

THAI ALRO WIND FARMS CHALLENGED

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The Supreme Administrative Court of Thailand recently declared that agricultural land administered by the Agricultural Land Reform Organization (“ALRO”) cannot be used for wind farms.

The Court upheld the decision of the lower Administrative Court in Nakhon Ratchasima Province, which ruled that the use of ALRO land in Chaiyaphum Province for the construction of a wind farm project was unlawful.

Although the Court’s decision applies to a specifically identified 90 MW wind project, the Court’s reasoning could jeopardise existing wind farms on ALRO land and prevent future wind farms from being developed on ALRO land (also known as a “Sor Por Kor” land) unless regulatory changes are implemented.

BACKGROUND

In 2010, ALRO executed a lease, allowing Thep Sathit Wind Farm Co Ltd to rent ALRO land for 27 years for the purpose of operating a wind farm with a generation capacity of 90 MW.

LEGISLATION, NOTIFICATIONS AND RESOLUTIONS

The Agricultural Land Reform Act was established to make agricultural land available to farmers with no land of their own, but it expressly empowers ALRO to lease land to any person for activities that support or relate to land reform as prescribed in ministerial notifications. A 2000 ministerial notification prescribed “activity related to economic or social aspects of farmers’ livelihood” as an activity that supports or relates to land reform, and an ALRO resolution in 2010 classified generating electricity from wind power as an activity that supports or relates to economic and social aspects of farmers’ livelihoods.

The Court, however, took the view that it was necessary for non-agricultural activities to directly benefit farmers in order to come within ALRO’s power to grant a lease. The Court held that the wind farm did not directly relate to economic and social aspects of farmers’ livelihoods, and that the lease over the ALRO land was unlawful.

In light of the Court’s ruling, ALRO land can be used only for activities other than agricultural activities if those activities provide direct benefits to farmers.

THE INTERRUPTION OF WIND FARM PROJECTS IN THAILAND

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Following the Court's ruling, the fate of many wind energy projects in a land reform area has been thrown into doubt and the ruling has raised concerns about whether a precedent will be set for any other current or future projects.

ALRO has granted land leases to 20 business developers in Chaiyaphum and Nakhon Ratchasima Provinces. In Chaiyaphum Province, there are 13 projects in total, including Thep Sathit Wind Farm, and there are seven wind energy projects in Nakhon Ratchasima Province.

The Court's decision may delay the commercial operation date ("COD") of many wind energy projects despite most CODs being scheduled this year, as lenders reconsider the bankability of ALRO leases for wind farms.

The Court's ruling further affects the confidence of financial lenders in granting credit facilities to project owners and raises yet another layer of "country risk".

The Energy Regulatory Commission ("ERC") and ALRO are likely to work towards a solution over the next few months to enable wind farms to be constructed on ALRO land without breaching Thai laws. The solution may be as straightforward as issuing a new notification to expressly include wind farms as a permitted non-agricultural activity, or including lease terms that confirm that wind farms provide a direct benefit to farmers.

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