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Investor-State Agreements in Thailand . . .
. . . encouraging investment by protecting foreign investors

For several years now, commentators - particularly in the business community - have opined that Thailand is in need of a significant infrastructure upgrade such as its mass transportation, road and railways systems.

The government appears to agree. Despite the differences between Thailand's two main political parties, both of them have presented proposals for large scale and comprehensive infrastructure projects. Both parties continue to agree that Thailand needs to invest significant amounts to modernize and improve its infrastructure.

In such circumstances it is not uncommon for a government to encourage private sector investment. Such private participation may have several benefits for the government. These may include technical or managerial expertise not available domestically, a larger and more competitive bidding pool for the project and, depending on the type of private participation, project financing. Where the potential private investor is foreign, a significant consideration will be an assessment of the protections afforded to the investment. Internationally, this is usually provided by substantive rights and enforcement provisions in a public-private contract ("PPC") between the host State and the foreign private party or under any relevant investment treaty ("IT") or both. The following will briefly explain what types of rights and enforcement provisions are commonly available to foreign investors under these two options and conclude with a brief comment on the current investor-State situation in Thailand.

SUBSTANTIVE RIGHTS

The rights afforded to an investor under a PPC are for the contracting parties to determine and may vary with regard to the type of investment. However, a common concern for foreign investors is that the State may enact or change its law relevant to the investment such that it would diminish the investment's value. Thus, an example of a substantive right commonly included in the PPC for the investor is a provision, which applies the law of the host State - at the time of the investment - to the investment throughout its duration. This is commonly known as a "freezing clause".

Whereas the investor will need to convince the host State to include investment

protection provisions contractually, ITs provide such protections to the investor without such requirement.
Its take three common but different forms:

1) bilateral agreements between two countries (BITs) and to which Thailand is currently a party of at least 34 such agreements;

2) multilateral investment agreements between more than two countries (MITs) and of which the 2009 ASEAN Comprehensive Investment Agreement (ACIA), to which Thailand is also party, is a good example; and

3) free-trade agreement (FTA), which although not dealing only with investment protection issues, commonly include such provisions. The 2009 ASEAN-Australia-New Zealand Free-Trade Treaty (AANZFTT) to which Thailand is also a party is a good example of and FTA and to which Thailand is a party.

The substantive protections that ITs offer to investors are common and generally include the following:

1) "fair and equitable treatment" in accordance with international minimum standards (which has generally been equated with the investor's legitimate expectations to be treated transparently, predictably, consistently, and justly by the host State);

2) "full protection and security" (which imposes positive obligations on the host State to protect investments);

3) no "arbitrary or discriminatory treatment" (which imposes a duty on the host State not to disregard internationally accepted standards of due process of law);

4) no direct or indirect "expropriation" of the investor's property by the host State without "prompt, adequate, and effective compensation";

5) "national treatment" and "most favored nation treatment" (which are sometimes treated separately and which require the host State to treat the investor no worse than it treats its own nationals or investor parties from third States); and

6) the observance of specific contractual undertakings by the host State with the investor (which are sometimes referred to as "umbrella clauses" and which require the host State to honor its undertakings with investors regarding their investment).

ENFORCEMENT
Claims by an investor under a PPC would be subject to whatever dispute resolution mechanism is provided for therein. In the case of the IT this is usually by way of submission of the dispute to the courts of the host State or to international

arbitration. Where international arbitration is provided for it will commonly take one of the following three main forms:

1) "ICSID";

2) "institutional arbitration"; or

3) "ad hoc arbitration under the UNCITRAL Rules".

Submission to the courts of the host State is generally not the preferred choice for the investor. The forum is considered not to be in a "neutral" location and the decision-maker is regarded as not to be "independent" of the allegedly breaching host State.

"ICSID" stands for the International Center for the Settlement of Investment Disputes. The 1965 Washington Convention established ICSID "primarily to create an arbitral forum for the resolution of disputes between investors and States . . ." As of 1 November 2013, 150 States had ratified the Washington Convention. Because it was designed to resolve investor-State disputes, ICSID arbitration is distinctive in that it:

1) virtually eliminates any involvement by another State's courts in the arbitration proceedings; and

2) requires all contracting States to immediately enforce the final award without any grounds on which it may analyze and conclude to refuse such enforcement-thereby avoiding the "indignity" of any contracting State being subjected to the scrutiny of another State's courts.

"Institutional arbitration" refers to arbitration under the administration and rules of an arbitration service provider, for example: the International Chamber of Commerce; the International Center for Dispute Resolution; the Singapore International Arbitration Center; or the Thai Arbitration Institute.

"Ad hoc arbitration under the UNCITRAL Rules", refers to arbitration which is not administered by an institution and is therefore "ad hoc" but which is controlled by the United Nations Commission on International Trade Law Arbitration Rules.

Both institutional and ad hoc UNCITRAL arbitration are designed for commercial disputes between individual parties without regard to sensitivities of disputes involving National "sovereigns". They depend on the "1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards". The New York Convention will only recognize arbitration awards, which are subject to the procedural law and a certain degree of possible involvement of the courts of the State where the arbitration takes place. Such third party State court involvement is the reason why ICSID arbitration is the preferred choice for arbitration involving a

State. ICSID arbitration gained acceptance within ITs as they proliferated. However, since States have increasingly come to recognize that their commercial activity does not necessarily implicate their sovereignty, ITs have also become increasingly subject to institutional and ad hoc arbitration.

With regard to enforcement of ITs, it is not uncommon that the investor will be required to first submit their dispute to the host State's courts for some minimum period of time. However, the ultimate resolution of the dispute is generally vested in one of the forum options discussed above. The investor generally has a choice of which forum, but once made this choice will exclude the other forums. A typical example of such is Article 33(1) of the ACIA:

> *A disputing investor may submit a claim referred to in Article 32 (Claim by an Investor of a Member State) at the choice of the disputing investor:*
> • *to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claims; or*
> • *under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or*
> • *under the ICSID Additional Facility Rules, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or*
> • *under the UNCITRAL Arbitration Rules; or*
> • *to the Regional Centre for Arbitration at Kuala Lumpur or any other regional center for arbitration in ASEAN; or*
> • *if the disputing parties agree, to any other arbitration institution,*
> *provided that resort to any arbitration rules or for a under sub-paragraphs (a) to (f) shall exclude resort to the other.*

It should also be noted that an investor may have a claim under either their PPC with the host State or an applicable IT or both. Any such claims would be properly addressed only under the applicable PPC or IT dispute resolution provision.

THAILAND

Thailand can properly point to several successful foreign investor-State projects in recent years. However, in December 2003 the Civil Court of Thailand upheld a 6.2 billion Thai Baht international arbitration award against the Expressway and Rapid Transit Authority of Thailand (ETA) (a Thai government agency) in favor of Bangkok Expressway, PLC (a Thai-foreign joint-venture company) regarding their PPC to construction of the Bang Na-Chonburi elevated expressway and a concession to thereafter operate it. Following this, on 27 January 2004, the Thai Cabinet passed a resolution prohibiting the inclusion of arbitration in PPC contracts involving *concessions* without prior approval by the Cabinet.

Then, on 1 July 2009, Walter Bau AG (a foreign contractor) was awarded

approximately 30 million euros in an international arbitration regarding the construction of the Don Muang tollway. And - although this arbitration was brought under an IT - on 28 July 2009 the Thai Cabinet issued a resolution extending the 2004 resolution to *all* PPCs.

Both cabinet resolutions, as well as, other instances where Thai courts have refused to enforce international arbitration awards based on interpretations, which are not in keeping with international norms, have caused concern to the foreign business community in Thailand. Furthermore, although Thailand signed the Washington Convention in 1985, it still has not ratified it. Undeniably, these issues must be considered in the course of any potential foreign investor's contemplation of contracting with the State in Thailand.

However, despite these issues, Thailand remains a part of the trend to protect foreign investors by way of its several IT commitments. And even with regard to PPCs themselves, it should be noted that Cabinet approval for the provision of arbitration therein has actually been granted in several instances since 2010. A further encouraging sign is the 14 July 2015 Cabinet resolution, which amended the 2009 resolution. Pursuant to this Cabinet approval of arbitration in PPCs is now required only for:

1) contacts covered by the Private Investments in State Undertakings Act (2013), which includes all PPC for projects worth 1 billion Thai Baht or more; and

2) all PPC's involving concessions.

Thus, any potential investor should consider PPC contractual provisions with the Thai State, including arbitration as the means to resolve any dispute. And any applicable IT - which may still achieve what may not be obtainable by way of a negotiated PPC.

Furthermore, with little exception, the current dominant global and regional international trend is to favor protection and enforcement of rights between investors and State parties. Thailand has always been and continues to be a responsible and active member of the global economic community. It is anticipated that Thailand will continue its path towards harmonization with internationally accepted foreign investor-State practices.
