The Future of Investment Treaties:
Government Perspective on Future Policies and Impact of Integrated Trade and Investment Negotiations vs Investment-Only Treaties[1]

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Challenges: Rethinking investment policies in a changing landscape

Investment policymakers and negotiators today are navigating a vastly different landscape compared to 50 or 60 years ago when bilateral investment treaties (BITs) were first concocted. There is now a wide range of social issues that beckon for the attention of investment policymakers. The fundamental question for every government now is therefore: how to best attract investment within this changing landscape while ensuring that investment-related regulatory objectives are met in order to achieve sustainable development?

Wide scope and vaguely defined obligations in old-generation international investment agreements (IIAs)

Older IIAs, mostly BITs are notorious for their wide scope of vaguely defined obligations. First-generation BITs usually affirm that investors are entitled to a "fair and equitable treatment" and must be accorded "full protection and security". They stipulate that investors must be "compensated" when subject to "an indirect taking" of their property. But those treaties rarely define the meaning of these crucial terms. Consequently, tribunals in investor-state dispute settlement (ISDS) cases are often left with a broad discretion to establish the scope and contours of these treaty obligations. Such a situation may result in exposure to undesirable consequences for States in ISDS cases.

Increasing call for safeguarding policy space and the right to regulate

In recent years, IIAs have been criticised for preventing governments from adopting legislation or regulations designed to promote policies that are in the public interest *(e.g. health, environment, safety and labour),* threatening States' "right to

[1] This article is based on the presentation by Dr. Vilawan Mangklatanakul, Director-General of Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand at the OECD 6th Annual Conference on Investment Treaties which was virtually held on Monday, 29 March 2021.

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regulate" and limiting the "policy space" of governments. The proliferation of investment disputes in recent years, passing the 1,000-case mark in 2019[3], has brought this concern into focus, and the criticism has intensified. In the case of Thailand, so far there have been two ISDS arbitration cases initiated against the Thai Government, one of which involved measures adopted by the government to address the environmental and health concerns. These cases have prompted the country to reassess the impacts of its BITs as well as the effectiveness of ISDS[4].

Emerging sustainable development policy agendas

With new global challenges and transformed environment for international economic policies, the scope of interests for potential inclusion in treaties has broadened. It is no longer just about attracting investment, but how to achieve an attractive climate for inclusive, responsible and sustainable development. New important issues such as state-owned enterprises (SOEs) and digital economy that could have impact on investment policies have emerged and need to be addressed comprehensively.

Current trends

Ongoing reform efforts

Against this backdrop, Thailand, like many others, has taken up reforms to address these challenges. First, the Thai Government is modernising its new model BIT to provide more clarity and reduce ambiguities in the language used in old-generation IIAs, enhance the ability of the State to guide ISDS tribunals, and strike a greater balance between the protection of investors and the right to regulate in the public interest. In 2018, it has also established the Committee on the Protection of International Investment[5], which serves as a policy tool to oversee investment protection policies as well as enhance coherence between enforcement of domestic regulations and policies and implementation of IIAs obligations. Secondly, with the assistance of the OECD, the country has also recently completed a strategic review of its investment policy and examine especially where investment policy intersects with other policy areas such as trade, competition, tax and environment[6].

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[3] IIA Issues Note: "Investor–State Dispute Settlement Cases Pass the 1,000 Mark: Cases and Outcomes in 2019" (No. 2, July 2020), UNDTAD https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf

[4] See also Vilawan Mangklatanakul, "Thailand's First Treaty Arbitration: Gain From Pain", *Investor-State Disputes: Prevention and Alternatives to Arbitration II, Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, United States of Americ* (March 2010): pp. 81 – 87, which can be accessed at http://unctad.org/en/docs/webdiaeia20108_en.pdf.

[5] Under the Regulation of the Office of the Prime Minister on Work Relating to the Protection of International Investments B.E. 2562 (2019) which entered into force on 1 March 2019.

[6] For more details, see OECD (2021), OECD Investment Policy Reviews: Thailand, *OECD Investment Policy Reviews, OECD Publishing, Paris*, https://doi.org/10.1787/c4eeee1c-en.

Finally, Thailand has been engaging actively in the deliberations at international fora, especially the UNCITRAL Working Group III on the Investor-State Dispute Settlement Reform. Reform options presented by Thailand under the three overarching principles namely, "universality and versality", "building blocks for the future" and "prevention rather than litigation", have been gaining support from the Working Group. Those proposals include establishing an advisory centre on international investment law, drawing up a new set of UNCITRAL ISDS Rules, promoting the use of alternative dispute resolution mechanisms and setting up guidelines for dispute prevention[7].

From BITs to Investment Chapters in Free Trade Agreements (FTAs)

Thailand currently has 45 IIAs in force, 36 of which are bilateral investment treaties or BITs and 9 are investment chapters in FTAs. Most of the 36 BITs have been concluded in 1990s or early 2000s, while the Investment Chapters in FTAs are more recent. After the Doha Round trade talks had stalled, Thailand, like many other countries, started to pursue negotiations of FTAs, which usually include an investment chapter, as means to liberalise trade and investment as well as to sustain economic recovery. The last BIT concluded was the one with the United Arab Emirates in 2015.

(1) A shift towards mega-regional comprehensive agreements

While Thailand's BIT negotiations have halted for many years amid growing concerns regarding ISDS, the country continued to negotiate investment chapters in FTA negotiations, even though they are not without their own obstacles. In fact, there has been constant public attention on the potential impact of FTAs in Thailand. Questions were raised whether FTAs could actually generate broad benefits across all sectors.

Later, the trend has shifted from bilateral FTAs to regional trade agreements and more recently to "mega-regional" comprehensive agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Regional Comprehensive Economic Partnership Agreement (RCEP) or Economic Partnership Agreements (EPAs) between EU and its partners. These mega-regional agreements aim for higher standards and higher quality. They require not only at-the-border liberalization but also beyond-the-border economic reforms by working on regulatory coherence on issues such as the enforcement of intellectual property rights, SOEs, administration on digital economy and most importantly the expansion of coverage of protection to pre-establishment stage of investment.

[7] Submission from the Government of Thailand to the UNCITRAL Working Group III, available at http://undocs.org/en/A/CN.9/WG.III/WP.162

(2) Overlapping obligations

The proliferation of these agreements has resulted in an increasingly complex web of IIAs with different terms and sets of parties, and various degrees of overlap. For example, in the case of Thailand and Viet-Nam, there are at least 8 IIAs currently in force, namely Thailand-Vietnam BIT and 7 Agreements in the framework of ASEAN, pending the entry into force of RCEP and potential accession of Thailand to the CPTPP.

It is clear that, at least for some more time to come, international investment disciplines will continue to co-exist side by side and governments will have to ensure consistency between differing sets of obligations. Quite a large number of IIAs, notably BITs, while promoting closely related concepts (national treatment [NT], most-favoured nation [MFN] treatment, fair and equitable treatment [FET], full protection and security), contain legal and/or textual variations, which could result in divergent interpretations of the same general obligation under different agreements.

Questions have also been raised regarding the various types of Investor-State and State-State dispute settlement procedures or "forum shopping" where an investor may initiate multiple procedures on the same question in order to take advantage of the potentially more favourable dispute settlement provisions available in different agreements.

Integrated trade and investment negotiations (FTAs/EPAs) vs. investment-only treaties

Opportunities for improving regulatory practice and standards

Considering that the coverage of FTAs/EPAs usually span a wide range of economic sectors, they can offer an avenue for the negotiating parties to develop rules that respond to their respective development agendas as well as some social demands, and provide for better interaction between such rules and investment policies. A number of new-generation mega-regional agreements have already expanded their scope of coverage to include additional commitments beyond traditional trade and investment liberalisation. The CPTPP and EPAs concluded by the EU have incorporated basic standards on the environment, health, human rights and labour - including for example commitments to accede to ILO conventions and enforce relevant domestic law[8].

[8] For example, Article 13.4 of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam provides that *"… 3. Each Party shall (a) make continued and sustained efforts towards ratifying, to the extent it has not yet done so, the fundamental ILO conventions; … 4. Each Party reaffirms its commitment to effectively implement in its domestic laws and regulations and practice the ILO conventions ratified by Viet Nam and the Member States of the Union, respectively. …*"

The new-generation FTAs/EPAs also seek to address the problems and loopholes that have been identified in the first-generation IIAs, through more precise treaty languages and regulated ISDS. The US-Mexico-Canada Trade Agreement (USMCA) or the "New NAFTA" sets quite a remarkable example. Its new innovations include a more detailed definition of expropriation, the use of specific examples given for interpretation of the minimum standard of treatment and the implication that a state's actions which fulfill "public welfare objectives" will be considered in the new Article 14.4 on National Treatment and Article 14.5 on the Most Favored Nation standard in determining whether treatment was accorded in "like circumstances".

In this sense, FTA negotiations can provide a more versatile policy tool than investment-only treaties. For developing countries that are seeking to strengthen their own regulatory practice and standards, there may be more political and economic incentives to conclude such mega-regional agreements as a tool for domestic reform.

Opportunities for updating old-generation treaties

Both tracks provide an avenue for States to update their investment treaty obligations, but re-negotiations of BITs may be less likely to happen. Why? Unlike in the past when BITs were signed as diplomatic gestures without much scrutiny of the content or assessment of potential consequences, now many governments have experienced first-hand the real impact of BITs when claims are brought against them by foreign investors. This, together with bad publicity and criticisms from some NGOs and academia, has caused a shift in attitude. There is little political appetite now for investment-only treaty negotiations in some countries including Thailand.

For investment negotiators, this means options for way forward are limited. One option is to terminate the treaty. Another is to wait for it to be superseded by future FTAs. It is noted that there are tools available that States can use to improve certainty in the interpretation of contentious obligations in their IIAs, including the use of joint interpretation mechanism and unilateral interpretative declaration. Joint interpretations, in particular, can be considered a way for States to retain control over the interpretation of their existing investment treaties, as and when disputes arise. It is also one of the passages for "home States" to re-enter Investor-State arbitration and dissipate some legal uncertainty that characterises certain provisions of investment treaties. However, these tools do not yield the same legal effect under the Vienna Convention on the Law of Treaties 1969 as a treaty amendment.

On the other hand, FTAs/EPAs negotiations provide opportunities for States to undertake substantive and procedural reforms of their IIAs, as well as offer benefits of market access for both trade and investment, and comprehensive economic partnership. In the recently concluded RCEP, for example, Member States were able to provide greater clarity for the core post-entry investment protection obligations such

as FET by clearly stating that the obligations does not require treatment beyond customary international law minimum standard of treatment of aliens[9]. The obligation on expropriation is also spelled out in more details, defining what constitutes an indirect expropriation and providing limits on the amount of compensation.

Challenges remain however, in the case where "new-generation agreements" today become "old-generation agreements" in the future. It might be even more difficult to amend or terminate FTAs/EPAs than BITs, and especially so for regional FTAs/EPAs with more than two parties.

Looking ahead

Whilst foreign direct investment (FDI) continues to be an important impetus for economic growth, there is certainly a role for investment treaties to play in furthering investment-related regulatory priorities as they evolve over time. But there are cautions as well. The issue of how to effectively deal with overlapping obligations and old-generation treaties that are still in force, as mentioned earlier, needs to be addressed. Notably, negotiations for a multilateral investment facilitation framework in the WTO officially kicked off last year and the UN open-ended intergovernmental working group (IGWG) has released, not too long ago, a second revised draft of the binding treaty on business and human rights. These multilateral negotiations could also open up further possibilities of overlapping obligations. This issue will need to be carefully considered by investment policymakers and negotiators.

It seems that there is already a trend towards convergence of norms between the new-generation FTAs/EPAs from which States can capture emerging norms and develop a uniform set of standards. Thus when the conditions are ripe, there is a possibility for a multilateral instrument on investment to be negotiated which can then replace the web of existing treaties that States currently have vis-à-vis one another and provide a more coherent policy framework for the international investment regime. Also on the issue of safeguarding policy space and the right to regulate, a multilateral

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[9] Article 10.5 of the Regional Comprehensive Economic Partnership Agreement:

"Article 10.5: Treatment of Investment

1. *Each Party shall accord to covered investments fair and equitable treatment and full protection and security, in accordance with the customary international law minimum standard of treatment of aliens.*
2. *For greater certainty:*
   (a) fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings;
   (b) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment; and
   (c) the concepts of fair and equitable treatment and full protection and security do not require treatment to be accorded to covered investments in addition to or beyond that which is required under the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.
2. *A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."*

instrument on investment can potentially set out clear and agreed limits on government actions or regulatory powers, for example by having provisions to ensure on ensuring non-discrimination, transparency and due process of law in the exercise its right to regulate, in order to reduce uncertainties associated with government control.

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