Thailand's International Investment Agreements: Moving Towards A More Balanced Investment Protection Regime?

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Abstract

The world has witnessed the creation and proliferation of IIAs since 1959. From 2008 until present, re-orientation seems to have taken place away from unqualified investment protection on part of foreign investors towards more regulatory space on part of the government. IIA reform has gathered momentum and high on governments' agenda. To make matters worse, the COVID-19 pandemic may have accelerated the pace of and the need for reform even further. Governments may be at risk of violating obligations under IIAs when implementing measures to contain outbreaks and the spread of the virus. However, the IIA reform is far from uniform, and not all countries embrace it or do it at the same pace. This paper therefore proposes to conduct preliminary reviews of the investment chapter in the RCEP Agreement and the CPTPP in order to determine whether Thailand has moved towards a more balanced investment protection regime or not. In addition, the paper will briefly look at the recent establishment of the Committee on the Protection of International Investments and the formulation of Thailand's model treaty for IIAs, which may confirm and complement such a move.

I. Stock-taking of IIA reform efforts in recent years

The first bilateral investment treaty (BIT) was concluded in 1959 between Germany and Pakistan, which was updated 50 years later in 2009.[2] BITs are but one form of international investment agreement (IIA), which generally contain provisions on investment protection. IIA also encompasses other forms of international agreement such as free trade agreement (FTA) with an investment chapter. Such FTAs tend to contain provisions on investment liberalisation as well as protection.

The IIA landscape has changed over the past 60 years. During 1990 until 2007, IIAs were proliferating at an unprecedented rate, benefiting from the enhanced substantive provisions on investment protection as well as investor-state dispute settlement (ISDS), which were developed

[1] This paper was written by the author in his personal capacity as an independent academic. Views and opinions expressed in this paper are therefore his and his alone, and do not reflect official positions of the Ministry of Foreign Affairs of Thailand.

[2] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/ 1732/germany---pakistan-bit-1959-.

in the mid-1960s until the late 1980s (United Nations Conference on Trade and Development [UNCTAD], 2015).[3] Arguably, the focus of IIAs then was to protect investors that were often from developed countries and invested in developing countries. From 2008 until present, however, the IIA landscape has been in the period of re-orientation and the focus has shifted towards a more balanced investment protection regime (UNCTAD, 2015).[4]

The re-orientation may have been triggered by the fact that many governments around the world, developed and developing countries alike, have been sued by foreign investors through ISDS made available under IIAs. Between 1987 and 2019, there were 1023 known ISDS cases (UNCTAD, 2020a).[5] In addition, governments have been more active in pursuing legitimate public welfare objectives such as public health and environment (UNCTAD, 2018).[6] This, coupled with relatively vague treaty language in old-generation IIAs, has resulted in more ISDS cases brought against governments. It is therefore no surprise that IIA reform has gathered momentum and been high on agenda of many governments. In fact, UNCTAD has been advocating IIA reform for almost a decade, particularly in relation to sustainable development (UNCTAD, 2012).

The COVID-19 pandemic may have accelerated the pace of and the need for IIA reform even further. To contain outbreaks and spread of the virus, governments have to impose various restrictions, ranging from travel ban to closure of certain business premises. In addition, many governments have been providing financial assistance to companies adversely affected by the pandemic. These measures could be in violation of existing IIAs and governments are at risk of being subject to ISDS litigation. Such scenario would impose a huge burden on governments, particularly those from developing countries like Thailand, whose finances are already constrained due to the pandemic and its economic impact.

As advocated by UNCTAD in World Investment Report 2015, the question is "not about *whether* or not to reform [IIAs], but about the *what*, *how* and *exten*t of such reform."[7] In its subsequent work, UNCTAD divides IIA reform into three phases: Phase 1 involves making strategic choices on the extent and depth of the reform agenda, and choosing policy approaches for key areas, including substantive IIA provisions, ISDS and systemic issues; Phase 2 involves addressing the problems and risks posed by the large stock of existing, old-generation IIAs; and Phase 3 focuses on improving coherence, consistency and interaction between different levels and types of policymaking (UNCTAD, 2018).[8] It should be noted at this juncture that this paper looks at Thailand's efforts on IIA reform primarily in Phase 1 although certain policy decisions taken by the government may contribute to Phase 3 reform as well.

When looking at Phase 1 reform, one could broadly divide it into (1) improvement on substantive IIA provisions and (2) improvement on ISDS, the mechanism through which these IIA provisions are enforced. The former concerns provisions such as national treatment (NT), most-

[3] See UNCTAD (2015), pages 121-124.
[4] See ibid, pages 124-125.
[5] See UNCTAD (2020a), page 110.
[6] See UNCTAD (2018), pages 15-16.
[7] See UNCTAD (2015), page xi.
[8] It is important to note that UNCTAD advices countries to consider these phases at the same time when planning IIA reform instead of carrying them out in successive reform actions. See UNCTAD (2018), pages 30-31.

favoured-nation (MFN) treatment, fair and equitable treatment (FET), full protection and security (FPS), indirect expropriation, and general exceptions; whereas, the latter concerns provisions such as appointment of arbitrators, conduct of arbitration, and arbitral awards. So, how can these substantive IIA provisions and ISDS be improved? Arguably, the primary aim of the IIA reform is to make sure that governments can exercise the "right to regulate" in order to achieve legitimate public welfare objectives while investment protection under IIAs is adequately guaranteed. To this end, these substantive provisions should be clarified, or in some cases omitted (UNCTAD, 2020b),[9] and more details and structure should be added to ISDS to promote transparency and reduce discretion on parts of the claimant investor and arbitrators.[10]

The debate on how to reform substantive IIA provisions and ISDS is still on-going, particularly through the works done by UNCTAD and the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL).[11] Given its limitations, this paper does not aim to materially contribute to the on-going debate, but uses such works as a basis for preliminary reviews[12] of the investment chapter in two IIAs related to Thailand. The first is the Regional Comprehensive Economic Partnership (RCEP) Agreement, which is the latest IIA that Thailand recently concluded with 14 other countries.[13] The second is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[14], which is an IIA that Thailand has been considering acceding. In fact, a Parliamentary Select Committee undertook an in-depth study of Thailand's readiness to join the CPTPP in 2020, during which a number of issues regarding ISDS were raised.

The preliminary review of the investment chapter in the RCEP Agreement should provide a glimpse of an investment protection regime that the Parties, which include developed, developing and least-developed countries, can accept. On the other hand, the preliminary review of the CPTPP's investment chapter and the issues raised during the study by the Parliamentary Select Committee should provide insights to Thailand's concerns when it comes to an investment protection regime under one of the most ambitious FTAs to date. In addition, the paper also briefly looks at the recently established Committee on the Protection of International Investments and the formulation of Thailand's latest model treaty for IIAs to determine whether these policy decisions confirm and complement Thailand's move towards a more balanced investment protection regime.

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[9] See UNCTAD (2020b), pages 9-28.

[10] The European Union and its Member States would go even further to replace arbitration with a multilateral investment court. See European Commission (2015), *Trade for All: Towards a More Responsible Trade and Investment Policy*, pages 21-22, available at https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

[11] UNCITRAL Working Group III has been working on ISDS reform since November 2017. It has been looking at the procedural aspects of ISDS, including issues on costs and timeframe of arbitration process, consistency and accuracy of arbitral awards, appointment of arbitrators, and third-party funding. In addition, it has been also looking at systemic and structural reform, including the possibility of establishing an appeal mechanism and a multilateral investment court. For more detail, see at https://uncitral.un.org/en/working_groups/3/investor-state.

[12] The preliminary reviews look primarily at provisions on investment protection and ISDS.

[13] The Parties of the RCEP Agreement are Australia, Brunei, Cambodia, China, Indonesia, Japan, Lao PDR, Malaysia, Myanmar, New Zealand, the Philippines, Republic of Korea, Singapore, Thailand and Vietnam.

[14] The Parties of the CPTPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

II. Preliminary Reviews of Investment Chapters in the RCEP Agreement and the CPTPP

RCEP Agreement

The RCEP Agreement was substantially concluded in 2019 and later signed in November 2020 by all 15 countries. For Thailand, the Parliament has approved the agreement in February 2021 and at the time of writing, line agencies are working on necessary amendments of domestic laws and regulations before Thailand can ratify the agreement.[15] While Chapter 10 (Investment) covers four aspects of investment, namely protection, liberalisation, promotion and facilitation, the focus of this section is only on investment protection.

Article 10.1 deals with definitions of various terms in the Chapter. The common asset-based and non-exhaustive approach is used for the term "investment".[16] However, the term "covered investment" is limited by its subjection to "relevant laws, regulations, and policies."[17] The word "policies" is defined in Footnote 3 as "those policies affecting an investment that are endorsed and announced by the government of a Party in a written form and made publicly available in a written form." In addition, for Thailand and Malaysia, protection will be accorded to a covered investment, which "where applicable, has been specifically approved in writing for protection" by a competent authority.[18] The phrase "an investor seeks to make an investment" is clarified as to when "that investor has taken concrete action or actions to make an investment", and "where a notification or approval process is required for making an investment, an investor that "seeks to make" an investment refers to an investor that has initiated such notification or approval process."[19]

Article 10.3 governs NT obligation whereby each Party has to "accord to investors of another Party, and to covered investments, treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments." This obligation is clarified in Footnote 17 that "whether the treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." Article 10.4 on MFN Treatment obligation adopts a similar approach to Article 10.3 whereby the phrase "like circumstances" is clarified and linked to legitimate public welfare objectives.[20]

Article 10.5 (Treatment of Investment) deals with both FET and FPS obligations and specifically states that both obligations have to be implemented "in accordance with the customary

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[15] At the time of writing (August 2021), only China, Japan, Myanmar and Singapore have deposited their Instrument of Ratification with the Secretary-General of ASEAN as the Depositary. Thailand is expected to ratify the RCEP Agreement by the end of 2021. Article 20.6(2) states that the RCEP Agreement "shall enter into force for those signatory States that have deposited their instrument of ratification, acceptance, or approval, 60 days after the date on which at least six signatory States which are Member States of ASEAN and three signatory States other than Member States of ASEAN have deposited their instrument of ratification, acceptance, or approval with the Depositary."

[16] See RCEP Agreement, Article 10.1(c).

[17] See RCEP Agreement, Article 10.1(a).

[18] See RCEP Agreement, Chapter 10, Footnote 1.

[19] See RCEP Agreement, Chapter 10, Footnotes 8 and 9.

[20] See RCEP Agreement, Chapter 10, Footnotes 19.

international law minimum standard of treatment of aliens."[21] Furthermore, the Article also elaborates on what FET and FPS may cover. Article 10.5(2)(a) states that FET "requires each Party not to deny justice in any legal or administrative proceedings", and Article 10.5(2)(b) states that FPS "requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment." Article 10.5(2)(c), on the other hand, makes it clear that both FET and FPS obligations do not require treatment in addition or beyond that which is required under the customary international law minimum standard of treatment of aliens, and they themselves do not create additional substantive rights. Based on how Article 10.5(2) is constructed, it seems to be indicative only.

Article 10.13 covers situations of expropriation, both direct and indirect.[22] The Article is to be interpreted in accordance with Annex 10B (Expropriation), which clarifies how indirect expropriation is to be determined. For example, paragraph 3 of the Annex states that whether an action or series of related actions by a Party constitutes an indirect expropriation requires "a case-by-case, fact-based inquiry" that considers, among others, factors such as economic impact of the government action, whether the government's prior binding written commitment is breached, and character of the government action, including its objective and context.[23] Paragraph 4 of the Annex also exempts "non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilisation" from the scope of indirect expropriation. In addition, Article 10.13(4) makes it clear that this Article does not apply to the issuance of compulsory licences to the extent that it is consistent with Chapter 11 (Intellectual Property) [of the RCEP Agreement] and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Although Chapter 10 does not have its own General Exceptions, Article 17.12 under Chapter 17 (General Provisions and Exceptions) for the purposes of Chapter 10, among others, incorporates Article XX of the General Agreement on Tariffs and Trade (GATT) 1994 and Article XIV of the General Agreement on Trade in Services (GATS) *mutatis mutandis*.[24] It is therefore possible for a Party to rely on general exceptions such as protection of human, animal or plant life or health and security of compliance with laws and regulations when it is found in violation of an obligation in Chapter 10.[25]

Surprisingly, Chapter 10 does not contain any provision on ISDS. However, Article 10.18 (Work Programme) requires the Parties to enter into discussions on ISDS and the application of Article 10.13 (Expropriation) to taxation measures that constitute expropriation no later than two

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[21] RCEP, Chapter 10, Footnote 20 states that Article 10.5 is to be interpreted in accordance with Annex 10A (Customary International Law) whereby [T]he Parties confirm their shared understanding that "customary international law" generally and as specifically referenced Article 10.5 (Treatment of Investment), including in relation to the customary international law minimum standard of treatment of aliens, results from a general and consistent practice of States that they follow from a sense of legal obligation."

[22] See RCEP Agreement, Article 10.13.

[23] See RCEP Agreement, Annex 10B, paragraph 3.

[24] See RCEP Agreement, Article 17.12.

[25] For more detail, see GATT, Article XX and GATS, Article XIV.

years after the date of entry into force of the RCEP Agreement, and to conclude the discussions within three years from the date of its commencement.

Having looked at these provisions in Chapter 10, one could argue that the Parties of the RCEP Agreement intend to strike a better balance between the right to regulate on part of the government and investment protection on part of the investors. The clarification on "covered investment" is but one example. An investment will be a covered investment, hence receiving the protection under Chapter 10, only when it complies with "relevant laws, regulations, and policies." The inclusion of the word "policies" implies high degree of discretion on part of the government as policies can change more easily than laws and regulations. In addition, in the case of Thailand and Malaysia, the requirement of "specifically approved in writing for protection" is also attached to "covered investment", which restricts the scope of the term further in favour of the government.[26] The elaboration of the phrase "an investor seeks to make an investment" makes it clearer when exactly such investors and their investments will be protected.

The inclusion of "like circumstances" with clearer scope and linkage to legitimate public welfare objectives in Articles 10.3 and 10.4 with regard to NT and MFN Treatment obligations, respectively, should also narrow the scope of NT and MFN Treatment obligations in favour of the government. However, it is not clear how the linkage to legitimate public welfare objectives will work in practice. Does it mean that a measure which distinguishes (or rather discriminates) between investors or investments on the basis of legitimate public welfare objectives will render the investors/investments not in like circumstances?

Article 10.5 qualifies FET and FPS obligations with the customary international law minimum standard of treatment of aliens, and Annex 10A, with which Article 10.5 is to be interpreted in accordance, helps clarify that customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. This, coupled with the indicative list in Article 10.5(2), should help delimit the scope of FET and FPS obligations to some extent, and reduce the chance of Article 10.5 being used successfully by a claimant investor.

The scope of indirect expropriation has been clarified and narrowed. Not only does the issuance of compulsory licences consistent with Chapter 11 (Intellectual Property) and the TRIPS Agreement fall outside of Article 10.13, but non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives as stated in Annex 10B do also. It should be noted that the application of Article 10.13 to taxation measures that constitute expropriation[27] is not currently covered and subject to Work Programme under Article 10.18 along with ISDS. Arguably, such taxation measures would be beyond Article 10.13 as of now and governments of the Parties would be free to use them.

The preliminary review of the investment chapter in the RCEP Agreement has shown that the Parties did agree on an investment protection regime that arguably leans towards the right to

[26] For Thailand and Malaysia, this requirement arguably limits the scope of investment protection as investments that have not been specifically approved in writing for protection by a competent authority will not be regarded as covered investment.

[27] Presumably, such tax measure would constitute indirect expropriation rather than direct expropriation.

regulate on part of the government. The substantive IIA provisions discussed above are much more "government-friendly" compared to many past IIAs. More importantly, Chapter 10 currently does not have any provision on ISDS. Although ISDS is subject to Work Programme under Article 10.18, there is no guarantee that the Parties will be able to agree on ISDS provisions within the period provided thereunder. If they fail to do so, investors will not have any mechanism to protect their rights in Chapter 10.

CPTPP

The CPTPP is a resulting FTA after the United States under President Trump pulled out of the Trans-Pacific Partnership (TPP) agreement at the beginning of 2017. The CPTPP includes many of the elements that were negotiated as part of the TPP agreement, but with some differences, particularly on items which were primarily pushed by the United States. The CPTPP was concluded in January 2018 where the Parties agreed to suspend 22 items from the original TPP agreement, and it was later signed in March that year.[28] At the time of writing, the CPTPP is in force between seven Parties which have ratified it.[29] While Chapter 9 (Investment) covers two aspects of investment, namely protection and liberalisation, the focus of this section is only on investment protection.[30]

For Thailand, the government had expressed interest in joining the trade pact since the time of the TPP agreement was being negotiated[31] and has continued to do so after it became the CPTPP. However, due to many reasons, including changing Thai political landscape and fierce opposition from non-governmental organisations, Thailand is yet to officially make a formal request to negotiate for an accession to the CPTPP. Since the beginning of 2021, the Cabinet has tasked the Committee on International Economic Policy to further work on the in-depth study conducted by the Parliamentary Select Committee in 2020. After about six months, the Committee has completed its work and reported back to the Cabinet for consideration. The issues regarding ISDS, which were first raised during the study, revolve around the concerns that government agencies would be sued through ISDS, particularly when they implement measures aiming to curve tobacco and alcohol consumptions as well as the issuance of compulsory lincences.[32] Such a possibility, many argue, would result in "regulatory chill" on part of the government.

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[28] For more detail on the differences between CPTPP and TPP agreement, see at https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/cptpp-vs-tpp/.

[29] The seven countries are Australia, Canada, Japan, Mexico, New Zealand, Singapore, and Vietnam. It should be noted that Peru is in the process of ratifying the agreement and the CPTPP is expected to be enforced for Peru on 19 September 2021.

[30] Chapter 22 (Competitiveness and Business Facilitation) establishes the Committee on Competitiveness and Business Facilitation. The Chapter mostly elaborates on how the Committee would enhance competitiveness and promote business facilitation, particularly through strengthening regional supply chains. One could argue that "business facilitation" is closely related to investment facilitation, but this falls outside the scope of this paper.

[31] See at https://www.reuters.com/article/us-asia-obama-trade-idUSBRE8AH06R20121118.

[32] Thailand's measures on tobacco and alcohol consumptions have been praised quite highly both domestically and internationally, and it has been willing to issue compulsory licences to improve access to medicines and essential treatments in the past.

Article 9.1 deals with definitions of various terms in the Chapter. Like Chapter 10 of the RCEP Agreement, the common asset-based and non-exhaustive approach is used for the term "investment".[33] However, unlike its RCEP counterpart, the term "covered investment" is not restricted by subjection to "relevant laws, regulations, and policies."[34] In addition, there is no extra requirement such as the case of Thailand and Malaysia's "specifically approved in writing for protection". On the other hand, the phrase "an investor attempts to make an investment" is clarified as "when that investor has taken concrete action or actions to make an investment, such as channelling resources or capital in order to set up a business, or applying for a permit or licence."[35] This is comparable to the clarification on the phrase "an investor seeks to make an investment" under the RCEP Agreement.

Articles 9.4 and 9.5 deal with NT and MFN Treatment obligations, respectively. A similar approach is taken compared to Articles 10.3 and 10.4 of the RCEP Agreement, whereby the phrase "like circumstances" is clarified and linked to legitimate public welfare objectives. Footnote 14 states that "whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." In addition, with regard to MFN Treatment obligation, Article 9.5(3) further clarifies that it "does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).

Article 9.6 (Minimum Standard of Treatment), which covers both FET and FPS obligations, is to be interpreted in accordance with Annex 9-A (Customary International Law) whereby a similar language with its RCEP counterpart is used.[36] Albeit some differences when compared with Article 10.5 of the RCEP Agreement, Article 9.6 elaborates on what FET and FPS may cover and stresses that the concepts of FET and FPS do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens, and do not create additional substantive rights.[37] Moreover, subparagraphs 4 and 5 of Article 9.6 further clarify that the mere fact that "a Party takes or fails to take an action that may be inconsistent with an investor's expectations" or "a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party", does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.[38]

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[33] See CPTPP, Article 9.1.

[34] "[c]overed investment means, with respect to a Party, an investment in its territory of an investor of anther Party in existence as of the date of entry into force of this Agreement for those Parties or established, acquired, or expanded thereafter."

[35] See CPTPP, Chapter 9, Footnote 12.

[36] See CPTPP, Chapter 9, Footnote 15. Annex9-A (Customary International Law) states that "[T]he Parties confirm their shared understanding that "customary international law" generally and as specifically referred to in Article 9.6 (Minimum Standard of Treatment) results from a general and consistent practice of States that they follow from a sense of legal obligation. The customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the investments of aliens."

[37] See CPTPP, Article 9.6(2).

[38] See CPTPP, Articles 9.6(4) and 9.6(5).

Article 9.8 covers situations of expropriation, both direct and indirect.[39] The Article is to be interpreted in accordance with Annex 9-B (Expropriation), which clarifies how indirect expropriation is to be determined. For example, paragraph 3(a) of the Annex states that whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires "a case-by-case, fact-based inquiry" that considers, among others, factors such as economic impact of the government action, the extent to which the government action interferes with distinct, reasonable investment-backed expectations,[40] and the character of the government action.[41] Paragraph 3(b) also exempts "non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health,[42] safety and the environment, […] except in rare circumstances", from the scope of indirect expropriations.[43] In addition, Article 9.8(5) makes it clear that this Article does not apply to the issuance of compulsory licences to the extent that it is consistent with Chapter 18 (Intellectual Property) [of the CPTPP] and the TRIPS Agreement. Overall, it seems that the construct of Article 9.8 (and Annex 9-B) is rather similar to Article 10.13 (and Annex 10B) of the RCEP Agreement.

Although Article 29.1 (General Exceptions) under Chapter 29 (Exceptions and General Provisions) contains general exceptions for other Chapters in the CPTPP, they are not available for Chapter 9. This differs from the case of Chapter 10 and Article 17.12 of the RCEP Agreement. However, Article 29.5 (Tobacco Control Measures) does specifically carve out tobacco control measures from the reach of ISDS under Chapter 9. It allows a Party to "deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure[44] of the Party." This can be done prior to the submission of a claim or during the proceedings under Section B.[45] Within Chapter 9, Article 9.16 (Investment and Environmental, Health and other Regulatory Objectives) more generally governs the relationship between investment protection and the government's right to regulate. It explicitly allows a Party to adopt, maintain or enforce any measure otherwise consistent with Chapter 9 that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other

[39] See CPTPP, Articles 9.8.
[40] Footnote 36 of Chapter 9 of the CPTPP clarifies that "whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."
[41] See CPTPP, Annex 9-B, paragraph 3(a).
[42] Footnote 37 of Chapter 9 of the CPTPP clarifies that "regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products."
[43] See CPTPP, Annex 9-B, paragraph 3(b).
[44] Footnote 12 of Chapter 29 clarifies that "[A] tobacco control measure means a measure of a Party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labelling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. For greater certainty, a measure with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco product is not a tobacco control measure."
[45] See CPTPP, Article 29.5.

regulatory objectives.[46] To some extent, Articles 29.5 and 9.16 compensate for the unavailability of General Exceptions for the obligations in Chapter 9.[47]

Unlike its RCEP counterpart, Chapter 9 of the CPTPP does contain detailed ISDS provisions in Section B such as Article 9.21 (Conditions and Limitations on Consent of Each Party), Article 9.22 (Selection of Arbitrators), Article 9.23 (Conduct of the Arbitration), Article 9.24 (Transparency of Arbitral Proceedings), and Article 9.29 (Awards). Arguably, these provisions intend to direct how an arbitration is conducted and to reduce the discretion on parts of the claimant investor and arbitrators. Due to limited space, only selected provisions in Section B are discussed below.

Article 9.21(1) does not allow any claim to be submitted to arbitration if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the alleged breach. Article 9.22(6) requires the Parties to provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) to arbitrators selected to serve on ISDS tribunals.[48] Article 9.23(4) dictates an arbitral tribunal to address and decide as a preliminary question any objection by the respondent that, "as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.29 (Awards) or that a claim is manifestly without legal merit."[49] In the case of a claim alleging that a Party breached Article 9.6 (Minimum Standard of Treatment), Article 9.23(7) imposes "the burden of proving all elements of its claims, consistent with general principles of international law applicable to international arbitration" on the investor initiating ISDS. Subject to confidentiality obligation, Article 9.24(2) requires an arbitral tribunal to conduct hearings open to the public. For claims alleging the breach of an obligation in Chapter 9 with respect to an attempt to make an investment, Article 9.29(4) makes it clear that when an award is made in favour of the claimant, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages, and if the arbitral tribunal determines such claims to be frivolous, it may award to the respondent reasonable costs and attorney's fees.

Having looked at these provisions in Chapter 9, one could argue that the Parties of the CPTPP, like their RCEP counterparts, intend to strike a better balance between the right to regulate on part of the government and investment protection on part of the investors. On balance, Chapter 9 of the CPTPP seems to provide greater protection for investors and their investments as compared to Chapter 10 of the RCEP Agreement, given notably the availability of ISDS and fewer restrictions/conditions attached to the likes of "covered investment". However, this is not to say

[46] See CPTPP, Article 9.16.

[47] Article 9.16 cannot fully compensate for General Exceptions as it only allows a Party to implement a measure to ensure that investment activity in its territory is undertaken in *a manner sensitive to* environment, health or other regulatory objectives. This is far from a general exception that allows a Party to implement a measure that is *necessary to achieve* a legitimate public welfare objective.

[48] Chapter 28 governs disputes between the CPTPP Parties as opposed to ISDS under Chapter 9.

[49] For more detail, see CPTPP, Article 9.23(4).

that investment protection is favoured over the right to regulate under the CPTPP. In fact, many features of Chapter 9 do make it much more "government-friendly" compared to many past IIAs.

There are a number of similarities between the two chapters which aim to ensure that the government can exercise the right to regulate. One could point to the clarification of "like circumstances" and its linkage to legitimate public welfare objectives with regard to NT and MFN Treatment obligations, and to the construct and language used with regard to FET and FPS obligations as well as indirect expropriation.[50] Furthermore, Articles 9.16 and 29.5 explicitly provide regulatory space on part of the government, and to some extent compensate for the unavailability of General Exceptions to obligations in Chapter 9.

The availability of ISDS in Chapter 9 ensures that investors have a mechanism to protect their substantive rights. On the other hand, the provisions in Section B are likely to direct how an arbitration is conducted and reduce the discretion on parts of the claimant investor and arbitrators. To that extent, ISDS under the CPTPP should contribute in favour of the right to regulate on part of the government, procedure-wise.[51]

The preliminary review of the investment chapter in the CPTPP has shown that the Parties did agree on an investment protection regime that arguably also leans towards the right to regulate on part of the government. The substantive IIA provisions discussed above are quite similar to those under the RCEP Agreement, and hence are more "government-friendly" compared to many past IIAs. However, during the study of the Parliamentary Select Committee and the subsequent work under the Committee on International Economic Policy, many argue that the likes of Articles 9.16 and 29.5 are not enough to protect the Thai government from ISDS. More specifically with regard to indirect expropriation, they believe that Article 9.8(5), which makes it clear that the issuance of compulsory licences consistent with Chapter 18 (Intellectual Property) and the TRIPS Agreement is allowed, and paragraph 3(b) of Annex 9-B, which exempts non-discriminatory regulatory actions by a Party designed and applied to protect legitimate public welfare objectives from the scope of indirect expropriations except in rare circumstances, still leave room for interpretation. On paragraph 3(b), some insist that the issuance of compulsory licences can fall within "rare circumstances" and will result in "regulatory chill".[52] In addition, some opponents also refer to the fact that Chapter 9 covers "pre-establishment" period of investment, which

[50] It is notable that the wording used in various provisions in Chapter 9 of the CPTPP is very similar or even the same as the wording used in equivalent provisions in Chapter 10 of the RCEP Agreement. Arguably, this is due to the overlapping of memberships between the two agreements, namely Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Vietnam.

[51] It should be noted that New Zealand agreed Side Instruments with five other Parties, namely Australia, Brunei, Malaysia, Peru and Vietnam, to curtail how consent is given to arbitration under Section B of Chapter 9. For more detail, see at https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/.

[52] It was explained during both the Parliamentary Select Committee and the Committee on International Economic Policy stages that "rare circumstances" is to do with "proportionality and good faith" or the lack thereof. In other words, a government action or actions would fall within "rare circumstances" if the action (or actions) is disproportionate to the legitimate public welfare objective it is designed to achieve or the action is carried out in bad faith.

increases the probability of an ISDS case being brought against the Thai government.[53] Such concerns illustrate how difficult it is to find the right balance (for all) in an investment protection regime under IIAs.

III. Lessons learned and charging forward

It is quite clear that both the RCEP Agreement and the CPTPP do move towards a more balanced investment protection regime, albeit some differences, most notably the unavailability of ISDS in the RCEP Agreement. Overall, the substantive provisions such as those concerning definition "covered investment" and those concerning NT, MFN Treatment, FET, FPS obligations as well as indirect expropriation and exceptions in both agreements tend to have been drafted to offer more regulatory space on part of the government. In addition, the ISDS provisions in the CPTPP are detailed and should make ISDS process and outcomes more predictable. Both agreements appear to confirm the IIA re-orientation advocated by UNCTAD discussed at the beginning of this paper. One would expect the future ISDS provisions in the RCEP Agreement, if ever agreed, would also re-orient towards predictability and help address concerns on part of the government.

Since Thailand is a Party to the RCEP Agreement, the text of Chapter 10 should reflect its positions on the IIA re-orientation. If one considers on the basis of substantive provisions alone, Thailand should be able to accept the text of Chapter 9 of the CPTPP. However, given the availability of ISDS in the CPTPP, concerns over "regulatory chill" and the possibility of the Thai government being sued through ISDS are real and apparent during the internal consultation processes. The fact that the CPTPP is finalised and Thailand would have to simply accept the existing text of Chapter 9 (and the rest) arguably makes matters worse in the minds of opponents.

Perhaps incentivised by two ISDS cases,[54] the Thai government has in recent years made progress on the IIA re-orientation with the establishment of the Committee on the Protection of International Investments in 2019 and the recently updated model treaty for IIAs in 2020. The Committee is composed of representatives from over 15 government agencies and chaired by a designated Deputy Prime Minister. Its main objective is to act as a centralised body to supervise and coordinate matters concerning the protection of international investments, both foreign direct investments and Thai investments abroad.[55] The Committee should contribute greatly to the Phase 3 reform advocated by UNCTAD as it will help improve coherence, consistency and interaction between different levels and types of policymaking within and among Thai government agencies. As for Phase 1 reform, in Thailand's model treaty of 2020, there are a number of changes made in favour of regulatory space. For example the model treaty would: put emphasis on the principles of responsible and sustainable investment as well as the right to regulate on part of the government;

[53] Note the clarification on the phrase "an investor attempts to make an investment" in Article 9.1 and the requirements imposed by Article 9.29(4) discussed earlier.

[54] Walter Bau v. Thailand (2005), see at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/186/walter-bau-v-thailand; and Kingsgate v. Thailand (2017), see at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/825/kingsgate-v-thailand.

[55] See at http://www.ratchakitcha.soc.go.th/DATA/PDF/2562/E/052/T_0001.PDF (in Thai).

try to narrow the scope of FET and FPS obligations by referring to customary international law; and contain detailed ISDS provisions so as to make the process and outcomes more predictable.[56]

Thus, it is quite clear that Thailand is moving towards a more balanced investment protection regime as far as Phase 1 and Phase 3 reforms are concerned. However, Thailand still has to address Phase 2 reform, namely the problems and risks posed by its existing 36 BITs and 9 FTAs (with an investment chapter). This will not be easy as renegotiating existing IIAs requires time and resources. There is yet evidence that Thailand would be willing to terminate these existing old-generation IIAs in the meantime.[57] It is hoped that the Committee on the Protection of International Investments will provide the necessary policy direction in this regard and operate in such a way that ensures all three phases of IIA reform complement one another. Until these reform phases substantially complete, the risks of potential ISDS cases arising from measures imposed to achieve legitimate public welfare objectives, including sustainable development and containment of the COVID-19 pandemic, will remain the same.

Lastly, negotiations of future IIAs and renegotiations of existing ones as guided by the model treaty will need to be tailored on the basis of each individual country. As more Thai companies invest abroad, Thailand's next generation IIAs will have to protect their interests oversea as well as the Thai government's at home. Thus, a move towards a more balanced investment protection regime may have to be more nuanced and depend on the dynamics between Thailand and its investment partners.

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[56] Due to its confidential nature, the model treaty is not discussed in detail in this paper. A brief overview of the new model treaty was presented at the Virtual Peer Review of the OECD Investment Policy Review of Thailand on 22 June 2020.

[57] Note the application of survival clauses in existing IIAs which will extend the protection under these IIAs after termination for a certain period of time, usually 10 years.

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