ON TRADE AND DEV. ("UNCTAD"), BILATERAL INVESTMENT TREATIES, 1959-1999, U.N. Doc UNCTAD/ITE/IIA/2 (2000), at [http:// www.unctad.org/en/docs/poiteiid2.en.pdf](http://www.unctad.org/en/docs/poiteiid2.en.pdf) (last visited Apr. 29, 2009); UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S, U.N. Doc. UNCTAD/ITE/IIT/7 (1998); K. J. VANDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992); Antonio R. Parra, The Scope of New Investment Laws and International Instruments in Economic Development, in ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND LAW 27 (R. Pritchard ed., 1996). In addition, see the website of the International Centre for Settlement of Investment Disputes ("ICSID") for materials on BITs, including the texts of many BITs, arbitration awards that have interpreted and applied them, and a bibliography of books and articles commenting on BITs. See ICSID, ICSID Bilateral Investment Treaties, at <http://www.worldbank.org/icsid/treaties/treaties.htm> (last visited Apr. 29, 2009).

importing state uses a BIT to attract FDI, hence increasing the amount of capital and associated technology that flows to its territory. This is mainly to deal with the promotion on FDI in the host state's territory. From the home state perspective, the capital-exporting state uses a BIT as a means to protect the investments made by its nationals and companies in the host state. In addition to protecting the investments of its nationals, some countries, especially the United States, have had another objective in negotiating BITs— to facilitate the entry and operation of these investments by inducing host countries to remove various impediments in their regulatory systems.<sup>15</sup>

Despite the fact that a BIT is normally a reciprocal agreement between a capital-importing state (normally the developing country) and a capital-exporting state (normally the developed country) where a BIT between them is founded on a grand bargain: a promise of protection of capital in return for the prospect of more capital in the future,<sup>16</sup> it also cannot refuse that a BIT can be found in an agreement between developing countries as well as that between developed countries. Examples of the former include BITs between Thailand and China and between Egypt and Morocco.<sup>17</sup> The most notable example of the latter is the 1988 agreement between the United States and Canada that created a free trade area between the two countries.<sup>18</sup>

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<sup>15</sup> The Deputy United States Trade Representative stated the U.S. goals in negotiating BITs as follows:

The BIT program's basic aims are to:

(1) protect U.S. investment abroad in those countries where U.S. investors' rights are not protected through existing agreements;

(2) encourage adoption in foreign countries of market-oriented domestic policies that treat private investment fairly; and

(3) support the development of international law standards consistent with these objectives.

Jeffrey Lang, Keynote Address, 31 CORNELL INT'L L.J. 455, 457 (1998). See also United States Trade Representative, USTR Focus on Investment, at [http://www.ustr.gov/Trade\\_Sectors/Investment/Section\\_Index.html](http://www.ustr.gov/Trade_Sectors/Investment/Section_Index.html) (last visited Apr. 29, 2009).

<sup>16</sup> Jeswald W. Salacuse & Nicholas P. Sullivan, DO BITS REALLY WORK?: AN EVALUATION OF BILATERAL INVESTMENT TREATIES AND THEIR GRAND BARGAIN, 46 HVILJ 67 at 77.

<sup>17</sup> AGREEMENT FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, P.R.C.-Thail., Mar. 12, 1985, available at [www.unctad.org/sections/dite/ia/docs/bits/china\\_thailand.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_thailand.pdf) (last visited Apr. 29, 2009); AGREEMENT REGARDING THE ENCOURAGEMENT AND PROTECTION OF INVESTMENT, Egypt-Morocco, June 6, 1976, available at [http://www.unctad.org/sections/dite/ia/docs/bits/egypt\\_morocco\\_arb.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/egypt_morocco_arb.pdf) (last visited Apr. 29, 2009).

<sup>18</sup> See FREE TRADE AGREEMENT, U.S.-Can., Jan. 2, 1988, 27 I.L.M. 281 (1988).

The basic structure of any BIT encompasses the following topics: scope of application; conditions for the entry of foreign investment; general standards of treatment of foreign investments; monetary transfers; operational conditions of the investment; protection against expropriation and dispossession; compensation for losses; and investment dispute settlement.<sup>19</sup>

In addition to BITs, there have been attempts to enter into multilateral investment treaties between several parties, but they have not been easily successful. The first such effort was the Havana Charter of 1948, which would have created the International Trade Organization with powers to promulgate rules on international investment<sup>20</sup> but the Havana Charter failed to gain support from a sufficient number of states.<sup>21</sup> The reason was that it was not easy for those parties to conclude all of their concerns and issues by means of a single agreement. To reach such agreement, the parties inevitably came across conflicts of interest between them (host states and home states on behalf of their investors). This was a central reason why bilateral investment treaties or BITs became more popular than multilateral investment treaties.

Therefore, it is absolutely out of questions that BITs are of great importance. In fact, the significant roles BITs play not only promote the flow of capital from the home state to the host state but also enhance capital flows globally. Without BITs, FDI flow would be obstructed. Without the incentives given to and protections surrounding foreign investments granted by BITs, foreign investors are

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<sup>19</sup> Salacuse, *supra* note 16 at 79.

<sup>20</sup> *Id.* at 72. Also see Havana Charter for an International Trade Organization, Mar. 24, 1948, U.N. Doc. E/Conf.2/78.

<sup>21</sup> *Id.* at 72. Also see William Diebold, Jr., The End of the ITO 9 (Princeton Essays in International Finance No. 16, 1952), cited in Todd S. Shenkin, Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving toward a Multilateral Investment Treaty, 55 U. Pitt. L. Rev. 541, 555 n.68 (1994).



forced to rely on the host state's law alone for protection, thereby making it difficult for foreign investors to be willing to invest their capital in the host state. In a common practice, the host state and home state will enter into a BIT agreement creating favourable conditions and FDI-friendly environments for greater economic cooperation between both states and in particular, for the investments made by nationals and companies of one state in the territory of the other state. As a consequence, when foreign investors make their investments in the host state, their investments will be protected by the host state's domestic law (for example, investment contracts or state contracts relating to FDI) as well as by a BIT between the host state and home state. According to this practice, it seems that protections and promotions of foreign investments depend on the two-tier level of investment agreements. At the state level, it must appear that the host state and home state enter into a BIT agreement granting the promotions and protections on investments made by their nationals in the territory of the other state. As a result of such, foreign investors (nationals of one state) shall be entitled to enjoy the promotions and protections according to BIT's provisions. At the second-tier level, foreign investments (through investment contracts or state contracts relating to FDI) shall be protected by the host state's domestic law (especially obligations under investment contracts or state contracts relating to FDI). Only the latter circumstance is within the scope of this dissertation.

To sum up, protections of and incentives for foreign investments derive from two (2) sources or levels: international investment treaties or agreements between a host state and home state (BITs) and an investment contract between a foreign investor and a host state (defined as a state contract relating to FDI under this dissertation). Under such circumstances, the host state is bound to abide by both

BIT's provisions as well as to those provisions found in any state contract relating to FDI even when the state contract relating to FDI does not expressly spell out or refer to protections of and incentives for foreign investments under a BIT in it.

Recently, international negotiations leading to these agreements (BITs) are growing rapidly in both numbers and forms. There has been an extraordinary proliferation of BITs. There are currently two thousand and five hundred (2,500) BITs, compared to about five hundred (500) BITs in 1992.<sup>22</sup> One explanation behind this phenomenon is that BITs and similar forms of agreements can bring failed issues (particularly non-WTO issues) deriving from a multilateral negotiation level to negotiations between a pair of interested countries (for example, FDI, competition policy, movement of persons, visas and work permits, mutual recognition, cooperation in specific areas and so on). Second, these agreements also provide the opportunity for bilateral pairs to customize their agreement to the bilateral propensity as to how to proceed.<sup>23</sup> Third, it seems that bilateral bargaining, which is free from the constraints of multilateral rules and which restricts bargaining power (for example, in the WTO), can offer more opportunities for mutual gain.<sup>24</sup>

As a result of these characteristics, bilateral treaties or agreements therefore become more popular, creating a liberal, favourable and competitive environment for FDI and strengthening cooperation and relations between a host state and a home state, essentially bringing about greater globally sustainable economic development.

### **1.3. Sustainable Economic Development**

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<sup>22</sup> Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law, Oxford, 2008, p. 2. Also see UNCTAD, World Investment Report (2006) XVII, 26.

<sup>23</sup> O. G. Dayaratna Banda & John Whally, National Bureau of Economic Research, Beyond Goods and Services: Competition Policy, Investment, Mutual Recognition, Movement of Persons and Broader Cooperation Provisions of Recent FTAs Involving ASEAN Countries 28 (2005).

<sup>24</sup> *Id.*

FDI is also considered the international capital flow that plays a more significant function in the world economy. FDI not only serves the benefits for a capital-importing state (a host state), which needs capital flowing into a country, but FDI also benefits a capital-exporting state (a home state) and its nationals (foreign investors). For example, FDI can allow levels of domestic investment in a country to exceed the country's level of saving and also provide a means to invest in a country where returns arising from FDI are higher than that at home.<sup>25</sup>

It cannot deny that foreign investors, host states (normally known as developing countries or the third world countries) and home states (normally known as developed countries or industrialized countries) have significantly playing roles to encourage FDI as world capital flows. The achievement of sustainable economic development is absolutely dependant upon and correlated with the performance and relations of these actors. Therefore, the United Nations General Assembly, in the Action Programme of the United Nations Development Decade II, called upon all actors consisting of developing countries, developed countries and foreign investors to be aware of how they might work toward building a better and more friendly environment for investments:

*Developing countries will adopt appropriate measures for inviting, stimulating and making effective use of foreign private capital, taking into account the areas in which such capital should be sought and bearing in mind the importance for its attraction of conditions conducive to sustained investment. Developed countries, on their part, will consider adopting further measures to encourage the flow of private capital to developing countries. Foreign private investment in developing countries should be undertaken in a manner consistent with the development objectives and priorities established in their national plans. Foreign private investors in developing countries should endeavour to provide for an increase in the local share in management and administration, employment and training of local labour including personnel at the managerial and technical*

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<sup>25</sup> Robert E. Lipsey, National Bureau of Economic Research, The Role of Foreign Direct Investment Capital Flows 13 (1999).

*levels, participation of local capital and reinvestment of profits. Efforts will be made to foster better understanding of the rights and obligations of both host and capital-exporting countries, as well as of individual investors.*<sup>26</sup>

In addition to the Action Programme of the United Nations Development Decade II pointing out the important roles of these actors, the United Nations General Assembly also issued a series of instruments balancing the interests of these actors. Obviously, permanent sovereignty over natural resources, among other things, was of significance in that the permanent sovereignty over natural resources embodied and symbolized the conflict of economic interests between capital-exporting nations and capital-importing nations.<sup>27</sup> Therefore, the United Nations General Assembly has highlighted the principles of sovereignty, territorial integrity, and political independence as fundamental elements of states' rights into the following instruments.<sup>28</sup>

### **1.3.1. United Nations General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources**

Resolution 1803 laid down the principles of permanent sovereignty of each state over its natural wealth and resources and affirmed the principles by which each state is self-determined by its people. Having said that, the right of peoples and nation to permanent sovereignty over its natural wealth and resources must be exercised in the interest of its national development and for the well-being of the peoples of a state concerned. The Resolution also suggested that the exploration,

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<sup>26</sup> The Guidelines for International Investment were adopted unanimously by the Council of the International Chamber of Commerce at its 120<sup>th</sup> Session on 29 November 1972.

<sup>27</sup> Ruth E. Gordon & Jon H. Sylvester, DECONSTRUCTING DEVELOPMENT 22 Wis. Int'l L.J. 1 53. See also Franz Xavier Perrez, The Relationship Between "Permanent Sovereignty" and the Obligation Not to Cause Transboundary Environmental Damage, 26 Env'tl. L. 1187, 1190 (1996) (citing Milan Bulajic, Principles of International Development Law: Progressive Development of the Principles of International Law Relating to the New International Economic Order 269 (2d ed. 1993)).

<sup>28</sup> G.A. Res. 29/3281, U.N. Doc. A/RES/29/3281 (Dec. 12, 1974).

development and disposition of such resources as well as the foreign capital required for these purposes should be in conformity with the rules and conditions that the people and nation freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

Furthermore, foreign investment agreements (including BITs) as freely entered into by or between sovereign states shall be observed in good faith; states and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter of the United Nations<sup>29</sup> and the principles set forth in the present Resolution.<sup>30</sup> The violation of the rights of peoples and nations to sovereignty over their natural wealth and resources shall be deemed contrary to the spirit and principles of the Charter and hinders the development of international co-operation and the maintenance of peace.<sup>31</sup>

**1.3.2. United Nations General Assembly Resolution 3201 (S-VI): Declaration on the Establishment of A New International Economic Order (“NIEO”) and United Nations General Assembly Resolution 3202 (S-VI): Programme of Action on the Establishment of A New International Economic Order (“NIEO”)**

The NIEO was set forth in a Resolution of the United Nations General Assembly, with its philosophy that the world was a "global village" (i.e., one national society).<sup>32</sup> The NIEO proposed a charter of economic rights and duties of states and a programme of action on the establishment of a new international economic order (“NIEO”). Its goals went beyond merely alleviating poverty in an attempt to change

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<sup>29</sup> Charter of the United Nations was signed on June 26, 1945 and entered into force on October 24, 1945 in accordance with Article 110.

<sup>30</sup> G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (Dec. 14, 1962).

<sup>31</sup> G.A. Res. 1803 (XVII), *supra* note 30, para 7.

<sup>32</sup> Gabe S. Vargas, The New International Economic Order Legal Debate, 1 (1983).

the material relations of production in order to better the lot of persons in the third world.<sup>33</sup> Among the demands were: increased exports from the third to the first world, transfers of capital to the third world, transfers of technology to the third world, a regime to control multinational corporations, as well as provisions for increasing aid and to alter the international monetary system.<sup>34</sup> Therefore, to establish a NIEO, the sovereign equality of states, self-determination of all peoples, inadmissibility of the acquisition of territorial integrity and non-interference in the internal affairs of other states must be taken into consideration.

### **1.3.3. United Nations General Assembly Resolution 3281: the Charter of Economic Rights and Duties of States**

The United Nations General Assembly Resolution 3281 (XXIX): the Charter of Economic Rights and Duties of States<sup>35</sup> constitutes an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality and interdependence of the interests of developed and developing countries, known as a New International Economic Order (“NIEO”). The principle of sovereignty, territorial integrity, political independence of states, sovereign equality of all states, equal rights and self-determination of peoples are the fundamentals of international economic relations.<sup>36</sup> This Resolution emphasizes that each state, either a developed state or developing state that has been recognized as having full and permanent sovereignty over all its wealth, natural resources and economic activities, is able and free to choose its economic system and political,

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<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.* at 15-16.

<sup>35</sup> United Nations General Assembly Resolution 3281 (XXIX) was adopted by the General Assembly at its twenty-ninth session on December 12, 1974.

<sup>36</sup> G.A. Res. 29/3281, *supra* note 28, chapter I.

social and cultural systems as well as to exercise its inalienable rights over its natural resources in accordance with the will of its people.<sup>37</sup>

Subject to the Resolution 3281 (XXIX), on the one hand, a developing state as a capital-importing state is encouraged to exercise its sovereign and inalienable rights to regulate and supervise foreign investment within its territory in conformity with its people's interest as well as its national treatments and restrictions. According to the Resolution, capital-importing states also can exercise of their rights to nationalize, expropriate, transfer ownership of foreign property or take foreign enterprises with appropriate compensation<sup>38</sup> so long as such exercise of full and permanent sovereignty of each state correspond with the self-determination of its people.<sup>39</sup>

On the other hand, a home state is also expected to cooperate with a host state in the establishment, strengthening and development of its scientific and technological infrastructures and its scientific research and technological activities to help expand and transform the economies of a developing country.<sup>40</sup>

The Resolution further states and emphasizes that the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in solving international problems in the economic and social fields are issues that highlight the vital importance of the Charter.

To sum up, the foregoing section demonstrates how FDI has begun to play significant roles in promoting capital flowing from home states to host states as well as global capital flows. Protection of foreign direct investments has gradually

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<sup>37</sup> G.A. Res. 29/3281, *supra* note 28, art. 1 and art. 2 para 1.

<sup>38</sup> G.A. Res. 29/3281, *supra* note 28, art. 2 para 2.

<sup>39</sup> G.A. Res. 29/3281, *supra* note 28, art. 7.

<sup>40</sup> G.A. Res. 29/3281, *supra* note 28, art. 13 para 3.

developed from the principle of state responsibility in those days to the emergence of FCN treaties in the eighteenth century, and to the development of current BITs. With this regard, the United Nations also emphasized how developing countries, developed countries, and foreign investors can contribute to international capital flow to enhance sustainable economic development. At the very least, the United Nations General Assembly has issued the following Resolutions: the United Nations Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources; the United Nations Assembly Resolution 3201 and 3202 on Declaration on the Establishment of A New International Economic Order and its Programme of Action; and the United Nations Assembly Resolution 3281 on the Charter of Economic Rights and Duties of States



## 2. Thailand's State Contracts

Before examining the significant characteristics of Thailand's state contract, it is crucial to note that a state contract also is founded upon and originates from ordinary private contract principles. Consequently, even if a state contract has special characteristics, the principles of general contract law (such as contract elements, contract formation, and so on) still apply.

Broadly defined, a contract is an agreement between parties whereby one acquires the right to an act from the other, and the other assumes an obligation to perform an act.<sup>41</sup> A contract normally comprises every description of agreements, obligations, or legal ties, whereby one party binds himself or herself, or becomes bound, expressly or implicitly, to pay a sum of money, or perform or omit to do a certain act.<sup>42</sup> Contract elements include the offer and acceptance, consideration, and mutual assent to terms essential to the formation of a contract.<sup>43</sup> Overall, the definition of a "contract" embodies all of the essential elements of a legal contract, enumerated as being: (1) parties competent to contract, (2) a valid subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.<sup>44</sup>

In addition to contract elements, the doctrines of freedom and privity of contract are of particular importance. The doctrine of "freedom of contract"<sup>45</sup> recognizes that people have the right to bind themselves legally—a judicial concept that a contract is based on mutual agreement and free choice, and thus should not be hampered by external control such as governmental interference. Meanwhile, the

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<sup>41</sup> Minn.—Petition of Anderson, 565 N.W.2d 461 (Minn. Ct. App. 1997).

<sup>42</sup> Iowa—Compiano v. Kuntz, 226 N.W.2d 245 (Iowa 1975).

<sup>43</sup> Ala.—Ex parte Grant, 711 So. 2d 464 (Ala. 1997), reh'g overruled, (Feb. 20, 1998).

<sup>44</sup> U.S.—Moglia v. Geoghegan, 403 F.2d 110, 69 L.R.R.M. (BNA) 2640, 58 Lab. Cas. (CCH) 13036 (2d Cir. 1968); Joseph v. Donovan Co., 261 F.2d 812 (9th Cir. 1958); Ram Products Co., Inc. v. Chauncey, 967 F. Supp. 1071 (N.D. Ind. 1997). Ariz.—Savoca Masonry Co., Inc. v. Homes & Son Const. Co., Inc., 112 Ariz. 392, 542 P.2d 817 (1975).

<sup>45</sup> Black's Law Dictionary 664 (8th ed. 2004). Also see, C.J.S. Constitutional Law § 491 and Atiyah, An Introduction to the Law of Contracts, p. 5 (3d ed. 1981).

doctrine of “privity of contract,”<sup>46</sup> as an elementary principle of English law, provides that contractual rights and duties only affect and bind on the parties in the contract (in other words, not to non-contractual parties). As a result, a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party, subject to certain exceptions. Such special features make the law of contract differ from the law of property insofar as while true proprietary rights are “binding on the world,” contractual rights are only binding on, and enforceable by, the immediate parties to the contract.

### **2.1. Use of Term “State Contract”**

Under Thai laws, there is no express and written definition of the term “state contract.” However, by its usage and characteristics, the term “state contract” can be understood as a contract in which a government (or a government agency acting on behalf of the State or exercising the State’s power as the one party) enters into an agreement or transacts with the other party. The other party can be any private party, other agency, international organization or other state. So despite the fact that there is no written or expressed definition, a state contract, even within the parameters of the implicit definition, must be composed of these three (3) elements.<sup>47</sup> First, one party of a contract must always be the State acting through its government agencies or persons acting on behalf of the State. Government agencies can be one of the main Government Agencies, (consisting of the Legislative Branch, Executive Branch, and Judicial Branch), Local Authorities (Local Administrative Organizations), Independent Organizations, or State Enterprises. The detailed structure and organization of the Thai Government and its agencies will be explained in the

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<sup>46</sup> Black’s Law Dictionary 1199 (8th ed. 2004). Also see, Atiyah, *An Introduction to the Law of Contract*, p. 265 (3d ed. 1981) and G.H. Treitel, *The Law of Contract*, p. 538 (8th ed. 1991).

<sup>47</sup> Nuntawat Boramanunt, *Administrative Contract* 105 (2003).

forthcoming section. Second, individual Government Agencies must have authority as designated by law to enter into a contract or transact with the other party. This is to say that a contract type and transaction to be entered by those Government Agencies must be within the scope, objectives, and mandates of their establishment.<sup>48</sup> Third, a person acting on behalf of each Government Agency must be authorized or delegated to exercise power by the law or laws establishing such a Government Agency.

A state contract is sometimes recognized as a government contract. This dissertation, however, uses the term “state contract,” instead of “government contract” since the term of a “state contract” can provide broader scope insofar as a state contract is a contract where any person or Government Agency acting on behalf of the State enters into a contract with the other party. A person or Government Agency can be any delegate from any type and level of Government Agencies: main Government Agencies (consisting of the Legislative Branch, Executive Branch, and Judicial Branch), Local Authorities (Local Administrative Organizations), Independent Organizations, or State Enterprises. On the contrary, the term “government contract” is typically more narrowly defined in that it more commonly refers to a contract where the Government as the Executive Branch enters into with any person, other state or international organization. A government contract is likely to represent transactions between parties at the international level such as a G to G agreement (Government to Government agreement). Therefore, this dissertation prefers the term “state contract” rather than “government contract” to refer to a contract in which one party is the State or involves exercising the power of the State.

By this definition, the meaning of a state contract seems very broad, thereby nearly covering all types of contracts in which one party is the State. The

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<sup>48</sup> To find out the precise scope and objectives of individual Government Agencies, it is necessary to look at the Restructuring of Government Organization Act, B.E. 2545 (2002)(Thail.) and Royal Decree of individual divisions.

types of state contracts can range from a simple transaction with a private party (for example, a sale and purchase contract) to a complex transaction at international level with other states or international organizations (for example, international agreements, treaties, and conventions).

This dissertation, however, is particularly focused on those state contracts involving the exercise of state's power as opposed to those state contracts that are deemed to be private contracts and excludes contracts entered into with other states internationally.

## **2.2. Features of a State Contract**

Even though the characteristics of a state contract are different from those of an ordinary contract among private parties, the basic legal elements of a state contract are, however, derived from contract law principles as intended to govern transactions and contracts between private parties. Nonetheless, it is to be borne in mind that not all principles of contract law apply to a state contract. The involvement of a Government Agency acting on behalf of the State makes a state contract special and distinctive from other contracts among private parties. It is also important that even if the agreement between the State and a private party based upon the doctrine of freedom of contract, this does not mean that the State resigns or gives up its sovereign power by entering into a contract with a private party.<sup>49</sup> On the other hand, the State still has and reserves dominant power over private parties. Particularly for public policy, the State always has full power to unilaterally amend or terminate contract provisions whether or not these rights are spelled out in a contract. To put it in another way, the State can declare public policy, interest, or convenience as grounds not to abide by the contract so long as the State's contractual breach is implemented

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<sup>49</sup> Hector A. Mairal, Government Contracts under Argentine Law: A Comparative Law Overview, 26 *FDMILJ* 1716 1720 (2003). Also see, J.D.B. Mitchell, The Contracts of Public Authorities: A Comparative Study (1954).

to serve such public policy, interest, or convenience. In all circumstances, the State always has superior rights over private parties. The following demonstrates certain special features of a state contract (although not what would apply to a government procurement contract):<sup>50</sup>

### **2.2.1. Public Policy**

A state contract to certain degree always relates to public policy. At the very least, the execution of a state contract is normally paid off by the national budget, which arises from taxpayers.

As a result, contracts, which are contrary to public policy, are those tending to be injurious to the public or against the public good, and as a result, they are illegal, void, and unenforceable, whether or not actual injury results occur.<sup>51</sup> Even by such a definition, determination of whether a contract is contrary to public policy is not as easy as it appears. The term of “public policy” is vague and unclear in practice. However, it is generally accepted that what constitutes a tendency to be “injurious to the public” or “against the public good” can either be designated by the policy of the law or public policy in relation to the administration of the law.<sup>52</sup> As a consequence, a contract, which is derived from the doctrine of freedom of contract that the parties enter into and which is contrary to public policy, shall be, in certain special circumstance, overruled by the public policy principle.

Therefore, the Court must take all the facts and circumstances of each case into careful consideration. To invalidate a contract between parties, the Court must be aware not to infringe the rights of the parties of a contract, which is not

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<sup>50</sup> Certain types of state contracts under Thai law can be construed as administrative contracts under French law.

<sup>51</sup> Paul M. Coltonff, Sonja Larsen & Carmela Pellegrino, *Contracts*, 17A C.J.S. Contracts § 215.

<sup>52</sup> *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 51 S. Ct. 476, 75 L. Ed. 1112, 83 A.L.R. 1168 (1931).

clearly opposed or contrary to public policy in particular.<sup>53</sup> Generally, a contract as expressly prohibited by statute, condemned by judicial decision, opposed to public morals, or having a tendency to injure the public or public interest constitutes grounds to declare such a contract contrary to public policy.<sup>54</sup>

In consequence, a state contract containing a provision, which is likely to be harmful or contrary to public policy, will allow the State (or contracting government agency) to violate its contractual obligations. Such a breach of contract is legitimately justified but the State or a contracting government agency is often obliged to compensate a private party for any damages or loss of such.

### **2.2.2 Amendment, Revision, and Termination of Contract Clauses**

As a general rule under contract law, a contract's terms and conditions (including those of a state contract) are binding on the parties and the parties are required to perform their contractual obligations under it. Despite, the contract law principle does not prevent the State from exercising its dominant power according to administrative law over the private party to unilaterally amend, revise, or terminate contract clauses provided that the State may be liable for damages incurred to the private party as a result of the State's act. To put it another way, the mere action of entering into a contract with the private party does not infer that the State resigns or gives up its sovereign power over private parties. In fact, this principle is derived from the French administrative law.

Based upon the French administrative law, any contract falling into the definition of an "administrative contract" shall not be interpreted as an ordinary

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<sup>53</sup> Ohio—Lamont Bldg. Co. v. Court, 147 Ohio St. 183, 34 Ohio Op. 73, 70 N.E.2d 447, 169 A.L.R. 133 (1946).

<sup>54</sup> U.S.—Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 51 S. Ct. 476, 75 L. Ed. 1112, 83 A.L.R. 1168 (1931).

contract and accordingly subject to the Administrative Courts.<sup>55</sup> The determining criteria of what constitutes an administrative contract is:<sup>56</sup> first, a contract that has been expressly characterized as an administrative contract by statute; second, a contract that can illustrate the presence or involvement of the public service or the performance of public service; and third, a contract that either:

(i) includes clauses showing that the State or its government agency wishes to exercise public law prerogatives with respect to the contractor (the “exorbitant clauses”);

(ii) is subject to a special legal regime that grants the State certain regulatory or control powers (the “exorbitant regime”); or

(iii) entrusts a private contractor the performance of public service or is intricately linked with the performance of public service so that such a contract is to form the characteristics of the performance of public service, or constitute the contractor’s involvement in the performance of public service.<sup>57</sup>

As a result, a state contract, which falls into the category of an administrative contract, shall be interpreted by way of administrative law, thereby giving the State privileges or superior rights over the private party in that the State may violate its contractual obligations with the private party if it is necessary according to the administrative law.

### **2.2.3. Breach of Contract by the State and State Responsibility for Denial of Justice Rule**

Whereas the foregoing sections in 2.2.1. and 2.2.2. demonstrate the special characteristics of a state contract in the sense that the State has absolute superior right over the private party in respect of breach of contract or amendment,

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<sup>55</sup> Mairal, *supra* note 49 at 1720.

<sup>56</sup> *Id.* at 1723.

<sup>57</sup> *Id.* at 1723.

revision, termination of contract clauses so long as the State can raise the public policy principle, this section, on the other hand, demonstrates that the State (the host state) also has superior right over foreign investors in some exceptional cases.

Under the traditional rule of international law, the mere state's breach of contract with a foreign investor is not automatically deemed as international wrong, thereby not bringing about the state to be liable for any compensation to a foreign investor. Only a breach of the state's contractual obligations together with additional allowable grounds can raise the principle of state responsibility.

One of the common grounds that can make the state liable to a foreign investor under international law is "denial of justice." Denial of justice occurs in the context where a capital-exporting state (a home state) disputes with a capital-importing state (a host state) on a minimum standard of treatment of foreign investors and their property. The classic conception of the inability or unwillingness of courts to adequately remedy an antecedent wrong that occurred outside the judiciary constitutes a denial of justice.<sup>58</sup> For example, denial of justice can be raised against the offending state where a court refuses a foreign claimant — a procedural right— including acts such as denial, unwarranted delay, obstruction of access to the court, deficiency in the administration of justice, failure to provide guarantees of proper administration of justice.<sup>59</sup> Consequently, denial of justice is likely a matter of procedure: a failure to provide a national legal system with due process rather than substantive law.

Additional justifiable grounds that can raise the principle of state responsibility under international law are, for example, the state's unfair manner or

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<sup>58</sup> Bradford K. Gathright, A STEP IN THE WRONG DIRECTION: THE LOEWEN FINALITY REQUIREMENT AND THE LOCAL REMEDIES RULE IN NAFTA CHAPTER ELEVEN, 54 Emory L.J. 1093, 1110. See also Clyde Eagleton, Denial of Justice in International Law, 22 Am. J. Int'l L. 538, 542 (1928).

<sup>59</sup> *Id.*



treatment to an investor, an allegation of discrimination, abus de droit, any other international tort of the traditional type, or denial of justice.<sup>60</sup> Furthermore, breach of the state's contractual obligations, where no reparation is made for the injuries sustained after the remedies established by the laws of the country have been exhausted constitutes a ground for denial of justice, and as a result, can raise the principle of state responsibility.<sup>61</sup> Therefore, the state's contractual breach, which imposes the state to be liable to a foreign investor must comprise additional consideration of those elements, thereby constituting a ground of denial of justice by the host state.

#### **2.2.4. Cancellation of Contract by the Host State**

Like the foregoing section in 2.2.3., this is to demonstrate the superior right of the state (the host state) over foreign investors. As to the contract law principle, a contract as entered into between the state and a private foreign investor is obviously binding on the parties according to the *pacta sunt servanda* principle, thereby imposing the state to perform its contractual obligations therefrom. Nonetheless, it must be recognized that while the state is obliged to perform its contractual obligations according to the *pacta sunt servanda* principle, the state also has full and permanent sovereignty over its natural wealth and resources in the interest of its national development and of the well-being of the people of the state. As a consequence, the commitment arising out of a contract should not prevent the state from exercising its sovereign right to cancel a contract with a foreign investor.

Where cancellation of contract by the host state is to happen, like the breach of contract principle, cancellation of contract by the host state also lies on and

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<sup>60</sup> F.A. Mann, *State Contracts and State Responsibility*, 54 AM. J. Int'l L. 572, 577 (1960); see also CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW*, 194 (P.E. Corbett trans., 1957); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 547-51 (3ed. 1979).

<sup>61</sup> K. Lipstein, *The Place of the Calvo Clause in International Law*, 1945 BRIT. Y.B. Int'l L. 130, 134.

derives from the same principle of state responsibility as mentioned above in 2.2.3. The mere cancellation of contract by the host state cannot bring about the state responsibility principle unless the said cancellation of contract encompasses additional circumstances of justifiable grounds as mentioned earlier. To substantiate an international claim, it is necessary to prove that the respondent government has committed a wrong through its duly authorized agents or that the claimant has suffered a denial of justice in attempting to secure redress.<sup>62</sup> The failure of the host state to fulfil a contractual obligation towards an alien does not automatically result in a breach of international law unless such a failure is confiscatory or discriminatory in nature.<sup>63</sup>

Furthermore, in a case where cancellation of contract by the host state constitutes, amounts to, or is tantamount to expropriation, such action of expropriation (cancellation of contract) must comply with the conditions under customary international law, namely for public purpose, as provided by law, in a non-discriminatory treatment and with compensation as to be explained in the topic below.

#### **2.2.5. Nationalization, Expropriation, Indirect Expropriation, and Creeping Expropriation<sup>64</sup>**

The terms “nationalization,” “expropriation,” “indirect expropriation,” or “creeping expropriation” are unclear and indistinguishable under international law. Generally, these terms are implicitly understood as governmental actions of taking of foreign investments or property. Of course, these terms are of great concern for foreign investors so that every BIT often contains a clause assuring that investments

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<sup>62</sup> 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW, 1558 (1943).

<sup>63</sup> Lipstein, *supra* note 61.

<sup>64</sup> Expropriation is seen as a method in which the state takes over property belonging to individuals for public interest of local necessity while nationalization is a special form of acquisition of private property (whether it is national or foreign property) by means of compulsory transfer of the private property to the state. The term of “expropriation” can, in some cases, be used as a substitute for nationalization

made by nationals of one state (a home state) in the other state (a host state) will be protected as far as nationalization and expropriation are concerned. Due to the fact that it is unlikely to draw the distinction of these terms, these terms, especially “nationalization” and “expropriation” can, in some cases, be used in substitution for each other in practice. Before exploring the implication of these terms, it is inevitably to describe the following terms: nationalization; expropriation; indirect expropriation; and creeping expropriation.

When looking at the history of nationalization during decolonization period, nationalization referred to a situation in which a state embarked on a wholesale taking of property of foreigners to end their economic domination of the economy or sectors of the economy.<sup>65</sup> However, nationalization in the present times is seen very similar to expropriation and they are often used interchangeably. The term “nationalization” is defined as the act of bringing an industry under governmental control or ownership,<sup>66</sup> whereas Kaj Hober views that nationalization as the systematic expropriation of private property within one or more specific sectors of a nation’s economy within the framework of socio-economic or political reform.<sup>67</sup> Nationalization is likely based on the alteration of social-economic structure. Once the nationalization of assets or businesses takes place, the state usually continues the carrying out of business or the utilization of such assets as it has been previously used. The nationalizing state will utilize the opportunities arising from the nationalized assets or businesses created by the former owner.

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<sup>65</sup> Sornarajah, *supra* note 13 at 346.

<sup>66</sup> Black’s Law Dictionary (8<sup>th</sup> ed. 2004). Also see C.J.S. International Law § 35.

<sup>67</sup> Kaj Hober, INVESTMENT ARBITRATION IN EASTERN EUROPE: RECENT CASES ON EXPROPRIATION 14 AMRIARB 377 at 381.

Expropriation is defined as a governmental taking or modification of an individual's property rights,<sup>68</sup> which normally gives to the person affected by the expropriation a claim to full compensation. Expropriation not only means a direct and formal taking of private property by a government but also includes some indirect measures, whereby a state deprives an individual or enterprise of the enjoyment of their property. The distinction between nationalization and expropriation could be made in a context where nationalization leads to the wholesale of taking of foreign property while expropriation targets a specific business belonging to foreigners.<sup>69</sup>

Indirect expropriation tentatively introduces any measure that leads to the deprivation by state organs of a right of property either as such, or by permanent transfer of the power of management and control over it.<sup>70</sup> Consequently, indirect expropriation can be found in various forms and measures, especially those measures, which *per se* are legitimate but their cumulative effect can *de facto* give rise to an expropriatory nature and accordingly those measures are tantamount to expropriation.<sup>71</sup> Apparently, governmental actions, where the actual seizures of the invested property by a host state totally and permanently deprive the fundamental rights of ownership in the use of that property or with the enjoyment of its benefits, is considered as measures amounting to expropriation.<sup>72</sup> That also includes a dramatic change of legislation that has the effect of depriving an investor of his investment, even in the absence of an express governmental guarantee against such a change.<sup>73</sup> Indirect expropriation can be exemplified in the following measures: restriction of physical access to production facilities; labour legislation setting wages at a

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<sup>68</sup> Black's Law Dictionary (8<sup>th</sup> ed. 2004).

<sup>69</sup> Sornarajah, *supra* note 13 at 349.

<sup>70</sup> Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 532 (4th ed. 1992).

<sup>71</sup> Hober, *supra* note 67 at 382.

<sup>72</sup> Wena Hotels Limited v Arab Republic of Egypt, ICSID Case No. ARB/98/4.

<sup>73</sup> Link-Trading Joint Stock Company v Republic of Moldova, UNCITRAL (AWARD ON JURISDICTION).

prohibitively high level; denial of entrance of essential spare parts or machinery, tax measure, or of visa for key foreign employees.<sup>74</sup>

Creeping expropriation is a form of indirect expropriation, and may accordingly constitute measures tantamount to expropriation.<sup>75</sup> By their very nature, tax or regulatory measures, which are indirect but have the effect of an expropriation over a period of time, could be characterized as creeping expropriation and may be tantamount to expropriation.<sup>76</sup> Notwithstanding, it is still difficult to clarify measures amounting to creeping expropriation in practice. At the very least, creeping expropriation, however, must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the state could erode the investor's rights to its investment to an extent that is in violation of the relevant international standard of protection against expropriation.<sup>77</sup>

Despite the meaning of these terms, nationalization or expropriation, which can be used in substitution of one another, on foreign property has long been recognized and justified under customary international law. The existing customary international law provides that the justification of expropriation must comply with the following requirements; namely, taking of foreign investment for public purpose, as provided by law, in a non-discriminatory treatment, and with compensation.<sup>78</sup>

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<sup>74</sup> The Explanatory Note to the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens provides certain measures of indirect expropriation. Also see Louis B. Sohn & R.R. Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM. J. INT'L L. 545, 549 (1961).

<sup>75</sup> *Marvin Feldman v United Mexican States*, ICSID Case No. ARB(AF)/99/1 (AWARD). The Tribunal notes that the *S.D. Myers* tribunal (citing *Pope & Talbot*) effectively concluded that the words »tantamount to expropriation« were designed to embrace the concept of »creeping« expropriation rather than to »expand the internationally accepted scope of the term expropriation.« See *S.D. Myers v. Government of Canada*, Partial Award, November 13, 2000, para. 286, <http://www.state.gov/documents/organization/3992.pdf> (last visited Apr. 15, 2009).

<sup>76</sup> *Id.*

<sup>77</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (September 16, 2003), para. 20.26, quotation in the Counter-Memorial, para. 911.

<sup>78</sup> OECD, Working Papers on International Investment Number 2004/4, Indirect Expropriation and the Right to Regulate in International Investment Law, (September, 2004), available at [http://www.ilsa.org/jessup/jessup07/basicmats/oecd\\_report.pdf](http://www.ilsa.org/jessup/jessup07/basicmats/oecd_report.pdf) (last visited Apr. 15, 2009).

First, taking of foreign investment must be undertaken for public purpose that is to seek the motive or purpose behind the taking. Comparatively, nationalization is more likely taken in pursuance of economic-socio reform; namely for the purpose of reshaping and restructuring economic climate as happened in Latin American countries during the post-colonial period. Nationalization took place in Latin American countries in order to take control, take over wealth and natural resources that had previously been in the possession of colonizing states and eliminate the dominance and influence of powerful states over their resources. However, it is to admit that the requirement of public purpose is a contentious one because the test of public purpose is likely based on the subjectivity of each state. The Court therefore has hesitation to review the legislature's judgement by a state as to what is in the public interest unless the judgement is manifestly without reasonable foundation.<sup>79</sup> At the very least, the surrendered property must be transferred to the state, or its agencies, not a private person. Second, the expropriation must be proceeded as provided by law. Third, the expropriation must be based upon a non-discriminatory treatment. Finally, the expropriating state is required to pay compensation to foreign investors.

Interestingly, this justification also corresponds with the United Nations General Assembly Resolution 1803 on permanent sovereignty over natural resources providing that "nationalization, expropriation or requisitioning shall be based on grounds of public utility, security or the national interest with appropriate compensation."<sup>80</sup>

Given the United Nations General Assembly Resolution 1803, it can be said that a host state is legitimately allowed to expropriate or nationalize foreign

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<sup>79</sup> James v. United Kingdom (1986) 8 EHRR 123.

<sup>80</sup> G.A. Res. 1803 (XVII), *supra* note 30, para 8.

property under customary international law provided that a host state complies with those requirements. Specifically, a host state is required to pay compensation to a foreign investor.

To sum up, a state contract (except for a government procurement contract) has special characteristics different from ordinary private contracts in that a state contract can demonstrate a threshold of public policy, thereby linking a state contract to the exercising of the state's power. The state also has privileges over a private party to unilaterally alter or terminate a contract's clauses provided that the state may be liable for any damage or loss to a private party. Furthermore, a simple breach of contract by the host state does not necessarily justify an international claim against the host state unless such breach of contract amounts to denial of justice, whereby the host state fails to provide a private party to access local remedy system. Finally, the host state is allowed under customary international law to expropriate or nationalize alien property, provided that a host state is required to compensate a private party for such expropriation or nationalization.

### **2.3. The Administrative Structure of the Government Organizations of Thailand<sup>81</sup>**

Under the Thai Constitutional law, the Kingdom of Thailand is known as a “constitutional monarchy,” whereby the King has full and absolute power through the “Legislative Branch,” known as the “Parliament,” the “Executive Branch,” known as the “Royal Thai Government” and the “Judicial Branch,” known as the “Judiciary.”<sup>82</sup> In addition to these three (3) branches, there are also two (2) groups of Government Agencies: the “Independent Organizations,” (one of which is the OAG); and “State Enterprises.”

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<sup>81</sup> Restructuring of Government Organization Act, B.E. 2545 (2002) (Thail.).

<sup>82</sup> Constitution of the Kingdom of Thailand, B.E. 2550 (2007).

As far as the Executive Branch is concerned, it is divided into three (3) levels: the “Central Administration” level; the “Regional Administration” level; and the “Local Administration” level (known as Local Authorities or Local Administrative Organisations). Whereas the former two levels are seen as part of bureaucratic administration system, consisting of twenty (20) ministries,<sup>83</sup> the latter is a decentralized administration system. The Chart of the Administrative Structure of the Government Organizations of Thailand is demonstrated in **Appendix 1 of the Appendices**.

The administration below the Central Administration Level is divided into two (2) levels: the Regional Administration Level; and the Local Administration Level. While the Regional Administration Level is part of the Bureaucratic Administration System, the Local Administration Level is totally a separate and autonomous administration, known as the Decentralized Administration System. Of course, these two (2) systems work in conjunction with each other and the geographical area of these administration systems are overlapping.

Within the Regional Administration System, there is a branch office called “Changwat” that supervises the administration throughout a province. In Thailand, there are seventy-six (76) provinces (including Bangkok). In each province there are a group of sub-divisions, called Amphoe, which consists of a number of Tambol (a group of villages which are known as Moobarn).

As part of the Decentralized Administration System, the Local Authorities (Local Administrative Organisations) are divided into two (2) forms:

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<sup>83</sup> Office of the Prime Minister, Ministry of Defense, Ministry of Finance, Ministry of Foreign Affairs, Ministry of Tourism and Sports, Ministry of Social Development and Human Stabilization, Ministry of Agriculture and Co-operatives, Ministry of Transportation, Ministry of Natural Resources and Environment, Ministry of Technology, Information and Communications, Ministry of Energy, Ministry of Commerce, Ministry of Interior, Ministry of Justice, Ministry of Labor, Ministry of Culture, Ministry of Science and Technology, Ministry of Education, Ministry of Public Health and Ministry of Industry.



general forms and special forms. As to general forms, there is a two-tier level. The first one is called the “Provincial Administrative Organization,” responsible for the geographical area of the entire province. In Thailand, there are seventy six (76) provinces (including Bangkok) but there are only seventy five (75) Provincial Administrative Organizations because the province of Bangkok is governed in a special form within the decentralized administration system; called the “Bangkok Metropolitan Administration” or BMA. The second level of a two-tier decentralized administration consists of the Municipal Organizations covering urban areas within a province and Tambol Administrative Organizations covering rural areas within a province. The geographical areas of Municipal Organizations and the Tambol Administrative Organizations collectively overlap the geographical areas of individual Provincial Administrative Organizations. The Chart of the Administrative Structure of the Government Organizations Within A Province appears in **Appendix 2 of the Appendices**. In addition to these general forms, in Thailand, there are another two (2) special forms: the Bangkok Metropolitan Administration or BMA that oversees the entire geographical area of Bangkok province, and the Pattaya Administration that is geographically a part of Chonburi Province and Provincial Administrative Organization of Chonburi. A Summary of the Provincial Administration Structure in Thailand appears in **Appendix 3 of the Appendices**.

Therefore, a contract entered into by these Government Agencies is considered a state contract within the scope of this dissertation. The execution of a state contract by the State or these Government Agencies is deemed to be an action of the State. Therefore, to make a state contract legally binding, it must be the case that each Government Agency acts in a legal capacity (i.e., there is a juristic person who has legal status under national law). Furthermore, a Government Agency must have

an authority granted by law in order to enter into a contract relating to its functions and authority. Finally, a contract concerned must be within the scope, mandates, and objectives of such Government Agency.

To seek the scope, mandates, and objectives of individual Government Agencies, the authority, mandates, and objectives of a Government Agency at the ministry level are stipulated in the Restructuring of Government Organization Act, B.E. 2545 (2002). In a case where a Government Agency is operating in the department level, the State's authority, mandates, and objectives will be stipulated by the royal decree under the particular division of such Government Agency. For example, the OAG's mandates, objectives, and authority are stipulated in the Royal Decree on Division of the Office of the Attorney General, B.E. 2540 (1997). For Local Authorities (Local Administrative Organizations), State Enterprises and Independent Organizations, their authority, mandates, and objectives will be stipulated in their establishment laws.

#### **2.4. Types of State Contracts**

In Thailand, a state contract is, in some cases, known as a government contract. As mentioned earlier, a state contract is defined as a contract where the State or its Government Agency as the one party, enters into with the other party, which commonly belongs to the private sector regardless of the kind of contract transaction. State contracts in the Thai legal system can be divided into five (5) types: a government procurement contract, an administrative contract, a concession contract, a state-joint venture contract, and other. Categories of State Contracts in Thailand are illustrated in **Appendix 4 of the Appendices**.

##### **2.4.1. Government Procurement Contracts**

A government procurement contract is a contract where a Government Agency enters with the other party (most commonly within the private sector) in order to acquire supplies and services with funds from national budget, loans, or grants. Actually, a government procurement contract is simply considered a private contract because the contract has no involvement in the exercising of the State's power. In addition, it also does not carry the special characteristics of a state contract or being involved in public service or utility. Therefore, a government procurement contract is excluded from the meaning and scope of the term "state contract," which is the focus of this dissertation. Basically, a government procurement contract is governed by general rules of law, for example, the Civil and Commercial Code ("CCC"). From a legal perspective, a government procurement contract is not different from other private contracts, and is thereby treated in the courts as a contract among private parties.

For all main Government Agencies (the Parliament, Government and Judiciary) and some Independent Organizations, a government procurement contract shall be governed by the Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992) or known as the 1992 Regulation.<sup>84</sup> As a result, Local Authorities (Local Administrative Organizations) and State Enterprises are theoretically excluded from the 1992 Regulation's application.

Local Authorities (Local Administrative Organizations) and State Enterprises have their own regulations on procurement, but they often adopt the 1992 Regulation's model in practice. Currently, the Local Authorities (Local Administrative Organizations) have their own regulation on procurement: the

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<sup>84</sup> Clause 5 of the Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992) (Thail.) provides that

*"procurement" means self-production, purchase, employment, employment of consultants, employment for design and supervision of work, exchange, lease, disposal and other steps specified in the Regulation.*

Regulation of the Ministry of Interior on Procurement of Local Administrative Organizations, B.E. 2535 (1992).

Under 1992 Regulation, government procurement contracts can be categorized into the following five (5) groups:

- (1) acquisition of supplies, services and construction;
- (2) advisory services;
- (3) design and supervision of work;
- (4) exchange of supplies; and
- (5) leasing.

As far as a government procurement contract is concerned, when a dispute from this contract arises, a case shall be brought to the Court of Justice, not the Administrative Court. Only if a government procurement contract carries some special characteristics of granting superior rights or privileges to the State or its Government Agency, would the government procurement contract be subsequently transformed from a private contract to an administrative contract, in which case, the dispute would fall under the Administrative Court's jurisdiction. A procurement contract, which confers upon the State exclusive and unilateral rights to alter terms and conditions of a contract or to terminate a contract, is the only type of state contract that will be the scope of this dissertation.

#### **2.4.2. Administrative Contracts<sup>85</sup>**

An administrative contract is a contract where the State or its Government Agency<sup>86</sup> as the one party enters into a contract with a private party. The terms of the transactions in these types of contracts commonly relate to concessions,

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<sup>85</sup> Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999) (Thail).

<sup>86</sup> This includes all main Government Agencies (the Legislative Branch, the Executive Branch, the Judicial Branch), Local Administrative Organizations, Independent Organizations and State Enterprises.

the provision of public service or utility, or the exploitation of natural resources. Because of the nature of these transactions, such a contract inevitably involves in “public interest,” or public policy. As a consequence, the legal theory that has been recently adopted from the French administrative law by the Thai Administrative Court will apply.

The theory of public interest or public policy applies to a case where the State or its Government Agency desires to assign a private sector to perform its functions relating to the provision of public service or utility on its behalf by means of an administrative contract. The theory of public interest consists of the following principles: equality, continuity, and adaptation. As to the principle of equality, the State must provide public service or utility for its people so that its people can use such public service or utility equally. As to the principle of continuity, the public service or utility must be provided and operated continually because the discontinuity may cause trouble or inconvenience to its people or nationals. Therefore, a competent Government Agency must supervise the performance of the private sector to ensure that the provision of public service or utility or service assigned to the private party is operated continually. As to the principle of adaptation, due to the fact that the State (through its Government Agency) has its obligations to provide what its people need, when the people’s needs relating to the public service or utility have changed, the State has to adjust its service in such a way that responds to its people’s needs.

Under the Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999), administrative contracts<sup>87</sup> can be categorized as follows:

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<sup>87</sup> The first three types of administrative contracts are defined and categorized by the Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999) (Thail.) whereas the last two types are defined and categorized by Administrative Court’s precedent. See Resolution of the

- (1) a concession contract;
- (2) a contract relating to the provision of public service or utility;
- (3) a contract relating to the exploitation of natural resources;
- (4) a contract assigning a private sector to undertake or jointly undertake the provision of public service or utility provided by State;<sup>88</sup> and
- (5) a contract containing terms and conditions that confer privileges or superior rights to the State.<sup>89</sup>

Therefore, a dispute arising from these types of administrative contracts will fall into the jurisdiction of the Administrative Court, not the Court of Justice.

#### **2.4.3. Concession Contracts**

A concession contract is a contract where the State, through a Government Agency, authorizes or assigns a private party to provide public service or utility on its behalf within a period of time in exchange for the private party's own risk and expenses. By doing so, a private party will be eligible to collect charges from users (known as users' charges) for its consideration.<sup>90</sup> As mentioned earlier, the State has its obligations to provide public service or utility for its people. Once a private party is authorized to provide such public service or utility, the private party is bound to perform obligations by himself. The obligations under a concession contract are non-transferable unless it is approved by the State or its Government Agency. During the contract term, the State has its authority to supervise the performance of the public service or utility in order to ensure that the service operates continually.

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General Meeting of the High Administrative Court No. 6/2544 (2001) (Thail.) dated October 10, 2544 (2001).

<sup>88</sup> Order of the High Administrative Court No. 25/2545 (2002) (Thail.).

<sup>89</sup> Order of the High Administrative Court No. 104/2544 (2001) (Thail.), No. 127/2544 (2001) (Thail.).

<sup>90</sup> Prayoon Kanchanadul, Administrative Law, 146 (1980).

Generally, concession contracts can be divided into two (2) types: concession contracts according to the National Executive Council Announcement No. 58; and concession contracts according to specific statutory acts. Under the National Executive Council Announcement No. 58, concession contracts normally relate to the provision of public service or utility covering the following activities: trains, trams, canal construction, airways, water system, irrigation system, electricity, pipe gasoline, and sea shipping. The criteria and requirements to obtain concessions under the National Executive Council Announcement No. 58 have been subsequently explained in Chapter 2. For concession contracts according to specific statutory acts, concessions relating to mining, forestry and birds' nests (harvesting of birds' nests) are of importance.<sup>91</sup>

According to the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999), a concession contract is also defined as an administrative contract, thereby falling under the jurisdiction of the Administrative Court. Therefore, the theory of public interest or public policy will apply to a concession contract. Accordingly, the State has exclusive rights to alter terms and conditions of a contract as well as to terminate a contract unilaterally but the State also has an obligation to pay compensation to a private party.

#### **2.4.4. State-Joint Venture Contracts<sup>92</sup>**

A state-joint venture contract is recognized and categorized as a contract type according to the Private Participation in State Undertakings Act, B.E. 2535 (1992). A state contract as defined and categorized as a state-joint venture contract must be composed of the following elements:

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<sup>91</sup> Mine Act, B.E. 2510 (1967) (Thail.), Petroleum Act, B.E. 2514 (1971) (Thail.), Forestry Act, B.E. 2484 (1941) (Thail.) and Bird's Nest Act, B.E. 2540 (1997) (Thail.).

<sup>92</sup> Private Participation in State Undertakings Act, B.E. 2535 (1992) (Thail.).

(1) a contract is entered into between a Government Agency (including Local Authorities and State Enterprises) as the one party and a private sector as the other party;

(2) the characteristics of a contract transaction must involve in state undertakings authorized by law, the exploitation of natural resources, or the utilization of any asset or property of the State or its Government Agency;

(3) the project concerned having its value in either forms of an investment fund, asset, or property is worth at least one (1) billion Baht (approximately equivalent to US\$ twenty eight and fifty-seven hundredths (28.57) million) or more; and

(4) the private participation in state undertakings must be in a form of either a state-joint venture with a private sector, or a private investment with an approval, concession, or any exclusive right granted by a Government Agency.

Basically, a state-joint venture contract is governed by the Private Participation in State Undertakings Act, B.E. 2535 (1992). However, if a state-joint venture contract can be simultaneously defined as an administrative contract under Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999), such a state-joint venture contract will be also subject to the Administrative Court's jurisdiction under the Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999); otherwise, it shall be within the Court of Justice's jurisdiction.

#### **2.4.5. Other**

A state contract that does not fall into government procurement contracts, administrative contracts, concession contracts or state-joint venture contracts is governed by the relevant general laws such as the CCC. A contract as



defined and categorized as the “Other” will not be, therefore, governed by those particular statutes.

Upon such categories, it is noted that these five (5) types of state contracts are divided and categorized by existing statutory acts establishing them. Therefore, it may appear that a particular state contract that falls into one type of state contract categories can also fall into another type of categories and thus there will be a possibility that one state contract may be governed by several statutory acts.

### 3. Foreign Direct Investments in Thailand

#### 3.1. Agreements on Promotions and Protections of Investments in Thailand

During the period when Thailand encountered the colonial domination of Western powers, the relationship on commerce and investment between Thailand (known as Siam at that time) and other states had been initiated since the Ayudhya era. The first Treaty of Friendship and Commerce was concluded between Siam and Portugal in 1516.<sup>93</sup> Under its provisions, the Government of Portugal agreed to supply Ayudhya with cannons and ammunition in exchange for allowing Siam to be the residence of Portuguese nationals, and extending to these nationals the right to engage in trade at Ayudhya, Ligor, Pattani, Tenasserim and Mergui as well as a royal permission for Portuguese subjects to practice their Christian faith.<sup>94</sup> Later, the first Friendship, Commerce and Navigation Treaty (an FCN treaty as a precursor of the present BIT) between Great Britain and Thailand was negotiated and concluded in 1855, known as the Bowring Treaty named after Sir John Bowring, a British ambassador to the Siamese Court in Bangkok.<sup>95</sup>

Currently, Thailand has entered into several forms of agreements, such as BITS, free trade agreement (“FTA”) with many countries. In October 2002, Thailand signed a Bilateral Trade and Investment Framework Agreement (“TIFA”) to initiate FTA negotiations with the United States.<sup>96</sup> The last round of TIFA’s negotiation took place in Chiangmai, Thailand in January 2006. Apart from TIFA,

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<sup>93</sup> Sompong Sucharitkul, Asian Perspectives of the Evolution of International Law: Thailand’s Experience at the Threshold of the Third Millennium, 2 Chinese J. Int’l L. 527.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> In October 2003, President George W. Bush and Prime Minister Thaksin Shinawatra announced the intention to begin bilateral free trade agreement (“FTA”) negotiations. The first round of FTA negotiations were held between June 28, 2004 and July 2, 2004 in Hawaii. The second round was scheduled in October 2004. The negotiation process was estimated to last approximately two (2) years.

Thailand also signed bilateral trade and investment agreement with Bahrain, Australia and India.<sup>97</sup> In order to establish a bilateral free trade agreement (“TIFA”) with Japan, Thailand also signed An Agreement of Japan-Thailand Economic Partnership with Japan to work out a framework of FTA between these two countries.

As of August 15, 2008, Thailand has entered into forty two (42) agreements on the promotions and protections of investments with other countries as appeared in **Appendix 5**.<sup>98</sup> Terms and conditions found in those agreements on promotions and protections on investments generally cover fair and equitable treatment, national treatment, most-favoured nation treatment (“MFN”), reciprocal treatment, definition and scope of investment, compensation for losses, expropriation and nationalization, transfer, subrogation, and dispute settlement mechanism. The existence of BITs and free trade agreements mentioned above can well demonstrate and reaffirm that Thailand has enthusiastically participated in and contributed to the sustainable economic development by promoting the flow of trading goods and services as well as FDI globally.

### **3.2. Investments and the 1997-1998 Asian Financial Crisis<sup>99</sup>**

After the rapid economic growth and industrialization between mid-1980s and 1995 led by a private sector, Thailand suddenly faced an abrupt end to the economic growth in mid-1997, which subsequently developed and contributed to the Asian economic crisis in 1997 and, in many ways, affected the world economy.

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<sup>97</sup> Thailand signed FTA with Bahrain on December 29, 2002, covering goods and services, Thailand signed FTA with Australia on July 5, 2003, extending FTA with broader coverage beyond goods and service trade, and Thailand signed FTA with India on October 9, 2003, creating free trade area between India and Thailand.

<sup>98</sup> The Netherlands, United Kingdom, China, ASEAN, Republic of Korea, Laos, Hungary, Vietnam, Peru, Poland, Romania, Czech Republic, Finland, Cambodia, The Philippines, Sri Lanka, Taiwan, Canada, Indonesia, Switzerland, Argentina, Croatia, Egypt, Israel, Slovenia, Sweden, Zimbabwe, India, North Korea, Bahrain, Belgo-Luxemburg, Germany, Bangladesh, Russia, Bulgaria, Turkey, Tajikistan, Hong Kong SAR, and Jordan (Source: Ministry of Foreign Affairs, Thailand on September 27, 2005).

<sup>99</sup> Business Handbook for Royal Thai Embassies and Consulates-General 2000, Thailand's Road to Recovery (Thail.), available at <http://www.mfa.go.th/web/139.php> (last visited Apr. 20, 2009).

Interestingly, one of the causes of the crisis was the excessive investment in high-risk sectors and poorly managed and unchecked capital in-flows. It appeared that both Thai and foreign investors held high levels of investment in high-risk and highly volatile property and real estate projects, thereby resulting in the oversupply in the property and real estate sector as well as speculative purchases of land, office buildings, and condominiums. As a result, the phenomena of the “bubble” gradually emerged in that assets in property and real estate were sold at over-priced value. Finally, the bubble began to burst in 1997. In addition to the burst of the bubble economy, the sharp drop of stock market, default loans and devaluation of Thai currency all contributed to the economic crisis in Thailand and Asia.

Therefore, to regain macroeconomic stability and foreign investors’ confidence, the Government of Thailand decided to enter into an agreement for a US\$ seventeen point two (17.2) billion assistance package with the International Monetary Fund (“IMF”) on August 20, 1997. The reform package also contained a comprehensive rehabilitation plan encompassing five (5) main areas: financial sector reform; monetary and fiscal policies; bureaucratic reform and privatization; industrial and agriculture restructuring; and social and environmental agendas with the assistance from the IMF, the World Bank, and the Asian Development Bank (“ADB”). Additionally, infrastructure investment projects were proposed in order to attract private investment and FDI in a country. To achieve economic growth and stability, Thailand has built a friendly environment to gain foreign investors’ confidence and to attract FDI through a variety of means for example, tax privileges, deregulation of domestic laws and so on.

### **3.3. Importance of Foreign Direct Investments in Thailand**

Given the Policy Statement of the Council of Ministers delivered by Prime Minister Abhisit Vejjajiva to the National Assembly on December 30, 2008, the Government has set up the national strategies in respect to investment into two (2) levels: the internal affairs level and international level.

With the internal affairs level, the government policy is aimed to develop a medium-term and long-term public sector investment that makes clear the source of financing, types of investment, and support for an increased private sector role as appropriate; develop tools and mechanisms for efficient capital mobilization for large-scale projects, taking into consideration fiscal discipline and the burden on the public budget<sup>100</sup> and to strengthen the capital market and system of financial institutions to cope with global financial volatility and provide stable support for investment and business by amending rules and regulations and putting in place a regulatory system in line with financial innovations; and encourage long-term savings as a basis for the country's future capital mobilization.<sup>101</sup>

With the international level, the Government led by Prime Minister Abhisit Vejjajiva is aimed to strengthen cooperation and strategic partnership with countries that play important roles in global affairs as well as Thailand's trading partners in other regions to maintain and expand cooperation in the areas of politics, security, economics, trade, finance, investment and tourism, while searching for new markets to promote cooperation on resources, raw materials, science and technology and new knowledge.<sup>102</sup>

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<sup>100</sup> Abhisit Vejjajiva, the Prime Minister of Thailand, the Policy Statement of the Council of Ministers to the National Assembly (Dec. 30, 2008), *available at* [http://www.thailandoutlook.com/NR/rdonlyres/B61C5456-0AFA-4CDD-A63E-8EC9174A1742/0/policy\\_eng.pdf](http://www.thailandoutlook.com/NR/rdonlyres/B61C5456-0AFA-4CDD-A63E-8EC9174A1742/0/policy_eng.pdf) (last visited Apr. 20, 2009).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

Based upon the government policy, Thailand has issued a package of incentives and privileges to attract foreign investors to invest their capital into Thailand by focusing on:

*The country's well-defined investment policies focus on liberalization and encourage free trade. Foreign investments, especially those that contribute to the development of skills, technology and innovation are actively promoted by the government. Thailand consistently ranks among the most attractive investment locations in international surveys, and a 2006 World Bank report indicated that Thailand was the 4th easiest country in Asia to do business, and the 20th easiest in the world.<sup>103</sup>*

*The government has placed emphasized on attracting investment in six (6) key sectors that have been determined as key to the country's developmental objectives. These (6) six target industries include: agriculture and agro-industry, alternative energy, automotive, electronics and ICT, fashion, and value-added services including entertainment, healthcare and tourism.<sup>104</sup>*

These excerpts illustrate that the Thai government has a strong belief in and commitment to promote FDI in Thailand. By making it as part of the national policy and assigning the Board of Investment (“BOI”) to implement this task, Thailand has created a friendly environment for foreign investors with a series of incentive packages to develop good infrastructure, low-cost labor, tax privileges and deregulation of immigration law, labor law and so on. Thailand not only considers FDI a simple means to encourage capital flowing into a country but Thailand also sees FDI creating new jobs as well as serving other social purposes like personnel development, technology transfer, research and technology development. Therefore, foreign investments, especially those that contribute to the development of skills, technology and innovation are actively promoted and welcome by the Thai government.

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<sup>103</sup> Board of Investment of Thailand, FDI Policies, [http://www.boi.go.th/english/why/thailand\\_advantages.asp](http://www.boi.go.th/english/why/thailand_advantages.asp) (last visited Apr. 20, 2009).

<sup>104</sup> *Id.*

In addition to the development of skills, technology and innovation, liberalization, and free trade also are a crucial part of the national policy. Consequently, any investment or FDI that can accommodate those international obligations is all the most welcome in Thailand.

Currently, the Government has extended areas to attract investments in six (6) key sectors. These six (6) target industries include: agriculture and agro-industry; alternative energy; automotive; electronics and ICT; fashion; and value-added services including entertainment, healthcare and tourism.<sup>105</sup>

Given these incentive packages offered by the Government, Thailand has been ranked among the most attractive investment locations in international surveys. The 2006 World Bank report ranked Thailand the fourth in Asia and the twentieth country in the world where capital could be most easily invested.<sup>106</sup>

According to the Embassy of the United States of America in Bangkok, Thailand, the Thai government has long maintained an open, market-oriented economy and encouraged FDI as a means of promoting economic development, employment and technology transfer. Thailand welcomes investment from all countries and seeks to avoid dependence on any one country as a source of investment.<sup>107</sup> By attracting FDI, Thailand launched many measures for economic growth such as the Land Code that allows non-Thais to hold property ownership in Thailand and the Alien Business Law that opens additional business sectors to foreign investors.

It can be said that Thailand has long promoted FDI inflow into the country and the BOI has been the main authority to perform the function in promoting

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> U.S. Commercial Service, *The Embassy of the United States of America, Bangkok, Thailand, Country Commercial Guide (Mid-FY 2004)*.

and maximizing the benefits of investment in Thailand. Nonetheless, it is believed that not only the BOI has mandates in promoting FDI inflows, but other related Government Agencies can also contribute to the greater inflows of FDI towards territory.

The OAG, which has the authority to scrutinize state contracts for the Thai government and Government Agencies, is also aware of this policy. The OAG not only has responsibility to scrutinize and check whether a contract concerned is legally binding or whether there is any term and condition disadvantageous or prejudicial to the State's benefits or public interest but the OAG also has the responsibility of ensuring that a contract serves its objectives of promoting FDI in Thailand in a way that corresponds to the government policy. Emphatically, a state contract relating to an investment project is no less important than the investment project itself. Therefore, when scrutinizing a state contract relating to investment or FDI, the OAG must assure that a draft contract is fully legal binding and that there are no terms and conditions disadvantageous to the country's benefit. The OAG is also responsible for making sure that the contract concerned must serve foreign investors' interest and facilitate them in running their operation and business in Thailand successfully and smoothly. This dissertation will discuss as to how the OAG's roles can help enhance FDI flows into a country in the forthcoming chapters.

#### **3.4. Private Foreign Investments in Thailand**

Generally speaking, there are two (2) channels that private foreign investors can invest their capital in Thailand. First, they can invest their capital in a state project due to the invitation made by the Thai government. By this channel, foreign investors and the Thai government (through its Agency) will negotiate and conclude terms and conditions of the prospective transaction in respect to a particular



state project. At the end, the selected foreign investor shall enter into an investment contract with the State (through its Agency) and as a result, such a contract shall be defined as a state contract insofar as it relates to FDI. The investment contract can, for example, be found in forms of a concession contract, a management contract, a turnkey construction contract, a state-joint venture contract, etc. Such a state contract relating to investment or FDI is seen as a means of pursuing government policy. Most foreign investment projects are tentatively ad hoc projects that the Government solicits foreign investors to invest their capital in particular state projects.

As an alternative, foreign investors invest their capital in businesses in which they are interested but not in state projects. By this channel, they can either put their investment in a country with or without incentives provided by the Government. If they decide to run a business without the Government's incentives, they are simply required to comply with relevant domestic law. However, if they would like to receive certain privileges from the Government for their business, they need to contact the Board of Investment ("BOI") as to how they can obtain such privileges and incentives offered by the Government, or the Industrial Estate Authority of Thailand ("IEAT") as to how they can utilize industrial estate facility with minimal rent as provided by IEAT. However, to enjoy those privileges and incentives, prospective foreign investors are required to meet all conditions set forth by the BOI and IEAT.

### 3.3.1. BOI<sup>108</sup>

the BOI, an official authority to promote investments in Thailand, offers foreign investors as one-stop service for investors who desire to receive incentives offered by the Government through the BOI, including services regarding

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<sup>108</sup> Board of Investment of Thailand, *supra* note 97

visas and work permits. The BOI has its mandates to help investors in three (3) ways: to reduce the risks associated with investments, to reduce initial investment cost and to improve the overall rate of return on investments, and to provide support service. Furthermore, the BOI is considered a central agency working with other Government Agencies like the IEAT, the Department of Export Promotion, or the Customs Department to facilitate and assist foreign investors to set up and operate their businesses in Thailand smoothly and confidently.

Through the BOI, the Government offers a range of tax incentives, support services, and concessions on duty for a list of businesses that are regarded as priority or promoted activities. Recently, there are no foreign equity restrictions in the manufacturing sector, no local content requirements, and no export requirements, as Thailand's investment regime is in total compliance with the WTO Regulations.

Nevertheless, the investment ventures that can enjoy privileges and incentives provided by the Government through the BOI must be approved by the BOI as entry requirements.

### **3.3.2. IEAT<sup>109</sup>**

The IEAT is one of the state enterprises under the supervision of the Ministry of Industry. The Government uses the IEAT to develop and set up industrial estates in various regions, apart from Bangkok and central areas systematically and orderly.

The IEAT has its mandates to develop and set up its own industrial estate for plant sites and factories, and to provide infrastructure and necessary facility for industries (for example, roads, electricity, water system, drainage system, and so on) as well as to promote and support other private industrial estates run by the

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<sup>109</sup> Industrial Estate Authority of Thailand, [http://www.ieat.go.th/index\\_thtest.php?lang=th](http://www.ieat.go.th/index_thtest.php?lang=th) (last visited Apr. 21, 2009).

private sector. In addition to the provision of an infrastructure and necessary facility, the IEAT also facilitates and provides other services for manufacturer-investors, such as commercial banks, post offices, shopping malls, sport clubs and golf courses, resident areas, gas stations, etc. The investment venture receiving the BOI's incentives is also eligible to apply for additional privileges as provided by the IEAT provided that it has its business in an approved industrial estate. At the very least, the rents and fees chargeable by the IEAT are considered a minimal cost.

#### 4. Involvement of the Office of the Attorney General (“OAG”) in the Review of State Contracts<sup>110</sup>

##### 4.1. History and Principal Mandates of the OAG

The OAG was originally established on April 1, 1916 and named the Public Prosecution Department under the Ministry of Justice. The Public Prosecution Department was subsequently transferred to be part of the Ministry of Interior in 1922 but the Public Prosecutor Department was separated from the Ministry of Interior and became an independent agency in 1991. Since then, the Public Prosecution Department has been renamed and existed as the Office of the Attorney General until now.<sup>111</sup>

The OAG is the principal and independent agency responsible for handling criminal prosecution, providing legal advice to the Thai government and Government Agencies, representing Government Agencies in the matter of civil litigation in court, and conducting international cooperation in criminal matters. It is also entrusted with the duty to protect civil rights and to provide legal aid to the needy. The purpose of its independent status is to ensure justice and prevent political influence from interfering with prosecutorial functions. The OAG has set its vision on becoming an intelligent and innovative criminal justice agency that represents the State and the people fairly and equally.<sup>112</sup>

Overall, the authority, mandates, and functions of the OAG or Director-General (including public prosecutors) can be divided into five (5) categories:<sup>113</sup> criminal justice administration; safeguarding of national interests; civil

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<sup>110</sup> A government contract can be, in some cases used in a substitute of a state contract and *vice versa*.

<sup>111</sup> Office of the Attorney General, [http://www.ago.go.th/about\\_ago/history.html](http://www.ago.go.th/about_ago/history.html) (last visited Apr. 21, 2009).

<sup>112</sup> *Id.*

<sup>113</sup> Public Prosecutors Act, B.E. 2498 (1955) (Thai.) § 11.

rights protection and legal aid provision; international cooperation in criminal matters; and research and legal development.

One of the OAG's main mandates regarding the criminal justice administration is to jointly conduct the investigation with the help of a psychologist, social worker, or council as requested by young offenders in juvenile cases. The OAG is also required to jointly conduct investigation with officials of the Department of Special Investigation ("DSI") in certain special cases like organized crime or crime relating to influential people. In addition, the OAG's responsibilities include reviewing the investigation files as provided by inquiry officials, prosecuting an accused, and proceeding criminal trial, and proceedings in a criminal court.

Second, the OAG is aware of the importance for safeguarding of the national interest. By doing so, the OAG is required to provide legal advice to the Thai government and its Government Agencies, to review draft contracts for Government Agencies transacting with private parties, and to represent government authorities and Agencies in both civil and criminal litigation.

Third, with regard to the protection of civil rights of nationals, the OAG represents and helps any person who is seeking a court order or permission to endorse or grant his/her legal rights. For example, the OAG helps an heir to manage and transfer the property of his ancestor who passes away or helps any person who cannot afford to pay court fees such as in the case of child adoption.

Fourth, the OAG also plays a significant role in international cooperation in criminal matters, extradition, and mutual legal assistance. For extradition in particular, the OAG is required to seek a court order for extraditing a person to the requesting state as well as to make a request to foreign countries to extradite any person or fugitive to Thailand. As of January 2005, Thailand has

entered into extradition treaties with ten (10) countries: namely, Bangladesh, Belgium, Cambodia, China, Indonesia, Lao PDR, Philippines, Republic of Korea, the United Kingdom, and the United States. Regarding the provision of mutual legal assistance, the International Cooperation in Criminal Matters Act, B.E. 2535 (1992) requires the OAG to provide certain types of assistance to other countries such as locating persons, searching and seizing objects or documents, taking witness statement, or confiscating assets situated in Thailand.

Finally, the Ministerial Regulation for Organization of the Office of the Attorney General B.E. 2546 (2003) assigns the OAG to conduct legal research and development. It also includes the task to propose new statutory acts and regulations as well as to modernize outdated laws and regulations to ensure that Thailand stays abreast to capture new legal issues that arises in the globally changing world.

Nevertheless, apart from these five (5) missions, the Prime Minister of the Kingdom of Thailand also has power to assign the OAG or any public prosecutor to perform any other functions as he considers appropriate.<sup>114</sup>

#### **4.2. Historical Background of the OAG's Involvement in the Review of State Contracts**

Since the establishment of the OAG, there had been no express statutory provisions granting an authority to the OAG to perform the function of perusing a state contract. The involvement of the OAG in this task had been, however, authorized by the Executive Government in a form of a "Cabinet Resolution."

Before B.E. 2491 (1948), the OAG was hardly involved in the process of scrutinizing a state contract. During those periods, a contracting government

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<sup>114</sup> *Id.* § 17.

agency would assign its lawyer, known as a state attorney who acted as an in-house legal adviser, to revise a draft contract before a contracting government agency would enter into a contract concerned. Under such a practice, it appeared that in many cases, terms and conditions concluded in a contract concerned were prejudicial and disadvantageous to a country or public interest and sometimes a contract was not fully legal binding. Therefore, in 1948 (B.E. 2491), the Council of Ministers issued a Resolution, known as the Cabinet Resolution dated March 31, B.E. 2491 (1948) regarding a contract-making process, which provided that in a case where a contracting government agency was to execute a contract or an agreement with a private sector or a corporation and the competent Minister was of the opinion that such a contract was very significant to a country or involved in mega projects, such contracting government agency shall submit a draft contract to the OAG for the scrutiny prior to entering into the contract.<sup>115</sup> However, this Resolution was not an absolute imposition. On the contrary, it was left open to the Minister's discretion to consider whether or not a contract needed to be submitted to the OAG for scrutiny. It was also noted that State Enterprises were not, however, included in this Resolution.

The reason of the OAG's involvement in the scrutiny of a state contract was that the Government needed the OAG to examine and check whether terms and conditions of a contract concerned were legally binding or disadvantageous to the national interest or public interest. More importantly, for a contract involving public service or utility in particular, the OAG was required to take the theory of public interest into consideration by weighing the benefits between public interest and the private sector. Since then, the OAG has begun to play its roles in scrutinizing a state contracts.

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<sup>115</sup> Letter of the Secretary General to the Council of Ministers, Urgent No. Nor. Ror. 33/2491 (Apr. 1, 1948) (Thail).

At present, in addition to the prosecution authority, the OAG has been officially authorized by law to give legal advice to the Government and all Government Agencies on administration and domestic legal issues and that also includes the responsibility of scrutinizing state contracts to be entered into by the Government and all Government Agencies.<sup>116</sup> Such authority is stipulated in Section 46 (9) of the Restructuring of Government Organization Act, B.E. 2545 (2002) and Section 4 of the Royal Decree on Division of the Office of the Attorney General, B.E. 2540 (1997), providing that:

*The Office of the Attorney General has its authority and mandates in connection with the prosecution of criminal cases, carrying of civil litigation, and giving legal advice to the Government and any Government Agency and also has authority as stipulated by law.*

#### **4.3. Channels of State Contracts to Be Reviewed by the OAG**

Under the existing law, the OAG has authority and power to scrutinize state contracts through the following three (3) channels.

##### **4.3.1. A Review of State Contracts in Accordance with a Cabinet Resolution**

When the Thai government became aware that certain state contracts were invalid and others contained terms and conditions disadvantageous to public interest or policy (contracts that had been handed out by Government Agencies without the scrutiny of the OAG), the Government issued the Cabinet Resolution dated March 31, B.E. 2491 (1948) to lay down the rules regarding a contract-making process applicable for Government Agencies.

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<sup>116</sup> Royal Decree on Division of the Office of the Attorney General, B.E. 2540 (1997) (Thail.) issued by provisions of the Administration of Government Organization Act, B.E. 2534 (1991) (Thail.).



The most updated Resolution regarding a contract-making process is the Cabinet Resolution dated September 1, B.E. 2535 (1992).<sup>117</sup> The Resolution provides that in a case of main Government Agencies, all state contracts shall be submitted to the OAG for scrutiny before signing a contract. In the case of State Enterprises, only contracts falling into the following categories shall be required for the scrutiny by the OAG:

(1) a contract is to be entered into with a natural person, a juristic person or an institution in which a nature of a contract concerned is not within a scope of normal activities of such State Enterprise and in which it will be executed abroad; or

(2) a contract may lead to legal difficulty, disadvantages or non-binding; or

(3) a contract is to be executed for specific purposes which do not constitute qualifying usual expenditure within a scope of normal activities of such state enterprise.

Any decision about a contract that is outside these parameters falls upon the Minister's discretion. However, both Government Agencies and State Enterprises are exempted to comply with these requirements if a contract type of a contract concerned has already been in the consideration and the scrutiny of the OAG, or in which the terms and conditions of the contract concerned are not substantially material to a contract concept and disadvantageous to the benefits of such Government Agency or State Enterprise. In addition, in a case of a contract to be executed abroad, if a contract concerned has already been in the consideration and the

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<sup>117</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0205/ Wor. 138 (Sept. 9, 1992) (Thail.).

scrutiny of legal expertise abroad, such a contract is not required for the scrutiny by the OAG once again.

#### **4.3.2. A Review of State Contracts in Accordance with the Regulation of the Office of the Prime Minister on Procurement, B.E. (Buddhist Era) 2535 (1992)**

Basically, this Regulation is only imposed on main Government Agencies, consisting of the Legislative Branch, Executive Branch (only Central Administration and Regional Administration), Judicial Branch and some Independent Organizations. Both Local Administrative Organizations and State Enterprises are excluded. Moreover, this Regulation is only applicable to a government procurement contract covering (1) acquisition of supplies, services and construction; (2) advisory services; (3) design and supervision of work; (4) exchange of supplies; and (5) leasing. Therefore, any state contract outside these categories is not governed by this Regulation but it shall be governed by any other relevant statutory acts.

In addition to the 1992 Regulation's provisions,<sup>118</sup> the Procurement Committee<sup>119</sup> also provides a sample contract attached to the 1992 Regulation. If a draft contract concerned contains terms and condition in accordance with the 1992 Regulation's sample contract, or a draft contract contains terms and conditions different from those of a sample contract but they do not differ in material substance and those terms are not disadvantageous to the national interest, such Government

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<sup>118</sup> Regulations of the Office of the Prime Minister on Procurement, B.E. 2535 (1992) (Thail.) clause 132.

<sup>119</sup> The Procurement Committee consists of (1) Director-General of the Ministry of Finance (2) Director-General of the Department of the Comptroller General (3) Authorized Representative of the Ministry of Defence (4) Authorized Representative of the Office of the Audit General (5) Authorized Representative of the Office of the Attorney General (6) Authorized Representative of the Budget Bureau (7) Authorized Representative of the Office of the Council of State (8) Authorized Representative of the Office of Prevention and Suppression on National Corruption (9) Authorized Representative of the Office of the Prime Minister (10) Authorized Representative of the Office of Fiscal Policy (11) Authorized Representative of the Office of Industrial Product Standardization (12) not more than five (5) qualified persons as appointed by the Prime Minister.

Agency is allowed to enter into a contract without submitting a contract concerned to the OAG for scrutiny.

Furthermore, where it is impractical to conclude a contract concerned as prescribed in the 1992 Regulation's sample contract, such a draft contract shall be submitted to the OAG for scrutiny unless a draft contract, which is similar to the original contract, has been previously reviewed by OAG. For a lease contract requiring additional payments other than rent or in a case where a head of a Government Agency is of the opinion that a draft contract may give rise to an issue of disadvantages to the national interest or contain invalid terms and conditions, such contract must be submitted to the OAG for scrutiny. Nevertheless, it is noted that in any circumstance, the Procurement Committee has its vast authority and discretion to give an approval to any Government Agency an exemption from the rules stipulated by this Regulation.

Subject to the 1992 Regulation, only main Government Agencies are made to comply with this Regulation so Local Administrative Organizations and State Enterprises are excluded. While the Local Administrative Organizations are required to comply with rules as stipulated by the Regulation of the Ministry of Interior on Procurement of Local Administrative Organizations Act, B.E. 2535 (1992), State Enterprises are imposed to comply with their own regulations on procurement. In practice, it appears that the Regulation of the Ministry of Interior on Procurement of Local Administrative Organizations Act, B.E. 2535 (1992) and State Enterprises' regulation on procurement adopt the 1992 Regulation as their own rules. Therefore, when scrutinizing a draft contract of State Enterprises, the OAG must be aware that laws concerning the establishment of those State Enterprises as well as their

regulations on procurement are taken into an account for the OAG must assure that a contract transaction is within their scope and authority of those State Enterprises.

#### **4.3.3. A Review of State Contracts in Accordance with the Private Participation in State Undertakings Act, B.E. 2535 (1992)**

Generally, this Act is imposed on all Government Agencies (including Local Administrative Organizations and State Enterprises) and is only applicable to a state-joint venture contract (a state contract falls within the definition of a “state-joint venture contract,” thereby being governed by this Act). The reason why this type of a contract is to be governed with special implication is that a state-joint venture contract has particular characteristics. A state-joint venture contract normally allows private investors to take part in public activities provided by Government Agencies. Moreover, such state-joint venture projects are, normally, worth millions and millions of dollars. Therefore, a contract falling into the definition of a state-joint venture contract must be submitted to the OAG for scrutiny and the OAG must assure that such a state-joint venture contract will be specifically treated, implemented and administrated as provided by this Act.

Basically, a state contract falling into the definition of a state-joint venture contract is required by this Act to be submitted to the OAG for a review provided that a state-joint venture contract meets the following conditions. First, a contract must be entered into between a Government Agency (including Local Administrative Organizations and State Enterprises) as the one party and a member of the private sector as the other party. Second, a contract’s transaction must involve in the state undertakings authorized by law, the exploitation of natural resources, or the utilization of any asset or property of Government Agencies. Third, the contract project is worth at least one (1) billion Baht (approximately US\$ twenty eight and

fifty-seven hundredths (28.57) million) or more in either form of an investment fund, asset, or property. Fourth, the private participation in state undertakings must be done in a form of either a state-joint venture with a private sector or a private investment with an approval, concession, or any exclusive right granted by Government Agencies.

Given such a definition, a state-joint venture contract could be simultaneously defined as a concession contract and an administrative contract under the Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999), thereby being governed by the Administrative Court Act when disputes arising out of those state-joint venture contracts occur. The Table of Legislation Regarding the Execution of State Contracts Applicable to Government Agencies appears in **Appendix 6 of the Appendices**.

## **Chapter 2 Practice and Process of Reviewing Draft State Contracts**

The OAG reviews a draft contract through a series of procedures. These procedures embody the ethics of the OAG's professional philosophy. As a result, all public prosecutors are bound by these procedures because non-compliance may be damaging to the State or it may otherwise entail serious unforeseen or foreseeable adverse consequences. Therefore, the OAG is required to review a draft contract consonant with these four (4) key rules: (1) the most updated laws, regulations, Cabinet Resolutions, and international law and practice; (2) for benefits of the State; (3) for public interest or policy; and (4) the OAG's internal practice.

As to the first rule, the OAG must ensure that a contract's terms and conditions are subject to and consistent with the most updated relevant laws, regulations, Cabinet Resolutions, and orders in order to ensure the complete legality of a contract. Therefore, it is very likely in practice that a particular contract may be governed by a set of relevant statutory acts, regulations, Cabinet Resolutions, or orders. It is the duty of the OAG to thoroughly look through all relevant laws, regulations, Cabinet Resolutions and orders as well as international law and practice when reviewing a state contract.

As a second rule, a state contract, especially a state contract involving in the exercising of the State's power, must be executed for the State's benefit. Regarding this rule, the OAG lays down a guideline of reservations on certain issues in particular so that all responsible public prosecutors must be aware and take them into consideration when reviewing a draft contract. The following issues are reservations made by the OAG: definite and inclusive contract pricing; fair and reasonable purchased price; shipment by Thai Vessels' policy; terms of payment; performance guarantee bond, etc. Terms and conditions that differ from the OAG's

reservations require the responsible public prosecutor to provide his/ her supervisor with a written explanatory memorandum.

As a third rule, the state contract granting private parties to provide public service or utility must be executed to serve public policy or interest. Therefore, the OAG is inevitably required to apply the theory of public interest to any contract concerned. As a result, terms and conditions of a state contract involving the provision of public service or utility must reflect and correspond to public policy (for example, a concession contract or construction contract). Especially when coming across a state contract granting a private party exclusive rights to operate the project's property, the OAG is likely to advise that a contract should apply the BTO ("Build-Transfer-Operate") term to ensure that when the project's facility has been completely built, the ownership of the facility will be transferred to the State so that the project's facility will not be able to be seized by a contractor's creditors. However, it is noted that the application of these terms of BTO ("Build-Transfer-Operate") or BOT (Build-Operate-Transfer") is variable depending on the nature of a contract transaction between the parties. The details of this rule will be discussed later.

As to the fourth rule, the OAG also issues internal practice as a guideline that responsible public prosecutors must follow from the beginning to the end of the process. The details of these rules will be also addressed in forthcoming section of this Chapter.

## **1. Relevant Laws, Regulations, Cabinet Resolutions and International Law and Practice**

When reviewing a state contract, the OAG has an obligation to ensure that contract drafting remains consistent with the most updated laws, regulations, Cabinet Resolutions, and international law and practice. This section addresses the most important of these laws, regulations, resolutions, and practices.

### **1.1. Relevant Laws**

Basically, the OAG must examine two (2) main types of laws: general laws and specific laws. As to general laws, when reviewing a draft contract, the OAG needs to examine basic rules and principles of general laws, especially the Civil and Commercial Code (“CCC”) that provides basic legal principles of contract law, sales law, corporate and commercial law, and so on. For example, for contract elements, it is inconceivable to disregard basic principles of contract law, such as the freedom of contract<sup>120</sup> or the privity of contract.<sup>121</sup> These are the foundations of contract law from which parties cannot depart.

Under Thai law, it is advised that the basic principles provided by the CCC are essential. For elements of a state contract, the CCC, for example, lays down the principal rules regarding contract formation, contract interpretation, contract modification, performance, remedies, assignment of rights, and delegation of duties. The CCC also provides general rules regarding the capacity of both natural and juristic persons, property and real property, prescription, obligations, unjust

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<sup>120</sup> Freedom of contract is considered by the U.S. Constitution as a basic right reserved to the people (Art. I & 10) that a state cannot violate even under sanction of direct legislative act. *Springfield Fire & Marine Ins. Co. V. Holmes*, D.C. Mont., 32 F.Supp. 964, 987.

<sup>121</sup> Privity refers to a direct relationship between two or more contracting parties. It was traditionally essential for any action that privity exist between the plaintiff and defendant but the importance of privity has currently declined drastically. Warranty statutes have largely pre-empted the importance of privity. Further discussion of privity exceeds this paper’s scope.



enrichment, contract, sales, leasing, guarantee, agency, partnership and corporate, and other foundational legal subjects.

Apart from these general law principles, the OAG is required to consider the following specific laws in order to check whether a contract is governed by any of these statutory acts.

**1.1.1. Restructuring of the Government Organisation Act, B.E. 2545 (2002)**

The Act was promulgated in 2002 to completely restructure the entire Government Agencies in Thailand, particularly at the ministerial level. Currently, there are twenty (20) ministries, including nine (9) Independent Organisations. The Act also details the scope, authority, and functions of individual ministries. Whereas competent ministers supervise and administer their respective ministries, seven out of these Independent Organisations are overseen and governed by the Prime Minister. The other two Independent Organisations, namely the Office of Money Laundering Suppression and Prevention, and the OAG, are supervised by the Minister of Justice.

While the Restructuring of Government Organisation Act, B.E. 2545 (2002) establishes the structure of government organisations at the ministerial level, royal decrees lay down the structure of government divisions within individual ministries, as well as the respective scope, mandate, and functions of each division. Therefore, it is necessary to examine the royal decree of each division, in addition to the Restructuring of Government Organisation Act, B.E. 2545 (2002) to determine the clear and specific mandate, scope, authority and functions of each division.

To state more precisely, this Act performs the vital function of examining whether a draft contract is within the scope and authority of a particular

Government Agency. A contract executed outside the scope and authority of its Government Agency is void, and therefore not legally binding on the parties.

This Act only pertains questions about the authority, mandates and scope of main Government Agencies (the Legislative Branch, the Executive Branch, the Judicial Branch) and some Independent Organisations (for example, the OAG). For Local Authorities<sup>122</sup> and State Enterprises, it is advised to check with their establishment law.

### **1.1.2. State Enterprises' Establishment Law**

Surprisingly, State Enterprises in Thailand can be found in various forms: State-owned entities, corporations, divisions as partial sections of Government Agencies, or independent institutions. Regardless of the form, State Enterprises have historically originated from the State Enterprises Establishment Act, B.E. 2496 (1953), which conferred upon the Government the power to establish any State Enterprise as responsible for providing public service or utility to its people, or to carry on certain economic activities. By this means, a Royal Decree establishing such State Enterprise was issued in accordance with this Act.<sup>123</sup>

Currently, State Enterprises can be set up by any of these three methods: an individual and a separate act, a Royal Decree in accordance with the State Enterprises Establishment Act, B.E. 2496 (1953), and a corporation in accordance with the CCC. Moreover, objectives for establishing State Enterprises are no longer limited to the provision of public service and utility, or economic activities. State Enterprises can be established to carry on other activities to serve the government policy. For example, the Sports Authority of Thailand — one of State

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<sup>122</sup> Local Administration Organisations (Provincial Administrative Organisations, Municipal Organisations, Tambol Administrative Organisations, Bangkok Metropolitan Administration and Pattaya Administration), and State Enterprises are excluded.

<sup>123</sup> State Enterprises Establishment Act, B.E. 2496 (1953) (Thail.).

Enterprises —is established to promote sports and recreational activities for nationals and residents in Thailand. Likewise, the Tourism Authority of Thailand functions as the authority to promote tourism in Thailand.

Determination of the scope and authority of individual State Enterprises requires the examination of statutory acts in relation to their establishment. This establishment's legislation can be found in different levels: a statutory act, a Royal Decrees pursuant to the State Enterprises Establishment Act, B.E. 2496 (1953), and a memorandum of association under the CCC. These relevant statutory acts will indicate whether a contract is within the scope and authority of each State Enterprise as well as whether the proper authorization has been granted to enter into a contract with the other party.

Determination of scope and authority of a State Enterprise can be exemplified in the National Lottery Case. In fact, the National Lottery case provides a sound answer to the question whether a contract entered into with the private party is within the scope and authority of the National Lottery Office as the contracting government agency. The National Lottery Office was established by the National Lottery Office Act, B.E. 2517 (1974) in 1974 with its exclusive mandate to issue the national lottery. A lottery, as issued by the National Lottery Office, is a gambling game where players buy numbered tickets at the National Lottery Office. Those whose numbered tickets match the numbers drawn by the National Lottery Office win designated prizes.

Later, due to a widespread two and three digit lotto game in the black market, the Government under the leadership of the Prime Minister Thaksin Shinawatra was persuaded to legalise a two and three digit lotto game adapted from

the black market. The Government subsequently requested that the National Lottery Office issued a two and three digit lotto game, trumping the black market.

Due to such a policy, the National Lottery Office issued a two and three digit lotto game and then entered into the On-Line Lotto Game System Provision Agreement with Loxley G Tech Technology Co. Ltd. (“Loxley”). Based upon such an agreement, Loxley was obliged to provide the National Lottery Office with an online lotto system covering a two and three-digit lotto game, lotto, keno, and sport betting (soccer). However, in the contract’s initial terms, Loxley was required to serve the National Lottery Office with an online two and three-digit lotto system. The results of the system were to be directly referable to and dependant upon the lottery issued by the National Lottery Office. In other words, a two and three digit lotto game was a game providing a chance that resembled numbers drawn as in a lottery that matched the numbers on a card. A person who had numbers appearing in his card matching the numbers drawn as in a lottery would win (earning rewards provided by the National Lottery Office).

After a military coup in Thailand on September 19, 2006, a new provisional Government led by the Prime Minister Surayut Chulanontha announced that a two and three digit lotto game issued by the National Lottery Office was outside the scope and objectives of the National Lottery Office’s establishment. The National Lottery Office Act, B.E. 2517 (1974) clearly provides that the National Lottery Office has authority to issue lottery, print lottery, or do other activities relevant to, or for the benefit of, the National Lottery Office. The Act does not allow the National Lottery Office to issue a two and three digit lotto game. Therefore, the National Lottery Office has no authority to issue a two and three digit lotto game.

Nevertheless, after balancing the equities of having a two and three digit lotto game, the new Government agreed to keep this lotto game due to its popular demand. However, the game required further legalisation to survive. Therefore, the National Lottery Office Act, B.E. 2517 (1974) has been subsequently modified to extend the scope and authority of the National Lottery Office to cover the issuance of a two and three digit lotto game.

As a consequence, due to the fact that the two and three digit lotto games by the National Lottery Office was evidently outside the scope and authority of the National Lottery Office, the Online Lotto Game System Provision Agreement between the National Lottery Office and Loxley was presumed to be invalid, being *ultra vires* and thus outside the National Lottery Office's authority.

Hypothetically, if the Online Lotto System Provision Agreement between the National Lottery Office and Loxley were to be considered unlawful for the lack of the National Lottery Office's authority or excess of power, the National Lottery Office would suffer a huge loss. Eventually, the State would suffer because it would be required to compensate Loxley for the losses suffered.

### **1.1.3. National Executive Council Announcement No. 58**

The National Executive Council Announcement No. 58 was published on January 26, 2515 (1972) to regulate certain State activities in relation to the provision of public service or utility, particularly for any service or utility in respect of trains, trams, canal construction, airways, water system, irrigation system, electricity, pipe gasoline and sea shipping.<sup>124</sup> Subject to the National Executive Council Announcement No. 58, the private sector is not allowed to operate or provide any public service or utility unless approved by a competent Minister.

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<sup>124</sup> National Executive Council Announcement No. 58 B.E. 2515 (1972) (Thail.) clause 3.

Whereas the Minister of Transportation has the power to approve or grant a concession to a private party to operate trains and airways, the Minister of Agriculture and Co-operatives has the authority to approve or grant a concession over activities regarding canal construction and irrigation systems to a private party. Activities involving the use of trams, water system, and pipe gasoline are within the authority and discretion of the Minister of the Interior.

A private party, who is interested in operating these activities under the the National Executive Council Announcement No. 58, is required to seek prior approval from their respective Minister through a concession contract but the National Executive Council Announcement No. 58 failed to provide practical guidance, requirements, or conditions as to how a private party could obtain such a concession. The National Executive Council Announcement No. 58 gave the particular Minister the freedom to devise criteria for granting of an appropriate concession to a private party. There were, in other words, no standard rules and criteria to which both the competent authority and a private party were obliged to conform. The rules and criteria set up by the respective Minister were seen very subjective and discretionary. The Minister who happened to be in charge at the time could operate such an agreement with any set of rules of standards.

The absence of standard rules and criteria in the the National Executive Council Announcement No. 58 raised questions of transparency, good governance, and corruption. As a result, the Private Participation in State Undertakings Act, B.E. 2535 (1992) was enacted to address these problems. Nevertheless, even with the promulgation of the 1992 Act, it is noted that the 1992 Act did not truly replace the National Executive Council Announcement No. 58. On the contrary, provisions of the National Executive Council Announcement No. 58 still remain effective. Having

said that, activities listed in the National Executive Council Announcement No. 58 with their value less than one (1) billion Baht (approximately equivalent to US\$ twenty eight and fifty-seven hundredths (28.57) million) are still governed by the National Executive Council Announcement No. 58. On the other hand, a project having its value up to one (1) billion Baht (approximately equivalent to US\$ twenty eight and fifty-seven hundredths (28.57) million) or more shall be governed by the 1992 Act. Therefore, the OAG is mandated to ascertain whether a contract regarding a particular area of activities would still be governed by the National Executive Council Announcement No. 58 or the Private Participation in State Undertakings Act, B.E. 2535 (1992).

**1.1.4. Private Participation in State Undertakings Act, B.E. 2535 (1992)**

The Private Participation in State Undertakings Act, B.E. 2535 (1992) was adopted to stop irregular, unfair, uncertain, and ambiguous rules and processes arising from the National Executive Council Announcement No 58. The 1992 Act lays down clear and concrete rules for selecting a private party to take part, operate, or jointly invest in state undertakings, activities or projects. Apparently, the 1992 Act provides a private party transparency and formality of requirements and conditions as to how to obtain an approval to participate in State projects. It is believed that the 1992 Act would provide greater confidence for foreign investors, thereby attracting FDI and foreign capital toward Thailand through State projects. Furthermore, the 1992 Act also guarantee that the private participation in State projects will benefit the State in consonant with the government policy. The various ways in which this Act benefits the State will be examined later.

The 1992 Act provides standard rules and timeframes for all relevant processes from the start of the project to its completion. Furthermore, the 1992 Act also provides the project's supervisory measure to ensure that the project will be implemented and operated as contractually agreed upon and consistent with the government policy. Especially on the occurrence of inconvenient or unusual events, the selected private investor will be promptly provided with government assistance so that the project will be successfully completed so as to fulfil the provision of public service and utility.

The private participation in state undertakings can demonstrate the involvement of the following characteristics: (1) state undertakings authorized by law; (2) state undertaking in relation to the exploitation of natural resources; or (3) state undertaking in relation to the utilisation of any asset or property owned by the State or the Government or any Government Agency.

More importantly, it is noted that the 1992 Act applies to all Government Agencies. There is no exception for either Local Authorities (Local Administrative Organisations) or State Enterprises so long as the project value is worth up to or more than one (1) billion Baht (approximately equivalent to US\$ twenty eight and fifty-seven hundredths (28.57) million), thereby requiring the contracting government agency to comply with rules and requirements provided by the 1992 Act.

Compliance with the 1992 Act consists of three (3) stages: project proposal, project implementation, and project supervision. The 1992 Act expressly specifies detailed requirements as to its timeframe and as to the constituent members of a committee that shall select and supervise the private party.

**(i) Project Proposal**



For a project with its value ranging from one (1) to five (5) billion Baht (approximately from US\$ twenty eight and fifty-seven hundredths (28.57) million to US\$ one hundred forty two and eighty-five hundredths (142.85) million), the initiating project author (the contracting government agency) must prepare a project feasibility study, as required by the Office of the National Economic and Social Development Board (“NESDB”) for a competent Minister in charge.<sup>125</sup> The Minister must consider whether or not he/ she agrees with the project. For a project worth more than five (5) billion Baht (approximately equivalent to US\$ one hundred forty two and eighty-five hundredths (142.85) million), the initiating project author must have an independent and qualified consultant<sup>126</sup> to prepare the project feasibility study. Subsequently, upon the completion of the report, it will be submitted to a respective Minister for consideration.

Upon the project study’s completion, the Minister considers the project feasibility. If he/she agrees with it, he/she will submit the same to the NESDB for consideration if it is a new project.<sup>127</sup> For an old project that already has any asset or property, the project feasibility study will be submitted to the Ministry of Finance for consideration. The NESDB or the Ministry of Finance are destined to consider and give their opinion as to whether or not they agree with the proposed project within

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<sup>125</sup> Notification of the Office of the National Economic and Social Development Board. January 13, 2536 (1993) (Thail.). This provides that the initiating project owner prepares the following: scope and details of the project, rationales and necessity of the project, economic and social impacts, readiness of the initiating project owner, financial status, project management and administration, and implementation plan.

<sup>126</sup> Notification of the Ministry of Finance, July 7, 2537 (1994) (Thail.). This provides that consultant (s) must be independent and must not, either directly or indirectly, be involved with interested private sector. Consultant (s) shall possess knowledge, capability, experience and work relevant to the project concerned at least three (3) years.

In cases where consultants are foreign, there must be Thai nationals joining a team of consultants of not less than fifty (50) per cent of entire man/month consultants.

<sup>127</sup> In consideration of the project proposal, the NESDB will take the following factors into consideration: compatibility between the project and the government policy as well as the current national economic and social development plan, suitability of the project, project impacts on environment and community, politics and security, law and regulations, roles and contribution of private sector to the initiating project author, benefits arising from the private participation in state undertaking and activities.

sixty (60) days prior to submitting the project proposal to the Council of Ministers for ultimate consideration.

In cases where the NESDB or the Ministry of Finance disagrees with the initiating project author, they will inform the initiating project author of their disagreement within sixty (60) days. In such circumstance, if the initiating project author disagrees, he/she will provide and submit additional information to a respective Minister. The Minister will gather all necessary information and then submit a report to the Council of Ministers for final consideration.

Where the NESDB or the Ministry of Finance agrees with the initiating project author, the project will be proposed to the Council of Ministers for final consideration.

#### **(ii) Project Implementation**

After the project has been approved by the Council of Ministers, the initiating project author (the contracting government agency) will select a prospective contractor through a fair and transparent bidding method. For a project with value ranging from one (1) to five (5) billion Baht (approximately from US\$ twenty eight and fifty-seven hundredths (28.57) million to US\$ one hundred forty two and eighty-five hundredths (142.85) million), the initiating project author must prepare an invitation notice, terms of reference (“TOR”), and contract terms and conditions. For a project worth more than five (5) billion Baht (approximately equivalent to US\$ one hundred forty two and eighty-five hundredths (142.85) million), the initiating project author must have an independent and qualified consultant<sup>128</sup> help prepare and draft

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<sup>128</sup> Notification of Ministry of Finance, July 7, 2537 (1994) (Thail.), *supra* note 126. It provides that consultant (s) must be independent and must not, either directly or indirectly, be involved with interested private sector parties. Consultant (s) shall possess knowledge, capability, experience and works relevant to the project concerned at least three (3) years.

If consultants are foreign, there must be Thai people joining a team of consultants of not less than fifty (50) per cent of entire man/month consultants.

these documents. The greater the project value naturally requires the more expertise to offset the greater potential loss.

Meanwhile, the initiating project author must also appoint a Committee consisting of constituent members, as required by the 1992 Act.<sup>129</sup> The Committee has authority and mandate to consider and approve draft invitation notices, draft TORs, and a draft contract. After approval by the Committee, the Committee shall select a prospective contractor to participate or implement the state project or activity.<sup>130</sup> Additionally, the 1992 Act authorizes the Committee to require the selected contractor to provide the contracting government agency a bidding guarantee, or performance guarantee or security bond subject to the terms and conditions designated by the Committee. For example, the value of the bidding guarantee and performance bond or the validity of the terms of these guarantees might be included among the conditions. More precisely, the Committee is authorised by the 1992 Act to supervise and ensure that the bidding method and all relevant processes are fair and transparent to all potentially interested contractors.

The bidding method is comparatively the most suitable and effective means to provide a fair and equal opportunity to all interested contractors for it can provide full and open competition among potential contractors. However, in some cases, if the Committee and the initiating project author believe that the bidding method should not be used for a project, the proposal of such shall be submitted to the NESDB and the Ministry of Finance for consideration. However, if the NESDB or

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<sup>129</sup> Section 13 of the Private Participation in State Undertaking Act, B.E. 2535 (1992) (Thail.) provides that the initiating project author is required to appoint a committee, consisting of an authorised representative of a relevant ministry as a chairman, an authorised representative of the Ministry of Finance, an authorised representative of the Office of Council of State, an authorised representative of the OAG, an authorised representative of the NESDB, an authorised representative of the Budget Bureau, two (2) authorised representatives from other ministries, not more than three (3) qualified persons and an authorised representative of the initiating project author as a secretary.

<sup>130</sup> Private Participation in State Undertakings Act, B.E. 2535 (1992), *supra* note 92, § 14.

the Ministry of Finance disagrees with the Committee and the initiating project author, the bidding will apply to a project. The question whether the bidding method should be used for the project only arises when the NESDB and the Ministry of Finance agree with the Committee that the bidding method is unsuitable. Under such circumstance, the Council of Ministers shall consider the question for final approval.<sup>131</sup> Otherwise, the bidding method will always apply.

In cases where the initiating project author disagrees with the Committee on non-application of the bidding method, the initiating project author must submit its objection to the NESDB and the Ministry of Finance. If the NESDB and the Ministry of Finance agree with the initiating project author's objection, and in cases where the NESDB and the Ministry of Finance cannot reach an agreement on the bidding method, automatic application of the standard bidding method applies.<sup>132</sup>

Finally, the 1992 Act requires for quorum at least three fourths (3/4) of the total Committee members in attendance.<sup>133</sup> It also provides that a meeting resolution issued by a Committee shall not be by less than two thirds (2/3) of the Committee members attending the meeting.<sup>134</sup>

### **(iii) Project Supervision**

Following the project implementation, once the contractor has been selected and the contract between the initiating project author and the contractor has been executed, the next step is ensuring both parties fully perform. To effectuate this need, the 1992 Act provides that the initiating project author appoints the Project Coordination and Follow-up Committee<sup>135</sup> with an authorised representative of the

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<sup>131</sup> *Id.* § 16 para 1.

<sup>132</sup> *Id.* § 16 para 2.

<sup>133</sup> *Id.* § 19 para 1.

<sup>134</sup> *Id.* § 19 para 2.

<sup>135</sup> *Id.* § 22. This section provides that the initiating project owner is required to appoint a Committee called a "Coordination and Follow-up Committee." The Committee consists of authorised

contractor acting as a member of the Committee panels. These Committee panels, operating as a tripartite committee, are unique by comparison. The 1992 Act requires the Coordination and Follow-up Committee to follow-up and supervise both parties, making sure that the contractor will perform the agreed contractual obligations. In the event of unusual occurrences, this Committee is required to work with the parties to remove all obstacles and ensure that the project will be completed punctually and successfully. Finally, the Committee must report on the stage of the project implementation, including a progress report on problems and obstacles. This report should include possible solution proposals to the respective Minister at least every six (6) months.

## **1.2. Relevant Regulations**

In addition to relevant laws, the OAG must review all relevant regulations regarding a contract-making process before a contracting government agency enters into a contract with a private party. The Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992) (the “1992 Regulation”) is not only considered the most significant regulation on government procurement but it also plays significant roles to other types of state contracts. The reason is that it has become common practice for most Government Agencies to adopt the 1992 Regulation when legislating state contracts other than government procurement contracts even though the 1992 Regulation is theoretically intended to apply to only government procurement contracts.

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representative of the initiating project owner as a chairman, an authorised representative of the Ministry of Finance, an authorised representative of the NESDB, an authorised representative from the other Government Agency other than the initiating project owner, an authorised representatives from the contractor, an authorised representative from the other relevant ministry, authorised representatives as approved by the initiating project owner of not more than three (3) qualified persons. As a result, the Committee members must exceed nine (9) persons.

Additionally, it is noted that the application of 1992 Regulation is exclusively confined to main Government Agencies consisting of the Legislative Branch, the Executive Branch (only the Central Administration Level and the Regional Administration Level), the Judicial Branch and some Independent Organisations such as the OAG. As a result, Local Authorities (Local Administrative Organizations), Independent Organizations, and State Enterprises are excluded from the application of the 1992 Regulation. Nonetheless, the 1992 Regulation is considered the paradigm for other Government Agencies outside the 1992 Regulation's scope. Most Government Agencies are likely to adopt the 1992 Regulation as their own regulations. As a result, it is very possible to find that regulations on procurement of many State Enterprises have similar provisions to those in the 1992 Regulation. Moreover, the Regulation of Ministry of Interior on Procurement of Local Administrative Organisations, B.E. 2535 (1992) applicable to all Local Authorities almost contains identical provisions as appeared in the 1992 Regulation.

Regardless of the fact that the 1992 Regulation may be adopted to other types of state contracts, the 1992 Regulation is theoretically intended to only apply to government procurement contracts, covering (1) acquisition of supplies, services and construction; (2) advisory services; (3) design and supervision of work; (4) exchange of supplies; and (5) leasing. As a result, other types of state contracts are not governed by this 1992 Regulation. Examples of other types of contracts include a concession contract, a licensing contract, a state joint-venture contracts, etc.

As a mechanism of the 1992 Regulation's provisions, the 1992 Regulation also authorize at least two (2) key persons to supervise the application, interpretation, enforcement, and any related matters in respect to the 1992 Regulation.

They are the Permanent-Secretary of the Office of the Prime Minister and the Procurement Committee. While the Permanent-Secretary of the Office of the Prime Minister assumes authority of the 1992's application, interpretation and enforcement in general,<sup>136</sup> the Procurement Committee acting as a Working Committee under the Permanent-Secretary of the Office of the Prime Minister assumes authority in handling all routine subject matter regarding a government procurement contract under this 1992 Regulation.

As to the Procurement Committee, persons designated to serve on the Committee Panels can be classified into three (3) groups: (1) representatives of relevant Government Agencies; (2) independent and qualified persons; and (3) a Secretary and Secretary Assistants.

Subject to these three (3) groups, the Committee Panels consist of (1) the Director-General of the Ministry of Finance; (2) the Director-General of the Department of the Comptroller General; (3) an authorized representative of the Ministry of Defence; (4) an authorized representative of the Office of the Audit General; (5) an authorized representative of the OAG; (6) an authorized representative of the Budget Bureau; (7) an authorized representative of the Office of the Council of State; (8) an authorized representative of the Office of Prevention and Suppression on National Corruption; (9) an authorized representative of the Office of the Prime Minister; (10) an authorized representative of the Fiscal Policy Office; (11) an authorized representative of the Office of Industrial Product Standardization; (12) not more than five (5) qualified persons as appointed by the Prime Minister as Committee Panels; (13) an authorised staff of the Department of the Comptroller General as a Committee Member and Secretary to the Procurement Committee together with not

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<sup>136</sup> Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992) (Thail.), *supra* note 118, clause 4.

more than two (2) persons as appointed by the Procurement Committee as Secretary Assistants.

The Procurement Committee has a broad range of authority and duties under the 1992 Regulation. As a primary mandate, the Procurement Committee interprets and issues rulings in a manner consonant with the 1992 Regulation. Second, the Procurement Committee has discretionary power to grant any exemption of the 1992 Regulation subject to limited level and scope to any Government Agency if necessary. The exemption of the 1992 Regulation above the Procurement Committee's limited level and scope will be within the Council of Ministers' authority. Third, the Procurement Committee is designated to consider a complaint regarding the violation of the 1992 Regulation by any Government Agency. Fourth, where the Procurement Committee comes across any irregularity of the 1992 Regulation in practice, the Procurement Committee is required to figure it out and propose the solution to the Council of Ministers for consideration so that the Council of Ministers shall issue an amendment to the 1992 Regulation accordingly. Fifth, the Procurement is required to set up guidance, practice or process as well as a contract sample and standard supplementary form to the 1992 Regulation in order to serve as the reference material for all Government Agencies. Sixth, the Procurement Committee also has authority to propose the Work Abandoned Suppliers and Contractors List to the Permanent-Secretary of the Office of the Prime Minister. The list shall be subsequently circulated to all Government Agencies as soon as it has been approved by the Permanent-Secretary of the Office of the Prime Minister. Any person of the Work Abandoned Suppliers and Contractors List will be barred from tendering an offer to any Government Agency. Likewise, the 1992 Regulation also prohibits any Government Agency from transacting with a supplier or contractor whose name is



listed.<sup>137</sup> In addition to these mandates, the Procurement Committee is also required to set up any requirement or any term or condition of a contract concerned (for example, percentage of supplies or materials used from Thai owned businesses, local supplies and services,<sup>138</sup> or maximum penalty rates) and as a result, ensure that a prospective private party complies with these terms.

In conclusion, it is evident that the Procurement Committee is considered a key person in terms of the application of the 1992 Regulation. The Procurement Committee has a broad range of authorities and responsibilities covering all matters in respect of the 1992 Regulation. Its powers, *inter alia*, include the supervision of the application, interpretation, and enforcement of the 1992 Regulation, creating the Work Abandoned Suppliers and Contractors List, determining local content requirements, and setting penalty rates, amongst other duties.<sup>139</sup>

The following is the concept of the 1992 Regulation and significant rules set by the 1992 Regulation.

#### **1.2.1. The Concept of the 1992 Regulation<sup>140</sup>**

Rules and requirements provided by the 1992 Regulation ensure that each step of the procurement is fair and transparent as well as provides open competitiveness to all interested bidders, suppliers or contractors. In general, any bidder is encouraged to tender an offer for any procurement project provided that one bidder submits one tender for one particular project. If it appears that several bidders are associated with other bidders or have mutual interest with other bidders and those

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<sup>137</sup> *Id.* clause 145.

<sup>138</sup> *Id.* clause 16.

<sup>139</sup> *Id.* clause 12.

<sup>140</sup> *Id.* clause 15.

bidders individually tender their own offers to any procurement project, only one tender can be used.<sup>141</sup>

The Regulation defines the term “mutual interest” as a circumstance where a natural or juristic person who tenders a bid for any particular procurement has either direct or indirect mutual interest with other bidders’ business owners who have put a tender for bidding of the same procurement.

The term of “having direct or indirect mutual interest”<sup>142</sup> covers, *inter alia*, the relationship of these bidders in terms of the management,<sup>143</sup> capital,<sup>144</sup> or crossed relationships between management and capital. The relationship among bidders in terms of management is considered a relationship whereby a manager, managing partner, managing director, executive director, or these persons of one juristic person has power over other natural persons or juristic persons’ business or operation of which has already tendered for bidding on the same procurement.

The relationship of these bidders in terms of capital is a relationship whereby a partner of an ordinary partnership, a partner with unlimited liability of a limited partnership, or a major shareholder in a limited company or a public company is a partner of another ordinary partnership or limited partnership, or a major shareholder of another limited company or public company which has already tendered for the same procurement. As far as these positions are concerned, spouses

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<sup>141</sup> *Id.* clause 15.

<sup>142</sup> *Id.* clause 5.

<sup>143</sup> The relationship of those bidders in terms of management is a relationship whereby a manager, managing partner, managing director or executive director of one natural person or juristic person’s business or operation has power over another natural person or juristic person’s business or operation of which already put a tender for bidding of the same procurement.

<sup>144</sup> The relationship of those bidders in terms of capital is a relationship whereby a partner of an ordinary partnership, a partner with unlimited liability of a limited partnership or a major shareholder in a limited company or a public company is a partner of another ordinary partnership or limited partnership, or a major shareholder of another limited company or public company in which already put a tender for bidding of the same procurement.

and children of these persons holding such positions are included into the definition of “having direct or indirect mutual interest.”

To avoid bidders having mutual interests or associations, the contracting government agency must examine all bidder qualifications. This critical determination must precede the opening of a quoted price or bidding price.<sup>145</sup> This process is known as “pre-qualification examination.” To complete pre-qualification examination, bidders must submit relevant documents to the contracting government agency. In cases of natural persons or groups of natural persons, a certified copy of the bidder identification card and a copy of partnership agreement (if any), as well as a certified copy of identification card of partners will be submitted to the procuring government agency.<sup>146</sup> For juristic persons, authorities require a certified copy of Affidavit of Incorporation, Memorandum of Association, lists of managing partners, managing directors, persons with controlling power and major shareholders.<sup>147</sup> For a joint-venture or consortium, a certified copy of a joint-venture or consortium agreement and identification card of participants must be submitted to the procuring government agency. If any participant of a joint-venture or consortium is not of Thai nationality, a certified copy of passport of such participant is required. If a participant is a juristic person, a series of the following documents is required: a certified copy of Affidavit of Incorporation, Memorandum of Association, list of managing partners, managing directors, persons with controlling power and major shareholders.<sup>148</sup> In addition to these documents, a financial statement, a certified copy of a Commercial

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<sup>145</sup> Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992) (Thail.), *supra* note 118, clause 15.

<sup>146</sup> *Id.* clause 15.1.

<sup>147</sup> *Id.* clause 15.2.

<sup>148</sup> *Id.* clause 15.3.

Registration Certificate, and a certified copy of Value Added Tax (“VAT”) Registration Certificate may be required.<sup>149</sup>

### **1.2.2. Procurement Methods and Their Limits of Procurement Value**

The 1992 Regulation requires the procuring government agency (the contracting government agency) to apply one (1) of these five (5) methods to acquire supplies and services from a private party: Agreement on Price, Price Enquiry, Bidding, Special Method, and Special Case Method. The application of each method depends on certain conditions and the procurement value.<sup>150</sup> The application of the Agreement on Price is limited to procurement value not exceeding one hundred thousand (100,000) Baht (approximately equivalent to US\$ two thousand eight hundred and fifty seven (2,857)) per procurement.<sup>151</sup> The Price Enquiry will be applied if the procurement value as per one procurement is ranging from one hundred thousand (100,000) Baht (approximately equivalent to US\$ two thousand eight hundred and fifty seven (2,857)) to two million (2,000,000) Baht (approximately equivalent to US\$ fifty seven thousand one hundred forty two and eighty-five hundredths (57,142. 85)).<sup>152</sup> The procuring government agency is required to apply the Bidding if the procurement value, per procurement, exceeds two million (2,000,000) Baht (approximately equivalent to US\$ fifty seven thousand one hundred forty two and eighty-five hundredths (57,142. 85)).<sup>153</sup> Regardless of procurement value, if the procuring government agency chief reasonably believes that the Bidding should be applied in a case where the value is less than two million (2,000,000) Baht (approximately equivalent to US\$ fifty seven thousand one hundred forty two and

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<sup>149</sup> *Id.* clause 15 ter.

<sup>150</sup> *Id.* clause 18.

<sup>151</sup> *Id.* clause 18.

<sup>152</sup> *Id.* clause 20.

<sup>153</sup> *Id.* clause 21.

eighty five hundredths (57,142. 85)), the Bidding method will apply. However, the procurement value cannot be divided or split up to decrease the threshold of the procurement value in order to avoid using a particular procurement method.<sup>154</sup>

The Special Method applies in a case where supply acquisition exceeds one hundred thousand (100,000) Baht (approximately equivalent to US\$ two thousand eight hundred and fifty seven (2,857)) and falls within one of these conditions. First, the procured supplies are supplies to be auctioned by any of Government Agencies, Local Authorities (Local Administrative Organisations), State Enterprises, International Organisations, or Foreign Agencies.<sup>155</sup> Second, the procured supplies need to be acquired urgently; otherwise, a delay may cause harm to the State.<sup>156</sup> Third, the procured supplies are to be used in the government intelligence service.<sup>157</sup> Fourth, the procurement repeats what is to be used for additional need in cases of necessity, urgent situation, or for the benefit of such Government Agency.<sup>158</sup> Fifth, the procurement is to be acquired directly from abroad, or through an international organisation.<sup>159</sup> Sixth, such procurement is specially required to identify the brand-name of the procured supplies. Examples of such supplies are spare parts of certain vehicles due to the nature and usage or technical limitations subject to Clause 60.<sup>160</sup> Seventh, the procurement is either land, buildings, or structures in special need.<sup>161</sup> Finally, the procurement is required to refer to the Special Method due to the failure of other methods.<sup>162</sup>

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<sup>154</sup> *Id.* clause 22.

<sup>155</sup> *Id.* clause 23.1.

<sup>156</sup> *Id.* clause 23.2.

<sup>157</sup> *Id.* clause 23.3.

<sup>158</sup> *Id.* clause 23.4.

<sup>159</sup> *Id.* clause 23.5.

<sup>160</sup> *Id.* clause 23.6.

<sup>161</sup> *Id.* clause 23.7.

<sup>162</sup> *Id.* clause 23.8.

Likewise, as for services, the Special Method will apply in a case where the acquisition of services exceeds one hundred thousand (100,000) Baht (approximately equivalent to US\$ two thousand eight hundred and fifty seven (2,857)) and falls within one of these conditions. First, such service requires specific craftsmanship, or special expertise.<sup>163</sup> Second, such service is required for particular machines, machinery parts, mechanical devices, engines or electronics that need to be disassembled in order to examine the defect or damage so authorities can estimate repair cost.<sup>164</sup> Third, the procured service is the work that needs to be acquired urgently; otherwise, such delay may damage or harm the State.<sup>165</sup> Fourth, such service is required for the State's confidentiality.<sup>166</sup> Fifth, the procured service is a repetition of a work order, which is to be used for additional need in cases of necessity, urgent situation, or for the benefit of such government agency.<sup>167</sup> Finally, the procurement is required to use the Special Method due to the failure of other methods.<sup>168</sup>

The Special Case Method is rarely used in practice. This method typically applies when the procured supplies and services are acquired among Government Agencies (including Local Authorities and State Enterprises) and such Special Case Method must be approved by the Prime Minister or where the Special Case Method is allowed by any specific law or Cabinet Resolution.<sup>169</sup>

### **1.2.3. Thailand Purchasing Requirements<sup>170</sup>**

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<sup>163</sup> *Id.* clause 24.1.

<sup>164</sup> *Id.* clause 24.2.

<sup>165</sup> *Id.* clause 24.3.

<sup>166</sup> *Id.* clause 24.4.

<sup>167</sup> *Id.* clause 24.5.

<sup>168</sup> *Id.* clause 24.5.

<sup>169</sup> *Id.* clause 26.

<sup>170</sup> *Id.* clause 16.

Like other countries, the national policy encourages Government Agencies to purchase domestic supplies and services. As a result, the 1992 Regulation requires a procuring government agency to use locally produced supplies or supplies from Thai-owned businesses. The requirement of the purchased amount is stipulated by the Procurement Committee. Additionally, the procuring government agency cannot set up specifications that exclude local suppliers or Thai owned businesses from tendering a bid on government procurement.

#### **1.2.4. Advance Payments**

As a general rule, the procuring government agency is not allowed to make an advance payment to suppliers or contractors unless the procuring government agency reasonably believes it is necessarily subject to particular conditions. The exemption of the 1992 Regulation happens in a case of a procurement acquired from Local Authorities (Local Administrative Organisations) and State Enterprises. In such circumstance, the procuring government agency is allowed to make an advance payment of not more than fifty (50) per cent of the total procurement value.<sup>171</sup>

When the procurement is acquired from or through an overseas government agency, or international institution, or international organisation, or where scientific appliances or other suppliers are specially designated by the Procurement Committee and these supplies can be only purchased directly from manufacturers or suppliers abroad due to urgent necessity, the advance payment can be made. As a result, such an advance payment must be made in accordance with the terms and conditions as approved by those overseas government agencies,

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<sup>171</sup> *Id.* clause 68.1.

international institutions, international organisations, manufacturers, or suppliers.<sup>172</sup>

For subscriptions to a series of magazines, books or databases on CD-ROM in which they are issued periodically and the membership fee is required, the actual advance payment may be made.<sup>173</sup>

For procurement contracts awarded as a result of the Price Enquiry or the Bidding, advance payment not exceeding fifteen (15) per cent of the total procurement value can be made provided that such an advance payment is conditionally required by the Price Enquiry or the Bidding.<sup>174</sup>

For the procurement by a means of the Special Method, the procuring government agency is allowed to make an advance payment of more than fifty (50) per cent of the total procurement value.

However, when advance payments are required in cases of the Price Enquiry, the Bidding or the Special method, the supplier or contractor must, in return, provide the procuring government agency an advance payment guarantee or bond as a condition before receiving the advance payment from the procuring government agency. The guarantee or bond can be a Thai government bond or a letter of guarantee issued by a local commercial bank. In other cases, apart from the Price Enquiry, the Bidding and the Special Method, advance payment guarantees or bonds are not required.<sup>175</sup>

#### **1.2.5. Reservation Rights<sup>176</sup>**

Regardless of the terms and conditions stipulated in an invitation notice, TOR, or draft contract, if the procuring government agency finds that the interested supplier or contractor appears in the List of Work Abandoning Suppliers

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<sup>172</sup> *Id.* clause 68.2.

<sup>173</sup> *Id.* clause 68.3.

<sup>174</sup> *Id.* clause 68.4, 68.5.

<sup>175</sup> *Id.* clause 70.

<sup>176</sup> *Id.* clause 40.15.



and Contractors provided by the Procurement Committee, the procuring government agency shall have the right to reject the successful bidder and avoid or invalidate the procurement contract. More importantly, where the procuring government agency finds out that any part of the procurement process has not been performed in good faith, or in collusion with other bidders, the procuring government agency reserves the right not to opt for the procurement with the lowest bidder and can also suspend or cancel the procurement of supplies or services, regardless of the stage of performance.

#### **1.2.6. Formality of a Government Procurement Contract<sup>177</sup>**

As a general rule, a procurement contract must be written in the Thai language. However, if necessary, it can, in some cases, be written in a foreign language (e.g., English). Under such a circumstance, if a contract contains terms and conditions as prescribed in a sample contract as the reference material provided by the Procurement Committee, a Thai translation is not needed. Otherwise, a Thai translation must always accompany the foreign language version.

Where a Government Agency is situated abroad, a contract can be written in English or a foreign language other than English, provided that it is scrutinised by a legal expert abroad.

#### **1.2.7. Contract Amendment and Modification<sup>178</sup>**

As a rule, once a contract between a procuring government agency and a supplier or contractor is executed, it cannot be subsequently altered or modified unless it is necessary and such alteration or modification will not disadvantage the State. However, if the alteration or modification of a contract would benefit the State, such alteration or modification is allowable. In all cases, the procuring government

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<sup>177</sup> *Id.* clause 132.

<sup>178</sup> *Id.* clause 136.

agency cannot alter the terms and conditions that have been executed only for the private party's benefits.

#### **1.2.8. Performance Guarantee and Bond<sup>179</sup>**

The 1992 Regulation requires a supplier or contractor to provide the procuring government agency with a performance guarantee or bond ranging from five (5) to ten (10) per cent of the total procured value. Such bond will guarantee that a private party will fully perform his obligations. In the event of breach of contract by the private party, the Government Agency shall retain the right to collect on this bond. The performance guarantee or bond can be provided in various forms such as cash, cashier cheque, letter of guarantee issued by local commercial banks, bank guarantee issued by the Industrial Finance Corporation of Thailand ("IFCT"), a finance company, a finance and securities company licensed by the Bank of Thailand (BOT), or Thai government bond. However, in cases of an international bidding, a bank guarantee issued by a recognised foreign bank will suffice.<sup>180</sup>

Normally, when supplier's or contractor's obligations has been discharged, the procuring government agency is required to return such performance guarantee or bond to the supplier or contractor within fifteen (15) days from the date of discharge. In practice, the OAG however recommends that the procuring government agency holds the performance guarantee or bond for the entirety of the warranty period. In such circumstance, the performance guarantee or bond will be held during the term of a contract and until the warranty expires.<sup>181</sup>

#### **1.2.9. Penalty Payment<sup>182</sup>**

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<sup>179</sup> *Id.* clause 142.

<sup>180</sup> *Id.* clause 141.

<sup>181</sup> *Id.* clause 144.

<sup>182</sup> *Id.* clause 134.

The 1992 Regulation provides rates of penalty payment for damages of non-performance of a contract by a private party. For supplies, daily penalty rates ranging from one hundredths (0.01) to two tenths (0.20) per cent of undelivered supply value must be contractually stipulated. For services, in a case where the provision of contracted service by a private party must be completed at once, daily penalty rates between one hundredths (0.01) and one tenth (0.10) per cent of the total service value (the total project value), but not less than one hundred (100) Baht (approximately equivalent to US\$ 2.5) per day must be contractually stipulated. For infrastructure construction or public work adversely affecting the traffic for public users in general, the contractor will be liable to pay a daily penalty rate of twenty five hundredths (0.25) per cent of the total service value to the procuring government agency.

Regardless of these fixed rates, the Procurement Committee is however entitled to stipulate the maximum daily rate different from these fixed rates chargeable to the contractor but the maximum daily rate cannot exceed the rates provided by the Regulation.

#### **1.2.10. Submission of a Signed Contract to the Office of the Audit-General and the Revenue Department<sup>183</sup>**

Once a contract between a procuring government agency and a supplier or contractor has been officially executed, the 1992 Regulation requires such agency to submit a copy of the executed contract worth up to one (1) million Baht (approximately equivalent to US\$ twenty eight thousand five hundred and seventy one (US\$ 28,571) to the Office of the Audit-General and the Revenue Department.

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<sup>183</sup> *Id.* clause 135.

The rationale behind this requirement is the need to ensure that the Office of the Audit-General shall be able to follow up and verify whether the procuring government agency has received supplies or services in accordance with the contract. In a normal practice, the procuring government agency as the party of a contract must remind and urge the supplier or contractor to perform obligations according to the contract or otherwise, the procuring government agency must take an action against the supplier or contractor, for example, claim for damages as a result of breach of contract. If the procuring government agency fails to do so, the agency will be accountable for such failure. It can be said that this mechanism is obviously established to check on the procuring government agency's side.

In addition, the 1992 Regulation also requires the procuring government agency to submit a copy of a contract to the Revenue Department. This ensures the taxability of any payment or consideration made by the procuring government agency to the supplier or contractor. By this means, it prevents a supplier or contractors from attempting to evade income tax liability on earned income or revenue received from the procuring government agency because the income earned from the contract has already been in the Revenue Department's record.

#### **1.2.11. Exemptions under the 1992 Regulation**

Under the 1992 Regulation, it appears that on the one hand, the Procurement Committee has the necessary authority to issue rulings on government procurement. On the other hand, the Procurement Committee also has discretionary power to give certain exemptions of the 1992 Regulation to the procuring government agency if necessary. These exemptions are however determined on a case-by-case basis.

In practice, the exemption on the project carrying the government policy is more likely to be passed on toward the Council of Ministers to give approval of the exemptions of the 1992 Regulation. Some exemptions from the application of the 1992 Regulation can be found in the Purchase Agreement of the Boeing Model 737-800 Aircraft between the Royal Thai Air Force and the Boeing Company. In this case, Boeing requested that the Purchase Agreement shall be governed by the United States law instead of Thai law and non-compliance on the counter-trade requirement. As one of the only two aircraft manufacturers in the world, upon the Council of Ministers' approval, Boeing had been exempted from complying with the 1992 Regulation, especially for governing law and the counter-trade requirement even though these exemptions were very rare in practice.

#### **1.2.12. The Work Abandoned Suppliers and Contractors List**

As one of the significant mandates of the Procurement Committee that could adversely affect interested suppliers and contractors in general, the 1992 Regulation empowers the Procurement Committee to prepare and propose a List of Work Abandoning Suppliers and Contractors to the Permanent-Secretary of the Office of the Prime Minister. After the List of Work Abandoned Suppliers and Contractors has been approved by the Permanent-Secretary of the Office of the Prime Minister, it will be circulated to all Government Agencies, Local Authorities (Local Administrative Organisations), Independent Organisations, and State Enterprises.<sup>184</sup> Based upon such List, all Government Agencies are forbidden from establishing legal relations or conducting transactions with any of the named suppliers or contractors.<sup>185</sup>

To be placed on such List, any supplier or contractor who has been selected as the winner of the bid, but failed to enter into a contract with the

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<sup>184</sup> *Id.* clause 12.6.

<sup>185</sup> *Id.* clause 145.

contracting government agency within the time limit as designated by the contracting government agency, is considered to have abandoned work.<sup>186</sup> For services, where a supplier, contractor, or sub-contractor who has been approved by the contracting government agency to sub-contract, fails to discharge his contractual obligations, will also be placed on the List.<sup>187</sup>

Moreover, for the purchase of supplies, any supplier providing sub-standard supplies will also be listed as a work abandoned supplier. For a service provider, if the service provided by the provider causes any defect in the work within the contractually agreed warranty period, the contractor's name will be also listed.<sup>188</sup> Likewise, in cases of infrastructure construction, if it turns out that the procured supplies or materials provided by the supplier or work done by the contractor or sub-contractor are below the standardisation as agreed in a contract, those persons will also be listed as those who have abandoned work.<sup>189</sup> Having been included in the List, these people are barred from transacting with all Government Agencies and until removed from the List.

### **1.3. Relevant Cabinet Resolutions**

Cabinet Resolutions regarding a contract-making process are of great importance to all Government Agencies, especially those Agencies that are preparing to transact with the private sector because there is no exception of Cabinet Resolutions' application for any particular Government Agency. Even though Cabinet Resolutions are not technically law, thereby not binding on the people and the public in general, they definitely bind all branches of the Government, including all Government Agencies and authorities. Violation of Cabinet Resolutions by omission

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<sup>186</sup> *Id.* clause 145 bis.

<sup>187</sup> *Id.* clause 145 bis para 2.

<sup>188</sup> *Id.* clause 145 bis para 3.

<sup>189</sup> *Id.* clause 145 bis para 4.

carries personal accountability for any official. Furthermore, an action could be brought against a government official on the ground of non-compliance with government disciplines and, as a result, could, in some cases, carry criminal liability. Therefore, from the government officials' perspective, Cabinet Resolutions are as significant as statutes and legislation because the enforcement of Cabinet Resolutions effectively provides them with "law" in the sense that each violation carries personal liability on criminal law.

Due to the link between personal accountability on non-compliance with government disciplines and Cabinet Resolutions, the contracting government agency and the OAG must take pre-caution. Since 1948, Cabinet Resolutions regarding a contract-making process have demarcated a unified system. Currently, twelve (12) Cabinet Resolutions exist. The OAG as a state counsel is required to exercise constant care and to pay every attention to these Resolutions. The OAG must examine the legality of a contract in accordance with Cabinet Resolutions before any contracting government agency can conclude any contract with the private sector. Some of those Cabinet Resolutions are considered general rules, laying out general contract-negotiation rules. Some Resolutions are *ad hoc*, that are, rules for specific projects. This complexity must always be considered by the OAG .

The following is a series of Cabinet Resolutions regarding a contract-making process that both the contracting government agency and the OAG must consider.

### **1.3.1. Overseas Training Program<sup>190</sup>**

As a basic principle, a Government Agency is required to set up its own budget to cover yearly expenditures. The budget of any Government Agency

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<sup>190</sup> Letter of the Secretary General to the Council of Ministers No. Sor. Ror. 0202/Vor. 222 (Nov. 18, 1980) (Thail.).

must also include the expenditures for the acquisition of yearly supplies and services as well as overseas training programs. Once the proposed budget has been prepared, it will be submitted to the Budget Bureau for primary approval and subsequently to the Parliament for final approval. Upon the Parliament's approval, a Government agency will be able to only spend its budget as approved by the Parliament.

From the Government Agencies' perspective, compliance with such rules seems confusing, complicated, and time-consuming. Furthermore, compliance with the rule cannot guarantee full and unaltered approval. Particularly, some items of expenditures, such as expenditures for overseas training program, will more likely be removed. To avoid such inconvenience, certain Government Agencies came up with new ideas by arranging with a private party who transacted with the Agency on the acquisition of supplies or services. Based upon the arrangement between the contracting government agency and the private sector, it appeared that there was a hidden cost of certain items in a contract value. The common arrangement between the contracting government agency and the private party can be demonstrated in cases where the purchase of imported supplies is necessary. The purchase of imported supplies is often necessary when the usage and operation of these devices requires the procuring government agency's staff to attend a training program abroad. Otherwise, these machines and devices could not be run and operated correctly and efficiently.

Under such arrangements, the contracting government agency and the supplier agreed to include the cost of the overseas training program for the contracting government agency's staff in the cost of the procured supply. This resulted in a huge increase in total contract value because the supplier likely added an excessive training cost to the cost of the procured supply. Such arrangements also caused a further problem in encouraging a Government Agency to open a loophole as well as



promoting non-compliance with standard regulations in respect of the preparation of its annual expenditures. Inclusive pricing tempts officials to make unnecessary business trip and personal reimbursements, thereby affecting the unnecessary increase of the national budget.

The Cabinet Resolution regarding the overseas training program was, therefore, issued in 1980 to prevent an improper arrangement between the contracting government agency and the private sector. The Resolution strictly prohibits inclusion of overseas training costs in the contract value. Nevertheless, where overseas training program is necessary, the contracting government agency must follow the rule by including it in the normal budget and accordingly asking for approval from the Budget Bureau and the Parliament. Otherwise, a procurement including the overseas training cost shall be specifically approved by the Council of Ministers on a case-by case basis.

### **1.3.2. A Lump Sum Turnkey Contract by the Same Contractor<sup>191</sup>**

As a common feature, a lump sum turnkey contract allows a contractor to undertake and deliver to a contracting government agency (a project's owner) a completed and operating facility within a certain date for a fixed lump sum price. A lump sum turnkey construction contract normally involves in millions of Baht in a project value. In Thailand, a lump sum turnkey project is always found in a mega project, which is likely a State project. For the process of selecting prospective contractor, the contracting government agency will normally have an independent consultant help issue an initial design, set up specifications, and prepare for bidding documentation. Once the contractor is selected, the contractor will be responsible for undertaking both the detailed design and construction of the entire project.

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<sup>191</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0203/Vor. 98 (July 15, 1983) (Thail.).

From the State perspective, it seems not to be better off for the contracting government agency if the independent consultant and the contractor are the same persons, or associated with each other. Therefore, the Cabinet Resolution dated July 15, B.E. 2526 (1983) was issued to demarcate rules for a lump sum turnkey construction contract. Importantly, the contracting government agency must ensure that the independent consultant and the contractor are not the same persons, or associated with each other. Furthermore, a turnkey project specially requires the approval from the Council of Ministers before the contracting government agency contracts with the private sector.

### **1.3.3. Strict Compliance with Cabinet Resolutions<sup>192</sup>**

This Cabinet Resolution makes all Government Agencies and authorities aware that they must strictly comply with the guidance as ruled out by any Cabinet Resolution. In cases where compliance with a Cabinet Resolution is impossible or struggling, those Government Agencies and authorities must ask the Council of Ministers to review the Resolution concerned. Otherwise, any government authority who neglects to do so may be charged with non-compliance with government disciplines.

### **1.3.4. State Enterprises' Regulations<sup>193</sup>**

Apparently, individual State Enterprises have authority to set up their own regulations. In practice, the Ministry of Finance has supervisory power to provide guidance to these State Enterprises. The Ministry of Finance has been issuing a series of regulations to increase the efficiency of these State Enterprises' operation by relaxing some rules. The guidance covers regulations regarding procurement,

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<sup>192</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0202/Vor. 180 (Nov. 24, 1988) (Thail.).

<sup>193</sup> Letter of the Secretary General to the Cabinet No. Nor. Ror. 0202/Vor. 156 (Sept. 19, 1991) (Thail.).

asset distribution, asset depreciation, and the valuation of procured goods, raw materials, manufacturing goods, and finished products. Upon such guidance, all State Enterprises are supposed to adopt these recommendations.

Likewise, this Resolution also requires State Enterprises to strictly comply with a regulation adopted upon the Ministry of Finance's guidance and recommendation. As a result, this Resolution assigns the Office of the Audit General, an in-charge ministry of individual State Enterprises, the managing director, and the Board Committee of individual State Enterprises to supervise them closely so that they strictly comply with all relevant regulations.

### **1.3.5. Preventive Measures for Collusive Business Practices<sup>194</sup>**

The Council of Ministers has been issuing preventive measures on collusive business practices respecting government procurement. Parts of the preventive measures deal with contract execution by setting quoted referral construction rates and a two-year warranty requirement. For quoted referral contract rates, the OAG is required to check whether the itemised construction cost and the total contract value are within quoted referral construction rates. The quoted referral construction rates help give both the contracting government agency and the OAG an idea whether the contract price is appropriate. Without the quoted rates, there would be no clues how much the contract should cost.

As to a two-year warranty period, this Resolution requires that the contract provides a warranty clause covering a two-year period following the contract completion. This requirement forces the private party to provide the contracting government agency reasonable standardisation and quality supplies. At the very least, these supplies should be able to last at least two (2) years following the contract

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<sup>194</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0202/Vor. 1 (Jan. 3, 1994) (Thail.).

completion. Therefore, by this Resolution, the OAG, acting as a state counsel, ensures that the contract value is within the quoted referral construction rate and the contract provides the contracting government agency a two-year post-contract warranty.

### **1.3.6. A State-Joint Venture Project<sup>195</sup>**

A state-joint venture project normally allows a private party to participate in state undertakings or activities. This project normally involves in millions of Baht in value. As its common characteristics, a state-joint venture project is considered a means to implement the government policy, or to serve public purpose or policy. A state-joint venture can be found in joint-investment between the State and a private party, or by a means of concession. Due to the involvement in the State's activities, a state-joint venture contract must be drafted and reviewed cautiously. Legality and conformity with the national policy are of vital concern. The OAG must scrutinize the whole contract and ensure compliance with the national policy, along with basic legality.

As a result, the Cabinet Resolution dated October 9, 1995 provides that the contracting government agency submits a draft contract, together with the project details, to the Council of Ministers for final approval. In order to give an approval, the Council of Ministers shall take all matters into consideration, including how the state-joint venture project would benefit the State. Furthermore, this Resolution also prohibits the contracting government agency and the OAG from inserting any clause giving the existing contractor eligibility to renew the contract automatically, or having priority over other prospective contractors in a State project.

### **1.3.7. Exemptions for the State Data Disclosure<sup>196</sup>**

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<sup>195</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0215/Vor. 209 (Oct. 9, 1995) (Thail.).

Whereas all Government Agencies are obliged to disclose what is defined as “state data or information”, in accordance with the State Data Disclosure Act, B.E. 2540 (1997), Government Agencies (including the contracting government agency), on the other hand, also have contractual obligations with a private party to keep all information or data arising from the contract confidential. The contracting government agency is prohibited from revealing information and data under the contract to other persons. As a result, the obligations under the State Data Disclosure Act make the contracting government agency face the dilemma of whether to disclose information arising from a contract. To disclose the information or data arising from the contract as provided by the State Data Disclosure Act may place the contracting government agency in breach and require payment of damages to the private party.

In consequence, the Resolution dated December 1, 2000 was issued to give suggestions regarding state data disclosure to the contracting government agency. The Resolution suggests that prior to contracting with a private party, the contracting government agency should negotiate with the private party to set up certain exemptions allowing the contracting government agency to disclose information and data arising from the contract to a competent authority. This holds particularly true when the disclosure is made on duty and in accordance with conditions designated by the State Data Committee.

Nevertheless, if the private party disagrees with the proposed exemptions, the contracting government agency should take the following factors of the necessity, benefits, obligations, rights and duties and responsibilities arising out of a contract into consideration and then proceed accordingly. In other words, the contracting government agency should balance the consequences between contracting

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<sup>196</sup> Letter of the Secretary General to the Cabinet No. Nor. Ror. 0205/Vor. 182 (Dec. 1, 2000) (Thail.).

with such private party without an exception clause and not contracting with such private party. In a latter case, the contracting government agency is encouraged to contract with any other private party who is more willing to agree with the proposed exception.

### **1.3.8. Execution of International Agreements, Treaties and Conventions<sup>197</sup>**

In a normal practice, the Ministry of Foreign Affairs is considered an official authority on behalf of the Kingdom of Thailand that has mandate to deal with international transactions or foreign affairs with other states or international organisations. Especially with regard to entering into international agreements, treaties or conventions, the Ministry of Foreign Affairs is authorised to give legal opinion of consequences, advantages, disadvantages, or impacts of possible consequences from entering into a particular international agreement, treaty or convention to the Government.

In fact, major parts of the Ministry of Foreign Affairs' mandates are similar to many of the OAG's mandates. The distinguishing feature of the mandates between the Ministry of Foreign Affairs and the OAG is that the Ministry of Foreign Affairs mainly deals with international transactions, mostly at the state level whereas the OAG advises matters in respect of legal transactions within territory. Therefore, before Thailand enters into international agreements, treaties, or conventions, the Ministry of Foreign Affairs will have an exclusive authority of this matter.

However, in a case where entering into an international transaction is not initiated by the Ministry of Foreign Affairs in that the contracting government agency is dealing with the other party (international agencies or organisations)

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<sup>197</sup> Letter of the Secretary General to the Council of Ministers (Urgently) No. Nor. Ror. 0504/Vor. 9 (Jan. 15, 2003) (Thail.).

directly, this Resolution sets up the guidance for all Government Agencies preparing to enter into international transactions without the Ministry of Foreign Affairs' involvement. This is particularly true for international transactions that legally bind the parties according to international law. Under such circumstance, the contracting government agency that will enter into an international agreement is required to submit the subject-matter to the Ministry of Foreign Affairs. The Ministry of Foreign Affairs shall consider and give opinion on such subject-matter and then submit the opinion to the Council of Ministers for final approval.

In a case where urgency requires and submission of such subject-matter to the Ministry of Foreign Affairs would cause a delay and prejudice to the State, the contracting government agency is allowed to enter into international agreements, treaties, or conventions without prior the Council of Ministers' approval. However, entering into international agreements without the Council of Ministers' approval requires certain conditions. First, the contracting government agency is allowed to do so only with the Ministry of Foreign Affairs' consultation. This means that the contracting government agency is technically required to work with the Ministry of Foreign Affairs internally. By doing so, it gives rise to the Ministry of Foreign Affairs supervision because the Ministry of Foreign Affairs is considered an authority, which possesses expertise in dealing with international affairs. Second, entering into international agreements without the Council of Ministers' approval shall not constitute a legal rights and obligation toward the Government under international law. Third, even though the entering into international agreements without the Council of Ministers' approval is allowed, the contracting government agency is finally required to inform the Council of Ministers that it entered into the international agreement.

### 1.3.9. A Turnkey Contract<sup>198</sup>

In addition to the Cabinet Resolution dated July 15, B.E. 2526 (1983), the Council of Ministers has recently issued another Resolution dealing with the execution of a turnkey contract. By this Resolution, the Council of Ministers has issued a manual regarding a turnkey project for the contracting government agency to comply with by adopting the concept and methodology of the Private Participation in State Undertakings Act, B.E. 2535 (1992).

Normally, the Government discourages Government Agencies to refer to a turnkey construction project. Government Agencies are encouraged to use a turnkey construction contract only if other methods are unavailable. The opposition to a turnkey construction contract is due to the comparatively expensive cost. A turnkey construction contract is quite expensive due to the fact that the Government has less opportunity for negotiation with the contractor.

Nevertheless, the application of a turnkey contract is still important and needed, particularly for a mega project in which advanced technology and skilfulness are aggressively required. Under such circumstance, the contracting government agency must comply with the manual, regarding the execution of a turnkey construction project.

Subject to the manual, the term “turnkey project”<sup>199</sup> can be divided into three (3) categories: design and construction; construction and project finance; and design, construction and project finance. Like requirements and processes provided

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<sup>198</sup> Letter of the Secretary General to the Council of Ministers (Urgently) No. Nor. Ror. 0504/Vor. 269 (Nov. 14, 2003) (Thail.).

<sup>199</sup> A turnkey contract or turnkey construction contract is a contract whereby the contractor undertakes to deliver to the contracting government agency (the project's owner) a completed and operating facility within a certain date for a fixed price. Under a turnkey contract, the contractor's obligations consists of the design, engineering, procurement, construction, installation, start-up and testing of the facility. In many cases, the contractor may be required for training the contracting government agency's personnel and staffs as well as the maintenance so that after the facility completion, the contracting government agency's personnel and staffs will be able to operate the facility and carry out its maintenance.



by the Private Participation in State Undertakings Act, B.E. 2535 (1992), the manual also provides three (3) steps requiring compliance by the contracting government agency: project preparation and proposal, project implementation, and project supervision and follow-up.

For the project preparation and proposal, the contracting government agency must prepare a project study covering the following items: necessity and rationale for the project, scope and details of the project, economic and social impacts, readiness of the contracting government agency, financial status, project management and administration, and implementation plan. These lists are, however, not exhaustive; other factors could be deemed important and included in the study. Subsequently, the contracting government agency shall submit the project study to the NESDB, the Budget Bureau, and the Ministry of Finance for initial approval. These authorities are supposed to consider it within sixty (60) days; otherwise, such project shall be deemed to be approved by these authorities. Once the project proposal has been approved by these authorities, the project, together with the project study and its feasibility, shall be submitted to the Council of Ministers for primary approval.

Upon the Council of Ministers' approval, the project implementation follows. For this process, the contracting government agency will be obliged to prepare the invitation notice, terms of reference ("TOR"), and terms and conditions of a contract concerned. These documents are required to be reviewed by the OAG. After that, the contracting government agency, together with several authorised representatives from the NESDB, the Budget Bureau and the Ministry of Finance, must select prospective contractors by a fair and transparent bidding method. Once the contractor has been selected, the contracting government agency shall propose

such prospective contractor, the bidding result, a draft contract, and all relevant documents to the Council of Ministers for final approval.

Once the prospective contractor has been selected and a contract between the initiating project author and the contractor has been executed, the next step is ensuring that both parties properly discharge their obligations. The manual provides that the contracting government agency appoints the Project Coordination and Follow-up Committee<sup>200</sup> to urge both parties to properly perform.

Overall, this Cabinet Resolution has adopted the concept of the Private Participation in State Undertakings Act, B.E. 2535 (1992) to a turnkey contract.

#### **1.3.10. Execution of a Concession Contract between the State and a Private Party<sup>201</sup>**

Having been on the losing end of an extraordinary arbitral award in the Expressway case, the Council of Ministers recently issued a Resolution for dealing with concession contracts that outlined the following conditions.

First, a contract shall not give rise to the parties' right to bring disputes to be settled before arbitration. On the contrary, disputes shall be settled by the Administrative Court, or Court of Justice. However, in cases where the application of arbitration is unavoidable, the contracting government agency must ask for the Council of Ministers' approval as to whether the contract should apply an arbitration clause.

Second, a concession contract, particularly for a main contract, shall be written in a Thai language. In cases where any part of a contract is written in English,

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<sup>200</sup> The "Coordination and Follow-up Committee" consists of the Inspector General of the Office of Prime Minister as a chairman, an authorised representative of the contracting government agency, an authorised representative from the relevant ministry, qualified persons in fields of special technique, finance and law as Committee members.

<sup>201</sup> Letter of the Secretary General to the Council of Ministers (Urgently) No. Nor. Ror. 0504/Vor. 31 (Feb. 9, 2004) (Thail.).

such part containing an English version shall only be referred to as its translation. In other words, the main contract must be written in Thai but its annexes could be written in English.

Last, there must be a specific clause explicitly providing that a contract shall be construed and governed by Thai law.

### **1.3.11. Interpretation of the Cabinet Resolution Regarding the Execution of a Concession Contract between the State and a Private Party<sup>202</sup>**

Succeeding to the preceding Cabinet Resolution, it prohibits all Government Agencies from concluding an arbitration clause in a concession contract due to the disappointment of the arbitral award in the Expressway case. Given the preceding Cabinet Resolution, it turns out that a contract concerned in the Expressway case is not a concession contract. It is simply a construction contract. The analysis as to why the contract in the Express case is not a concession contract will be carried out later in Chapter 4. As a result, it raises a question among Government Agencies as to whether such Cabinet Resolution shall only apply to a concession contract or other contract types. The uncertainty of the application of such Cabinet Resolution cause irregularities for Government Agencies in practice. Therefore, the present Resolution was issued to reaffirm that conditions provided by the preceding Cabinet Resolution Regarding the Execution of a Contract between the State and the Private Party are only applicable to a concession contract. Other types of contracts, such as a procurement contract or construction contract, are excluded from the application of such Cabinet Resolution. Consequently, it means that other types of contracts can use arbitration as dispute settlement resolution, or use English as contract language between the parties.

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<sup>202</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0504/Vor. 100 (May 6, 2004) (Thail.).

### **1.3.12. Sub-Lease of the Radio and Television Broadcasting Contract<sup>203</sup>**

This Resolution was issued because it appeared that a leaseholder of the radio and television broadcasting contract sub-leased his/ her rights to broadcast radio or television according to such contract to other persons. As a result, it turned out that the leaseholder was simply a broker and had no intention to produce radio or television programs for broadcasting by himself/ herself. Under such circumstance, it showed that the leaseholder (known as a broker) took advantage of the State and the contracting government agency by subleasing a broadcasting contract to other persons. These persons usually paid the leaseholder much more than what the leaseholder paid the contracting government agency. In this case, the sublease between the leaseholder and the assignee (the sub-leaseholder) brought about the legal dispute because the sub-leaseholder was not the direct with the original party who contracted with the contracting government agency.

Therefore, this Resolution was issued to prohibit the leaseholder from sub-leasing the broadcasting rights subject to the contract to other persons. The Resolution required a clause prohibiting the private party or the leaseholder from sub-leasing the broadcasting time to other persons. Furthermore, the Resolution also required that the private party as the leaseholder of the contract produces radio or television programs for broadcasting by himself/ herself. The Resolution also prohibited the contracting government agency from extending or renewing the existing contract to any leaseholder. The renewal of the existing broadcasting contract would be specially controlled by the Minister of Defence.

### **1.4. International Law and Practice**

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<sup>203</sup> Letter of the Secretary General to the Council of Ministers No. Nor. Ror. 0504/Vor. (Lor.) 11386 (Aug. 13, 2004) (Thail.).

Apart from the practice and process of reviewing state contracts provided by those domestic laws, regulations and Cabinet Resolutions, the OAG as a state counsel must review international law and practice, especially those obligations binding on Thailand. It appears that some international obligations arise due to the membership of some international organizations, but certain international obligations arise via custom.

The following lists of the GPA, UNCITRAL, ICSID, the New York Convention, MIGA, and Thailand's BITs with other countries are international agreements, treaties or conventions that are considered very significant to the execution of a state contract (especially one relating to FDI) in Thailand. Nonetheless, this section only touches on the overview of these international agreements, which relate to the execution of a state contract in the Thai legal system. The concept and detailed principles of these international agreements will be thoroughly addressed in Chapter 4.

#### **1.4.1. Agreement on Government Procurement 1994 ("GPA")**

The Agreement on Government Procurement 1994 ("GPA") is one of the "Plurilateral" Trade Agreements under Annex 4 to the Agreement Establishing the WTO.<sup>204</sup> The GPA was first brought into the negotiation among WTO members in the Tokyo Round between 1973 and 1979. Initially, there were only twelve (12) signatory members to the 1979 Agreement,<sup>205</sup> coming into force on January 1, 1981. The 1979 Agreement was subsequently amended in 1987 and its amendment entered into force in 1988. Even with such amendment, it appeared that the parties have

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<sup>204</sup> Annex 4: Plurilateral Trade Agreements  
Agreement on Trade in Civil Aircraft  
Agreement on Government Procurement  
International Dairy Agreement  
International Bovine Meat Agreement

<sup>205</sup> Grier, Jean Heilman, Government Procurement, <http://www.osec.doc.gov/ogc/occic/gpa.htm> (last visited Apr. 21, 2009).

consistently negotiated in order to expand the scope and coverage of the Agreement since the Uruguay Round. Eventually, the current Agreement on Government Procurement 1994 with a wider scope and coverage has been signed in Marrakesh on April 15, 1994, and came into force on January 1, 1996. As of August 17, 2009 there were forty (40) signatory states to the GPA.<sup>206</sup>

The GPA was initially created to encourage trade liberalization on government procurement (similar to what the WTO has done for goods and services). More precisely, it is suggested that GATT and WTO obligations, *per se* the rules of non-discrimination consisting of the national treatment and most-favored nation (“MFN”) treatment, should also apply to government procurement. At first glance, the GPA requires that government procurement should apply the principle of non-discriminatory treatment. This means foreign suppliers should be given equal opportunities as domestic suppliers. Second, domestic laws, regulations, procedures and practices regarding government procurement should guarantee the transparency of government procurement to interested suppliers, including foreign suppliers. Third, there should be an enforceable mechanism with clear and certain procedures for each step of government procurement. Examples of these mechanisms include notification, consultation, surveillance, and dispute settlement that are at least fair, prompt, and effective.

GPA scope and coverage is limited. Not all government procurement is subject to the GPA. Only government procurement stipulated in Annex 1 to Annex 5 of the Appendix to this Agreement is subject to GPA rules. Upon the adoption of

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<sup>206</sup> Canada, the European Union (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands (including Aruba), Poland, Portugal, Romania, Slovakia Republic, Slovenia, Spain, Sweden, and the United Kingdom), Hong Kong China, Iceland, Israel, Japan, Korea, Liechtenstein, Norway, Singapore, Switzerland, Chinese Taipei, and the United States, *available at* [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm) (last visited Aug. 17, 2009).

this Agreement, the parties are required to provide Annex 1 to Annex 5 as part of Appendix of this Agreement. Whereas Annex 1, 2, and 3 are lists of procuring entities,<sup>207</sup> Annex 4 and Annex 5 provide positive lists of services and construction services, respectively. In addition to lists of procuring entities and positive lists of services and construction services, only procurement values within the GPA threshold shall be governed by the GPA rules.

The GPA threshold varies according to the types of procurement and the procuring entity. For central government entities, a procurement of up to one hundred and thirty thousand (130,000) SDRs<sup>208</sup> (equivalent to US\$ one hundred seventy-seven thousand (US\$ 177,000)) in the case of goods and services and up to five million (5,000,000) SDRs (equivalent to US\$ six million eight hundred and six thousand (US\$ 6,806,000)) in cases of construction services is governed by the GPA rules. For sub-central government entities, the procurement up to two hundred thousand (200,000) SDRs for goods and services and up to five million (5,000,000) SDRs (equivalent to US\$ six million eight hundred and six thousand (US\$ 6,806,000)) for construction services is subject to the GPA rules. For government-owned enterprises (known as State Enterprises in Thailand), only the procurement of up to four hundred thousand (400,000) SDRs (equivalent to US\$ five hundred and forty-five thousand (US\$ 545,000)) in cases of goods and services, and up to five million (5,000,000) SDRs (equivalent to US \$ six million and eight hundred and six thousand (6,806,000)) in the case of construction services, is governed by the GPA rules.

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<sup>207</sup> Annex 1 is the central government entities list; Annex 2 is the sub-central government entities list; and Annex 3 is the government-owned enterprises list.

<sup>208</sup> SDRs are units of thresholds stated in terms of the IMF's accounting unit of Special Drawing Rights. The dollar values mentioned above were set on March 1, 2000 and remained valid until March 2002.

Therefore, when dealing with government procurement on particular goods and services, it is necessary to look at all of the following lists of procuring entities, lists of services, and the value of government procurement. Only the government procurement on an item that falls into these three (3) main categories will be a so-called “covered procurement,” and subject to GPA’s rules.

The GPA rules also provide explicit and thorough procurement procedures. These procedures cover tendering procedures, technical specifications, qualifications of suppliers, information for prospective suppliers, time limits for tendering and delivery, award of contracts, post-award information, and dispute settlement mechanisms.

Thailand has been a WTO member since January 1, 1995.<sup>209</sup> She has not yet acceded to the GPA despite the recommendation by the Trade Policy Review Body (“TPRB”) that appeared in the trade policy review of January 1996.<sup>210</sup> In addition, the Bilateral Trade and Investment Framework Agreement (“TIFA”) initiating FTA negotiations with the United States also requests Thailand to adopt the GPA or alternatively, the United States requests provision of national treatment on government procurement to the United States suppliers so that the United States suppliers can bid similarly to domestic suppliers. Even though the GPA rules are not binding on Thailand, it is possible that Thailand may be forced to adopt and abide by these rules in the near future

#### **1.4.2. United Nations Commission on International Trade Law (“UNCITRAL”)**

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<sup>209</sup> World Trade Organization, [http://www.wto.org/English/thewto\\_e/countries\\_e/thailand\\_e.htm](http://www.wto.org/English/thewto_e/countries_e/thailand_e.htm) (last visited Apr 21, 2009).

<sup>210</sup> World Trade Organization, Trade Policy Reviews: Thailand (January 1996), [http://www.wto.org/english/tratop\\_e/tp22\\_e.htm](http://www.wto.org/english/tratop_e/tp22_e.htm) (last visited Apr. 21, 2009).



The United Nations Commission on International Trade Law (“UNCITRAL”) was established by the General Assembly in 1966.<sup>211</sup> The principal mandate of the Commission is to promote harmonisation of international trade law<sup>212</sup> by tackling the problem of different state laws in relation to international trade. Apparently, the Commission has also become the main the United Nations legal institution for developing international commercial law.

The Commission consists of sixty (60) member states elected by the General Assembly based upon geographic regions as well as their economic and legal system. The Commission members serve for a six-year term. Every three (3) years, half of the members’ terms will expire. Thailand has been a Commission member since June 14, 2004, and its term will expire in 2010.<sup>213</sup> Therefore, UNCITRAL doubtlessly binds Thailand.

Apparently, UNCITRAL has issued a series of texts and statutes covering (1) International Commercial Arbitration and Conciliation, (2) International Sale of Goods (CISG) and Related Transactions, (3) Insolvency, (4) International Payments, (5) International Transport of Goods, (6) Electronic Commerce, (7) Procurement and Infrastructure Development, and (8) Security Interests.<sup>214</sup>

For International Commercial Arbitration and Conciliation in particular, UNCITRAL has also issued the following: (1) the 2002 UNCITRAL Model Law on International Commercial Conciliation, (2) the 1996 UNITRAL Notes on Organising Arbitral Proceedings, (3) the 1985 UNCITRAL Model Law on

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<sup>211</sup> G.A. Res. 2205 (XXI), U.N. Doc. A/6369 and Add. 1 and 2 (Dec. 17, 1966).

<sup>212</sup> *Id.*

<sup>213</sup> United Nations Commission on International Trade Law, <http://www.uncitral.org/uncitral/en/about/origin.html> (last visited Apr. 21, 2009).

<sup>214</sup> *Id.*

International Commercial Arbitration with Amendments as Adopted in 2006,<sup>215</sup> (4) the 1982 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules, (5) the 1976 UNCITRAL Arbitration Rules, and (6) the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award (“New York Convention”).<sup>216</sup>

The UNCITRAL Arbitration Rules (1976) and the Model Law on International Commercial Arbitration (1985), *inter alia*, have been recognised worldwide and highly recommended. They have come to near universal application in dealing with international trade and investment disputes. While the Arbitration Rules are directed at potential (or actual) parties to a dispute, the Model Law is directed at the States.<sup>217</sup>

On the one hand, UNCITRAL suggests that the contractual parties should adopt the 1976 UNCITRAL Arbitration Rules as dispute settlement resolution (a means in arbitral proceedings) conducted in accordance with the UNCITRAL Arbitration. In addition, the 1976 UNCITRAL Arbitration Rules also provide a reference in a dispute settlement clause to the UNCITRAL Arbitration Rules, the UNCITRAL arbitration, or any other provision to the same effect as the UNCITRAL Arbitration Rules. Under these Rules, they can select the UNCITRAL rules either as part of their contract, or after a dispute arises, to govern the arbitration.

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<sup>215</sup> Amendments to articles 1 (2), 7, and 35 (2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised version of article 7 is intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices. The newly introduced chapter IV A establishes a more comprehensive legal regime dealing with interim measures in support of arbitration. As of 2006, the standard version of the Model Law is the amended version. The original 1985 text is also reproduced in view of the many national enactments based on this original version. Also see the 1985 UNCITRAL Model Law on International Commercial Arbitration with Amendments as Adopted in 2006, *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (last visited Aug. 17, 2009).

<sup>216</sup> United Nations Commission on International Trade Law, *supra* note 213.

<sup>217</sup> *Id.*

Nonetheless, UNCITRAL is not supposed to get involved in disputes, directly or indirectly. UNCITRAL never acts or performs the function as an arbitral tribunal, administers arbitration proceedings, or performs any function related to individual arbitration proceedings, or any other system of public or private dispute settlement.

On the other hand, the 1985 UNCITRAL Model Law on International Commercial Arbitration offers a pattern, or model, that individual states can adopt it as part of its domestic legislation on arbitration.

#### **1.4.3. United Nations Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention,” or the “1965 Washington Convention”)**

ICSID was established in 1966 under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and entered into force on October 14, 1966. As of November 2007, one hundred and fifty-five (155) states have signed the Convention and one hundred and forty-three (143) states have deposited their instruments of ratification and attained “Contracting States” status. Twelve (12) states, including Thailand, have not yet ratified the Convention<sup>218</sup> even though Thailand became a signatory state of ICSID on December 6, 1985.

One of the principal objectives of ICSID is to deal with disputes between a host state and nationals of another Contracting State. ICSID aims to satisfy both foreign investors of a home country and a host country. From a foreign investor perspective, international settlement dispute mechanism can provide greater confidence that the investor’s capital and profits will be protected. At the very least, it ensures that their assets are not easily expropriated without just compensation.

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<sup>218</sup> ICSID, List of Contracting States And Other Signatories of the Convention (Nov. 4, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main> (last visited Apr. 21, 2009).

From a host state perspective, ICSID is also beneficial to a host state as it is seen as an incentive for investment in terms of capital flows. In the end, the international cooperation for sustainable economic development at the state level could be achieved through the establishment of ICSID. This is because ICSID, under the auspices of the International Bank for Reconstruction and Development (“IBRD”), provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.<sup>219</sup>

The Centre offers two (2) panels for dispute settlement resolution. One is the Panel of Conciliation, called a Conciliation Commission, and the other is the Panel of Arbitration, called an Arbitral Tribunal. Persons designated to perform the functions of both conciliators and arbitrators must possess high moral character and recognised competence in the fields of law, commerce, industry, or finance. They must also exercise independent judgment.<sup>220</sup>

For conciliation, the Commission may consist of a sole conciliator or any uneven number of conciliators to which the parties will agree. Normally, one of the three-conciliator panel will be appointed by each party and the third conciliator will be the president of the Commission, to be appointed by both parties.<sup>221</sup> The Commission will help the parties clarify the dispute issues and enable them to reach a mutually acceptable agreement. Occasionally, the Commission may give the parties a recommendation on a dispute concerned and as a result, the parties are expected to take such recommendation into their consideration.<sup>222</sup> However, the recommendation of the Commission itself is not legally binding. In cases of settlement agreement or

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<sup>219</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 1(2) opened for signature Mar 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

<sup>220</sup> *Id.* art. 14.

<sup>221</sup> *Id.* art. 29(2).

<sup>222</sup> *Id.* art. 34.

failure of the parties to reach mutual agreement, the Commission will close the proceeding and submit a summary report to the Centre.

Similarly, arbitration may consist of a sole arbitrator or any uneven number of arbitrators appointed, as to which the parties will agree. Normally, the tribunal shall consist of three arbitrators: two of them will be appointed by each party, the third arbitrator will be the president of the tribunal appointed by both parties.<sup>223</sup> The tribunal will consider disputes in accordance with rules of law as agreed by the parties. In the absence of such agreement, the tribunal will apply the law of the Contracting State party to the dispute and rules of international law to a case.<sup>224</sup> Normally, the tribunal is allowed to determine any incidental or additional claims, or counter-claims arising directly out of the dispute subject matter. This is provided that these claims are within the scope of the consent of the parties, and within the scope of ICSID's jurisdiction.<sup>225</sup> In addition, if the tribunal considers necessary, it may give the parties recommendation on provisional measures, which should be taken to preserve the respective party rights.<sup>226</sup> Once the arbitral award is rendered, it is final and binds the parties. This means the parties cannot appeal or seek other remedy<sup>227</sup> unless it has appealed on interpretation, revision, and annulment on defined and limited grounds in accordance with Article 50, 51 and 52, respectively. As far as the enforcement of arbitral awards is concerned, an arbitral award is enforceable either as subject to the ICSID Convention or the New York Convention.

However, due to the nature of ICSID, which is closely associated with the World Bank and IMF, it often appears that the parties, particularly for host developing countries, comply willingly with ICSID awards. Compliance with the

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<sup>223</sup> *Id.* art. 37(2).

<sup>224</sup> *Id.* art. 43.

<sup>225</sup> *Id.* art. 46.

<sup>226</sup> *Id.* art. 47.

<sup>227</sup> *Id.* art. 53.

ICSID award is construed as giving cooperation, which may facilitate loan approval by the World Bank or IMF. It is a reason that it is sometimes called the World Bank International Center for the Settlement of Investment Disputes.<sup>228</sup>

#### **1.4.4. Convention of the Recognition and Enforcement of Foreign Arbitral Awards (the “1958 New York Convention,” or the “New York Convention”)**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, was adopted on June 10, 1958, and entered into force on June 7, 1959. The New York Convention was established to facilitate and encourage international trade and commerce by creating mechanisms recognizing a foundation instrument of international arbitration.

The Convention not only involves the enforcement of arbitration agreements, but also the recognition and enforcement of foreign arbitral awards. The New York Convention is also considered one of the most important achievements of the United Nations in promoting a more effective and universal rule of law.<sup>229</sup> Moreover, the New York Convention is further described as the single most important pillar on which the edifice of international arbitration rests.<sup>230</sup> The Convention has gained phenomenal acceptance by the international community.<sup>231</sup> Due to its worldwide application, the New York Convention also allows for the enforcement of an award in a non-contracting country<sup>232</sup> by conferring legitimacy upon awards granted in any state (regardless of whether the awards are granted in a contracting

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<sup>228</sup> Biggs, *supra* note 10.

<sup>229</sup> Martin Gusy, The History and Significance of the New York Convention, 4 VJ 147 (2000).

<sup>230</sup> J. Gillis Wetter, the Present Status of the International Court of Arbitration of the ICC: An Appraisal, 1 AMER. REV. OF INT'L ARB. 91 (1990).

<sup>231</sup> Kristin T. Roy, the New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards?, 18 FORDHAM INT'L L.J. 920, 920 (1995).

<sup>232</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

state nor whether the parties are subject to the jurisdiction of different contracting states).<sup>233</sup>

As a means of enforcing arbitral awards, the Convention requires a domestic court of the contracting state to give effect to the consent to arbitrate as made by the contracting state. The Convention also requires recognition and enforcement of arbitral awards made outside the contracting state's territory. Furthermore, one of the appealing characteristics found in the New York Convention is that the Convention shifts the burden of proof from the party seeking enforcement to the party against whom the enforcement is sought.<sup>234</sup> To request a domestic court to enforce foreign arbitral award, the party looking for such the enforcement is merely required to present an arbitration agreement and award.<sup>235</sup>

Nevertheless, the recognition and enforcement of the foreign arbitral award may be refused provided that the opponent party can prove the following refusal grounds: (1) incapacity of the parties,<sup>236</sup> (2) improper notice of the appointment of the arbitrator or of the arbitration itself,<sup>237</sup> (3) lack of jurisdiction,<sup>238</sup> (4) procedural irregularities,<sup>239</sup> and (5) an invalid award based on the ground that the award was not "binding on the parties, or has been set aside or suspended by a competent authority of the country in which ... that award was made."<sup>240</sup> Moreover, the foreign arbitral award may be rejected if the competent authority finds the

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<sup>233</sup> Cindy Silverstein, *Iran Aircraft Industries v. Avco Corporation: Was a Violation of Due Process Due?*, 20 BROOK. J. INT'L L. 443, 454 (1994).

<sup>234</sup> New York Convention, *supra* note 232, art. V.

<sup>235</sup> *Id.* art. IV.

<sup>236</sup> *Id.* art. V(1)(a).

<sup>237</sup> *Id.* art. V(1)(b).

<sup>238</sup> *Id.* art. V(1)(c).

<sup>239</sup> *Id.* art. V(1)(d).

<sup>240</sup> *Id.* art. V(1)(e).

disputed subject matter incapable of settlement by arbitration under the law of that country,<sup>241</sup> or the arbitral award would be contrary to that country's public policy.<sup>242</sup>

To limit its application, the New York Convention allows the contracting parties to make two reservations when adopting the Convention: the reciprocity reservation and the commercial reservation. The reciprocity reservation allows the state to declare that it will apply the Convention to the recognition and enforcement of awards made only in another contracting state when signing, ratifying or acceding to this Convention, or notifying extension under article X hereof.<sup>243</sup> On the other hand, the state may declare the commercial reservation where differences arising out of legal relationships, whether contractual or not, are considered as commercial under the national law of the state making such declaration.<sup>244</sup> Whereas the reciprocity reservation allows the contracting state to permit enforcement only in the territory of other contracting states,<sup>245</sup> the commercial reservation allows the contracting state to limit the application of the Convention only to disputes arising out of legal relationships that are considered "commercial" under its law.<sup>246</sup> Thus, a state may reserve the right to apply the Convention exclusively to commercial disputes, as interpreted under its very subjective domestic law.

As of April 21, 2009, there are one hundred and forty-four (144) parties to the Convention, including Thailand.<sup>247</sup> Thailand ratified the New York Convention on December 21, 1959, with no reservation. Upon such ratification,

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<sup>241</sup> *Id.* art. V(2)(a).

<sup>242</sup> *Id.* art. V(2)(b).

<sup>243</sup> *Id.* art. I(3).

<sup>244</sup> *Id.* art. I(3).

<sup>245</sup> *Id.* art. I(3).

<sup>246</sup> *Id.* art. I(3).

<sup>247</sup> United Nations Commission on International Trade Law, Status of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Apr. 21, 2009).



Thailand is legally bound to recognize and enforce arbitral awards made in the territory of another Contracting State.

#### **1.4.5. Convention Establishing the Multilateral Investment Guarantee Agency (the “MIGA Convention”)**

The Convention Establishing the Multilateral Investment Guarantee Agency (“MIGA”) entered into force on April 12, 1988. As one of the World Bank Group,<sup>248</sup> MIGA's mission is to promote foreign direct investment (FDI) into developing countries to help support economic growth, reduce poverty, and improve people's lives.<sup>249</sup> By doing so, MIGA provides its foreign investor clients three (3) key services: political risk insurance,<sup>250</sup> technical assistance<sup>251</sup> and dispute mediation.<sup>252</sup>

As a rule, investors who can enjoy the coverage offered by MIGA must be a national of a MIGA member country other than a host country in cases of a natural person. For juridical persons, the juridical investor must be incorporated and have its principal business based in a member country other than a host country. In cases where the majority of a juridical person's capital is owned by a member other than a host country, the juridical investor will be eligible to receive MIGA's guarantee. Regardless of investor type, to be eligible to MIGA's coverage, a juridical

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<sup>248</sup> The World Bank Group consists of (1) the International Bank for Construction and Development (“IBRD”); (2) the International Finance Corporation (“IFC”); (3) the International Development Association (“IDA”); (4) the International Centre for Settlement of Investment Disputes (“ICSID”); and (5) the Multilateral Investment Guarantee Agency (“MIGA”).

<sup>249</sup> Multilateral Investment Guarantee Agency, World Bank Group, [http://www.miga.org/quickref/index\\_sv.cfm?stid=1588](http://www.miga.org/quickref/index_sv.cfm?stid=1588) (last visited Apr. 21, 2009).

<sup>250</sup> Political risk insurance covers losses arising from currency transfer restrictions, expropriation, war and civil disturbance and breach of contract as named in Article 11 of the MIGA Convention.

<sup>251</sup> MIGA is claimed as the international organisation with global experience offers technical assistance services that include investment promotion agencies, business associations, promotional departments within sectoral ministries, other government and private sector organisations. MIGA also provides the FDI Promotion Centre, an online resource for the delivery of technical assistance for foreign investors.

<sup>252</sup> MIGA offers free mediation services to its clients, that have been proved an effective and amicable dispute resolution tool for the parties. Also see the Agency Averts Claim for Power Project in China and the Agency Helps Resolve Decade-Long Dispute in Sri Lanka.

investor must operate its investment on a commercial basis.<sup>253</sup> However, the MIGA's Board is entitled to extend eligibility to a natural person who is a national of the host country, or a juridical person incorporated in a host country (or the majority of whose capital is owned by its nationals). This is provided that the assets invested are transferred from outside the host country.<sup>254</sup> The purpose of this innovative feature of MIGA's coverage is to help countries to reverse capital flight.<sup>255</sup>

In addition to its main functions, MIGA also promotes and facilitates the conclusion of investment promotion and protection agreements among its members (a host country and home country). Additionally, MIGA is expected to seek to remove impediments in both developed and developing member countries to increase investment flows to developing member countries, as well as to coordinate with other agencies concerned with the promotion of foreign investment, in particular the IFC.<sup>256</sup>

As of January 19, 2007, there are one hundred and seventy (170) member countries to MIGA; twenty-three (23) of which are industrialized countries and the remaining one hundred and forty-seven (147) countries classified as developing. Thailand is also a membership of MIGA and holds seven hundred and forty-two (742) shares worth US\$ eight thousand and twenty-eight (8,028) billion.<sup>257</sup>

Among these international agreements relating to the execution of state contracts in Thailand, MIGA is the most important international agreement in that it plays such a crucial function in the Thai legal system. Its importance is highlighted

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<sup>253</sup> Convention Establishing the Multilateral Investment Guarantee Agency, art. 13, opened for signature Oct. 11, 1985, 24 I.L.M. 1598, ICSID REV.-FOR INV. L.J. 147 (1986) [hereinafter MIGA Convention].

<sup>254</sup> *Id.* art. 13.

<sup>255</sup> Ibrahim F.I. Shihata, The Multilateral Investment Guaranty Agency (MIGA) and the Settlement, 477 PLI/Comm 345 (1988).

<sup>256</sup> MIGA Convention, *supra* note 253, art. 23.

<sup>257</sup> *Id.* Schedule A.

by the fact that the Regulation of the Office of the Prime Minister on Compliance with Arbitral Awards B.E. 2544 (2001) requires the contracting government agency to comply with the arbitral award where the contracting government agency disputes with MIGA.

#### **1.4.6 Agreements on the Promotions and Protections of Investments between Thailand and Other Countries**

Incentives for and protections of foreign investments (as mentioned earlier in Chapter 1) derive from two (2) sources or levels: international investment treaties between host states and home states (Thailand's BITs with other countries); and investment contracts (state contracts relating to FDI) between a foreign investor and the Government of Thailand (including its Agencies).

Currently, Thailand has entered into forty-two (42) agreements regarding the promotions and protections of investments with other countries as appeared in **Appendix 5**. Most of these agreements contain similar structural provisions. The following are principles and rules contained in these agreements: definitions of "investment" and "investor;" requirement of MFN treatment and national treatment; compensation for losses; expropriation; subrogation; settlement of disputes between an investor and the host contracting party; settlement of disputes between the Contracting Parties; and so on.

Therefore, before any Government Agency of Thailand enters into any state contract representing or carrying the FDI's functions (a state contract relating to qualifying FDI), both the Government Agency and the OAG must aware of the existence and application of Thailand's BITs with other countries, especially with the state in which the foreign investor holds the nationality. Terms and conditions to be

concluded in a state contract relating to FDI must be consistent with those provisions of those Thailand's BITs.

Here chooses the Agreement between the Government of the Kingdom of Thailand and the Government of Canada for the Promotion and Protection of Investments<sup>258</sup> (the "Agreement") to exemplify Thailand's obligations under it and to urge the Government of Thailand to be aware of those obligations subject to Thailand's BITs with other countries. The following are substantial concepts and requirements of the Agreement between the Government of the Kingdom of Thailand and the Government of Canada for the Promotions and Protections of Investments.

First, for any foreign investor to claim the promotions and protections as provided by the Agreement, the foreign investor making the investment must qualify as an investor whose investment is defined by the Agreement.

The term "investor" means any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws or any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of the Kingdom of Thailand, in accordance with its laws and regulations, applied in a manner consistent with paragraph 2 of Article IV.<sup>259</sup> Subject to this provision, it is noted that minority shareholders also fall within the defined term "investor," whether or not they hold shareholdings at least ten (10) per cent so long as they can demonstrate that they make

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<sup>258</sup> Agreement between the Government of the Kingdom of Thailand and the Government of Canada for the Promotion and Protection of Investments, Jan. 17, 1997, *available at* <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/THAILAND-E.PDF> (last visited Aug. 6, 2009).

<sup>259</sup> *Id.* art I (g).

the investment to acquire the participation in the enterprise, corporation, or whatever form operating in the Kingdom of Thailand.<sup>260</sup>

The term “investment” means any kind of asset owned or controlled either directly or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter’s laws. The Agreement also provides a non-exclusive list of investments provided that they are used for the purpose of economic benefit or other business purposes.

Second, the Government of Thailand is obliged to accord investments of investors with fair and equitable treatment subject to principles of international law as well as full protection and security.<sup>261</sup> It is to say that the Government of Thailand is required to provide investors the national treatment and MFN treatment in that the Government of Thailand shall provide investors any treatment or privilege no less favorable than that it provides its own investors or nationals<sup>262</sup> as well as the Government of Thailand shall provide investors any treatment or privilege no less favorable than that it provides to investors of any third state.<sup>263</sup>

Additionally, in cases of losses of investments of an investor affected by an armed conflict, a national emergency, or a natural disaster, the Government of Thailand shall accord the investments in respect of restitution, indemnification,

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<sup>260</sup> While IMF and OECD require that an investor must hold at least 10 (ten) per cent of equity ownership to qualify an investor as a foreign direct investor and accordingly shall be entitled to minimum treatment standards under customary international law; otherwise such an investor will simply qualify as a portfolio investor, this Agreement and most BITs, on the other hand, require that an investor, who shall be entitled to the promotions and protections under this Agreement and most BITs, must hold shares, stock, bonds or debentures or any other form of participation in a company, business enterprise of joint venture. See also *Walter Bau vs. Thailand*. In *Walter Bau vs. Thailand*, the arbitral tribunal reaffirmed that Walter Bau, a minority shareholder holding shareholdings 10 (ten) per cent in Don Muang Tollway (DMT), is entitled to the protections under the Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments.

<sup>261</sup> Agreement between the Government of the Kingdom of Thailand and the Government of Canada for the Promotion and Protection of Investments, *supra* note 259, art.II (2).

<sup>262</sup> *Id.* art.IV.

<sup>263</sup> *Id.* art.III.

compensation, treatment, or other settlement no less favorable than that it accords to its own investors, or nationals, or to investors of any third state.<sup>264</sup>

Third, as to expropriation, the Government of Thailand shall not nationalize, expropriate, or proceed any measure equivalent to nationalization or expropriation unless such expropriation is undertaken for a public purpose, under due process of law, in a non-discriminatory manner, and against prompt, adequate and effective compensation.<sup>265</sup> The valuation of compensation shall be based on the fair market value of the expropriated investment immediately before or at the time the expropriation becomes public knowledge. In cases of expropriation, the investor affected shall have a right to prompt review by a judicial or other independent authority under domestic law.<sup>266</sup>

Fourth, this Agreement also adopts the concept of subrogation from the MIGA Convention in that a Contracting Party or any agency thereof is entitled to be subrogated to the investor's right against the other Contracting Party (the Host Contracting Party), provided that the former already makes a payment to its investors under a guarantee or a contract of insurance of non-commercial risks it has entered into in respect to such an investment.<sup>267</sup>

Fifth, as to settlement of disputes between an investor and the Host Contracting Party (Thailand), the Agreement encourages the investor and Thailand to amicably settle a dispute through consultation between them within six (6) months since it was initiated. Unless the dispute has been settled through consultation between them, the dispute may be submitted to international arbitration under either

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<sup>264</sup> *Id.* art.VII.

<sup>265</sup> *Id.* art.VIII (1).

<sup>266</sup> *Id.* art.VIII (3).

<sup>267</sup> *Id.* art. X.

the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules.<sup>268</sup>

According to this provision, Thailand as the Contracting Party to this Agreement would agree to give consent to submit a dispute to international arbitration whether or not the investment contract (state contract relating to FDI) provides as such.<sup>269</sup> Additionally, this Agreement requires that arbitration shall be held in a state that is a party to the New York Convention and claims submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for the purposes of Article of the New York Convention.<sup>270</sup> This requirement is to ensure that the arbitral award arising out of this international arbitration shall be binding and enforced by domestic courts of the state that arbitration is held and that both Canada and Thailand are committed to apply the New York Convention in their territories.

Sixth, this Agreement also provides a mechanism of the settlement of disputes between the Contracting Parties (Canada and Thailand) concerning the interpretation or application of this Agreement. Likewise, the Contracting Parties are invited to amicably settle their dispute through consultation as their initial dispute settlement resolution; otherwise, the Contracting Parties shall submit a dispute to arbitral tribunal where each party shall appoint its own arbitrator.<sup>271</sup> Then the two (2) members shall select a national of a third state upon approval by the two (2) Contracting Parties to be a Chairman of the arbitral tribunal. If the Contracting Party fails to appoint its own arbitrator or the Contracting Parties cannot agree with such

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<sup>268</sup> *Id.* art. XIII (1) and (2).

<sup>269</sup> *Id.* art. XIII (5).

<sup>270</sup> *Id.* art. XIII (6)(b).

<sup>271</sup> *Id.* art. XV.

appointment, either Contracting Party shall invite the President of the International Court of Justice to make such appointment.<sup>272</sup>

Overall, the foregoing section demonstrates substantial principles laid down in a BIT between Canada and Thailand. A set of principles becomes a common structural model and has been adopted by other Thailand's BITs. Therefore, when reviewing a state contract relating to FDI, the OAG is required to scrutinize Thailand's BITs, especially one with the state that the prospective investor holds the nationality. The OAG must ensure that terms and conditions are concluded in a state contract relating to FDI and are consistent without anything contradicting a BIT's provisions. The reason is that even though a state contract relating to FDI with the prospective investor does not spell out or adopt those principles in such a state contract, the Government of Thailand is already bound to abide by those BIT's provisions in addition to an investment contract itself. The Government of Thailand cannot get away from obligations arising out of those Thailand's BITs. The protections of foreign investments granted by Thailand's BITs with other countries can be exemplified in *Walter Bau vs. Thailand*.

In *Walter Bua vs Thailand*,<sup>273</sup> Walter Bau AG (a German construction group), which was a shareholder holding 10 (ten) per cent in the Don Muang Tollway (DMT), submitted disputes to international arbitration under the UNCITRAL Arbitration Rules against the Government of Thailand for its alleged repeated failures to fulfil the obligations under the Thai-German Investment Protection Treaty and the concession agreement for the project. Walter Bua claimed that the State ordered DMT to reduce the toll on an elevated road from Din Daeng to Don Muang districts

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<sup>272</sup> *Id.* art. XV (4).

<sup>273</sup> The official arbitral award has not been published to public. See also Piyanart Sirvalo & Watcharapon Thongrung, *Govt must pay Bt1.4 bn to DMT*, THE NATION, Published on July 29, 2009, available at <http://www.nationmultimedia.com/worldhotnews/30108581/Govt-must-pay-Bt1.4-bn-to-DMT> (last visited Aug. 11, 2009).



from thirty (30) Baht (equivalent to US\$ one and sixteen hundredths (US\$1.16)) to forty-three (43) Baht (equivalent to US\$ one and twenty-two hundredths (US\$1.22)) per vehicle to a flat rate of twenty (20) Baht (equivalent to US\$ fifty-seven hundredths (US\$0.57)) and the State built a parallel road that diverted tollway traffic, which was seen as the obstruction of the operation of Din Daeng-Don Muang Tollway. On July 1, 2009, the arbitral tribunal awarded in favor of Walter Bau by ordering the Highways Department of Thailand to pay twenty-nine million (29,000,000) euros (equivalent to one and a half billion (1500,000,000) Baht) in compensation to Walter Bau.

Given the arbitral award in *Walter Bau vs. Thailand*, the arbitral tribunal reaffirmed that Walter Bau, although a minority shareholder holding ten (10) per cent in DMT, was protected by a Thai-German investment-promotion treaty and obligations under the concession contract granted to DMT and Walter Bau's rights under such treaty did not require prior approval from DMT. Nonetheless, the Government of Thailand disagreed with the arbitral award in *Walter Bau* and prepared to object this award.

## **2. For Benefits of the State**

Even though the OAG has an obligation to review draft contracts relating to legal issues, the OAG cannot disregard commercial issues or factual concerns. When reviewing a draft contract, the OAG is supposed to take all relevant factors into consideration. In addition, the OAG must be capable of anticipating legal consequences or disputes. Once the OAG anticipates what might become potential obstacles or disputes between parties, the OAG must find solutions or preventive measures. Particularly, when the parties need to settle their disputes by means of arbitration or lawsuit, the OAG must ensure that terms and conditions of a contract are fully legal binding. For disputes, there must be a complete set of witness documents as evidence for the contracting government agency to support the claims. Therefore, to prevent damages and losses that might happen to the State, the OAG must be aware and ensure that the following issues have been handled consciously and wisely.

### **2.1. Contract Objects**

For a sale and purchase contract, or service contract in which a contractor is required to provide materials for such service, the contracting government agency will normally have its own specifications of objects, articles, or materials that the seller or the contractor must provide. Under such specifications, the seller or the contractor must provide these objects, articles, or materials that meet the standard and requirements as specified by the contracting government agency. In addition to these specifications, the OAG also requires the seller or contractor to undertake that the contract object must be brand new and has never been used.

Terms and conditions in respect of the contract object are exemplified as follows:

*The Seller guarantees that the Goods sold under the Contract are of a quality not below that as stipulated in the Specifications and must be brand new, never been put to use except for testing.*

*In case of the purchase of Goods which will have to be subject to tests, the Seller guarantees that the tests will prove that the quality is not below that as stipulated in.....<sup>274</sup>*

## **2.2. Definite and Inclusive Contract Pricing**

As a general practice, the contract value or contract price will normally be paid off by the national budget. Therefore, before contracting with the private party, the contracting government agency must ask the Budget Bureau for primary approval and the Parliament for ultimate approval. Upon approval, the Budget Bureau must allocate the budget to cover the project cost for the contracting government agency. As a result, the contracting government agency must abide by such approval in that the contracting government agency cannot contract when its terms and prices differ from what has been approved by the Parliament. To put it another way, the contracting government agency as the one party of the contract cannot pay the seller or contractor any amount over what the Parliament has approved.

Therefore, the contracting government agency and the OAG must ensure that the contract value is definite and inclusive in that the contract value must cover all other expenses as well as additional taxes and charges. Examples of these charges include excise tax, value-added tax (“VAT”), local tax, stamps and duties. In cases where certain expenses incur unexpectedly, the OAG will ask the private sector as the other party of the contract to bear these costs.

In practice, the private party normally dealing or transacting with Government Agencies tentatively understands such practice and is already aware of

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<sup>274</sup> Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992) (Thail.), *supra* note 118, Sample Contract: Sale and Purchase Contract, clause 3.

the budget limitation by including all expenses, fees and any charges in the contract value.

Terms and conditions in respect to the contract value are as follows:

*The Seller agrees to sell and the Buyer agrees to buy the goods as described and referred in the Contract Document as “the Goods” at the total price of ... ..<sup>275</sup>*

*Any export taxes, duties, fees or other charges of whatsoever nature which shall be payable in countries other than Thailand for Goods which are to be imported into Thailand under the Contract shall be entirely the responsibility of the Seller.<sup>276</sup>*

*The Seller shall pay all import duties, taxes, fees and other expenses incurred in Thailand in supplying the Goods under the Contract.<sup>277</sup>*

### **2.3. Fair and Reasonable Purchase Price or Contract Value**

It is assumed that the contract value arising from the bidding process is reasonable and fair and the State is comfortable on what it spends within the national budget. The reason is that the bidding process can give all potential bidders an equal opportunity to submit a tender offer. However, under certain circumstances, where the bidding process is not applicable, the OAG will not be in the position to determine whether the contract value is reasonable. In this case, the OAG normally imposes “the price guarantee clause” on the private party. This means that the private party agrees to undertake the purchased price or the contract value at a reasonable price (that is not much more than that offered to other parties) and is subject to similar terms and conditions. If it turns out that the contract value is higher than the price offered to other parties, it is deemed that the seller violates his contractual obligations, thereby giving rise to the contracting government agency to terminate a contract and seek damages.

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<sup>275</sup> *Id.* Sample Contract: Sale and Purchase Contract, clause 1.

<sup>276</sup> *Id.* Sample Contract: Sale and Purchase Contract, clause 5.

<sup>277</sup> *Id.* Sample Contract: Sale and Purchase Contract, clause 8.

#### 2.4. Thai Vessels' Policy

As a matter of national policy, the Procurement Committee requires all Government Agencies to use the shipment service provided by Thai vessels. In this regard, the Procurement Committee has approved a shipment clause in the Sample Contract as the reference material attached to the Regulation of the Office of Prime Minister on Procurement B.E. 2535 (1992). Therefore, the OAG is obliged to assure that in cases where the contract goods, objects, articles or materials must be imported, these goods, objects, articles or materials must be shipped by Thai vessels unless this obligation is waived by the Minister of Transportation, or prohibited by foreign lenders.

Where these goods, objects, articles, or materials are not carried or shipped by Thai vessels, the seller or contractor must either submit evidence showing that the Thai vessel shipment requirement is waived by the Office of Mercantile Marine Promotion Commission or the seller or contractor is obliged to pay a non-compliance fee.

Terms and conditions in respect of the shipment are normally found as follows:

*If the Goods to be delivered to the Buyer according to this Contract are Goods which have to be ordered or imported from abroad by the Seller and are to be carried by sea on the route where Thai vessels are in carriage service and their space are available according to the Notification issued by the Minister of Transportation, the Seller must make arrangements for the shipment of such goods to Thailand by Thai vessels or vessels which enjoy the rights similar to Thai vessels unless permission has been obtained from the Office of the Mercantile Marine Promotion Commission before such Goods are carried by non-Thai vessels or they are Goods which, according to the Notification of the Minister of Transportation, may be carried by non-Thai vessels.*

*The Seller must submit a bill of lading or its certified copy to the Buyer together with the delivery of the Goods*

*showing those Goods are carried by Thai vessels or vessels which enjoy the rights similar to Thai vessels.*

*In a case where such Goods are not carried from abroad by Thai vessels or vessels which enjoy the rights similar to Thai vessels, the Seller must submit either an evidence to the Buyer showing that permission has been obtained from the Office of the Mercantile Marine Promotion Commission allowing the carriage of the Goods by non-Thai vessels or an evidence showing that payment of special fee has been made due to non-carriage of the Goods by Thai vessels according to the law on Mercantile Marine Promotion.*

*In a case where the Seller does not submit to the Buyer either of the evidence mentioned in the preceding paragraph, but nevertheless desires to deliver such Goods to the Buyer without receiving payment for such Goods, the Buyer is entitled to accept such Goods and will pay for the price to such Goods when the Seller has properly fulfilled the aforesaid requirements.*

## **2.5. Terms of Payment**

Like other types of private contracts, the reciprocity principle is a significant element of a state contract. This means that, on the one hand, both parties are committed to discharge their obligations to each other. On the other hand, one party is entitled to hold his obligations against the other party so long as it appears that the other party is intended not to perform his obligations. As a result, it becomes a general rule that when dealing with terms of payment, the State or contracting government agency will not be liable to make any payment to a private party unless the private party has fully discharged his obligations.

Furthermore, in cases where the payment has been broken down into installments, the OAG will ensure that each installment made to the private party covers the value of goods, objects, articles, materials, work or service for which the seller or contractor has delivered to the contracting government agency. The State or contracting government cannot make a payment to the private party exceeding the value of goods, objects, articles, materials, work or service delivered by the private

party to the contracting government agency. Otherwise, it is considered prejudicial toward the State.

In addition, the contracting government agency is not allowed to make an advance payment to a private party subject to some exemptions. In the event where an advance payment is contractually required, the contracting government agency shall make an advance payment to the private party even though the private party has not yet delivered any contract goods or work to the contracting government agency. The application of an advance payment can be commonly found in a contract having huge contract value so that the private party will be able to spend such amount to get materials ready before performance. In such a case, the contracting government agency is allowed to make an advance payment up to fifteen (15) per cent of the purchased value or the contract value provided that the private party is also required to provide an advance payment guarantee or bond to the contracting government agency in return of receiving the advance payment.<sup>278</sup>

The advance payment guarantee or bond can be made in various forms. The typical forms are cash, a bank draft, a letter of bank guarantee issued by local commercial banks, a letter of bank guarantee issued by the Industrial Finance Corporation of Thailand (“IFCT”), a finance company or a finance and securities company approved and licensed by the Bank of Thailand (“BOT”) or a Thai government bond. Therefore, when reviewing draft contracts, the OAG needs to check whether terms of payment of a draft contract are consistent with these rules.

## **2.6. Performance Guarantee or Bond**

On the one hand, as a means to guarantee that the private party will perform its obligations to the contracting government agency subject to the contract,

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<sup>278</sup> *Id.* clause 68.4.

the private party is required to provide a performance guarantee or bond with its value ranging from five (5) per cent to ten (10) per cent of the total contract value to the contracting government agency.<sup>279</sup> On the other hand, the State or contracting government agency will never be required to provide such performance guarantee or bond to the private sector as the other party, regardless of contract type. The reason is that the contracting government agency has its creditworthiness due to acting on behalf of the State. Simply having acted on behalf of the State can be considered a guarantee in itself that the contracting government agency shall be obliged to discharge its contractual obligations. Therefore, in all cases, the contracting government agency will never be liable to provide the private sector a performance guarantee or bond.

#### **2.7. Compensation for Losses or Damages Payable to a Private Party**

As mandatory requirements provided by the Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992), known as the 1992 Regulation, the State or contracting government agency will be entitled to claim compensation against the private party in a form of penalty at respective rates for breaches of the contract by the private party. For a sale and purchase contract, the 1992 Regulation requires the private party to pay the penalty, ranging from one hundredths (0.01) per cent to two tenths (0.20) per cent of the contract object value that has not been delivered to the contracting government agency. For a service contract, the penalty shall be chargeable daily between one hundredths (0.01) per cent and one tenth (0.10) per cent of the total contract value, but not less than one hundred (100) Baht (equivalent to US\$ two and eighty-five hundredths (2.85)) per day. In a

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<sup>279</sup> *Id.* clause 142.



case of public work affecting traffic conditions, the penalty is chargeable daily of twenty-five hundredths (0.25) per cent of the total value of the project.<sup>280</sup>

Such penalty is considered minimal compensation for the contracting government agency. Therefore, if there are additional losses or damages (after deducting the stipulated penalty as minimal compensation), the State is still entitled to claim from the private party the remaining actual compensation. In addition to claims for such compensation, the OAG will ensure that the contract allows the contracting government agency to deduct any compensation or any amount owed by the private party from the unpaid amount, performance guarantee, or bond given by the private party to the contracting government agency.

The following is an instance of terms and conditions in respect of penalty.

*In claiming liquidated damages and damages from the Seller under this Contract, the Buyer may be reimbursed by way of deduction from the cost of the Goods including reimbursable costs remaining unpaid to the Seller or by claiming against the bank issuing the performance security as the Buyer may prefer.*

On the contrary, in cases of breach of contract by the contracting government agency, the State or contracting government agency cannot pay the private party any fine or penalty. The State or contracting government agency is merely liable to pay actual or real compensation to the private party, only as to be proved by means of arbitration or lawsuit.

## **2.8. Unilateral Rights**

As one of its special characteristics, a state contract always gives superior rights or privileges to the State or contracting government agency over the

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<sup>280</sup> *Id.* clause 134.

private party. When reading state contracts thoroughly, it occasionally finds many clauses granting privileges to the State, particularly for unilateral rights. In fact, it does not really matter that terms and conditions granting superior rights to the State (a contracting government agency) must be spelled out in a contract. Even the lack of express unilateral rights, the State or contracting government agency is still superior as the State and can accordingly exercise the State's power to wipe out the private party's right so long as it is done to serve public interest or policy. In other words, the State seems to have absolute rights to exercise its authority by putting the private sector's benefits aside provided that the exercising of the State's authority serves the public purpose, whether or not such rights are expressly written in a contract.

For instance, as a rule, the State or contracting government agency has exclusive rights to alter terms and conditions. The State can even terminate the contract if the State thinks that it is appropriate, whether or not the private party has breached contract. However, under such circumstance, while the State is entitled to alter or terminate the contract unilaterally, the State may need to pay compensation to the private party for any damage or loss.

The sample clause of unilateral rights can be illustrated as follow:

*The Contract may be terminated by the Buyer in whole, or from time to time in part, in accordance with this Clause whenever the Buyer shall determine that such termination is in the best interest of the Buyer.*

Aside from those places where terms and conditions appearing in a main contract are inconsistent with those appearing in its annexes or amendments, the OAG requires that the private party shall comply with clauses to be affirmed or determined by the contracting government agency. Alternatively, in cases where terms and conditions of a contract are in conflict, the OAG will place a clause allowing the State or contracting government agency to consider what is most

beneficial to the State, or purporting to the object of the contract. The contracting government agency is entitled to choose the term and condition is in an effect, thereby requesting the private party to comply. As a result, the private party must comply with such an affirmative request.

## **2.9. Turnkey Contracts**

As a distinguishing characteristics of a turnkey contract, the value or the cost of individual items of design, engineering, procurement, construction, installation, start-up, testing and training, cannot be itemized. The value or cost of the entire project is occasionally quoted in one fixed price. As a result, it is quite difficult for the contracting government agency to determine whether the one fixed price of a turnkey contract is reasonable, or whether it is too expensive because a turnkey contract gives an opportunity to the contractor to quote one fixed price, which is often comparatively very expensive. Therefore, as a precaution, the OAG discourages the contracting government agency to enter into a turnkey contract, unless necessary or approved by the Council of Ministers.

### **3. For Public Interest/ Policy**

When dealing with a state contract, concession contract, or contract involving in public service or utility, or natural resources in particular, the theory of public interest becomes of great concern. This importance is because these types of contracts affect the contracting government agency and the State one way or another. Therefore, when reviewing these kinds of contracts, the OAG must pay great attention to the public interest theory. The public shall be deemed to be the third party of a contract for which the OAG must represent. The following matters are of particular concern when the OAG reviews a state contract involving in public policy or interest.

#### **3.1. Ownership of the Project Asset**

When coming across a draft contract involving in the provision of public service or utility or granting the exclusive right to the private party to manage or operate the facility or the project's property, the OAG encourages the contracting government agency to negotiate with the private party to agree to transfer the ownership of the facility or the project's property to the State once the construction of the facility is completed. Such concept is recognised as a "Build-Transfer-Operate" ("BTO") term. The necessity of requiring the private party to transfer the ownership of the project's property to the State is to prevent the facility that will be used for the public service or utility from being seized by the contractor's creditors.

For example, the BTO term was used in the Sky-Train Project. The Bangkok Metropolitan Administration ("BMA") was a party of this project. The OAG recommended BMA to use BTO terms in the project so that the ownership of the poles and beams would be transferred to the State when they were completed. However, the rails and trains were still in the ownership of the contractor. This agreement allowed the contractor to own and use its rails and trains for running the

sky-trains. In doing so, the burden of maintaining the rails and trains would be imposed on the contractor.

However, where the term of BTO is not appropriate due to restrictions stipulated by lenders or international grantors, the OAG alternatively advises the contracting government agency to apply the “Build-Operate-Transfer” term (“BOT”), instead of BTO to the project. However, for public service or utility’s purposes, the OAG will recommend that there must be a clause prohibiting the private party as the contractor from stopping or discontinuing the operation or service provision to the public, as well as prohibiting the lenders from seizing the project’s property that could affect the provision of public service or utility of such facility. This is to guarantee that the facility or the project’s property used for the public service or utility will be free from any encumbrance, whether or not the contracting government agency is claimed in breach.

In the *BECL case*, the Expressway and Rapid Transit Authority of Thailand (the “ETA”) entered into an expressway construction contract with Bangkok Expressway Company Limited (the “BECL”). When the expressway was completed, BECL refused to deliver the expressway to ETA by claiming that ETA failed to share the revenue as collected from the toll fee from expressway users to BECL, as contractually stipulated. Such a refusal by BECL caused a delay for the expressway usage, thereby causing inconvenience and trouble to public expressway users. In this case, it was clear that the public interest was adversely affected. Therefore, ETA brought the case against BECL to the Court of Justice and subsequently the Court ordered BECL to deliver the expressway to ETA. The judgement was held on the ground that the expressway was constructed for the public purpose or policy and as a result, the question whether ETA violated its contractual obligations would be

disregarded. Therefore, BECL was imposed to deliver the expressway to ETA whether or not ETA had failed to perform its obligations.

In consequence, the *BECL case* reaffirms that even with non-application of the BTO term in the project, the Court of Justice recognises that the State, through ETA in this case, has superior rights to access and occupy the expressway, which has been constructed for the public policy whether or not ETA fails to perform its contractual obligations to BECL.

### **3.2. User Charge Rates**

Even though a question of user charge rates is considered a commercial issue that is unlikely within the scope and authority of the OAG, the OAG tentatively pays attention to this issue. The OAG pays attention to the issue because the user charge rates can affect the accessibility of users or people to the public service or utility.

In practice, the OAG rarely agrees that the private party should have an exclusive right to increase user charge rates unilaterally and freely. In this case, the OAG will recommend the creation of a review mechanism for the proposed increased rates, probably in a form of a committee where a number of authorised representatives from the Government constitutes the committee panel. Alternatively, the OAG may advise the increased rate based upon certain formula as stipulated by the Government. For example, one of common formula is to refer to the inflation rate, which will be quoted by the Government. In all cases, a question as to whether or not the user charge fee should be increased and how much it should be increased, will be reviewed by the Government to ensure public accessibility.

### **3.3. Revenue Collection and Sharing**

The most important feature of a concession contract, state-joint venture contract, or contract involving in the provision of public service or utility or natural resources, is the revenue sharing between the parties (the State and the private party). For the State benefit, the OAG ensures that the contracting government agency will be entitled to collect the revenue. Examples of revenue include toll fees or user charge fees. Then the collected revenue shall be divided and given by the contracting government agency to the private party. This measure can give rise to the contracting government agency taking charge of the whole project revenue.

However, if it is impossible to assign the contracting government agency to collect the revenue, the OAG is expected to find a mechanism to supervise, examine, and cross-check the collection system provided by the private party. This also ensures that the revenue received from the private party is correct.

Additionally, the term “revenue sharing” becomes another concern requiring the OAG to define the term explicitly and clearly in order to avoid any argument between the parties of what constitute revenue sharing.

For example, the Telephone Organisation of Thailand (“TOT”) entered into a cell-phone network provision agreement with the private company. The contract provided that the revenue sharing between the parties was the revenue received and any other benefits arising from the cell-phone operation. Then the question of whether revenue received from cell-phone repair service, spare parts distribution, or interests arising out of the deposit guarantee would be considered revenue sharing. In such a contract, it was unclear, thereby bringing about an argument between TOT and the contractor. However, when the contract was renewed, the OAG made it clear that those arguable items were included in the definition of the “revenue sharing” between the parties.

Finally, the OAG must find a measure to prevent the private party from siphoning off its revenue or profits to its subsidiaries or affiliate companies in order to decrease the revenue to be shared with the State.

Even the fact that the extent of the revenue sharing or the profit sharing in which the private party will benefit from the contract is likely outside the scope and authority of the OAG, the OAG is likely to ensure that the private party will not receive an excessive profit or windfall from the State. In some cases, where it appears that there have been too much unexpected profits or surplus cash flow, the OAG may require the private party to distribute a proportional amount of the excessive profit to the State, subject to an agreed formula.

Furthermore, after considering capital invested in the project and standard profits which the private party should earn from the project, the OAG may recommend that the contracting government agency quote or stipulate the ceiling profit or maximum amount that the private party will be allowed to receive from the contract. The reason is that, at the end, the private party should not receive any profit more than the contractual figure.

#### **3.4. Relationship between the Bidder and the Contractor**

Particularly for mega projects involving in large capital outlays, it appears that the bidder is always a recognised and well-known firm with a high reputation in its field. But when the bidder is selected, the bidder will normally set up a new corporation to do the project, thereby signing a contract with the contracting government agency. Such scenario is set up partly because the bidder does not want its accounts consolidation with a contractor.

Under such circumstance, the OAG shall ensure that the new corporation or contractor will be supported or backed up by the bidder so that the



contractor will be able to discharge its obligations rightly. In practice, the OAG will recommend that the bidder holds a certain ratio of the shareholdings in a contractor's corporation throughout the contract term. By doing so, there may be a clause prohibiting the bidder from transferring or distributing its shareholdings in the contractor's company for certain periods of time, or until the contractor completes the facility and the facility is ready for the public service or utility. Furthermore, the OAG may suggest that the bidder provides the contractor financial and technical assistance.

### **3.5. No Penalty or Fine to be Levied on the State**

Due to the fact that the contract value is normally paid off by the national budget, which comes from taxpayers, the OAG must ensure that the entire contract will benefit the State, public, or people. Having said that, the OAG cannot agree with any clause allowing the contracting government agency or State to be liable to pay any penalty or fine to the private party where the contracting government agency fails to perform its contractual obligations. As a rule, where the contracting government agency or State violates its contractual obligations, the contracting government agency will be liable to pay only actual or real compensation to the private party, not punitive damages, penalties, or fines.

On the contrary, a delay or non-performance of a state contract in respect of the provision of public service or utility could bring about inconvenience or difficulty to people (or the "public"). Therefore, it is quite reasonable for the State to penalize or fine the private party where the private party fails to perform its obligations. The reason is that such non-performance by the private party not only affects the contracting government agency as the party of the contract but it also affects the public in general. Under such circumstance, the contracting government

agency is still entitled to claim compensation arising from breach of contract by the private sector, in addition to the stipulated fine.

#### **4. The OAG's Internal Practice in Reviewing State Contracts**

In addition to those rules mentioned earlier, the OAG also issues its internal practice as a guideline when reviewing a state contract. Where requirements under the internal practice are not met, the OAG may refuse to review a draft contract and subsequently return a draft contract to the contracting government agency. The following is the internal practice issued by the OAG when reviewing state contracts.

##### **4.1. Status of the Contracting Government Agency**

Before the OAG reviews a draft contract, the OAG needs to check the status of the contracting government agency that sends or submits a draft contract to the OAG for a review. It must appear that the government official who makes a request has full authority to do so on behalf of the contracting government agency and that person must be at the level of the government agency chief, or in the top management level of the agency. For the Central Administration Level, the agency chief must be or equivalent to the director-general level. For the Regional Administration Level, the agency chief must be or equivalent to the provincial governor.<sup>281</sup> Therefore, if it appears that the person who makes a request or signs a covering letter requesting the OAG to review a draft contract is an authority below the director-general or the provincial governor, the OAG cannot review such a draft contract and return the draft to the agency.

This requirement is very crucial. The reason is that subject to the existing laws and regulations, it is not mandatory that all Government Agencies submit a draft contract to the OAG for a review. The 1992 Regulation leaves it to the Government Agency chief's discretion to consider whether such a draft contract needs

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<sup>281</sup> *Id.* clause 5.

to be reviewed by the OAG.<sup>282</sup> In addition, the OAG will be able to review a draft contract only if all terms and conditions of a contract have been finalized and approved by the agency chief before submitting it to the OAG. The OAG cannot review a draft contract which its terms and conditions are not final.

It is to be borne in mind that only the contracting government agency can request the OAG for reviewing a draft contract by signing a covering letter to the OAG. Neither the private party nor its attorney can make a request, submit a draft contract, or contact the OAG directly. Apart from the contracting government agency, the OAG never contacts or deals directly with any private party.

In cases where both parties of a contract are defined as between Government Agencies, Local Authorities (Local Administrative Organisations), or State Enterprises, any of these agencies can submit a draft contract to the OAG for a review.

#### **4.2. Status of Documentation**

When the contracting government agency submits a draft contract to the OAG for a review, the contracting government agency not only submits a draft contract, but also other documents to the OAG. Examples include terms of reference (“TOR”), specifications, or its annexes and amendments. In many cases, it appears that a large set of documents are submitted to the OAG for a review. Therefore, before looking at the content or substance of these documents, the OAG needs to check the status of these documents to find out whether the OAG should accept them for a review or send them back to the contracting government agency.

First, the OAG must ensure that a contract concerned, TOR, and all amendments are still draft. In a case of a contract, the OAG must further check as to

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<sup>282</sup> *Id.* clause 132.

whether such a contract has been signed. Otherwise, it will be useless for the OAG to review a contract that has been signed and already binding on the parties because under such circumstance, it is unlikely to alter or modify terms and conditions. Therefore, in this case, the OAG is unable to review a draft contract, thereby requiring the OAG to return the contract to the contracting government agency.

Similarly, where a draft contract has not been signed yet but its TOR has been distributed or given to bidders, the OAG cannot review a draft contract for the contracting government agency unless it appears that the TOR, which has been already distributed to bidders, reserves rights to the contracting government agency. These rights allow alteration of terms and conditions in a draft contract as to be advised by the OAG. In this case, the OAG is supposed to review a draft contract promptly.

It is also to be borne in mind that a draft contract must be final. A draft contract submitted to the OAG cannot be in the negotiation process because a non-final draft is always changeable and negotiable. In this case, the OAG cannot review a contract for a contracting government agency so the OAG will have to return the draft contract to the contracting government agency to finalise it and subsequently send it back for review.

However, in many cases the contracting government agency prefers to have a representative of the OAG to participate in the negotiation process. In such a case, the OAG will assign its staff to help the contracting government agency negotiate with the private party, as requested by the contracting government agency. Nevertheless, the participation of the OAG's representative in the negotiation process does not give rise to an exception to the contracting government agency not to submit a draft contract to the OAG. This is particularly true where it is required by law or to

impose the OAG to agree or to be bound by terms and conditions as drafted by the OAG's representative. Therefore, despite having the OAG's representative in the negotiation process, terms and conditions appearing in a draft contract are not binding on the OAG, thereby still giving rise to OAG the alteration of terms and conditions.

More importantly, for particular projects, the OAG must ensure that the project be approved by a competent authority beforehand. Otherwise, a draft contract must be returned to the contracting government agency to receive a proper approval.

#### **4.3. Documents to be Reviewed**

Only documents containing legal issues will be reviewed by the OAG. The following is a set of listed documents to be reviewed: a draft contract, its annexes and amendments, bidding documents, and others. It is to be borne in mind that a draft contract must be final and has not yet been signed. While the main contract contains general terms and conditions, the annexes and amendments normally contain specific conditions relevant to the main contract, and they will be treated as parts of a contract. Examples of annexes and attachments include design, specifications, special specifications, terms of payment, and terms of warranty. Furthermore, the bidding documents normally consist of a form of invitation to bid, instructions to bidders, bid form, contract form, form of letter of guarantee as bid security, form of letter of guarantee as performance security, and form of letter of guarantee as advance payment. The other types of documents may be one of a letter of intent, notice to proceed, letter to comfort, or memorandum of understanding.

#### **4.4. Languages Used**

Before reviewing a draft contract, it is essential for the OAG to check what language to be used in a contract by confirming with the contracting government

agency. The OAG is supposed to review only a version to be used as a genuine contract, not merely its translation. Where a contract will be executed in two (2) languages, for example both Thai and English, the OAG will have to ensure contract consistency in both languages. In cases of any divergence, the OAG should specify to which contract the party will agree to comply, for example:

*This Contract is executed in Thai and English. In case of any divergence, the English text shall prevail.*

#### **4.5. Scope and Authority of the Contracting Government Agency**

As mentioned earlier, to find out whether the contracting government agency has authority to contract with the private party, the OAG needs to look at the Restructuring of Government Organisation Act, B.E. 2545 (2002) as well as their royal decree of establishing divisions within individual ministries. To put it another way, to find the scope and mandate of the main Government Agencies consisting of the Legislative Branch (the Parliament), the Executive Branch (the Government), the Judicial Branch, (the Judiciary) and some Independent Organisations, the OAG is required to look at the Restructuring of Government Organisation Act, B.E. 2545 (2002), as well as their royal decree. For State Enterprises and Local Authorities (Local Administrative Organisations), the OAG has to check with their establishment law.

#### **4.6. Inquiry and Additional Information**

In order to produce clear and concise contract terms and conditions that meet what the contracting government agency is seeking, the OAG, in many cases, will invite authorised representatives of the contracting government agency who are in charge of the negotiating, drafting, and entering into a contract with a private party for a meeting. In a meeting, an authorised staff of a contracting

government agency will be required to provide the OAG additional information, as well as to submit relevant documents. Under such circumstance, the potential private party or its representatives may be welcome to attend the meeting. The private party is also welcome to give a statement and submit documents to the OAG, but only through or on behalf of the contracting government agency. This is normally because the OAG cannot contact or deal with the private party directly.

During the meeting, the OAG's responsible staff is required to keep minutes of the meeting by stating who is attending the meeting, what additional facts and information are given to the OAG, and what documents are submitted to the OAG for consideration before reviewing a draft contract.

#### **4.7. A Key Concept of Reviewing a Draft Contract**

After finding out the intention of both parties and considering all the facts and documents, the OAG's responsible staff will start reviewing a draft contract. However, before the OAG's responsible staff alters or changes any contract clause, such alteration or changes to a draft contract must be better, clearer, and more concise than the original version. Further, there must be an explanatory rationale to support individual alteration or changes. Basically, the OAG's responsible staff is supposed to alter a clause that is meaningfully material to the concept of the transaction, not just wordings.

After finishing the review, in some cases, the OAG needs to make a reservation together with the alteration. The contracting government agency is supposed to consider the reservation and alteration. The reason is that the contracting government agency has vast discretion and is free to contract in a way it desires. However, if the contracting government agency enters into a contract by ignoring the



reservation or alteration made by the OAG, the contracting government agency must be accountable for such ignorance.

### Chapter 3 Initial Impediment to the Arbitration Legal System

In the Thai legal system, there is a wide range of state contracts that Government Agencies use as a means of entering into legal agreements with the private sector. Under Thai law, state contracts are defined and classified based upon the sources of their statutory acts that establish individual contract types. Each statutory act always sets its own elements and criteria for what constitutes a particular type of contract. Because state contracts are categorized and divided by laws establishing them, reference to the sources of statutory acts is necessary to establish the specific criteria for each contract. For example, to seek what an administrative contract is, it is advised to look at the Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999). Under the Administrative Court Act, a concession contract, a contract relating to the provision of public service or utility, a contract relating to the exploitation of natural resources, or a state-joint venture contract can be defined as falling within the meaning of an administrative contract and as a result, these contracts are governed by the Administrative Court Act. The detail of the definition and categories of state contracts has been previously addressed in Chapter 1.<sup>283</sup>

The advantage of categorizing state contracts by using the sources of statutory acts is, in particular, to find what kind of laws will govern a particular state contract. Such categorization cannot however draw up dividing lines among state contracts or distinguish one contract type from the others. In fact, even though individual statutory acts set up their own definition of each type of state contracts, the definition of individual types of state contracts often overlap in practice. Therefore, it

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<sup>283</sup> In Chapter 1, it provides and explains the definition and categories of state contracts in the Thai law system.

is very possible to find that one particular contract may be defined and classified into a few categories and accordingly be governed by several statutory acts.

Under Thai law, state contracts can be divided into five (5) categories: a government procurement contract; an administrative contract; a concession contract; a state-joint venture contract; and other. The following is a brief summary of the significant characteristics of these five (5) state contracts.

A government procurement contract is a contract between the State (through any of its Agencies) and a private party carrying forth a simple and straightforward transaction. A government procurement contract more likely involves the acquisition of ordinary supplies and services that are routinely necessary for the administration and operation of a Government Agency. A government procurement contract is principally governed by the Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992).

An administrative contract is a contract that relates to or involves a concession, the provision of public service or utility, or the exploitation of natural resources, or a contract conferring privileges or superior rights upon the State. The crucial ramification of any contract being defined as an administrative contract is that any dispute arising out of an administrative contract shall be settled by the Administrative Court, not the Court of Justice. An administrative contract is generally subject to the Establishment of Administrative Court and Administrative Court Procedure Act, B.E. 2542 (1999).

A concession contract is not expressly defined in any statutory act. Nevertheless, it is understood as a contract where the State through its Government Agency authorizes or assigns a private party to provide public service or utility on its behalf within a period of time with a private party's own risk and expenses. This

means that a private party is accordingly eligible to collect charges from users (users' charges) for its consideration.<sup>284</sup> Most concession contracts in Thailand are principally but not exclusively governed by the National Executive Council Announcement No. 58. Apparently, the National Executive Council Announcement No. 58 regulates certain state activities, especially those involving in the provision of public service or utility, particularly for any activity in respect of trains, trams, canal construction, airways, water system, irrigation system, electricity, pipe gasoline, and sea shipping. Apart from concession contracts under the National Executive Council Announcement No. 58, some concession contracts relating to forestry shall be accordingly subject to the Forestry Act, B.E. 2484 (1941). Likewise, a concession contract relating to mining shall be governed by the Mine Act, B.E. 2510 (1967), or a concession contract relating to state highways shall be under the State Highways' Concession Act, B.E. 2542 (1999).

A state-joint venture contract is a transaction or an agreement between the State and the private party that allows the private party to take part in the State undertakings or activities. The participation by the private party in the State undertakings or activities must be authorized by law, or involving in the exploitation of natural resources, or the utilization of the State's asset or property. A state-joint venture can be found in the following forms: a state-joint venture with a private sector; and a private investment with an approval, concession, or any exclusive right granted by the State or its Government Agencies. By its nature, a state-joint venture contract is very similar to a concession contract since both originated out of the National Executive Council Announcement No. 58. The main distinction between a concession contract and a state-joint venture contract is the value of a contract. While

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<sup>284</sup> Prayoon Kanchanadul, *supra* note 90 at 146.

a concession contract with its value less than one (1) billion Baht (equivalent to US\$ twenty eight and fifty-seven (28.57) million)) shall be subject to the application of the National Executive Council Announcement No. 58, a concession contract having a value of at least or more than one (1) billion Baht (equivalent to US\$ twenty eight and fifty-seven (28.57) million)) shall be governed by the Private Participation in State Undertakings Act, B.E. 2535 (1992).

A state contract under the “other” category is simply a contract that is outside the other categories and, as a result, is not be specially governed by those laws and regulations but by general rules of law as they appear in the CCC or other relevant statutes (if any).

#### **1. Indistinguishable Definition of Each Type of State Contracts**

Given the cursory look at the present contract types mentioned above, there are five (5) contract categories according to their sources of statutory acts that are unclear and indivisible. As a consequence, it is difficult in practice to differentiate one contract type from the others because there are no hard and fast dividing lines among them. In many cases, the definition and criteria of individual contract types overlap. Therefore, it always appears that one contract type can be defined and categorized in different ways and this creates confusion because such a contract might be governed by several different relevant acts and regulations.

The division of a state contract carrying the function of FDI from the other is even more difficult to assess in practice. It appears that several types of existing state contracts by their nature can represent or carry the characteristics of FDI but they are not explicitly defined and classified as an investment contract or a state contract relating to FDI under Thai law. The failure of recognizing a contract as a state contract as it relates to FDI in the Thai legal system could mean confusion over

which relevant laws and regulations apply, especially for international arbitration law. The reason is that under Thailand's BITs with other countries, foreign investors are given the right to submit a dispute arising out of a state contract relating to FDI to international arbitration where they are confident in its neutrality and impartiality. The lack of a mechanism to differentiate a state contract relating to FDI from others makes it impossible in practice that a dispute between the State and foreign investors will be settled by international arbitration.

The lack of clarity surrounding each type of state contracts is therefore considered a potential impediment to the arbitration legal system since it brings about uncertainties of how state contracts (especially those carrying the characteristics of FDI) should be implemented and governed. As a result, those state contracts, which carry and represent the function of FDI, may not be treated and implemented in a way that the Government of Thailand is committed to facilitate foreign investors to invest their capital in Thailand under international law (for example, Thailand's BITs with other countries).

Therefore, it is necessary to differentiate a state contract that represents or carries the characteristics of FDI from others, whether or not it is named as such. Only a state contract representing or carrying the characteristics of FDI as a so-called "a state contract relating to qualifying FDI" will be specially governed by the Special Method as proposed in Chapter 5.

## **2. Necessity for Establishing the Definition of “Investment” and “FDI,” as well as the Testing Process of “a State Contract Relating to Qualifying FDI”**

Apparently, the term of FDI has not been explicitly and legally defined under Thai law. Furthermore, a state contract relating to qualifying FDI has not been categorized as one of the contract types according to the sources of statutory acts. Therefore, it is very doubtful and difficult to find what these terms are and what constitutes elements of these terms under Thai law.

However, the lack of the definition of these terms does not suggest that there is no FDI or a state contract relating to FDI in Thailand. On the other hand, FDI or a state contract relating to FDI is commonly found in various contract types. Certain contract types that by their very nature can represent and establish FDI are, for example, concession contracts, state-joint venture contracts, and management contracts.

The lack of definition around terms such as investment, FDI, and state contracts relating to FDI has further lead to great confusion, discouraging of FDI inflow toward the country, and untold legal battles. Therefore, this dissertation emphasizes the importance of defining such terms so as to distinguish a state contract carrying the characteristics of FDI from the other state contracts whether they are called by name as such. The dissertation also proposes that a contract, which carries the characteristics of FDI according to the testing process, would be defined as a state contract relating to qualifying FDI and accordingly, treated under the Special Method. The justifications of the testing process of “a state contract relating to qualifying FDI” that should be set up are demonstrated as follows:

First, as far as FDI is concerned, Thailand (the host state) is required by international law to provide foreign investors some protection on FDI. At the first

glance, Thailand is required to provide a minimum standard of treatment and protection on foreign investment under customary international law. The failure of doing so would require the opportunity of the home state to apply diplomatic protection, raising the question of “state responsibility” for injuries to aliens against Thailand as a host state.

In addition to Thailand’s international obligations under customary international law, Thailand is also bound by international obligations arising out of international investment agreements into which Thailand has entered (for example, BITs). At present, Thailand has entered into approximately forty-two (42) BITs with other countries. The List of Agreements on The Promotion and Protection of Investments between Thailand and Other Countries appears in **Appendix 5 of the Appendices**.

Therefore, Thailand is definitely required by either customary international law, or international investment agreements, or both to provide foreign investors certain protections and treatments on FDI. The ignorance of those international obligations will give rise to foreign investors to bring a case against Thailand as previously mentioned in *Walter Bau vs. Thailand*. As a result, it is very necessary to differentiate state contracts that relate to FDI from others, regardless of what type of state contracts, or whether those contracts are termed investment contracts or state contracts carrying or relating to FDI. Any state contract that carries the function of FDI should be treated and implemented in a way that Thailand has committed herself or is bound by international obligations.

Second, due to Thailand’s international obligations as mentioned above, the OAG must ensure that a state contract that any Government Agency enters into with the private party and that relates to FDI must contain FDI-friendly clauses



under customary international law and Thailand's BITs with other countries. Therefore, there must be a tool that can differentiate a state contract carrying the function of FDI, whether or not it is named as such from other types of state contracts because a state contract relating to FDI is not defined and categorized as a contract type under the existing legal system. Once a state contract relating to FDI has been differentiated from the other, the OAG will then be able to ensure that such a contract contains FDI-friendly clauses such as the availability of international arbitration.

Third, to encourage FDI flow to the country, the Government has issued a package of privileges and incentives for foreign investors. In addition to those privileges and incentives, the availability of international arbitration is the key factor for foreign investors' consideration because it can assure that their investments will be protected. The unavailability of international arbitration for a dispute arising out of a state contract relating to FDI not only impairs the flow of FDI toward the country but also affects the image of Thailand as a state in international level as it happened to Thailand due to non-ratification of the ICSID Convention. Therefore, to ensure that a state contract that relates to FDI, whether it is named as such, provides international arbitration as an alternative means of dispute settlement for foreign investors, it is necessary to differentiate a state contract that carry the function of FDI from the other. Only a state contract relating to FDI should provide international arbitration as an alternative settlement of disputes for foreign investors when they are entering into a state contract relating to FDI with any Government Agency of Thailand.

Fourth, subject to Thai law, dispute settlement resolution for each contract type under the existing state contract categories is variable and inconsistent. There is no uniform or standard treatment in respect to dispute settlement mechanism

for state contracts, especially those contracts carrying or relating to FDI. It is particularly true in terms of the existing arbitration laws and regulations, the confusion of jurisdiction between the Court of Justice and the Administrative Court is still unresolved, thereby resulting in the uncertainty in practice as to whether disputes arising out of a state contract should be submitted to the Court of Justice or the Administrative Court. For example, while a dispute arising from a government procurement contract shall be submitted to the Court of Justice, a dispute arising out of a concession contract or a state-joint venture contract, shall be settled by the Administrative Court.

Furthermore, before the Cabinet Resolution dated February 9, B.E. 2547 (2004)<sup>285</sup> was issued, the possibility for arbitration for any type of state contracts was allowed. However, due to the disappointment of the arbitral award in the *Expressway case*, the Council of Ministers issued the Cabinet Resolution dated February 9, B.E. 2547 (2004) prohibiting all Government Agencies from including an arbitration clause in a concession contract. As a result, the application of arbitration is no longer applicable to a dispute arising out of a concession contract. In contrast, the Cabinet Resolution requires a dispute arising out of a concession contract to be brought into either the Court of Justice or the Administrative Court but definitely not through arbitration.

The issuance of such Cabinet Resolution is understandable. The rationale behind the issuance of the Cabinet Resolution is that the Council of Ministers is aware that the parties' obligations according to a concession contract often involve the exercising of the State's power and can affect public policy in general. Therefore, it would be more appropriate that disputes arising from a

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<sup>285</sup> Letter of the Secretary General to the Council of Ministers, *supra* note 202.

concession contract shall be settled by judiciary consideration rather than through the process of arbitration. The reason is that in the arbitration process, the arbitral tribunal is not required to apply the mandate of public interest or policy to a case even though a concession contract grants a private party certain exclusive rights on the provision of public service or utility or the exploitation of natural resources.

Overall, the foregoing justifications demonstrate the necessity of the testing criteria of a state contract relating to qualifying FDI in order to differentiate a state contract that carries the function of FDI from the other. The proposal is based on the assumption that all state contracts carrying the function of FDI or relating to FDI, whether they are named as such, should be treated equally according to both national and international laws. The names and classifications of state contracts should not make any difference in terms of legal treatment so long as they carry the same function of FDI because they all play the same role in that by their nature, they establish FDI in a country.

### **3. Use of Terms “Investment,” “Foreign Investment,” and “FDI” from International Law Perspective**

Before analyzing and defining the terms of “investment,” “FDI,” and “a state contract relating to qualifying FDI,” it is important to clarify the distinction between foreign investment, portfolio investment, direct investment and FDI in general terms from international law perspective. Understanding these terms is essential because it will help establish the definition and the testing process of “a state contract relating to qualifying FDI” which is the core of this dissertation.

#### **3.1. General Meaning of “Foreign Investment,” “Portfolio Investment,” “Direct Investment” and “FDI”**

##### **Foreign Investment**

According to Professor Sornarajah, foreign investment involves the transfer of tangible or intangible assets from one country into another country for the purpose of generating wealth under the total or partial control of the owner of the assets.<sup>286</sup>

In the Encyclopaedia of Public International Law, foreign investment is defined as a transfer of funds or materials from one country (called the capital exporting country or home state) to another country (called the capital importing country or host state) in return for a direct or indirect participation in the earnings of that enterprise.<sup>287</sup>

##### **Portfolio Investment**

Portfolio investment is simply a movement of capital for the purpose of buying shares in a company formed or functioning in another country. It could also

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<sup>286</sup> Sornarajah, *supra* note 13 at 7.

<sup>287</sup> Encyclopaedia of Public International Law, vol. 8, p. 246.

include other security instruments through which capital is raised for ventures.<sup>288</sup> Portfolio investment can be found in various forms of equity securities, debt securities, bonds, money market instruments and financial derivatives such as options.<sup>289</sup> Nevertheless, according to Robbins, portfolio investment can be distinguished from FDI, in which the former does not maintain control over the management or use of the invested assets.<sup>290,</sup>

### **Direct Investment**

The IMF defines the term of direct investment as the category of international investment that reflects the objective of a resident entity (a direct investor) in one economy (a home country) obtaining a lasting interest in an enterprise resident (a direct investment enterprise) in another economy (a host country). The lasting interest requires the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise. Direct investment comprises not only the initial transaction establishing the relationship between the investor and the enterprise but also all subsequent transactions between them and among affiliated enterprises, both incorporated and unincorporated.<sup>291</sup> The concept and definition of direct investment as suggested by IMF lays the foundation of the definition of FDI as adopted in the OECD Detailed Benchmark, which will be subsequently discussed.

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<sup>288</sup> Sornarajah, *supra* note 13 at 7.

<sup>289</sup> Lipsey, *supra* note 25 at 13.

<sup>290</sup> Joshua Robbins, the Emergence of Positive Obligations in Bilateral Investment Treaties, 13 U. Miami Int'l & Comp. L. Rev. (2006) 407. Also see Alfred Escher, Current Development, Legal Challenges, and Definition of FDI, in Legal Aspects of Foreign Direct Investment, (1999) at 21-22 (Daniel D. Bradlow and Alfred Escher, eds. 1999). Escher classifies ownership of over 10% of the voting rights in a foreign company as foreign direct investment, since such a large voting block indicates an interest in being able to influence the company's management decisions. Ownership of less than 10% is considered portfolio investment for exactly the converse reason.

<sup>291</sup> IMF Committee on Balance of Payments Statistics and OECD Workshop on International Investment Statistics, Direct Investment Technical Expert Group (DITEG), Issues Paper # 2 : Direct Investment – 10 Percent Threshold of Voting Power/Equity Ownership, Employment (Apr., 2004), available at <http://www.imf.org/External/NP/sta/bop/pdf/diteg2.pdf> (last visited Apr. 21, 2009).

Meanwhile, the United States distinguishes the difference of inward direct investment and outward direct investment in that an inward investment was to measure "...all foreign equity interests in those American corporations or enterprises which are controlled by a person or group of persons...domiciled in a foreign country."<sup>292</sup> The term of "equity interest" covers all holdings of common and preferred stock, advances and intercompany account.

On the other hand, the outward direct investment is defined as the United States equity in controlled foreign business enterprises...as statistically defined for the purposes of the survey,"<sup>293</sup> covering:

(1) "Foreign corporations, the voting securities of which were owned to the extent of twenty five (25) per cent or more by persons or groups of affiliated persons, ordinarily resident in the United States..."

(2) "Foreign corporation, the voting stock of which was publicly held within the United States to an aggregate extent of fifty (50) per cent or more, but distributed among stockholders, so that no one investor or group of affiliated investors, owned as much as twenty five (25) per cent"

(3) "Sole proprietorships, partnerships or real property (other than property held for the personal use of the owner) held abroad by residents of the United States" and

(4) "Foreign branches of the United States corporations"

Given the definition of outward direct investment, the second category is unlikely considered "direct investment" because it includes publicly owned companies with as little as twenty five (25) per cent of stock in scattered U.S. holdings.

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<sup>292</sup> U.S. Department of Commerce, 1937, p 10.

<sup>293</sup> *Id.* at 10.

## **FDI**

Following the definition of foreign investment as given by Professor Sornarajah, he also adds that “there can be no doubt that the transfer of physical property such as equipment or the physical property that is bought or constructed such as plantations or manufacturing plants constitutes FDI.”<sup>294</sup> Therefore, FDI can be established in either form of capital flowing into a host state or physical property like equipment, machines, etc. brought into a host country so long as such an investment is tentatively invested in long-term businesses to generate profits of such investment. In this regard, Robbins emphasizes that “[T]ypically FDI involves the purchase or development of productive facilities such as factories, mines, drilling platforms, or offices, although it also includes ownership of subsidiary entities based in the host state.”<sup>295</sup> Nowadays, the definition and scope of FDI is much extended to cover other items or instruments with economic value. Robbins further adds that “[I]n recent years “intangible” forms of FDI such as patent, copyright, and trademark rights have comprised an increasing portion of the value of total FDI flows.”<sup>296</sup>

### **3.2. Development and Expansion of FDI under Customary International Law**

The development and expansion of FDI have been historically derived from the principle of “state responsibility” for “injuries to aliens” under customary international law, that is, the host state is responsible for injuries to aliens (foreign investors). The rule of state responsibility for injuries to aliens was considered as justifiable grounds for applying diplomatic protection based upon the notion that the injury done to the alien was deemed to be an injury done to his home state under

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<sup>294</sup> Sornarajah, *supra* note 13 at 7.

<sup>295</sup> Robbins, *supra* note 290 at 407

<sup>296</sup> *Id.*

customary international law.<sup>297</sup> This rule was also reaffirmed and adopted by the Permanent Court of International Justice as follows:<sup>298</sup>

*In taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because in the absence of special agreement the bond of nationality between the state and the individual which alone confers upon it the right of diplomatic protection, and it is as part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged.*

Subject to this rule, what made the state responsible for injuries to aliens against a host state were wrongs done to aliens. For example, when there was a situation where a host state failed to provide foreign investors a minimum standard of treatment and protection under customary international law, a home state could claim the rule of state responsibility for injuries to aliens against the host state and as a result, could apply military intervention in the host state's territory. The use of armed force by the home state to collect default debt from the host state was recognized as a "self-help measure," and was justified subject to customary international law.

However, it is noted that the mere error in investigation or lack of resources to investigate personal crimes was insufficient to bring responsibility upon the host state. Only additional elements of the state's outrage, acting in bad faith, willful negligence of duty, or insufficiency of governmental action (which was considered so far short of international standards that any reasonable person would readily recognize its insufficiency) could accordingly amount to international delinquency of treatment, thereby bringing state responsibility upon the host state.<sup>299</sup>

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<sup>297</sup> Sornarajah, *supra* note 13 at 138.

<sup>298</sup> Panevezys-Saldutiskis Railway Case (1939) Series A/B No. 76,16.

<sup>299</sup> Sornarajah, *supra* note 13 at 151.



Nevertheless, the use of military intervention for sovereign default was opposed by host states, especially Latin American states. From their perspective, they claimed that the principle of a minimum standard of treatment and protection under customary international law was still arguable and as a result, a self-help measure for sovereign default could not be the absolute satisfactory and appropriate means. They argued that first, a minimum standard of treatment and protection under customary international law could impose host states to provide standard of treatment higher than that they provided to their own nationals. Second, as a result, the meaning and scope of international minimum standard itself was vague and still arguable. In consequence, Latin American states (including developing states in Asia) disagreed with international minimum standard, since those were perceived to be higher than what was given to their own investors. Third, given the principle of state responsibility for injuries to aliens, the espousal was considered itself the dispute settlement resolution among the parties (foreign investors, host states and home states).

The espousal was a mechanism whereby an injured national's state assumed the national's claim as its own and presented the claim against the state that injured the national.<sup>300</sup> Once the home state stepped in by pursuing a claim against the host state for its investor, the investor would lose control over the claim. It would absolutely depend on the home state's discretion.

However, it was noted that the espousal itself was considered unsatisfactory in that the national's state seemed reluctant to espouse a claim against the host state because it could affect the relationship between the host state and home state at the state level. Moreover, even if the espousal was to happen, the espousal

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<sup>300</sup> Vandevelde, *supra* note 11 at 159.

process could eventually end up with the use of military intervention by the home state in the host state's territory, which had been already challenged and opposed by Latin American countries.

Therefore, the principle of "state responsibility for injuries to aliens" seemed insufficient to guarantee that foreign investment or property in all forms, for example, shareholders' rights vested in a company. The reason was that the principle was not really designed to directly deal with issues in respect to foreign investment or FDI in particular as can be seen in the *Barcelona Traction Case*.

In the *Barcelona Traction Case*,<sup>301</sup> the International Court of Justice ("ICJ") laid down the rule that a shareholder's rights in a company could not be protected through diplomatic intervention of the shareholders' home state. To put it another way, the home state of the company's shareholders could not claim state responsibility for alien injuries under customary international law on the shareholders' behalf against the host state. ICJ rather viewed the shareholders' right in a company as a vehicle of foreign investors. Therefore, according to customary international law, the shareholders of the company did not have the same independent interests and protection as the state did. Only the state where a company (in which FDI was invested) was incorporated would claim the responsibilities and obligations against a host state.

As a consequence of the *Barcelona Traction Case*, the question arose as to what the legal ramifications would be if FDI was operated through a company incorporated under the host state's domestic laws and if the foreign investor was a minority shareholder in a company. These questions had been brought into an intense discussion among international law scholars but they had not been successfully

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<sup>301</sup> 1970 ICJ Rpts 1.

solved. However, to ensure that some sort of protection was provided for foreign investors in a case like the *Barcelona Traction Case*, it was proposed that the same minimum standard of treatment as provided by customary international law should be alternatively given to foreign investors (including minority shareholders) in either form of BITs or MITs, or FTA. Put another way, the failure for providing treatment and protection on FDI in the *Barcelona Traction Case* triggered and contributed to the fact that the treatment and protection on FDI have been gradually developed and expanded through BITs.

The tendency of the current BITs is not only to ensure the provision of the minimum treatment standard as recognised by customary international law for foreign investors but BITs also bring additional foreign investors' concerns into an agreement between the host state and home state. The following are basic features of BITs<sup>302</sup>: admission of investments; standard treatment (MFN and national treatment); fair and equitable treatment; guarantee; expropriation and compensation; free transfer of funds and repatriation of capitals and profits; subrogation on insurance claims; dispute settlement resolution; transparency of national laws; and performance requirement.

By means of BITs, the definition and scope of FDI have been gradually expanded to include new forms of current investments. It appears that the definition of investment and FDI is nowadays drafted in a way to provide for an open-ended definition of investment including an illustrative list of assets specially protected by BITs (including all categories of assets, rights and interests). The open-ended definition is seen as wide enough to cover everything of economic value.<sup>303</sup>

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<sup>302</sup> Calvin A. Hamilton & Paula I. Rochwerger, Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties, 18 NYILR. 3 (2005).

<sup>303</sup> *Id.* at 4.

From the present BITs model, the definition of FDI can be divided into these five (5) categories: physical assets or property of foreign investors; shares in a company (including minority shareholdings); intellectual property (including copyright and trademark); contractual rights; and administrative rights.

Therefore, it can be concluded that the extended definition of FDI and investment in BITs was resulted from the need to ensure that a minimum standard of treatment and protection on FDI according to customary international law was also available for foreign investors (including minority shareholders). BIT is not the only means to guarantee the protection, especially what was not covered like minority shareholdings in those days for foreign investors but also to expand the definition of FDI to include other forms of present investment, for example, intellectual rights, contractual rights, etc.

### **3.3. Development and Expansion of FDI under Modern International Instruments**

#### **3.3.1. WTO Rules on Investment<sup>304</sup>**

WTO is one of the most significant international instruments and it raises issues about foreign investment or FDI. In fact, the key purpose of WTO is to encourage and promote global trade liberalization and remove both trade (tariffs) and non-trade barriers from the free market. Non-discriminatory treatment (consisting of national treatment and most favored-nation (“MFN”)) is a fundamental rule under WTO. The application of the WTO rules can be demonstrated in trading in goods under GATT<sup>305</sup> and trading in services under GATS.<sup>306</sup>

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<sup>304</sup> Sornarajah, *supra* note 13 at 304.

<sup>305</sup> General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, LT/UR/A-1A/1/GATT/1 [hereinafter GATT], *available at* [http://docsonline.wto.org/gen\\_browseDetail.asp?preprog=3](http://docsonline.wto.org/gen_browseDetail.asp?preprog=3) (last visited Apr. 21, 2009).

<sup>306</sup> General Agreement on Trade in Services, LT/UR/A-1B/S/1 [hereinafter GATS], *available at* [http://docsonline.wto.org/gen\\_browseDetail.asp?preprog=3](http://docsonline.wto.org/gen_browseDetail.asp?preprog=3) (last visited Apr. 21, 2009).

Even though WTO rules are mainly emphasized on trading in goods and trading in services in general, it appeared that investment issues have been initiated in WTO since the Uruguay Round. In fact, the WTO's instruments carrying some investment issues have been found in GATS, TRIMs,<sup>307</sup> and TRIPs<sup>308</sup> but these instruments are not intended to directly rule out legal framework and practice on investment or FDI in particular. On the contrary, these instruments have been issued to impose certain measures relating to investment in order to promote trade liberalization rather than to promote capital flows through FDI. Nonetheless, it is believed that when barriers and obstacles of trade in goods and services are removed, free flows of capital and FDI will be automatically enhanced.

Therefore, the WTO rule as found in GATs, TRIMs and TRIPs can enhance and contribute to the flow of FDI to certain extent. For example, GATs provides some important measures for investor protection as FDI is seen as a mode of supply ("commercial presence") as well as the movement of related skilled personnel ("temporary movement of natural persons"), thereby having a direct bearing on investments.<sup>309</sup> TRIMs forbids host states from imposing certain measures, particularly for performance requirement on FDI, which could result in trade distortion. Likewise, TRIPs requires state parties to provide certain protections on intellectual property in which intellectual property is considered a form of FDI.

Nevertheless, at its first Ministerial Meeting in Singapore, a Working Group on the Relationship Between Trade and Investment was set up and assigned to conduct an in-depth study on the linkage between trade and investment. This working

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<sup>307</sup> Agreement on Trade Related Investment Measure, LT/UR/A-1A/13 [hereinafter TRIMs], available at [http://docsonline.wto.org/gen\\_browserDetail.asp?preprog=3](http://docsonline.wto.org/gen_browserDetail.asp?preprog=3) (last visited Apr. 21, 2009).

<sup>308</sup> Agreement on Trade Related Aspects of Intellectual Property Rights, LT/UR/A-1C/IP/1 [hereinafter TRIPs], available at [http://docsonline.wto.org/gen\\_browserDetail.asp?preprog=3](http://docsonline.wto.org/gen_browserDetail.asp?preprog=3) (last visited Apr. 21, 2009).

<sup>309</sup> Peter Nunnenkamp & Manoj Pant, KIEL DISCUSSION PAPERS, Why the Case for a Multilateral Agreement on Investment Is Weak? (Mar. 2003) 14-15.

group was required to work in cooperation with other relevant intergovernmental organizations (including UNCTAD), and through appropriate regional and bilateral channels, to provide strengthened and adequately resource assistance to respond to these needs.<sup>310</sup>

In a study conducted by A Working Group on the Relationship Between Trade and Investment, it reveals that in terms of investment, the developing countries would likely adopt and accept only long-term investment rather than short-term investment in their countries. More importantly, they would prefer greenfield investment more than mergers and acquisitions of existing ventures. They claimed that a long-term foreign direct investment would benefit them as host states as well as contribute to the expansion of trade liberalization. On the other hand, short-term investment and portfolio investment, which could promote free movement of capital, may be damaging to the economies of host states as previously happened in the Asian financial crisis in 1997. It was believed that the Asian financial crisis was partly triggered by the abrupt pullout of portfolio investment. Therefore, from the developing countries' perspective, they were confident that only long-term foreign investment would contribute to trade liberalization and should be protected.

On the other hand, the developed countries preferred a broader, asset-based definition of foreign investment, which is known as an open-ended definition of investment and includes small portions of shareholdings such as portfolio investments and every kind of assets that have economic value.

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<sup>310</sup> WTO, Report (2001) of the Working Group on the Relationship Between Trade and Investment To the General Council, WT/WGTI/5 (Oct. 8, 2001), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/5-en.doc> (last visited Apr. 22, 2009).

### **3.3.2. The 1987 ASEAN Agreement for the Promotion and Protection of Investment<sup>311</sup> and The 1998 Framework Agreement on ASEAN Investment Area**

#### **The 1987 ASEAN Agreement for the Promotion and Protection of Investment**

The Association of Southeast Asian Nations (“ASEAN”) was established on August 8, 1967, in Bangkok by the five (5) original Member Countries, namely: Indonesia; Malaysia; Philippines; Singapore; and Thailand. Brunei Darussalam joined ASEAN on January 8, 1984, Vietnam on July 28, 1995, Lao PDR and Myanmar on July 23, 1997, and Cambodia on April 30, 1999. Main purposes of the Association are to accelerate economic growth, social progress and cultural development in the region and promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter. The ASEAN Community comprises three pillars, namely: ASEAN Security Community; ASEAN Economic Community; and ASEAN Socio-Cultural Community.<sup>312</sup>

As to the Promotion and Protection of Investment, the ASEAN Economic Community issues the end-goal of economic integration measures as outlined in the ASEAN Vision 2020 that is to create a stable, prosperous and highly competitive ASEAN economic region, in which there is a free flow of goods,

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<sup>311</sup> AGREEMENT AMONG THE GOVERNMENT OF BRUNEI DARUSSALAM, THE REPUBLIC OF INDONESIA, MALAYSIA, THE REPUBLIC OF THE PHILIPPINES, THE REPUBLIC OF SINGAPORE, AND THE KINGDOM OF THAILAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS Manila (Dec. 15, 1987) [hereinafter the 1987 ASEAN Agreement for the Promotion and Protection of Investment].

<sup>312</sup> ASEAN, Overview: Association of Southeast Asian Nations, <http://www.aseansec.org/64.htm> (last visited Apr. 22, 2009).

services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020.<sup>313</sup>

As far as the definition of investment and FDI are concerned, the 1987 ASEAN Agreement applies an open-ended definition and provides an illustrative list that is wide enough to cover everything with economic value.

In accordance with the 1987 ASEAN Agreement, the term of “investment”<sup>314</sup> is defined as every kind of asset and in particular shall include, though not exclusively:

- (a) movable and immovable property and any other proper rights such as mortgages, liens and pledges;
- (b) shares, stocks and debentures of companies or interests in the property of such companies;
- (c) claims to money or to any performed under contract having a financial value;
- (d) intellectual property rights and goodwill;
- (e) business concessions conferred by law or under contract, including concessions to search for, cultivative, extract, or exploit natural resources.

Notwithstanding these lists, only the investment subject to the following conditions shall be protected by the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

First, the investment shall be characterized as an inward direct investment. The inward direct investment is simply an investment brought into,

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<sup>313</sup> *Id.*

<sup>314</sup> The 1987 ASEAN Agreement for the Promotion and Protection of Investment, *supra* note 311, art. I (3).



derived from or directly connected with investment brought into the territory of any Contracting Party.<sup>315</sup>

Second, for a new investment, a new FDI must receive specific approval in writing and registration from the host state. However, for the existing investments made before the 1987 Agreement entered into force for the host state, these investments must be specially approved in writing and registered by the host state and upon conditions as the host state deems fit for purposes of this Agreement subsequent in its entry into force.<sup>316</sup>

Third, a company, which makes an investment in a host country must be incorporated or constituted under the laws in force in the territory of another Contracting Party and must have its place of effective management in that Contracting Party.<sup>317</sup>

#### **The 1998 Framework Agreement on ASEAN Investment Area**

The 1998 Framework Agreement on ASEAN Investment Area was issued to establish a competitive ASEAN Investment Area (“AIN”) with a more liberal and transparent investment environment amongst Member States as well as to enhance ASEAN attractiveness and competitiveness for promoting external direct investments from non-Member States. The arrangement under the 1998 Framework Agreement is to liberalize the movement of investment within the ASEAN area, thereby enabling the free movement of investment in either form of capital, assets, technology transfer, personnel among the ASEAN states as well as outside states.

Subject to the 1998 Framework Agreement, Member States are encouraged to negotiate with other ASEAN states to remove internal barriers in order to create a liberal common market. With the removal of internal barriers, outside

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<sup>315</sup> *Id.* art. II (1).

<sup>316</sup> *Id.* art. II (3).

<sup>317</sup> *Id.* art. I (2).

investors may more easily take advantage of the diverse benefits of various ASEAN states.<sup>318</sup> Therefore, it will encourage and attract non-Member States to put their investment within ASEAN Investment Area. At the end, ASEAN will be capable of negotiating a much more favourable agreement with outside states than would any of the member states be acting alone.<sup>319</sup>

Unlike the 1987 ASEAN Agreement, the 1998 Framework Agreement is not directly intended to provide guidelines or any promotion and protection on investment to Member States. On the contrary, it recalls the commitment arising from previous documents, which has already entered into force. The 1998 Framework Agreement recalls Member States to their commitment to the 1987 ASEAN Agreement and the 1996 Protocol to enhance investors' confidence for investing in ASEAN, and to reaffirm the importance of sustainable economic growth and development as enshrined in the Framework Agreement on Enhancing ASEAN Economic Co-operation signed in Singapore on January 28 1992.<sup>320</sup>

Even though the 1998 Framework Agreement is not aimed to define the terms of investment and FDI, it, on the contrary, designates the coverage of the Agreement. It appears that the 1998 Framework Agreement however outlines the scope of "FDI" to certain degree. At the very least, this 1998 Framework Agreement excludes portfolio investments and matters relating to investments covered by other ASEAN Agreements, such as the 1998 ASEAN Framework Agreement on Services

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<sup>318</sup> Joel Vander Kooi, THE ASEAN ENHANCED DISPUTE SETTLEMENT MECHANISM: DOING IT THE "ASEAN WAY," 20 NYILR 1 20. Also See Terence J. Lau, Distinguishing Fiction from Reality: The ASEAN Free Trade Area and Implications for the Global Auto Indus., 31 DAYTON L. REV. 453, 461 (2006); White, supra note 84, at 162-71; Shin-Yi Peng, Note, Economic Relations between Taiwan and Southeast Asia: A Review of Taiwan's "Go South" Policy, 16 WIS. INT'L L.J. 639, 647 (1998).

<sup>319</sup> See Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M. 498; also see George O. White III, Comment, From Snowplows to Siopao-Trying to Compete in a Global Marketplace: The ASEAN Free Trade Area, 8 TULSA J. COMP. & INT'L L. 177, 195 (2000).

<sup>320</sup> Framework Agreement on the ASEAN Investment Area (Oct. 7, 1998) [hereinafter the 1998 Framework Agreement on the ASEAN Investment Area], available at <http://www.aseansec.org/7994.pdf> (last visited Apr. 23, 2009).

from the definition of “investment.”<sup>321</sup> Nevertheless, it is to be borne in mind that the 1998 Framework Agreement does not require foreign investors to receive specific approval nor require them to have the effective management like the 1987 ASEAN Agreement.<sup>322</sup>

### 3.3.3. International Monetary Fund (“IMF”)

According to the Balance of Payments Manual: Fifth Edition (“BPM5”),<sup>323</sup> which adopts a narrow sense, FDI refers to an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor. Further, in cases of FDI, the investor’s purpose is to gain an effective voice in the management of the enterprise. The foreign entity or group of associated entities that make the investment is termed the “direct investor.” The unincorporated or incorporated enterprise --a branch or subsidiary, respectively, in which direct investment is made-- is referred to as a “direct investment enterprise.” Some degree of equity ownership is almost always considered to be associated with an effective voice in the management of an enterprise; the BPM5 suggests a threshold of ten (10) per cent of equity ownership to qualify an investor as a foreign direct investor. The forms of investment by the direct investor, which are classified as FDI are equity capital, the reinvestment of earnings, and the provision of long-term and short-term intra-company loans (between parent and affiliate enterprises).<sup>324</sup> The definition of FDI provided by the BMP5 also corresponds with that defined by the Organisation for Economic Co-operation and Development (“OECD”).

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<sup>321</sup> *Id.* art. 2.

<sup>322</sup> *Id.* art. 1.

<sup>323</sup> IMF, The Balance of Payments Manual: Fifth Edition (BPM5) (1993), available at <http://www.imf.org/external/np/sta/bop/bopman.pdf> (last visited Apr. 23, 2009). Also see OECD, Benchmark Definition of Foreign Direct Investment: Third Edition (BD3) (1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf> (last visited Apr. 23, 2009).

<sup>324</sup> UNCTAD, Foreign Direct Investment (FDI), available at <http://www.unctad.org/Templates/Page.asp?intItemID=3146&lan> (last visited June 14, 2009).

### **3.3.4. Organisation for Economic Co-operation and Development (“OECD”)**

OECD defines FDI in the Detailed Benchmark Definition of Foreign Direct Investment: Third Edition (“BD3”) in that FDI reflects the objective of obtaining a lasting interest by a resident entity in one economy (“direct investor”) in an entity resident in an economy other than that of the investor (“direct investment enterprise”). The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence on the management of the enterprise. Direct investment involves both the initial transactions between the two entities and all subsequent capital transactions between them and among affiliated enterprises, both incorporated and unincorporated. It also includes a flow of lending to, or purchase of ownership in a foreign enterprise that is largely owned (at least ten (10) per cent ownership, according to the United States balance of payments accounts) by residents of the investing country. Direct investment implies full or partial control of the enterprise and, usually, the physical presence by foreign firms or individuals in the host country.<sup>325</sup> A threshold of ten (10) per cent of equity ownership is required to qualify an investor as a foreign direct investor and this number makes the dividing line between foreign direct investors and portfolio investors. Therefore, a foreign investor holding less than ten (10) per cent of the ordinary shares or voting power of an enterprise simply qualifies as a portfolio investor and therefore does not entitle that investor to minimum treatment standards under customary international law.

### **3.3.5. U.S. Model BIT**

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<sup>325</sup> OECD, *Benchmark Definition of Foreign Direct Investment: Third Edition (BD3)* 7-8 (1996), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf> (last visited June 23, 2009).

The United States currently adopts the 2004 U.S. Model BIT, which also provides an open-ended definition of investment. According to the 2004 U.S. Model BIT, the definition of “investment” is divided into three (3) categories: general definition; non-exclusive list; and additional covered investment.

As the first category, the 2004 U.S. Model BIT defines the term of “investment” as every asset that an investor owns or controls, directly or indirectly, that has the characteristics of investment. Such characteristics include the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. However, the term of “investment” does not include an order or judgment entered in a judicial or administrative action.<sup>326</sup>

In terms of the second category, the Model provides the following items in addition to the general definition of investment:

- (1) an enterprise;
- (2) shares, stock and other forms of equity participation in an enterprise;
- (3) bonds, debentures, other debt instruments and loans<sup>327</sup>;
- (4) futures, options and other derivatives;
- (5) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (6) intellectual property rights;
- (7) licenses, authorizations, permits and similar rights conferred

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<sup>326</sup> Treaty Between the Government of the United States of America And the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment 4 (2004) [hereinafter the 2004 Model BIT], *available at* [www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf) (last visited Apr. 23, 2009).

<sup>327</sup> It seems that most forms of bonds, debentures, debts and loans carrying long-term obligations are more likely considered an investment. On the other hand, even though certain forms of debts, such as claims to payment that are immediately due and derived from the sales of goods or services are less likely to have such characteristics of an investment, they could be however defined an investment. See the 2004 U.S. Mode BIT, Footnote 1 p 3.

pursuant to domestic law; and

- (8) other tangible or intangible, movable or immovable property and related property rights, such as leases, mortgages, liens and pledges.

As to the third category, the 2004 U.S. Model BIT includes any alteration of the form, in which the existing assets are invested or reinvested as well as activities associated with the existing investment as “covered investment.” The covered investment is defined as an investment in the territory of an investor of the other Party in existence at the date of entry into force of this Treaty or established, acquired or expanded thereafter.<sup>328</sup>

#### **3.3.6. Thailand’s BITs**

From the BITs that Thailand has entered into with other countries, it appears that Thailand also adopts the open-ended definition (i.e., a very wide asset-based approach), thereby being able to include almost everything with economic value. The open-ended definition does not only provide the general definition of investment but also encompasses items on the non-exclusive list, and additional covered investment as can be found in the U.S. Model BIT.

As to the general definition of “investment,” which also provides a non-exclusive list, it appears that Thailand adopts the 1987 ASEAN Agreement for the Promotion and Protection of Investment as a model in most of Thailand’s BITs as follows:

The term of “investment” is defined as every kind of asset and in particular shall include, though not exclusively:

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<sup>328</sup> The 2004 Model BIT, *supra* note 326, art. 1.

- (a) movable and immovable property and any other proper rights such as mortgages, liens and pledges;
- (b) shares, stocks and debentures of companies or interests in the property of such companies;
- (c) claims to money or to any performed under contract having a financial value;
- (d) intellectual property rights and goodwill;
- (e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract, or exploit natural resources.

Regarding the additional covered investment, Thailand Model BIT also includes any alteration of the form in which assets are invested provided that such alteration does not affect their characteristics as investment and the alteration must be consistent with the laws and regulations of the Contracting Party in whose territory the investment were made. However, the portfolio investment is excluded from the definition of investment under Thailand Model BIT.

With the open-ended definition, the definition and scope of the term FDI seem variable and dynamic, having evolved to facilitate and cope with the development of new economic derivatives or instruments.

Like the 1987 ASEAN Agreement, only the investment that meets the following conditions shall be entitled to claim protections under Thailand Model BIT.

First, the investment shall be characterized as an inward direct investment. The inward direct investment is simply an investment brought into,

derived from, or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party.<sup>329</sup>

Second, such FDI must receive specific approval in writing and registration from the host state for the new investment. As for the existing investments made before this Agreement entered into force, these investments must have been specially approved in writing and registered by the host state under such conditions as it deems fit for purposes of this Agreement subsequent in its entry into force.<sup>330</sup> This is a so-called the admission of investment.

In Thailand, only foreign investors who receive the Certificate of Approval for Protection (“CAP”), as issued by the Committee on the Approval for the Protection of Investment, will be eligible to enjoy rights and privileges as conferred by Thailand Model BIT. To obtain a CAP, foreign investors need to meet the conditions and requirements as designated by the Committee. Meanwhile, the Committee is required to take into consideration the benefits in relation to the nation’s safety and security; economic and social development; technology transfer and research for development; public order and good moral; art, culture and tradition of the country; natural resource conservation; energy and environment protection; and consumer protection.<sup>331</sup>

Third, foreign investors can be either natural persons who are nationals of another Contracting Party, or juridical persons. In cases of juridical persons, they can form a company, corporation, partnership, or other business associations provided

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<sup>329</sup> The 1987 ASEAN Agreement for the Promotion and Protection of Investment, *supra* note 311, art. II (1).

<sup>330</sup> *Id.* art. II (3).

<sup>331</sup> The Announcement of the Committee on the Approval for the Protection of Investment between Thailand and Other Countries No. MFA 0704/1/2003 concerning Foreign Investment Protection under the Agreements on the Promotion and Protection of Investments between the Government of the Kingdom of Thailand and Foreign Governments dated October 22, 2003.



that they must be incorporated or constituted under the laws in force in the territory of another Contracting Party wherein the place of effective management is situated.<sup>332</sup>

To review, the preceding section illustrates the legal methodology regarding FDI, emphasizing the importance of the definition and scope of FDI from relevant modern international instruments. It explained how the terms of FDI and investment have been gradually defined, developed, and expanded from the perspective of customary international law to the perspective of modern international law as found in BITs, MITs or FTA. Not only the definition of FDI and investment have been expanded but the scope and application of FDI have been also extended. A Summary of Definitions and Scope of “FDI” under Modern International Instruments is demonstrated in **Appendix 7 of the Appendices**. The next section will seek to get closer to explore the testing process of “a state contract relating to qualifying FDI” as well as the definition of “investment” and “FDI.”

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<sup>332</sup> The 1987 ASEAN Agreement for the Promotion and Protection of Investment, *supra* note 311, art. I (2).

#### **4. Testing Process of a “State Contract Relating to Qualifying FDI”**

After having explored the definition and scope of investment and FDI from international law perspective, this dissertation proposes that the testing process that sets up the criteria and conditions of a “state contract relating to qualifying FDI” should be established as well as that the terms “state contract,” “investment” and “FDI” should be defined. The proposal is to provide the OAG’s staff with guideline and reference material in order to help them differentiate a state contract relating to qualifying FDI from other types of state contracts.

The main purpose for establishing the testing process of a “state contract relating to qualifying FDI” and the definition of “state contract,” “investment” and “FDI” is to examine whether a prospective state contract to be entered between the State (through its agency) and the private party carries or forms FDI. In determining whether a prospective state contract is a state contract relating to qualifying FDI, the OAG is required to take the nature and characteristics of a contract concerned into account, whether or not it is named as such. If a state contract establishes FDI, such a contract would be within the scope of the defined “state contract relating to qualifying FDI,” thereby being governed by the Special Method.

The Special Method would ensure that first, a state contract relating to qualifying FDI that is to be transacted between the State or Government Agency and foreign investors would be treated and protected appropriately under customary international law and by the international investment agreements into which Thailand has entered. The reason for this is that Thailand as a host state is required to provide a minimum standard of treatment and protection on foreign investment for foreign investors under customary international law and international investment agreements or treaties into which Thailand has entered.

Second, where a dispute from a state contract relating to qualifying FDI arises, the Special Method ensures that the dispute would be amicably solved to the satisfaction of both parties. The Special Method would provide a two-tier dispute settlement mechanism for the parties. At the initial resolution, the parties are encouraged to settle their dispute between themselves within a period of time unless they have failed in doing so. Under such circumstances, the parties will be subsequently referred to the Consultation and Negotiation where a national commission as a third party will help the parties reach an agreement. As a second tier mechanism, once local remedy of the Consultations and Negotiation has been exhausted, the parties would be further referred to settle dispute before international arbitration where Thailand has become a member. By a two-tier mechanism, the State would be required to put great efforts to help the parties seek a resolution that would both benefit the parties amicably.

Third, the Special Method would allow the State to exercise its power over foreign investors or FDI under special circumstances provided that foreign investors would be appropriately compensated. This means that even though the State through its Government Agency enters into an agreement with the private party, the State also reserves exclusive rights to unilaterally alter, amend, or terminate such an agreement, for example, for expropriation. This is to affirm that the State still has and reserves full permanent sovereignty over its natural wealth and resources and self-determination of its people as recognised by the United Nations General Assembly Resolution 1803 (XVII).

Based upon the proposal, the testing process of a “state contract relating to qualifying FDI” can be divided into three (3) steps: testing criteria of the foreign element; testing criteria and conditions of qualifying FDI; and testing criteria

of qualifying FDI invested in a state contract. According to the testing process, a prospective investment will be brought to the test according to these three (3) steps respectively. As to the first step, there are four (4) testing criteria: place of incorporation; exclusive ownership; percentage of foreign shareholdings; and controlling power in a corporation. By doing so, a prospective investment will be tested with one testing criterion at a time, from the first criterion to the final criterion respectively. When a prospective contract fails to meet the first criterion, the next criterion will be applied to the contract until the final criterion will have been applied. Only a contract representing FDI falling into one of these testing criteria will be brought to the second step. The purpose of the second step is to examine whether a prospective investment holding the foreign element qualifies as a foreign direct investment, *per se*, “qualifying FDI.” Then only qualifying FDI made in a state project by a means of state contracts as specified in the third step will be defined as “a state contract relating to qualifying FDI” and accordingly governed by the Special Method. The Flowchart of the Testing Process of “a State Contract Relating to Qualifying FDI” is demonstrated in **Appendix 8 of the Appendices**.

#### **4.1. Testing Criteria of the Foreign Element**

This step is to testify as to whether a prospective investment constitutes or holds the foreign element. In fact, to seek whether the prospective investment holds or carries the element of having foreign involvement is to seek whether the investment’s owner (both natural and juridical person) has foreign nationality or alternatively the majority shareholder holds foreign nationality or otherwise the foreigner has controlling power over such investment. In this process, there are four (4) testing criteria: place of incorporation; exclusive ownership; percentage of foreign shareholdings; and controlling power in a corporation. By this

step, a prospective investment will be tested with one of these four (4) testing criteria at a time until it meets conditions set forth by either criterion and as a result, it will then be brought to the test in the next step. If a prospective investment fails to meet conditions set forth by these four (4) testing criteria, such an investment will never qualify as a state contract relating to qualifying FDI, thereby being outside the Special Method's scope.

The first three criteria (place of incorporation and registration, exclusive ownership, and percentage of foreign shareholdings) will look at or take legal status or certification of the investment concerned into consideration. Meanwhile, the fourth testing criterion of having effective voice in management will look at *de facto* management over the investment in that who has an effective voice in management over such investment. Upon the testing process, only an investment holding the element of having foreign involvement will be further tested under the second and third steps respectively.

#### **4.1.1. Place of Incorporation and Registration**

Although there are various criteria to determine the corporate nationality according to international law and practice, the most widely accepted method is by way of the incorporation or registered office. The place of incorporation and registration has been traditionally seen as a classic test to determine the corporate nationality. In other words, the location of a company's registered office determines its nationality under the incorporation theory.<sup>333</sup> It is further found that in determining

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<sup>333</sup> Christian Kersting, Corporate Choice of Law: A Comparison of the United States and European Systems and a Proposal for a European Directive, 28 Brook. J. Int'l L.1,2,37 (2002).

the corporate nationality, Great Britain, Ireland, Denmark and the Netherlands endorse the incorporation theory.<sup>334</sup>

Additionally, the test of the place of incorporation has been largely adopted by ICSID tribunal, for example in *SOABI*<sup>335</sup>:

*The Tribunal has observed that the Convention does not define the term "nationality," thus leaving to each State the power to determine whether or not a company is possessed of its nationality. As a general rule, States apply either the head office or the place of incorporation criteria in order to determine nationality. By contrast, neither the nationality of the company's shareholders nor foreign control, other than over capital, normally govern the nationality of a company, although a legislature may invoke these criteria in exceptional circumstances. Thus, "a juridical person which had the nationality of the Contracting State, party to the dispute," the phrase used in Article 25(2)(b) of the Convention, is a juridical person which, in accordance with the laws of the State in question, has its head office or has been incorporated in that State.*

*Such a reasoning is, in law, not in accord with the Convention. Indeed, the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control.*<sup>336</sup>

According to the first criterion, a company, which is incorporated and registered in a country other than Thailand, is qualified as a foreign company having its nationality of the state where it is incorporated and registered. Therefore, any investment brought into Thailand by a company incorporated in a country other than

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<sup>334</sup> Nicole Rothe, Freedom of Establishment of Legal Persons Within the European Union: An Analysis of the European Court of Justice Decision in the Uberseering Case, 53 Am.U.L.Rev. 1103, 1111 (2004).

<sup>335</sup> *Societe Ouest Africaine des Betons Industriels v Senegal*, ICSID Case No. ARB/82/1, p 181. See also *Autopista Concesuibada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5 at note 108, p 41. See also Bernardo M. Cremades, *Arbitration between States and investors: some jurisdiction issues*, in *Business Law International* 157, 160-162 (May, 2001).

<sup>336</sup> In *Amco v Indonesia*, Amco Asia Corporation, a U.S. corporation, submitted an application to the Indonesia Investment Board for the establishment of a foreign business incorporated in Indonesia. Upon the approval of the Indonesia Investment Board, Amco formed a local company to construct and operate a hotel in Jakarta.

Thailand is considered to be holding the foreign element, thereby being treated as a foreign company under Thai law.

#### **4.1.2. Exclusive Ownership**

In terms of the second testing criterion, taking the ownership of foreign investment or FDI into consideration is of great importance. The place of incorporation and registration of foreign investment or FDI will be disregarded. Under the second testing criterion, if the investment or FDI is entirely owned by foreign investors through or in a form of natural persons or juridical persons, the investment would be considered to be holding the foreign element and shall be treated as a foreign company under Thai law. An investment that is entirely owned by foreign investors can be invested in a country in the following forms: through local natural persons, local juridical persons, joint venture, consortium, etc.

The criterion of the exclusive ownership is without difficulty when it comes to establishing of the degree of foreign involvement. On the contrary, the jointly owned investment may bring some complications in finding the degree of involvement of foreign investors. In a case where the ownership of an investment is shared between local investors and foreign investors, it is essential to find out the proportion of the ownership that will dictate whether the investment falls under the third testing criterion.

#### **4.1.3. Percentage of Foreign Shareholdings**

By this criterion, any foreign investment or FDI, which is jointly owned of more than fifty (50) per cent in value by foreign investors, would constitute foreign involvement, thereby falling within the scope of having the foreign element. In other words, a corporation, even one incorporated and registered under Thai law but having shares of more than fifty (50) per cent held by foreign investors, would be

considered a foreign corporation under Thai law.<sup>337</sup> This testing criterion simply looks at the percentage or proportion of shareholdings of a company incorporated and registered under domestic law. The investment of more than fifty (50) per cent of shareholdings held by foreign investors will be simply within the scope subject to the Special Method even though such an investment is invested in a company incorporated and registered under domestic law.

#### **4.1.4. A Voice in the Management/ Controlling Power**

If an investment fails to meet the criteria set forth in (4.1.1.)-(4.1.3.), the investment in question will be tested according to the final criterion. This criterion disregards the place of incorporation and registration of a company. It also disregards the exclusive ownership as well as portions of shareholdings invested in a corporation by foreign investors. This criterion does not pay much attention to the legal status of a corporation making the investment in question under the above testing criteria. On the contrary, it simply looks at *de facto* controlling management or power over the investment.

This criterion, known as the “control” test in contrast with the incorporation theory in (4.1.1.), is also referred to as the “real seat” doctrine. This test requires that a company should abide by the law of the state where it carries on its principal business and should not be able to escape the “legal, economic, and social values” of that country.”<sup>338</sup> The real seat theory applies to many countries within the European Union such as Germany, France, Italy, and Spain.<sup>339</sup>

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<sup>337</sup> Foreign Business Act, B.E. 2542 (1999) (Thail.) is considered the most crucial law governing alien-controlled businesses in Thailand as originally derived from the National Executive Council Announcement No. 281 of B.E. 2515 (1972) (Thail.).

<sup>338</sup> Werner F. Ebke, The Real Seat Doctrine in the Conflict of Corporate Laws, 36 int'l Law. 1015, 1026-28 (2004).

<sup>339</sup> Rothe, *supra* note 334 at 1103, 1111.



Additionally, this “control test” (foreign control) corresponds to the exception according to Article 25(2)(b) of the ICSID Convention.<sup>340</sup> It is reaffirmed by the arbitral tribunal under the ICSID Convention by ruling that all locally incorporated entities, which are subject to foreign control, can constitute the criteria of being foreign nationals (nationals of another Contracting State).<sup>341</sup> With this regard, the ICSID’s tribunal in *Holiday Inns v Morocco*<sup>342</sup> upheld that the Government of Morocco itself had requested the foreign parties to form the companies in question and that there was ample documentary evidence that Morocco had at all times treated the H.I.S.A. companies (locally incorporated companies) as alter egos of their foreign parent companies.<sup>343</sup>

Likewise, even if a corporation was incorporated and registered under Thai law, a corporation incorporated and registered under Thai law would be deemed a foreign corporation provided that foreign investors had effective voice in the management of a corporation. This testing criterion simply examines whether foreign investors have controlling power over a company operated in Thailand. If it appears that they have power to control the company’s businesses, such investment would be

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<sup>340</sup> Article 25(2)(b) of the ICSID Convention provides:

*any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

<sup>341</sup> William Rand, Robert N. Hornick & Paul Friedland, *ICSID’s Emerging Jurisdiction: The Scope of ICSID’s Jurisdiction*, 19 N.Y.U.J. Int’l L. & Pol. 33, 46 (1986).

<sup>342</sup> In *Holiday Inns V Morocco*, the 1966 Joint Venture agreement was entered into between the Government of Morocco and two U.S. companies (Occidental Petroleum Corporation “O.P.C.” and Holiday Inns) for construction of Gulf Oil Gasoline Station and four Holiday Inns hotels in Morocco with an ICSID clause. In addition to this Joint Venture Agreement, these two (2) principal investors formed Moroccan companies consisting of a Swiss subsidiary of Holiday Inns, Holiday Inns S.A. of Glarus, and a subsidiary of O.P.C. as requested by the Government of Morocco because local law limited the government to transact with foreign companies. Apparently, the agreement between the Government of Morocco and these local subsidiaries did not contain an ICSID clause.

<sup>343</sup> *Id.* at 46. See also Pierre Lalive, “The First World Bank Arbitration (Holiday Inns V Morocco) – Some Legal Problem, 1980 BRIT. Y.B. INT’L L. 123.

considered to be holding the foreign investment and treated as a foreign company under Thai law. .

In fact, this testing criterion is issued to close loopholes of the Foreign Business Act, B.E. 2542 (1999). It is particularly true in a jointly owned company where Thai investors hold fifty one (51) per cent and foreign investors hold forty nine (49) per cent of a company's shareholdings. Under Thai law, to be eligible to operate reserved businesses under alien business law, foreign investors usually keep their shareholding ratio at forty nine (49) per cent but still have *de facto* controlling power over a company. For example, when setting up a company, foreign investors would stipulate some conditions in a memorandum of association requiring that certain important matters must be approved by foreign shareholders even though they are considered minority shareholders. In some cases, foreign shareholders are entitled by a memorandum of association to appoint or discharge a managing director of a company. Even having no exclusive ownership or being minority shareholders of a company, foreign investors still have effective power in the management of a company's operation.

#### **4.2. Testing Criteria and Conditions of Qualifying FDI**

Once it becomes clear that a prospective investment holds the foreign element, the next step is to testify that such an investment qualifies as "qualifying FDI." In doing so, it is essential to lay down the definition and scope of these terms "investment" and "FDI" as well as conditions of "qualifying FDI." The following is the proposed definition and scope to these terms by adopting it from international law.

##### **"Investment"**

To help understand the definition of FDI better and more thoroughly, it is necessary to define “investment,” a term, which can be classified in three (3) ways: a general open-ended definition; a non-exclusive list; and additional covered list.

As to the general open-ended definition, “investment” is defined as every asset that an investor owns or controls, directly or indirectly, that has the characteristics of a long-term investment. The characteristics of an investment can be found in a form of the commitment for providing capital, or other resources, or the expectation of gain or profit from businesses invested, or etc.

In addition to the general open-ended definition, an illustrative list, known as the non-exclusive list is provided in that investment is defined as every kind of asset and in particular shall include, though not exclusively:

- (1) tangible or intangible, movable or immovable property and any other proper right such as leases, mortgages, liens and pledges;
- (2) shares, stock and other forms of equity participation in a corporation;
- (3) bonds, debentures, other debt instruments and loans;
- (4) futures, options and other derivatives;
- (5) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (6) claims to money or to any performed under contract having a financial value;
- (7) intellectual property rights and goodwill;
- (8) licenses, authorizations, permits and similar rights conferred pursuant to domestic law; and

(9) business concessions conferred by law or under contract, including concessions to search for, cultivative, extract, or exploit natural resources.

Finally, it includes additional covered investment, encompassing any alteration of the form, in which the existing assets are invested, or reinvested, or activities associated with the existing investment. However, the alteration must not affect the characteristics of the investment and the alteration must be consistent with Thai laws and regulations.

Examples of state contracts forming investments include a construction contract,<sup>344</sup> a joint venture agreement for construction,<sup>345</sup> a management and construction contract,<sup>346</sup> a turnkey construction and operation contract,<sup>347</sup> or investment licence through an investment application approved by the Investment Board (like the Board of Investment of Thailand “BOI”).<sup>348</sup>

#### “FDI”

The term “FDI” is therefore defined as an investment in all forms having their economic value that is transferred from one country (a home state) into another country (a host state) to obtain long-term interest and to gain an effective voice in the management of businesses or enterprises invested.

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<sup>344</sup> In *Alcoa v Jamaica*, a U.S. corporation (Alcoa) and the Government of Jamaica, entered into an agreement that Alcoa undertook to construct at its own expense an alumina refining plant in Jamaica and the Government of Jamaica, in return, was to confer tax concessions upon Alcoa and grant Alcoa long-term mining leases.

<sup>345</sup> In *Holiday Inns v Morocco*, two U.S. companies and the Government of Morocco entered into a joint venture agreement for the construction and operation of the Gulf Oil Gasoline Station and four Holiday Inns hotels in Morocco. The Government of Morocco undertook to lend these companies a loan needed for construction as well as to grant them foreign exchange transfer facilities, duties exemptions, and other tax benefits.

<sup>346</sup> *Id.*

<sup>347</sup> In *Klockner v Cameroon*, a German multinational group and the United Republic of Cameroon entered into a joint venture agreement for the construction and operation of a fertilizer factory in Cameroon. In return, the Government of Cameroon undertook to furnish an appropriate site for the factory and to guarantee payment of a loan covering the cost of the factory.

<sup>348</sup> *Autopista Concesuibada de Venezuela, C.A. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5 at note 98, p 38. See also Bernardo M. Cremades, *Arbitration between States and investors: some jurisdiction issues*, in *Business Law International* 157, 160-162 (May, 2001).

It is to be borne in mind that the proposed definition of investment and FDI is mainly intended to provide general understanding of these terms. Therefore, there would be channels open to developing and accommodating new forms of investment into this definition.

#### **Testing Criteria and Conditions of “Qualifying FDI”**

Only the investment holding the foreign element that meets all of the following testing criteria and conditions will be considered “qualifying FDI,” thereby falling within the scope of “a state contract relating to qualifying FDI.”

##### **4.2.1. Inward Investment**

The investment to be governed by the Special Method must be an inward investment. The inward investment is simply an investment brought into, derived from, or directly connected with investment brought into Thailand of any other countries by nationals or companies of any other countries.

##### **4.2.2. Exclusion of Portfolio Investment**

Long-term investment can most reflect real functions and objectives of investment, which does not simply include purchasing shares in a company. From the host states’ perspective, long-term investment is considered much more beneficial and preferable as it can help stabilize economic conditions as well as stimulate economic growth in a country. Therefore, the definition of investment shall exclude portfolio investment: a movement of capital for the purpose of buying shares in a company or corporation formed or functioning in Thailand.

##### **4.2.3. Investment Value Not Less Than One Billion Baht**

Not every investment holding the foreign element qualifies as qualifying FDI. Only investment worth up to the requiring minimum threshold shall be within the scope of the Special Method. This requirement is for the benefit and effectiveness

of the administration of a state contract relating to qualifying FDI under the Special Method. To qualify as qualifying FDI, the value of the investment shall be worth not less than one (1) billion Baht (equivalent to twenty eight (28) billion U.S. dollars). Therefore, any investment holding the foreign investment worth less than one (1) billion Baht shall not be subject to the Special Method.

#### **4.2.4. Effective Management in Another Country**

To be governed by the Special Method, it must appear that the investment owned or controlled by foreign investors must have the place of effective management in a country other than Thailand. This is to prevent foreign investors from setting up a company outside Thailand as their nominees in order to enjoy promotions and protections on investment under domestic law (including the Special Method). This requirement also prohibits local investors from setting up a company that is to be incorporated in a country other than Thailand and as a result, it would be defined as a foreign company under Thai law in order to claim privileges under the Special Method. Otherwise, there would be no real FDI brought into a country since such an investment is owned by Thai nationals or local investors. Under such circumstance, the main purposes and functions of FDI would have never been achieved unless there had been real long-term investment in a host state.

The adverse consequences of the application of nominees are exemplified in a case of tax evasion by a former Prime Minister Thaksin Shinawatra's family tax-free sale of shares in the telecom giant Shin Corp to the Singaporean government's investment arm Temasek Holding. Even though the facts in this case do not directly raise investment issues, this case has implications for the application of nominees in Thailand.

Shin Corp is linked by stock control to the following companies: Shin Satellite, Advance Info Services, Thai AirAsia, and ITV.<sup>349</sup> All of these companies have been granted and licensed by the State (the Government of Thailand) and are now in the hands of Singapore's Temasek Holding. Shin Corp has been granted a license from Thailand's Ministry of Transport and Communication to launch and operate satellites in Thailand. Advanced Info Services has been granted a concession by the Telephone Organization of Thailand ("TOT") to provide and operate mobile phone network in Thailand. Thai AirAsia has been granted a license to operate domestic and international airlines in Thailand. ITV had been granted a concession by the Office of the Permanent Secretary to the Office of the Prime Minister to operate a free-to-air television station in the Ultra High Frequency (UHF) Spectrum at 510-790 MHz.

The case revolved around the fact that a former Prime Minister Thaksin Shinawatra set up Ample Rich on April 12, 1999, which was registered in the British Virgin Island but was headquartered in Singapore. He owned one hundred (100) per cent of Ample Rich and Ample Rich was considered part of the Shinawatra and Damapong<sup>350</sup> families' holdings.<sup>351</sup> Just before assuming the premiership in 2001, on June 11, 1999, he sold half of his holding in Shin Corp (three hundred twenty nine and two tenths (329.2) million shares or approximately eleven and eight hundred seventy five thousandths (11.875) per cent) to Ample Rich and kept his

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<sup>349</sup> Shin Corporation, available at [http://en.wikipedia.org/wiki/Shin\\_Corporation](http://en.wikipedia.org/wiki/Shin_Corporation). (last visited June 13, 2009).

<sup>350</sup> Damapong is Khun Ying Pojaman Shinawatra's maiden name.

<sup>351</sup> On Shin Corp's website, as of August 26, 2005, the two (2) families were clearly reported to own 1,487,740,120 shares (approximately 49.61 per cent) of Shin Corp. The breakdown of this ownership structure was as follows: Pinthongta, 440,000,000 shares (14.67 per cent); Bhanapot Damapong, 404,430,300 shares (13.49 per cent); UBS AG, Singapore Branch for the account of Ample Rich Investments Ltd, 329,200,000 shares (10.98 per cent); Panthongtae, 293,950,220 shares (9.80 per cent); Yingluck Shinawatra, 20 million (0.67 per cent); Busaba Damapong, 159,600 shares (0.01 per cent).

remaining half (eleven and eight hundred seventy five thousandths (11.875) per cent) of Shin Corp in his Thai portfolio.

Later the Shinawatra and Damapong families agreed to sell their forty nine and sixty one hundredths (49.61) per cent stake in Shin Corp for seventy three and two tenths (73.2) billion Baht to Temasek Holdings. The first transaction took place on January 20, when Ample Rich unloaded all of its Shin stock by selling one hundred sixty four and six tenths (164.6) million shares to Pinthongta<sup>352</sup> and another one hundred sixty four and six tenths (164.6) million shares to Panthongtae<sup>353</sup> at one (1) Baht<sup>354</sup> a share (the selling price was much below the market value). These transactions between Ample Rich and Thaksin's children were tax-free because Ample Rich did not realize any gain from these transactions.

On January 23 (three days later), Pinthongta and Panthongtae resold these shares bought from Ample Rich to nominees of Temasek for forty nine and twenty five hundredths (49.25) Baht a share (at the market value), turning a profit of fifteen (15) billion Baht on their dealings with Ample Rich. They did not have to pay tax because they bought the stocks from Ample Rich on the over-the-counter market and resold the stocks on the stock exchange to enjoy exemption from capital gains tax (tax exemption from the Revenue Department and stock market rulings). The Flowchart of Transactions' Arrangement in Transferring Shinawatra/Damapong Families to Temasek arranged by a former Prime Minister Thaksin Shinawatra's family is demonstrated in **Appendix 9 of the Appendices**.

In the end, the Shinawatra/Damapong families effectively sold 1,487,740,120 shares (forty-nine and sixty-one hundredths (49.61) per cent of Shin Corp) to two nominees of Temasek: Cedar Holdings and Aspen Holdings and as a

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<sup>352</sup> One of a former Prime Minister Thaksin Shinawatra's children.

<sup>353</sup> One of a former Prime Minister Thaksin Shinawatra's children.

<sup>354</sup> The exchange rate of the U.S.-Thai currency at that time was one (\$1) dollars to forty (40) Baht.



result, netted seventy three (73) billion Baht tax-free. Such an arrangement put a former Prime Minister Thaksin Shinawatra under intense pressure because the transfer of Shin Group's ownership amounted to the State handing over all mobile phone, satellite and television operations to Singapore.

Apart from the arrangement, it further appeared that there were several nominee shareholders in Shin Corp: Kularb Kaew; Cedar Holdings; and Aspen Holdings. These corporations were considered Thai-owned companies whereby fifty one (51) per cent shareholdings held by Thai citizens and the remaining ratio held by foreigners. Furthermore, all of them also held shareholdings in Shin Corp. As to Kularb Kaew, it was found that even though foreigners held just forty nine (49) per cent shareholdings in Kularb Kaew but they had voting rights up to ninety (90) per cent.

The deal arranged by a former Prime Minister Thaksin Shinawatra's family became an unforgettably painful lesson for the Thai people and a case study for the military Government and management-level government authorities to tackle. The case sponsored an intense investigation by relevant departments and both civil and criminal actions has been brought against persons (including government officers) who were helping and being involved in Shinawatra's arrangement. At the very least, the following issues came up in the investigation.

First, it was evident that just before transferring Shin Corp's shares to Temasek, the Telecommunications Act was amended to raise foreign shareholding limit in a Thai telecom firm from twenty five (25) per cent to forty nine (49) per cent. Otherwise, the takeover by Temasek would violate foreign business law. The deal also showed that foreign investors could now gain more than fifty (50) per cent ownership of Thai firms through local nominees. This could have long-term, lasting

effects on domestic media, which has traditionally imposed a limit on foreign ownership. By using local nominees, Temasek, an investment arm of the Singapore government, now controls more than eighty five (85) per cent of Shin Corp despite Thai law banning foreigners from holding more than forty nine (49) per cent in key businesses that affect national security.

Second, the arrangement of share transfer in Shin Corp was seen as an example of flawed morality, a potential threat to national security, and could damage bilateral relations with Singapore. It could also demonstrate the policy corruption in Thaksin's premiership.

Third, the controversial takeover, which saw Thaksin's family utilizing legal loopholes to avoid paying tax, had caused "extensive permanent damage."<sup>355</sup> The fact that legal loopholes were used for tax avoidance by a former Prime Minister Thaksin Shinawatra's family, a State governor, would seemingly justify and reaffirm the legality of such measure and accordingly encourage both Thai nationals and residents in Thailand to enjoy legal loopholes for their own benefits. As a result, this case raised the question of good governance since as a state governor, Thaksin Shinawatra was supposed to abolish legal loopholes, not to enjoy them for his personal benefits.

Fourth, it is now clear that the arrangement of share transfer in Shin Corp is illegal. As a result, the Revenue Department executives (including the Director General of the Revenue Department) were sacked for being negligent in their duty and also were charged in a criminal case on the ground of negligence in their

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<sup>355</sup> Somkiat Tankitvanijt, Thailand Development Research Institute (TDRI).

duty by not taxing the children of a former Prime Minister Thaksin Shinawatra over the acquisition of Shin Corp shares from Ample Rich Investment.<sup>356</sup>

Based upon this painful and unforgettable lesson for Thailand, this dissertation proposes that only FDI, having its place of effective management in another country, can enjoy promotions and protections offered by this Special Method. It is because the FDI, having its place of effective management in another country, can demonstrate the element of foreign involvement and represent the real functions and objectives of FDI and as a result, FDI through its nominees should never enjoy the same privileges.

#### **4.3. Testing Criteria of Qualifying FDI Invested in a State Contract**

According to the testing process in the first and second steps, a qualifying FDI will be then brought to a test whether such a qualifying FDI is invested in the state projects by a means of state contracts. Only qualifying FDI invested in a state contract will fall within the definition and scope of a “state contract relating to qualifying FDI,” and as a result, the Special Method will apply. Having said that, the definition, characteristics, and scope of a state contract are as follows:

##### **“State Contract”**

A state contract is defined as a contract where the State through the Government (or its Government Agency as acting on behalf of the State or exercising the State’s power as the one party) enters into an agreement or transacts with the private party. By this definition, a state contract must compose these three (3) elements.<sup>357</sup> First, one party of a contract must always be the State acting through the Government or its Government Agency or person acting on behalf of the State. A Government Agency can be one of the main Government Agencies, (consisting of the

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<sup>356</sup> Decision of the Supreme Court No. 2953/2550 (2007) (Thail.).

<sup>357</sup> Nuntawat Boramanunt, *supra* note 47 at 105..

Legislative Branch, Executive Branch, and Judicial Branch), Local Authorities (Local Administrative Organizations), Independent Organizations, or State Enterprises. Second, individual Government Agencies must have authority as designated by law to enter into a contract or transact with the private party and as a result, a contract must be within the scope, objectives, and mandates of their establishment.<sup>358</sup> Third, a person acting on behalf of each Government Agency must be authorized or delegated to exercise power by the law establishing such a Government Agency.

Therefore, according to the testing process, the term a “state contract relating to qualifying FDI” refers to any type of state contracts where the one party of the contract is the State and the other is the private party, and more importantly, a contract must carry the characteristics of FDI. Only a state contract carrying the characteristics of FDI that meets the above proposed testing criteria and conditions will be defined as a “state contract relating to qualifying FDI” and will be accordingly governed by the Special Method.

To sum up, only the qualifying FDI according to step one and two that is invested in a form of state contracts in step three will be considered as a “state contract relating to qualifying FDI” and as a result, it will be governed by the Special Method as proposed in Chapter 5.

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<sup>358</sup> To find out the precise scope and objectives of individual government agencies, it is necessary to look at the Restructuring of Government Organization Act, B.E. 2545 (2002) (Thail.) and the royal decree of each division.

## **Chapter 4 Inconsistency and Incompatibility of Arbitration for Disputes**

### **Arising Out of a State Contract**

#### **1. Arbitration for Disputes Arising Out of a State Contract**

Arbitration is considered to be the alternative dispute resolution (“ADR”) that helps the disputing parties settle their disputes before institution of formal remedy, *per se*, judicial process. Parties often prefer arbitration to judicial process because arbitration provides the parties some flexibility that the latter does not. Time and cost of arbitral proceedings may be significantly lower than that of disputes relying upon the court process. Additionally, the parties are able to choose the arbitral tribunal, choices of law, and arbitral proceedings, depending upon what they consider appropriate.

In the Thai arbitration legal system, disputes arising out of state contracts between the State and a private party can be also referred to arbitration<sup>359</sup> like those between private parties and are therefore subject to domestic and international arbitration law. In practice, the contracting government agency normally includes an arbitration clause in a state contract by stipulating that where disputes arising out of a contract occur, the parties request that the disputes shall be settled before an arbitral tribunal.

Under domestic law, the arbitration legal system is mainly subject to the Arbitration Act, B.E. 2545 (2002). In addition to the Arbitration Act, the following regulations are of significance: the Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992); the Regulation of the Office of the Prime Minister on Compliance with Arbitral Awards B.E. 2544 (2001); and the Cabinet

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<sup>359</sup> Section 15 of the Arbitration Act, B.E. 2545 (2002) (Thail.) provides:

“The parties of a contract between the State through its Government Agencies and private parties may agree to apply arbitration as a means of their dispute settlement resolution and such agreement is accordingly binding on the parties.”

Resolution Regarding the Execution of Concession Contracts between the State and the Private Party.

Apart from domestic law, Thailand has also entered into several international treaties and conventions with other countries or international organizations, thereby enabling disputing parties (especially for foreign private parties) to submit their disputes to international arbitration. At the very least, Thailand is specifically bound to the following conventions by virtue of her membership to these international agreements: UNCITRAL; the New York Convention; MIGA;<sup>360</sup> and Thailand's BITs with other countries.

Despite such fact, international arbitration for disputes arising out of state contracts is rarely found in the State sector. It is particularly true in cases of international arbitration under the ICSID Convention that offers an investor-state dispute settlement resolution for the parties. The reason is that Thailand has not ratified the Convention yet even though Thailand already signed the ICSID Convention since December 6, 1985. Thailand's hesitation in ratifying the ICSID Convention demonstrates that Thailand has no confidence in the operation of international arbitration and as a result, the application of international arbitration in the State sector (especially state contracts) in Thailand has been obstructed, although ICSID is considered to be the most suitable mechanism in settling disputes between the State and the private party.

Due to non-ratification of the ICSID Convention, ICSID's obligations are not apparently binding on Thailand. This dissertation is notwithstanding prepared to address significant roles and functions of ICSID in addition to those international

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<sup>360</sup> The United Nations Commission on International Trade Law ("UNCITRAL"), the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID"), the 1987 ASEAN Agreement for the Promotion and Protection of Investment, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Convention Establishing the Multilateral Investment Guarantee Agency ("MIGA").

conventions as well as to advise that Thailand should ratify the ICSID Convention. Before exploring Thailand's international obligations in respect to international arbitration, the following is the existing legal methodology on arbitration according to domestic law.

## **1.1. Legal Methodology for Arbitration According to Thai Law**

### **1.1.1. Arbitration Act, B.E. 2545 (2002)**

Arbitration has a long history in Thailand but arbitration went through significant changes during the legal reform of the 1930s. The reform reiterated that, at least, arbitration in both forms of court-annexed arbitration and out-of-court arbitration had been adopted in the Civil Procedure Code. Despite such fact, the application of arbitration in those days was still very rare in practice. The popularity of arbitration became widespread in the Thai legal system later due to the promulgation of the Arbitration Act, B.E. 2530 (1987) in 1987 and the establishment of the Thai Arbitration Institute ("TAI") in 1990, which was at that time under the supervision of the Ministry of Justice. However, TAI has been currently transferred to be part of the Alternative Dispute Resolution Office, the Court of Justice due to the separation between the Court of Justice and the Ministry of Justice under the 1997 Constitution.<sup>361</sup>

The Arbitration Act, B.E. 2530 (1987) was subsequently preceded and prevailed by the Arbitration Act, B.E. 2545 (2002), the present arbitration statutory act. The current Arbitration Act adopted and embodied main principles of the UNCITRAL Model Law on International Commercial Arbitration for its arbitration rules and proceedings as well as the New York Convention for its enforcement of arbitral awards. However, the significant difference between the Arbitration Act and

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<sup>361</sup> The Constitution of the Kingdom of Thailand, B.E. 2540 (1997), known as the 1997 Constitution, was preceded by the Military Coup on September 19, 2006.

these international instruments is that arbitration under the Arbitration Act seems to work very closely under the Court of Justice's supervision, while arbitration tribunal, as suggested by the UNCITRAL Arbitration Rules, is free and independent from any external authority.

Under the Arbitration Act, B.E. 2545 (2002), the Court of Justice's supervisory roles are predominant from the beginning of the process to the end. The Court of Justice's supervisory authority starts when the parties, by themselves or through their appointed arbitral tribunal, request some services or assistance from the Court of Justice during the arbitration process or the enforcement of arbitral awards. Since then the Court of Justice shall resume and exercise supervisory powers over arbitral proceedings. The Court of Justice exercises its supervisory powers to ensure that the arbitral proceedings have been undertaken with due process. However, the Court of Justice working along with the arbitral proceedings throughout the arbitration process is sometimes seen as a drawback to the existing arbitration system since it can potentially deviate the concept and value of the arbitration, which should be independent and flexible in settling disputes between the parties. As a result, arbitration under the Court of Justice's supervision has been even viewed as a quasi-judicial mechanism.<sup>362</sup>

In the Thai arbitration system, the Court of Justice's involvement consists either of an arbitral tribunal that come as a result of a request made by the disputing party to the Court of Justice, which will issue a warrant to any person to give oral statement, or deliver documentary evidence or objects to the arbitral tribunal.<sup>363</sup> Furthermore, once an arbitral award is rendered, the objection and the

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<sup>362</sup> Narumol Kijsinthapachai, Interim Measures in International Arbitration, 19 (Chulalongkorn University Publisher) (2004). Also see Giuditta Cordero Moss and Tano Aschehoug, International Commercial Arbitration: Party Autonomy and Mandatory Rules 161 (1999).

<sup>363</sup> Arbitration Act, B.E. 2545 (2002) (Thail.) § 33.



enforcement of the arbitral award are directed to the Court of Justice. As to the objection of an arbitral award, the disputing parties are entitled to request the Court of Justice to nullify the arbitral award subject to certain grounds such as a lack of capacity of arbitrators, illegality and invalidity of arbitration contracts, *ultra vires* scope and jurisdiction of arbitration.<sup>364</sup> If the Court of Justice finds these to be grounds valid, the Court of Justice shall annul the arbitral award. Additionally, as far as the objection of the Court of Justice's decision in respect of arbitral proceedings is concerned, the Arbitration Act allows the party dissatisfied with the Court of Justice's decision to appeal such judgment to the Supreme Court or the Supreme Administrative Court.<sup>365</sup>

When arbitral awards are rendered, they are of course binding on the parties. Under the Arbitration Act, arbitral awards shall be only enforced by the Court of Justice.<sup>366</sup> With this regard, the Arbitration Act only assigns the Court of Justice, not the Administrative Court, to assume the power to enforce arbitral awards. Additionally, as far as international arbitration is concerned, the Court of Justice is required to recognize and enforce arbitral awards made outside Thailand provided that such international arbitral awards are made according to treaties, conventions, or international agreements to which Thailand is bound and only to the extent that Thailand has consented to be bound.<sup>367</sup>

In Thailand, there are several arbitration institutes available for disputing parties. Some serve very specific roles with limited areas of arbitration but some like TAI, provide arbitration service with a very wide scope. To start with TAI, TAI was established in 1990 and is now under the supervision of the Alternative

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<sup>364</sup> *Id.* § 40.

<sup>365</sup> *Id.* § 45.

<sup>366</sup> *Id.* § 41.

<sup>367</sup> *Id.* § 41.

Dispute Resolution Office, the Court of Justice. TAI has adopted the UNCITRAL Arbitration Rules as its own rules. However, as its appealing features, TAI not only offers the UNCITRAL Arbitration Rules as its own but also acts and performs the function as the arbitral tribunal as well as administers arbitration proceedings. Apart from the UNCITRAL Arbitration Rules, TAI also offers to administer disputes governed by other rules of international ad hoc arbitration institution such as International Chamber of Commerce rules (“ICC”) for the parties. A very close association with the Court of Justice by being under the supervision of the Court of Justice undoubtedly promotes TAI’s roles even more widely recognized in Thailand.

Second, the Thai Arbitration Committee was established in 1968 under the supervision of the Board of Trade of Thailand. In fact, the Thai Arbitration Committee is the oldest arbitration institution in Thailand but it is rarely recognized as popular as TAI. Due to the strong relationship with the Board of Trade of Thailand and Thai-own business community, this arbitration institution obviously adopts ICC as its own.

Third, the Casualty Insurance Company Association was founded in 1994 to handle disputes arising from insurance policy among its members, which is tentatively limited to insurance area and to its members.

Fourth, likewise, the Security and Exchange Commission on Arbitration was set up in 2001 under the Security and Exchange Commission. Mandates of this arbitration institution are quite limited since it only deals with disputes relating to security trading and mutual fund businesses among its member companies.

Fifth, the Intellectual Property Arbitration was established in 2002 to arbitrate disputes relating to intellectual property. This arbitration institution is under the supervision of the Department of Intellectual Property, the Ministry of Commerce.

Last, the Thai Rubber Trade Association is the most specific arbitration area and the numbers of its members are very small. The institution is designed to deal with disputes arising out of rubber trade.

In Thailand, there are at least six (6) arbitration groups, most of which deal with trade and investment in particular sectors. Some of them are rarely known to the public due to the limited availability of arbitration services. Overall, these arbitration agencies have played significant roles and contributed to the development of the present Thai arbitration system, especially among private parties.

#### **1.1.2. Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992)**

In addition to the Arbitration Act, the 1992 Regulation is considered as important as the secondary legislation for Government Agencies when they prepare to enter into government procurement contracts with private parties. Surprisingly, as far as arbitration process is concerned, the 1992 Regulation, however, provides none of the step-by-step guidance on arbitration for Government Agencies. The only implication on arbitration that the 1992 Regulation provides is the sample arbitration clause as the reference material that Government Agencies should look at. The following is the sample arbitration clause provided by the 1992 Regulation:

##### ***Settlement of Disputes***

*1. Any dispute or difference arising out of or in connection with this Contract or the implementation of any of the provisions of this Contract, which cannot be settled amicably shall be referred to arbitration.*

*2. Unless both parties agree in the appointment of a single arbitrator, either party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name*

*of an arbitrator to be appointed by him. Then the dispute or the difference shall be referred to two arbitrators, one to be appointed by the issuing party as aforesaid and the other one to be appointed by the other party within thirty (30) days after receipt of the said notice. If the two arbitrators are unable to agree on such dispute or difference, an umpire shall be appointed by the two arbitrators within thirty (30) days from the date of disagreement. The umpire so appointed shall resolve the dispute or difference.*

*3. Should either party be unable to appoint an arbitrator or in case of disagreement as regards to the appointment of an umpire, each party is entitled to refer the matter to the Civil Court in Bangkok, Thailand for the appointment of arbitrator or umpire as the case may be.*

*4. Any decision or award given by the single arbitrator or the two arbitrators jointly, or the umpire in case the two arbitrators disagree, shall be final, conclusive and binding upon the parties hereto. The arbitration proceedings shall follow the Rule of Arbitration of the Ministry of Justice's Arbitration Office or any rule as agreed by both parties and shall be conducted in Bangkok.*

*5. Each party shall bear the cost of his own arbitrator's service and share equally other cost of all proceedings. In case a single arbitrator or an umpire is appointed, the cost of the single arbitrator's service or the cost of the umpire's service shall be decided by the arbitrator, or the umpire, as the case may be.*

*6. The submission of any matter in dispute or difference to the arbitration proceedings as aforesaid, shall be a condition precedent to the right of institution of court action.*

*7. Each party shall have the right to institute suit against the other in the Civil Court in Bangkok, Thailand, to enforce any decision or award rendered in arbitration proceedings.<sup>368</sup>*

Given the sample arbitration clause, it is noted that first, the sample arbitration clause does not designate a step-by-step arbitration process on the rules of arbitration for Government Agencies to comply with. There is no guidance as to how to adopt this sample clause. The sample arbitration clause seems to be a finished written product that can generally apply to any case. It, however, sounds reasonable in that the 1992 Regulation and the sample arbitration clause are objectively designed to apply for government procurement contracts carrying simple transaction in respect of acquisition of ordinary goods and services that are necessary for the daily operation

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<sup>368</sup> Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992) (Thail.), *supra* note 118, Sample Clause: Sale and Purchase Contract, clause 23.

of individual Government Agencies. The sample arbitration clause is not designed for the other contract types carrying special characteristics, for example, involving in the exercising of the State's power, relating to FDI, etc.

Second, even though the sample arbitration clause is intended to apply only for government procurement contracts, most Government Agencies however adopt the sample arbitration clause as provided by the 1992 Regulation to state contracts other than government procurement contracts in actual practice due to the absence of step-by-step rules on arbitration,. This is seen as one of the main reasons why the arbitration legal system in respect to state contracts is even more messy and awkward. Such inconsistency and incompatibility will be discussed later.

Third, due to the lack of the step-by-step guidance on arbitration, Government Agencies are required to exercise their own discretion as to whether, how, and to what extent they should adopt the sample arbitration clause to their contracts.

### **1.1.3. Regulation of the Office of the Prime Minister on Compliance with Arbitral Awards B.E. 2544 (2001)**

This Regulation was a consequence of Thailand becoming a member of the MIGA Convention. By ratifying the MIGA Convention, Thailand has been bound to abide by the MIGA's obligations. As a result, this Regulation was issued to provide the conformity and regularity of the practical guidance on compliance with arbitral awards for all Government Agencies. The Regulation lays down step-by-step rules as to how the Government Agency shall act when facing arbitral awards,

especially when the Government Agency is a losing party which is required by the arbitral award to pay compensation to MIGA.<sup>369</sup>

The scope of this Regulation is considered very wide in that it is imposed on all Government Agencies, including State Enterprises, Local Authorities (Local Administrative Organizations), and Independent Organizations. None of the Government Agencies is excluded from this Regulation.

Under the Regulation, once the contracting government agency agrees to apply arbitration as a dispute settlement resolution and as soon as the arbitration tribunal renders an arbitral award, the award is binding on the contracting government agency. As a result, it compels the contracting government agency to comply with the arbitral award unless it appears that such arbitral award is contrary to effective and enforceable law, derived from illegal actions or proceedings, or beyond arbitration agreement.<sup>370</sup>

The contracting government agency, which desires to declare the invalidity of an arbitral award due to these grounds and refuses to comply with such award, is required to inform the other party (the private party) accordingly within fifteen (15) day since the date of acknowledging the award.<sup>371</sup> Meanwhile, the losing agency is also required to submit the matter to the Ministry of Finance to forward it to the Arbitral Awards Consideration Committee for consideration within fifteen (15) days since the date of acknowledging the award.<sup>372</sup>

The Committee consists of each of these representatives of the Ministry of Finance, the Office of the Council of State, and the OAG together with a

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<sup>369</sup> MIGA was established to enhance the flow of investment (FDI) to developing countries by providing an investor investment information, policies, and cooperative assistance with host countries on the basis of fair and stable standard for the treatment of foreign investment.

<sup>370</sup> Regulation of the Office of the Prime Minister on Compliance with Arbitral Awards B.E. 2544 (2001), clause 5.

<sup>371</sup> *Id.* clause 6.

<sup>372</sup> *Id.* clause 7.

secretary and a secretary-assistant from the Department of the Comptroller General as appointed by the Director General of the Department of the Comptroller General.<sup>373</sup>

The Committee is required to consider the matter and provide its opinion within thirty (30) days since the date of receiving the matter. Upon the consideration, the Committee shall inform the losing agency promptly. However, it is important to bear in mind that the Committee's opinion is not automatically final and legally binding on the losing agency. It simply carries strong advice that the agency is supposed to take into account. Therefore, the result or opinion of the Committee is not legally binding on the losing agency but in practice, the Agency most often complies with the Committee's opinion. Theoretically speaking, when the losing agency receives the Committee's opinion, the losing agency must take the Committee's opinion into consideration whether or not the losing agency should comply with the arbitral award and if so, the losing agency shall proceed accordingly within thirteen (30) days.<sup>374</sup>

Meanwhile, during the Committee's consideration process, it is very possible to find that the winning private party seeking the enforcement of the arbitral award may request the Court of Justice to enforce the arbitral award. If in the end, the losing agency considers that it should comply with the arbitral award, the losing agency shall proceed to negotiate with the private party promptly by showing that it is willing to comply with the arbitral award.<sup>375</sup> If the arbitral award requires the agency to make a payment to the private party, the agency shall proceed accordingly promptly.<sup>376</sup>

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<sup>373</sup> *Id.* clause 8.

<sup>374</sup> *Id.* clause 8.

<sup>375</sup> *Id.* clause 9.

<sup>376</sup> *Id.* clause 10.

Regardless of the grounds or reasons, the losing agency cannot refuse to comply with the arbitral award if such award is made to settle disputes between MIGA and the losing agency according to the MIGA Convention. Under such circumstance, MIGA, which already paid compensation to the insured investor, shall be subrogated the insured investor's right to pursue his claim against the losing agency. In this case, the losing agency is required to comply with the arbitral award promptly and prohibited from declaring the invalidity of the arbitral award as such.<sup>377</sup>

#### **1.1.4. Cabinet Resolution Regarding the Execution of a Concession Contract Between the State and a Private Party**

Before the issuance of this Cabinet Resolution, Government Agencies are free to make any agreement with the private party in order to settle disputes arising out of a state contract, and this dispute can be settled by arbitration—a rule made effective before the Council of Ministers issued this Cabinet Resolution.<sup>378</sup>

Upon the issuance, the Cabinet Resolution prohibits all Government Agencies from concluding an arbitration clause in a concession contract. As a result, disputes arising out of a concession contract shall be only settled by judicial process (either by the Administrative Court, or the Court of Justice). Otherwise, the contracting government agency that desires to settle disputes with private parties by a means of arbitration is required to ask for a specific approval from the Council of Ministers prior to signing a contract with the private party.

The rationale behind the Cabinet Resolution is mainly derived from the arbitral award made in the *Expressway case*. The *Expressway case* dramatizes how the Thai government can suffer from an arbitral award rendered by the arbitral tribunal. In this case, the Expressway and Rapid Transit Authority of Thailand

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<sup>377</sup> *Id.* clause 11.

<sup>378</sup> Letter of the Secretary General to the Council of Ministers, *supra* note 202.



("ETA") and the BBCD Joint Venture (Bilfinger, Berger Bauaktiengesellschaft, CH. Karnchang Public Company Limited, and Dyckerhoff & Widmann AG) ("BBCD") entered into the Construction Contract of Bangna-Bangpli-Bangpakong Project on June 28, 1995.

Subject to the Construction Contract of Bangna-Bangpli-Bangpakong Project, ETA hired BBCD to design, construct, and deliver the expressway facility to ETA within forty two (42) months, which was due on February 27, 2001, with the fixed cost of twenty five billion (25,000,000,000) Bath. However, ETA delayed handing over construction areas to BBCD for eleven (11) months. Consequently, BBCD proposed to extend the target completion date of fifteen (15) months but only eleven (11) months were approved by ETA without additional costs. Later BBCD claimed that ETA was liable to pay an adjusted fixed price due to the foregoing extension of the target completion date of sixty two billion (6,200,000,000) Baht (equivalent to one hundred fifty five million U.S. dollars (US\$155)) but ETA refused to do so.

The parties brought a case toward the arbitral tribunal, consisting of three (3) panels. On September 20, 2001, the arbitral tribunal rendered an award requiring ETA to pay such amount as its adjusted fixed price to BBCD. To enforce the arbitral award, BBCD requested the Civil Court (the Court of the First Instance) to enforce the award. As a result, the Civil Court recognized the validity of the arbitral award and enforced it accordingly. Then ETA appealed the Civil Court's judgment toward the Supreme Court. Finally, the Supreme Court rendered the decision by reversing the Civil Court's decision that ETA was not obligated to pay the amount to BBCD on the grounds that the contract between ETA and BBCD was not legally binding. It appeared that the ETA governor intentionally signed the construction

contract in favour of BBCD even though he was aware that ETA could not deliver the construction area to BBCD within the designated timeframe. Apart from that, it further appeared that some of the ETA's top management authorities (including the ETA's governor) acquired shareholdings in CH. Karnchang Public Company Limited (one of BBCD's partners) before ETA signed a contract with the BBCD and eventually gained profits when they disposed of those shares. Upon such fact, the Supreme Court further inferred that by bringing a lawsuit against ETA, BBCD had not exercised its rights in good faith, which was considered a core principle of proceeding civil cases. Given the Supreme Court's judgement, it is noted that even though ETA was not obligated to pay the amount to BBCD due to invalidity of a contract between BBCD and ETA, BBCD was not prohibited by the Supreme Court's decision from claiming any actual loss or damage (if any) against ETA

In the meantime (before the Supreme Court rendered the judgment on this case), the Council of Ministers issued this Resolution prohibiting all Government Agencies that were prepared to enter into a concession contract with the private sector from concluding an arbitration clause in a concession contract unless it would be specially approved by the Council of Ministers.

The reason that the Council of Ministers issued such a Resolution is understandable. First, the Thai government suffered the disappointment from an extraordinary arbitral award in the *Expressway case*. The tribunal award requesting ETA to pay BBCD of sixty two billion (6,200,000,000) Baht (equivalent to one hundred fifty five million U.S. dollars (US\$155)) was definitely inconceivable as a local sovereign government to be condemned to pay a fine or a penalty to a contracting party above and beyond normal compensation for actual damage or loss suffered.

Second, the arbitration tribunal's independence and impartiality in this case was questionable. It appeared that one of the panels held shareholdings in CH. Karnchang Public Company Limited, which has apparently been a major shareholder of the BBCD Joint Venture without disclosing such information to ETA as the party of the dispute. As a result, ETA was unable to withdraw this arbitrator out of the tribunal panel as this member was associated with the other disputing party.

Third, the arbitration tribunal and the Civil Court only applied principles of contract law, especially freedom of contract and privity of contract according to private law and the burden of proof principle according to civil procedure law to this case. The tribunal and the Civil Court did not even look at the principal rules derived from administrative and public law even though the contract between ETA and BBCD was manifestly an administrative contract under the Establishment of Administrative Court and Administrative Court Procedures, B.E. 2542 (1999). No principles of administrative law (public law) were applied to this case during the tribunal's and the Civil Court's hearings.

Fourth, as a general rule, arbitration proceedings must be undertaken confidentially. Only the disputing parties are allowed in the tribunal hearings. All information must be kept confidential. Disclosure of data and information without the parties' consent to the public is prohibited. This closed procedure prevented the public from monitoring and participating in the arbitral tribunal's conduct and arbitral proceedings even though the consequence of this case could affect the public in general.

Fifth, the contract between ETA and BBCD was evidently an administrative contract under the Establishment of Administrative Court and Administrative Court Procedures, B.E. 2542 (1999). The Administrative Court

seemed to be an appropriate institution to settle disputes between the parties according to administrative law rather than the arbitral tribunal, in which disputes were settled according to the parties' choices of law, and the agreements, and the Court of Justice, in which disputes were purely settled according to private law. Otherwise, the Administrative Court would be able to raise the public interest theory or public policy to a case. More importantly, the application of trial system or inquisitional system as opposed to the accusatory system used in the Court of Justice is apparently used in the Administrative Court so that the acquisition and collection of evidence of the case by the Administrative Court was not necessarily limited to the burden of proof principle according to civil procedure law.

To sum up, as far as domestic arbitration law is concerned, it is, at least necessary, to scrutinize these laws and regulations: the Arbitration Act, the 1992 Regulation, the Regulation on Compliance with Arbitral Awards, and the Cabinet Resolution Regarding the Execution of a Concession Contract between the State and the Private Sector.

## **1.2. Legal Methodology for Arbitration According to Thailand's International Obligations**

In addition to domestic arbitration law, some international conventions and treaties have also been significantly influential on the shape of the Thai arbitration system. Particularly, those international treaties and conventions that offer an international arbitration forum for foreign investors when disputes arising out of investment occur.

The availability of international arbitration as the dispute settlement resolution between investors and the host state evidently offers great advantages to both parties. For investors, international arbitration ensures the impartiality and

neutrality of an arbitral tribunal without local bias and pressure of the host state. For host states, international arbitration can provide investors' confidence that their investment will be protected and as a result, they will gain more confidence in investing their capital in host states' territory, thereby enhancing the flow of FDI toward the host state's territory. Further, international arbitration can help prevent home states and host states from confrontation at the state level.

In addition to Thailand's BITs with other countries as previously discussed in Chapter 2, there are at least four (4) international treaties and conventions in particular that have directly influenced on the existing arbitration system in Thailand: UNCITRAL; the ICSID Convention; the New York Convention; and the MIGA Convention.

### **1.2.1. UNCITRAL**

#### **Preliminary Background**

UNCITRAL was set up by the United Nations in 1966 as the General Assembly recognized that "disparities in national laws and practice created obstacles to the free flow of trade."<sup>379</sup> Therefore, UNCITRAL was established to remove those obstacles arising from international trade transactions as well as to improve laws, procedures and practices for resolving disputes between parties. By doing so, UNCITRAL has issued several rules. Two of them are the 1976 UNCITRAL Arbitration Rules that are designed for private parties' reference and the 1985 Model Law on International Commercial Arbitration that is designed for states' adoption. However, this dissertation only focuses on the 1976 UNCITRAL Arbitration Rules because these rules outline a step-by-step process for international arbitration.

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<sup>379</sup> Howard M. Holtzmann, RECENT WORK ON DISPUTE RESOLUTION BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW UNCITRAL 5 ILSA J. Int'l &Comp. L. 425. Also see UNCITRAL Informational Release, p. 1 (Nov. 1996).

UNCITRAL has been accepted and recognized as a worldwide dispute settlement mechanism in relation to trade and commercial transactions. UNCITRAL offers a measure of convergence and harmonization of arbitration rules, procedures, and practices. Professor Pieter Sanders noted that “the UNCITRAL Rules were designed for worldwide use, intended to be acceptable in both capitalist and socialist systems, in developed and developing countries and in common law as well as civil law jurisdiction.”<sup>380</sup>

Notwithstanding, it is noted that the 1976 UNCITRAL Arbitration Rules, unlike ICSID, were not tailored to resolve investor-state disputes or entertain claims for breach of customary or conventional international law.<sup>381</sup> On the contrary, the UNCITRAL Rules were rather designed to tackle disputes among private commercial parties.<sup>382</sup>

### **Significant Characteristics**

The UNCITRAL Arbitration Rules offers the parties the flexibility in settling their disputes in that the parties are entitled to choose their arbitral tribunal, choices of laws, place of arbitration, and so on. To facilitate the flexibility, the arbitral tribunal is required to conduct the arbitration in a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings, each party must be given a full opportunity of presenting its case.”<sup>383</sup> Furthermore, the Rules also ensure that the arbitral proceedings shall be conducted in appropriate manner. Having said that, arbitrators are required to be impartial and

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<sup>380</sup> Pieter Sanders, Commentary on UNCITRAL Arbitration Rules 173 (II Yearbook Commercial Arbitration) (1977).

<sup>381</sup> UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Apr. 28, 1976), art 1(1).

<sup>382</sup> Andrew P. Tuck, Investor-State Arbitration Revised: A Critical Analysis of the Revisions and Proposed Reforms to the ICSID and UNCITRAL Arbitration Rule 13 L.&Bus. Rev. Am. 885, 887 (2007).

<sup>383</sup> UNCITRAL Arbitration Rules, *supra* note 381, art. 5.

independent, and they may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrators' impartiality or independence.<sup>384</sup>

### **Scope of Application**

The application of the UNCITRAL Arbitration Rules is entirely subject to the parties' agreement. To settle disputes in accordance with the UNCITRAL Arbitration Rules, it must appear that the parties to a contract have agreed in writing that disputes in relation to a contract shall be referred to arbitration under the UNCITRAL Arbitration Rules. However, the application of the UNCITRAL Arbitration Rules can be limited to certain extent depending on modification as the parties may agree to in writing.<sup>385</sup> It is particular true where any of these Rules are in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate. Under such a circumstance, the provision of that law shall prevail.<sup>386</sup>

### **Appointing Authority**

Appointing Authority is considered a key element of the effectiveness of the UNCITRAL Arbitration Rules. In fact, the Appointing Authority is a key person who ensures that arbitral proceedings under the Rules shall not be frustrated or delayed due to the parties' failure or ignorance in participating in the arbitration process. As a result, Article 6(1) advises that the parties should designate the Appointing Authority at the time that the arbitration agreement or arbitration clause is being concluded.<sup>387</sup> One of the Appointing Authority's significant roles is, for example, that when either party fails to appoint his own arbitrator or the parties

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<sup>384</sup> *Id.* art. 10(1).

<sup>385</sup> *Id.* art. 1(1).

<sup>386</sup> *Id.* art. 1(2)).

<sup>387</sup> Sanders, *supra* note 380 at 174.

cannot reach an agreement on appointing a sole arbitrator or the third arbitrator, the Appointing Authority shall be empowered to do so.<sup>388</sup>

### **Composition of the Arbitral Tribunal**

The composition of the arbitral tribunal under the UNCITRAL Arbitration Rules must be in even numbers in order to reach majority votes. Normally, the arbitral tribunal will be either comprised of a sole arbitrator or a three-arbitrator panel. In a case where the parties have not previously agreed on the number of arbitrators, the arbitral tribunal shall be composed of three arbitrators.<sup>389</sup>

### **Appointment of a Sole Arbitrator**

To appoint a sole arbitrator, either party may propose names of persons to the other party out of which one name will be selected to serve as the sole arbitrator.<sup>390</sup> If the parties have not reached agreement on the choice of a sole arbitrator within thirty (30) days since the date the party received a proposal, the sole arbitrator shall be appointed by the Appointing Authority subject to the parties' agreement.

In a case that no Appointing Authority is selected or the Appointing Authority refuses to act or fails to appoint the arbitrator within sixty (60) days of the receipt of a party's request, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the Appointing Authority.<sup>391</sup> Then the Appointing Authority shall be empowered to appoint the arbitrator for the parties. Otherwise, the Secretary-General of the Permanent Court of Arbitration at The Hague shall appoint the sole arbitrator accordingly.

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<sup>388</sup> UNCITRAL Arbitration Rules, *supra* note 381, art. 6(3).

<sup>389</sup> *Id.* art. 4.

<sup>390</sup> *Id.* art. 6(1).

<sup>391</sup> *Id.* art. 5 6(2).



To perform this function, the Appointing Authority shall appoint the sole arbitrator promptly and take into consideration the independence and impartiality of the arbitrator. As a precautionary measure, the arbitrator shall be appointed from a nationality other than the nationalities of the parties.<sup>392</sup> In order to make the appointment of a sole arbitrator, the Appointing Authority shall use the list-procedure unless both parties agree that the list-procedure should not be used or unless the Appointing Authority determines in its discretion that the use of the list-procedure is not appropriate for the case. Regardless of the reason, if the appointment of the sole arbitrator cannot be made according to this list-procedure, the Appointing Authority may exercise its discretion in appointing the sole arbitrator.<sup>393</sup>

### **Appointment of a Three-Arbitrator Tribunal**

Where three (3) arbitrators are to be appointed, each party shall appoint one arbitrator and then the two arbitrators shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.<sup>394</sup> In a circumstance where either party fails to appoint his own arbitrator or the parties cannot agree with the appointment of an arbitrator. The Appointing Authority as appointed in accordance with Article 6(3) shall come to play its significant roles in appointing the other arbitrator.

Likewise, in a case of no Appointing Authority or the Appointing Authority refuses to act or fails to appoint the arbitrator, the Secretary-General of the Permanent Court of Arbitration at The Hague may be requested by the parties to appoint the Appointing Authority to select an arbitrator, or to appoint an arbitrator for the parties.

### **Evidence and Hearings**

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<sup>392</sup> *Id.* art. 6(4).

<sup>393</sup> *Id.* art. 6(3).

<sup>394</sup> *Id.* art. 7(1).

As a basic rule, each party holds the burden of proof of his claim or defence as well as to provide evidence to support it.<sup>395</sup> Notwithstanding, the arbitral tribunal may require one party to deliver a summary of documents as well as other evidence, which that party intends to present in support of his claim or defence, to the tribunal and to the other party within a period of time.<sup>396</sup>

Upon the hearing, an oral hearing may be held but the arbitral tribunal must give the parties adequate advance notice of the date, time and place of the hearing.<sup>397</sup> For the rest of the process, the arbitral tribunal has full and complete power to determine the admissibility, relevance, materiality and weight of the evidence as well as the manner in which witnesses are examined.<sup>398</sup>

#### **Place of Arbitration**

The arbitral tribunal shall determine the place of arbitration by taking the circumstances of the arbitration into consideration.<sup>399</sup>

#### **Defaulting Party**

The UNCITRAL Arbitration Rules ensures that the proceedings shall not be frustrated by the parties. For instance, where one of the parties, duly notified under the Rules, fails to appear at a hearing without showing sufficient cause for such failure, the arbitral tribunal may further proceed with the arbitration.<sup>400</sup> Furthermore, where one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award based upon the evidence before it.<sup>401</sup>

#### **Arbitral Awards**

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<sup>395</sup> *Id.* art. 24(1).

<sup>396</sup> *Id.* art. 24(2).

<sup>397</sup> *Id.* art. 25(1).

<sup>398</sup> *Id.* art. 25(4) and (6).

<sup>399</sup> *Id.* art. 16(1).

<sup>400</sup> *Id.* art. 28(2).

<sup>401</sup> *Id.* art. 28(3).

As a rule, the award shall be made at the place of arbitration.<sup>402</sup> In a case of a three-arbitrator tribunal, any award or other decisions shall be made by a majority of the arbitrators.<sup>403</sup> The award shall be made in writing and shall be final and binding on the parties and as a result, the parties will be compelled to undertake to carry out the award without delay.<sup>404</sup> Furthermore, the award must be kept confidential and can only be made public with the consent of both parties.<sup>405</sup>

### **1.2.2. ICSID Convention**

#### **Preliminary Background**

The ICSID Convention entered into force on October 14, 1966, and opened for ratification since then. Thailand has been a signatory state of the ICSID Convention since December 6, 1985 but Thailand has not ratified the Convention yet. As a result, the ICSID Convention is not legally binding on Thailand. Nonetheless, it cannot refuse its significance as ICSID has been increasingly recognized as one of worldwide international arbitration institutions in which it offers investor-state dispute settlement resolution for the parties.

#### **Significant Characteristics**

Application of the ICSID arbitration is absolutely dependent on the state's voluntary consent. Ratification of the ICSID Convention by the state, conferring the state on becoming a Contracting State to the Convention, does not automatically constitute consent on part of the Contracting State to arbitration<sup>406</sup> or impose the Contracting State to submit disputes to ICSID. On the contrary, at the time of ratification, acceptance, or approval of the Convention or at any time

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<sup>402</sup> *Id.* art. 16(4).

<sup>403</sup> *Id.* art. 31(1).

<sup>404</sup> *Id.* art. 32(2).

<sup>405</sup> *Id.* art. 32(5).

<sup>406</sup> The ICSID Convention's Preamble declares that "no Contracting States shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration.

thereafter, the Contracting State may notify the Centre of the class or classes of disputes, which would or would not consider submitting to ICSID's jurisdiction.<sup>407</sup>

In order to submit a dispute to ICSID, the disputing parties must take further action by giving their consent to arbitration under ICSID before a dispute arises or at the time the dispute arises. Notwithstanding, the disputing party may be required to exhaust local remedies before submitting the dispute to ICSID. The reason is that the Convention allows the Contracting State to require prior exhaustion of domestic remedies as a condition of its consent to ICSID arbitration.<sup>408</sup> This condition may be stipulated in investment agreements, BITs, or a declaration made by the Contracting State at the time of its signature or ratification of the Convention.

#### **Prerequisite Conditions Prior to Arbitration**

ICSID shall assume jurisdiction over disputes provided that the following criteria must be fulfilled: (1) it must be a legal dispute; (2) a dispute must arise out of investment; (3) a dispute must be between a national of another Contracting State (a foreign investor) and a Contracting State (through its Government Agency); and (4) the parties must consent to settle their dispute before arbitration in writing.<sup>409</sup> Once the parties' consent to ICSID's arbitration has been given, the parties cannot unilaterally revoke their consent.<sup>410</sup>

#### **Choice of Substantive Law**

The ICSID Convention is very advantageous to the parties in that it allows the parties to choose applicable laws to govern their dispute as a result of their agreement. In the absence of their agreement, the tribunal will apply laws of a host

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<sup>407</sup> ICSID Convention, *supra* note 219, art. 25(4).

<sup>408</sup> *Id.* art. 26.

<sup>409</sup> *Id.* art. 25.

<sup>410</sup> *Id.* art. 25(1).

state as well as rules of international law to a dispute.<sup>411</sup> This implication is unique and different from that of the ICC and the UNCITRAL Arbitration Rules in that the ICC and the UNCITRAL Arbitration Rules designate rules of conflict of laws to apply to a dispute that the arbitral tribunal thinks appropriate.<sup>412</sup>

### **Arbitration Process**

ICSID has recently become one of the most recognized international arbitration institutions because it offers the parties the most flexibility of dispute settlement resolution, *per se*, the appointment of arbitrators, or choices of law, etc. As its advantages, the ICSID Convention, like the UNCITRAL Rules, also ensures that the parties cannot frustrate the proceedings. For example, in a case where either party fails to appoint his arbitrator, the Chairman of the ICSID's Administrative Council shall be entitled to appoint an arbitrator or arbitrators not yet appointed.<sup>413</sup> Notwithstanding the fact that the party may fail to appear, present his case, or participate in the proceedings, the ICSID Convention ensures that the proceedings shall be continued and an award shall be rendered.<sup>414</sup>

### **Enforcement of Arbitral Awards**

Under the ICSID Convention, once the arbitral tribunal renders an award, it is binding on the parties and as a result, there must be no further appeal or further remedy, *per se* domestic courts.<sup>415</sup> Subject to limited exceptions, the party may challenge the arbitral award on the following grounds: (1) interpretation of the meaning or scope of the award; (2) revision of the award due to discovery of new fact; (3) annulment of the award. Whereas issues of interpretation and revision of the

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<sup>411</sup> *Id.* art. 42.

<sup>412</sup> David J. Branson & W. Michael Tupman, Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration, 24 VA.J.INTL.L. 917, 930 (1984).

<sup>413</sup> ICSID Convention, *supra* note 219, art. 38.

<sup>414</sup> *Id.* art. 45(2).

<sup>415</sup> *Id.* art. 53.

award will be heard by the original tribunal, the annulment of an award will be brought before a new tribunal.

As to the enforcement of arbitral awards under the ICSID Convention, ICSID provides effective measures of compelling the losing party to comply with the arbitral award. A losing party who refuses to comply with an arbitral award, especially for the Contracting State (the host state), may face the following legal sanctions. First, under the ICSID Convention, disputes between the Contracting State and foreign investors regarding the interpretation and application of the Convention that cannot be settled by negotiation may be referred to the ICJ. By this method, the home state will possibly take further action on its nationals' behalf to bring a case to ICJ against the host state that refuses to comply with such an award unless those states agree to another method of settlement.<sup>416</sup> Second, the home state may step in its nationals' claim and bring some action against the host state by using diplomatic protection or bringing about an international claim. This means is usually prohibited during arbitration process under the ICSID Convention.<sup>417</sup> In fact, this is seen as the ICSID Convention's suspension of the right of diplomatic protection and it works well at avoiding an unnecessary confrontation between the home state and the host state. As a result, ICSID can contribute to the depoliticization of investment disputes at the international level. The depoliticization, which is intended to promote an atmosphere of mutual confidence between a Contracting State and foreign investors favourable to increasing the flow of resources to developing countries, is a fundamental objective of the ICSID system.<sup>418</sup>

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<sup>416</sup> *Id.* art. 64.

<sup>417</sup> *Id.* art. 27.

<sup>418</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 4 I.L.M. 524 (1965), para 9.

Like the New York Convention, enforcement of arbitral awards is subject to these two (2) steps: recognition and enforcement. Regarding the recognition of arbitral awards, a Contracting State is imposed to recognize an award rendered subject to the ICSID Convention as binding, provided that the party seeking recognition or enforcement furnishes to a competent court a copy of the award certified by the Secretary-General. As to the enforcement of arbitral awards, a Contracting State is obliged to enforce an award, especially relevant to pecuniary obligations as if it was a final judgement of a court in that Contracting State.<sup>419</sup> Further, a Contracting State must always recognize and enforce arbitral awards rendered pursuant to the Convention even though they or their nationals are not parties to arbitration.

### **1.2.3. New York Convention**

#### **Preliminary Background**

Thailand acceded to the New York Convention on December 21, 1959 but later disputed the fact that the New York Convention might not be binding on Thailand. The reason is that as a practice of Thailand, before international obligations according to a particular treaty or convention becomes binding and effective in the Kingdom of Thailand, the Parliament shall promulgate domestic legislation in compliance with the treaty or convention.<sup>420</sup> However, at the time when Thailand ratified the New York Convention, the Military government rather than the Parliament enacted a royal decree to ratify the New York Convention on March 10, 1960.<sup>421</sup> As a result, there was a question as to whether Thailand was a member of the Convention because from the perspective of the new government, the Parliament never justifiably

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<sup>419</sup> ICSID Convention, *supra* note 219, art. 54.

<sup>420</sup> Surakiart Sathirathai & Borwornsak Uwanno, Introduction to the Thai Legal System, 4 Chulalongkorn L. Rev. 108 (1985-86).

<sup>421</sup> *Id.*

ratified it.<sup>422</sup> Notwithstanding, this question was later solved by judicial interpretation in that, despite of improperly promulgated legislation, domestic courts construe and accept Thailand as a member of the New York Convention and as such must abide by its terms.<sup>423</sup>

### **Significant Characteristics**

The New York Convention becomes a universally satisfactory method in recognizing and enforcing international arbitral awards in a commercial world. It is even described as “the single most important pillar on which the edifice of international arbitration rests”<sup>424</sup> because it provides a uniform and effective method of obtaining recognition and enforcement of both arbitration agreement and arbitral awards.<sup>425</sup>

Besides, the scope of application of the New York Convention is comparatively wide in that it can apply to both commercial and noncommercial matters.<sup>426</sup> In addition, the New York Convention also allows the winning party to enforce an award in a non-contracting state: a state other than disputing parties’ states<sup>427</sup> in that the Convention does not require the parties’ nationality. The only requirement is that arbitral awards must be made in other states and those are not considered to be domestic awards in the state where their recognition and enforcement are sought.<sup>428</sup> As a result, it can be said that the New York Convention confers legitimacy upon awards granted in any state, whether or not it is a contracting state

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<sup>422</sup> *Id.*

<sup>423</sup> *Id.* Also see Jayavadh Bunnag, Arbitration Law in Thailand, 2 (1991) (this paper presented to the Tokyo Conference on the Harmonization of Trade and Investment Practices in the Asia-Pacific Region 1991, on the file with the Hastings International and Comparative Law Review).

<sup>424</sup> Wetter, *supra* note 230 at 91.

<sup>425</sup> Orkun Akseli, Enforcement of International Arbitration Awards-the New York Convention of 1958, 9 VJ 211 (2005).

<sup>426</sup> Jan L. Volz, Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser, 21 Wm. Mitchell L. Rev. 867, 878 (1996).

<sup>427</sup> New York Convention, *supra* note 232, art. I(1).

<sup>428</sup> *Id.* art. I



(the disputing party's state) and whether or not the parties are subject to the jurisdiction of different contracting states.<sup>429</sup> The only limitation to the application of the New York Convention is subject to reciprocity and commercial reservations as mentioned earlier.<sup>430</sup>

### **Application of the New York Convention**

The New York Convention generally deals with international arbitral awards of two aspects: enforcement of arbitration agreement; and recognition and enforcement of foreign arbitral awards.

With the enforcement of arbitration agreement, domestic courts must be aware of the existence of arbitration agreement between the parties in either form of a separate written arbitration agreement or of an arbitration clause contained in a contract or in an exchange of letters or telegrams. When domestic courts come across disputes in which the parties have made agreement that their disputes shall be settled before arbitration, domestic courts must refer the parties to arbitration, unless it is found that such an agreement is null and void, inoperative, or incapable of being performed.<sup>431</sup>

With the recognition and enforcement of foreign arbitral awards, member states are compelled to recognize foreign arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon: that is, in accordance with local rules of procedure. This mechanism is seen that the New York Convention abolished the double exequatur.<sup>432</sup> To enforce foreign arbitral awards, the party applying for recognition and enforcement simply submits (1) the duly authenticated original award or a duly

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<sup>429</sup> Silverstein, *supra* note 233 at 443, 454.

<sup>430</sup> New York Convention, *supra* note 232, art. III.

<sup>431</sup> *Id.* art. II.

<sup>432</sup> Gusy, *supra* note 229 at 152.

certified copy thereof and (2) the original arbitration agreement to the court where the enforcement is sought.<sup>433</sup> After the arbitral award and agreement are submitted to the court where the enforcement is sought, the party against whom the enforcement is sought is responsible to prove refusal grounds under Article V that the award should not be enforced.

### **Refusal of Arbitral Awards**

The New York Convention provides certain grounds to be challenged in that arbitral awards should not be enforced. The process of refusing arbitral awards starts after the party seeking enforcement simply provides arbitral award as well as arbitral agreement to an enforcing court. Subsequently, the party against whom the enforcement is sought and who refuses the enforcement must raise and prove refusal grounds according to Article V to the competent authority. Then it becomes the losing party's responsibility to demonstrate a ground that such an arbitral award should not be enforced. Due to such requirement, this provision is seen as the most significant development of international arbitration as it shifts the burden of proof from the party seeking the enforcement to the party against whom the enforcement is sought.

Subject to Article V, there are two (2) channels by which arbitral awards may be refused. As a first channel, the party against whom the enforcement is sought must furnish the competent authority the following refusal grounds: (1) incapacity of the parties or invalidity of arbitration agreement; (2) improper notice of the appointment of the arbitrator or of the arbitration proceedings (violation of due process); (3) lack of jurisdiction or matters beyond the scope of arbitration; (4)

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<sup>433</sup> New York Convention, *supra* note 232, art IV.

procedural irregularities or irregularities in the composition of the arbitral tribunal; and (5) non-binding award.

As a second channel, the recognition and enforcement of arbitral awards may be refused if the competent authority finds that (1) the subject-matter of the dispute is incapable of settlement by arbitration under the law of which the enforcement is sought; or (2) arbitral awards would be contrary to the public policy of such state. In fact, the public policy exception has been called the “safety valve” of the New York Convention because it is subject to interpretation by each country’s legislative or judicial processes.<sup>434</sup> Regarding the public policy, the United States’ judicial policy views that the “public policy” must be construed narrowly. In *Fotochrome, Inc. v. Copal Company, Limited*,<sup>435</sup> the Court of Appeals for the Second Circuit noted that “[t]he public policy in favor of international arbitration is strong...”<sup>436</sup> and “the public policy limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state’s most basic notion of morality and justice.”<sup>437</sup>

Overall, it can be claimed that the New York Convention promotes advantages and effectiveness of international arbitration. The New York Convention provides a uniform enforcement method for the commercial world, which most nations have already accepted. Even though there are certain exceptions subject to Article V, domestic courts of the state (where the enforcement of the arbitral award is

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<sup>434</sup> Heather R. Evans, The Nonarbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in United States Federal Courts, 21 N.Y.U. J. Int’l. L. & Pol. 329, 334-35 (1989).

<sup>435</sup> 517 F.2d 512 (2d Cir.1975). See also *Parson & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RATKA)*, 508 F.2d 969, 974 (2d Cir. 1974) (addressing that in response to an attempt to declare an award invalid based on public policy arguments, the court held that awards should be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice) and *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.* 656 F. Supp. 160, 163-65 (S.D.N.Y. 1987) (affirming that although the public policy defense in Article V(2)(b) of the New York Convention remains, the defense must be read narrowly to be effective only when international arbitral award enforcement would violate the most fundamental notions of justice.)

<sup>436</sup> *Id.* at 516.

<sup>437</sup> *Id.*

sought) are likely to apply such exceptions very narrowly, thereby not circumventing the concept of the New York Convention.

#### **1.2.4. MIGA Convention**

##### **Preliminary Background**

MIGA was created by the MIGA Convention, opened for signature on October 11, 1985, and entered into force on April 12, 1988, with initial ratifications by the United States and the United Kingdom.<sup>438</sup> Subject to the MIGA Convention, the Convention shall be entered into force only when at least five (5) signatories from Category One (developed countries) and at least fifteen (15) signatories from Category Two (developing Countries) ratify the Convention, in which the total subscriptions of these signatories amount to at least one-third (1/3) of the authorized capital.<sup>439</sup> Thailand also ratified the MIGA Convention on October 3, 1996, being the 156<sup>th</sup> signatory country of MIGA (also known as the “Agency”).<sup>440</sup>

The main goal of establishing MIGA is to enhance the flow to developing countries of capital and technology for productive purposes under conditions consistent with their development needs, policies and objectives, on the basis of fair and stable standards for treatment of foreign investment.<sup>441</sup> By doing so, MIGA provides insurance to investors against non-commercial risks arising out of investments in developing countries, in which risks cannot be insured by national and private risk insurance programs.

##### **Eligible Investors**

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<sup>438</sup> Malcolm D. Rowat, Multilateral Approaches To Improving The Investment Climate of Developing Countries: The Cases of ICSI and MIGA, 33 Harv. Int'l L.J. 103 at 126.

<sup>439</sup> MIGA Convention, *supra* note 253, art. 61(b).

<sup>440</sup> MIGA, Thailand Signs MIGA Convention, [http://www.miga.org/news/index\\_sv.cfm?std=1506&aid=375](http://www.miga.org/news/index_sv.cfm?std=1506&aid=375) (last visited Apr. 23, 2009).

<sup>441</sup> MIGA Convention, *supra* note 253, preamble.

To be eligible to coverage subject to MIGA, the Convention requires that an investor must be a national of a member country other than a host country. In cases of a juridic\al person, it must be incorporated and has its principal place of business in a member country, or the majority of its capital is owned by nationals of a member country provided that it must be in a country other than the host country. Generally speaking, an investor whose his state becomes a member country of MIGA is entitled to insure his investment with MIGA. The Convention also allows nationals of the host country to enjoy MIGA's coverage provided that assets invested are transferred from outside the host country which is seen as to reverse capital flight. Notwithstanding, it is to be borne mind that an investor who desires to insure his investment with MIGA must operates his investment on a commercial basis.<sup>442</sup>

### **Eligible Investments**

The term of "investments" is not defined under the MIGA Convention. On the contrary, the MIGA Convention rather exemplifies what could be included in the scope of eligible investments subject to it. Apparently, MIGA primarily considers equity interests of medium-long term loans made or guaranteed by holders of equity in the enterprise concerned, and those forms of direct investment as may be determined by the Board as eligible investments.<sup>443</sup>

The scope of eligible investments may be additionally extended by special majority of the Board to cover any other medium- or long- term form of investments provided that they are relating to a specific investment covered or to be covered by the Agency. The other forms of eligible investments can be exemplified

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<sup>442</sup> *Id.* art. 13(a).

<sup>443</sup> *Id.* art. 12(a).

in management and service contracts, licensing and franchising agreements, turnkey contracts, arrangements concerning the transfer of technology and know-how.<sup>444</sup>

Apart from new investments, eligible investments subject to the MIGA Convention may include any transfer of foreign exchange made to modernize, expand, or develop the existing investment as well as the use of earnings from existing investments, which could be otherwise transferred outside the host country.<sup>445</sup>

Prior to guaranteeing an investment, the Agency shall take all relevant factors regarding the investment from both sides (an investor and the host country) into consideration. These factors include: economic soundness of the investment, contribution to the development of the host country by an investor, compliance of the investment with the host country's laws and regulations, consistency of the investment with the declared development objectives and priorities of the host country, and investment conditions in the host country.<sup>446</sup>

### **Covered Risks**

The objective of MIGA is aimed to provide eligible investors the insurance on non-commercial risks. Non-commercial risks in accordance with this Convention can be divided into the following types: (1) currency transfer;<sup>447</sup> (2) expropriation and similar measures;<sup>448</sup> (3) breach of contract;<sup>449</sup> (4) war and civil

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<sup>444</sup> *Id.* art. 12(b).

<sup>445</sup> *Id.* art. 12(c).

<sup>446</sup> *Id.* art. 12(d).

<sup>447</sup> Any introduction attributable to the host government of restrictions on the transfer outside the host country of its currency into a freely usable currency or another currency acceptable to the holder of the guarantee, including a failure of the host government to act within a reasonable period of time on an application by such holder for such transfer.

<sup>448</sup> Any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.

<sup>449</sup> Any repudiation or breach by the host government of a contract with the holder of a guarantee, when (a) the holder of a guarantee does not have recourse to a judicial or arbitral forum to determine the claim of repudiation or breach, or (b) a decision by such forum is not rendered within such

disturbance.<sup>450</sup> Apart from these types, the Board of the Agency by special majority can approve the extension of eligible coverage based upon specific non-commercial risks other than these risks. Nevertheless, the risk of devaluation or depreciation of currency is excluded. It is noted that losses resulting from any host government action or omission to which the holder of the guarantee has agreed or for which he has been responsible, or any host government action or omission or any other event occurring before the conclusion of the contract guarantee shall not be covered.<sup>451</sup>

### **Prerequisite Conditions**

Only investments that meet the following conditions may be guaranteed under the Convention. First, investments must be made in the territory of a developing member country.<sup>452</sup> The rationale behind this requirement is that MIGA was intended to enhance the flow of foreign investment to developing countries. Second, the host government country must approve the issuance of guarantee by the Agency prior to guaranteeing.<sup>453</sup> Third, as a rule, the guaranteed value shall not exceed the total loss of the guaranteed investment.<sup>454</sup>

### **Settlement of Investment Disputes under MIGA**

Disputes under the MIGA Convention can be categorized into (four) 4 types:

(1) disputes over interpretation and application of the Convention between a member and the Agency;<sup>455</sup>

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reasonable period of time as shall be prescribed in the contracts of guarantee pursuant to the Agency's regulations, or (c) such a decision cannot be enforced.

<sup>450</sup> Any military action or civil disturbance in any territory of the host country to which this Convention shall be applicable as provided in Article 66.

<sup>451</sup> MIGA Convention, *supra* note 253, art. 11.

<sup>452</sup> *Id.* art. 14.

<sup>453</sup> *Id.* art. 15.

<sup>454</sup> *Id.* art. 16.

<sup>455</sup> *Id.* art. 56.

(2) disputes between the Agency as subrogee of an insured investor and a member (a host country);<sup>456</sup>

(3) disputes arising under a contract of guarantee or reinsurance between the Agency and the contract parties;<sup>457</sup>

(4) disputes other than those according to (1), (2), or (3) between the Agency and a member or former member.<sup>458</sup>

However, this dissertation only focuses on disputes in Category 2 (disputes between MIGA as subrogee of an insured investor and a host country) because disputes in Category 2 can raise issues of FDI and international arbitration as dispute settlement resolution between the parties in which Thailand is the one party and MIGA is the other party of the disputes.

Disputes in Category 2 occur when MIGA pays the insured investor compensation upon the claim against the host country. As a result, MIGA shall step in the insured investor's rights to pursue such a claim against the host country.<sup>459</sup> According to the MIGA Convention, disputes between MIGA and the host country due to the subrogated rights shall be settled in accordance with the procedures set forth in Annex II to the Convention. As its initial resolution, the parties are required to settle their dispute through negotiation. When the negotiation is failed, either party will be entitled to request arbitration proceedings unless the parties reserve to resort first to conciliation.<sup>460</sup>

In this regard, Thailand as a membership of the MIGA Convention has issued the Regulation of the Office of the Prime Minister on Compliance with Arbitral Awards B.E. 2544 (2001) providing a step-by-step guidance for Government

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<sup>456</sup> *Id.* art. 57(2).

<sup>457</sup> *Id.* art. 58.

<sup>458</sup> *Id.* art. 57(1).

<sup>459</sup> *Id.* art. 18(a).

<sup>460</sup> *Id.* art. 57(b).



Agencies as to how to process when facing an arbitral award. The Regulation imposes that upon the arbitral award, the losing Government Agency is imposed to strictly comply with the arbitral award especially where such an award is made to settle disputes between MIGA and the Government of Thailand through its Agency. Therefore, where a Government Agency is awarded by the arbitral tribunal to compensate MIGA after MIGA has paid compensation to an insured investor and after MIGA has assumed the insured investor's subrogated rights, the losing agency is absolutely obligated to pay compensation to MIGA, no matter what excuse the losing agency may have.

To sum up, MIGA is created to enhance capital flowing into developing countries. Having said that, MIGA offers insurance coverage over non-commercial risks for foreign investors. The application of MIGA is seen as an advanced method that is perfectly fitted to the situation where national and private insurance programs fail to provide insurance coverage in certain areas such as non-commercial risks, especially for those relating to eligible investors, eligible investments, and large projects that require reinsurance coverage.

## **2. Inconsistency and Incompatibility of Arbitration for Disputes Arising out of a State Contract**

Having briefly outlined the existing arbitration legal system in both aspects of domestic and international law, this study now turns to an analysis of the arbitration legal system to look at the drawbacks and problems that can arise for disputes arising under state contracts. The heart of this analysis is the idea that the methods that the existing arbitration system has in place for dealing with disputes from state contracts is awkward, inconsistent, incompatible and inappropriate. Likewise, such inconsistency and incompatibility can be viewed from two (2) perspectives: domestic law perspective and international law perspective.

### **2.1. From Thailand (National) Perspective**

#### **2.1.1. The Arbitration Act and State Contracts' Functions**

Apparently, disputes arising out of a state contract regardless of whatever contract type can be settled by a means of arbitration. Having said that Section 15 of the Arbitration Act provides that:

*“Disputes arising out of a contract between the State as the one party and the private party as the other party may be settled by arbitration whether or not such a contract is an administrative contract.”*

Even the existing Section 15, the Arbitration Act does not seem to suit well for disputes arising out of state contracts, especially those carrying the special characteristics as follow:

First, when looking at the objectives of the Arbitration Act, it finds that the Arbitration Act was initiatively invented as a dispute settlement mechanism for private parties. Based upon the concept of the Arbitration Act, the disputing parties shall be deemed as equal and have absolute rights to choose a means in settling their disputes. They can choose a method that provides the flexibility that both of them

satisfy. Accordingly, they can choose the arbitral tribunal that they can trust as impartial as well as choose the laws and arbitral proceedings that they think appropriate. Agreement on those matters between the parties is binding and absolutely recognized by the Arbitration Act. As a result, the arbitral award as derived from the arbitral tribunal is also legally binding on the parties and the Court of Justice hesitates to review the arbitral award rendered by the arbitral tribunal. Under the Arbitration Act, the Court of Justice is unlikely to intervene or invalidate the arbitral award unless the Court of Justice comes across refusal grounds that the arbitral award should be annulled. So far, it can be inferred that the concept of arbitration seems to work well as dispute settlement resolution among private parties<sup>461</sup> but not for disputes arising out of a state contract where one of the party is the State.

In addition to the arbitration's purpose in settling disputes among private parties, the application of arbitration is also aimed to help reducing the number of civil cases that are to be brought into the Court of Justice. With this regard, the Arbitration Act reaffirms that disputes between private parties are considered civil cases and the arbitral tribunal may apply the Civil Procedure Code to a case during arbitral proceedings. This legal implication can be demonstrated in Section 25 providing that:

*For the purpose of this chapter, the arbitral tribunal may apply the provisions on witness and evidence of the Civil Procedure Code to the arbitral proceedings mutatis mutandis.*

Therefore, it is quite evident that the concept and purposes of arbitration under the Arbitration Act does not work out well with disputes arising out

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<sup>461</sup> This is also in the line with the UNCITRAL Arbitration Rules that are aimed to tackle disputes among private commercial parties. See also Tuck, *supra* note 367 at 885, 887.

of state contracts other than government procurement contracts. Disputes arising under state contracts other than government procurement contracts are unique and different from disputes between private parties as disputes arising out of state contracts can bring about issues of public policy or morals. More importantly, some of those disputes are normally involved in the exercising of the State's power, the provision of public service or utility, or the exploitation of natural resources, thereby being inappropriate as being defined as civil cases that are subject to civil law principles as appeared in the Arbitration Act.

Second, given Section 15 of the Arbitration Act, the term of "state contract" is comparatively wide in that it is wide enough to cover all types of state contracts where one party is the State, thereby including any state contract, which carries special characteristics, other than government procurement contract, into the provision's scope. In other words, Section 15 can be interpreted as saying that disputes arising out of any contract type, defined as a "state contract," whether it is simply deemed to be a contract between private parties like a government procurement contract or carrying special characteristics like FDI, can be arbitrated subject to the Arbitration Act. According to Section 15, disputes arising out of a state contract even involving in the exercising of the State's power, public policy or morals, will be treated as civil cases and as a result are exclusively subject to civil law principles. Such imposition does not sound right as far as disputes arising out of state contracts other than government procurement contract are concerned. It is definitely inappropriate that disputes arising out of state contracts involving in the exercising of the state's power shall be treated as civil cases and subject to civil law principles. On the contrary, state contracts carrying the special characteristics, for example ones

involving in the exercising of the State's power, should be subject to administrative and public law principles.

Third, state contracts under Thai law are classified into five (5) categories: government procurement contracts, administrative contracts, concession contracts, state-joint venture contracts and other. Based upon these five (5) categories, state contracts individually carry and serve their own functions and objectives according to their contract types but when encountering arbitration issues, these state contracts are nonetheless subject to the same legal implication in accordance with the Arbitration Act. This would seem to be extremely inappropriate in that state contracts carrying special characteristics shall be exclusively arbitrated under the Arbitration Act, which was designed to help private parties settle their disputes. At the very least, it is suggested that disputes arising out of state contracts, which are deemed as contracts among private parties like government procurement contracts can be treated as civil cases and subject to civil law principles, whereas disputes arising out of state contracts carrying special characteristics, for example involving in the exercising of the state power or relating to FDI, should not be treated as civil cases. These disputes should be subject to a Special Method where administrative law principles apply.

Fourth, state contracts involving the State's power, the provision of public service or utility, or natural resources, are also defined as administrative contracts, thereby being subject to the Administrative Court's jurisdiction according to the Establishment of the Administrative Court and the Administrative Court Procedure Act, B.E. 2542 (1999). Therefore, a question regarding the Court's jurisdiction may arise as to whether disputes arising out of an administrative contract should be subject to the Court of Justice's jurisdiction or the Administrative Court's

jurisdiction. Provisions of the Arbitration Act and the Administrative Court Act seem to be in conflict. On the one hand, all types of state contracts can be arbitrated under the Arbitration Act and accordingly, the Court of Justice shall assume jurisdiction over issues or matters relating to arbitration. On the other hand, disputes under state contracts, which are also defined as administrative contracts under the Administrative Court Act shall be within the Administrative Court's jurisdiction. The conflict of these two (2) statutory acts bring about great confusion to Government Agencies as to whether disputes arising out of the defined state contract, which at the same time can be defined as an administrative contract, should be subject to the Court of Justice's jurisdiction or the Administrative Court's jurisdiction in practice.

Although there is a clash of legal implication between these two (2) acts, this is not to suggest that disputes arising out of state contracts other than government procurement contracts cannot be arbitrated at all. On the contrary, disputes from those state contracts can be arbitrated (subject to the special legal treatment) in a way that is different from that of the Arbitration Act as designed to settle disputes between private parties. The idea behind the special legal treatment is that it would ensure that state contracts with special characteristics would be appropriately treated without distortion and ignorance of the public interest theory.

Therefore, it can be said that the Arbitration Act's purposes and state contracts' functions are individually unique and inconsistent. The application of arbitration under the Arbitration Act does not seem to work well with disputes arising out of state contracts carrying special characteristics. In consequence, this dissertation proposes that arbitration as alternative means of dispute settlement for disputes arising out of state contracts other than government procurement, *per se*, disputes arising under state contracts relating to qualifying FDI, should be subject to

the Special Method as a powerful alternative of dispute settlement resolution. Alternatively, the Special Method should apply to disputes arising out of any state contract that carry the functions of FDI, *per se*, a state contract relating to qualifying FDI, for example, concession contracts, administrative contracts, construction contracts etc.

### **2.1.2. Lack of Step-by-Step Guidance on Arbitration for Disputes Arising out of a State Contract**

As mentioned earlier, even though the Arbitration Act was enacted to provide arbitration as an alternative dispute resolution between private parties but disputes arising out of state contract can be also arbitrated under the Arbitration Act. Surprisingly, the Arbitration Act does not provide step-by-step guidance on arbitration for Government Agencies to comply with as far as disputes under state contracts are concerned. The Arbitration Act imposes neither what contract type can be arbitrated nor what contract type is prohibited from applying arbitration. Moreover, the Arbitration Act does not designate to what extent those disputes arising under state contracts can be arbitrated as well as provide procedural guidance as to how to conclude an arbitration clause or arbitration agreement, how to initiate arbitration process, or how to undertake arbitration proceedings, etc.

The lack of step-by-step procedure on arbitration jeopardizes consistency, formality and regularity of the legal implication on arbitration, especially for disputes arising under state contracts. Under such circumstance, individual Government Agencies are compelled to exercise their own discretion to tackle these issues by themselves. Without step-by-step rules for disputes arising out of state contracts having special characteristics, most Government Agencies are left with no choice of what to do and where they should turn to. Without clues of what to do, they

are urged to turn to the 1992 Regulation by applying the sample arbitration clause provided by the 1992 Regulation to a case. They often tentatively apply the sample arbitration clause to state contracts, no matter what contract type they transact with the private party in practice.

As a result, the reference to the sample arbitration clause in state contracts other than government procurement contract even causes further confusion and difficulties. Specifically, this reference raises the question as to whether disputes arising out of state contracts, which can be simultaneously defined as administrative contracts, should be within the Court of Justice's jurisdiction or the Administrative Court's jurisdiction. It is simply due to the fact that the Sample Clause provided by the 1992 Regulation often refers disputes, whether or not they arise or relate to arbitration, to the Court of Justice's jurisdiction even though those disputes at the same time can be defined as disputes arising from an administrative contract under the Administrative Court Act and as a result, they are subject to the Administrative Court's jurisdiction.

This unusual practice inevitably causes irregularity of the legal implication on arbitration as the practice can be variable depending on individual Government Agencies, thereby even resulting in the greater inconsistency and incompatibility of the entire legal arbitration system governing disputes arising out state contracts in Thailand.

### **2.1.3. Confusion of the Jurisdiction between the Court of Justice and the Administrative Court over Arbitration Issues**

Before the Administrative Court was established in 1999, all relevant matters regarding arbitration were referred to the Court of Justice. As a result, the disputing parties could request the Court of Justice to issue a warrant to any person to



give oral statement, or deliver documentary evidence or objects to the arbitral tribunal<sup>462</sup> and only the Court of Justice could enforce arbitral awards<sup>463</sup> under the Arbitration Act. The reference of arbitration issues to the Court of Justice in those days sounded reasonable because at that time, the Administrative Court did not exist. Furthermore, the Arbitration Act was objectively issued to help settle disputes between private parties. Therefore, disputes derived from arbitration between private parties were considered civil cases and accordingly subject to the Court of Justice's jurisdiction.

The jurisdiction of the Court of Justice has never been in question until the Administrative Court was established in 1999 by the Establishment of the Administrative Court and the Administrative Court Procedure Act, B.E. 2542 (1999). The Administrative Court was set up as an independent court separate from the Court of Justice having jurisdiction over administrative cases (disputes among Government Agencies, or disputes between Government Agencies and private parties). It also includes disputes arising out of the administrative contracts where one party is the State.

The confusion of the jurisdiction between the Court of Justice and the Administrative Court first arose when the Administrative Court was established. It appears that certain legal provisions on arbitration for disputes arising under state contracts have not been updated in a manner consonant with the existence and functions of the Administrative Court. The following issues are still in questions as to whether certain disputes should be referred to the Administrative Court or the Court of Justice.

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<sup>462</sup> Arbitration Act, B.E. 2545 (2002) (Thail.), *supra* note 363, § 33.

<sup>463</sup> *Id.* § 41.

**(i) The Sample Arbitration Clause As It Pertains to State  
Contracts Other Than Government Procurement Contracts**

The sample arbitration clause as provided by the 1992 Regulation has been playing a significant role in dispute settlement resolution for disputes arising out of state contracts other than government procurement contracts. The reason is that Government Agencies likely apply the sample arbitration clause to state contracts other than government procurement contract, which is the only contract type within the 1992 Regulation's scope, thereby causing the unexpected controversy in adopting the sample arbitration clause. The application of the sample arbitration clause as adopted by most Government Agencies makes for confusion in practice. This confusion stems in part out of 1992 Regulation, which refers all matters regarding arbitration to the Court of Justice regardless of the existence of the Administrative Court and regardless of what contract type they are transacting.

The following is the sample arbitration clause provided by the 1992 Regulation<sup>464</sup>:

*1. Any dispute or difference arising out of or in connection with the Contract of the implementation of any of the provisions of the Contract, which cannot be settled amicably shall be referred to arbitration.*

*2. Unless both parties agree in the appointment of a single arbitrator, either party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name of an arbitrator to be appointed by him. Then the dispute or the difference shall be referred to two arbitrators, one to be appointed by the issuing party as aforesaid and the other one to be appointed by the other party within thirty (30) days after receipt of the said notice. If the two arbitrators are unable to agree on such dispute or difference, an umpire shall be appointed by the two arbitrators within thirty (30) days from the date of disagreement. The umpire so appointed shall resolve the dispute or difference."*

*3. Should either party be unable to appoint an arbitrator or in case of disagreement as regards to the appointment of an umpire,*

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<sup>464</sup> Regulation of the Office of the Prime Minister on Procurement B.E. 2535 (1992) (Thail.), *supra* note 118, sample clause at 2-25.

*each party is entitled to refer the matter to the Civil Court in Bangkok, Thailand for the appointment of arbitrator or umpire as the case may be.*

*4. Any decision or award given by the single arbitrator or the two arbitrators jointly, or the umpire in case the two arbitrators disagree, shall be final, conclusive and binding upon the parties hereto. The arbitration proceedings shall follow the Rule of Arbitration of the Ministry of Justice's Arbitration Office or any rule as agreed by both parties and shall be conducted in Bangkok.*

*5. Each party shall bear the cost of his own arbitrator's service and share equally other cost of all proceedings. In case a single arbitrator or an umpire is appointed, the cost of the single arbitrator's service or the cost of the umpire's service shall be decided by the arbitrator, or the umpire, as the case may be.*

*6. The submission of any matter in dispute or difference to the arbitration proceedings as aforesaid, shall be a condition precedent to the right of institution of court action.*

*7. The Contract shall be construed according to the laws of the Kingdom of Thailand. Each party shall have the right to institute suit against the other in the Civil Court in Bangkok, Thailand, to enforce any decision or award rendered in arbitration proceedings.*

The misuse of the sample arbitration clause inevitably brings about inconsistency within the existing arbitration system governing disputes arising out of state contracts. This is especially true for those state contracts, which can be simultaneously defined as "administrative contracts" and as a result, subject to the Administrative Court's jurisdiction. Under such circumstance, the question of whether disputes arising out of these sorts of contract should be brought into the Court of Justice due to the sample arbitration clause contained in a contract or they should be submitted to the Administrative Court due to their transaction nature corresponding to definition of administrative contracts arises. In such an event, it seems that the Court of Justice is not appropriate to adjudicate those disputes but to submit disputes to the Administrative Court may cause the Government Agency be condemned of violating its contractual obligations. Therefore, even though the provisions of the Administrative Court Act shall always overrule the contract's obligations, the

consequence of this misuse is quite severe because it can cause the State to be liable for compensation to the private contracting party for breach of contract.

Therefore, to respond to this drawback, the Special Method that this dissertation suggests provides a new sample arbitration clause so as to help with the confusions that stem from state contracts and the existence of the Administrative Court.

### **(ii) Self-Contradictory Provision of the Arbitration Act**

The Arbitration Act itself contains a contradictory provision that raises the question as to how the Arbitration Act should be interpreted and implemented. The reason is that the Arbitration Act generally refers all matters occurred during the arbitration process to the Court of Justice. In the initial process, if the parties cannot reach an agreement in appointing a sole arbitrator or umpire, either party can request the Court of Justice to do so.<sup>465</sup> Likewise, the objection to arbitrators shall be referred to the Court of Justice.<sup>466</sup> Furthermore, the disputing parties, who desire to protect their rights during the arbitration process, are entitled to request the Court of Justice to issue an interim measure either before or during the process.<sup>467</sup> During the arbitration process, the arbitral tribunal or the disputing parties with the arbitral tribunal's consent can request the Court of Justice to issue a warrant to any person to give oral statement, deliver any documentary evidence or objects to the arbitration.<sup>468</sup> After the arbitral award is rendered, the arbitral award shall be only enforced through the Court of Justice regardless of what contract type.<sup>469</sup> Moreover, the arbitral award may be nullified through the Court of Justice with the request of the dissatisfied party.<sup>470</sup>

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<sup>465</sup> Arbitration Act, B.E. 2545 (2002) (Thail.), *supra* note 363, § 18.

<sup>466</sup> *Id.* § 20.

<sup>467</sup> *Id.* § 16.

<sup>468</sup> *Id.* § 33.

<sup>469</sup> *Id.* § 41.

<sup>470</sup> *Id.* § 40.

The Court of Justice seems to have full and exclusive power and jurisdiction over all matters relating to arbitration subject to the Arbitration Act. Nevertheless, it is quite surprising to find that the Arbitration Act also empowers the party who disagrees with the Court of Justice's decision to appeal the matter to either the Supreme Court or the Supreme Administrative Court<sup>471</sup> even though no provision of the Arbitration Act confers the lower Administrative Court's jurisdiction at the initial stage. As a result, there would be no possibility that the party who is dissatisfied with the Court of Justice's judgment would further appeal to the Supreme Administrative Court because the lower Administrative Court itself has no jurisdiction and authority over any matter relating to arbitration.

Therefore, this dissertation seeks to amend this self-contradictory provision. Disputes between private parties and those arising out of state contracts other than government procurement contracts should be differentiated. On the one hand, disputes between private parties and those that are deemed as between private parties, *per se*, government procurement contracts should be treated as civil cases and subject to the Arbitration Act and the Court of Justice's jurisdiction. On the other hand, disputes arising out of state contract carrying special characteristics, for example involving the exercising of the State's power, the provision of public service or utility, the exploitation of natural resources, or FDI should be treated appropriately and subject to the proposed Special Method and the Administrative Court's jurisdiction.

**(iii) Unclear Jurisdiction over Arbitration Issues derived from the Commission on Jurisdiction of Courts**

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<sup>471</sup> *Id.* § 45.

In Thailand, where a question regarding jurisdiction arises, the Commission on Jurisdiction of Courts, consisting of the President of the Supreme Court of Justice, the President of the Administrative Court, the President of the Military Court and any other Court (if any) shall have authority to deal with this jurisdictional matter. The Commission on Jurisdiction of Courts shall decide which court the disputes in question should be submitted.<sup>472</sup> However, the Commission's decision on jurisdictional disputes, in some cases, may be challenged as the decision can be too subjective depending on the Commission's discretion, thereby being unjustified by legal principles that attempt to differentiate disputes within the Court of Justice's jurisdiction according to the Arbitration Act from those within the Administrative Court's jurisdiction according to the Administrative Court Act.

The Commission's decision, which is too subjective and far beyond the legal justification, even brings about more confusion to Government Agencies in practice. They do not know which practice they should follow. Unfortunately, if their contracts cause damage or loss to the State (as seen in the *Expressway case*), they would possibly assume responsibility for concluding such a contract

The challenge to the Commission on Jurisdiction of Courts can be exemplified in the *Expressway case* where BBCD requested the Court of Justice to enforce the arbitral award rendered by the arbitral tribunal. ETA with the OAG's advice argued that the case should be transferred to the Administrative Court on the ground that the enforcement of the arbitral award would give rise to the issues of public policy or morals under administrative and public law principles. The Commission on Jurisdiction of Courts, however, concluded that disputes between BBCD and ETA were within the Court of Justice's jurisdiction due to the fact that the

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<sup>472</sup> Constitution of the Kingdom of Thailand B.E. 2550 (2007), *supra* note 82. Also see the Act Concerning the Settlement of Disputes on the Competent Jurisdiction among Courts B.E. 2542 (1999) (Thail.).

Court of Justice had previously issued a warrant requesting a witness to give oral statement before the arbitral tribunal during the arbitral proceedings.<sup>473</sup> The Commission on Jurisdiction of Courts' decision seemed very subjective as the decision was too far beyond the legal justification of the Administrative Court Act. With this regard, Julasing Vasantasing<sup>474</sup> disagreed with the Commission on Jurisdiction of Courts' decision by arguing that the disputes derived from a contract between BBCD and ETA were considered to relate to the provision of public service or utility and as a result, fell within the administrative contract's definition so as to be subject to the Administrative Court accordingly. Therefore, the Administrative Court should be more suitable and appropriate for handling disputes arising out of state contracts, especially for those being involved in the exercising of the State's power.

The Administrative Court is considered the most suitable authority to adjudicate or settle disputes arising out of administrative contracts because the Administrative Court can apply principles (including the public interest theory) that are not applicable in the Court of Justice to a case. Furthermore, the Administrative Court is free from any restriction to acquire additional evidence as it considers necessary rather than leave it to the disputing parties according to the burden of proof principle.

To sum up, even with the establishment of the Administrative Court, it is very likely to find that disputes arising out of administrative contracts continue to be brought into the Court of Justice, not the Administrative Court. Part of the reason for this is that the existing arbitration laws and regulations have not been updated in a manner consistent with the Administrative Court's existence and functions.

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<sup>473</sup> Julasing Vasantasing, State Contracts: the Cabinet Resolution Regarding the Execution of A Concession Contract between the State and the Private Party 29 (2004).

<sup>474</sup> Julasing Vasantasing, at that time was the Director General of the Legal Counsel Department, the Office of the Attorney General and was fully in charge of defending this case for ETA.

Therefore, it is advised that on the one hand, disputes between the private parties and those arising out of government procurement contracts should be governed by the Arbitration Act, treated as civil cases and accordingly subject to the Court of Justice's jurisdiction. On the other hand, disputes arising out of state contracts carrying special characteristics, for example, involving in the exercising of the State's power, the provision of public service or utility, the exploitation of natural resources, or FDI should be defined as administrative contracts, treated by the Special Method, and accordingly subject to the Administrative Court's jurisdiction.

#### **2.1.4. Error of the 2004 Cabinet Resolution**

It becomes clear that the existing arbitration laws and regulations cannot serve their best functions in settling disputes arising under state contracts and concession contracts in particular. The arbitral award in the *Expressway case*, which was seen as the most disappointing and shocking award that Thailand has ever experienced is another factor in what gave rise to the failure of arbitration for state contracts. In *the Expressway case*, as demonstrated earlier, the Government as a sovereign state was asked to pay the private party (BBCD) a fine (punitive damage) or penalty above and beyond normal compensation for actual damage or loss suffered.

These circumstances were seen as crucial factors striking the Government of Thailand to issue a Cabinet Resolution in 2004. The issuance of the 2004 Cabinet Resolution was derived from the arbitral award in the *Expressway case* to prohibit all Government Agencies from concluding an arbitration clause in a concession contract unless it is specially<sup>475</sup> approved by the Council of Ministers. Based upon the Cabinet Resolution, it clarifies that arbitration is inappropriate for settling disputes arising under concession contracts.

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<sup>475</sup> Letter of the Secretary General to the Council of Ministers, *supra* note 202.



In spite of the issuance of the 2004 Cabinet Resolution, it is very unfortunate to find that there is an error of the 2004 Cabinet Resolution. Based upon the nature of the contract transaction between BBCD and ETA, ETA hired BBCD to construct the expressway facility and BBCD received a fixed amount in the form of a promissory note in return. BBCD was not eligible to collect toll fees from expressway users. Therefore, the contract between BBCD and ETA was simply a construction contract. It was not a concession contract. To be defined as a concession contract, BBCD must have been granted a concession to provide the expressway facility to public in general with its own risk and expense (including constructing the expressway facility) in order for BBCD to directly collect toll fees from users in return. Therefore, a contract between ETA and BBCD was not a concession contract so the drafter of the 2004 Cabinet Resolution must have misunderstood that the construction contract between BBCD and ETA had been a concession contract and the 2004 Cabinet Resolution was drafted as such.

Due to this error, the 2004 Cabinet Resolution cannot therefore solve the problem like that arose in the *Expressway case*. More specifically, the 2004 Cabinet Resolution cannot prevent disputes arising out of state contracts, which are not defined as concession contract (like a construction contract in the *Expressway case*) from being arbitrated. This definitely causes difficulties for Government Agencies, and has brought uncertainty as to how they should comply with this 2004 Cabinet Resolution in practice.

Therefore, it is advised that the 2004 Cabinet Resolution should be redrafted to provide for the specific conditions that a contract should carry rather than expressly designate names of contract types because the categories of state contract types under Thai law are overlapping and indistinguishable in practice.

## **2.2. From International Perspective**

From international perspective, it appears that domestic legal implications and practice on arbitration and international arbitration law are not perfectly consistent and compatible. The following are factors causing such inconsistency and incompatibility.

### **2.2.1. ICSID Convention**

Thailand has been a member of UNCITRAL, the New York Convention and the MIGA Convention. For the ICSID Convention, Thailand already signed the ICSID Convention but has not ratified the Convention yet, hence making the entire arbitration system in Thailand even more incompatible and inconsistent.

Thailand's reluctance to ratify the ICSID Convention raises some important questions as to the reasons behind the country's inaction. According to Professor Sompong Sucharitkul, the inaction of non-ratification on the part of Thailand might stem from political issues that are very sensitive for the Thai government. It seems that her legal experts have not succeeded in convincing the leadership of the Government of the advantages and absence of disadvantages of becoming the party to the ICSID Convention. The Government is unaware of how ICSID operates and how Thailand can benefit from the ratification of the ICSID Convention. The Thai government has not been informed and persuaded by her expert advisers that there will be no unforeseen risk upon ratification.<sup>476</sup> Further, the reluctance to ratify the ICSID Convention seems to be increasing due to the disappointment of the domestic arbitral award in the *Expressway case* as well as the disappointment of the international arbitral award under UNCITRAL in the *Walter*

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<sup>476</sup> From the discussion with Professor Sompong Sucharitkul on April 19, 2006.

*Bau*.<sup>477</sup> The arbitral awards of the *Expressway case* and *Walter Bau* reaffirmed that fears about being involved in dispute settlement outside of its national adjudication system were justified. As a result, the Council of Ministers even issued a resolution in 2004 to prohibit all Government Agencies from concluding an arbitration clause in a concession contract unless it is specifically approved by the Council of Ministers upon case-by-case basis.

If the ICSID Convention is not ratified, the arbitration system under the Thai laws will remain inconsistent and incomplete, especially in regards with international arbitration. Due to Thailand's international obligations under UNCITRAL, the New York Convention, and the MIGA Convention, it means that Thailand's nationals and Thailand as a host state as happened in *Walter Bau* can be brought to any ad-hoc international arbitration or international arbitration institution under the UNCITRAL Arbitration Rules or any other rules. When the arbitral award is rendered, Thailand is obliged to recognize and enforce such arbitral award made outside Thailand whether or not the disputing party holds the Thai nationality in accordance with the New York Convention. More importantly, in a case of disputes between Thailand and MIGA where MIGA is subrogated to pursue the insured's rights against Thailand as a host state before international arbitration, Thailand is absolutely obliged to comply with the arbitral award. It is particularly true when the arbitral tribunal awards Thailand to pay compensation or damages to MIGA. With this regard, the Thai government has issued the Regulation of the Office of the Prime Minister on Compliance with Arbitral Awards B.E. 2544 (2001), compelling the Government Agency to pay compensation to MIGA promptly and prohibiting it from refusing to comply with the arbitral award.

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<sup>477</sup> The arbitral tribunal in *Walter Bau vs. Thailand* awarded in favour of Walter Bau as a minority shareholder holding ten (10) per cent of shareholdings in Don Muang Tollway ("DMT") and requested the Government of Thailand to pay one and a half (1.5) billion Baht compensation to Walter Bau.

By such fact, it demonstrates that Thailand has already bypassed the ICSID Convention because Thailand is obligated to recognize and enforce arbitral awards made outside its territory under the New York Convention, and to pay compensation to MIGA as an insurer for foreign investors under the MIGA Convention. Under such circumstances, it is quite surprising to find that Thailand is not entitled to submit disputes arising out of investments to international arbitration under ICSID since it has not ratified the ICSID Convention even though ICSID is considered the most suitable international arbitration providing investor-state dispute resolution.

The unavailability of ICSID is extremely disadvantageous to Thai investors, who desire to settle their disputes with other ICSID-member states, in that they are not eligible to arbitrate their dispute before ICSID. On the other hand, nationals of other ICSID-member states can pursue their claims through international arbitration institutions other than ICSID against Thailand and, of course, Thailand is bound to comply with such international arbitral awards made outside Thailand due to its commitment under the New York Convention and to pay compensation to MIGA under the MIGA Convention. The Flowchart of the Existing International Arbitration System in Thailand appears in **Appendix 10 of the Appendices**, showing how the non-ratification of the ICSID Convention on part of Thailand can contribute to the incompleteness of the existing international arbitration system in Thailand because the part of the accessibility to ICSID is missing. Additional justifications that Thailand should ratify the ICSID Convention will be further discussed in Chapter 5.

### **2.2.2. 1992 Regulation**

As mentioned earlier, the 1992 Regulation provides a sample arbitration clause as the reference material for Government Agencies. Even though

the sample arbitration clause is only intended to apply to a government procurement contract but in the real practice, most Agencies likely apply the sample arbitration clause to other types of state contracts. The sample arbitration clause itself is found not corresponding to principles and concepts set forth in the UNCITRAL Rules and the ICSID Convention as follows:

First, the sample arbitration clause allows a two panel of arbitrators to serve as the arbitral tribunal,<sup>478</sup> while both the UNCITRAL Arbitration Rules and the ICSID Convention recognize even numbers of arbitrators, *per se*, a sole arbitrator or a three panel of arbitrators as the arbitral tribunal of a dispute because the latter enables disputes to be settled by majority votes. In the latter case, each of the disputing parties chooses his own arbitrator and these two arbitrators will appoint the third arbitrator as the presiding arbitrator or umpire of a dispute.

Second, even though Government Agencies are free to choose any arbitration rule for their arbitration proceedings, but in practice, Agencies are more likely to apply the Rule of Arbitration of the Ministry of Justice's Arbitration Office as suggested by the sample arbitration clause.<sup>479</sup> Due to such suggestion, the application of international arbitration as a dispute settlement solution among Government Agencies is found very rare in the State sector.

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<sup>478</sup> The Sample Arbitration Clause provides:

2. *Unless both parties agree in the appointment of a single arbitrator, either party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name of an arbitrator to be appointed by him. Then the dispute or the difference shall be referred to two arbitrators, one to be appointed by the issuing party as aforesaid and the other one to be appointed by the other party within thirty (30) days after receipt of the said notice. If the two arbitrators are unable to agree on such dispute or difference, an umpire shall be appointed by the two arbitrators within thirty (30) days from the date of disagreement. The umpire so appointed shall resolve the dispute or difference.*

<sup>479</sup> The Sample Arbitration Clause:

"4. *Any decision or award given by the single arbitrator or the two arbitrators jointly, or the umpire in case the two arbitrators disagree, shall be final, conclusive and binding upon the parties hereto. The arbitration proceedings shall follow the Rule of Arbitration of the Ministry of Justice's Arbitration Office or any rule as agreed by both parties and shall be conducted in Bangkok.*

Given the foregoing clarifications, it suggests that the Special Method should be set up. The Special Method provides specific guidance on arbitration for Government Agencies to ensure that disputes arising out of a state contract will be handled correctly, efficiently and appropriately. At the very least, the sample arbitration clause provided by the 1992 Regulation should be amended in a manner consistent with the principles set forth in those conventions and Thailand's BITs by providing international arbitration as alternative dispute for foreign investors.

### **3. A Uniform and Standard Methodology of Arbitration**

The above sections illustrate that the existing arbitration laws and regulations governing disputes arising out of a state contract (including one relating to FDI) are inconsistent and contradictory. The overall domestic arbitration regime does not correspond to international investment laws, thereby making it inappropriate in dealing with disputes arising out of a state contract representing FDI, especially those with special characteristics, for example, involving in the exercising of the State's power, the provision of public service or utility, or natural resources.

Therefore, this dissertation proposes to establish a uniform and standard methodology on arbitration to handle disputes arising out of a state contract with special characteristics, *per se*, relating to qualifying FDI. The establishment of a uniform and standard methodology on arbitration would adopt principles of protection and promotion on investment in accordance with international law in order to help foreign investors gain greater confidence that their capital and investment would be protected. At the very least, in cases of disputes, foreign investors are not compelled to only rely on domestic remedy system. On the contrary, foreign investors are also eligible to submit their disputes to international arbitration. It is believed that once foreign investors have confidence that their FDI would be protected in Thailand, they would be convinced to invest their capital in Thailand.

With this regard, even though the BOI was established to accomplish these missions and mandates in promoting FDI in a country, other agencies, for example, the Ministry of Finance (the Fiscal Policy Office, the NESDB), the Ministry of Commerce, the Ministry of Foreign Affairs and so on should work closely with the BOI to achieve such goal. In part of the OAG's mandates in reviewing state contracts to be executed by Government Agencies with private parties, it is believed that the

OAG should perform its functions by ensuring that a state contract in question is well written and fulfills the parties' intent and goals. Especially for a state contract representing FDI, the OAG must ensure that a state contract relating to qualifying FDI is valid, enforceable, and corresponds according to both domestic and international laws on investment. The terms and conditions of a contract concerned must be consistent with obligations under international investment law. At the very least, a state contract relating to qualifying FDI must meet obligations as imposed by UNCITRAL, the New York Convention, the MIGA Convention as well as BITs, MITs, or FTAs that Thailand has entered into with other countries.

Therefore, to establish a uniform and standard methodology on arbitration to handle disputes arising out of a state contract relating to qualifying FDI, the following goals need to be implemented. First, Thailand should ratify the ICSID Convention so that the missing piece of the existing arbitration regime on international arbitration would be completed. Second, the Special Method governing disputes arising out of a state contract relating to qualifying FDI should be established. The Special Method would provide an alternative to dispute resolution, for example consultation, negotiation, local arbitration or international arbitration for the parties. The Special Method ensures that disputes between the State and foreign investors would be treated appropriately subject to relevant domestic laws and international laws on arbitration. Third, it is advised that the existing arbitration law and regulations governing disputes arising out of a state contract relating to qualifying FDI should be updated and modified in a manner consonant with the existence of the Administrative Court Act. The details and rationales of this proposal will be discussed in Chapter 5. In the end, it is believed that the establishment of a uniform and standard methodology on arbitration to handle disputes arising out of a state



contract relating to qualifying FDI would promote and enhance FDI flowing toward a country.

## Chapter 5 Towards a Uniform and Standard Methodology of Arbitration

Given the analysis of the arbitration legal system in Chapter 4, it finds that the arbitration for state contracts, especially those relating to FDI, is contradictory, inconsistent, incompatible and incomplete. The inconsistency and incompatibility derive from both aspects of domestic arbitration law itself as well as divergence between domestic arbitration law and international arbitration law.

To fix the inconsistency and incompatibility as well as to harmonize the arbitration domestic law and international arbitration law, this dissertation proposes to set up a Uniform and Standard Methodology on Arbitration Governing Disputes Arising out of a State Contract Relating to qualifying FDI. The establishment of the Uniform and Standard Methodology on Arbitration consists of three (3) missions: the ratification of the ICSID Convention; the establishment of the Special Method; and the modification of the existing arbitration laws and regulations to accommodate the availability of ICSID, the Special Method, and the existence of the Administrative Court.

At the first glance, Thailand should ratify the ICSID Convention since there is no doubt that arbitration is the preferred method of dispute settlement among foreign investors since it offers flexibility, informality, time saving, ability to choose the governing substantive and procedural law, and enforcement of arbitral awards. Arbitration is even claimed as a contract-based substitute for court-supervised litigation<sup>480</sup> where true arbitration produces a decision that binds the parties and carries the legal effect of a final court judgment.<sup>481</sup>

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<sup>480</sup> Jahan P. Raissi, Arbitrating in Thailand, 16 HSTICLR 99 (1992). Also see Henry P. de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 Tul. L. Rev. 42, 43 (1982).

<sup>481</sup> Henry P. de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 Tul. L. Rev. 47 (1982).

By not ratifying the Convention, Thailand creates an undesirable and negative image of the country and disrupts the fluidity of relations at the international level. When looking at the List of Contracting States and Other Signatories of the Convention as of November 4, 2007, very few countries have not yet ratified the Convention and, of course, Thailand is one of them.<sup>482</sup> The List of Contracting States and Other Signatories of the ICSID Convention appears in **Appendix 11 of the Appendices.**

Therefore, Thailand should ratify the ICSID Convention but with a reservation and condition. The reservation would ensure that Thailand as the sovereign state still reserves the right to certain disputes, which are particularly sensitive to Thailand as the host state. With the reservation, Thailand can opt out the ICSID's jurisdiction over certain disputes to the extent that Thailand reserves this right. Additionally, Thailand should set forth the condition that disputes should be submitted to ICSID only if local remedy system has been exhausted. This requirement would ensure that the host state and the investor are given an opportunity to try to settle disputes among themselves before they will be settled before international arbitration, *per se* ICSID. The rationale behind this recommendation for Thailand to ratify the ICSID Convention is illustrated subsequently in this Chapter.

Second, the Special Method governing disputes arising out of a state contract relating to qualifying FDI should be established. The Special Method would ensure that disputes arising out of a "state contract relating to qualifying FDI" would be handled and treated by a mechanism to encourage both the contracting government agency and the private investor to put great efforts to settle the disputes by amicable

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<sup>482</sup> The following signatory states have not ratified the ICSID Convention: Belize; Canada; Dominican Republic; Ethiopia; Guinea-Bissau; Haiti; Kyrgyz Republic; Moldova; Namibia; Russian Federation; Sao Tome and Principe; Thailand.

agreement. The justifications of the establishment of the Special Method as well as the model of the Special Method and its details about the function and process of the Special Method will be subsequently explained.

Third, the existing arbitration laws and regulations governing disputes arising out of a state contract relating to qualifying FDI should be modified in a manner consonant with the availability of the ICSID Convention (with the assumption that Thailand would ratify the ICSID Convention), the establishment of the Special Method, and the existence of the Administrative Court. With such modification, the Arbitration Act, B.E. 2545 (2002) needs to be altered to confer jurisdiction upon the Administrative Court over disputes arising out of state contracts with special characteristics, especially for those relating to qualifying FDI. It is also necessary to draft a new regulation as well as a sample arbitration clause specially governing disputes arising out of state contracts with special characteristics, *per se* relating to qualifying FDI. The details of the proposal are discussed as follows:

## **1. Ratification of the ICSID Convention (1965)**

It is strongly recommended that Thailand should ratify the ICSID Convention. The consequence of such inaction on the part of Thailand has been previously discussed in Chapter 4. Therefore, the following analysis reiterates justifications so as to support that Thailand should ratify the ICSID Convention:

### **1.1. Justifications for Urgent Ratification of the ICSID Convention**

#### **1.1.1. Invention of International Arbitration Mechanism and the Establishment of ICSID**

International arbitration mechanism was initially invented to prevent creditor states from intervening in debtor states' territories by the use of military force to collect debts in a case where debtor states were facing sovereign default. In those

days, such an intervention of military force was known as a so-called “self-help” measure in the pursuit of justice for creditor states’ nationals and accordingly justifiable under international law. However, Latin American countries aggressively opposed to such “self-help” methods and contended that all states (weaker or stronger states) had “equality” in terms of sovereignty over their territories under international law. According to this argument, the principle of “equality of states” was a fundamental principle of international law. This point of view contended that the use of military force for sovereign default was unjustified and military force should only be used for self-defense.<sup>483</sup> This concept of equality had been widely accepted and recognized as the Drago Doctrine. As a result, the Permanent Court of Arbitration (“PCA”) was established as compulsory international arbitration in 1907. Since then, the application of international arbitration had gradually become more acceptable as it provided a dispute settlement resolution between states (home states and host states) in those periods.

International arbitration has continued to function along this path. Particularly, the mechanism of international arbitration relating to trade and investment has gradually evolved until ICSID was established in 1965. Nonetheless, ICSID was seen little different from international arbitration in those days in that ICSID was focused on disputes arising out of investments in particular. ICSID recognized that disputes arising out of investment could bring the confrontation between host states and home states at the state level. Therefore, to avoid such confrontation, ICSID was designed to serve as an international mechanism for dispute settlement between Contracting States and nationals of another Contracting State by a means of conciliation or arbitration.

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<sup>483</sup> Cousens, *supra* note 8.

The avowed purpose of ICSID was first aimed at resolving international conflicts by removing ultimate judicial authority from domestic jurisdiction because foreign investors were uncertain about bias and neutrality of the host state's domestic remedy system. Consequently, ICSID provides an investor-state mechanism in settling disputes between the investor and the host state. Second, the dispute settlement mechanism according to ICSID provides the disputing parties a forum to settle their dispute among themselves so both the host state and the home state will not be compelled to get involved in the dispute by means of subrogation. Therefore, ICSID's mechanism helps prevent the home state and the host state from military or diplomatic conflict. Third, diplomatic protection and subrogation of a foreign investor by the home state is no longer necessary as ICSID plays "depoliticization" role—one of the major contributions of ICSID. The home state is prohibited from formally participating in the dispute once a claim has been submitted to ICSID.<sup>484</sup>

### **1.1.2. Significant Role of International Arbitration**

As its main feature, international arbitration (including ICSID) has been recognized as an effective dispute settlement resolution for foreign investors because it is considered to be flexible, fast, modern, efficient and independent from national jurisdiction.<sup>485</sup> International arbitration even plays greater roles nowadays due to the pressure from insurance industries or financial institutions. To have investments insured with insurance or by financial institutions, foreign investors are more likely to direct their investment into a country where international arbitration is made available in a host state. By such a requirement, foreign investors seem to have no option to determine where they should invest their capital. As a result, foreign

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<sup>484</sup> ICSID Convention, *supra* note 219, art. 27(1).

<sup>485</sup> Biggs, *supra* note 10.

investors are technically compelled to export their capital from their home country to a host country that offers international arbitration as a dispute settlement resolution.

Overall, international arbitration plays a huge role in promoting and enhancing international trade and contributes to the investment incentives, the free-flow of goods, services and open markets to international competition. At the very least, the benefits of opening the economies to international trade and investment would not have materialized if the countries had insisted on submitting disputes arising from these transactions to the exclusive jurisdiction of their domestic courts.<sup>486</sup>

### **1.1.3. ICSID as the Most Suitable International Arbitration Mechanism for Investor-State Disputes**

It is generally accepted that both ICSID and the UNCITRAL Arbitration Rules have been recognized international arbitration mechanisms employed to settle disputes regarding trade and investment. Particularly, the UNCITRAL Arbitration Rules has been recognized as the universal means by which international arbitration deals with international trade and investment disputes among commercial private investors.

However, in terms of investor-state dispute settlement, ICSID is considered the most suitable dispute settlement resolution because ICSID directly offers an investor-state arbitration that provides a forum designed to settle disputes between a host state (Contracting State) as the one party and a national of another Contracting State (a foreign investor) as the other party. ICSID is not intended to deal with disputes among private parties like UNCITRAL or between states.

With the provision of the investor-state arbitration, ICSID serves the benefit of both the foreign investor and the host state. From the investor perspective,

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<sup>486</sup> *Id.*

the international mechanism for settlement of disputes can give a foreign investor much more confidence that his capital and profits will be protected. When a dispute arises, the investor can submit such a dispute to ICSID where it provides a neutral, independent and flexible forum for the parties. The availability of international arbitration under ICSID can put the investor's concern at ease because he is confident that his investment will be protected or at least it will not be easily expropriated or nationalized without just compensation. From the host state perspective, when a foreign investor is confident that his investment in the host state will be protected, the host state will accordingly enjoy the benefit of investment flowing into a country. Through the ICSID mechanism, the host state is further guaranteed that it will not be subject to international claims or diplomatic intervention by foreign investors' home state during the ICSID's arbitration process.<sup>487</sup>

Additionally, ICSID has been currently considered one of the worldwide international arbitration institutions and recognized as a preferred method of alternative dispute resolution for foreign investors as well as international investment guarantee and insurance industries. Especially for the latter, most insurance corporations or financial institutions tentatively require foreign investors to insert an arbitration clause that establishes ICSID as a dispute resolution mechanism in their investment contracts. The lack of availability of ICSID may deter transnational investment flow into a country. Only host states that can provide such international arbitration mechanism will be definitely more attractive and promising for foreign investment than states that do not.

Last but not least, ICSID also issues the ICSID Additional Facility Rules administering certain types of proceedings between States and foreign

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<sup>487</sup> ICSID Convention, *supra* note 219, art. 27. See also William Rand, Robert N. Hornick and Paul Friedland, "ICSID 's Emerging Jurisdiction: The Scope of ICSID's Jurisdiction," 19 N.Y.U.J. Int'l L. & Pol. 33



investors, which fall outside the scope and ICSID's jurisdiction. Circumstances that are outside the scope of ICSID can be illustrated in those cases where either a host state or a home state of foreign investors is not the Contracting State of ICSID or where a dispute is not an investment dispute but relates to a transaction concerned, which is not an ordinary commercial transaction.<sup>488</sup> The application of the Additional Facility Rules can be found in the North American Free Trade Agreement ("NAFTA"), the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur. It is to say that under the present circumstance, ICSID is not only the recognized form of international arbitration among Contracting States but also a preferred method for a dispute settlement among non-Contracting States subject to the Additional Facility Rules.

Therefore, due to the ICSID Additional Facility Rules, it is very possible that Thailand (including Thai investors) may be forced to get involved in international arbitration under ICSID one way or another even though Thailand is not defined as a Contracting State to the ICSID Convention.

#### **1.1.4. Institutional Arrangements**

ICSID not only offers an investor-state settlement resolution, which is applies to disputes between a host state and a foreign investor but it also offers options to the disputing parties regarding the venue of arbitration where it is most convenient to them. The reason is that ICSID has made some arrangements with other international arbitration institutions allowing ICSID to use their offices to be a place of arbitration under ICSID. In addition to ICSID's headquarters in Washington, District of Columbia, the United States, the disputing parties may agree to hold their

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<sup>488</sup> *Id.* art. 27.

proceedings at any other places subject to certain conditions of the following institutions.<sup>489</sup>

- Permanent Court of Arbitration at The Hague;
- Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo, at Kuala Lumpur and at Lagos;
- Australian Commercial Disputes Centre at Sydney;
- Australian Centre for International Commercial Arbitration at Melbourne;
- Singapore International Arbitration Centre;
- Gulf Cooperation Council Commercial Arbitration Centre at Bahrain; and
- German Institution of Arbitration.

Such arrangements with other institutions even bring ICSID up to its worldwide recognition as an international arbitration institution because it offers venues covering regions of Europe, America, Asia-Pacific, and Africa.

#### **1.1.5. Close Relations with the World Bank**

It is generally accepted that ICSID has a very close link to the World Bank. In fact, ICSID was initially established to relieve the President of the World Bank's task in assisting in mediation or conciliation of investment disputes between governments and private foreign investors:<sup>490</sup>

*On a number of occasions in the past, the World Bank as an institution and the President of the Bank in his personal capacity have assisted in mediation or conciliation of investment disputes between governments and private foreign investors. The creation of the International Centre for Settlement of Investment Disputes (ICSID) in 1966 was in part intended to relieve the President and the staff of the burden of becoming involved in such disputes. But the Bank's*

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<sup>489</sup> ICSID, *Institutional Arrangements*, [www.worldbank.org/icsid](http://www.worldbank.org/icsid) (last visited Apr. 23, 2009).

<sup>490</sup> *Id.*

*overriding consideration in creating ICSID was the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help promote increased flows of international investment.*

With the World Bank's pronouncement, ICSID was established as an international arbitration institution and was specially designed to offer a settlement resolution of investment disputes between governments and foreign investors in order to enhance FDI flow from home states to host states.

Additionally, ICSID becomes part of the World Bank Group ("WBG"). Among of them are (1) International Bank for Reconstruction and Development ("IBRD"); (2) International Development Association ("IDA"); (3) International Finance Corporation ("IFC"); (4) Multilateral Investment Guarantee Agency ("MIGA"); and (5) International Centre for Settlement of Investment Disputes ("ICSID").

Apart from the fact that the World Bank established ICSID, it further appears that the President of the World Bank becomes *ex officio* Chairman of the ICSID's Administrative Council.<sup>491</sup> Therefore, it is out of question that ICSID has deeply associated with the World Bank.

The ICSID's affiliation with the World Bank technically contributes to the efficiency of ICSID's functions in terms of how enforceable ICSID's arbitral awards are. It appears that the parties (host states) in most cases are seemingly willing to comply with ICSID's arbitral awards since this compliance may facilitate host states' application of financial assistance from the World Bank. In other words, the World Bank can technically press the parties (particularly host states) to comply with ICSID's awards to certain extent. Due to the close association with the World

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<sup>491</sup> ICSID Convention, *supra* note 219, art. 5.

Bank, ICSID has become more effective, efficient and recognized as an international arbitration institution.

#### **1.1.6. Enforceability of Arbitral Awards under the New York Convention (1958)**

Thailand ratified the New York Convention on December 21, 1959, with no reservation.<sup>492</sup> As a result, Thailand has obligations under the New York Convention to recognize and enforce arbitral awards made in other territories whether or not Thailand ratifies the ICSID Convention. In fact, the non-ratification of the ICSID Convention does not keep Thailand from being involved in international arbitration. On the contrary, due to the New York Convention, Thailand is still obliged to recognize and enforce international arbitral awards made outside Thailand.

The consequence of non-ratification of the ICSID Convention is preposterous since it prevents Thailand from being eligible from referring a dispute to ICSID as a worldwide international arbitration institution. The ineligibility of ICSID's application will thereby bring about the contradiction of the application and practice on the international arbitration system in Thailand. It is controversial that Thailand is ineligible to submit a dispute to ICSID due to non-ratification of the ICSID Convention but Thailand has already committed herself to recognize and enforce arbitral awards made outside her territory regardless of the international arbitration institution or an ad-hoc arbitration.<sup>493</sup>

As a result, it is possible to find that Thailand may need to recognize and enforce the arbitral award made under the ICSID Convention (including the ICSID Additional Facility Rules) in her territory provided that the losing party has or owns property in Thailand. This contradiction of the international arbitration can

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<sup>492</sup> The New York Convention was adopted on June 10, 1958

<sup>493</sup> See also Annex 10 of the Appendices.

make the entire arbitration legal system particularly relating to international arbitration inconsistent and incompatible as has been mentioned earlier.

#### **1.1.7. Enforceability of Thailand's Obligations under the MIGA Convention**

Subject to the MIGA Convention, Member Countries are obliged to comply with arbitral awards when they have disputes with the Agency (MIGA). Disputes between the Member Country as a host state and MIGA occur when MIGA pays the insured investor compensation upon the claim where the insured investor has against the host state. Upon compensation paid to the insured investor by MIGA, MIGA will be subsequently subrogated the insured investor's rights to pursue such a claim against the host state.<sup>494</sup> Basically, disputes between MIGA and the host state due to the subrogated rights shall be settled in accordance with the procedures set forth in Annex II to the MIGA Convention. As its initial resolution, the parties are required to settle their dispute through negotiation. When the negotiation has failed, either party will be entitled to request arbitration proceedings unless the parties reserve to resort first to conciliation.<sup>495</sup> In most cases, the arbitration proceedings between the host state and MIGA will be referred to ICSID.

As Thailand becomes a membership of the MIGA Convention, Thailand may be compelled to get involved in international arbitration with MIGA when MIGA has defended the insured investor's right to pursue his claim against Thailand as a host state. Under such a circumstance, the dispute between MIGA and Thailand is likely to be submitted to international arbitration. More specifically, Thailand may be requested by MIGA to refer the dispute to international arbitration under ICSID in

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<sup>494</sup> *Id.* art. 18(a).

<sup>495</sup> *Id.* art. 57(b).

accordance with the ICSID Additional Facility Rules,<sup>496</sup> which can apply to disputes outside the scope of ICSID's jurisdiction, for example, due to being non-Contracting States. In the end, Thailand may not refuse the application of international arbitration under ICSID even though Thailand has not ratified the ICSID Convention.

Therefore, due to being a membership of the New York Convention and the MIGA Convention, it will be difficult for Thailand to avoid being involved in international arbitration. Despite of non-ratification of the ICSID Convention, Thailand may be compelled to submit a dispute to ICSID under the ICSID Additional Rules. In consequence, Thailand's obligations under the New York Convention and the MIGA Convention make the overall international arbitration system in Thailand even more contradictory and controversial.

#### **1.1.8. Thailand as a State Member of ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (“AALCO”)**

In addition to the ICSID Convention, the New York Convention, and the MIGA Convention, Thailand also became a member of AALCO in 1961.<sup>497</sup> Participation in AALCO is open to all Asian and African States. In terms of promotion and protection of investment, AALCO has concluded tentative formulations in regard with model investment agreements. As to the question of settlement of disputes, fair and expeditious procedures are established in the hope of giving rise to greater stability, confidence and protection to transnational investors. AALCO also recommended that the most appropriate modality for creating stability and confidence for foreign investors in international transactions is the ICSID Convention or the ICSID Additional Facility Rules, if applicable. Otherwise, the

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<sup>496</sup> ICSID has adopted the Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention (Article 25(1)).

<sup>497</sup> ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION (AALCO), List of Member States, [www.aalco.int](http://www.aalco.int) (last visited Apr. 23, 2009).

UNCITRAL Arbitration and Conciliation Rules might be alternatively appropriate.<sup>498</sup> Therefore, Thailand, as a state member of AALCO, is expected to adopt AALCO's policy as well as to take AALCO's recommendations into consideration. Otherwise, there is no point for Thailand to be a member of such an organization.

### 1.1.9. Popularity of BITs

UNCTAD<sup>499</sup> defines the term of "BIT" as an agreement between two (2) countries for the reciprocal encouragement, promotion, and protection of investment in each other's territories by companies based in either country.<sup>500</sup> Apparently, the number of BITs has been growing dramatically in recent years as demonstrated in the Figure below. The Figure illustrates the extraordinary proliferation of BITs in that in 2002, there were two thousand two hundred and sixty five (2,265) BITs involving one hundred and seventy six (176) countries, as compared to about three hundred eighty five (385) BITs in 1989.<sup>501</sup>

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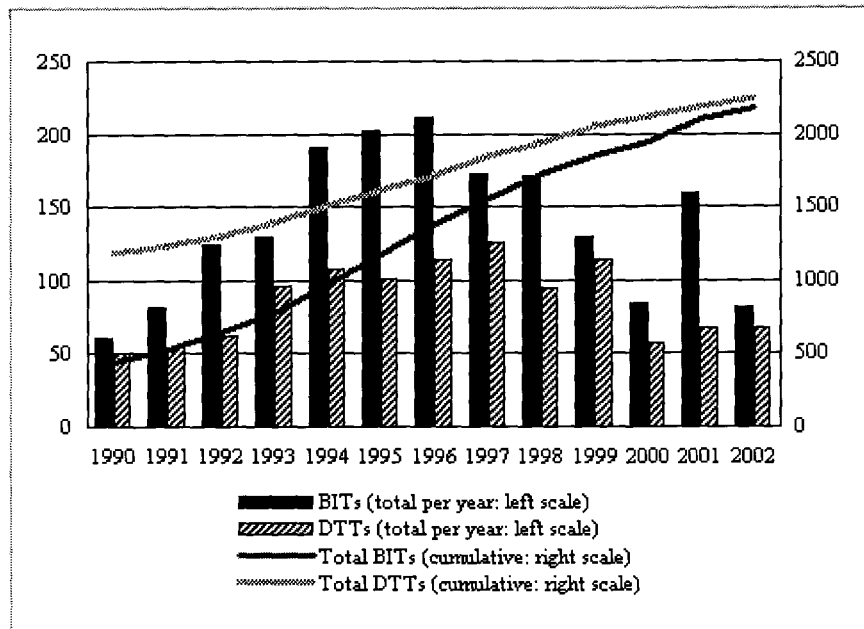
<sup>498</sup> AALCO, Promotion and Protection of Investment, <http://www.aalco.int> (last visited Apr. 24, 2009).

<sup>499</sup> United Nations Conference on Trade and Development or UNCTAD was established in 1964. UNCTAD promotes the development-friendly integration of developing countries into the world economy. UNCTAD has progressively evolved into an authoritative knowledge-based institution whose work aims to help shape current policy debates and thinking on development, with a particular focus on ensuring that domestic policies and international action are mutually supportive in bringing about sustainable development.

<sup>500</sup> UNCTAD, What are BITs?, <http://www.unctadxi.org/templates/Page1006.aspx> (last visited Apr. 24, 2009).

<sup>501</sup> *Id.*

**Figure: Number of Bilateral Investment Treaties (“BITs”) and Double Taxation Treaties (“DTTs”) concluded per year and cumulative 1990-2002**



(Source: UNCTAD, BITs and DTT databases)

From the Figure, the extraordinary proliferation of BITs also demonstrates the greater popularity and significance of international arbitration as dispute settlement mechanism. The reason is that international arbitration is strongly advised and concluded as dispute settlement resolution in BITs. Therefore, BITs have brought about the development of international arbitration in many forms. One of those forms is found in ICSID in which most BITs refer investment disputes to ICSID as a disputes settlement mechanism between host states and foreign investors. For example, the North American Free Trade Agreement (NAFTA) gives disputing investors an opportunity to submit the claim to ICSID under the ICSID Convention or the ICSID Additional Facility Rules.<sup>502</sup> As of 2002, there were six (6) cases of disputes between Canada, Mexico and the United States subject to ICSID.

<sup>502</sup> U.S. Department of State, *NAFTA Investor-State Arbitrations*, <http://www.state.gov/s/l/c3439.htm> (last visited Apr. 24, 2009).



Therefore, it is evident that the growth of BITs can promote the significance and popularity of ICSID's roles. It is believed that even though Thailand has not ratified the ICSID Convention, Thailand may be compelled to refer a dispute to ICSID by BITs sooner or later because ICSID also offers the ICSID Additional Facility Rules to a dispute between States and nationals of other States outside the scope of ICSID's jurisdiction, thereby forcing Thailand to be involved in international arbitration under ICSID inevitably.

#### **1.1.10. Sustainable Economic Development**

To achieve sustainable economic development, the United Nations, in the Action Programme of the United Nations Development Decade II, called upon all parties (including developing countries as host states, developed countries as home states) and foreign investors to be aware of the significant roles they each play:

*Developing countries will adopt appropriate measures for inviting, stimulating and making effective use of foreign private capital, taking into account the areas in which such capital should be sought and bearing in mind the importance for its attraction of conditions conducive to sustained investment. Developed countries, on their part, will consider adopting further measures to encourage the flow of private capital to developing countries. Foreign private investment in developing countries should be undertaken in a manner consistent with the development objectives and priorities established in their national plans. Foreign private investors in developing countries should endeavour to provide for an increase in the local share in management and administration, employment and training of local labour including personnel at the managerial and technical levels, participation of local capital and reinvestment of profits. Efforts will be made to foster better understanding of the rights and obligations of both host and capital-exporting countries, as well as of individual investors.*<sup>503</sup>

Thailand as one of the United Nations members<sup>504</sup> cannot escape from such concerns. To adopt appropriate measures for inviting, stimulating and making

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<sup>503</sup> The Guidelines for International Investment were adopted unanimously by the Council of the International Chamber of Commerce at its 120<sup>th</sup> Session on 29 November 1972.

<sup>504</sup> Thailand has joined UN on December 16, 1946.

effective use of foreign private capital as recommended by the United Nations Action Program, it seems that Thailand cannot avoid the adoption of ICSID as a dispute settlement mechanism sooner or later. If Thailand does not accept ICSID as a mechanism for settlement of investment disputes, Thailand will not be able to get benefits of transnational investments that ICSID provides. Furthermore, due to the pressure on foreign investors by insurance industries or financial institutions, it seems there is no alternative for foreign investors to invest capital into a country where international means for dispute resolution is provided.

### **1.2. Advantages and Disadvantages of the ICSID Convention**

Although it is very obvious that Thailand will benefit from the ratification of the ICSID Convention, it is still indispensable to analyze the pros and cons of the ICSID Convention in order to clarify how this might best be done. While the benefits of the ratification of the ICSID Convention to Thailand are evident, such a decision must be proceeded upon consideration of any foreseeable downside. The following demonstrates the pros and cons of the ICSID Convention by starting with the pros:

First, ICSID is an autonomous international arbitration institution offering the investor-state dispute settlement under the ICSID Convention. With its purposes, the Convention sought to remove major impediments to the free international flow of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement.<sup>505</sup> Therefore, ICSID is created to offer settlement mechanism of investor-state disputes and is currently recognized as a worldwide and preferred dispute settlement resolution for private foreign investors and insurance and financial institutions. As a result,

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<sup>505</sup> ICSID, About ICSID, [http://icsid.worldbank.org/ICSID/ICSID/AboutICSID\\_Home.jsp](http://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp) (last visited Apr. 24, 2009).

ICSID's roles can attract and enhance FDI flow toward a country where ICSID is made available as a dispute settlement resolution for private foreign investors. Therefore, Thailand, were it to submit to ICSID, would more be able to attract and motivate foreign investors to consider Thailand as a potential country where they should direct their investment. Upon the ratification of the Convention, Thailand would be able to enjoy benefits that the Convention provides.

Second, because Thailand has already ratified the New York Convention and the MIGA Convention but has not yet ratified the ICSID Convention, the entire arbitration legal system appears incomplete and contradictory, especially in part of international arbitration. Under the New York Convention, Thailand is bound to recognize and enforce arbitral awards made outside her territory. Under the MIGA Convention, Thailand is bound to compensate MIGA the full amount that MIGA has paid an insured investor for loss or damages incurred by Thailand as a host state. Obligations under the New York Convention and the MIGA Convention compel Thailand to recognize, enforce and comply with arbitral award made outside Thailand even though Thailand is ineligible to submit dispute to international arbitration under ICSID. Therefore, the ratification of the ICSID Convention will provide Thailand the eligibility and accessibility to ICSID with the benefit of investor-state dispute settlement. The ratification of the ICSID Convention can fill a missing piece of the overall picture of the arbitration legal system, especially with international arbitration. The Flowchart showing the Incompletion of the Existing International Arbitration System in Thailand appears in **Appendix 10 of the Appendices**.

Third, to be subject to the ICSID's jurisdiction, the parties' consent is the cornerstone of the ICSID Convention. The mere ratification of the ICSID Convention does not confer upon the Centre jurisdiction over investment disputes

automatically. The ratification of the Convention simply verifies that the state, which ratifies the Convention, becomes the Contracting State to the ICSID Convention but it does not constitute the consent on behalf of the Contracting State to submit a dispute to the Centre automatically.<sup>506</sup> If the Contracting State desires to submit disputes to the Centre, the Contracting State is further required to give its consent in writing to the Centre designating that the disputes shall be settled before ICSID.<sup>507</sup> In this sense, the Convention requires two levels of consent. At the first level, it is deemed as the parties giving consent to the Centre when the Contracting States, which agreed to be bound by the Convention, ratify the Convention. At the second level, the parties' consent can be given to the Centre when the parties (a host state and investor) have agreed by a means of an agreement to ICSID arbitration.<sup>508</sup>

Therefore, the mere ratification of the ICSID Convention on part of Thailand does not give the Centre exclusive rights to assume jurisdiction over investment disputes. Apart from the requirement of the two-level consent, the ICSID Convention also allows the Contracting States to provide a class or classes of disputes that would or would not consider submitting to ICSID. As a result, Thailand still reserves the right not to submit certain disputes to ICSID if she thinks that those disputes should not be settled by the Centre. Under such circumstance, Thailand can

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<sup>506</sup> ICSID Convention, *supra* note 219, art. 25(4).

(4) Any Contracting State may, at the time of ratification, acceptance, or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

<sup>507</sup> ICSID Convention, *supra* note 219, art. 25(1).

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

<sup>508</sup> *Autopista Concesuabada de Venezuela, C.A. v Bolivarian Republic of Venezuela.*

make an agreement with a private investor that disputes arising out of the investment concerned shall be settled by any other means.

On the other hand, even though it is evident that the ICSID Convention would benefit Thailand as a host state that needs FDI flow toward her territory, the downside of the ICSID Convention cannot be disregarded. The following are foreseeable disadvantages of the ICSID Convention that Thailand should take into consideration. First, the ratification of the ICSID Convention means that Thailand has to give sovereignty and exclusive jurisdiction over to ICSID regarding disputes arising out of investment. However, this is not always absolutely true because this drawback can be mended. Under the ICSID Convention, Thailand can make a reservation at the time of ratification of the ICSID Convention by notifying the Centre of the class or classes of disputes, which would or would not be considered submitting to ICSID's jurisdiction.<sup>509</sup> In other words, the ICSID Convention allows Thailand to make a reservation to the Convention so that Thailand still has exclusive rights of the jurisdiction over those disputes that carry sensitive issues to Thailand's nationals. Therefore, regardless of this concern, Thailand should carefully assess what kind of disputes should or should not be submitting to the Centre's jurisdiction rather than being persistent of inaction of ratification of the ICSID convention.

Second, from a developing countries' perspective, international arbitration may not always be a preferred method of settlement of disputes since it is very costly to hire a qualified legal counsellor and to conduct international arbitration. Notwithstanding, this obstacle can be overcome by reforming and establishing domestic remedy system that is impartial, reliable and efficient to assure foreign investors' confidence. It is believed that when private foreign investors satisfy and

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<sup>509</sup> ICSID Convention, *supra* note 219, art. 25(4).

are confident with neutrality and efficiency of domestic remedy system, they would choose a domestic remedy system over international arbitration because a domestic remedy system would provide a cost-saving method of dispute settlement. Moreover, it would be more convenient to enforce a domestic court judgement or domestic arbitral award because assets or property involved the dispute are situated in the host state.

Third, it has been argued that ICSID is considered an international arbitration available only for foreign investors, not for host states. The reason is that ICSID is seen more favourable to foreign investors than host states. Seymour even claims that ICSID is a one-way court,<sup>510</sup> for almost invariably, the plaintiff is a foreign private investor and the defendant is a state. It is very rare to find the case on the other way because the host state seems to have hesitation to bring disputes against foreign investors to ICSID as appeared in the *Bolivia case*.

In the *Bolivia case*, under the IMF's and the World Bank's financial assistance programme, the Bolivian government had been pressed to sell off publicly run water systems (in other words, to privatize rainwater) in the province of Cochabamba. As a result, the Bolivian government subsequently entered into a privatization contract with Bechtel Corporation, a very powerful American firm, to run water system in Cochabamba. Within weeks, water bills skyrocketed to unaffordable levels. Therefore, civic demonstrations had started in chasing Bechtel away from public water and encouraging the government in response to break contractual obligations arising from the privatization contract with Bechtel. During the demonstration, it was found that a boy was killed. As a result of such

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<sup>510</sup> Malcolm Seymour, World Bank's ICSID to Hear Case on Bolivia Water Privatization, *Economic Justice News*, Vol. 5, No. 3 (Oct. 2002), available at <http://www.50years.org/cms/ejn/story/85> (last visited Apr. 24, 2009).

demonstration and pressure, Bechtel eventually decided to withdraw its investment in Bolivia and bring this case against the Bolivian government to ICSID.

Hypothetically, Bolivia and its people through the Bolivian government could also sue Bechtel to ICSID. However, suing a multinational corporation like Bachtel would alienate Western lenders and investors, spelling economic and political strangulation for the Bolivian government. As a result, non-governmental organizations (NGOs) brought together the Democracy Centre, the Institute for Policy Studies, and Earth Justice and submitted a petition to ICSID requesting civil participation in the suit even though they were not defined as eligible party to submit application to ICSID under the ICSID Convention. However, on May 19, 2005, an ICSID tribunal for the first time decided that it had the power to accept an *amicus curiae* brief from a civil society organization, even though these briefs might not carry the same weight as the documents submitted by the actual parties. At least, they gave citizens some voice before the tribunal. Nonetheless, before the arbitral tribunal in this case would render an award, Bechtel decided to withdraw a case from ICSID.

From the *Bolivia case*, it is noted that first, even though some argued that ICSID was more favourable to foreign investors, the ICSID tribunal in the *Bolivia Case* proved that it was not always true. At least, the ICSID tribunal in the *Bolivia Case* reaffirmed that ICSID was the investor-state dispute settlement and accepted an *amicus curiae*<sup>511</sup> brief from the third party into a case as if he was representing on

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<sup>511</sup> *Amicus curiae* or *amicus curiae* (plural *amici curiae*) is a legal Latin phrase, literally translated as "friend of the court", that refers to someone, not a party to a case, who volunteers to offer information on a point of law or some other aspect of the case to assist the court in deciding a matter before it. The information may be a legal opinion in the form of a brief, testimony that has not been solicited by any of the parties, or a learned treatise on a matter that bears on the case. The decision whether to admit the information lies with the discretion of the court.

behalf of the Bolivian government as the host state. At very least, the ICSID tribunal gave citizens some voice before the court.<sup>512</sup>

So do the advantages of ratifying the Convention offset the disadvantages? This dissertation argues that the advantages far outweigh the disadvantages because the potential drawbacks of the Convention can be solved and corrected. Furthermore, Thailand's action to ratify the ICSID Convention herself would overshadow the consequences of inaction and the unrecoverable repercussions to the negative image that have ensued as a result of the present state of affairs.

### 1.3. Ratification with a Reservation

This dissertation proposes that Thailand should ratify the ICSID Convention with a reservation. The ratification with a reservation is generally allowable and justifiable in accordance with the 1969 Vienna Convention and the ICSID Convention. Pursuant to Article 19 of the 1969 Vienna Convention, all states have rights to make a reservation when signing, ratifying, accepting, approving or acceding to a treaty.<sup>513</sup> Furthermore, Article 25 (4) of the ICSID Convention also allows a Contracting State to notify the Centre of class or classes of disputes, which it would or would not consider submitting to the jurisdiction of the Centre at the time of ratification, acceptance or approval of the Convention.<sup>514</sup>

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<sup>512</sup> Seymour, *supra* note 496.

<sup>513</sup> Article 19 of Vienna Convention on the Law of Treaties (May 23, 1969) [hereinafter the 1969 Vienna Convention]:

A State may, when signing, ratifying, accepting, approving or acceding to the treaty, formulate a reservation unless:

- (a) the reservation is prohibited by the treaty;
- (b) the treaty provides that only specified reservation, which do not include the reservation in question, may be made; or
- (c) in cases of failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

<sup>514</sup> ICSID Convention, *supra* note 219, art. 25(4).

(4) Any Contracting State may, at the time of ratification, acceptance, or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).



Subject to the ICSID Convention, the notification of those classes is not only limited to the fact that it must be made at the time of ratification but the Convention also allows the Contracting State to submit notification to the Centre at any time thereafter.<sup>515</sup> When the time of ratification with a reservation has passed, the Contracting State will be able to notify the Centre of the class or classes of disputes, which it would or would not be subject to the Centre's jurisdiction at any other times. This provision is considered the advanced inventive measure and very beneficial to the Contracting State in practice since it allows the Contracting State to alter the class or classes of disputes that would or would not be within ICSID's jurisdiction from time to time to serve the Contracting State's need. With this provision, the Contracting State will be able to accommodate new issues that become (or might become) sensitive and substantial after the ratification of the ICSID Convention.

The followings are sample reservations to the ICSID Convention of some Contracting States:

China adopted a similar stance when the Chinese government acceded to the ICSID Convention. Upon the ratification, China made a reservation that:

*[t]he Chinese Government would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation or nationalization."*

Given the ratification, China agrees that only disputes over compensation resulting from expropriation or nationalization shall be submitted to the jurisdiction of the Centre. From the notification, it is implicitly understood that ICSID only has jurisdiction to determine the amount of compensation resulting from expropriation or nationalization, while China still reserves rights to determine the initial issues and remaining issues over those disputes. The Chinese Government,

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<sup>515</sup> ICSID Convention, *supra* note 219, art. 25(4).

through her local authorities, still has exclusive rights to determine any potential violation by the government as to whether there is any expropriation or nationalization. As a result, the notification merely entitles foreign investors the right to refer the matter of compensation to international arbitration to determine the amount of compensation.<sup>516</sup>

In another example, Jamaica declared that disputes arising directly out of an investment relating to minerals or other natural resources would not be subject to the jurisdiction of ICSID.<sup>517</sup> In other cases, the reservation was very broad in scope and as a result, the jurisdiction of ICSID was very limited. For instance, in Papua New Guinea, the jurisdiction of ICSID was restricted to only disputes that were considered fundamental to the investment itself would be subject to ICSID's jurisdiction.<sup>518</sup> Turkey made a reservation that only disputes arising out of investment activities that had obtained necessary permission in accordance with the relevant Turkish law on foreign capital, and that had effectively started would be subject to ICSID's jurisdiction. Moreover, it stated that disputes relating to property and real rights upon real estates would be totally under the jurisdiction of the Turkish courts and therefore would not be submitted to ICSID's jurisdiction.<sup>519</sup> These tailored-made reservations ensure that each state still reserve exclusive rights over certain disputes that would or would not be submitting to ICSID.

#### **1.4. Proposed Reservation and Condition**

This dissertation proposes that Thailand should ratify the ICSID Convention with a reservation. Prior to the ratification of the ICSID Convention, it is

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<sup>516</sup> Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable For Submission to the Centre. See also Michael J. Moser and O'Melveny & Myers, "Treaty Claims, China: Do China's BITs Have Teeth?" 1626 *PLI/Corp* 283, 285.

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

<sup>519</sup> *Id.*

necessary for Thailand to formulate a reservation of the class or classes of disputes that it would or would not consider submitting to the jurisdiction of the Centre. In this dissertation, it is advised that Thailand should make a reservation on natural resources as natural resources are substantial and sensitive to individual sovereign states. Individual states should be able to reserve and have full sovereign powers over their natural resources according to their national interests and self-determination of their people.

The issue relating to natural resources is also in line with the United Nations. The United Nations is aware of the significance of natural resources of each state and accordingly the United Nations issued the United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources stating that:

*... Considering that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,*

*Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,*

*1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."*

*2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.*

The foregoing excerpts demonstrate that based on the principles of equality of states, all states (developed and developing countries) have full and

permanent sovereignty over their natural wealth and resources. As a result, they should have inalienable rights to freely dispose of their natural wealth and resources in accordance with their national interests, self-determination of their nations and their people and the economic independence of their states. If any loss or damage occurs from the exercise of the sovereign power of the host state over its natural resources to foreign investors, such loss or damage would be compensated to those investors by the host state.

Due to the fact that individual states have full and permanent sovereignty over their natural wealth and resources, they should accordingly have exclusive rights on disputes over their natural wealth and resources. At least, they should be able to decide whether those disputes over their natural wealth and resources should be subject to domestic remedy system or submitted to the Centre's jurisdiction. Therefore, this dissertation recommends that Thailand should reserve her inalienable rights on disputes over her natural resources as subject to the jurisdiction of her domestic judiciary system. The following is the proposed reservation for Thailand at the time of ratification of the ICSID Convention:

*The Government of Thailand would not consider submitting to the jurisdiction of ICSID disputes over natural resources.*

After the ratification, if Thailand encounters any other disputes or concerns that Thailand desires to reserve within domestic judiciary system (for example, disputes relating to public service or utility), Thailand will be entitled to submit notification of additional classes that would not consider submitting to ICSID's jurisdiction to the Centre thereafter.<sup>520</sup>

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<sup>520</sup> ICSID Convention, *supra* note 219, art. 25(4).

In addition to the ratification with a reservation, it is recommended that Thailand should require the exhaustion of local administrative or judicial remedies as a condition of its consent to international arbitration under the ICSID Convention. Government Agencies should set forth the condition of disputes to be submitted to ICSID in that only disputes that have been exhausted by local administrative or judicial remedies would be submitted to the jurisdiction of the Centre.

### **1.5. Conclusion**

There is a great deal of evidence to suggest that Thailand would tremendously benefit from ICSID as a worldwide international arbitration institution dealing with investor-state disputes. Therefore, there is absolutely no doubt that Thailand should ratify the ICSID Convention. This suggestion is also in line with the Policy Statement of the Government under the leadership of Prime Minister Abhisit Vejjajiva delivered to the National Assembly on December 30, 2008, where Prime Minister Abhisit Vejjajiva committed his support of international agreements (bilateral and multilateral) that are beneficial to Thailand. According to the Policy Statement, Vejjajiva also made assurances that he would work to expedite the ratification of agreements already signed like the ICSID Convention.<sup>521</sup>

Aside from the immediate benefits Thailand might see as a result, the ratification of the ICSID Convention would also have symbolic significance for Thailand on the world stage. The development of international arbitration has been driven various international organizations, for example, the United Nations, the World Bank, IMF, ASEAN, or AALCO, etc. As part of the globalization, the ratification of the ICSID Convention on part of Thailand would prove that Thailand's foreign policy

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<sup>521</sup> Abhisit Vejjajiva, *supra* note 94.

has been implemented in a manner consonant with those international organisations in that Thailand would move forward with the rest of the world.

On the contrary, by not ratifying the ICSID Convention, Thailand continues to maintain a negative image at the international level. Especially, when Thailand already signed and became a signatory state of ICSID without ratification, it was assumed that the obligations arising out of the Convention as an international agreement would be imposed on Thailand according to the Vienna Convention because Thailand agreed to the substance of the ICSID Convention. Therefore, Thailand already has its obligation not to defeat the object and purpose of a treaty, *per se* the ICSID Convention, prior to its entry into force.<sup>522</sup> Otherwise, Thailand may be accused of violating the rule of *pacta sunt servanda* under the 1969 Vienna Convention. Therefore, it seems inappropriate for Thailand not to ratify the Convention in which more than half of the obligations are already binding on Thailand.

To help Thailand gain more confidence in ratifying the Convention, Thailand is encouraged to make a reservation while ratifying the Convention. By ratifying the Convention, Thailand is allowed to reserve certain disputes substantial and sensitive to Thailand from ICSID's jurisdiction. In the meanwhile, Thailand should figure out how to reform and reinforce domestic remedy system to work parallel with the availability of ICSID arbitration. By doing so, it is advised that the Special Method to deal with disputes arising out of a state contract relating to qualifying FDI as the initial settlement mechanism should be established.

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<sup>522</sup> The 1969 Vienna Convention, *supra* note 515, art. 18.

## **2. The Special Method Governing Disputes Arising out of a State Contract Relating to Qualifying FDI (the “Special Method”)**

In addition to making international arbitration under ICSID available for foreign investors by ratifying the ICSID Convention, the establishment of the Special Method is the second task of reforming the entire arbitration legal system in Thailand. The proposition of establishing the Special Method is mainly to incorporate the Calvo Clause as an alternative settlement resolution prior to institution of international arbitration under ICSID. By adopting the Calvo Clause, the Special Method would require the parties (a host state through its contracting government agencies and foreign investors) to recourse to local remedies system as their initial settlement resolution. Only when the Special Method has failed, the parties would be eligible to international arbitration.

### **2.1. Adoption of the Calvo Clause to the Special Method**

#### **2.1.1 Use of Term “Calvo Clause”**

The Calvo Clause originated from the Calvo Doctrine holding two (2) key principles: equality of sovereign states and national treatment standard. The first principle “equality of sovereign states,” means that all sovereign states are internationally equal, free and independent and as a result, enjoy the right on the basis of equality, to freedom from interference of any sort by other states of either armed force or diplomatic protection. The second principle is the “national treatment standard,” which provides that foreign investors should not be granted more rights or privileges than those accorded to nationals. As a result, when they come across conflicts, differences, or disputes with a host state, they must seek redress for loss or grief only before local remedies prior to seeking help from their home states through international claims or diplomatic protection.

The Calvo Doctrine has been severely opposed by most developed countries (including the United States) but the Calvo Doctrine in regard with the national treatment standard has been partially accepted and accordingly it has known as the Calvo Clause. By adopting the Calvo Clause, foreign investors are required to seek local remedies before bringing a case to international arbitration.

### **2.1.2. Acceptance of the Calvo Clause at the International Level**

Even though the complete principles of the Calvo Doctrine have been repudiated by home states, the Calvo Doctrine is, however, not completely dead.<sup>523</sup> The Calvo Clause still remains in effect in Latin American countries but the degree of its application may vary according to the economic and social climate of negotiating states. The Calvo Clause has been recently found in BITs with many developed states (including the United States), requiring foreign investors to seek the exhaustion of local remedies before the institution of international arbitration. Despite this, the complete Calvo Doctrine has not been recognized as part of international law but still plays important roles internationally.

#### **(i) *North American Dredging Company of Texas (U.S.) v United Mexican States***<sup>524</sup>

The notion of this case demonstrated that International Tribunal has partially accepted the Calvo Clause based on the status of the individual in international law, not as a principle of international law. This case was brought before the U.S.-Mexican General Claims Commission and one of the central questions in this case raised before this Commission was the validity of the Calvo Clause in a contract between a state and foreign investor as to whether the Company

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<sup>523</sup> Wenhua Shan, *IS CALVO DEAD?*, 55 Am. J. Comp. L. 123, at 163 (2007).

<sup>524</sup> *North American Dredging Company of Texas (U.S.) v United Mexican States*, 4 Rev. Int'l Arb. Awards 26 (1926).



would be entitled to bring a case to the Commission before the Company exhausted local remedies.

In this case, the Company suffered from personal and property injuries from the Mexican revolution in 1910 so it sought to redress these injuries from a breach of contract in the dredging of the port of Salina Cruz before the Commission. In the end, the Commission held that the Calvo Clause in the said contract deprived the Company of requesting diplomatic protection and required it to first seek redress from local remedies system.

Nonetheless, the Commission's ruling in this case was not laid down as a general rule to apply to each and every case. The Commission stated that neither the Calvo Clause would be valid in any situation,<sup>525</sup> nor the Calvo Clause would always preclude diplomatic intervention, especially in cases of denial of justice under international law.<sup>526</sup> As a result, the application of the Calvo clause has been presently interpreted and accepted to varying degrees while its complete validity has been rejected under international law.<sup>527</sup>

#### **(ii) Application of the Calvo Clause in Latin American Countries**

Although the Calvo Doctrine has been opposed by developed countries, most Latin American countries have, however, insisted and applied the principles of the Calvo Clause in their countries. The application of the Calvo Clause by these Latin American states can be found in their constitutions and statutes, for example, the Bolivian Constitution, or the Venezuelan Constitution. Furthermore, many Latin American countries continue to subject their investment contracts to the

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<sup>525</sup> *Id.* at 26.

<sup>526</sup> *Id.* at 29.

<sup>527</sup> Denise Manning-Cabrol, THE IMMINENT DEATH OF THE CALVO CLAUSE AND THE REBIRTH OF THE CALVO PRINCIPLE: EQUALITY OF FOREIGN AND NATIONAL INVESTORS, 26 LPIB 1169 at 1191.

Calvo Clause.<sup>528</sup> They not only conclude the Calvo Clause in investment treaties among themselves but the Calvo Clause also becomes conspicuous part of their foreign policy with capital-exporting states.

**(iii) U.N. General Assembly Resolution 3281 (XXIX):  
Charter of Economic Rights and Duties of States**

The Charter of Economic Rights and Duties of States was adopted by the United Nations General Assembly on December 12, 1974, establishing a new system of international economic relations based on equity, sovereign equality, and interdependence of the interests of developed and developing countries.<sup>529</sup> The Charter adopted the Calvo Clause to its system to certain degree by reaffirming that each state has the right to regulate and supervise the activities of transnational corporations within national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies.<sup>530</sup> In cases of nationalization and expropriation, a dispute shall be settled under the domestic law of the nationalizing state and by its tribunals, unless it is freely and mutually agreed otherwise.<sup>531</sup> Therefore, this Resolution demonstrates that the United Nations Charter has accepted and adopted the concept of the Calvo Clause in respect to the national treatment standard as its rules in that a host state is not compelled to grant preferential treatment to foreign investment and as a result, foreign investors are required to seek redress for loss or grief from local remedies.

**(iv) ICSID**

The principles of the Calvo Clause can be also found in ICSID's provisions to a certain degree. Given the equality of sovereign states' principle, the

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<sup>528</sup> Joseph J. Jova, Private Investment in Latin America: Renegotiating the Bargain, 19 Tex. Int'l L.J. 3, 12 (1984) at 12.

<sup>529</sup> G.A. Res. 29/3281, *supra* note 28, preamble.

<sup>530</sup> *Id.* art. 2(b).

<sup>531</sup> *Id.* art. 2(c).

Convention prohibits a home state to apply diplomatic protection or bring an international claim in respect to disputes against a host state (especially where the home state's nationals and the host state have consented to submit or shall have submitted to arbitration under ICSID).<sup>532</sup> For the national treatment standard, the Convention allows the Contracting State to require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.<sup>533</sup>

**(v) MIGA**

The Calvo Clause can be found in the MIGA Convention, which adopts both of the key principles in its operation: the diplomatic intervention and the exhaustion of local remedies. For the diplomatic protection, where MIGA is subrogated the insured investor claims against a host state, MIGA requires the parties to attempt to settle a dispute by negotiation before seeking conciliation or arbitration rather than apply international claim or diplomatic protection right away. If the parties fail to reach a settlement within a period of one hundred and twenty (120) days from the date of the request for negotiation, such negotiation shall be deemed to have been exhausted.<sup>534</sup>

For the national treatment standard, MIGA also allows members to choose an alternative dispute settlement procedures other than those established under the Convention.<sup>535</sup> By choosing an alternative dispute settlement procedure between MIGA and a member as approved by MIGA's Board of Directors with a special majority vote, a member can set forth the condition that local remedies must be exhausted before seeking international arbitration. In such a case, the alternative

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<sup>532</sup> ICSID Convention, *supra* note 219, art. 27(1).

<sup>533</sup> *Id.* art. 26.

<sup>534</sup> *Id.* Annex II, art. 2.

<sup>535</sup> MIGA Convention, *supra* note 253, art. 57(b).

settlement procedure shall prevail on the established settlement procedures under the Convention's terms.

## **2.2. Concept and Model of the Special Method**

The Special Method apparently adopts the concept of the Calvo Clause. Having said that, the Special Method is invented as an alternative settlement resolution requiring the exhaustion of local remedies. In addition to the adoption of principles derived from the Calvo Clause,<sup>536</sup> the Special Method also removes obstacles that local remedies may have as well as strengthen the efficiency of local remedies. The establishment of the Special Method demonstrates that Thailand put a great deal of effort into providing an efficient local remedies system on which foreign investors will satisfy and rely.

Generally speaking, the Special Method will provide a process that encourages the disputing parties to settle their disputes among themselves and only as a result, seek a third party to assist them reach an agreement if they have failed to do so between themselves. Actually, the Special Method ensures that the parties will be provided a mechanism that assists them in settling their disputes with the agreement so that they can remain in good relations in order to perform their contractual obligations until the completion of the project. The Special Method can be divided into three (3) stages: Amicable Settlement Resolution; Consultation and Negotiation; and Arbitration.<sup>537</sup>

At the first stage, the Amicable Settlement Resolution is designed to provide a channel for the parties to settle their disputes between themselves within a

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<sup>536</sup> The Calvo Doctrine requires the exhaustion of local remedies before the institution of international arbitration.

<sup>537</sup> Before the Special Method has been finally concluded, multi-methods of dispute settlement resolution have been thoroughly scrutinized in order to seek the possible and efficient mechanism of dispute settlement that most suits disputes arising out of state contracts relating to FDI. It is believed that the availability of the effective and efficient method of dispute settlement can provide a more-friendly environment for FDI moving toward Thailand.

period of time. The Special Method opens up an opportunity and encourages the parties to talk and compromise until they are able to reach an agreement amicably. At this stage, there is no involvement of any third party. When the settlement resolution at this stage has failed, the parties will be directed to the Consultation and Negotiation as the second stage.

In the second stage, the Consultation and Negotiation stage, which has been widely accepted as an initial settlement resolution for the parties before they seek further formal mechanism of dispute settlement in BITs and other investment treaties, is adopted to be part of the Special Method. In normal practice, it appears that many investment treaties contain a dispute settlement clause that provides for consultation and negotiation between an investor and a State before a dispute may be submitted to international arbitration.<sup>538</sup> The periods of the Consultation and Negotiation are known as “waiting and cooling off” periods as they allow for good faith consultations and negotiations that might lead to the settlement amicably before the institution of formal proceedings.<sup>539</sup>

Actually, the application of the Consultations and Negotiation is not only found in BITs but also becomes normal practice between Singapore and Japan. With the Singapore-Japan FTA (“JSEPA”) approach, non-violation disputes are subject to the General Consultations, while the violation disputes may be brought to the Special Consultations. However, when those disputes cannot be resolved, non-violation cases would be further submitted to the Consultative Committee, whereas violation conflicts would then be submitted to Arbitral Tribunal.<sup>540</sup>

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<sup>538</sup> Martina Polasek, The Consultation Period Requirement in Investment Treaties As A Matter of Jurisdiction, Admissibility or Procedure, Newsletter Summer 2006, ICSID, Volume 23 No. 1 at 14.

<sup>539</sup> *Id.*

<sup>540</sup> M. Matsushita & D. Ahn (eds.), *WTP And East Asia: New Perspective* 425 (Cameron 2004).

Under the Special Method, the Consultation and Negotiation stage definitely differs from the Amicable Settlement Resolution stage in that the former will have the third party involved in helping the parties settle a dispute, whereas the latter is designed as a stage to settle the dispute between the parties only.

In this stage, the Consultation and Negotiation forum should be constituted in the form of commission, as a so-called National Consultation Commission on State Contracts Relating to Qualifying FDI (the “Commission”).<sup>541</sup> The Commission shall be constituted from various Agencies that are directly in charge of finance, economics, FDI, legal affairs from the macro perspective. The Commission’s functions are partly adopted from those of the Conciliation Commission under the ICSID Convention.<sup>542</sup> The details of the Commission’s functions as well as the proceedings of the Consultation and Negotiation under the Special Method will be discussed later.

As the third stage, when the Consultation and Negotiation stage has failed for whatsoever reason, it shall be deemed that the local remedy system has been exhausted. As a consequence, the disputing parties shall be eligible to refer their dispute to arbitration. In this stage, the parties still have options to choose either domestic arbitration or international arbitration.<sup>542</sup> Of course, an arbitral award of this arbitration is binding on the parties.

The overall requirement demonstrates the adoption of the Calvo Clause to the Special Method’s operation since the Special Method requires the parties to

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<sup>541</sup> Before the model of the Consultation and Negotiation stage has been finalized, a few questions have been raised. Particularly, questions of how the forum for the Consultation and Negotiation should be formed, how the Consultation and Negotiation shall be proceeded, and so on have been analyzed.

<sup>542</sup> Under the ICSID Convention, it is the duty of the Conciliation Commission to clarify the issues in disputes between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties and as a result, the parties shall give their most serious consideration to its consideration.

exhaust local remedies prior to a formal settlement of disputes by a means of arbitration.

### **2.3. The Special Method Dealing with Disputes Arising out of State Contract Relating to Qualifying FDI**

As its main objective, the Special Method is intended to help foreign investors and Thailand as a host state (through Government Agencies) settle their disputes amicably and promptly. The Special Method provides a process, which is intended to open up channels of communication between the parties so they can reach their own agreement in settling their disputes.

However, the Special Method is not intended to apply to all disputes that arise out of state contracts. The Special Method only applies to a dispute arising out of what is defined as “state contract relating to qualifying FDI.” Only a state contract meeting all criteria and conditions set forth by the testing process of “a state contract relating to qualifying FDI” as demonstrated in Chapter 3 will be subject to the Special Method; otherwise, such a contract will be governed by general relevant laws. The Special Method dealing with disputes arising out of a state contract relating to qualifying FDI can be divided into the following stages:

#### **2.3.1. Stage 1 Amicable Settlement Resolution**

When disputes arising out of a defined “state contract relating to qualifying FDI” occur, the parties are usually directed to an amicable settlement mechanism as an initial dispute settlement. In a general practice, this amicable settlement mechanism normally becomes part of a dispute settlement clause that has been included in a state contract, thereby encouraging the parties to have a prompt amicable settlement resolution. The following is a typical dispute settlement clause found in most state contracts.

*1. Any dispute or difference arising out of or in connection with this Contract or the implementation of any of the provisions of this Contract, which cannot be settled amicably shall be referred to [arbitration].<sup>543</sup>*

By this amicable settlement measure, the disputing parties are encouraged to have a conversation, talk over their disputes, and figure out together how they can reach the settlement with agreement that will satisfy them both. The period of this process normally ranges from thirty (30) days to sixty (60) days. After these periods have elapsed, then such disputes will be brought into a so-called “Consultation and Negotiation” stage.

This stage of Amicable Settlement Resolution is distinct from the other stages of the Special Method in that the Amicable Settlement Mechanism encourages only the disputing parties of a state contract relating to qualifying FDI to settle their disputes among themselves. It is because most state contracts relating to qualifying FDI are likely to be long-term projects and they probably last twenty (20) or thirty (30) years. Therefore, during the initial periods of disputes, the parties should try to solve problems and settle disputes between themselves in order to keep them remain in good relations. Good relations between the parties are of great importance and greatly contribute to the accomplishment of the project. Therefore, during the initial periods of disputes, there is no third party involvement since this stage is designed to assist the parties to seek the settlement between themselves.

### **2.3.2. Stage 2 Consultation and Negotiation**

Once the Amicable Settlement Resolution between the parties (the contracting government agency and the private party) has failed or the sixty (60) day period of the first stage has elapsed, either party shall refer disputes to a national

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<sup>543</sup> This dissertation suggests that any dispute or difference arising out of the Contract that cannot be settled amicably shall be referred to the Special Method.



commission the “National Consultation Commission on State Contracts Relating to Qualifying FDI,” (the “Commission”). In this regard, the Special Method requires that when the Amicable Settlement Resolution has failed, the contracting government agency is compelled to submit a request for Consultation and Negotiation to the Commission, whether or not the private party has done so. This is to ensure that the disputes shall be forwarded into the Commission’s consideration. It is believed that after the disputes have been forwarded to the Commission’s consideration, the Commission—that consists of various authorities specializing in finance, economics, foreign investment and laws from macro perspective—shall put great efforts towards assisting the parties settle their disputes. It is believed that the Commission’s role can help prevent and minimize damages arising from such disputes and help bring the process of negotiation to an end.

#### **Request for Consultation and Negotiation**

When the Amicable Settlement Resolution has failed, the contracting government agency is required to submit a request for Consultation and Negotiation to the Commission promptly. A request for Consultation and Negotiation will contain issues of the disputes as well as relevant information, facts and details relevant to the disputes, for example, the claim of the disputes, a contract concerned, or etc.

#### **Periods for Consultation and Negotiation**

The periods for the Consultation and Negotiation may take three (3) months to twelve (12) months depending on complications and levels of the disputes. If the disputes are not complicated and revolve around straightforward issues, the Consultation and Negotiation may take just a few months, whereas a maximum of

twelve (12) month period will allow the parties to put several great efforts to deal and settle perplexing and multi-level issues successfully and satisfactorily.

### **Constitution of the Commission**

The Consultation and Negotiation will take place in a commission forum where a group of designated authorities will be appointed. Once the parties have failed to reach an agreement in the Amicable Settlement Resolution as provided in Stage One or if the time periods of such a stage have elapsed, the disputes will be brought into the Commission's consideration. This Commission consists of various authorities from relevant agencies:

(1) an authorized representative of the Ministry of Finance as a Chairman;

(2) an authorized representative of the Office of the National Economic and Social Development Board (the "NESDB");

(3) an authorized representative of the Fiscal Policy Office, the Ministry of Finance (the "FPO");

(4) an authorized representative of the Board of Investment (the "BOI");

(5) an authorized representative of the Department of Treaties and Legal Affairs, the Ministry of Foreign Affairs;

(6) an authorized representative of the OAG;

(7) an authorized representative of the Office of Council of State;

(8)-(10) three (3) independent and qualified persons from either state sector or private practice; and

(11) an authorized representative from the Department of the Legal Counsel, the OAG as a Commission member and secretary.

The Commission comprises eleven (11) constituent panels constituted from variable relevant agencies, who have knowledge and experience relating to FDI, finance and economics, and legal aspects. These uneven numbers of the Commission ensures that the Commission's resolution will be issued by a majority vote. The following rationales demonstrate how the Commission subject to the Special Method should be formed.

As a Chairman of the Commission, the Special Method requires an authorized representative from the Ministry of Finance to be a part of constituent panels and to act as the Chairman of the Commission. The reason that the Special Method requires an authorized representative of the Ministry of Finance to act as a Commission's Chairman is that this person possesses recognized competence in the fields of finance and economics at the national level. Furthermore, the consequence of the Commission's recommendation may potentially affect the national budget or financial status of a country. As a result, it is strongly believed that an authority from the Ministry of Finance is the most suitable to be a Chairman of the Commission and to preside over the Commission's meeting.

For the constituent members from (2) and (3), the Special Method requires authorized representatives from the NESDB and the FPO who are directly responsible for and in charge of fiscal, financial and macro-economic policies. The NESDB has key mandates to formulate the National Economic and Social Development Plan and translate it into an implementation plan of every five (5) years.<sup>544</sup> Currently, Thailand has the 10<sup>th</sup> National Economic and Social

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<sup>544</sup> The NESDB has key functions as follows:

(1) formulate the National Economic and Social Development Plan and translate it into action plan within a five-year timeframe.

(2) make the National Agendas: alleviation of poverty and income distribution problems; enhancing Thailand's competitiveness; promoting social capital development; and promoting sustainable development.

Development Plan covering from year 2007 to year 2011. Meanwhile, the FPO is an instrumental government agency and has key mandates to formulate, make recommendations for, and oversee implementation of fiscal and financial policies, government borrowing, capital markets as well as macro-economic policies.<sup>545</sup> Overall, these Agencies have important roles in formulating the national fiscal and economic policy and accordingly, they are needed to be part of the Commission.

For the constituent members from (4), the Special Method requires that an authorized representative from the BOI also be a part of the Commission. The reason is that the BOI is a key agency that has a direct association with FDI and foreign investors.<sup>546</sup> The BOI has an authority to grant privileges depending on promoted activities and investment zones. Privileges are variable ranging from an exemption from rules restricting foreign ownership of companies; exemption from corporate income tax for up to eight (8) years; exemption from import duties on machinery and raw materials; exemption from rules restricting foreign ownership of land; exemption from work permit and visa rules; to exemption from rules restricting overseas remittances. Therefore, the BOI will be able to share its perspective as well as practical advice relating to FDI to the Commission.

While the constituent members from (2)-(4) are distinguished professionals in the fields of finance and economics, the constituent panels from (5)-(7) are persons who specialize in legal aspects of both domestic and international laws. An authorized representative from the Department of Treaties and Legal

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(3) formulate strategies for key government policies and major development projects.

(4) analyze budget proposals by state enterprises and government agencies.

(5) create an Economic Intelligence Database, especially on GDP data.

(6) develop development indicators.

<sup>545</sup> Fiscal Policy Office, <http://www.mof.go.th/mofweb/org/fpo-org.html> (last visited Apr. 24, 2009).

<sup>546</sup> Board of Investment of Thailand, *supra* note 97, <http://www.boi.go.th/english/> (last visited Apr. 24, 2009).

Affairs, the Ministry of Foreign Affairs is considered a crucial part of the Commission panels since this authority can help point out issues and international obligations into which Thailand has entered, especially those treaties relating to FDI such as BITs. For domestic laws and regulations, the OAG is a key agency that reviews drafts of state contracts before a contracting government agency will enter into with a private party. Typically, the main function of OAG is to ensure that a contract is valid and binding and that a contract does not prejudice against the State's benefits. In addition to authorities of the Ministry of Foreign Affairs and the OAG, the Special Method also requires that a representative of the Office of Council of State shall be formed as a part of the Commission. Substantially, the Office of Council of State helps the Government draft legislation, thereby possessing knowledge pursuant to objectives of individual acts as well as knowledge about how to interpret and apply them. It is believed that these key constituent panels of the Department of Treaties and Legal Affairs, the OAG, and the Office of Council of State will greatly assist the Commission to cover all relevant visions, issues, and aspects domestically and internationally that the Commission should be aware in helping the disputing parties settle their disputes satisfactorily and practically.

In addition to authorities appointed from variable agencies, the Special Method recommends that the Commission must have another three (3) members from independent and recognized professionals. These persons can be appointed from both State and private sectors (for example, from any agency, private practice, organization, institution, or university).

Last, the Special Method recommends that an authority of the Department of the Legal Counsel, the OAG should be appointed as a Commission as well as a secretary. Under the Special Method, a secretary to the Commission is

significant in that this key person shall fulfil the duty of preparing a meeting agenda, analyzing the issues in dispute as well as legal consequence, and seeking all possible terms of settlement to the Commission. The reason is that the Department of Legal Counsel, the OAG, has been responsible for safeguarding national interests and public policy.<sup>547</sup> As a result, the Department of the Legal Counsel has its mandates in rendering legal advice to Government Agencies as well as reviewing draft contracts that Government Agencies will enter into with the private party.<sup>548</sup> In practice, the Department of the Legal Counsel (the OAG) is very familiar with and specializes in terms and conditions of state contracts and routinely come across disputes, differences and conflicts in respect to state contracts.

Overall, the Commission's structure demonstrates the advantage of having individual constituent panels since they possess extensive knowledge and experience in macro fiscal and economic perspective, trade and investment, and legal expertise of both domestic and international laws and both private and public laws. It is likely that these panels will be able to contribute their extensive knowledge and experience to increase the effectiveness and efficiency of the Commission's roles in helping the disputing parties settle their disputes amicably, successfully and satisfactorily.

### **Proceedings of the Consultation and Negotiation**

As soon as the Commission acknowledges the disputes between the contracting government agency and the private party, either from the disputing agency, or the private party, the Commission shall call upon a meeting to discuss the

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<sup>547</sup> Section 46 (9) of the Restructuring of Government Organization Act, B.E. 2545 (2002) (Thail.) and Section 4 of the Royal Decree on Division of the Office of the Attorney General, B.E. 2540 (1997) (Thail.) were issued by provisions of the Administration of Government Organization Act, B.E. 2534 (1991) (Thail.).

<sup>548</sup> Office of the Attorney General, *supra* note 112, <http://www.ago.go.th/eng/p1.pdf> (last visited Apr. 24, 2009).

disputes in order to recommend possible terms of settlement to the parties within thirty (30) days. By doing so, the Commission is allowed to invite both disputing parties to participate in the meeting. Such an invitation will give the disputing parties another opportunity to talk to each other after the Amicable Settlement Resolution in the initial stage has failed, while the Commission's panels are expected to put great efforts to help them seek a solution in a way that satisfies both parties. Regardless of whether these efforts succeed or fail, the Commission is expected to come up with possible terms of settlement.

If the Commission cannot help the parties seek a resolution within a single meeting, the Commission is entitled to provide the parties additional meetings. These additional meetings will give both parties opportunities to put efforts together to share their opinions, guide direction, and propose possible and practical solutions to the parties that correspond with the Government Policy and the National Plan.

During the Consultation and Negotiation stage, the Commission has the responsibility of clarifying the issues in dispute between the parties, to come up with possible terms of settlement to them, and to endeavour to bring about the settlement between them. During this session, the Commission may give any recommendation (for example, regarding terms of settlement) and the parties are supposed to take such a recommendation into consideration accordingly.

In the final proceedings of the Consultation and Negotiation, the Commission is obliged to draw up a report that describes whether or not the disputes between the parties can be settled. In a case where the parties can reach an agreement, the Commission shall specify the issues in dispute and how the parties agree to settle their disputes.

However, during the Consultation and Negotiation, if the Commission considers that it is unlikely that the parties can seek a solution with an agreement, the Commission shall close the Consultation and Negotiation's proceedings and draw up a report of the parties' failure to reach such an agreement. After a report has been produced, the Commission shall hand out a report to the parties as well as submit such a report to the Council of Ministers for approval (that is, whether the Council of Ministers will agree with the Commission's recommendation and conclusion based upon the report).

### **Commission's Recommendation**

The Commission's recommendation is not binding on the parties. In fact, the entire process of this Consultation and Negotiation stage is based on the parties' agreement and consent. The Commission is designed to assist the parties to seek the settlement with an agreement. The legal status of the Commission's recommendation will be the same as that of the Conciliation Commission's recommendation under the ICSID Convention.

### **Submission of a Report to the Council of Ministers**

Whether or not the Commission is able to help the parties seek the settlement with agreement, the Commission shall draw up a report and submit it to the Council of Ministers for approval. After the Council of Ministers receives a report, the Council of Ministers is required to consider a report, issue a resolution over the disputes, and notify the Commission of the Cabinet Resolution within sixty (60) days, whether or not the Council of Ministers will agree with the parties' agreement in settling their disputes as appeared in a report. In a case where the Council of Ministers disagrees with the settlement, the Council of Ministers is required to come up with alternative terms of settlement to the parties.



This requirement is considered a significant measure, particularly where the Commission has failed in helping the parties seek the settlement with an agreement. If the Consultation and Negotiation stage fails, the disputes shall be forwarded to the Council of Ministers as the top-level authority of the Executive Branch and, of course, the disputes now become the national issues that the Council of Ministers must pay much attention and try to seek the most possible and practical solution for the parties. If the Council of Ministers cannot come up with a solution that satisfies the parties (the private party), it is very likely that the private party will bring the disputes to international arbitration, thereby affecting the Thai government inevitably.

#### **Notification of the Cabinet Resolution to the Commission**

The Council of Ministers shall consider a report, resolve the disputes by issuing a Cabinet Resolution, and notify the Cabinet Resolution over the disputes to the Commission within sixty (60) days since the Council of Ministers receives a report. Then the Commission shall notify the parties of the Cabinet Resolution promptly. If the private party agrees with the Cabinet Resolution, the parties shall comply with the Cabinet Resolution. However, if the private contracting party is dissatisfied with the Cabinet Resolution, the private party is entitled to bring the disputes against the contracting government agency for the purposes of arbitration. Up to this point, it is not a question of whether or not the contracting government agency will agree with the Cabinet Resolution because in the practice of Thailand, a Cabinet Resolution is legally binding to all Government Agencies.

Once the Consultation and Negotiation stage subject to the Special Method has failed, the private party is eligible to refer the disputes to arbitration (both domestic and international arbitration). At this stage, the disputes are considered

exhausted by local administrative bodies. In other words, the condition of the Calvo Clause has been completely fulfilled and the private party will accordingly have an absolute right to bring a case into international arbitration.

### **2.3.3. Stage 3 Arbitration**

When local remedies have been exhausted, the private contracting party has the option of bringing the disputes before a domestic arbitration or international arbitration subject to the parties' agreement (the contracting government agency and the private contracting party). For arbitration, both parties are free to tailor how they shall arbitrate the disputes (for example, they may agree to apply the UNCITRAL Arbitration Rules as their arbitration rules).

In regards to domestic arbitration, this dissertation strongly recommends that in appointing the arbitral tribunal, the arbitral tribunal must have at least one (1) member who has knowledge and experience with administrative or public law. This requirement ensures that the principles derived from administrative and public law will not be disregarded because the disputes arising out of a state contract relating to qualifying FDI always contains an element of public policy. Along with the arbitration process, the Administrative Court shall assume authority to supervise the arbitration process and make sure that the proceedings follow due process, rather than the Court of Justice.

As to international arbitration, even though the parties are entitled to choose any arbitration rule to apply to their disputes, it is strongly recommended that ICSID is used to settle disputes arising out of a state contract relating to qualifying FDI. The reason is that ICSID offers a state-investor arbitration mechanism, which is able to settle disputes between the contracting government agency as the one party and the private contracting party as the other party. As far as the recognition and

enforcement of arbitral awards are concerned, the Administrative Court is an appropriate mechanism used to perform this function. The Flowchart of the Special Method appears in **Appendix 12 of the Appendices**.

#### **2.4. Conclusion**

Conceptually, the Special Method adopts the content of the Calvo Clause and applies it to the Consultation and Negotiation stage. By adopting what in effect is the Calvo Clause, the Consultation and Negotiation stage is designed as a precedent stage before the parties seek a formal settlement mechanism of arbitration (including international arbitration). During the Consultation and Negotiation phase, the parties are required to bring the disputes to local administrative bodies (“National Consultation Commission on State Contracts Relating to Qualifying FDI”). The function of Commission in the Consultation and Negotiation stage provided by the Special Method is to assist the parties in getting to an agreement so that there is no need for the parties to bring their disputes to arbitration (particularly international arbitration). Unless the Consultation and Negotiation has failed, the parties shall be entitled to refer the disputes to international arbitration, especially for ICSID as proposed by this dissertation.

### **3. Modification of Domestic Laws and Regulations on Arbitration**

Given the establishment of a Uniform and Standard Methodology on Arbitration, it is strongly advised that domestic laws and regulations on arbitration should be modified in a manner consonant with the ratification of the ICSID Convention, the establishment of the Special Method, and the existence of the Administrative Court.

Actually, the ratification of the ICSID Convention, the establishment of the Special Method, and the existence of the Administrative Court are not the only grounds that bring about the need for having existing laws and regulations modified. The self-contradictory provision of the Arbitration Act calls upon certain modification so as to avoid confusion in practice. Besides, the painful lessons from the arbitral awards in the *Expressway case*, *Walter Bau* and the mistakes of the 2004 Cabinet Resolution are considered the other main factors leading to this proposition. Before addressing how the existing laws and regulation on arbitration should be modified, it is necessary to clarify justifications of its modification.

#### **3.1. Justifications of the Modification of Relevant Domestic Laws and Regulations on Arbitration**

Modification of the existing laws and regulations on arbitration as addressed in this Chapter absolutely depends on an analysis of the arbitration legal system in Chapter 4 that strongly suggests that the arbitration legal system governing disputes arising out of a state contract is contradictory, inconsistent, incompatible, and incomplete. Therefore, the modification as proposed by this dissertation is intended to reconcile those of the contradictions mentioned in Chapter 4. Justifications of such a modification are as follows:

First, the concept of the Arbitration Act does not fit into state contracts' functions since the Arbitration Act is aimed to help private parties settle their disputes. Consequently, it is necessary to have the Arbitration Act modified in such a manner consonant with the nature and function of state contracts. By doing so, the Arbitration Act must accept that disputes arising out of state contracts are different from those between private parties. As a result, the Arbitration Act should entitle the arbitral tribunal to apply principles derived from administrative and public law to a case rather than only those derived from private law, civil law, and civil procedural law.

Second, the division of jurisdiction between the Court of Justice and the Administrative Court is still a question in practice, thereby leading to confusion and uncertainty for Government Agencies as to whether they should submit disputes with the private party to the Court of Justice or the Administrative Court. Therefore, both the Arbitration Act and the Administrative Court Act should be amended to make it clear that what disputes should be subject to the Court of Justice's jurisdiction and what disputes should be referred to the Administrative Court. This dissertation proposes that the Court of Justice should assume jurisdiction over disputes between private parties and those treated as private parties such as government procurement contracts, whereas the Administrative Court should assume its jurisdiction over disputes arising out of state contracts other than government procurement contracts.

Third, even though the 2004 Cabinet Resolution becomes a consequence of the disappointment of the arbitral award in the *Expressway case*, the 2004 Cabinet Resolution obviously contains an error and as a result, the 2004 Cabinet Resolution cannot operate in a manner as intended. It was assumed that the 2004 Cabinet Resolution was issued to apply to any state contract in respect to the

provision of public service or utility (as state contracts could impact on public policy, or were involved in the exercising of the State's power). However, instead of providing conditions and requirements of state contracts to be governed by the 2004 Cabinet Resolution, the Council of Ministers, on the other hand, expressly designated the name of a contract type, *per se* a "concession contract" even though the contract between ETA and BBCD in the *Expressway case* was not a concession contract. It was simply a construction contract. Therefore, to correct this error, it is advised that the 2004 Cabinet should be repealed and replaced by the issuance of a new regulation on arbitration. The new regulation on arbitration will provide conditions and requirement of what contract type can or cannot be arbitrated.

Fourth, it proposes that a new regulation on arbitration should be issued. Having said that, this new regulation on arbitration will provide step-by-step guidance from the beginning of the process to the end for Government Agencies to comply with when they are facing arbitration issues. This guidance is not only to provide the step-by-step reference material for Government Agencies, but it is also to update relevant procedure in a manner consonant with the existence and function of the Administrative Court.

The followings are the proposed modifications of domestic statutory acts and regulations on arbitration applicable to disputes arising out of a state contract relating to qualifying FDI.

### **3.2. Modification of the Existing Statutory Acts on Arbitration**

The objectives of the modification of the existing statutory acts on arbitration is first to empower the Administrative Court to assume jurisdiction over disputes arising out of state contracts, *per se* state contracts relating to qualifying FDI, in addition to administrative contracts. Second, the Administrative Court should be

empowered to assume jurisdiction over arbitration issues, especially those relating to or as a result from disputes arising out of state contracts relating to qualifying FDI. Third, in the cases of arbitrating disputes arising out of a state contract with special characteristics (i.e., a state contract relating to qualifying FDI), it is unclear whether the arbitral tribunal can apply principles of administrative and public law to a case. There is no expressed provision of the Arbitration Act providing as such. Therefore, it is advised to make it clear and certain by expressly providing that the arbitral tribunal shall be entitled to apply principles derived from administrative or public law to a case when coming across disputes arising out of a state contract with special characteristics (i.e., state contracts relating to qualifying FDI).

### **3.2.1. Amendment of the Arbitration Act, B.E. 2545 (2002)**

#### **Rationales and Necessity**

Currently, it is unclear whether disputes arising out of a state contract should be subject to the jurisdiction of the Court of Justice or the Administrative Court even though there have been efforts to draw the dividing lines between them in practice. This dissertation proposes that while state contracts carrying simple transactions such as government procurement contracts without the State's involvement shall be subject to the Court of Justice's jurisdiction, state contracts with the State's involvement (i.e., a state contract relating to qualifying FDI) shall be subject to the Administrative Court's jurisdiction.

It would be more appropriate that disputes arising out of a state contract relating to qualifying FDI should be designated under the jurisdiction of the Administrative Court. The reason is that disputes arising out of such state contracts contain an element of State's involvement. It further appears that disputes involving in exercising the State's power may bring about some impact on its people or public

in general. Furthermore, it will be extremely inappropriate that disputes carrying the State's power or involvement shall be exclusively governed by private law principles (for example, burden of proof, freedom of contract, or privity of contract under the Court of Justice). In contrast, it is believed that principles of administrative and public law should be applied to disputes where one of the parties is the State and the disputes involving the exercise of State's power. Therefore, in a case of Thailand, the Administrative Court is considered more appropriate to assume jurisdiction over disputes involving in the State's power.

### **Concept of Amendment**

To empower the Administrative Court to assume jurisdiction over disputes arising out of a state contract relating to qualifying FDI where one of the parties is the State or its delegates, it is proposed to alter the Arbitration Act, B.E. 2545 (2002). Having said that, there should be a new sub-section (Paragraph 2) following Section 9.

To enable the arbitral tribunal to apply principles derived from Administrative and Public law to disputes arising out of a state contract carrying special characteristics (a state contract relating to qualifying FDI), it is proposed that there should be a new sub-section (Paragraph 4) added to Section 25.

By adding these new provisions to Section 9 and Section 25, the addition of these provisions will be consistent with the rest of the Arbitration Act.

### **Proposed Provisions**

#### **(i) Adding Paragraph 2 to Section 9**

**Section 9** The Central Intellectual Property and International Trade Court, or the Regional Intellectual Property and International Trade Court, or a Court having jurisdiction over arbitration cases, or a Court where either party has a domicile



within its territory, or a Court having jurisdiction over disputes that have been submitted to arbitration within its territory, shall have jurisdiction over cases as designated by this Act.

*[The Central Administrative Court or the Regional Administrative Court as the case may be shall have jurisdiction over disputes arising out of a state contract that has agreed to submit or has been submitted to the arbitration where at least one of the parties is the State or its Government Agencies or persons acting on behalf of the State and where a contract relates to the exercising of the State's power, the provision of public service or utility, the exploitation of natural resources, FDI, or relating matters.]*

**(ii) Adding Paragraph 4 to Section 25 Paragraph 3**

**Section 25** During arbitral proceedings, both parties shall be afforded reasonable opportunities to give explanation and present evidence pertaining thereto.

In the absence of the parties' agreement or unless the law states otherwise, the arbitral tribunal shall be the judge of its own competence. The arbitral tribunal's authorities include matters relating to the acquisition of witnesses, evidence as well as the weight of evidence.

The arbitral tribunal may apply civil procedure law to a case.

*[For disputes arising out of a state contract involving in the exercising of the State's power, the provision of public service or utility, the exploitation of natural resources, FDI, or relating matters, the arbitral tribunal shall take principles of administrative and public law or rules of law regarding public interest or public policy into consideration.]*

**3.2.2. Amendment of the Establishment of the Administrative Court and the Administrative Court Procedure Act, B.E. 2542 (1999)**

## **Rationales and Necessity**

This alteration is to empower the Administrative Court to assume jurisdiction over disputes arising out of state contracts, *per se* state contracts relating to qualifying FDI, in addition to administrative contracts, and to assume jurisdiction over arbitration issues, especially those relating to or as a result from disputes arising out of state contracts relating to qualifying FDI.

## **Concept of Amendment**

It is proposed to alter Article 9 by conferring upon the Administrative Court to assume jurisdiction over disputes arising out of state contracts (other than administrative contracts) as well as disputes arising out of or as a result of arbitration. Consequently, it is necessary to alter Paragraph (4) of Article 9 and to add Paragraph (7) to Article 9 as follows:

## **Proposed Provisions**

### **(i) Amendment of Article 9**

**Article 9** The Administrative Court has the competence to proceed with the trial, adjudicate, or give orders over the following matters:

(1) a case involving disputes in relation to an unlawful act by an administrative agency or government official, whether in connection with the issuance of a rule or order or in connection with other acts, by reason of acting without or beyond the scope of powers and duties or in a manner inconsistent with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion;

(2) a case involving disputes in relation to an administrative agency or government official neglecting official duties required by law to be performed or performing such duties with unreasonable delay;

(3) a case involving disputes in relation to a wrongful act or other liabilities of an administrative agency or government official arising from the exercise of power under the law or from law, administrative order or other orders, or from the neglect of official duties required by the law to be performed or the performance of such duties with unnecessary delay;

(4) a case involving disputes in relation to an administrative contract *or a state contract where at least one of the parties, is the State, or its Government Agencies, or persons acting on behalf of the State and where a contract relates to the exercising of the State's power, the provision of public service or utility, the exploitation of natural resources, FDI, or relating matters;*

(5) a case prescribed by law to be submitted to the Court by an administrative agency or government official for mandating a person to do a particular act or refraining therefrom;

(6) a case involving any matter prescribed by law to be under the jurisdiction of the Administrative Court;

*(7) a case arising from or as a result of arbitration conferred by a contract where one of the parties is the State, its Government Agencies, or persons acting on behalf of the State and where a contract relates to the exercising of the State's power, the provision of public service or utility, the exploitation of natural resources, FDI, or relating matters.*

The following matters are not within the jurisdiction of the Administrative Court:

- (1) an action concerning military disciplines:
- (2) an action of the Judicial Commission under the law on judicial service;
- (3) a case within the jurisdiction of the Juvenile and Family Court, Labor Court, Tax Court, Intellectual Property and International Trade Court, Bankruptcy Court or other specialized courts.

### **3.3. Issuance of the Regulation of the Office of Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI**

#### **Rationales and Necessity**

This is to provide step-by-step guidance on arbitration as the reference material for Government Agencies that are prepared to transact with the private party. The Regulation of the Office of the Prime Minister on Arbitration not only provides the step-by-step guidance but also provides the sample arbitration clause that is appropriate for disputes arising out of a state contract with special characteristics (a state contract relating to qualifying FDI). Therefore, Government Agencies are no longer compelled to refer to the sample arbitration clause provided by the 1992 Regulation, which is in fact intended to only deal with disputes arising out of government procurement contracts.

#### **Draft Regulation**

Basically, this Regulation adopts the concept and process as provided by the Special Method to this step-by-step guidance. The Regulation will help provide a guide for Government Agencies as to how to process when they are dealing with arbitration issues from the beginning of the process to the end. In addition to the guidance on arbitration, the Regulation also provides a sample arbitration clause that

is more appropriate to deal with disputes arising out of a state contract relating to qualifying FDI unlike that of the 1992 Regulation. It is believed that this Regulation will be practically helpful for Government Agencies that are prepared to enter into a state contract relating to qualifying FDI with the private party in practice.

The issuance of the Draft Regulation of the Office of the Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI is demonstrated in **Appendix 13 of the Appendices**. The following are step-by-step rules provided by the Regulation of the Office of the Prime Minister on Arbitration.

**- Proposed Draft Regulation -**

**The Regulation of the Office of Prime Minister on Arbitration Applicable to  
Disputes Arising out of a State Contract Relating to Qualifying FDI B.E. ....**

.....

Whereas it is appropriate to issue the Regulation of the Office of Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI B.E. .... to govern disputes arising out of a state contract relating to qualifying FDI.

**Clause 1** This Regulation shall be referred as to “the Regulation of the Office of Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI B.E. ....

**Clause 2** This Regulation shall come into force after sixty (60) days from the date of its publication in the Government Gazette.

**Clause 3** Where any regulation, rule, Cabinet Resolution, order is inconsistent or in contrast with these provisions of this Regulation, this Regulation shall prevail and apply.

**Clause 4** The Permanent-Secretary of the Office of Prime Minister shall be in charge of the application, interpretation and enforcement of this Regulation.

**Chapter I**

**General Definition and Scope**

**Clause 5** In this Regulation:

**A State Contract Relating to Qualifying FDI”** means any state contract having special characteristics that fulfills and meets criteria and conditions

subject to the Testing Process “a State Contract Relating to Qualifying FDI” set forth by **Schedule 1**.

**Contracting Government Agency**” means any of these types of Government Agencies: the Legislative Branch, the Executive Branch, the Judicial Branch, Independent Organizations, Local Authorities, and State Enterprises transacting with the Private Party.

**“Commission**” means the National Consultation Commission on State Contracts Relating to Qualifying FDI.

**“Government Agency**” means any of these types of Government Agencies: the Legislative Branch, the Executive Branch, the Judicial Branch, Independent Organizations, Local Authorities, and State Enterprises.

**“Parties**” means the Contracting Government Agency and the Private Party.

**“Private Party**” means the Private Party transacting with the Contracting Government Agency.

**“Prospective Contract**” means a contract to be entered into by a Contracting Government Agency with the Private Party.

**Clause 6** Any Contracting Government Agency desires to apply arbitration as dispute settlement resolution to disputes arising out of a state contract relating to qualifying FDI shall comply with this Regulation.

**Clause 7** Prior to signing any state contract relating to qualifying FDI with the private party, a Contracting Government Agency shall conclude an arbitration clause according to the sample arbitration clause as suggested by **Schedule 2** of this Regulation into a contract.

The sample arbitration clause may be adjusted and modified based upon a case-by-case basis. In this regard, the Contracting Government Agency may consult the Office of Attorney General for legal advice and its adjustment.

## **Chapter II**

### **Amicable Settlement Resolution**

**Clause 8** Any dispute or difference arising out of or in connection with this Prospective Contract or the implementation of any of the provisions of this Prospective Contract shall be referred to the Amicable Settlement Resolution where the Parties are encouraged to settle their dispute between themselves amicably within sixty (60) days since the day of acknowledging the dispute.

## **Chapter III**

### **Consultation and Negotiation**

**Clause 9** In an event where the Amicable Settlement Resolution between the Parties has failed or the sixty (60) day period of the Amicable Settlement Resolution has elapsed, the Contracting Government Agency is required to submit a request for Consultation and Negotiation to the National Consultation Commission on State Contracts Relating to Qualifying FDI, (the “Commission”) promptly, whether or not the private party has done so.

A request for Consultation and Negotiation will contain issues of the dispute as well as relevant information, facts and details relevant to the dispute, for example, the claim of the dispute, a contract concerned, etc.

**Clause 10** The Commission consists of authorized representatives designated from the Ministry of Finance as a Chairman; the Office of the National Economic and Social Development Board (the “NESDB”); the Fiscal Policy Office,



the Ministry of Finance (the “FPO”); the Board of Investment (the “BOI”); the Department of Treaties and Legal Affairs, the Ministry of Foreign Affairs; the OAG; the Office of Council of State; three (3) independent and qualified persons from either state sector or private practice; and the Department of the Legal Counsel of the OAG as a Commission member and secretary.

At least two-thirds (2/3) of the Commission members shall constitute a quorum of the meeting.

The Commission’s Resolution shall be issued by a majority vote.

**Clause 11** When the Commission acknowledges the dispute between the Contracting Government Agency and the Private Party, the Commission shall call upon a meeting to discuss the dispute in order to recommend possible terms of settlement to the Parties within thirty (30) days. The Commission shall be entitled to invite both Parties to participate in a meeting. If necessary, the Commission may call upon the Parties for additional meetings. The Parties shall facilitate the Commission in settling the dispute.

The periods for the Consultation and Negotiation may be consumed from three (3) months to twelve (12) months depending on the complication and levels of the dispute. If the dispute is not complicated and carries straightforward issues, the Consultation and Negotiation may take a few months whereas a maximum of twelve (12) month period will allow the Parties to put several great efforts to deal and settle perplexing and multi-level issues in dispute successfully and satisfactorily.

**Clause 12** During the Consultation and Negotiation, the Commission has the responsibility to clarify the issues in dispute between the parties, to come up with possible terms of settlement to them, and to endeavour to bring about the

settlement between them and the Parties are supposed to take such a recommendation into consideration accordingly.

**Clause 13** The Commission shall draw up a report of the Consultation and Negotiation, whether or not the dispute between the Parties can be settled. In the event where the Parties can reach an agreement, the Commission shall specify the issues in dispute and how the Parties agree to settle their dispute.

In the event where the Commission considers that it is unlikely that the Parties can seek a solution with an agreement, the Commission shall close the Consultation and Negotiation's proceedings and draw up a report of the Parties' failure to reach such an agreement.

After a report has been produced, the Commission shall hand out a report to the Parties as well as to submit such a report to the Council of Ministers for an approval as to whether the Council of Ministers will agree with the Commission's recommendation and conclusion based upon the report.

**Clause 14** Upon a report, the Council of Ministers shall consider a report, issue a Cabinet Resolution over the dispute, and notify the Commission of the Cabinet Resolution within sixty (60) days as to whether the Council of Ministers agrees with the Parties' agreement in settling their dispute as appeared in a report. In a case where the Council of Ministers disagrees with the settlement or where the dispute cannot be settled in the Consultation and Negotiation process, the Council of Ministers is required to come up with alternative terms of settlement to the Parties.

**Clause 15** The Commission shall notify the Parties of the Cabinet Resolution promptly. If the Private Party agrees with the Cabinet Resolution, the Parties shall comply with the Cabinet Resolution accordingly. However, if the

Private Party dissatisfied with Cabinet Resolution, the Private Party is entitled to bring the dispute against the Contracting Government Agency to arbitration.

#### **Chapter IV**

#### **Arbitration**

**Clause 16** Once the Consultation and Negotiation has failed or the periods of the Consultation and Negotiation have elapsed, the Parties shall be eligible to refer the dispute to arbitration (either domestic or international arbitration).

**Clause 17** In a case where the Parties have agreed to submit the dispute to domestic arbitration, either Party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name of an arbitrator to be appointed by him. The other Party shall appoint the arbitrator within thirty (30) days after receipt of the said notice.

Notwithstanding, there shall be at least one (1) arbitrator who has knowledge and experience background in administrative or public law. The two (2) arbitrators shall appoint the third arbitrator, a so-called umpire who will chair the arbitral tribunal.

Should either Party be unable to appoint an arbitrator or in case of disagreement as regards to the appointment of an umpire, each Party is entitled to refer the matter to the Administrative Court for the appointment of an arbitrator or umpire as the case may be.

**Clause 18** In a case where the Parties have agreed to submit the dispute to international arbitration, the Parties are strongly advised to submit their dispute to the International Centre for Settlement of Investment Disputes (hereinafter the "ICSID").

**Clause 19** The arbitral tribunal shall not be barred from applying the principles of administrative and public law into a case.

**Clause 20** The Administrative Court shall have jurisdiction over dispute and relating matters arising out of a state contract relating to qualifying FDI.

Given on this ... day of ..... B.E. ....

-signed-

### **3.4. Provision of a Sample Arbitration Clause for a State Contract Relating to Qualifying FDI**

#### **Rationales and Necessity**

This proposed model clause of settlement of disputes applies the Calvo Clause in that before the parties shall refer their disputes to arbitration, the parties are obliged to institute local remedies (the Consultation and Negotiation according to the Special Method). Until local administrative remedies have been exhausted, the parties shall not be entitled to arbitrate their disputes. This Calvo Clause ensures that the jurisdiction of international investment disputes lies with the country in which the investment is located. The Calvo Clause prohibits the parties from seeking international arbitration before local remedies are exhausted. Therefore, by adopting the Calvo Clause, Thailand should set up the condition requiring the parties to seek local remedies within a certain period of time in order to settle disputes among themselves. Unless the dispute resolution is reached within the limited period, the parties will be subsequently entitled to submit an application before ICSID, which is consistent with the ICSID Convention.<sup>549</sup>

#### **Concept of the Issuance of a Sample Arbitration Clause**

This is to provide the reference material for Government Agencies as to how they should conclude an arbitration clause in a state contract in question. Unlike the sample arbitration clause issued by the 1992 Regulation, this proposed clause is intended to be a model for other types of state contracts (such as state contracts relating to qualifying FDI) other than government procurement contracts.

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<sup>549</sup> ICSID Convention, *supra* note 219, art. 26.

### **Proposed Model Clause of the Settlement of Disputes**

1. Any dispute or difference arising out of or in connection with this Contract or the implementation of any of the provisions of this Contract shall be amicably settled between the parties within sixty (60) days

2. When such amicable settlement between the parties has failed or the periods of the amicable settlement have elapsed, either party shall submit a request for Consultation and Negotiation to the National Consultation Commission on State Contracts Relating to Qualifying FDI (the “Commission”). The parties shall facilitate the Commission to have the dispute settled with the parties’ agreement. The periods for Consultation and Negotiation shall range from three (3) months to twelve (12) months.

3. When the Consultation and Negotiation has failed or the periods of the Consultation and Negotiation have elapsed, the parties shall be eligible to refer the dispute to the arbitral tribunal consisting of three (3) arbitrators. The parties shall agree upon the application of either domestic arbitration or international arbitration.

4. For domestic arbitration, either party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name of an arbitrator to be appointed by him. The other party shall appoint the arbitrator within thirty (30) days after receipt of the said notice. Notwithstanding, there shall be at least one (1) arbitrator who has knowledge and experience background in administrative or public law. The two (2) arbitrators shall appoint the third arbitrator, a so-called umpire who will chair the arbitral tribunal.

5. For international arbitration, the parties hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the

"ICSID") any dispute arising out of or relating to this Contract for settlement by arbitration.

6. Should either party be unable to appoint an arbitrator or in case of disagreement as regards to the appointment of an umpire, each party is entitled to refer the matter to the Administrative Court for the appointment of the arbitrator or umpire as the case may be.

7. Unless agreed by the parties otherwise, the arbitral tribunal shall be the judge of its own competence and shall apply the rules as it think appropriate. The arbitral tribunal shall not be barred from applying principles of administrative or public law to a case.

8. The arbitral award shall be final, conclusive and binding upon the parties hereto.

9. Each party shall have the right to institute suit against the other before the Administrative Court to enforce any decision or award rendered in arbitral proceedings.

10. Each party shall bear the cost of his own arbitrator's service and share equally other cost of all proceedings.

11. The submission of any matter in dispute or difference to the arbitral proceedings as aforesaid, shall be a condition precedent to the right of institution of court action.

### **3.5. Conclusion**

It is believed that the establishment of a Uniform and Standard Methodology on Arbitration (the ratification of the ICSID Convention, the establishment of the Special Method, and the modification of the existing laws and

regulations on arbitration) would remove obstacles that the arbitration legal system has encountered. In addition, a Uniform and Standard Methodology on Arbitration would reform, reinforce and strengthen the effectiveness and efficiency of a domestic remedy system that private investors can trust and rely upon. It is believed that the reinforcement and reform of local administrative bodies that are more reliable, efficient and effective can provide a more friendly environment to transnational investors, thereby making Thailand much more attractive to foreign investors. In the end, the establishment of a Uniform and Standard Methodology on Arbitration will enhance and promote FDI flow toward Thailand.



## **Conclusion**

FDI has played an important role in the history of Thailand. FDI has and will continue to have a high priority in Thailand's national agenda. Currently, FDI has a particular importance given that it is a time of global economic crisis. Under such a circumstance, Thailand greatly needs capital inflow to stimulate her economic growth due to a shortage of currency in the country.

There are several significant factors contributing to what has prevented the inflow of FDI toward Thailand. One of those factors is that foreign investors often doubt that the dispute settlement resolution in a local remedy system is impartial or reliable. Therefore, arbitration (preferably international arbitration) as an alternative means of settlement of disputes arising out of foreign direct investments becomes one of key issues found in BITS between Thailand and other countries. The proliferation of BITS in recent years can well demonstrate the importance and worldwide acceptance of arbitration (including international arbitration) as an effective means of dispute settlement resolution between foreign investors and host states.

Therefore, as one of the OAG's mandates in reviewing state contracts introduced by the Government of Thailand as well as by Government Agencies, the main objective of this dissertation is to explore and better understand how the OAG can improve the functions and efficiency of state contracts relating to FDI in order to enhance FDI inflow toward a country. From the study, it is advised that in addition to a well-written contract, a state contract involving or relating to FDI should contain FDI-friendly clauses that provide foreign investors an efficient and effective dispute settlement resolution, offering arbitration (including international arbitration) as an alternative means of settlement of disputes arising out of Thailand's state contracts involving or relating to FDI between foreign investor and Thailand as a host state.

However, when examining the existing arbitration system under Thai law thoroughly, this study suggests that there are at least two (2) problems that make the application of arbitration for state contracts in Thailand a continuous struggle. They are the initial impediment to the arbitration system, and the inconsistency and incompatibility of the arbitration system itself.

As to the former, the lack of the definition and recognized category of “investment contract,” or “a state contract relating to FDI” under Thai law as well as the indistinguishable boundaries of the existing five (5) types of state contracts (government procurement contracts, administrative contracts, concession contracts, state-joint venture contract, and other) is the initial impediment to the arbitration legal system. This study further finds that these five (5) contract types are overlapping, thereby making it impossible in practice to differentiate an investment contract or a state contract relating to FDI from the other.

As to the latter, it appears that the existing arbitration legal system itself is contradictory, inconsistent, incomplete, and incompatible. The contradiction and inconsistency of the arbitration legal system can be examined from two (2) perspectives: domestic law perspective and international law perspective. As far as domestic law is concerned, there are several substantial factors causing such inconsistency and incompatibility. The main factor is that arbitration under the Arbitration Act, B.E. 2545 (2002) does not function well as an alternative dispute resolution for disputes between the State and private parties. The reason is that the Arbitration Act is aimed to help settle disputes among private parties, not between the State and the private party. As a result, the existing arbitration laws and regulations, which are aimed to help settle disputes between private parties, do not provide step-by-step guidance on arbitration as alternative dispute resolution for Government

Agencies, thereby compelling them to adopt the 1992 Regulation to their cases. Additionally, confusion of jurisdiction between the Court of Justice and the Administrative Court is still unresolved regardless of the existence of the Administrative Court.

In consequence, as a response to the former problem, this study advises that the testing process of “a state contract relating to qualifying FDI” should be established and the process is divided into three (3) steps: testing criteria of the foreign element; testing criteria and conditions of qualifying FDI; and testing criteria of qualifying FDI invested in a state contract. Under the testing process, a prospective investment will be brought to the test according to these three (3) steps respectively. As to the first step, there are four (4) testing criteria: place of incorporation; exclusive ownership; percentage of foreign shareholdings; and controlling power in a corporation. Only an investment that falls into one of the testing criterion shall be deemed to have the foreign element and it will be accordingly brought to the second step. The purpose of the second step is to examine whether a prospective investment holding the foreign element qualifies as a foreign direct investment, *per se*, “qualifying FDI.” Then any qualifying FDI that is invested in a state project by a means of state contracts as specified in the third step will be defined as “a state contract relating to qualifying FDI” and accordingly governed by the Special Method.

Overall, the testing process is aimed to differentiate a state contract relating to qualifying FDI from others. The differentiation of a state contract relating to qualifying FDI from other contract types helps ensure that a state contract carrying FDI functions will be treated appropriately, that is, in accordance with domestic arbitration law as well as international law in which Thailand has entered into.

As a response to the latter problem, this study proposes that a Uniform and Standard Methodology of Arbitration should be set up. A Uniform and Standard Methodology on Arbitration consists of three (3) missions: the ratification of the ICSID Convention; the establishment of the Special Method; and the modification of the existing arbitration laws and regulations to accommodate the availability of ICSID, the establishment of the Special Method, and the existence of the Administrative Court.

First, this dissertation strongly urges that Thailand should ratify the ICSID Convention because it becomes very clear that international arbitration is the preferred method of dispute settlement for foreign investors since it offers the parties flexibility, informality, time saving, ability to choose the governing substantive and procedural law, and enforcement of arbitral awards. Furthermore, ICSID also provides an investor-state dispute settlement mechanism, which is perfectly right to settle disputes between the State and the private party. As a consequence, this dissertation proposes that Thailand should ratify the ICSID Convention but with a reservation and condition, namely, that Thailand as the sovereign state is still able to reserve the right to certain disputes that are particularly sensitive to Thailand as the host state. With the reservation, Thailand can opt out the ICSID's jurisdiction over certain disputes to the extent that Thailand reserves this right. Additionally, Thailand should set forth the condition that disputes should be submitted to ICSID only if recourse to local remedy systems has been exhausted. This requirement would ensure that the host state and the investor are given an opportunity to settle disputes between themselves before they will be settled before international arbitration, *per se* ICSID.

By not ratifying the ICSID Convention, Thailand continues to maintain a negative image at the international level. Particularly, Thailand already signed and

became a signatory state of the ICSID Convention but Thailand has not ratified it yet. Under such circumstance, it shall be deemed that Thailand has agreed to the substance of the ICSID Convention and accordingly the obligations arising out of the ICSID Convention as an international agreement seem to be imposed on Thailand according to the Vienna Convention so that Thailand is not supposed to do anything to defeat the object and purpose of a treaty, *per se* the ICSID Convention; otherwise, Thailand may be accused of violating the rule of *pacta sunt servanda* under the 1969 Vienna Convention. Therefore, it seems very inappropriate for Thailand not to ratify the Convention in which more than half of the obligations are already binding on Thailand. The inaction of ratification of the ICSID Convention on part of Thailand stands in stark contrast with the Policy Statement of the Government under the leadership of Prime Minister Abhisit Vejjajiva delivered to the National Assembly on December 30, 2008, where the Prime Minister committed to the work of expediting the ratification of agreements already signed like it happened to the ICSID Convention.

Instead of insisting on not ratifying the ICSID Convention, to help Thailand gain more confidence in ratifying the Convention, Thailand should explore how to formulate the particular conditions when ratifying it so as to reinforce and strengthen her domestic remedy system (the Special Method as suggested by this dissertation). This would go a long way to ensure the impartiality and reliability of local remedies for foreign investors. The mere non-ratification of the ICSID Convention on part of Thailand does not guarantee that Thailand will be no longer involved in international arbitration. The reason is that Thailand may be pressed to submit a dispute with foreign investors to international arbitration under ICSID sooner or later because ICSID also provides the ICSID Additional Facility Rules for

any dispute which is outside of the scope of the ICSID Convention (for example, where the disputing party is not a Contracting State to the ICSID Convention).

Second, the Special Method governing disputes arising out of a state contract relating to qualifying FDI should be established. Apparently, the Special Method adopts the concept of the Calvo Clause, which requires the parties (the private party) to first recourse to local remedies prior to the institution of international arbitration. At the same time, the Special Method also removes obstacles surrounding local remedies that may strengthen the efficiency of local remedies. The Special Method ensures that the parties will be provided with a mechanism that assists them in settling their disputes so that they can remain in good relations in order to perform their contractual obligations until the completion of the contract. The Special Method can be divided into three (3) stages: Amicable Settlement Resolution; Consultation and Negotiation; and Arbitration.

At the first stage, the Amicable Settlement Resolution is designed to provide a channel for the parties to settle their disputes between themselves within a period of time. There is no involvement of any third party in this stage. When the settlement resolution at this stage has failed, the parties will be directed to the next stage.

In the second stage, the Consultation and Negotiation are known as the “waiting and cooling off” periods that the parties are encouraged to participate in good faith consultations and negotiations that might lead to the settlement amicably before the institution of formal proceedings as mostly found in BITs and other investment treaties. Here it is proposed that a Consultation and Negotiation forum in the form of commission, a so-called National Consultation Commission on State Contracts Relating to Qualifying FDI, should be formed. This would consist of

designated Government Agencies that are directly in charge of finance, economics, FDI, legal affairs from the macro perspective. The Commission's functions are partly adopted from those of the Conciliation Commission under the ICSID Convention.

In the third stage, when the Consultation and Negotiation stage has failed for whatsoever reason, it shall be deemed that the local remedy system has been exhausted. As a consequence, the disputing parties shall be eligible to refer their dispute to arbitration. At this point, the parties still have options to choose either domestic arbitration or international arbitration. If they choose international arbitration, this dissertation strongly advises that the parties submit their disputes to ICSID.

Overall, the Special Method would provide the appropriate legal treatment and administration of state contracts relating to qualifying FDI according to domestic investment law and international investment law, especially those that Thailand has been bound through international investment agreements. Only the appropriate treatment like the proposed Special Method could bring about and stimulate the efficiency and accomplishment of the functions of state contracts relating to qualifying FDI, thereby resulting in enhancing capital flowing into a country, which has instantly been in the Government's attention.

Third, the existing arbitration laws and regulations governing disputes arising out of state contracts relating to qualifying FDI should be modified in a manner consonant with the availability of the ICSID Convention (with the assumption that Thailand would ratify the ICSID Convention), the establishment of the Special Method, and the existence of the Administrative Court. With such modification, the Arbitration Act, B.E. 2545 (2002), and the Establishment of the Administrative Court and the Administrative Court Procedure Act, B.E. 2542 (1999) need to be altered to

confer jurisdiction upon the Administrative Court over disputes arising out of a state contract relating to qualifying FDI as well as matters relating to or as a result of arbitration provided by a state contract. In addition to such modification, it is also necessary to draft a new regulation on arbitration as well as a sample arbitration clause specially governing disputes arising out of state contracts relating to qualifying FDI. By doing so, there would be no need for Government Agencies to adopt the 1992 Regulation to state contracts other than government procurement contracts.

Based upon these proposals, it is believed that the achievement of these three (3) missions would remove problems and obstacles that the arbitration legal system has encountered and strengthened the entire domestic remedies system as an alternative settlement mechanism for the disputing parties (the State and foreign investors). Particularly, a Uniform and Standard Methodology of Arbitration can assure foreign investors that their investment will be protected in Thailand so that if and when disputes arise, there is recourse to domestic law and international law, especially international treaties and conventions that Thailand has entered into. The outcome of the establishment of a Uniform and Standard Methodology of Arbitration should be positive that attracts foreign investors by cultivating greater confidence to invest directly into Thailand and the inflow of FDI toward Thailand will be increased.

At the very least, a Uniform and Standard Methodology of Arbitration is also intended to help prevent Thailand from suffering the disappointment from what happened in *BBCD case* and *Walter Bau vs. Thailand*. This lesson is particular true for *Walter Bau case*, where Thailand was brought by Walter Bau to international arbitration under UNCITRAL. In *Walater Bau case*, the arbitral tribunal reaffirmed that Walter Bau, a minority shareholder holding just ten (10) per cent of DMT's holdings could bring a dispute to international arbitration as Walter Bau had been



granted such right under Thailand's BIT with Germany. Therefore, this case illustrates that Thailand will be absolutely unable to get away from being involved in international arbitration, especially due to the fact that Thailand has currently entered into at least forty-two (42) BITs with other countries, in which most Thailand's BITs grant foreign investors to submit a dispute to international arbitration. Moreover, regardless of the a Cabinet Resolution prohibiting Government Agencies from applying arbitration (including international arbitration) for state contracts, foreign investors are not deprived by such Cabinet Resolution of exercising their rights under Thailand's BITs with other countries to submit a dispute to international arbitration.

## **Appendices**

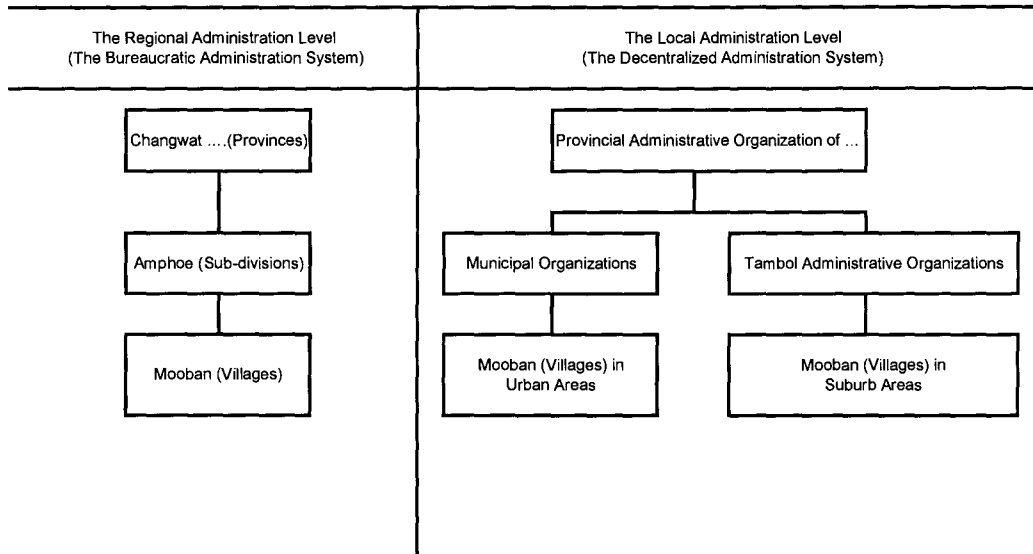
- Appendix 1 The Chart of the Administrative Structure of the Government Organizations of Thailand**
- Appendix 2 The Chart of the Administrative Structure of the Government Organizations Within A Province**
- Appendix 3 A Summary of the Provincial Administration Structure in Thailand**
- Appendix 4 Categories of State Contracts in Thailand**
- Appendix 5 Agreements on the Promotion and Protection of Investments between Thailand and Other Countries**
- Appendix 6 Legislation Regarding the Execution of State Contracts Applicable to Government Agencies**
- Appendix 7 A Summary of Definition and Scope of “FDI” under Modern International Instruments**
- Appendix 8 Testing Process of “a State Contract Relating to Qualifying FDI”**
- Appendix 9 Transactions’ Arrangement in Transferring Shinawatra/Damapong Families’ Shareholdings to Temasek**
- Appendix 10 The Flowchart Showing the Incompletion of the Existing International Arbitration in Thailand**
- Appendix 11 List of Contracting States and Other Signatories of the ICSID Convention**
- Appendix 12 The Flowchart of the Special Method**
- Appendix 13 Proposed Draft Regulation of the Office of the Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI**

The Chart of the Administrative Structure of the Government Organizations of Thailand



## Appendix 2

**The Chart of the Administrative Structure of the Government Organizations within A Province**



### Appendix 3

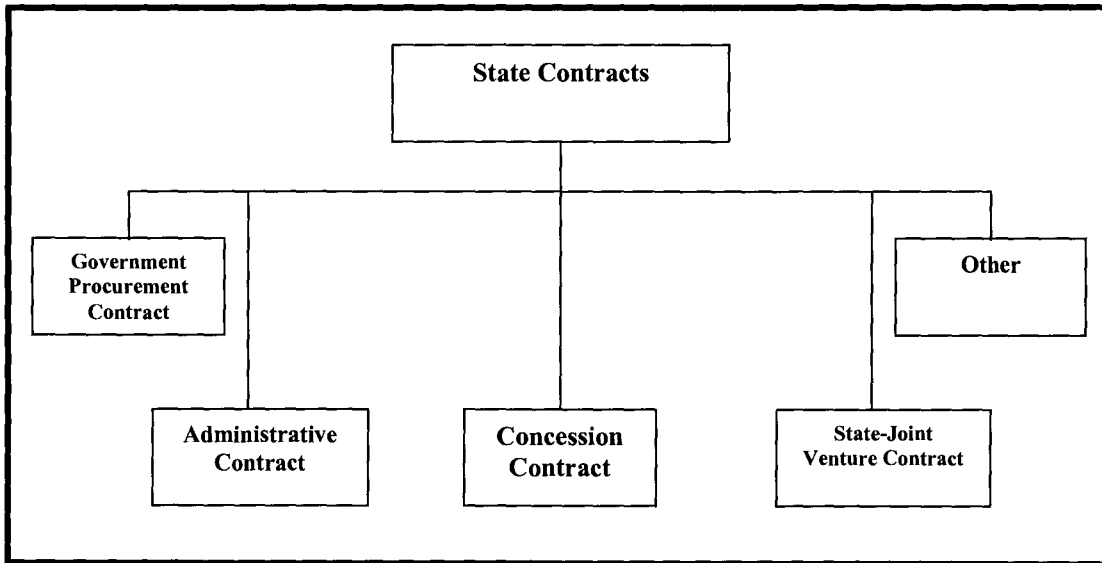
#### A Summary of the Provincial Administration Structure in Thailand

No.	The Regional Administration Level	The Decentralized Administration Level
	<b>North Part</b>	
1	Changwat Chiang Mai	Provincial Administrative Organization of Chiang Mai
2	Changwat Chiang Rai	Provincial Administrative Organization of Chiang Rai
3	Changwat Lampan	Provincial Administrative Organization of Lampan
4	Changwat Lamphun	Provincial Administrative Organization of Lamphun
5	Changwat Mae Hong Son	Provincial Administrative Organization of Mae Hong Son
6	Changwat Nan	Provincial Administrative Organization of Nan
7	Changwat Phayao	Provincial Administrative Organization of Phayao
8	Changwat Phrae	Provincial Administrative Organization of Phrae
9	Changwat Uttaradit	Provincial Administrative Organization of Uttaradit
	<b>Northeast Part</b>	
10	Changwat Amnat Charoen	Provincial Administrative Organization of Amnat Charoen
11	Changwat Buri Ram	Provincial Administrative Organization of Buri Ram
12	Changwat Chaiyaphum	Provincial Administrative Organization of Chaiyaphum
13	Changwat Kalasin	Provincial Administrative Organization of Kalasin
14	Changwat Khon Kaen	Provincial Administrative Organization of Khon Kaen
15	Changwat Loei	Provincial Administrative Organization of Loei
16	Changwat Maha Sarakham	Provincial Administrative Organization of Maha Sarakham
17	Changwat Mukdahan	Provincial Administrative Organization of Mukdahan
18	Changwat Nakhon Phanom	Provincial Administrative Organization of Nakhon Phanom
19	Changwat Nakhon Ratchasima	Provincial Administrative Organization of Nakhon Ratchasima
20	Changwat Nong Bua Lamphu	Provincial Administrative Organization of Nong Bua Lamphu
21	Changwat Nong Khai	Provincial Administrative Organization of Nong Khai
22	Changwat Roi Et	Provincial Administrative Organization of Roi Et
23	Changwat Sakon Nakhon	Provincial Administrative Organization of Sakon Nakhon
24	Changwat Si Sa Ket	Provincial Administrative Organization of Si Sa Ket
25	Changwat Surin	Provincial Administrative Organization of Surin
26	Changwat Ubon Ratchathani	Provincial Administrative Organization of Ubon Ratchathani
27	Changwat Udon Thani	Provincial Administrative Organization of Udon Thani
28	Changwat Yasothon	Provincial Administrative Organization of Yasothon
	<b>Central Part</b>	
29	Changwat Ang Thong	Provincial Administrative Organization of Ang Thong
30	Changwat Bangkok (Krung Thep Maha Nakhon), Special Form of Local Administration	-
31	Changwat Chai Nat	Provincial Administrative Organization of Chai Nat
32	Changwat Kamphaeng Phet	Provincial Administrative Organization of Kamphaeng Phet
33	Changwat Lop Buri	Provincial Administrative Organization of Lop Buri
34	Changwat Nakhon Nayok	Provincial Administrative Organization of Nakhon Nayok
35	Changwat Nakhon Pathom	Provincial Administrative Organization of Nakhon Pathom
36	Changwat Nakhon Sawan	Provincial Administrative Organization of Nakhon Sawan
37	Changwat Nonthaburi	Provincial Administrative Organization of Nonthaburi
38	Changwat Pathum Thani	Provincial Administrative Organization of Pathum Thani
39	Changwat Phetchabun	Provincial Administrative Organization of Phetchabun
40	Changwat Phichit	Provincial Administrative Organization of Phichit
41	Changwat Phitsanulok	Provincial Administrative Organization of Phitsanulok
42	Changwat Phra Nakhon Si Ayutthaya	Provincial Administrative Organization of Phra Nakhon Si Ayutt
43	Changwat Samut Prakan	Provincial Administrative Organization of Samut Prakan
44	Changwat Samut Sakhon	Provincial Administrative Organization of Samut Sakhon
45	Changwat Samut Songkhram	Provincial Administrative Organization of Samut Songkhram

## Appendix 3

No.	The Regional Administration Level	The Decentralized Administration Level
46	Changwat Saraburi	Provincial Administrative Organization of Saraburi
47	Changwat Sing Buri	Provincial Administrative Organization of Sing Buri
48	Changwat Sukhothai	Provincial Administrative Organization of Sukhothai
49	Changwat Suphan Buri	Provincial Administrative Organization of Suphan Buri
50	Changwat Uthai Thani	Provincial Administrative Organization of Uthai Thani
	<b>West Part</b>	
51	Changwat Kanchanaburi	Provincial Administrative Organization of Kanchanaburi
52	Changwat Phetchaburi	Provincial Administrative Organization of Phetchaburi
53	Changwat Prachuap Khiri Khan	Provincial Administrative Organization of Prachuap Khiri Khan
54	Changwat Ratchaburi	Provincial Administrative Organization of Ratchaburi
55	Changwat Tak	Provincial Administrative Organization of Tak
	<b>East Part</b>	
56	Changwat Chachoengsao	Provincial Administrative Organization of Chachoengsao
57	Changwat Chanthaburi	Provincial Administrative Organization of Chanthaburi
58	Changwat Chon Buri	Provincial Administrative Organization of Chon Buri
59	Changwat Prachin Buri	Provincial Administrative Organization of Prachin Buri
60	Changwat Rayong	Provincial Administrative Organization of Rayong
61	Changwat Sa Kaeo	Provincial Administrative Organization of Sa Kaeo
62	Changwat Trat	Provincial Administrative Organization of Trat
	<b>South Part</b>	
63	Changwat Chumphon	Provincial Administrative Organization of Chumphon
64	Changwat Krabi	Provincial Administrative Organization of Krabi
65	Changwat Nakhon Si Thammarat	Provincial Administrative Organization of Nakhon Si Thammarat
66	Changwat Narathiwat	Provincial Administrative Organization of Narathiwat
67	Changwat Pattani	Provincial Administrative Organization of Pattani
68	Changwat Phang Nga	Provincial Administrative Organization of Phang Nga
69	Changwat Phatthalung	Provincial Administrative Organization of Phatthalung
70	Changwat Phuket	Provincial Administrative Organization of Phuket
71	Changwat Ranong	Provincial Administrative Organization of Ranong
72	Changwat Satun	Provincial Administrative Organization of Satun
73	Changwat Songkhla	Provincial Administrative Organization of Songkhla
74	Changwat Surat Thani	Provincial Administrative Organization of Surat Thani
75	Changwat Trang	Provincial Administrative Organization of Trang
76	Changwat Yala	Provincial Administrative Organization of Yala

**Categories of State Contracts in Thailand**



Appendix 5

**Agreements on the Promotion and Protection of Investments  
between Thailand and Other Countries**

Country	Date of Signing	Date of Entry into Force	Note
1. <u>The Netherlands</u>	6-Jun-72	3-Mar-73	Re-Negotiation in Progress
2. <u>United Kingdom</u>	28-Nov-78	11-Aug-79	
3. <u>China</u>	12-Mar-85	13-Dec-85	
4. <u>ASEAN</u>	15-Dec-87	12-Apr-89	
5. <u>Republic of Korea</u>	24-Mar-89	29-Sep-89	
6. <u>Laos</u>	22-Aug-90	7-Dec-90	
7. <u>Hungary</u>	18-Oct-91	18-Oct-91	
8. <u>Vietnam</u>	30-Oct-91	7-Feb-92	
9. <u>Peru</u>	15-Nov-91	15-Nov-91	
10. <u>Poland</u>	18-Dec-92	10-Aug-94	
11. <u>Romania</u>	30-Apr-93	20-Aug-94	
12. <u>Czech Republic</u>	12-Feb-94	4-May-95	
13. <u>Finland</u>	18-Mar-94	18-May-96	
14. <u>Cambodia</u>	19-Mar-95	18-Apr-97	
15. <u>The Philippines</u>	30-Sep-95	6-Sep-96	
16. <u>Sri Lanka</u>	3-Jan-96	14-May-96	
17. <u>Taiwan</u>	30-Apr-96	30-Apr-96	
18. <u>Canada</u>	17-Jan-97	24-Sep-98	
19. <u>Indonesia</u>	17-Feb-98	5-Nov-98	
20. <u>Switzerland</u>	17-Nov-97	21-Jul-99	
21. <u>Argentina</u>	18-Feb-00	7-Mar-02	
22. <u>Croatia</u>	18-Feb-00		
23. <u>Egypt</u>	18-Feb-00	27-Feb-02	
24. <u>Israel</u>	18-Feb-00	28-Aug-03	
25. <u>Slovenia</u>	18-Feb-00	20-Oct-02	
26. <u>Sweden</u>	18-Feb-00	23-Nov-02	
27. <u>Zimbabwe</u>	18-Feb-00		
28. <u>India</u>	10-Jul-00	13-Jul-01	
29. <u>North Korea</u>	1-Mar-02	24-May-02	
30. <u>Bahrain</u>	21-May-02	17-Jul-02	
31. <u>Belgo-Luxemburg</u>	12-Jun-02	19-Sep-04	
32. <u>Germany</u>	24-Jun-02	20 Oct 2004	
33. <u>Bangladesh</u>	9-Jul-02	12 Jan 2003	
34. <u>Russia</u>	17-Oct-02		
35. <u>Bulgaria</u>	11-Sep-03	12 Aug 2004	
36. <u>Turkey</u>	24-Jun-05	-	
37. <u>Tajikistan</u>	9-Aug-05	-	
38. <u>Hong kong SAR</u>	19-Nov-05	18-Apr-06	
39. <u>Jordan</u>	15-Dec-05	-	

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Appendix 6

**Legislation Regarding the Execution of State Contracts Applicable to Government Agencies**

<b>Types of Government Agencies</b>	<b>Cabinet Resolution Regarding a Contract-Making Process</b>	<b>Regulation of the Office of the Prime Minister on Procurement, B.E. 2535 (1992)</b>	<b>Regulation of the Ministry of Interior on Procurement of Local Administrative Organizations, B.E. 2535 (1992)</b>	<b>Private Participation in State Undertakings Act, B.E. 2535 (1992)</b>
<b>1. Main Government Agencies</b>				
1.1 Legislative Branch	/	/	x	/
1.2 Executive Branch	/	/	x	/
1.2.1 Central Administration	/	/	x	/
1.2.2 Regional Administration	/	/	x	/
1.3 Judicial Branch	/	/	x	/
1.4 Independent Organizations	/	/	x	/
<b>2. Local Administration Organizations</b>	/	x	/	/
2.1 Provincial Administrative Organizations	/	x	/	/
2.2 Municipal Organizations	/	x	/	/
2.3 Tambol Administrative Organizations	/	x	/	/
2.4 Bangkok Metropolitan Administration	/	x	/	/
2.5 Pattaya Administration	/	x	/	/
<b>3. State Enterprises</b>	/	x	x	/

Appendix 7

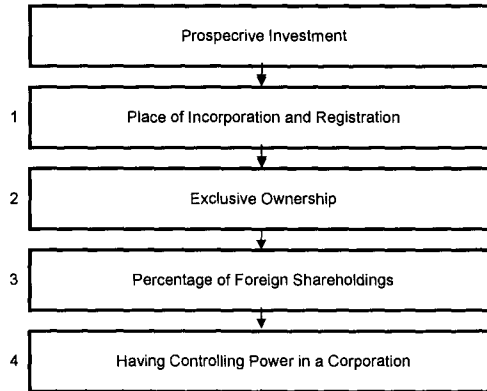
**A Summary of Definition and Scope of FDI under Modern International Instruments**

International Instruments	An Open-ended Definition	An Illustrative List	Additional Covered Investment	Conditions	Exclusion
1. A Working Group on the Relationship Between Trade and Investment, WTO	n/a (long-term investment)	n/a	n/a	n/a	n/a (short-term investment, portfolio investment)
2. 1987 ASEAN Agreement	/	/	x	/	x
3. 1998 Framework Agreement	x	x	x	x	(portfolio investment)
4. IMF	/ 10%	-	-	-	-
5. OECD	/ 10%	-	-	-	-
6. U.S. Model BIT	/	/	/ (alteration of the existing investment)	x	x
7. Thailand's BITs	/ (adopting the 1987 ASEAN Agreement)	/	/	/	- (portfolio investment)

# Appendix 8

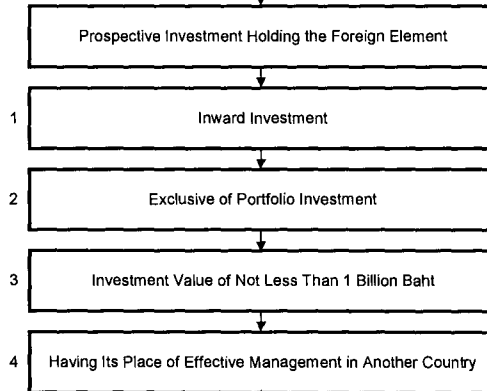
## Testing Process of "a State Contract Relating to Qualifying FDI"

### I. Testing Criteria of the Foreign Element



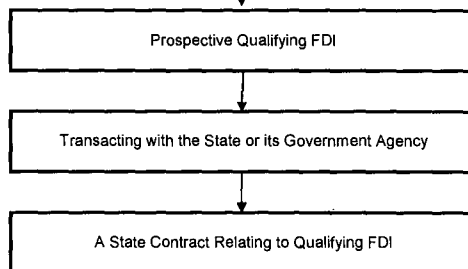
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### II. Testing Criteria and Conditions of Qualifying FDI



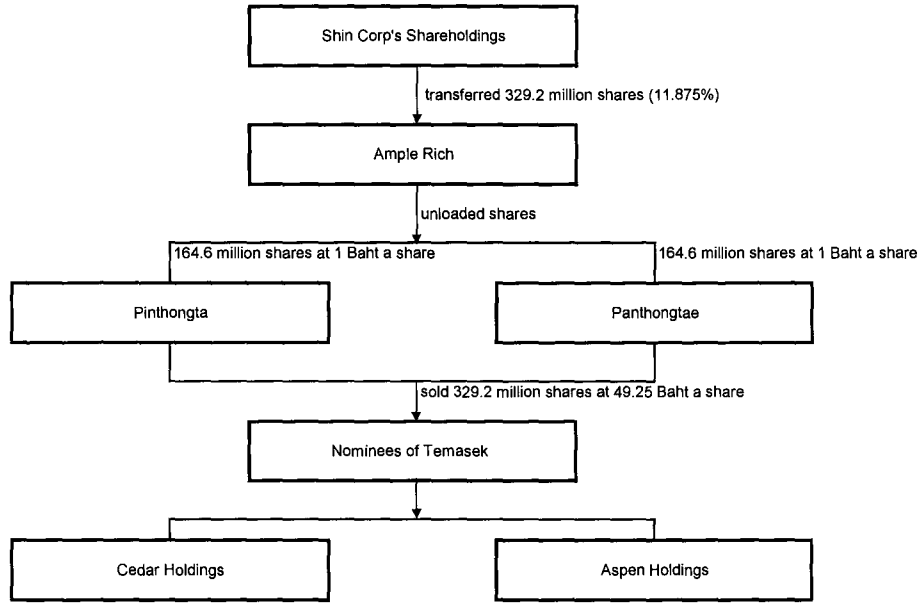
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### III. Testing Criteria of Qualifying FDI Invested in a State Contract



# Appendix 9

## Transactions' Arrangement in Transferring Shinawatra/Damapong Families' Shareholdings to Temasek



**The Flowchart Showing the Incompletion of the Existing International Arbitration in Thailand**

<p>Dispute Settlement Resolution between Private Parties (Thailand's Accessibility to UNCITRAL)</p>	<p><b>(Missing Piece)</b> Dispute Settlement Resolution between the State and the Private Party (Thailand's Inaccessibility to ICSID)</p>
<p>Arbitration Proceedings under the UNCITRAL Arbitration Rules</p>	
<p>Recognition and Enforcement of Arbitral Awards under the New York Convention</p>	
<p>Investment Insurance under the MIGA Convention</p>	

## Appendix 11

### LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE ICSID CONVENTION (as of November 4, 2007)

State	Signature	Deposit of Ratification	Entry into Force of convention
Afghanistan	Sep. 30, 1966	June 25, 1968	July 25, 1968
Albania	Oct. 15, 1991	Oct. 15, 1991	Nov. 14, 1991
Algeria	Apr. 17, 1995	Feb. 21, 1996	Mar. 22, 1996
Argentina	May 21, 1991	Oct. 19, 1994	Nov. 18, 1994
Armenia	Sep. 16, 1992	Sep. 16, 1992	Oct. 16, 1992
Australia	Mar. 24, 1975	May 2, 1991	June 1, 1991
Austria	May 17, 1966	May 25, 1971	June 24, 1971
Azerbaijan	Sep. 18, 1992	Sep. 18, 1992	Oct. 18, 1992
Bahamas	Oct. 19, 1995	Oct. 19, 1995	Nov. 18, 1995
Bahrain	Sep. 22, 1995	Feb. 14, 1996	Mar. 15, 1996
Bangladesh	Nov. 20, 1979	Mar. 27, 1980	Apr. 26, 1980
Barbados	May 13, 1981	Nov. 1, 1983	Dec. 1, 1983
Belarus	July 10, 1992	July 10, 1992	Aug. 9, 1992
Belgium	Dec. 15, 1965	Aug. 27, 1970	Sep. 26, 1970
Belize	Dec. 19, 1986		
Benin	Sep. 10, 1965	Sep. 6, 1966	Oct. 14, 1966
Bosnia and Herzegovina	Apr. 25, 1997	May 14, 1997	June 13, 1997
Botswana	Jan. 15, 1970	Jan. 15, 1970	Feb. 14, 1970
Brunei Darussalam	Sep. 16, 2002	Sep. 16, 2002	Oct. 16, 2002
Bulgaria	Mar. 21, 2000	Apr. 13, 2001	May 13, 2001
Burkina Faso	Sep. 16, 1965	Aug. 29, 1966	Oct. 14, 1966
Burundi	Feb. 17, 1967	Nov. 5, 1969	Dec. 5, 1969
Cambodia	Nov. 5, 1993	Dec. 20, 2004	Jan. 19, 2005
Cameroon	Sep. 23, 1965	Jan. 3, 1967	Feb. 2, 1967
Canada	Dec. 15, 2006		
Central African Republic	Aug. 26, 1965	Feb. 23, 1966	Oct. 14, 1966
Chad	May 12, 1966	Aug. 29, 1966	Oct. 14, 1966
Chile	Jan. 25, 1991	Sep. 24, 1991	Oct. 24, 1991
China	Feb. 9, 1990	Jan. 7, 1993	Feb. 6, 1993
Colombia	May 18, 1993	July 15, 1997	Aug. 14, 1997
Comoros	Sep. 26, 1978	Nov. 7, 1978	Dec. 7, 1978
Congo	Dec. 27, 1965	June 23, 1966	Oct. 14, 1966
Congo, Democratic Rep. of	Oct. 29, 1968	Apr. 29, 1970	May 29, 1970
Costa Rica	Sep. 29, 1981	Apr. 27, 1993	May 27, 1993
Côte d'Ivoire	June 30, 1965	Feb. 16, 1966	Oct. 14, 1966
Croatia	June 16, 1997	Sep. 22, 1998	Oct. 22, 1998
Cyprus	Mar. 9, 1966	Nov. 25, 1966	Dec. 25, 1966
Czech Republic	Mar. 23, 1993	Mar. 23, 1993	Apr. 22, 1993
Denmark	Oct. 11, 1965	Apr. 24, 1968	May 24, 1968
Dominican Republic	Mar. 20, 2000		
Ecuador	Jan. 15, 1986	Jan. 15, 1986	Feb. 14, 1986
Egypt, Arab Rep. of	Feb. 11, 1972	May 3, 1972	June 2, 1972
El Salvador	June 9, 1982	Mar. 6, 1984	Apr. 5, 1984
Estonia	June 23, 1992	June 23, 1992	July 23, 1992
Ethiopia	Sep. 21, 1965		
Fiji	July 1, 1977	Aug. 11, 1977	Sep. 10, 1977
Finland	July 14, 1967	Jan. 9, 1969	Feb. 8, 1969
France	Dec. 22, 1965	Aug. 21, 1967	Sep. 20, 1967
Gabon	Sep. 21, 1965	Apr. 4, 1966	Oct. 14, 1966
Gambia, The	Oct. 1, 1974	Dec. 27, 1974	Jan. 26, 1975
Georgia	Aug. 7, 1992	Aug. 7, 1992	Sep. 6, 1992
Germany	Jan. 27, 1966	Apr. 18, 1969	May 18, 1969
Ghana	Nov. 26, 1965	July 13, 1966	Oct. 14, 1966
Greece	Mar. 16, 1966	Apr. 21, 1969	May 21, 1969
Grenada	May 24, 1991	May 24, 1991	June 23, 1991
Guatemala	Nov. 9, 1995	Jan. 21, 2003	Feb. 20, 2003
Guinea	Aug. 27, 1968	Nov. 4, 1968	Dec. 4, 1968
Guinea-Bissau	Sep. 4, 1991		
Guyana	July 3, 1969	July 11, 1969	Aug. 10, 1969
Haiti	Jan. 30, 1985		
Honduras	May 28, 1986	Feb. 14, 1989	Mar. 16, 1989
Hungary	Oct. 1, 1986	Feb. 4, 1987	Mar. 6, 1987
Iceland	July 25, 1966	July 25, 1966	Oct. 14, 1966
Indonesia	Feb. 16, 1968	Sep. 28, 1968	Oct. 28, 1968
Ireland	Aug. 30, 1966	Apr. 7, 1981	1 May 7, 1981
Israel	June 16, 1980	June 22, 1983	July 22, 1983
Italy	Nov. 18, 1965	Mar. 29, 1971	Apr. 28, 1971
Jamaica	June 23, 1965	Sep. 9, 1966	Oct. 14, 1966
Japan	Sep. 23, 1965	Aug. 17, 1967	Sep. 16, 1967
Jordan	July 14, 1972	Oct. 30, 1972	Nov. 29, 1972
Kazakhstan	July 23, 1992	Sep. 21, 2000	Oct. 21, 2000
Kenya	May 24, 1966	Jan. 3, 1967	Feb. 2, 1967

## Appendix 11

State	Signature	Deposit of Ratification	Entry into Force of convention
Korea, Rep. of	Apr. 18, 1966	Feb. 21, 1967	Mar. 23, 1967
Kuwait	Feb. 9, 1978	Feb. 2, 1979	Mar. 4, 1979
Kyrgyz Republic	June 9, 1995		
Latvia	Aug. 8, 1997	Aug. 8, 1997	Sep. 7, 1997
Lebanon	Mar. 26, 2003	Mar. 26, 2003	Apr. 25, 2003
Lesotho	Sep. 19, 1968	July 8, 1969	Aug. 7, 1969
Liberia	Sep. 3, 1965	June 16, 1970	July 16, 1970
Lithuania	July 6, 1992	July 6, 1992	Aug. 5, 1992
Luxembourg	Sep. 28, 1965	July 30, 1970	Aug. 29, 1970
Macedonia, former Yugoslav Rep. of	Sep. 16, 1998	Oct. 27, 1998	Nov. 26, 1998
Madagascar	June 1, 1966	Sep. 6, 1966	Oct. 14, 1966
Malawi	June 9, 1966	Aug. 23, 1966	Oct. 14, 1966
Malaysia	Oct. 22, 1965	Aug. 8, 1966	Oct. 14, 1966
Mali	Apr. 9, 1976	Jan. 3, 1978	Feb. 2, 1978
Malta	Apr. 24, 2002	Nov. 3, 2003	Dec. 3, 2003
Mauritania	July 30, 1965	Jan. 11, 1966	Oct. 14, 1966
Mauritius	June 2, 1969	June 2, 1969	July 2, 1969
Micronesia	June 24, 1993	June 24, 1993	July 24, 1993
Moldova	Aug. 12, 1992		
Mongolia	June 14, 1991	June 14, 1991	July 14, 1991
Morocco	Oct. 11, 1965	May 11, 1967	June 10, 1967
Mozambique	Apr. 4, 1995	June 7, 1995	July 7, 1995
Namibia	Oct. 26, 1998		
Nepal	Sep. 28, 1965	Jan. 7, 1969	Feb. 6, 1969
Netherlands	May 25, 1966	Sep. 14, 1966	Oct. 14, 1966
New Zealand	Sep. 2, 1970	Apr. 2, 1980	May 2, 1980
Nicaragua	Feb. 4, 1994	Mar. 20, 1995	Apr. 19, 1995
Niger	Aug. 23, 1965	Nov. 14, 1966	Dec. 14, 1966
Nigeria	July 13, 1965	Aug. 23, 1965	Oct. 14, 1966
Norway	June 24, 1966	Aug. 16, 1967	Sep. 15, 1967
Oman	May 5, 1995	July 24, 1995	Aug. 23, 1995
Pakistan	July 6, 1965	Sep. 15, 1966	Oct. 15, 1966
Panama	Nov. 22, 1995	Apr. 8, 1996	6 May 8, 1996
Papua New Guinea	Oct. 20, 1978	Oct. 20, 1978	Nov. 19, 1978
Paraguay	July 27, 1981	Jan. 7, 1983	Feb. 6, 1983
Peru	Sep. 4, 1991	Aug. 9, 1993	Sep. 8, 1993
Philippines	Sep. 26, 1978	Nov. 17, 1978	Dec. 17, 1978
Portugal	Aug. 4, 1983	July 2, 1984	Aug. 1, 1984
Romania	Sep. 6, 1974	Sep. 12, 1975	Oct. 12, 1975
Russian Federation	June 16, 1992		
Rwanda	Apr. 21, 1978	Oct. 15, 1979	Nov. 14, 1979
Samoa	Feb. 3, 1978	Apr. 25, 1978	May 25, 1978
Sao Tome and Principe	Oct. 1, 1999		
Saudi Arabia	Sep. 28, 1979	May 8, 1980 J	June 7, 1980
Senegal	Sep. 26, 1966	Apr. 21, 1967	May 21, 1967
Serbia	May 9, 2007	May 9, 2007	June 8, 2007
Seychelles	Feb. 16, 1978	Mar. 20, 1978	Apr. 19, 1978
Sierra Leone	Sep. 27, 1965	Aug. 2, 1966	Oct. 14, 1966
Singapore	Feb. 2, 1968	Oct. 14, 1968	Nov. 13, 1968
Slovak Republic	Sep. 27, 1993	May 27, 1994	June 26, 1994
Slovenia	Mar. 7, 1994	Mar. 7, 1994	Apr. 6, 1994
Solomon Islands	Nov. 12, 1979	Sep. 8, 1981	Oct. 8, 1981
Somalia	Sep. 27, 1965	Feb. 29, 1968	Mar. 30, 1968
Spain	Mar. 21, 1994	Aug. 18, 1994	ept. 17, 1994
Sri Lanka	Aug. 30, 1967	Oct. 12, 1967	Nov. 11, 1967
St. Kitts & Nevis	Oct. 14, 1994	Aug. 4, 1995	Sep. 3, 1995
St. Lucia	June 4, 1984	June 4, 1984	July 4, 1984
St. Vincent and the Grenadines	Aug. 7, 2001	Dec. 16, 2002	Jan. 15, 2003
Sudan	Mar. 15, 1967	Apr. 9, 1973	3 May 9, 1973
Swaziland	Nov. 3, 1970	June 14, 1971	July 14, 1971
Sweden	Sep. 25, 1965	Dec. 29, 1966	Jan. 28, 1967
Switzerland	Sep. 22, 1967	May 15, 1968	June 14, 1968
Syria	May 25, 2005	Jan. 25, 2006	Feb. 24, 2006
Tanzania	Jan. 10, 1992	May 18, 1992	June 17, 1992
Thailand	Dec. 6, 1985		
Timor-Leste	July 23, 2002	July 23, 2002	Aug. 22, 2002
Togo	Jan. 24, 1966	Aug. 11, 1967	Sep. 10, 1967
Tonga	May 1, 1989	Mar. 21, 1990	Apr. 20, 1990
Trinidad and Tobago	Oct. 5, 1966	Jan. 3, 1967	Feb. 2, 1967
Tunisia	May 5, 1965	June 22, 1966	Oct. 14, 1966
Turkey	June 24, 1987	Mar. 3, 1989	Apr. 2, 1989
Turkmenistan	Sep. 26, 1992	Sep. 26, 1992	Oct. 26, 1992
Uganda	June 7, 1966	June 7, 1966	Oct. 14, 1966
Ukraine	Apr. 3, 1998	June 7, 2000	July 7, 2000
United Arab Emirates	Dec. 23, 1981	Dec. 23, 1981	Jan. 22, 1982
United Kingdom of Great Britain and Northern Ireland	May 26, 1965	Dec. 19, 1966	Jan. 18, 1967

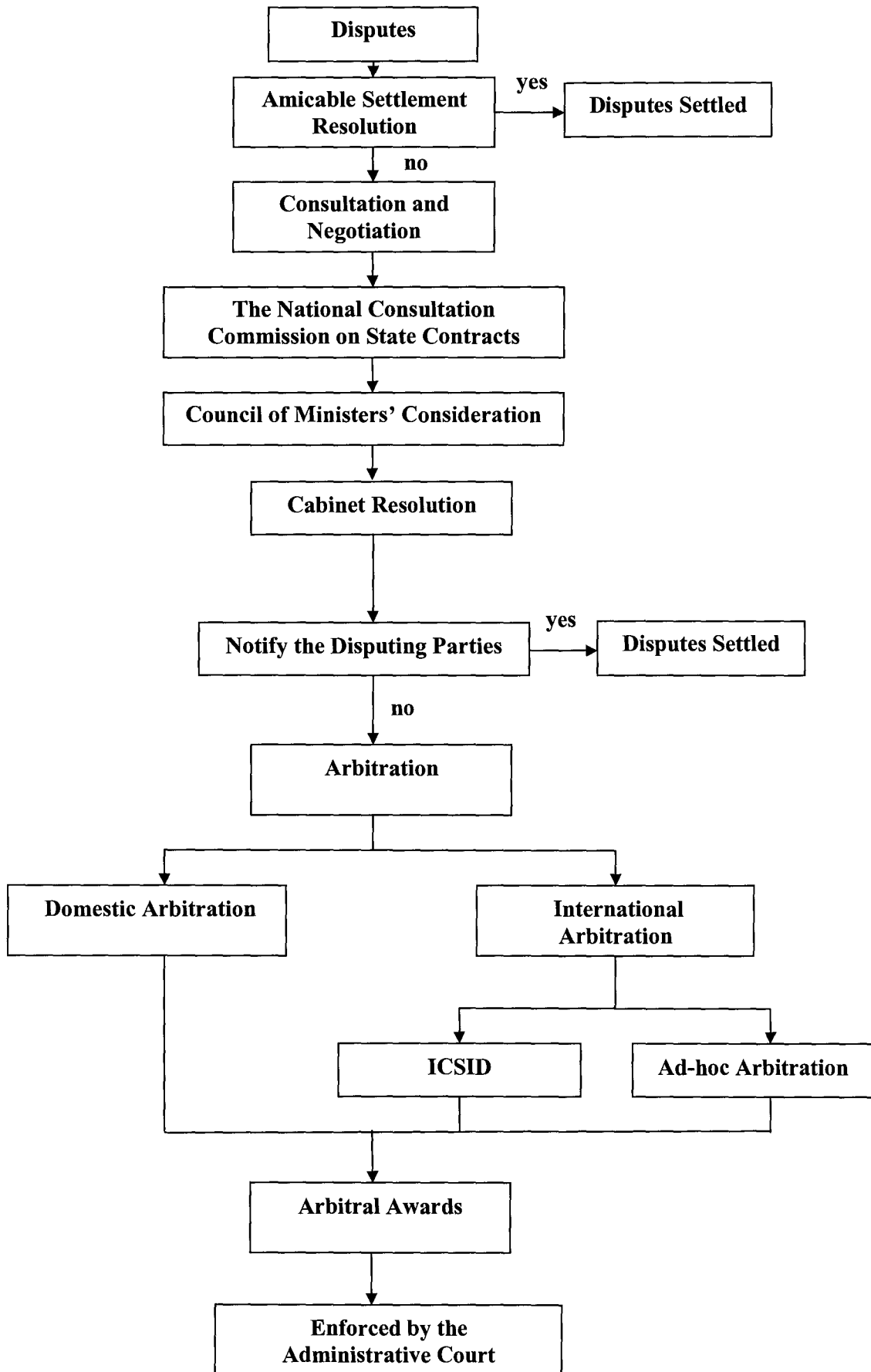
## Appendix 11

State	Signature	Deposit of Ratification	Entry into Force of convention
United States of America	Aug. 27, 1965	June 10, 1966	Oct. 14, 1966
Uruguay	May 28, 1992	Aug. 9, 2000	Sep. 8, 2000
Uzbekistan	Mar. 17, 1994	July 26, 1995	Aug. 25, 1995
Venezuela	Aug. 18, 1993	May 2, 1995	June 1, 1995
Yemen, Republic of	Oct. 28, 1997	Oct. 21, 2004	Nov. 20, 2004
Zambia	June 17, 1970	June 17, 1970	July 17, 1970
Zimbabwe	Mar. 25, 1991	May 20, 1994	June 19, 1994

Note: The Government of the Republic of Bolivia signed the ICSID Convention on May 3, 1991 and deposited its instrument of ratification on June 23, 1995. The Convention entered into force for Bolivia on July 23, 1995. On May 2, 2007, the depositary received a written notice of Bolivia's denunciation of the Convention. In accordance with Article 71 of the Convention, the denunciation took effect six months after the receipt of Bolivia's notice, i.e., on November 3, 2007.



Appendix 12  
**The Flowchart of the Special Method**



**- Proposed Draft -**

**The Regulation of the Office of Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI B.E. ....**

.....

Whereas it is appropriate to issue the Regulation of the Office of Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI B.E. .... to govern disputes arising out of a state contract relating to qualifying FDI.

**Clause 1** This Regulation shall be referred as to “the Regulation of the Office of Prime Minister on Arbitration Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI B.E. ....

**Clause 2** This Regulation shall come into force after sixty (60) days from the date of its publication in the Government Gazette.

**Clause 3** Where any regulation, rule, Cabinet Resolution, order is inconsistent or in contrast with these provisions of this Regulation, this Regulation shall prevail and apply.

**Clause 4** The Permanent-Secretary of the Office of Prime Minister shall be in charge of the application, interpretation and enforcement of this Regulation.

**Chapter I**

**General Definition and Scope**

**Clause 5** In this Regulation:

**A State Contract Relating to Qualifying FDI”** means any state contract having special characteristics that fulfills and meets criteria and conditions

subject to the Testing Process “a State Contract Relating to Qualifying FDI” set forth by **Schedule 1**.

**Contracting Government Agency**” means any of these types of Government Agencies: the Legislative Branch, the Executive Branch, the Judicial Branch, Independent Organizations, Local Authorities, and State Enterprises transacting with the Private Party.

**“Commission”** means the National Consultation Commission on State Contracts Relating to Qualifying FDI.

**“Government Agency”** means any of these types of Government Agencies: the Legislative Branch, the Executive Branch, the Judicial Branch, Independent Organizations, Local Authorities, and State Enterprises.

**“Parties”** means the Contracting Government Agency and the Private Party.

**“Private Party”** means the Private Party transacting with the Contracting Government Agency.

**“Prospective Contract”** means a contract to be entered into by a Contracting Government Agency with the Private Party.

**Clause 6** Any Contracting Government Agency desires to apply arbitration as dispute settlement resolution to disputes arising out of a state contract relating to qualifying FDI shall comply with this Regulation.

**Clause 7** Prior to signing any state contract relating to qualifying FDI with the private party, a Contracting Government Agency shall conclude an arbitration clause according to the sample arbitration clause as suggested by **Schedule 2** of this Regulation into a contract.

## Appendix 13

The sample arbitration clause may be adjusted and modified based upon a case-by-case basis. In this regard, the Contracting Government Agency may consult the Office of Attorney General for legal advice and its adjustment.

### **Chapter II**

#### **Amicable Settlement Resolution**

**Clause 8** Any dispute or difference arising out of or in connection with this Prospective Contract or the implementation of any of the provisions of this Prospective Contract shall be referred to the Amicable Settlement Resolution where the Parties are encouraged to settle their dispute between themselves amicably within sixty (60) days since the day of acknowledging the dispute.

### **Chapter III**

#### **Consultation and Negotiation**

**Clause 9** In an event where the Amicable Settlement Resolution between the Parties has failed or the sixty (60) day period of the Amicable Settlement Resolution has elapsed, the Contracting Government Agency is required to submit a request for Consultation and Negotiation to the National Consultation Commission on State Contracts Relating to Qualifying FDI, (the “Commission”) promptly, whether or not the private party has done so.

A request for Consultation and Negotiation will contain issues of the dispute as well as relevant information, facts and details relevant to the dispute, for example, the claim of the dispute, a contract concerned, etc.

**Clause 10** The Commission consists of authorized representatives designated from the Ministry of Finance as a Chairman; the Office of the National Economic and Social Development Board (the “NESDB”); the Fiscal Policy Office,

the Ministry of Finance (the “FPO”); the Board of Investment (the “BOI”); the Department of Treaties and Legal Affairs, the Ministry of Foreign Affairs; the OAG; the Office of Council of State; three (3) independent and qualified persons from either state sector or private practice; and the Department of the Legal Counsel of the OAG as a Commission member and secretary.

At least two thirds (2/3) of the Commission members shall constitute a quorum of the meeting.

The Commission’s Resolution shall be issued by a majority vote.

**Clause 11** When the Commission acknowledges the dispute between the Contracting Government Agency and the Private Party, the Commission shall call upon a meeting to discuss the dispute in order to recommend possible terms of settlement to the Parties within thirty (30) days. The Commission shall be entitled to invite both Parties to participate in a meeting. If necessary, the Commission may call upon the Parties for additional meetings. The Parties shall facilitate the Commission in settling the dispute.

The periods for the Consultation and Negotiation may be consumed from three (3) months to twelve (12) months depending on the complication and levels of the dispute. If the dispute is not complicated and carries straightforward issues, the Consultation and Negotiation may take a few months whereas a maximum of twelve (12) month period will allow the Parties to put several great efforts to deal and settle perplexing and multi-level issues in dispute successfully and satisfactorily.

**Clause 12** During the Consultation and Negotiation, the Commission has the responsibility to clarify the issues in dispute between the parties, to come up with possible terms of settlement to them, and to endeavour to bring about the

settlement between them and the Parties are supposed to take such a recommendation into consideration accordingly.

**Clause 13** The Commission shall draw up a report of the Consultation and Negotiation, whether or not the dispute between the Parties can be settled. In the event where the Parties can reach an agreement, the Commission shall specify the issues in dispute and how the Parties agree to settle their dispute.

In the event where the Commission considers that it is unlikely that the Parties can seek a solution with an agreement, the Commission shall close the Consultation and Negotiation's proceedings and draw up a report of the Parties' failure to reach such an agreement.

After a report has been produced, the Commission shall hand out a report to the Parties as well as to submit such a report to the Council of Ministers for an approval as to whether the Council of Ministers will agree with the Commission's recommendation and conclusion based upon the report.

**Clause 14** Upon a report, the Council of Ministers shall consider a report, issue a Cabinet Resolution over the dispute, and notify the Commission of the Cabinet Resolution within sixty (60) days as to whether the Council of Ministers agrees with the Parties' agreement in settling their dispute as appeared in a report. In a case where the Council of Ministers disagrees with the settlement or where the dispute cannot be settled in the Consultation and Negotiation process, the Council of Ministers is required to come up with alternative terms of settlement to the Parties.

**Clause 15** The Commission shall notify the Parties of the Cabinet Resolution promptly. If the Private Party agrees with the Cabinet Resolution, the Parties shall comply with the Cabinet Resolution accordingly. However, if the

Private Party dissatisfied with Cabinet Resolution, the Private Party is entitled to bring the dispute against the Contracting Government Agency to arbitration.

#### **Chapter IV**

#### **Arbitration**

**Clause 16** Once the Consultation and Negotiation has failed or the periods of the Consultation and Negotiation have elapsed, the Parties shall be eligible to refer the dispute to arbitration (either domestic or international arbitration).

**Clause 17** In a case where the Parties have agreed to submit the dispute to domestic arbitration, either Party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name of an arbitrator to be appointed by him. The other Party shall appoint the arbitrator within thirty (30) days after receipt of the said notice.

Notwithstanding, there shall be at least one (1) arbitrator who has knowledge and experience background in administrative or public law. The two (2) arbitrators shall appoint the third arbitrator, a so-called umpire who will chair the arbitral tribunal.

Should either Party be unable to appoint an arbitrator or in case of disagreement as regards to the appointment of an umpire, each Party is entitled to refer the matter to the Administrative Court for the appointment of an arbitrator or umpire as the case may be.

**Clause 18** In a case where the Parties have agreed to submit the dispute to international arbitration, the Parties are strongly advised to submit their dispute to the International Centre for Settlement of Investment Disputes (hereinafter the "ICSID").

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**Clause 19** The arbitral tribunal shall not be barred from applying the principles of administrative and public law into a case.

**Clause 20** The Administrative Court shall have jurisdiction over dispute and relating matters arising out of a state contract relating to qualifying FDI.

Given on this ... day of ..... B.E. ....

-signed-



**Schedule 1: Testing Process of a State Contract Relating to Qualifying FDI**

Only a state contract that fulfils and meets the criteria and conditions set forth by the “Testing Process of a State Contract Relating to Qualifying FDI” shall be defined as a state contract relating to qualifying FDI and accordingly shall be governed by the Special Method in accordance with this Regulation as follows:

**1. Testing Criteria of the Foreign Element**

A prospective investment will be tested with one testing criterion at a time of the following criteria: place of incorporation and registration; exclusive ownership; percentage of foreign shareholdings; and a voice in the management/controlling power. When a prospective investment fails to meet the first criterion, the next criterion will be brought to the test against such a prospective investment until the final criterion will have been tested. Only a prospective investment falling into one of these testing criteria is considered to be holding the foreign element and it will be accordingly treated as a foreign investor, company, corporation or enterprise as the case may be under Thai law.

**1.1. Place of Incorporation and Registration**

Any investment that its company, corporation or enterprise is incorporated and registered under law of the state other than Thailand, shall be considered a company, corporation or enterprise holding the foreign element and shall be treated as a foreign company, corporation or enterprise as the case may be under Thai law. The state of incorporation and registration of a company or corporation shall be the nationality of a company or corporation.

**1.2. Exclusive Ownership**

For any investment that is entirely owned by foreign investors through or in a form of natural persons or juridical persons, the investment shall be considered

to be holding the foreign element and shall be treated as a foreign investor, company, corporation or enterprise as the case may be under Thai law.

**1.3. Percentage of Foreign Shareholdings**

Any investment, which is jointly owned of more than fifty (50) per cent in value by foreign investors, shall be considered to be holding the foreign element and shall be treated as a foreign company, corporation or enterprise under Thai law.

**1.4. A Voice in the Management/ Controlling Power**

Any investment, in which foreign investors have *de facto* controlling management or power over a company, corporation or enterprise making such an investment, shall be considered to be holding the foreign element and shall be treated as a foreign company, corporation or enterprise under Thai law.

**2. Testing Criteria and Conditions of Qualifying FDI**

Any investment holding the foreign element subject to the Testing Criteria of the Foreign Element in No.1 that meets all of the following criteria and conditions set forth by the Testing Process shall be considered to be qualifying FDI and shall be within the scope of the Special Method subject to the Regulation.

**2.1. Inward Investment**

Any investment holding the foreign element must be an inward investment in that the inward investment is simply an investment brought into, derived from, or directly connected with investment brought into Thailand of any other countries by nationals or companies of any other countries.

**2.2. Exclusion of Portfolio Investment**

For an investment to qualify for FDI, an investment holding the foreign element shall exclude a portfolio investment: a movement of capital for the purpose of buying shares in a company or corporation formed or functioning in Thailand.

**2.3. Investment Value Not Less Than One (1) Billion Baht**

An investment holding the foreign element shall worth not less than one (1) billion Baht.

**2.4. Having Its Place of Effective Management In Another Country**

An investment holding the foreign element shall be owned or controlled by foreign investors, who have the place of effective management in a country other than Thailand.

**3. Testing Criteria of Qualifying FDI Invested in a State Contract**

Qualifying FDI shall be invested in a state project through a state contract. A state contract means a contract where the State (through the Government or its Government Agency as acting on behalf of the State or exercising the State's power as the one party) enters into an agreement or transacts with the Private Party. By this definition, a state contract must compose these three (3) elements.

**3.1. Having the State (Through Government Agencies) as the Contract Party**

One party of a contract must always be the State acting through the Government or its Government Agency or person acting on behalf of the State. Government Agency can be one of these main Government Agencies, (consisting of the Legislative Branch, Executive Branch, and Judicial Branch), Local Authorities (Local Administrative Organizations), Independent Organizations, or State Enterprises.

**3.2. The State (Through Government Agencies) Having Authority to Transact with the Private Party**

Individual Government Agencies must have authority as designated by law establishing them to enter into a contract or transact with the Private Party and as a result, a contract must be within the scope, objectives, and mandates of their establishment.

**3.3. The Person Having Authority to Act on Behalf of the State (Through Government Agencies)**

A person acting on behalf of each Government Agency must be authorized or delegated to exercise power by the law establishing such a Government Agency.

**Schedule 2: A Sample Arbitration Clause Applicable to Disputes Arising out of a State Contract Relating to Qualifying FDI**

**Settlement of Disputes**

1. Any dispute or difference arising out of or in connection with this Contract or the implementation of any of the provisions of this Contract shall be amicably settled between the parties within sixty (60) days

2. When such amicable settlement between the parties has failed or the periods of the amicable settlement have elapsed, either party shall submit a request for Consultation and Negotiation to the National Consultation Commission on State Contracts Relating to Qualifying FDI (the "Commission".) The parties shall facilitate the Commission to have the dispute settled with the parties' agreement. The periods for Consultation and Negotiation shall range from three (3) months to twelve (12) months.

3. When the Consultation and Negotiation has failed or the periods of the Consultation and Negotiation have elapsed, the parties shall be eligible to refer the dispute to the arbitral tribunal consisting of three (3) arbitrators. The parties shall agree upon the application of either domestic arbitration or international arbitration.

4. For domestic arbitration, either party shall serve upon the other a notice of intention to submit the dispute or difference to arbitration and specify the name of an arbitrator to be appointed by him. The other party shall appoint the arbitrator within thirty (30) days after receipt of the said notice. Notwithstanding, there shall be at least one (1) arbitrator who has knowledge and experience background in administrative or public law. The two (2) arbitrators shall appoint the third arbitrator, a so-called umpire who will chair the arbitral tribunal.

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5. For international arbitration, the parties hereby consent to submit to the International Centre for Settlement of Investment Disputes (hereinafter the "ICSID") any dispute arising out of or relating to this Contract for settlement by arbitration.

6. Should either party be unable to appoint an arbitrator or in case of disagreement as regards to the appointment of an umpire, each party is entitled to refer the matter to the Administrative Court for the appointment of the arbitrator or umpire as the case may be.

7. Unless agreed by the parties otherwise, the arbitral tribunal shall be the judge of its own competence and shall apply the rules as it think appropriate. The arbitral tribunal shall not be barred from applying principles of administrative or public law to a case.

8. The arbitral award shall be final, conclusive and binding upon the parties hereto.

9. Each party shall have the right to institute suit against the other in the Administrative Court to enforce any decision or award rendered in arbitral proceedings.

10. Each party shall bear the cost of his own arbitrator's service and share equally other cost of all proceedings.

11. The submission of any matter in dispute or difference to the arbitral proceedings as aforesaid, shall be a condition precedent to the right of institution of court action.

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## **International Agreements, Treaties and Conventions**

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