

The Investment Dispute Settlement in ASEAN

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The increasing investment and commercial activities occur in ASEAN region, and the related disputes may happen between Taiwanese investors and the host countries. To achieve win-win option and minimize the business costs, ASEAN governments are working on creating an investment-friendly market and an internationally accepted Investment Dispute Settlement mechanism to attract more inflow of FDI.

ASEAN Economic Community (AEC) has been officially launched since last year and the the booming integration among goods, service, capital and labour is expected to shape a new economic rule in Southeast Asia. In 2015, it has attracted more than 120 billion USD foreign direct investment (FDI), both from advanced countries and intra-ASEAN investment. Because of the region has more than 600 million population, with increasing middle class and purchasing power, it can predict that more international businesses and commercial activities occur in this area.

Thailand, as one of the major players in ASEAN, has the strategic location which makes it an investor's gateway to Asian market. It can observe that increasing trade and business transactions have been made in Thailand in recent years, as well as many different types of investment disputes taking place and causing extra investment cost. As a result, it is important to have a proper settlement or mechanism for dealing with these conflicting issues.

Traditionally, the trade or investment disputes arise when one state believes that another state member is violating an agreement or treaty which is causing trade lost or unfair competition. In order to settle various disputes among different countries, WTO has implemented its own dispute settlement rules, procedure and appeal mechanism (as known as Dispute Settlement Body, DSB) among member states since 1995. To a large degree, DSB provides an out-of-court, rule-based platform and more efficient channel for conflicting parties to use frequently.

However, while the WTO framework only applies to member states, those disputes occur between private sectors and host governments may need another mechanism to solve the problems. In this concern, investment arbitration, or alternative dispute resolution (ADR), allows investors to submit their cases to a third-party review and the arbitration decision (the 'award') is

legally binding on both disputing sides.

In the context of global trade and transaction, especially for the growing AEC region, the stable investor-state dispute settlement (ISDS) is required to replace the diplomatic methods or domestic jurisdiction. The main reason is that the traditional diplomatic methods may be criticized for the abuse of state's power while the domestic court may be costly and unreliable in certain countries. Furthermore, the unstable political environment and lack of transparency of legislation in many ASEAN countries make international investors less likely to bring cases locally. Therefore, investment arbitration has become one of the widely acceptable means for international business and dispute settlement.

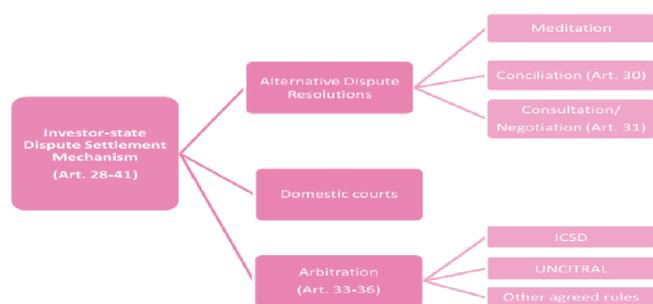
The development of ISDS, or investment arbitration has grown quickly since many international standards were set up and had impact on local sectors. For example. The ICSID-Convention¹ was initiated by the World Bank in 1965 and the 'Model Law' was implemented by the UNCITRAL² and the revised version has been published in 2015. In ASEAN region, plenty of bilateral investment treaties (BITs) or free trade agreements (FTAs) include these ISDS-related and arbitration clauses, especially in recent decade. The ISDS clauses are expected to act as investor safeguards in Southeast Asian countries and provide quasi-judicial awards for implementation of both disputing sides. Even though in ASEAN, many investment dispute resolutions still conduct through informal negotiations and try to pass-by ISDS regulations, the arbitration-based settlement is observed more often between host countries and individuals. Indeed, ASEAN governments are also working on creating an investment-friendly market and an internationally accepted mechanism to attract more inflow of FDI.

The arbitration and ISDS rules can be found in many intra-ASEAN agreements and even in the domestic law.

For instance, the ASEAN Comprehensive Investment Agreement (ACIA) has been exercised effectively among the region since 2012 and many principles have been included under the ACIA framework. Such principles like fair and equitable treatment of investment (Art. 11a), full protection and security for investment (Art. 11b), compensation in case of strife (Art. 12), and the dispute settlement mechanism. More importantly, due to the integration and cooperation among region have become closer, investment-related clauses in ACIA are expected to be institutionalized in individual legislation and the awards announced by arbitration will affect the state's civil court.

Although the public sectors put many efforts to promote the use of ISDS in ASEAN, it still needs more practices for both local governments and foreign enterprises. In Thailand, for instance, even if the first record of using alternative dispute resolution (ADR) was very early, the ADR and other ISDS mechanism had a very limited influence to Thai government and private sectors before 1997 (Limparangsri & Yuprasert, n.d.). After that,

Figure 1: ISDS Mechanism in ACIA



Source: Dr. Le Quoc Phuong, Investment Protection and Dispute Settlement Mechanisms in ASEAN Comprehensive Investment Agreement, http://www.aseancenter.org.tw/upload/files/20141029_2-1.pdf

in response to the increasing free flow investment, in 2002, Thailand introduced UNCITRAL Model law and revised its previous version in civil code (Arbitration Act B.E. 2530)³. However, it can be seen that arbitration or other ISDS mechanisms have not been used in most of the international investment cases. According to the UNCTAD statistics, in the past decade, only one case was submitted to the arbitration court and the arbitration result was in favour of investors⁴.

The investment dispute settlement and ISDS mechanism are still very new and facing challenges in the ASEAN region. It is believed that not only FTAs and domestic law, but also business contracts are trying to employ arbitration as a major mechanism to solve economic and commercial conflicting issues. As a result, even if some people concern the uncertainty of local administrations and unstable jurisdiction, investment arbitration still has a bright future and it will continually become the relatively better option. Given the international trend and on-going efforts, it's believed that ISDS is going to be recognized as one of the major means in dealing with dispute settlement in ASEAN countries.

注釋說明：

¹ ICSID is an international arbitration institution devoting to dispute settlement. The full name is: International Centre for Settlement of Investment Disputes.

² The United Nations Commission on International Trade Law, also known as UNCITRAL.

³ The Arbitration Act B.E. 2530 was made in 1987 and the current version, the Arbitration Act B.E. 2545, has enforced since 2002. The comprehensive context please see: http://www.tai.coj.go.th/doc/data/tai/tai_1467360115.pdf

⁴ Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand.

編者的話

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