

## **Opinion – Dissertation**

**Name of the Ph.D. Candidate: Kamol Tanchinwuttanakul**

**Topic of the Dissertation: Protection of Investments under the Bilateral Investment Treaty between Thailand and the Czech Republic, in total: 307 pages, incl. literature, proposal of the new BIT between Thailand and the Czech Republic, and abstracts**

Submission date: September 2017

### **1. Currency of the topic:**

The candidate has concentrated on the analysis and future prospects of the Bilateral Investment Treaty (BIT) between Thailand and the Czech Republic, its definitions and related provisions, the standards of treatment of the investments protection, the protection of the property investors from expropriation, and the settlement of disputes. The purpose of the research, as the author remarks, was to make suggestions for a new BIT between the two countries by revising and clarifying the allegedly vague wording in the current BIT (p. 301). The proposed model of the new BIT is included as Annex 4 (Draft), linked to the BIT model of the Czech Republic of November 2016 (Annex 3). The topic is current, the author has presented a rich case-law, illustrating the difficulties arising in the international investment protection.

### **2. Complexity of the topic:**

The topic is almost complex, the analysis is based on sufficient sources representing various legal systems, as well as the most important and relevant case-law. However, one particularly significant point is missing: the existence of the Regulation No. 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries. As is well-known, under the Treaty on the Functioning of the European Union, the foreign direct investment falls within the common commercial policy of the EU and is part of the sphere of the exclusive competence of the EU. The Member States are thus allowed to amend existing BITs with third countries only provided that the terms, conditions and procedures set out in the Regulation are observed. To open negotiations with such third countries, the Member States

must obtain an authorization from the European Commission. In the oral defense, the author should in brief describe the procedure and express his opinion, whether the proposed Draft would be in conformity with the stipulated conditions.

### **3. Evaluation criteria of the thesis**

The thesis is fairly logically divided and proportionally systematically arranged. It consists of six subdivided chapters, the first one being the Introduction and the last one the Conclusion.

In the Introduction (Chapter 1), the candidate presents the purpose of the thesis and the background of his research, the purpose being, as stated *supra*, a project (the Draft) of a new BIT between the two countries. The Draft is based partly on the Czech model BIT as of 2016. The author should mention the situation in Thailand, whether there are also some current models for new or renegotiated BIT, and how the current BIT between the CR and Thailand is assessed. Have there been any practical problems? Is there some case-law regarding this or similar BITs of Thailand? Is Thailand currently interested in renegotiations of this BIT? What are the starting points for the BIT renegotiation under the viewpoint of Thailand? And what is the position of the Czech Republic with respect to this BIT and/ or other BITs concluded with third countries? In my opinion, this general framework is crucial for all further conclusions.

Chapter 2 is devoted to definitions and related provisions in the BIT. I am interested in the definition of the ‘effective nationality’ as mentioned at p. 54: how will it be assessed? Is there some guideline in Thai legislation? In the Czech Private International Law Act (Act no 91/2012), this issue is only mentioned (Sec 28/2 PIL Act). As for juridical persons, I am interested in the provisions of Thai law on the law applicable to companies (apparently included in the Foreign Business Act, mentioned at p. 61). These provisions may be relevant for the concept of ‘nationality’ of companies in the future definitions of juridical persons in the BIT.

Chapter 3 outlines the standards of treatment of investments protection. Interesting may be the question of a relationship between FET and customary law (p. 103). Chapter 4 introduces the problems connected with the expropriation where the author points out that the relevant provision in the existing BIT is outdated and creates imbalance. Has there been some particular experience? Chapter 5 is directed to the settlement of disputes. Relevant is the fact that Thailand has not yet ratified the ICSID Convention. The author even remarks that there is no need to change the existing BIT with respect to Article 10 (negotiation, conciliation and arbitration) but Article 11 mentioning the Washington Convention seems to be ‘an obstacle to

solving problems between states and investors as it is unfair to investors.’ The situation is characterised as ‘imbalanced’ (p. 220-221). The author should explain his position. Another question concerns the last paragraph at p. 221: is it necessary to include in the BIT a special provision on the enforcement of awards? The NY Convention on the recognition and enforcement of foreign arbitral awards applies in both countries. As a matter of fact, what is the relationship between the NY Convention and the BIT?

The thesis results in Conclusions which sum up the individual points the thesis has concentrated on.

#### **4. Comments and questions to be answered at the defence**

The thesis has been illustrated with rich footnotes to literal sources and case-law. I appreciate the thesis as profound, the analysis is persuasive and convincing. My questions are mentioned *passim* in the opinion.

#### **5. Recommendation / non-recommendation to the defence:**

I fully recommend the thesis to the oral defence before the commission for defences of dissertations.

Práci plně doporučuji k obhajobě před příslušnou komisí pro obhajobu disertačních prací.

In Prague 30. September 2017

Prof. JUDr. Monika Pauknerová, CSc., DSc.

Opponent