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The Evolution of Bilateral Investment Treaty (BIT) between Thailand and Germany: An Overview

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Abstract

The purpose of this article is to study the overview of the Evolution of Bilateral Investment Treaty (BIT) between Thailand and Germany as regards to the commercial and investment relation. It also discussed topics about the brief main point of investment protection provision of Thailand and Germany BIT, the brief main point of settlement of disputes of Thailand and Germany BIT, some problems on how to renegotiate in new BIT of Thailand and Germany, and solutions to the problem of integration under the concept of UNCTAD and model international agreement on investment for sustainable development by IISD.

Keywords: Evolution, Bilateral Investment Treaty, Investment Protection, Settlement Dispute, Thailand, Germany

Introduction to commercial and investment relation between Thailand and Germany.

For the first time, Siam and German nation had diplomatic relation through the Treaty of Friendship, Commerce and Navigation between the Kingdom of Siam and the Hanseatic Republics (Lübeck, Bremen, Hamburg) in year 1858. Afterwards, Thailand and Germany established diplomatic relations on 7 February 1862 with the signing of the Prussia-Siam Treaty of Amity, Commerce, and Navigation. These historical details established an approximately 150 Years of Diplomatic relationship between Thailand and Germany (Royal Thai Embassy in Germany, 2016). According to German- Thai chamber of commerce report, "there are more than 600 German companies in Thailand as of these days.

The vast majority of them are in the industrial sector, but also several service providing companies have been established. In addition to that, a wide range of different German products is being purchased by the Thai market, due to an excellent distribution structure. The most important export goods from Thailand to Germany are IT machineries, gemstones, rubber products, and textiles.

On the other hand, the most important import goods from Germany are machineries, chemical products, cars, and spare parts for some electronic products" (German-Thai chamber of commerce , 2016). To develop Foreign Direct Investment (FDI) in Thailand, the first modern investment treaty was signed between Germany and Pakistan in 1959 and put into force in 1962 (BIT between Pakistan and Germany 1959). Germany, as an important partner of Thailand, developed a commercial relation through bilateral trade and investment that served as a mechanism to strengthen relationship between the two countries.

As regards to BITs, Thailand has signed an agreement with Germany (the first country with an agreement) in the year 1961 and put it into force in 1965 as a Treaty between The Kingdom of Thailand and The Federal Republic of Germany concerning The Promotion and Reciprocal Protection of Investment done at Bangkok Thailand on 13 December 1961 (In this article, we call 1961 Treaty).

Such agreement is amended, terminated, and replaced by The Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments done at Bangkok on 24 June 2002 (In this article, we call 2002 Treaty) and date of entry into force in 20 October 2004.

The Brief Main Point of Investment Protection Provision of Thailand and Germany BIT.

Relation between 1961 Treaty and 2002 Treaty

Although the Treaty between The Kingdom of Thailand and The Federal Republic of Germany concerning the promotion and reciprocal protection of investment that was signed in Bangkok Thailand on 13 December 1961 is terminated, it has a relation with the Treaty between the Kingdom of Thailand and the Federal Republic of Germany concerning the encouragement and reciprocal protection of investments done in Bangkok on 24 June 2002. Article 8 of 2002 Treaty (BIT between Thailand and Germany 2002, 2016) states that the Treaty applies to "investments" made before the enforcement of the 2002 Treaty (Walter Bau A.G. v Thailand 2009:109). That statement shall apply to approve investment under 1961 Treaty and it does not mean retroactivity into the enforcement of Treaty.

Investment and Investor

The 1961 Treaty determines the term of investment as "the investment of capital" and defines investors as "nationals or companies of the other contracting party" (BIT between Thailand and Germany 1961, 2016). Article 8 basically explains that "investment" means about investment of movable and immovable property, shares or interest of company, claim of money, intellectual property right, or business concessions. On the other other hand, investor defines as Thai and German nationality under the applicable law and this means that companies shall be any juristic person as well as any commercial or other company or association with or without legal personality, having its seat in territory of either contracting party and lawfully existing consistent with legal provisions, irrespective of whether the liability of its partners, associates or members is limited or unlimited and whether or not its activities are directed at profit.(BIT between Thailand and Germany 1961, 2016).

In the same way, 2002 Treaty determines clearness of definitions for the term of investment and investors, basically to understand, "investments" comprise to every kind of asset in particular, though not exclusively, about movable and immovable property, shares or interest of company, claim of money, intellectual property right, and business concessions.We have suggestions that investment in this Treaty must develop direct investment in territory of both countries and not as a mean for investment in portfolio. Investors, in easy definition mean natural persons considered to be Thai national of its applicable laws in Thailand and consider in respect of Germany within the meaning of its basic law and legal entities, including companies, corporations, business, associations and other organizations, with or without legal personality, which are constituted or otherwise duly organized under the law of that contracting party and have their seat in the territory of that contracting parties. (BIT between Thailand and Germany 2002, 2016)

Observations about some term of investments

One of the interesting observations about investment in intellectual property under 1961 Treaty and 2002 Treaty through The TRIPS is that Thailand has flexibility to incorporate the

TRIPS standard with Doha Declaration in domestic law in example for the aspect of public health, since the purpose of BIT is to improve investment. If Thailand disputes Germany about drug patent and go to compromise in arbitration, Thailand as a developing country will loss sovereignty to control standard in domestic law in the aspect of public health and the external control as the creation of international regime by dispute settlement function will control over domestic law of Thailand (Sonarajah M. 2010:45) and some negative experience with international investment arbitration in Asian countries (Sonarajah M. 2011:248-249) where arbiters have a tendency to extend substantive principles in BIT. (Sonarajah M. 2009:282-283) For the reason of investment and commerce, award of arbiters are being commercially based not to think about principles of international law in sustainable development of investment. (Sonarajah M. 2010:305) Hence, Thailand has disadvantage when it comes to BIT appointments to intellectual property and it is difficult to prove that Thailand does actions for public health under exclusion of National treatment and MFN clause.

Observations about term of investor

Observation about the term of "companies" in 1961 Treaty and the "legal entities" in 2002 Treaty opened opportunities to enjoy these BITs for investors of the third world countries, as major shareholder, or as a powerful force to control a company and occupy a seat in the territory of that contracting party. For example, Germany Trade and Investment has information that, "anyone can establish a business in Germany irrespective of nationality or place of residence. There is no specific investment legislation when setting up a branch office or a new subsidiary in Germany, nor is a minimum percentage of German shareholdings required for foreign entrepreneurs setting up business in Germany."(Germany Trade and Invest,2016)

For instance, an American investor played as a major shareholder, who established a company in the territory of Germany under its law, can enjoy the protection of investment under these BITs, same case scenario in *Tokios Tokeles v Ukraine* and *Saluka v Czech Republic*. (Dolzer and Schreuer 2008: 50-51) The next interesting observation in these BITs (both 1961 and 2002 Treaty) is about the investor, who is also a shareholder. In customary international law and in case of Barcelona Traction, its exclusion of shareholder rights against a host state about the damage of company is considered as a general principle. (Dolzer and Schreuer 2008: 56-57)

However both BITs of 1961 and 2002 Treaty, the case of *Walter Bau AG and Thailand*, Tribunal had a decision that "Walter Bau AG who is minority shareholder in Don Muang Tollway Co. Limited ("DMT") has status under the Treaty as an "Investor". The definition of "investment" includes share in special purpose in infrastructure of company such as DMT in which the claimant (Walter Bau AG) had a minority shareholding- and thus, able to be outvoted by the majority shareholders.

Such arrangement is not unusual as an investment vehicle in BIT situations. The Tribunal considers that the claimant should not fail just because of the type of vehicle used to house its investment which became protected by the 2002 Treaty." (Walter Bau A.G. v Thailand 2009:137) This means that a shareholder, particularly minority shareholder, is an investor who holds a protection of investment under BITs.

Standard of Investment protection

National Treatment and Most-Favoured-Nation Treatment (MFN. Clauses).

Bilateral Investment Treaty between Thailand and Germany is a German model treaty; both 1961 and 2002 Treaty combined the National Treatment with MFN. Basically, 1961 Treaty defines in article 1(2) that investment owned by, or under the management of effective control of, nationals or companies of each contracting party shall in the territory of the other contracting party not be treated less favourably by that party than it treats investments of its own nationals or companies or investment of nationals or companies of any third States. .(BIT between Thailand and Germany 1961, 2016) The 2002 Treaty makes clear and definite in article 3(1) that neither contracting party shall subject investments in its territory owned or controlled by investors of the other contracting party to treat them less favourable than it accords to investment of its own investors or to investments of investors of any third state. In response to that, 2002 article 3(2) (3) (4) (5) has to apply unequal to public interest for the reason of health or morality, and exclude tax, custom, custom union, economic union and free trade area. .(BIT between Thailand and Germany 2002, 2016)

In the Principle of National Treatment in BITs between Thailand and Germany, the investment and investor of both countries shall be applicable in same situations and circumstances without discrimination or differentiation, (Dolzer and Schreuer 2008: 178-183) and can apply with the principle of fair and equitable protection against arbitrary or discriminatory stipulations in BITs too just like the case of *Myer v. Canada*. (Schreuer 2009:190)

MFN clause in BITs between Thailand and Germany has the same meaning as the definition of Schwarzenberger, which Surya P Subedi cited in his book about an MFN clause that consists of an agency formation of equality. It prevents discrimination and establishes equality to opportunities on the highest possible plane: the minimum discrimination and maximum favours conceded to any third State…It is clear that MFN clauses serve as insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties. While the standard of MFN treatment has the effect of putting the services of the shrewdest negotiator of a third country gratuitously at the disposal of one's country, another aspect of the matter is more significant.

As long as a country is content to enjoy treatment of equality to that of most-favoured third country, and that subject matter of the treaty lends itself to such treatment, that use of the MFN standard leads to the constant self-adaptation of such treaties greatly contributes to rationalization of international affairs." (Subedi 2012:67-68) This only means that Thailand and Germany cannot normally discriminate between their investments in BITs. If Thailand grants some country a special favour, it has to do the same for Germany too. In the same way if Germany grants some country a special favour, it has to do the same for Thailand too.

MFN clause shall be applicable with Fair and Equitable principle in fair market value just like the case of *CME v Czech Republic* (Dolzer and Schreuer 2008: 190) which exactly suggested the combination of protection against arbitration or discrimination in BIT.

Fair and Equitable (FET.)

Almost all BITs in the world has the principle of fair and equitable standards and refers to international minimum standard of treatment (Sonarajah M. 2010:204) as a general concept of FET like *Ius aequum* as interpreted by UNCTAD "At this point the development of the FET obligation implied that it is possible to single out certain types of improper and

discreditable state conduct that would constitute to a violation of these standards. Such relevant concepts include:
(a) Defeating investors' legitimate expectations (in balance with the host State's right to regulate in public interest);
(b) Denial of justice and due process;
(c) Manifest arbitrariness in decision-making;
(d) Discrimination;
(e) Outright abusive treatment. " (UNCTAD 2012b: 62)

Some examples which apply several elements of FET cases exactly were presented in the cases of *Myer v. Canada, CMS v. Argentina*, and *Saluka v. Czech Republic*. These are all about protection against arbitration or discrimination. (Schreuer 2009:190-191)

The 1961 Treaty does not have FET in the agreement but the 2002 Treaty has FET in article 2(3), which states "each contracting party shall in territory in any case accord such investments by investors of the other contracting party and their returns shall have fair and equitable treatment and full protection." The effect of Article 8, 2002 which states "this treaty shall also apply to approve investments made prior to its entry into force by investors of either contracting party in the territory of the other party consisting of the letter's laws and regulations", means that investments before its enforcement of 2002 Treaty were protected under FET. The case *Walter Bau AG and Thailand* Tribunal has decision that: "Walter Bau AG as claimant has a right of legitimate expectations in his investment and Thailand could not breach the principle of FET to limit his right of legitimate expectations." (Walter Bau A.G. v Thailand 2009:123) This is like the same case of *Biwater Gauff v.Tanzania*, which decision stated that specific component of FET are protecting the legitimate expectation, good faith, transparency, consistency, and non- discrimination.(Biwater Gauff v.Tanzania 2008 : 178-179)

Expropriation

The article 3 of 1961 Treaty prescribes expropriation as follows:

(1) Investment by nationals or companies of either contracting party shall enjoy the most constant protection and security in the territory of the other contracting party.

(2) Nationals or companies of either contracting party shall not be subjected to expropriation of their investment in territory of the other contracting party except for the public benefit and against just compensation. Such compensation shall be actually realizable, freely transferable, and shall be made without undue delay. Adequate provision shall have been made at or prior to the time of the expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation shall be subjected to review by due process of law.

(3) Nationals or companies of either contracting party, who, owing to war or other armed conflict, revolution or revolt in the territory of the other contracting party suffer the loss of investment situation there, shall be accorded treatment no less favourable by such other contracting party than that party accords to its own nationals or companies, as regards to restitution, indemnification, compensation or other valuable consideration. With respect to the transfer of such payments, each contracting party shall accord to the requests of nationals or companies of other contracting party a treatment no less favourable than what is accorded to comparable requests made by national or companies of any third State.

(4) The provision of Paragraphs 1,2 and 3 above shall likewise apply to returns of investments. (BIT between Thailand and Germany 1961, 2016)

Also, 2002 Treaty expands the clarity of expropriation. Article 4 prescribes that:

(1) Investments by investors of either contracting party shall enjoy full protection and security in territory of the other contracting party.

(2) Investment by investors of either contracting party shall not be expropriated, nationalized or subjected directly or indirectly to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other contracting party except for the public benefits and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry interest at the market value rate from the date the payment is due until the date of actual payment; it shall be effectively realizable and freely transferable. Appropriate provision shall be made at or comparable measure for the determination and payment of such compensation. The legality of any expropriation, nationalization or comparable measure, as well as the compensation thereof, shall, at the request of the affected investors, be subject to review by due process of law.

(3) Investors of either contracting party whose investments suffer losses in the territory of other contracting party owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable by such other contracting party than that which the latter contracting party accords to it own investors as regards to restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(4) Investors of either contracting party shall enjoy most-favoured-nation treatment in the territory of the other contracting party in respect to the matters provided for this Article. (BIT between Thailand and Germany 2002, 2016)

The effects of Article 8 of 2002 Treaty were also observed. This treaty shall also apply to approve investments made prior to its entry into force by investors of either contracting party in the territory of the other contracting party consistent with the letter's laws and regulations. This means that investments before the enforcement of 2002 Treaty have full protection about expropriation under 2002 Treaty.

In order to understand it better, expropriation is like a Hull formula where "it had to be prompted adequate and effective compensation" (Sonarajah M. 2010:414) with due process of law and for the public benefit and against compensation, and investor shall enjoy most-favoured-nation treatment for expropriation.

Forms of expropriation can be defined as direct or indirect: direct expropriation is explained by UNCTAD as " a mandatory legal transfer of the title to the property or its outright physical seizure". Normally, the expropriation benefits the state itself or a state-mandated third party. In cases of direct expropriation, there is an open, deliberate and unequivocal intent, as reflected in a formal law or decree or physical act, to deprive the owner of his or her property through the transfer of title or outright seizure."(UNCTAD 2012a: 6-7) Indirect expropriation is also defined by UNCTAD as "a total or near-total deprivation of an investment but without a formal transfer of title or outright seizure."(UNCTAD 2012a: 7)

Indirect expropriations in 2002 Treaty encompass "creeping expropriation" too. Based on UNCTAD, "creeping expropriation may be defined as the incremental encroachment on one or more of the ownership rights of a foreign investor that eventually destroys (or nearly destroys) the value of his or her investment or deprives him or her of control over the investment.

A series of separate state acts, usually taken within a limited time span, are then regarded as constituent parts of the unified treatment of the investor or investment." UNCTAD 2012a: 11) In some case studies, creeping expropriation means as follows:

In *Metalclad Crop.v Mexico case,* it was said that an expropriation occurs where the state's actions have "….the effect of depriving the owner in a whole or significant part of usage or reasonably to have expected economic benefit of property, even if not necessary to the obvious benefit of the host state." (Metalclad Crop.v Mexico 2000 :28)

In *Generation Ukraine v Ukraine case*, the tribunal described creeping expropriation as "a form of indirect expropriation with distinctive temporal quality in a sense that it encapsulates a situation whereby a series of acts attributable to state over a period of time culminate in the expropriatory taking of such property." There does not have to be a formal taking of property or rights." (General Ukraine v Ukraine 2003:87)

The *Parkerings v Lithuania case* describes creeping expropriation as "the negative effect of government measures on the investor's property rights which do not involve transfer of property but a deprivation of the enjoyment of the property."(Pakerings v. Lithuania 2007:92)

In case of *Walter Bau AG and Thailand,* tribunal has a decision that "there was no expropriation on the claimant's contractual right as a shareholder in Don Muang Tollway co. Limited (DMT). The Toll way is still operating and will continue to operate for many years to come with DMT as concessionaire. The respondent's argument that "creeping expropriation" only, and not breaches of FET, defined as a series of act is not correct. The tribunal sees no reason why a breach of a FET obligation cannot be a series of cumulative acts and omissions. One of these may not on its own be enough, but taken together, they can constitute a breach of FET obligation. Accordingly, the tribunal considers that there was a breach of FET obligations by the respondent due to the following reasons: (1) The lengthy refusal to raise toll as required by MoA2; (2) Those charges to the road construction network which went well beyond what can be considered as "traffic management." (3) The short-term total closure of Don Muang Airport." (Walter Bau A.G. v Thailand 2009:140)

Umbrella clause

The 1961 Treaty Article 7 states that "if the legislation of either contracting party or international obligations existing at present or established hereafter between the contracting parties in addition to the present treaty, result in a position entitling investments by nationals or companies of the other contracting party to a treatment more favourable than what is provided for by the present treaty, such position shall not be affected by the present treaty. Each contracting party shall observe any other obligation it may have entered in with regard to investments within its territory by nationals or companies of the other contracting party." (BIT between Thailand and Germany 1961, 2016)

In 2002 Treaty Article 7(2), it stated "each contracting party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other contracting party." (BIT between Thailand and Germany 2002, 2016)

Underlined statements are umbrella clauses. Surya P. Subedi concludes from legal literatures explained in his book that "umbrella clause', has often been interpreted as proving a blanket protection for foreign investment, including activities under a contract with a foreign investor. Once such activities are regarded as being covered by BIT, then certain contractual undertaking to be governed by domestic law are liable to be elevated to international law obligations or enjoy protection under international law.

In such situation a breach of contractual obligation with a foreign company may become a breach of a BIT, thereby attracting the protection available under international foreign investment law. This blurs the distinction between private and public law disputes." (Subedi 2012:102)

As regards to the case of *Walter Bau AG and Thailand*, 2002 Treaty at Article 10 settlement of disputes between a contracting party and an investor has no limitation as to when the dispute might have arisen because the said article has to read with Article 7(2) "each contracting party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other contracting party". Walter Bau AG who is a claimant has a right to investor-state arbitration. (Walter Bau A.G. v Thailand 2009:102) Author has some suggestions that, Case *Walter Bau AG and Thailand* has the element of concept *"Contrats administratif"* in public law of Thailand which has a concept for nation-public interest. This case of *Walter Bau AG and Thailand* shows that Thailand lose on sovereign to manage "state-public service" by concept *"Contrats administratif"*(Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 of Thailand, Article 3, 2016) and the decision of Administrative Court of Thailand may lose importance by BIT.

The Brief main point of Settlement of Disputes of Thailand and Germany BIT

Settlement of Disputes between the Contracting Parties

The 1961 Treaty pertains only for state-to-state claim in Article 11:

(1) The dispute concerning the interpretation or application of the present treaty should, if possible, be settled by governments of the two contracting parties.

(2) If a dispute cannot thus be settled, it shall upon the request of either contracting party, be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be constituted for each individual case. Each contracting party shall appoint one member and these two members shall agree upon a national of a third state as their chairman to be appointed by the governments of the two contracting parties. Such members shall be appointed within two months, and such chairman within three months from the date on which either contracting party has informed the other contracting party that it want to submit the dispute to an arbitral tribunal.

(4) If the periods specified in paragraph 3 above not been observed, either contracting party may, in the absence of any other relevant arrangement, invite the president of the International Court of Justice to make the necessary appointments. If the President is a national of either contracting party or if he is otherwise prevented from discharging the said function, the Vice- President should make the necessary appointments. If the Vice- President is a national of either contracting party or if he, too, is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either contracting party should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by majority of votes. Such decisions shall be binding. Each contracting party shall bear the cost of its own member and of its counsel in the arbitral proceedings: the cost of the chairman and remaining costs shall be borne in equal part by both contracting parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure." (BIT between Thailand and Germany 1961, 2016)

In 2002 Treaty, Article 9, (1) Dispute between contracting parties concerning the interpretation or application of this treaty should as far as possible be settled by the governments of the two contracting parties.

(2) If a dispute cannot be settled, it shall upon the request of either contracting party be submitted to an arbitral tribunal.

(3) Such arbitral tribunal shall be constituted by ad hoc. Each contracting party shall appoint one member, and these two members shall agree upon a national of a third state as

their chairman to be appointed by governments of the two contracting parties. Such members shall be appointed within two months, and such chairman within three months from the date on which either contracting party has informed the other contracting party that it intends to submit the dispute to an arbitral tribunal.

(4) If such appointments have not been made within the period specified in paragraph 3 above, either contracting party may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either contracting party or if he is otherwise prevented from discharging the said function, the Vice- President should make the necessary appointment. If the Vice- President is a national of either contracting party or if he, too, is prevented from discharging the said function, the member of the court next in seniority who is not a national of either contracting party should make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each contracting party shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the contracting parties. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the tribunal shall determine its own procedure." (BIT between Thailand and Germany 2002, 2016)

Settlement of Disputes between the Contracting Party and an Investor

In 1961 Treaty, Article 11 provided only state-to-state claims. (BIT between Thailand and Germany 1961, 2016) After 1961 Treaty was terminated and 2002 Treaty has entered into force, the 2002 Treaty adds settlement of disputes between the contracting party and investor in Article 10 which stated that: "(1) Dispute concerning investment between a contracting party and investor of the other contracting party should as far as possible be settled amicably between the parties in dispute.(2) If the dispute cannot be settled within six months from the date on which it has been raised by one of the parties to the dispute, it shall, at the request of either party to the dispute be submitted for arbitration. Unless the parties to the dispute have agreed otherwise, the provisions of Article 9(3) to (5) shall be applied mutatis mutandis on condition that the appointment of the members of the arbitral tribunal in accordance to Article9 (3) is affective by the parties to the dispute and that, insofar as the period specified in Article 9(3) are not observed.

Either party to the dispute may, in the absence of other arrangements, invite the President of court of International Arbitration of the International Chamber of Commerce in Paris to make the required appointments. The award shall be enforced in accordance to domestic law. (3) During arbitration proceedings or the enforcement of an award, the contracting party involved in the dispute shall not raise the objection that the investor of the other contracting party has received compensation under the insurance contract in respect to all or part of the damage. (4) In an event when both contracting parties become contracting states of the convention of 18 March 1965 on the Settlement of Investment Disputes between State and Nationals of Other States, disputes under this article between the parties of dispute shall be submitted for arbitration under the aforementioned convention, unless the parties in dispute agree otherwise; each contracting party herewith declares its acceptance of such protection." (BIT between Thailand and Germany 2002, 2016).

Thailand has signed the ICSID Convention, but still has pending ratification case. It is not binding Thailand at this time, however, it can use services provided under the ICSID in case additional facilities rule out. In real practice of *Ad hoc* to the case of *Walter Bau AG and Thailand*, has summarized the process that "the provision in Article 9(3) to (5) of the 2002 Treaty, referred to in Article 10 above, required each party to appoint a member of an

arbitration tribunal The two members so appointed should nominate a national of a third state to be the chairman of arbitral tribunal within three months from the date when the claimant give notice that it intended to submit the dispute to an arbitral Tribunal (i.e.21 September 2005). In default of the co-arbitrators agreeing on a chairman, the nomination of a chairman to be made by the president of the Court of International Arbitration of the International Chamber of Commerce, Paris (the "ICC Court") must take place. Article 9 of the 2002 Treaty deals with state arbitration in the event of a dispute concerning interpretation or application of the treaty." (Walter Bau A.G. v Thailand 2009:2-3)

"Under the Term of reference the judicial seat of arbitration is in Geneva, Switzerland. The applicable law for the arbitration is the public international law and under term of reference of UNCITRAL Arbitration Rules ("the UNCITRAL Rules") and evidence taking in International Commercial Arbitration adopted by the International Bar Association ("the IBA Rules"). Chairman was empowered to make procedural rulings alone and tribunal and the parties who agreed that Presiding Arbitrator might make procedural rulings alone provided that all correspondence is copied to the co-arbitrators; the Presiding Arbitrator shall be free to consult, in his discretion, with the other arbitrators or to refer significant or difficult matters to the full tribunal for decisions; and the full Tribunal shall hear and determine any procedural matter if requested by either Party." (Walter Bau A.G. v Thailand 2009:6-7)

In this case, the tribunal has awarded Thailand as the respondent to pay the sum of 29.21 million EURO to the claimant Walter Bau AG as a damage for the respondent's breaches of its obligations to claimant as an investor under 2002 Treaty." (Walter Bau A.G. v Thailand 2009:163) This means that Thailand lost the case. Thailand is also member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. After this case Thailand does not protest to withdraw arbitral award in Switzerland, which means that this is under *res judicata*.

As an effect of the membership of the New York Convention, Schneider, as the insolvency administrator of the German company Walter Bau AG can file an application with the court in USA for the recognition and enforcement of foreign arbitral and for the affirmation of the US court. (Schneider v Thailand, 2012) Thailand tried to protest arbitral award but was unsuccessful. It means that properties of Thai Government may enforce execution of judgment in court of the USA.

In Germany, Schneider as Liquidator of Walter Bau AG, seized the Thai crown prince's Boeing 737-4Z6 at Munich airport in 2011 by the decision of Berlin Court of Appeals. However, the German Supreme Court (Bundesgerichtshof, BGH) doesn't agree and has decided that if an arbitral tribunal has an error in his competence, Thailand as the state party is not necessary to waive its immunity from jurisdiction and need not to appeal an award on a jurisdiction which does not constitute waiver of its sovereign immunity. It has to go back to the lower court to determine the right subject matter in dispute of 2002 Treaty with recognition and enforcement of foreign arbitral awards. (Vanina Sucharitkul and Gregory Travaini : 6)

Suggestions about the decision of courts in USA and Germany may conclude that it must have recognition of foreign arbitral award before enforcing the seizure of properties of the state, which loses the case in arbitration. Internal state court must check the legality of foreign arbitral award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 Article 5, if internal state court does not checks it in foreign arbitral award. This means that the state that loses the case does not waive its sovereign immunity.

Some problems on how to renegotiate in new BIT of Thailand with Germany

After exploring the investment protection provisions of two treaties, the 1961 Treaty is terminated and replaced by 2002 treaty while Thailand and Germany hope that there is still good ways for investment opportunities. However, when Thailand lost in the case of *Walter Bau AG and Thailand*, some problems appeared and it must renegotiate new BIT again with Germany. In practicing BIT, it looks like a model of investment treaty and developed countries invent it. There are major imbalances and inequality traditions in BIT. Developing countries are in a position of inequality and bargaining power in BIT negotiation is on a disadvantage area.(Huaqun : 300-304) But if in positive vision of Thailand and Germany, it still has the way to renegotiate new BIT in the concept of balance, sustainability and integrative agreement based on UNCTAD'IPFSD (Huaqun : 329-330) and Model International Agreement on Investment for Sustainable Development by IISD that may apply to renegotiate like the good way for a developing country like as Thailand.(Mann,Molke,Peterson and Cosbey 2006 : xii) To establish concern with investment protection in provision of 2002 Treaty, author suggests problems and how to solve and write suitable words and suitable sentence in new BIT for Thailand to renegotiate with Germany.

Problem about scope of Application

Article 8 of 2002 Treaty applies to investments made before its entry into force. This means that it shall apply to approve investment under 1961 Treaty and it doesn't mean retroactivity into force of 2002 Treaty. Imbalance as it is and seems like retroactive in protecting investment which are not suitable in Thailand because of some investments like in state or public services. Thailand loses sovereignty to control state-public service and depends only on 3 persons who are in arbitral tribunal. It is very easy to say that the new BIT between Thailand and Germany will not definitely protect investments made prior to new BIT. This BIT will protect only investments in the future but it has no justice and not suitable for Germany due to its numerous investments in Thai territory and still must have investment protection. As its improvement, the new BIT shall specify regulation that "this treaty does not apply any investments that are made before or after the entry in to force of this treaty, contracting parties shall have measures adopted or maintained in annex of treaty."(Mann,Molke,Peterson and Cosbey 2006 : 8) Examples are measurement to adopt protection of economic sector, state-public service, private commercial sector and non nation level.

Problem about definition of investment in intellectual property

However, it may eliminate intellectual property in new BIT but it is not suitable for Germany. Thailand and Germany are members of WTO and TRIPS. Because of this, they shall write new BIT in relation to protection of investment in intellectual property under the TRIPS., with Doha Declaration and contracting parties shall be consistent with development of technology and transfer.

Problem about definition of investor in case of Legal entities

Purpose of BIT between Thailand and Germany is for Thai or German investor and not for the third country. For instance, if an American investor and a major shareholder established a company in the territory of Germany under its law, can enjoy the protection of investment under this BIT between Thailand and Germany. It is an abuse of purpose of BIT., about investor if investor is a legal entity. In that case, the new BIT shall write clearly that "Contracting parties may deny the benefit of this treaty if investors of a non-party own or

control the legal entity."(Mann,Molke,Peterson and Cosbey 2006 : 10) and German minority shareholder still has investment protection unchanged and problem about legitimacy of expectation of minority shareholder and interpretation will consider in next subtopic of FET in number 4.5.

Problem about National Treatment and Most-Favoured-Nation Treatment (MFN. Clauses)

Text in 2002 Treaty is mixed between National Treatment and MFN in Article 3 and is very confusing when contracting terms is interpreted. This must be written separately in the new BIT.

National Treatment

The step to renegotiate in new BIT between Thailand and Germany about national treatment may be written in new BIT wherein "each contracting parties shall create good conditions for national treatment under own domestic law." (BIT between The Czech Republic and Canada 2009, 2016) "Contracting parties shall accord to its investment and investors, and the treatment must no less than that it accords, in like circumstances and equally, to its own investment or its own investor with respect to conduct, operation, expansion and sale or the other disposition of investment." "Lower level of government in state-public service or state procurement is not in accordance to national treatment."(Mann,Molke,Peterson and Cosbey 2006 : 12) "Plus measure of domestic health, safety or environment must not accord to national treatment too" (BIT between The Czech Republic and Canada 2009, 2016) and has to apply unequally to morality and exclude tax, custom, custom union, economic union and free trade area.

Most-Favoured-Nation Treatment (MFN. Clauses)

In terms of Most-Favoured-Nation Treatment (MFN.Clauses), it shall write in new BIT between Thailand and German that " each contracting party shall accord to investors and investments of contracting party no less favourable than that accord, in like circumstances to investors and investments of any third state under domestic law." (Mann,Molke,Peterson and Cosbey 2006 : 14-15) "Plus measure of domestic health, safety or environment not accord to MFN Clause" (BIT between The Czech Republic and Canada 2009, 2016) and has to apply unequally to morality and exclude tax, custom, custom union, economic union and free trade area.

Problem in Fair and Equitable (FET.) when interpret it

In case *Walter Bau AG and Thailand*, Thailand lose the case because Arbitral Tribunal has decision that "Walter Bau AG who is a minority share holder only holds 9.87% and Walter Bau AG as a claimant has the right of legitimate expectations in his investment. Thailand could not breach principle of FET to limit the right of legitimate expectations." The question is "does the shareholder's 9.87% has legitimate expectation of investment? It is very non proportional and tribunal of this case for former arbitral decisions but the tribunal of this case didn't think about the subject matter in proportion to holdings per share of investor which is suitable to make decision if an investor has the right of legitimate expectations. Unpleasant effect will come to Thailand if that investor who has share of only 0.1% can sue Thai government in arbitral tribunal and cite that the country has breached of FET.

The problem is arbitral tribunal does not have public international law to decide and thought only of former arbitral decisions. It is very easy; however, former arbitral decision does not state decisions of public international law. So the author's proposal shall be written in the new BIT between Thailand and Germany that may serve as a flame of international law in FET which state that " each contracting party shall accord to investors and investments treatment in accordance to customary international law, including fair and equitable treatment and full proportional protection and security with non discrimination" (Mann,Molke,Peterson and Cosbey 2006 : 15-16) Author suggests customary international law because it has a regulation which all the world has *opinio juiris* with state practice and it is very suitable if arbitral tribunal cite public international law as customary in which all parts of the world, both developed country and developing country, agree without refusal.

Problem about Expropriation and make clear exception

In 2002 Treaty, expropriation shall apply with full protection and Most-Favoured-Treatment in article 4(1) and 4(4) will be eliminated and shall be written in the new BIT between Thailand and Germany which states that "no party may directly or indirectly nationalize or expropriate an investment in its territory, except for a public purpose, on a nondiscriminatory basis, under due process of law" (Mann,Molke,Peterson and Cosbey 2006 : 16-17) "and payment of compensation is in accordance prompt, adequate and effective." Such compensation shall be based on the real value of the investment at the time of the expropriation, shall be payable from the date of expropriation at a proportional fair market value" (BIT between The Czech Republic and Canada 2009, 2016) and "compensation shall be paid without delay and fully realizable. Consistent with the right of state to regulate with *Bona fide*, proportional, and non- discriminatory for the purpose of protecting public interest welfare, public health, safety and environment, and do not constitute an indirect expropriation." (Mann,Molke,Peterson and Cosbey 2006 : 16-17)

Problem about umbrella clause and to be changed as procedural fairness

Case *SGS v Philippines* and *Case SGS v Pakistan* show uncertainty of umbrella clause while Thailand loses its sovereignty to manage "state-public service" by the concept of *"Contrats administratifs"*

Almost all BIT' s has umbrella clause for the reason that it guarantees a party from risk of domestic law of host state but it will lost sovereign to manage state- public service. It will eliminate umbrella clause from new BIT between Thailand and German but the former must make some measures to guarantee German investors and investments for successful integration. Author suggests that, when renegotiation of new BIT between Thailand and German takes place, it must to have legal expert staff who knows public international law, German Public Law, Thai Public Law, administrative law and public economic law. Thailand and Germany have the same legal system "Romano-Germanic" (Civil Law) and they have Administrative Law and Court Procedure.

Thereby, cooperation in legal education between Thailand and Germany will make opportunity of development for BIT. This only means that, it is very easy to make procedural fairness for BIT to replace umbrella clause. May be writing procedural fairness in BIT which states that host states shall ensure that their administrative, legislative and judicial process do not operate in a manner that is arbitrary or denies administrative and procedural fairness to investors and investments.

Investors or investment shall be notified in a timely fashion of administrative or judicial proceeding directly relating to them unless such notice is contrary to domestic law on an exceptional basis."(Mann,Molke,Peterson and Cosbey 2006 : 32-33) "Host states shall not create a denial of justice in judicial and administrative proceeding."(Mann,Molke,Peterson and Cosbey 2006 : 32-33) "Host state should strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial process."(Mann,Molke,Peterson and Cosbey 2006 : 32-33)

"Judicial and administrative review process shall be open to public and documents shall be accessible and decision shall be available to public."(Mann,Molke,Peterson and Cosbey 2006 : 32-33)

Problem about Settlement of Disputes between the Contracting Party and an Investor

Some non suitable situation happened when investor went to use settlement of disputes between the contracting party and an investor. Thailand does not refuse international arbitral tribunal but the new BIT between Thailand and Germany shall be adjusted. Author suggests two ways to choose from, the first way is "a dispute between investor and contracting party may not be commenced until domestic remedies are exhausted"(Mann,Molke,Peterson and Cosbey 2006 : 61) or the second way where "the fork in the road, such a clause provide that investor must choose between the litigation of its claims in the host state's domestic courts or through international arbitration and that the choice, once it has been made, is final for instance." (Dolzer and Schreuer 2008: 216)

Offer some obligations for Thailand and Germany in new BIT

Some obligations for Thailand and Germany in new BIT will be added into. Exactly obligations to take care of the environment in host state, to improve good governance and anti-corruption, to transfer technology and others according to sustainable development between Thailand and Germany must be taken carefully.

Conclusion

For a long period of time, Thailand and Germany have international investment relation in the form of an agreement. BIT is an investment regulation between Thailand and Germany with the purpose of developing of international investments. The first modern investment treaty was signed between Germany and Pakistan in 1959. It means that, BIT is an international legal invention of Germany and it has advantages in developing international investment with a guarantee of risk in standards of domestic law. Thailand has an advantage from BIT too. Just like a host state of investment, it becomes very easy for Thai investors to invest in German territory. After the case of *Walter Bau AG and Thailand*, Thailand lost the case and in this situation, the country considered the decision as very imbalance and non-equitable in BIT.

Thai people misunderstood that BIT is a disadvantage and it is a thief. But in a real situation the country still has an advantage from BIT. However BIT between Thailand and Germany must be adjusted and improved for promoting balance, sustainable development and integration under the concept of UNCTAD and Model International Agreement on Investment for Sustainable Development by IISD which the whole world agreed as a better way to develop international investment. Nowadays, Thailand's BIT is still very good and continuously making an advantage. However Thailand's situation in international investment under BIT depends on its political stability, good governance, and Rechtsstaat.

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