

The Assessment of Thailand's Investment Protection Regime in Connection with Its  
Prospective Participation in the Trans-Pacific Partnership Agreement

โครงการการศึกษาและวิเคราะห์นโยบายการคุ้มครองการลงทุนของไทยสำหรับเตรียม  
ความพร้อมเพื่อเข้าร่วมความตกลงหุ้นส่วนภาคพื้นแปซิฟิก

Wanaporn Techagaisiyavanit <sup>1</sup>

Buraskorn Torut <sup>2</sup>

**Abstract**

Economic opportunities presented by the Trans-Pacific Partnership Agreement (TPP) have drawn Thailand's interest into gaining its membership since the Yingluck administration back in 2012. Faced with national trade and investment policy challenges, Thailand seems to have fallen into an ambivalent position. This research article aims at analyzing Thailand's investment protection regime in comparison to the investment protection standards under the TPP's Investment Chapter, which has set trends for modern day Free Trade Agreements (FTAs). Despite Thailand's conservative investment protection policy, and its inconsistency with the TPP's Investment Chapter, the study has shown there are certain approaches which Thai policymakers can consider that can help address policy challenges present in the area of investment protection. This research article will present an insight on Thailand's investment protection policy, with some technical knowledge.

**Keywords:** investment protection policy, Free Trade Agreement, Trans-Pacific Partnership Agreement

---

<sup>1</sup>Lecturer at faculty of Social Sciences and Humanities, Mahidol University, S.J.D. (Indiana University Bloomington, Maurer School of Law), J.D. (University of Denver, Sturm College of Law), LL.M (University of Southern California, Gould School of Law).

<sup>2</sup> Lecturer at faculty of Social Sciences and Humanities, Mahidol University, PhD (Asian Institute of Technology), M.P.A (Cornell Institute for Public Affairs), B.S. (Carnegie Mellon University).

## บทคัดย่อ

โอกาสทางเศรษฐกิจซึ่งสะท้อนอยู่ภายใต้ความตกลงหุ้นส่วนทางเศรษฐกิจภาคพื้นแปซิฟิกได้ทำให้ประเทศไทยแสดงความสนใจที่จะเข้าร่วมเป็นสมาชิกนับตั้งแต่รัฐบาลยิ่งลักษณ์เมื่อปี ค.ศ. 2012 แต่ความท้าทายในนโยบายด้านการค้าการลงทุนกลับทำให้ไทยตกอยู่ในสภาวะลังเล บทความวิจัยชิ้นนี้จึงมีวัตถุประสงค์เพื่อมุ่งวิเคราะห์นโยบายการให้ความคุ้มครองการลงทุนของประเทศไทยเพื่อเปรียบเทียบกับมาตรฐานการคุ้มครองการลงทุนภายใต้บทลงทุนของความตกลงหุ้นส่วนทางเศรษฐกิจภาคพื้นแปซิฟิก ซึ่งถือเป็นความตกลงการค้าเสรีสำคัญที่มีบทบาทต่อการกำหนดแนวโน้มมาตรฐานด้านการให้ความคุ้มครองการลงทุนของการค้าเสรีในปัจจุบัน อย่างไรก็ตาม แม้ประเทศไทยจะมีนโยบายด้านการคุ้มครองการลงทุนในรูปแบบอนุรักษนิยมและไม่สอดคล้องกับมาตรฐานของบทลงทุนของความตกลงหุ้นส่วนทางเศรษฐกิจภาคพื้นแปซิฟิก งานวิจัยได้ชี้ให้เห็นแนวทางเพื่อให้ผู้วางนโยบายสามารถนำไปใช้พิจารณาเพื่อแก้ไขปัญหาความท้าทายด้านนโยบายการให้ความคุ้มครองการลงทุน งานวิจัยชิ้นนี้จะนำเสนอการวิเคราะห์เชิงลึกสำหรับนโยบายด้านการคุ้มครองการลงทุนของประเทศไทยโดยอาศัยความรู้ทางเทคนิค

**คำสำคัญ** นโยบายการคุ้มครองการลงทุน ความตกลงการค้าเสรี ความตกลงหุ้นส่วนภาคพื้นแปซิฟิก

## Introduction

The Trans-Pacific Partnership Agreement (TPP) has been recognized as one of most ambitious free trade agreements of the twenty-first century, which is a key toward economic growth of the participating member states due to its high-standard obligations and commitments aimed at eliminating substantial trade barriers and restrictions of investment activities that the members have to live up to.

Since its creation, TPP membership has grown to cover twelve Pacific Rim countries, whose combined Gross Domestic Product (GDP) represents nearly 40 percent of the global GDP and 50 percent of the international trade volume (World Bank, 2016). Under such conditions, the removal of trade and investment barriers as well as promoting a favorable business environment, especially by having a well-balanced investment protection regime to induce more effective market competition, can further yield higher growth among the participating countries.

For Thailand, the participation of four ASEAN member countries, namely Brunei Darussalam, Singapore, Malaysia and Viet Nam, in the TPP has certain economic implications. In terms of investment liberalization, what has been regarded as the “privilege” granted among the ASEAN members pursuant to the ASEAN Comprehensive Investment Agreement (ACIA) and the ASEAN Framework Agreement on Services (AFAS) will no longer be exclusive benefits for the group, as Most-Favoured-Nation Treatment (MFN) under the Investment Chapter of TPP requires such benefits provided by TPP member countries to any third party to be extended equally and unconditionally to other TPP members. Thailand may only get to enjoy the spillover of trade and investment benefits shared among the TPP members, while facing risks of losing its major export market to its ASEAN trade rivals, and the relocation of the affected industries from Thailand to other TPP member states.

Despite the withdrawal of the key player, the U.S., which may likely affect Thailand’s decision to join the TPP, the investment protection standards set within its Investment Chapter still serve as an internationally recognized benchmark in the modern day Free Trade Agreements that Thailand will inevitably have to meet. Therefore, assessing the compatibility of Thailand’s current investment protection policy with the TPP’s investment protection standards can help prepare the Thai policymakers for other emerging high standard investment agreements as well as providing the country with an opportunity to re-assess and undertake a policy reform that will best reflect global investment trends.

For Thailand, joining the high standard agreements, such as the TPP will bring challenges in terms of its legal framework and policy consideration, especially in the area of investment protection, for which Thailand has tried to strike a balance to ensure that the state’s policy space is not excessively threatened. Nonetheless, these types of challenges can also be viewed as the country’s opportunity to reassess its current investment protection regime to meet with the evolving international standard while keeping up its competitiveness in the fast-moving global environment.

## Research Objectives

The primary objectives of this study are to analyze Thailand's current investment protection policy and its relevant legislation in comparison to the investment protection standard under the Investment Chapter of TPP, to assess the country's capability for compliance with the obligations, and to make recommendations in terms of policy consideration according to the standard set under the TPP's Investment Chapter.

## Research Methodology

### (i) Data Collection

This study is qualitative research that gathers primary data from a focus group consisting of more than 50 government officials from 14 different concerned government agencies (Ministry of Commerce, Ministry of Finance, Ministry of Justice, Ministry of Industry, Ministry of Public Health, Central Bank of Thailand, Council of State, Board of Investment, Industrial Estate Authority of Thailand, Department of Industrial Works, Customs Authority, Securities and Commission Exchange, and Export-Import Bank of Thailand) and secondary data from documents, articles, books and legislation in the examination of Thailand's investment protection regime.

### (ii) Data Analysis

The research uses content analysis based on the review of literature, concepts, theories, and relevant laws and regulations which can primarily answer three basic questions, namely (1) what the basic principle and the scope of obligations in the TPP's Investment Chapter are, (2) what the standard of Thailand's investment protection policy is, and (3) how compatible Thailand's investment protection policy is to the standard of investment protection under the TPP's Investment Chapter. The method of content analysis used in the study is based on the principle of relational analysis by determining which concept to explore (in this case, the concept of investment protection), identifying the primary questions for the scope of the study, and determining the documents based on their relevant relationships to the questions (Palmquist, Carley, & Dale, 1997).

(iii) Selection of Documents

The method of document selection is based on authenticity and credibility by using available published original texts. The documentary research consisting of the actual text of the TPP's Investment Chapter, Thailand's bilateral investment treaty model of 2012 (BIT Model), Thailand's Free Trade Agreements (FTAs), and relevant Thai laws and regulations such as the Immovable Property Expropriation Act B.E. 2530 (1987), the Investment Promotion Act B.E. 2520 (1977), and the regulations on tax incentives, are used to provide a qualitative analysis on the compatibility of the Thai investment protection policy with the obligations of the TPP's Investment Chapter, while other published literature is examined to provide a general understanding of the principle of investment protection.

(iv) The Scope of the Study

This study first examines and analyzes the overall Thailand's investment protection policy in comparison to legal principles and the scope of the Investment Chapter of TPP, which consists of various obligations such as articles on National Treatment, Most-Favoured-Nation Treatment, Minimum Standard of Treatment, Expropriation and Compensation, Transfer, Performance Requirements in order to provide a primary evaluation on potential conflicts with the Thai investment protection regime.

The study then examines Thailand's relevant laws, regulations based on information gathered from a focus group, and policy on investment protection based on its position under the Thai BIT Model and other existing FTAs that Thailand is a party to in order to provide a final assessment on the compatibility of the Thai investment protection regime, and to propose practical recommendations in terms of its policy adjustment and measures that can help lower the impact of the commitment.

### Literature Review

Historically, investment protection for foreign investors had not been conferred by treaties or international agreements, but rather pursuant to customary international law, which provided a standard of protection for foreign direct

investment (FDI), mostly in the case of direct expropriation or nationalization in the absence of compensation by a host state justified on the grounds of national reform (Vandeveld, 2005). A standard practice of protection was still limited within the form of a domestic remedy or through a diplomatic channel ranging from negotiation, state-to-state dispute settlement, economic sanctions, severing diplomatic ties to the use of force also known as “gunboat diplomacy” (Newcombe & Paradell, 2009). Diplomatic protection for FDI has thus contributed to the evolution and development of international investment protection standards such as non-discrimination, equality before the law, fair and equitable treatment.

However, the evolving customary international law on the standard of investment protection had created uncertainty,<sup>3</sup> especially in the area of expropriation and compensation. A written agreement became an alternative to ensure adequate standards or protection for investors of the investment-sending states, and a policy compromise to attract investment abroad for host states.

During the twentieth century, FDI played a crucial role in fostering economic growth, especially in developing countries, prompting their policy makers to design policy plans that could further attract more FDI as an opportunity to build stronger economic foundations. In the case of Thailand, the first economic development plan, which aimed at stimulating economic growth and expanding public infrastructure (Office of Social and Development Board, 1961), also gave birth to the very first bilateral investment treaty with the Federal Republic of Germany. The trend of making bilateral investment treaties continued, and reached its peak between the years 1990 – 2000, with the belief that it could draw in greater direct investment abroad (Driemeier, 2003).

Today, the concept of investment protection is not only present in the bilateral investment treaties, but is also commonly found in free trade agreements (FTAs), specifically in an investment chapter, which provides a set of standard of protections such as national treatment (NT), most-favoured-nation treatment (MFN), minimum

---

<sup>3</sup> Another position had been formed by developing countries with regard to investment protection standards, also known as “Calvo doctrine”, with an attempt to set limits on the treatment of foreign investors and their investments, which according to the doctrine should not be more favourable than the national (Shea, 2004).

standard of treatment, expropriation and compensation, transfer, performance requirements, etc.

### **An Analysis of Thailand's Current Investment Protection Policy in Connection with TPP**

The result of the study reveals potential conflicts between Thailand's investment protection standard and the TPP's benchmark in three aspects, namely (i) the overall of its conservative investment protection framework in terms of its format and a screening process requirement, (ii) specific government measures that may run counter TPP Investment Chapter's obligations, especially those concerning the Central Bank of Thailand, Board of Investment of Thailand and Foreign Business Commission, and (iii) the limited scope of investor-to-State dispute settlement (ISDS) mechanism to allow foreign investors to bring a lawsuit against the government, all of which can be summarized as follows;

#### **(i) An Overview**

The format of Thailand's investment liberalization and protection has been viewed as a traditional one that builds upon the General Agreement on Trade in Services (GATS), which liberalizes investment in service sectors in the form of commercial presence (Mode 3). Traditionally, when it comes to the making of free trade agreements (FTA), Thailand's investment chapter only covers investment in non-service sectors, namely agriculture, fisheries, forestry, mining and manufacturing, while leaving investment in service sectors with the chapter on services, which still enjoy investment protection benefits extended by the investment chapter.

Inspired by the models of the North America Free Trade Agreement (NAFTA) and the U.S. Bilateral Investment Treaty (BIT), the format of the TPP's Investment Chapter has been diverted from the Thai traditional approach by combining investment in service and non-service sectors all in one place under the umbrella of the Investment Chapter to be subject to similar obligations.

In spite of the difference, the TPP approach seems to be less alarming to Thai policymakers as it has been predicted to be the future trend of important FTA negotiation, and it does not necessarily impose new or at least unfamiliar obligations

on the government in terms of taking measures concerning investment in service sectors. However, what can be more concerning is the liberalization format employed under the Investment Chapter, which uses a “negative list” as opposed to a “positive list” approach. While Thailand is more familiarized with listing only liberalized sectors, such a format will require a member state to liberalize all sectors, except those listed in the reservation schedule.

Thailand's investment protection policy is primarily designed to provide benefits mainly for foreign direct investment as a way of rewarding the type of investment that contributes to economic growth, sustainability of the environment or local community, promotion of innovation and technology or any other kinds of attribution. As a result, Thailand's traditional investment treaties often provide a specific clause that requires a specific approval in writing for protection by competent authorities as a condition to ensure that the benefits of the treaty's protection are conferred upon only desirable and well-deserved investments.

A limited investment protection policy is also reflected in the condition for using an investor-to-state dispute settlement (ISDS) mechanism, which often specifies which treaty obligation, when breached by the state, will enable an investor to bring a lawsuit against the host state if damages suffered are a result of such a breach of the obligation. This style is crafted to prevent casting an excessively wide net for lawsuits, especially when fair and equitable treatment or indirect expropriation alone already provide substantial grounds for investors to bring claims against the host state. This approach also helps separate the stages in which an investment is made, whether it is during the admission or the establishment process. While during the admission period, the protection will not be extended to cover such an investment due to the fact that investment authorization or permission given by the host state is still subject to their authorities' discretion and pertaining requirements. Such a permission or approval process cannot be a subject of dispute, at least not under an international arbitration forum. However, once such an investment has been permitted to be established, investment protection mechanisms will kick in. Nevertheless, how much of their losses investors can recover will depend on other factors, such as a direct causation of the breach or the actual amount of damages suffered as a result of the breach.

Judging from the overview of Thailand's investment protection policy, TPP's Investment Chapter can pose a real challenge, not to the Thai legal framework so much as to its policy consideration. The Investment Chapter provides a broad ground for legal claims to be brought by investors upon a breach of any obligation by a host state, which implies the protection that covers both admission and the establishment periods. Furthermore, a breach of investment authorization and investment agreement can also give rise to a legal claim under the ISDS mechanism. While the definition of "investment authorization" suggests that a decision by the foreign investment authority can now be subject to a legal challenge under ISDS, the definition of "investment agreement" provides a legal basis for a breach of a private contract concluded between a host state and an investor to be brought directly under international arbitration as opposed to a domestic court. Such a position unquestionably seems to go in the opposite direction from Thailand's conservative investment protection policy, especially with its recent cabinet decision which takes precaution with regard to an investment agreement undertaken by a government agency with a private entity that has an arbitration clause.<sup>4</sup> Thailand's investment protection policy struggle has continued as it tries to strike a balance between its fear of the lesson learned from a *Walter Bau AG* case<sup>5</sup> and its courage for new, vibrant

---

<sup>4</sup> The cabinet decision specifies two types of investment agreements undertaken between a government agency and a private entity that must receive its prior approval for having an arbitration clause, namely 1) an investment agreement made pursuant to the Private Investment in State Undertaking Act B.E. 2556 and 2) concession contract (Cabinet decision no. 0610/2439 dated August 3, 2015).

<sup>5</sup> "Walter Bau, a German company..., invested in a joint venture to construct and operate a tollway from Bangkok to the Don Muang airport. The joint venture was to be operated by Don Muang Tollway Co. Limited (DMT) in which the claimant had a 10% stake. Under a 1989 concession contract and subsequent 1996 amendment toll rates could only be increased with the approval of Thai authorities. According to the claimant, Thai authorities refused to approve toll hikes throughout the existence of the project, which prevented it from making a profit in the venture. The government also made several improvements to existing free highways in the area, which the claimant alleges violated the amended concession contract. Walter Bau filed for arbitration in September of 2005, alleging violations of the 2002 German-Thailand BIT, as well as its 1961 predecessor, claiming expropriation and a violation of fair and equitable treatment...The tribunal also rejected Walter Bau's claim of creeping expropriation on the grounds that none of the respondent's actions reached the level of creeping expropriation defined by the

economic opportunities, of which, to the Thai policy makers, nothing is currently more promising than joining the TPP membership. (The Nation, 2016) <sup>6</sup>

The TPP's Investment Chapter may set a new challenging standard of investment protection for Thailand. However, it does not mean that these demanding obligations and commitments are without recourse. Reservations and footnotes are seen throughout the investment text. Countries such as Canada, Mexico, and Australia made their reservations concerning their foreign investment authorities to be entirely kept out of the scope of the ISDS mechanism. The text also specifies conditions of an investment agreement such as the time period of its conclusion, the types of investment agreements which exclude investment agreements with respect to land, radio spectrum or social services, or the absence of an arbitration clause under an investment agreement in order for an investor to make use of the ISDS mechanism. Thus, in terms of the scope of commitment, the Investment Chapter may not be as threatening as it looks. The Thai policy makers should give more thoughts to policy space provided within the chapter, and may seek this opportunity to adjust their current policy accordingly. The next section will describe what kinds of obligations might pose a real challenge to Thailand's legal and policy framework.

---

tribunal in PSEG Global v Turkey...However, the tribunal ultimately found that Thailand had breached the fair and equitable treatment (FET) provision of the 2002 BIT by violating the claimant's legitimate expectations...In the end the tribunal awarded the claimant 29.2 million Euros for the FET breach and 1.98 million Euros in partial costs, plus interest." Fernando Cabrera Diaz (2010). German investor awarded 29 million Euros in claim against Thailand over highway concession. International Institute for Sustainable Development. Retrieved August 10, 2016 from <https://www.iisd.org/itn/2010/05/11/german-investor-awarded-29-million-euros-in-claim-against-thailand-over-highway-concession/> See also Walter Bau AG (in Liquidation) v. the Kingdom of Thailand (awarded July 1, 2009), available at <http://ita.law.uvic.ca/documents/WalterBauThailandAward.pdf>

<sup>6</sup> Deputy Prime Minister Somkid Jatusripitak sought support from Japan to help Thailand join the TPP as he viewed it as the country's opportunity to advance its economic interests. Petchanet Pratuangkrai & Sucheera Pinijparakarn (2016, June 1). Thailand seeks Japan's support in joining TPP: Somkid The Nation. Retrieved August 16, 2016 from <http://www.nationmultimedia.com/business/Thailand-seeks-Japans-support-in-joining-TPP-Somki-30287110.html>

## (ii) Challenging Obligations

Although the TPP's Investment Chapter contains several standard provisions, such as Most-Favoured-Nation Treatment, National Treatment, Expropriation, Minimum Standard of Treatment, or Treatment in Case of Armed Conflict like many other FTAs or bilateral investment treaties (BITs) in terms of substantive protection, the level of protection required under each obligation can be varied among these international agreements. The TPP's Investment Chapter is claimed to have one of the highest standards of protection, and to that effect, certain obligations of the investment text can potentially run counter to Thailand's current investment protection policy. Some of the real challenges that may require policy makers to pay close attention are the provisions on Expropriation and Compensation, Transfer, and Performance Requirements.

The provision on Expropriation and Compensation is deemed to be one of the traditional protection clauses that prohibits the government from taking possession of privately owned property, or taking measures or actions equivalent to the taking of private property unless such a government action is done in a non-discriminatory manner, following a fair legal process, and for a public purpose with prompt, adequate compensation.

While the substantive protection of the prohibition on expropriation by a host state is consistent with other FTAs that Thailand is a party to, what seems to be at issue is the standard of compensation. First of all, the provision requires that the interest be "accrued from the date of expropriation until the date of payment" (Article 9.8, paragraph 3). In addition, if the assessed compensation is denominated in a local currency, its market rate of exchange must not be less than that on the date of expropriation (Article 9.8, paragraph 4). In other words, not only does the government must provide a fair compensation in accordance with the rule of law, it will also have to guarantee the value of the exchange rate, when paid in the currency other than a freely usable one. The ASEAN Comprehensive Investment Agreement (ACIA), which is one of the FTAs that Thailand is party to, generally states the inclusion of interest in

the payment that is nonetheless still subject to domestic legislation.<sup>7</sup> Furthermore, the agreement only allows investors to be paid in a different currency upon their requests, and does not go as far as guaranteeing the currency exchange rate between the date of expropriation and the date of payment. This practice seems to be prevalent in other FTAs such as the Thailand-Australia Free Trade Agreement (TAFTA) or the Thailand-Japan Economic Partnership (JTEPA).

Thailand is also bound by its legal regime in the area of expropriation. Section 26 of the Immovable Property Expropriation Act B.E. 2530 (1987) stipulates that interest shall only apply in the case of a delayed payment, specifically when the injured party of those whose properties were expropriated are dissatisfied with their compensation, and decide to file for an appeal with the Minister of Treasury subject to the court's review.<sup>8</sup> In such a case, the interest shall only be taken into account from the date the payment is due, and not from the expropriation date, until the date of the actual payment at the highest interest rate of the fixed-term account of the Government Savings Bank. While the Act is silent about the issue on the compensation's exchange rate since nowhere in the legislation is the government required to pay compensation in any other currency, it is thus left to Thai policy makers to decide whether it is worth going beyond their current position, which means risking additional financial burden.

---

<sup>7</sup> "In the event of delay, the compensation shall include an appropriate interest in accordance with the laws and regulations of the Member State making the expropriation. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency." ACIA, Art. 14(3)

<sup>8</sup> "In the case where the person entitled to compensation is not satisfied with the decision of the Minister under section 25 or where the Minister fails to deliver his decision within the period prescribed in section 25 paragraph two, that person shall have the right to file the case to the Court within one year as from the date he receives the decision of the Minister or at the expiration of the aforesaid period, as the case may be... If the Minister decides, or the Court rules, that additional compensation shall be paid, the entitled person shall also be entitled to interest of that additional compensation at the highest interest rate of the fixed-term account of the Government Saving Bank since the date that compensation has to be paid or deposited." Published in the Government Gazette Vol. 104, Part 164, Issue, dated 19<sup>th</sup> August B.E. 2530 (A.D. 1987).

Another provision that may raise a policy issue is the provision on Transfer, which requires a host state to guarantee a free transfer of investors' assets such as capital, profits, interest, compensation, etc. in and out of the country with certain exceptions. These exceptions allow a host state to prevent or delay a transfer if the state's action is done pursuant to its applicable laws relating to bankruptcy, securities, criminal or penal offences, financial reporting or record keeping, or compliance with judicial or administrative orders (Article 9.9, paragraph 4).

Faced with economic crisis in the 1990s, Thailand has since taken more precaution in regulating banks and other financial institutions by establishing strong financial regulatory frameworks. To that effect, Thailand's Central Bank often asserts that "prudential measures" be incorporated in the FTAs. The concept allows a host state to adopt or maintain measures inconsistent with the Transfer obligation "in the event of serious balance-of-payments and external financial difficulties...or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause economic or financial crisis." This position is reflected in several FTAs such as the ASEAN-India FTA, JTEPA, Thailand-New Zealand FTA, or Thailand-Australia (TAFTA).

In spite of its significance, the absence of this special financial-related exception in the Investment Chapter may not entirely be a deal breaker since the TPP's Chapter on Financial Services may have addressed this issue under Article 11.11 (Exception) which is to be read with the Investment Chapter and the Transfer obligation. The exception basically allows a host state "to prevent or limit transfer by a financial institution....through the equitable, non-discriminatory and good faith application of measures relating to maintenance of the safety, soundness, integrity or financial responsibility of financial institutions..." This is another crucial point of policy consideration for the Thai policy makers to contemplate whether such a language can sufficiently accommodate their concerns, and protect the country against future financial mishaps. Nonetheless, the lack of a direct exception for a safeguard measure under the Transfer obligation should not be too concerning due to the fact that Thailand is not the only country that prioritizes this issue, since half of the world had also suffered, and learned from brutal experience during the global economic crisis in the 1990s.

Another important state obligation that this article seeks to elaborate is the provision on Performance Requirements. This provision prohibits a host state from imposing certain requirements for making an investment, or from providing benefits to investors in exchange for their compliance with certain investment conditions. These requirements and conditions can range from using a local content, choosing domestic producers, forcing technology transfer to regulating sales or productions of goods to ensure foreign exchange inflows or earnings. From the perspective of a policy maker, the provision can be burdensome since the state can run the risk of having legal action taken against it throughout the process of making an investment under several circumstances.

Although the Investment Chapter provides several exceptions to the Performance Requirements obligation such as the exception to forcing technology transfer when done pursuant to the host state's anti-competition law or Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the exception to regulating a local content of the product for the purpose of protecting the environment or natural resources, or the exception to compelling investors to accord a preference to domestic products in order to take advantage of export promotion programs, these exceptions may not provide enough shelter for Thailand, especially in the area of investment promotion programs that usually require those who wish to enjoy taxed or non-taxed related benefits<sup>9</sup> to be in strict compliance with the board of investment's (BOI) regulations.

In general, the approval criteria for admitting the investment projects into the program consist of several factors such as minimum capital investment, the value

---

<sup>9</sup> Tax incentives include exemption or reduction of import duties on machinery, reduction of import duties for raw or essential materials, exemption of corporate income tax and juristic person income tax, a 50 percent reduction of the corporate income tax, double deduction from the costs of transportation, electricity and water supply, additional 25 percent deduction of the cost of installation or construction of facilities, and exemption of import duty on raw or essential materials imported for use in production for export. Non-tax incentives include permission for foreign nationals to enter Thailand for the purpose of exploring investment opportunities, permission to bring skilled workers and experts into the country to work in investment promoted activities, permission for foreign nationals to own lands, and permission for foreign nationals to take out or remit money abroad. Thailand's Board of Investment. Retrieved August 16, 2016 from <http://www.boi.go.th/index.php?page=incentive>

added of the project, the debt-to-equity ratio, environmental protection, and new production process and machinery.<sup>10</sup> These requirements seem to fall outside the prohibitive realm of the Performance Requirements obligation. However, once the investment project has been admitted, there is also a separate set of criteria for granting incentives for different types of industry which are governed by a series of BOI's Announcements. And the requirements for investors to comply with are varied from industry to industry. Some of them require that a foreign investor accord preference to a local manufacturer or product, or regulate the quantity output to achieve a certain level of export volume. The board is endowed with the power to issue these regulations by taking into account the kind of investment needed at a time in order to formulate a policy in accordance with the country's best interest pursuant to Investment Promotion Act B.E. 2520 (1977) (as amended).<sup>11</sup> These regulations can be a source of conflict with the TPP's investment protection obligation. A thorough study and careful consideration of the regulations should be made in order to assess the risks that the government may face, and to ensure compatibility of Thailand's current policy with the TPP's Investment protection standard.

### (iii) ISDS Mechanism

ISDS is recognized as the cornerstone of investment protection that operates as an enforcement mechanism. Such a mechanism has gained its popularity among investors for its convenience, speed and effectiveness in addressing investment disputes between an investor and a host state. As a matter of fact, the TPP investment chapter provides a sharp ISDS mechanism, which attempts to make a balance between accommodating both state's and investors' interests, that the Thai policy makers should consider, despite certain aspects of its inconsistency with Thailand's investment protection policy.

In terms of its advantages, the ISDS mechanism provides an initial consultation and negotiation when the dispute first arises, which can be done

---

<sup>10</sup> See Criteria for Project Approval. Thailand's Board of Investment. Retrieved August 16, 2016 from [http://www.boi.go.th/index.php?page=criteria\\_for\\_project\\_approval](http://www.boi.go.th/index.php?page=criteria_for_project_approval)

<sup>11</sup> Published in the Government Gazette Volume 94, Part 38, Special Issue, dated May 4, B.E. 2520 (A.D. 1977).

informally through the use of several kinds of non-binding procedures such as mediation or conciliation. The purpose of this concept is to encourage the disputing parties to resolve conflicts without having to proceed with arbitration, which is a costly process. The mechanism also contains an elaborated process before an investor can submit a claim to arbitration by requiring a specific length of time for a notice of intent and notice of arbitration that must be given to ensure that the respondent (the host state) has sufficient time to take necessary action, and specific details about the claimant (the investor) and the claim to help screen illegitimate claims. Claims without legal or factual basis can also be removed from the arbitration proceeding through a preliminary objection by a respondent (host state) provided by the ISDS mechanism. In such a case, the arbitral tribunal is even allowed to award the prevailing disputing party with “reasonable costs and attorney’s fees incurred in submitting or opposing the objection” (Article 9.23, paragraph 6). This technique helps prevent any kinds of frivolous claims or objections from both sides to ensure that the arbitral proceeding’s time and resources are properly spent on a valid claim, and also helps discourage a foreign investor from filing or threatening to file random lawsuits against the host state. These aforementioned aspects of the ISDS mechanism are consistent with Thailand’s current investment protection policy. There are also other aspects that can be in favor of a host state such as the allocation of the burden of proof to an investor, the opportunity for the disputing parties to comment on the decision of the arbitral tribunal before it becomes formalized, the limited types of awards that can be made by the tribunal, the opportunity for the future appellate mechanism, or the possibility of *amicus curiae* submission<sup>12</sup> acceptance by the tribunal.

However, two major points of concern that should be noted are (1) the issue of the scope of arbitration and (2) the transparency rule applicable to the arbitration

---

<sup>12</sup> *Amicus curiae* or a friend of the court is the process that allows a submission of fact or law by an independent third party that has no significant interest in the arbitral proceedings. Such a process helped the U.S. government win the dispute over a Canadian corporation, a major marketer and distributor of methanol, with the help of opinion submission by a non-government organization called “Earth Justice” concerning the Californian law that prohibited the use or sale of the gasoline additive MTBE of which methanol is an ingredient. *Methanex Corp. v. U.S.A* (2005) 44 ILM 1345, available at <http://www.italaw.com/cases/683>.

process. As previously mentioned, Thailand's investment protection policy tends to limit the scope of investment arbitration by often specifying the obligations that can be brought against the government, when breached. This notion seems to go against the principle of the TPP's ISDS mechanism that broadens the scope of arbitral proceeding to cover not only all of the obligations in the Investment Chapter, but also a breach of an investment agreement and an investment authorization. Secondly, the transparency rule of the arbitral proceeding requires that documents involved in the proceeding be made available to the public, unless they are classified as "protected information" which is essential to national security interests, the maintenance of international peace or security, or contrary to the host state's law or public interest, or may jeopardize legitimate commercial interests pursuant to Article 29.2 (Security Exception) and Article 29.7 (Disclosure of Information). These documents range from the notice of intent, the notice of arbitration, pleadings, written submissions by the disputing parties or by a third party, hearing transcripts to orders, awards and decisions of the tribunal. The requirements can be viewed as extensive. This evolution of the transparency rule in the arbitral proceeding breaks the traditional practice of limiting public access to merely the tribunal's awards and decisions.

The Thailand Arbitration Center (THAC) still undertakes a traditional approach on the issue of transparency by requiring confidentiality of the entire arbitral proceeding unless consented in writing by the disputing parties or required by law (rule 87 of THAC Rule B.E. 2558 (2015)). This arbitration rule is of course non-binding upon the state policy since it is simply an institutional rule applicable to those who wish to make use of it. However, it can imply the country's preferred position on the limited access of the public to information involved in the arbitration since the process can cost the country's image, reputation, or even encourage more litigation, which seem to produce mostly psychological effects. However, as a matter of public policy, what is more important than the country's image is upholding the rule of law. The new transparency rule can provide an incentive for government officials to act fairly and independently. In addition, one of the exceptions provided under the transparency rule of the Investment Chapter specifies that such disclosure of information must be in accordance to relevant domestic law, which, in the case of Thailand, is governed by Official Information Act B.E. 2540 (1997). Substantively, these exceptions are also

within the scope of Section 15 (Information Exempted from Disclosure) of the legislation.<sup>13</sup> This flexibility should at least provide some comfort to Thai policy makers in the sense that whatever transparency commitment they make will be no more than what their domestic law requires. But despite these valuable exceptions, the policy makers should still be aware that the exceptions are still subject to the arbitral tribunal's interpretation whether such information, when raised and objected by a disputing party, is properly designated as "protected information" in accordance with the rule. This is another important point of policy consideration.

### Recommendation

For Thailand, committing to the TPP may pose challenges in the area of investment protection mostly in terms of policy rather than legal framework adjustment. However, upon closer examination, the investment text provides certain

---

<sup>13</sup> Section 15 "A State agency or State official may issue an order prohibiting the disclosure of official information falling under any of the following descriptions, having regard to the performance of duties of the State agency under the law, public interests and the interests of the private individuals concerned: (1) the disclosure thereof will jeopardize the national security, international relations, or national economic or financial security; (2) the disclosure thereof will result in the decline in the efficiency of law enforcement or failure to achieve its objectives, whether or not it is related to litigation, protection, suppression, verification, inspection, or knowledge of the source of the information; (3) an opinion or advice given within the State agency with regard to the performance of any act, not including a technical report, fact report or information relied on for giving opinion or recommendation internally; (4) the disclosure thereof will endanger the life or safety of any person; (5) a medical report or personal information the disclosure of which will unreasonably encroach upon the right of privacy; (6) an official information protected by law against disclosure or an information given by a person and intended to be kept undisclosed; (7) other cases as prescribed in the Royal Decree..." Published in the Government Gazette Vol. 115, Part 46, Issue, dated 10<sup>th</sup> September B.E. 2540 (A.D. 1997).

flexibilities to help accommodate the member states' needs for a policy space that aims at securing legitimate public and state interests. The member states can still be exempted from the investment protection obligations through 1) making a reservation for measures that may not be in conformity to the obligations and the applicable investment sectors, 2) using exceptions that are prevalent throughout the text for different obligations, and 3) using annexes to make additional reservations that cannot be made through a schedule of reservation pursuant to the first channel.

Making a reservation in the schedule of reservation is a fundamental step to help the country relieve its burden on investment protection obligations. However, there are restrictions for this channel. First of all, the reservation can be made against certain, not all, obligations, namely the National Treatment (NT), Most-Favoured-Nation Treatment (MFN), performance Requirements (PR), and Senior Management and Board of Directors (SMBD). And secondly, the reservation can only apply to existing measures or measures that are pending for amendments. Thus, the member state must take precaution in the issuance of the future law and policy, which must be in compliance with these obligations. For Thailand, this is a primary approach to help address the concern over PR obligation. All BOI announcements, rules and regulations must be examined closely to evaluate their potential conflict, and properly reserved.

The TPP's Investment Chapter also provides several exceptions to the investment protection obligations that member states can take advantage of. Among these are the exclusion of government procurement and state subsidies from National Treatment and Most-Favoured-Nation Treatment obligations, the exclusion of grants or subsidies from Treatment in Case of Armed Conflict obligation, or the right of a state to regulate in order to protect public welfare, health and environment. As mentioned in the previous section, the Chapter on Financial Services, which has to be read in relation to the Investment Chapter, also provides exceptions, specifically to the Transfer obligation. This flexibility may still allow Thailand's Central Bank to regulate money flows among financial institutions, and maintain important measures to ensure economic stability.

And last but not least, making additional reservations to the existing annexes can help address the concerns of the ISDS scope and the inconsistency of the

Immovable Property Expropriation Act B.E. 2530 (1987) with the current standard of compensation under the investment text. There are currently four member states that reserve the decisions of their foreign investment authorities to be carved out of the scope of arbitration. These are Australia, Canada, Mexico and New Zealand. And there are two member states that reserve their measures of direct expropriation and payment of compensation to be in accordance with their domestic legislation. These are Viet Nam and Singapore.

As good as it sounds, this approach may be deemed the most challenging as the investment text has already been concluded, and is in the process of ratification by each member state. For Thailand, the process of joining the membership will be accession subject to conditions to be agreed upon by the current member states.<sup>14</sup> While waiting for its pending entry to come into force, the conditions for the new member state may still be unclear. Thailand should start seeking friendly support from the existing members to secure the possibility of making additional reservations to the existing Annexes, which will likely help enhance its chance to gain its new membership.

---

<sup>14</sup> Article 30.4 Accession: "A State or separate customs territory may seek to accede to this Agreement by submitting a request in writing to the Depositary. 3. (a) Following receipt of a request under paragraph 2, the Commission shall, provided in the case of paragraph 1(b) that the Parties so agree, establish a working group to negotiate the terms and conditions for the accession. Membership in the working group shall be open to all interested Parties. (b) After completing its work, the working group shall provide a written report to the Commission. If the working group has reached agreement with the accession candidate on proposed terms and conditions for accession, the report shall set out the terms and conditions for the accession, a recommendation to the Commission to approve them, and a proposed Commission decision inviting the accession candidate to become a Party to this Agreement..." (Chapter 30 Final Provision) See <https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf>

## References

- Ahmad Ali Ghouri (2011). The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment Law, 14:6 Int. A.L.R. 189.
- Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides (2004). Law and Practice of International Commercial Arbitration (London: Thompson).
- Andrew Newcombe & Lluís Paradell (2009). Law and Practice of Investment Treaties: Standards of Treatment. [Online]. Available: <http://papers.ssrn.com/sol3>
- ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA). Investment Chapter (Full Text). [Online]. Available: <http://dfat.gov.au/trade/agreements>
- D. R. Shea, The Calvo Clause (1955). A Problem of Inter-American and International Law and Diplomacy (Minnesota: University of Minnesota Press).
- Immovable Property Expropriation Act B.E. 2530 (1987). Published in the Government Gazette Vol. 104, Part 164, Issue, dated 19<sup>th</sup> August B.E. 2530 (A.D. 1987).
- Investment Promotion Act B.E. 2520 (1977)(as amended). Published in the Government Gazette Volume 94, Part 38, Special Issue, dated May 4, B.E. 2520 (A.D. 1977).
- Kenneth J. Vandeveld (2005). A Brief History of International Investment Agreements. 12:1 U.C. Davis Journal of International Law & Policy. 157.
- Methanex Corp. v. U.S.A (2005) 44 ILM 1345, [Online]:<http://www.italaw.com>
- Michael R. Reading (1992). The Bilateral Investment Treaty in ASEAN: A Comparative Analysis, 42 Duke Law Journal 679, 700.
- National Economic Development Plan no. 1, Office of Social and Development Board (1961). [Online]. Available: <http://www.nesdb.go.th/Default. =62>. (in Thai)
- Official Information Act B.E. 2540 (1997). Published in the Government Gazette Vol. 115, Part 46, Issue, dated 10<sup>th</sup> September B.E. 2540 (A.D. 1997).
- Palmquist, M. E., Carley, K.M., and Dale, T.A. (1997). Two applications of automated text analysis: Analyzing literary and non-literary texts. In C. Roberts (Ed.), Text Analysis for the Social Sciences: Methods for Drawing Statistical Inferences from Texts and Transcripts. (Hillsdale, NJ: Lawrence Erlbaum Associates)
- Petchanet Pratrungkrai & Sucheera Pinijparakarn (2016, June 1). Thailand seeks Japan's support in joining TPP: Somkid. The Nation. [Online]. Available:

Regime in Connection with Its Prospective Participation in the Trans-Pacific Partnership Agreement

<http://www.nationmultimedia.com/business/Thailand-seeks-Japans-support-in-joining-TPP-Somki-30287110.html>

Steven Fietta (2006). Expropriation and the Fair and Equitable Standard: The Developing Role of Investors' Expectations in International Investment Arbitration 23:5 *Journal of International Investment Arbitration* 375.

Tax Incentives Regimes, Thailand's Board of Investment. [Online]. Available:

<http://www.boi.go.th/index.php?page=incentive>

Thailand's Investment Bilateral Investment Treaty Model (2012).

Thailand-Australia Free Trade Agreement (TAFTA). Investment Chapter (Full Text).

[Online]. Available: <http://dfat.gov.au/trade/agreements/tafta/pages/thailand-australia-fta.aspx>

Thailand-Japan Economic Partnership (JTEPA). Investment Chapter (Full Text).

[Online]. Available: [http://www.thaifta.com/english/eng\\_jp.html](http://www.thaifta.com/english/eng_jp.html)

Trans-Pacific Partnership Agreement (TPP) (Full Text). [Online]. Available:

<https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

Walter Bau AG (in Liquidation) v. the Kingdom of Thailand (awarded July 1, 2009),

[Online]. Available:

<http://ita.law.uvic.ca/documents/WalterBauThailandAward.pdf>.