8 Investment treaty policy in Thailand

This chapter addresses Thailand's policies with respect to investment treaties. It provides an overview of the status of Thailand's investment treaties, and the historical development of the government's policy towards investment treaties, with a particular focus on the design of substantive investment protections and investor-state dispute resolution (ISDS) provisions in these treaties. It then identifies a range of considerations for possible investment treaty reform that may assist Thailand in refining its investment treaty policy in the future.

Summary

Like many countries around the world, Thailand has taken on international obligations to grant foreign investors specific treatment in international investment agreements (referred to as investment treaties or IIAs). These international obligations in bilateral investment treaties (BITs) or investment chapters of trade and investment agreements have become part of Thailand's legal framework for investment protection. Investment treaties grant protections to treaty-covered investors in addition to and independently from protections afforded by domestic law to all investors. Domestic investors are generally not covered by treaties.

Investment treaties typically contain substantive protections for covered investments against expropriation or discrimination. Provisions requiring "fair and equitable treatment" (FET) are also common and have given rise to widely varying interpretations. While there are some significant recent exceptions, investment treaties also generally give covered investors access to investor-state dispute settlement (ISDS) mechanisms that allow them access to international arbitration to seek monetary compensation in cases where they claim that the host country has infringed these provisions. While domestic law does not typically provide compensation beyond narrowly-defined situations, such as cases of expropriation, compensation has been a common remedy for investors in ISDS cases.

Investment protection provided under investment treaties can play an important role in fostering a healthy regulatory climate for investment. Expropriation or discrimination by governments does occur. Government acceptance of legitimate constraints on policies can provide investors with greater certainty and predictability, lowering unwarranted risk and the cost of capital. Domestic judicial and administrative systems provide investors with one option for protecting themselves. Access to international arbitration under investment treaties gives substantial additional leverage to covered foreign investors in their dealings with host governments.

Investment treaties are frequently promoted as a method of attracting FDI and this is a goal for many governments. Despite many studies, however, it remains difficult to establish strong evidence of impact in this regard (Pohl, 2018). Some studies suggest that treaties or instruments that reduce barriers and restrictions to foreign investments have more impact on FDI flows than BITs focused only on post-establishment protection (Mistura et al., 2019). These assumptions continue to be investigated by a growing strand of empirical literature on the purposes of investment treaties and how well they are being achieved.

Thailand's investment treaty policy deserves continued attention. The current review of Thailand's investment treaties indicates that Thailand, like many other countries, has a significant number of older-style investment treaties with vague investment protections that may create unintended consequences. Where treaties set forth vague provisions, arbitrators deciding investment disputes have had wide discretion to interpret the scope of protection which has generated inconsistencies and uncertainty. Notably following early reactions in the context of ISDS cases under the North American Free Trade Agreement (NAFTA) in the early 2000s, many governments have substantially revised their investment treaty policies in recent years in response to increased public questioning about the appropriate balance between investment protection and sovereign rights to regulate in the public interest, the uncertain scope of many investment treaties and the costs and outcomes of ISDS. Experiences with the COVID-19 pandemic may shape how governments view key treaty provisions or interpretations and how they assess the appropriate balance in investment treaties.

The government is well aware of these challenges. It plans to start the process of seeking to update some provisions in its existing older-style BITs with treaty partners once its new model BIT is finalised later in 2020. In the meantime, it is taking a leading role in multilateral discussions on ISDS reform that are developing in UNCITRAL's Working Group III. It also established in 2019 the Committee on the Protection

of International Investment to steer government policy on investment treaties and enhance policy coherence.

The government may wish to recall that regional and plurilateral trade and investment agreements involving ASEAN members offer an opportunity to create an integrated investment region in ASEAN and establish common approaches to investment protection, dispute settlement and liberalisation. At the same time, in the absence of active management of the replacement of treaties, this approach can lead to multiple investment-related agreements being concluded with the same treaty partners. This situation may jeopardise the consistent implementation of Thailand's investment treaty policies: claimants may be able to circumvent newer treaties or domestic legislation by invoking protections and ISDS provisions in older-style treaties that remain in force concurrently.

Main policy considerations

Short- and medium-term policy priorities:

- Conduct a gap analysis between Thailand's domestic laws and its obligations under investment treaties with respect to investment protections. Thai law differs from Thailand's investment treaties in these areas. Overlapping legal regimes for investment protection may raise a number of policy concerns. Identifying and reviewing the impact of these differences may allow policymakers to ensure that these overlapping legal regimes are coherent and do not detract from the government's objectives with respect to investment protections. The newly-established Committee on the Protection of International Investment would appear to be the most obvious body to lead such a process given its steering role for investment treaty policy.
- Manage potential exposure under existing investment treaties proactively. The government should continue to develop ISDS dispute prevention and case management tools. The impact of the newly-established Committee on the Protection of International Investment – which has a centralising role in dispute prevention – should be monitored and measured so that it can be improved over time. The government should continue to participate actively in the work of UNCITRAL's Working Group III and other multilateral fora on these topics. Ongoing awareness-raising efforts for line agencies and treaty negotiators regarding Thailand's investment treaties and the significance of the obligations they contain for the day-to-day functions of government officials are commendable and should be continued on a regular basis. Developing written guidance manuals or handbooks for line agencies on these topics could encourage continuity of institutional knowledge as personnel changes occur over time.
- Continue to actively participate in and follow closely government and other action on investment treaty reforms including at the OECD's Freedom of Investment (FOI) Roundtable and at UNCITRAL. Many governments, including major capital exporters, have substantially revised their policies in recent years to protect policy space or to ensure that their investment treaties create desirable incentives. For example, the US and Canada recently agreed to terminate the NAFTA and will now provide only for state-state dispute settlement (SSDS) between them in the United States-Canada-Mexico Agreement, which replaced the NAFTA when it came into force on 1 July 2020, rather than permitting direct investor claims for damages in ISDS. The EU has rejected investment arbitration in favour of a court-like model with government appointed adjudicators for ISDS. Consideration of reforms and policy discussions on frequently-invoked provisions such as FET are of particular importance in current investment treaty policy. Emerging issues such as the possible role for trade and investment treaties in fostering RBC as well as ongoing discussions about treaties and sustainable development also merit close attention and participation.

Longer-term policy priorities:

- The government should continue to implement its plans to assess and where appropriate update its investment treaties to bring them in line with the government's current priorities. The government's experiences with the COVID-19 pandemic may shape how it views key treaty provisions or interpretations as well as the appropriate balance between investor protections and the right to regulate. Depending on the context and treaty language, it may be possible to achieve these goals through joint interpretations agreed with treaty partners. In other cases, treaty amendments may be required. Replacement of older investment treaties by consent may also be appropriate in some cases.

Thailand's investment treaties

Thailand is a party to 47 investment treaties in force today, including 37 BITs, three bilateral trade and investment agreements[1] and seven plurilateral agreements concerning investment in the context of Thailand's membership of ASEAN (see summary table in Annex 8.A).

Thailand has investment treaties in force with a diverse set of economies: large and small, advanced and developing. Amongst its treaty partners, Thailand has a longstanding relationship with the United States regarding investment protection and cooperation. Three treaties relating to investment are in force today between the United States and Thailand: a Treaty of Amity and Economic Relations (1966) (Treaty of Amity), a framework agreement (2002) and an ASEAN+ framework agreement (2006). Negotiations regarding a preferential trade agreement with the United States began in 2004 but were suspended indefinitely in 2006 (Sally, 2007).

At a regional level, Thailand is a party to seven investment agreements through its membership of ASEAN. The ASEAN Comprehensive Investment Agreement (2009) (ACIA) is the foundational investment instrument that applies between the ASEAN member states. The ASEAN community has also entered into several agreements concerning investment with third states (ASEAN+ agreements). ASEAN+ agreements with Japan (2008), Australia/New Zealand (2009), Korea (2009), China (2009), India (2014) and Hong Kong, China (2017) all contain investment protections. The ASEAN+Japan agreement in force since 2008 did not originally contain investment protections or ISDS but an amending protocol signed in March 2019 adds these elements to the agreement. The amending protocol came into force on 1 August 2020 for Japan, Lao PDR, Myanmar, Singapore, Thailand and Viet Nam. Following more than eight years of negotiations, ASEAN member states and five other Asia-Pacific countries (Australia, China, Japan, Korea and New Zealand) also concluded the Regional Comprehensive Economic Partnership (RCEP) in November 2020. RCEP includes rules and disciplines on investment, while ISDS is planned for future negotiations.

At a global level, Thailand acceded to the New York Convention in 1959, which represents an important commitment to recognising foreign arbitral awards including in ISDS cases under investment treaties. Thailand signed the ICSID Convention in 1985 but never ratified it (discussed separately below).

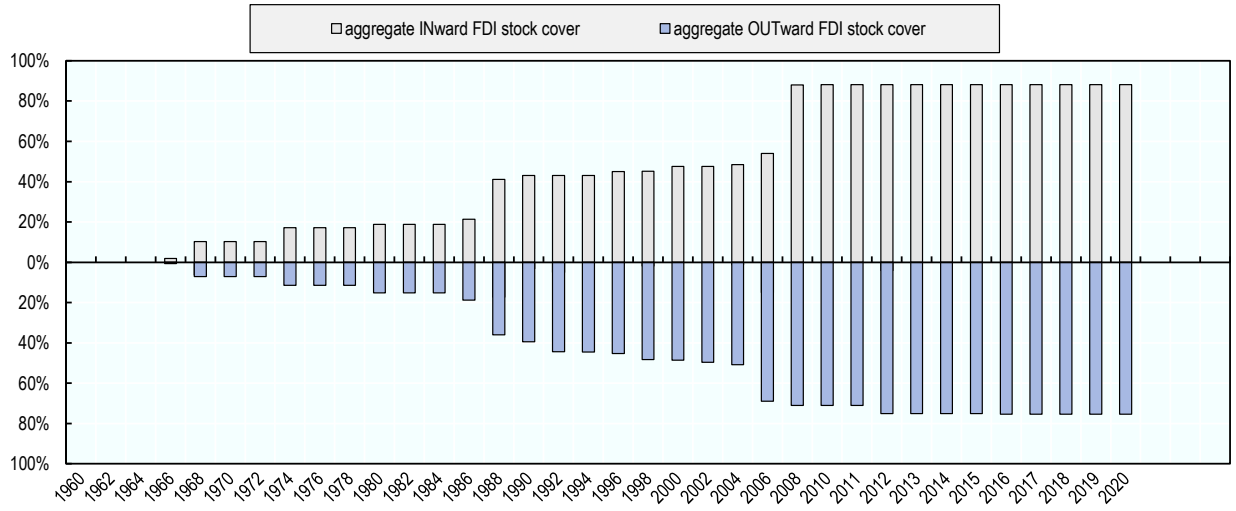
Treaty coverage for Thailand's inward and outward FDI stock

Thailand has treaty protection in force for significant portions of its inward (approximately 87%) and outward (approximately 75%) FDI stock (Figure 8.1).[2] FDI trends are discussed in further detail in Chapters 2 (inward FDI) and 11 (outward FDI), but for current purposes it is notable that four treaty relationships cover approximately two-thirds of Thailand's inward stock.[3] Two of these relationships – with the Netherlands and United States – do not involve binding ISDS provisions in the investment treaties. Investment treaties with eleven other countries account for the rest of Thailand's treaty-protected inward FDI stock.[4] Significant inward FDI stock from France and Mauritius is not covered by an investment treaty.

The Hong Kong (China)-Thailand BIT (2005) covers the largest portion of outward Thai FDI stock (approx. 16%). Eighteen other treaty relationships account for the rest of Thailand's treaty-covered outward FDI stock. Significant outward Thai FDI in the British Virgin Islands, the Cayman Islands, Mauritius and Norway is not covered by an investment treaty.

Many Thai investment treaties in force today cover none of Thailand's FDI stock or only negligible portions of it. This is a common phenomenon in many countries' treaty samples around the world (Pohl, 2018). Investment treaty relationships in force today with 27 countries are not associated with any inward FDI stock for Thailand.[5] The same is true for 24 treaty relationships and outward Thai FDI stock.[6] The result is that Thai treaty relationships with twenty countries cover no FDI stock of any kind or only negligible amounts.[7]

Figure 8.1. Approximate evolution of Thailand's inward and outward FDI stock coverage from investment treaties in force



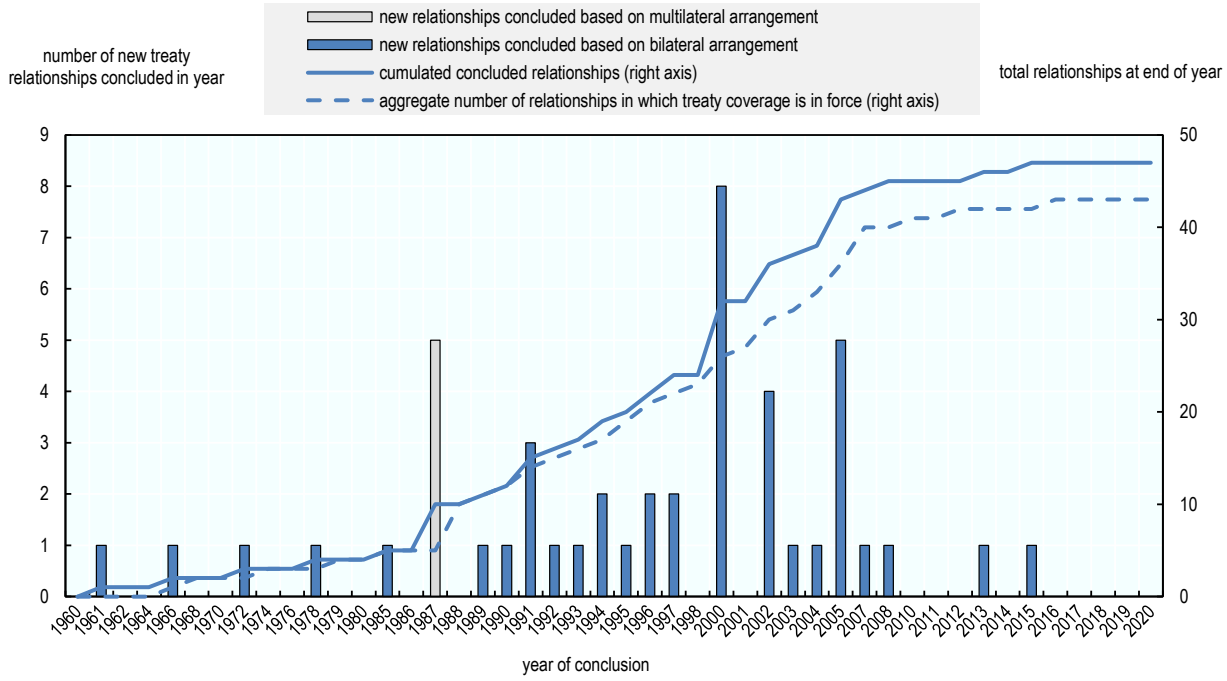
Note: Percentages are based on matching aggregate immediate bilateral FDI data and treaty relationships as of October 2020.
Source: OECD calculations based on OECD investment treaty database. FDI data was taken from the OECD FDI database and IMF Direct Investment Positions reflecting FDI stock as of 2018 rather than historical values.

Thailand's approach to investment treaties has evolved considerably over time

Thailand signed its first BIT in 1961 with Germany. It signed only four more investment treaties in the ensuing 25 years, all of which were with major capital exporters: the United States (1966), Netherlands (1972), United Kingdom (1978) and China (1985).

In 1987 the ASEAN member states signed an intra-ASEAN Investment Agreement, which was later replaced in 2009 by ACIA. This marked the start of a period of intensive treaty-making by Thailand. From 1988 to 2005, Thailand concluded 26 BITs with countries from all corners of the globe, including with capital-importing partners that had smaller economies compared to Thailand at the time (Figure 8.2).[8]

Figure 8.2. Evolution of Thailand's investment treaty relations



Source: OECD calculations based on OECD treaty database.

Thailand signed seven BITs in 2005-15, five of which are in force today. It has not signed any new BITs since 2015. Instead, the government's focus since 2004 appears to have been twofold. First, it has shifted away from negotiating BITs to prioritising investment agreements or chapters as part of broader trade agreements, both bilaterally (with Australia, New Zealand, Japan and Chile)[9] and with ASEAN+ partners (Australia, China, Hong Kong (China), India, Korea and New Zealand). Second, since 2015, efforts to revise the model BIT and establish the Committee on the Protection of International Investment (see further discussion below) have been prioritised as policy tools to harmonise and update Thailand's approach to investment treaties.

This focus looks set to continue. The government is negotiating, or plans to negotiate, trade and/or investment agreements with more than 20 partners, including some regional and mega-regional FTAs (Ministry of Foreign Affairs, 2019a). Notably, Thailand started treaty negotiations with the EU Commission in March 2013 although these negotiations are currently on hold.

The government's current priorities are to engage in multilateral efforts regarding ISDS reform and continue to review its existing model BIT. A new Framework for BIT negotiation has recently been approved by the Cabinet but is not yet publicly available. Thailand is widely seen as a leader in current debates regarding possible reforms for investment treaties. It participates actively in the meetings of the UNCITRAL Commission's Working Group III. In 2018, the government also hosted a five-day workshop in Bangkok for treaty negotiators from Asia-Pacific countries on reforming investment treaties.[10]

Treaty use: ISDS claims under Thailand's investment treaties

Thailand and Thai nationals have limited practical experience with investment treaties as a basis for legal claims by investors. As of April 2020, Thailand had been involved in at least two ISDS arbitrations. Thai

investors operating abroad have not been involved in any known ISDS cases with Thailand's treaty partners but two Thai investors are reported to have notified potential claims.

Thailand as a respondent in ISDS cases

Based on publicly available information, foreign investors have filed at least two ISDS claims against Thailand. This is a relatively low number of ISDS cases as a respondent state when compared to some other countries around the world. Both of these cases were brought before an international arbitration tribunal convened under the UNCITRAL Arbitration Rules pursuant to ISDS clauses in investment treaties with Germany and Australia.

The first ISDS case brought against Thailand involved a dispute concerning a concession agreement for a construction project. The case was filed in 2005 under the Germany-Thailand BIT (2002) and led to an arbitration award issued in 2009.[11] An Australian mining company filed the second known ISDS case against Thailand in 2017 under the Australia-Thailand FTA (2004).[12] This case is pending as of November 2020. The dispute relates to the closure of Thailand's largest gold mine.

Aside from the two known ISDS cases filed against Thailand, a Malaysian national reportedly filed a notice of dispute with the government in August 2014 under the Thailand-Hong Kong, China BIT (2005) regarding a dispute over a gold mining project.[13] The Thai Government has advised that this case was settled after a successful mediation process.

Thai investors as claimants in ISDS cases

There are no publicly-known ISDS cases brought by Thai nationals under Thailand's investment treaties. Two Thai entities have, however, reportedly filed notices of dispute relating to potential claims. The estate of a Thai investor reportedly filed a notice of dispute with Malaysia in July 2017 under the 1987 ASEAN Investment Agreement regarding a real estate transaction. The investor reportedly agreed to abandon its claims under the terms of a confidential settlement agreement concluded with the Malaysian government in July 2019.[14] Another notice of dispute was reportedly filed by a Thai company against Lao PDR in April 2020 in a long-running dispute over the termination of a contract for the development of a local power plant.[15] A Thai state-owned entity has also reportedly filed a claim in an Egyptian court relating to a dispute over a gas pipeline between Egypt and Israel that has already led to several concurrent ISDS cases and contract-based arbitrations.[16] As of July 2020, press reports indicate that this claim was filed under an investment treaty but further details of the claim are not yet public.

Reconsidering Thailand's investment treaty policy

Many of Thailand's investment treaties reflect the features often associated with older-style investment treaties concluded in great numbers in the 1990s and early 2000s. Such treaties are generally characterised by a lack of specificity of the meaning of key provisions and extensive protections for covered investors. ACIA, the ASEAN+ investment agreements and some of Thailand's recent BITs contain more precise approaches in some areas. However, most of Thailand's older BITs remain in force alongside these newer agreements.

This scenario may expose Thailand to a range of unintended consequences, especially given the potential scope for ISDS claims under older investment treaties. The balance of this section examines three key aspects of possible reform – the scope of two frequently-invoked substantive protections, namely the fair and equitable treatment (FET) and most-favoured nation (MFN) treatment standards, as well as ISDS mechanisms – before considering other possible aspects of investment treaty reform.

Uncertain provisions referring generally to "fair and equitable treatment" should be clarified where possible

Almost all of Thailand's investment treaties contain provisions that require Thailand to provide covered investors and their investments with "fair and equitable treatment" (FET).[17] Since the early 2000s, the FET standard has become the most-frequent basis for claims in ISDS. Most FET provisions were agreed before the rise of ISDS claims related to this treatment standard. Starting around 2000, broad theories for the interpretation of FET provisions by arbitral tribunals emerged as the number of ISDS cases increased markedly. The investors that brought the two known ISDS cases against Thailand both invoked the FET standard.

Most FET provisions in investment treaties do not provide specific guidance on what treatment should be considered fair and equitable. Arbitral tribunals in ISDS cases under investment treaties have taken different approaches to interpreting such "bare" FET provisions, creating considerable uncertainty and high litigation costs for governments and investors alike. It has also resulted in some broad interpretations of bare FET provisions than go beyond the standards of investor protection in some advanced economies. Governments have reacted to these developments in various ways, including by adopting more precise or restrictive approaches to FET or excluding FET in recent treaties (Box 8.1). Thailand's varying approaches to FET in its existing treaties can usefully be compared with these recent approaches in broader treaty practice.

Some of Thailand's investment treaties adopt some of these more precise or restrictive approaches to FET. The FET provisions in ACIA and all of the ASEAN+ treaties – including the new protocol to the ASEAN+ Japan agreement – state that FET requires the treaty partners "not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law", which is generally understood to be a high standard. All of these treaties except ACIA (2009) and the China-ASEAN Investment Agreement (2009) also expressly limit FET to the customary international law standard for the treatment of aliens and clarify that it does not create additional substantive rights. Thailand's BITs with Canada, Croatia, Lao PDR and Viet Nam, as well as its bilateral trade and investment agreement with Japan, require FET "in accordance with" international law or expressly limit FET to the customary international law standard for the treatment of aliens.[18] None of Thailand's investment treaties refers expressly to MST FET.

FET provisions in other Thai investment treaties may leave scope for broad interpretations by arbitral tribunals. For example, the Belgium/Luxembourg-Thailand BIT (2002) refers to FET as "in no case … less favourable than … recognised by international law". This creates a "floor" for FET, rather than a "ceiling" that would limit FET to the protections already afforded under international law. No guidance is provided about the extent to which protections may exceed those under international law. Other treaties contain several different references to FET. For example, Thailand's BITs with Lao PDR (1990) and Viet Nam (1992) contain multiple references to FET, including some that specify FET "in conformity with principles of international law" and others that do not. This may generate additional uncertainty.

Most of Thailand's treaties refer to "bare" FET without any further specific guidance on its meaning. The prevalence of "bare" FET provisions and of varying approaches more generally creates uncertainty as to the scope of these FET obligations and exposure to expansive interpretations by arbitral tribunals in ISDS cases. More specific approaches to FET provisions could improve predictability for the government, investors and arbitrators alike. They could also potentially contribute to preserving the government's right to regulate in the context of investment treaties (Gaukrodger, 2017a, 2017b). In some cases, agreement on new treaty language may be required to reflect government intent and preclude undesirable interpretations. In other cases, governments may be able to achieve greater clarity on the scope of FET by agreeing on joint government interpretations of provisions in existing investment treaties with treaty partners.[19]

Box 8.1. Recent approaches to the FET provision and ISDS for FET claims

States are becoming more active in the ways in which they specify, address or exclude FET-type obligations in their treaties and submissions in ISDS. Dissatisfaction with and uncertainties about FET and its scope have also led some governments to exclude it from their treaties or from the scope of ISDS. Some important recent approaches are outlined below.

The MST-FET approach – express limitation of FET to the minimum standard of treatment under customary international law (MST). This approach has been used in a growing number of recent treaties, especially in treaties involving states from the Americas and Asia (Gaukrodger, 2017). In addition to using MST-FET, the Comprehensive and Progressive Trans-Pacific Partnership Agreement (2018) (CPTPP) requires the claimant to establish any asserted rule of MST-FET by demonstrating widespread state practice and opinio juris. (Article 9.6 (3)-(5), fns 15 and 17, Annex 9A). Evidence of these two components has rarely, if ever, been provided by claimants. This approach has since been replicated by other states (e.g., Australia-Indonesia CEPA (2019), Article 14.7). The NAFTA governments have further restricted MST-FET claims in the USMCA (see below).

The definition approach – stating what FET means or listing its element(s). Recent treaties negotiated by the European Union, China, France and Slovakia contain defined lists for the elements of FET. This approach can vary greatly depending on the nature of the list. Some lists include elements such as a denial of justice, manifest arbitrariness, fundamental breach of due process, targeted discrimination on manifestly wrongful grounds, and/or abusive treatment of investors. This approach likely results in a broader concept of FET than MST-FET, especially if state practice and opinio juris must be demonstrated to establish rules under MST-FET.

Exclusion of FET from ISDS, investment arbitration or from treaties. The recently-concluded USMCA (replacing NAFTA) includes MST-FET but generally excludes it from the scope of ISDS (except for a narrow class of cases involving certain government contracts) (Article 14.D.3). ISDS under the USMCA generally applies only to claims of direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for MST-FET claims. India's Model BIT does not refer to FET and instead identifies specific elements; Brazil's model treaty and recent treaties also exclude FET.

MFN treatment provisions in Thailand's investment treaties may have a range of unintended consequences

Most of Thailand's investment treaties provide for most-favoured nation (MFN) treatment. Like national treatment provisions, MFN clauses establish a relative standard: they require Thailand to treat covered investments at least as favourably as it treats comparable investments by investors from third countries. As with its FET provisions, the MFN obligations in Thailand's investment treaties are often vague with little guidance on how they are to be interpreted or applied. More specific approaches to MFN provisions could improve predictability for the government, investors and arbitrators alike.

Recent investment treaty policies and debates over MFN have centred on several issues: (i) MFN clauses and treaty shopping; (ii) what constitute comparable investments; and (iii) the use of negative lists, carve-outs or conditions.

On the first issue, ISDS arbitral tribunals have frequently interpreted MFN clauses to allow claimants in ISDS cases to engage in "treaty shopping".[20] These interpretations allow claimants to use MFN provisions to "import" substantive or procedural provisions from other investment treaties that they consider more favourable than the provision in the treaty under which their case is filed.[21] While beneficial to claimants,

this can create uncertainty and also dilute the effect of investment treaty reforms. While MFN claims in trade law have centred on domestic law treatment of traders from different countries, most claimant attempts to use MFN in ISDS have sought to use the clause to access other treaty provisions.

Some governments have clarified in recent treaties that MFN provisions cannot be used to engage in treaty shopping. They have limited the application of MFN clauses to cases where government measures have been adopted or maintained under the third country treaty. Article 8.7(4) of the CETA between Canada, the EU and EU Member States, for example, clarifies that "substantive obligations in other international investment treaties do not in themselves constitute 'treatment', and thus cannot give rise to a breach of [the MFN provision], absent measures adopted or maintained by a Party pursuant to those obligations". The CETA also prohibits "treaty shopping" for procedural provisions. The USMCA similarly clarifies that treaty shopping is excluded under its MFN clause for both substantive and procedural matters (Article 14.D.3(1)(a)(i)(A), footnote 22): "For the purposes of this paragraph […] the "treatment" referred to in Article 14.5 (Most-Favored-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations".

A second area of interest and government action with regard to MFN treatment provisions involves the determination of what investments or investors are comparable. Many older-style treaties do not provide any specificity on what comparable treatment may entail, leaving this issue to arbitral interpretations in ISDS. Some recent treaties provide that comparability requires "like circumstances". Further clarifications have also been added. For example, some recent clarifications have stated that deciding on whether there are "like circumstances" requires, among other things, consideration of whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.[22]

A third area of interest and government action with regard to MFN treatment provisions involves exclusions or limitations. Some recent treaties include negative lists of exclusions from MFN clauses in their investment chapters. Thus, a schedule may specify exceptions to MFN treatment for existing benefits granted under customs unions, other international treaties or specific domestic law schemes.

Some of Thailand's investment treaties include specifications or restrictions on MFN provisions that reflect these recent treaty practices and debates. ACIA (2009), the ASEAN-Hong Kong, China Investment Agreement (2017) and the ASEAN-China Investment Agreement (2010) clarify that MFN treatment does not extend to the ISDS provisions in other investment treaties but they do not expressly address the issue of "imports" of substantive clauses from other treaties, leaving the issue to arbitral interpretation. Several Thai treaties exempt the domestic BOI investment promotion regime from the MFN treatment provision.[23] Sectoral carve-outs are also used. Thailand's BITs with Sri Lanka (1996) and Chinese Taipei (1996) condition MFN treatment on reciprocal treatment by the treaty party. The Germany-Thailand BIT (2002) contains a non-exhaustive list of treatment that will be "deemed" less favourable.

At least three of Thailand's investment treaties do not contain an MFN provision: AANZFTA (2009), the ASEAN-India Investment Agreement (2014) and the ASEAN+ Japan agreement (2008) following the entry into force of the first protocol in 2020. Some governments have decided to remove MFN provisions from their investment treaties to avoid unintended interpretations of these clauses by arbitral tribunals in ISDS cases.[24]

ISDS is lightly regulated in most of Thailand's investment treaties, leaving substantial decision-making power to arbitrators or claimants

Many investment treaties allow covered foreign investors to bring claims against host states in investor-state arbitration, in addition or as an alternative to domestic remedies. Investor-state arbitration currently generally involves *ad hoc* arbitration tribunals that adjudicate disputes in an approach derived from international commercial arbitration.

ISDS is included in 39 of the 47 Thai investment treaties in force today. Thailand's first BITs concluded between 1960 and 1985 with five major capital exporters – China, Germany, the Netherlands, the United Kingdom and the United States – do not contain ISDS provisions. ISDS provisions in nine Thai BITs concluded between 1989 and 2000 are not effective because of Thailand's non-membership of ICSID. These BITs – with the Czech Republic, Egypt, Finland, Hungary, Korea, Peru, Poland, Sri Lanka and Switzerland – provide foreign investors with a single option for international arbitration under the ICSID Convention. As Thailand has never acceded to the ICSID Convention, ISDS is not currently available under these treaties. Five other Thai investment treaties – with Cambodia, Israel, the Philippines, Romania and Chinese Taipei – provide for ICSID and non-ICSID arbitration options but condition access to non-ICSID arbitration on the host country's agreement to arbitrate a given investment dispute after it arises. This means that, in practice, ISDS is not possible under these treaties without Thai government consent after a dispute has arisen. The first Thai investment treaty that provided access to non-ICSID investor-state arbitration *without* the need for prior government consent was the Canada-Thailand BIT (1997). Since 1997, almost every investment treaty concluded by Thailand allows for ISDS through non-ICSID forms of investor-state arbitration.

Recent treaty practice has both greater specification of ISDS and, in some cases, replacement of investor-state arbitration with more court-like systems. Treaties like the CPTPP and the EU-Canada CETA are among some recent treaties that have included investor-state arbitration reforms. Common features in these treaties include time limits for claims, possibilities for summary dismissal of unmeritorious claims, mandatory transparency requirements, provisions for non-disputing party participation and the possibility for joint interpretations of the treaty by the state parties that are binding on the arbitral tribunal. The USMCA contains many similar investor-state arbitration reforms but has reduced the scope for ISDS claims to direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for claims under other provisions, such as MST-FET claims. The European Union, which supports the concept of a multilateral investment court, has included court-like dispute settlement in its all its recent investment protection treaties.[25] Brazil's treaties omit ISDS and designate domestic entities ("National Focal Points") to act as an ombudsperson by evaluating investor grievances and proposing solutions to a Joint Committee comprised of government representatives from both states.[26] Under this model, state-state dispute settlement is also available if necessary. South Africa has terminated its BITs with European countries. Domestic legislation governs the claims of foreign investors against the government in domestic courts and provides for the possibility of case-by-case agreement to arbitration.

Many of Thailand's investment treaties regulate investor-state arbitration very lightly. They thus leave substantial decision-making power to arbitrators or investors and their legal counsel. The five ASEAN treaties that contain ISDS provisions in force today – ACIA and the ASEAN+ agreements with Australia/New Zealand, China, Japan, Korea and India – are notable exceptions. All of these contain somewhat more specification of ISDS, reflecting recent treaty practices that address investor-state arbitration reforms.

Aside from the ASEAN treaties, however, Thailand's investment treaties contain relatively few specifications regarding ISDS: (i) only two of Thailand's investment treaties prescribe time limits for covered investor claims[27] – a feature that is standard in domestic law systems and that has become common in investment treaties concluded since 2005; (ii) only one expressly provides for binding government interpretations of the treaty in ISDS cases;[28] (iii) none address transparency in ISDS; (iv) none provide a mechanism for summary dismissal of unmeritorious claims; (v) none provide a mechanism for consolidating two or more related ISDS claims; (vi) only two address the remedies that may be awarded by an arbitral tribunal;[29] and (vii) only ten contain express references to the governing law in ISDS cases and those treaties use a range of different formulations.

Many of Thailand's investment treaties therefore give claimants and their counsel substantial power over key procedural issues in addition to allowing them to choose when to claim. For example, in ISDS, the

appointing authority in a case plays a key role notably because it chooses or influences the choice of the important chair of the typical three-person tribunal (Gaukrodger, 2018). Following NAFTA, many recent treaties provide for a single appointing authority for all cases. In contrast, many Thai treaties give claimants and their counsel a choice between different arbitration institutions at the time they file a claim. This allows them to choose or influence the choice of appointing authority and exacerbates the competition for cases between arbitration institutions (Gaukrodger, 2018). Even under ACIA, investors may decide whether to submit their dispute to domestic courts or tribunals, four arbitration fora specified in the treaty, "any other regional centre for arbitration in ASEAN" or any other arbitration institution that may be agreed by the disputing parties (Article 33(1)). One of Thailand's investment treaties in force provides for a single effective forum for ISDS[30] (leaving aside those treaties that refer only to ICSID arbitration and therefore are ineffective references to ISDS), but the rest of Thailand's treaties give power in this area to claimants and their counsel.

The current state of Thailand's investment treaties may therefore result in exposure to unintended consequences of ISDS cases. Thailand's 2013 model BIT seeks to address some of the issues for ISDS that are left unspecified in its existing investment treaties, but it does not address many others, including government interpretations, transparency, summary dismissal, consolidation or remedies. The government's new model BIT set to be finalised in 2020 is expected to address a number of these issues.

Multilateral reform efforts for ISDS are underway in the UNCITRAL Commission's Working Group III. Thailand's written submissions in this process have outlined the government's concerns with the cost and duration of ISDS arbitrations and the structural disadvantages for developing countries participating in ISDS. The government proposes to develop new arbitration rules that address concerns regarding ISDS, establish guidelines on prevention of investment disputes and establish an advisory centre for international investment law (UNCITRAL, 2019c; UNCITRAL, 2018b). Other possible reforms under consideration (no decisions have yet been reached) include both structural type reforms (a permanent multilateral investment court with government-selected judges or a permanent appellate tribunal) as well as more incremental reforms such as a code of conduct for arbitrators or adjudicators.

Thailand may wish to consider the costs and benefits of ISDS more broadly alongside potential alternatives or complementary steps. These might include *ad hoc* arbitration agreements with specific investors or the possibility for investors to purchase political risk insurance from the World Bank's Multilateral Investment Guarantee Agency that Thailand joined as a member in 1996. The government may also wish to consider whether the inclusion of ISDS can be leveraged to achieve Thailand's objectives in other aspects of the treaty negotiations.

Other possible aspects of investment treaty reform

Clearer specification of investment protection provisions would help to reflect government intent more effectively

Specifications on key provisions in investment treaties should reflect policy choices informed by Thailand's priorities. Policymakers need to consider the costs and benefits of these choices and their potential impact on foreign and domestic investors, together with Thailand's legitimate regulatory interests and potential exposure to ISDS claims and damages. The government should continue to implement its plans to assess and where appropriate update its investment treaties to bring them in line with the government's current priorities. Depending on the context and treaty language, it may be possible to achieve these goals through joint interpretations agreed with treaty partners. In other cases, treaty amendments may be required. Replacement of older investment treaties by consent may also be appropriate in some cases.

The government's experiences with the COVID-19 pandemic may shape how it views key treaty provisions or interpretations as well as the appropriate balance between investor protections and the right to regulate.

Measures taken by governments to protect their societies and economies during the pandemic affect companies and investors. Investment treaties should allow governments sufficient policy space to respond effectively to the crisis and to take vital measures such as securing quick access to essential goods and services. Governments have been addressing the balance between investment protection and the right to regulate in investment treaties through analysis and discussion at the OECD (OECD, 2020). The government may wish to reflect on its own experiences during the crisis when continuing its plans to assess and where appropriate update its investment treaties to reflect current priorities.

Investment treaties can be used as tools to liberalise domestic investment regimes

While liberalisation provisions are common features of international trade agreements, they have been much less common in BITs. They have become more frequent components of investment chapters in broader trade and investment treaties. Investment treaties can be used to liberalise investment policy by facilitating the making or establishment of new investments (Pohl, 2018). This can be achieved by extending the national treatment (NT) and MFN treatment standards to investors seeking to make investments (i.e. the pre-establishment phase of an investment) or by expressly prohibiting measures that block or impede market access.[31]

Seven of Thailand's investment treaties grant so-called pre-establishment NT or MFN treatment, or both, to investors.[32] The provisions are generally subject to SSDS, like in trade agreements; none of them would allow an investor to bring an ISDS claim.[33] The market access obligations in these seven treaties are accompanied by certain exclusions and reservations (Box 8.2).

Thailand may wish to consider whether entering into liberalisation obligations aligns with its policy goals when signing new investment treaties in the future, especially bilateral agreements signed outside the ASEAN framework.

Box 8.2. Negative and positive list-approaches to NT and MFN exceptions

When countries grant national and/or most-favoured nation treatment, whether pre- or post-establishment, they typically do so subject to exceptions or reservations adopted under one of two different approaches.

A ***negative list-approach*** typically provides that MFN and NT are granted subject to specific exceptions or reservations (negative lists) that are often contained in detailed annexes to the treaty. Article 9 of the ASEAN-Korea Investment Agreement, for example, provides that the governments may adopt and maintain measures in certain sectors that do not confirm with the MFN and NT provisions and identify sectors in a Schedule of Reservations for which they wish to reserve full policy space.

A ***positive-list approach*** involves limiting the application of MFN and NT liberalisation provisions to specific identified sectors (positive lists). Article 3(3) of ACIA is an example of a positive list. Generally, the negative list-approach is seen as more conducive to investment liberalisation particularly over time. New areas of economic activity are not covered by negative lists.

Addressing the unique approach to claims for reflective loss in ISDS

Thailand should continue to engage in multilateral fora such as at the OECD and UNCITRAL to develop proposals to address the unique approach to claims for shareholders' reflective loss in ISDS.

Shareholders incur reflective loss if a company in which they hold shares suffers a loss that results, in turn, in the shareholders suffering a commensurate loss, typically a loss in value of the shares. Domestic legal systems around the world generally prohibit claims for reflective loss. Where a company is injured, the

claim generally belongs to the directly-injured company rather than the shareholders of that company. This rule protects company creditors and all shareholders, lowering their risks and encouraging them to provide capital to companies. It also achieves judicial economy by limiting claims, avoiding inconsistent outcomes, facilitating amicable settlement, and precluding double recovery by the company and shareholders for the same loss.

In contrast to this domestic law approach, many existing investment treaties have been interpreted to allow ISDS claims by covered shareholders for losses incurred by companies in which they own shares. This greatly increases the chances of multiple claims against the government for the same alleged loss. For example, one or more foreign nationals who are minority shareholders in a local Thai company could bring an ISDS claim against the government under an investment treaty while the same local Thai company could bring a separate claim against the government under a government contract or in domestic courts.

Governments at the OECD have noted since 2013 that the availability of reflective loss claims in ISDS raises a broad range of policy issues including the risk of multiple legal claims, the risk of inconsistent decisions, increased costs defending legal claims, exposure to double recovery, the impact on predictability, hindering settlement, facilitating treaty shopping, and upsetting the hierarchy of claims so that a claimant gets better treatment than under normal legal principles (OECD, 2016; Gaukrodger, 2014a, 2014b, 2013; Summary of 19th FOI Roundtable, October 2013, pp. 12-19; Summary of 18th FOI Roundtable, March 2013, pp. 4-9). Ongoing discussions at UNCITRAL's Working Group III on ISDS Reform are addressing possible reforms to address these issues, which were underlined in a recent UNCITRAL Secretariat note (UNCITRAL, 2019d). Given that the current approach towards reflective loss in ISDS provides claimants with exceptional benefits and greatly expands the number of actual and potential ISDS cases, however, only government-led reform is likely to address the issues.

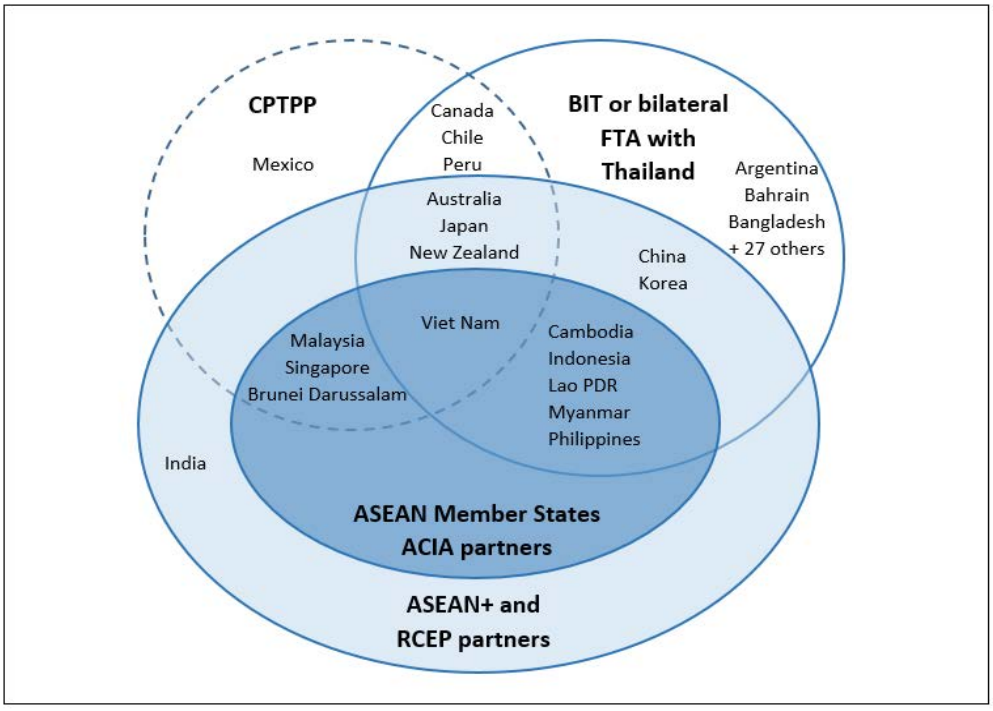
Evaluating overlaps between investment treaties

Thailand has two investment treaties – ACIA and an older-style BIT – in force with six of its nine ASEAN partners (Cambodia, Indonesia, Laos PDR, Myanmar, the Philippines and Viet Nam). It is also a party to ASEAN+ agreements in force with Australia, China, Japan, Korea and New Zealand as well as BITs or bilateral trade and investment agreements with these same partners. All of these countries except India have also concluded RCEP in November 2020 (see Figure 8.3).

Overlapping investment treaties that apply to investments by investors from the same country may raise some policy concerns. As a general matter, Thailand should strive to minimise inefficient inconsistencies between international obligations entered into with different countries. Investors from countries with two or more treaties in force may be able to rely on more favourably-worded provisions in Thailand's older BITs in their dealings with the government or in ISDS disputes. This approach could also potentially undermine reform efforts in some of Thailand's newer treaties if investors can circumvent newer, more nuanced investment treaties by relying older BITs that are still in force.

Any significant differences between Thailand's BITs, ACIA and the ASEAN+ agreements are also unlikely to contribute to the goals of ASEAN member states in strengthening common rules on investment protection and liberalisation at a regional level. Thailand may wish to engage with these treaty partners to review whether their respective international obligations reflect current priorities. Depending on the context and treaty language, it may be possible to achieve these goals through joint interpretations agreed with treaty partners. In other cases, treaty amendments may be required.

Figure 8.3. Overview of Thailand's overlapping investment treaty relationships



Note: This figure includes the Parties to the Comprehensive and Progressive Trans-Pacific Partnership Agreement (2018) (CPTPP), which is marked with the dashed line for illustrative purposes only. As of October 2020, Thailand is not a party to the CPTPP. Underlined text in this figure denotes countries that have two investment treaties in force with Thailand.
Source: OECD investment treaty database.

Despite the concerns that may arise with overlapping treaties, some governments may consider that they need to provide certain extra incentives or guarantees to some treaty partners over others in order to attract FDI. This may be because they expect that investors from those countries are less likely to invest their capital in the absence of such treatment or assess that the broader benefits associated with attracting FDI from those countries are particularly lucrative. Some governments may also consider that similar provisions in different treaties, while framed differently, are likely to be interpreted in a consistent way. The balance between these interests and assessments is a delicate one and may evolve over time.

Evaluating overlaps between investment treaties and domestic law

The scope of investor protections and obligations under Thailand's domestic laws and its investment treaties overlap in some respects. Some overlaps appear to give rise to inconsistencies in approach. Thailand's domestic laws do not contain guarantees of post-establishment non-discrimination and FET that appear in Thailand's investment treaties. Likewise, the protection from expropriation is narrower under domestic law than under many of Thailand's investment treaties. In terms of dispute resolution, many of Thailand's investment treaties provide the government's consent to investor-state arbitration which is not provided under domestic laws. Investment contracts that the government enters into with specific investors could create an additional layer of contractual rights and obligations for specific investors.

Differences between the domestic laws on investor protection and investment treaties may create more favourable legal regimes that apply to some investors and not others based on their nationality. It may also prompt some investors to structure their investments through a company in one of Thailand's treaty partner countries to seek to benefit from treaty protections and/or treaty-based ISDS if they perceive these to be

more favourable than protections and dispute resolution options under domestic laws. The government may therefore wish to conduct a gap analysis between domestic laws on investor protection and investment treaty provisions to consider the implications of any differences and ensure that these different regimes continue to reflect the government's current priorities.

Ensuring policy space for government regulation

Thailand may wish to consider ways in which it can guarantee a higher degree of legitimate regulatory freedom and attract sustainable, quality FDI through its investment treaties. These concerns would appear to align with the Thailand 4.0 economic model and the emphasis on sustainability as part of its role as chair of ASEAN in 2019.

Governments can use a range of techniques to affect the balance between the right to regulate and investor protections under investment treaties (Gaukrodger, 2017a). The most obvious one involves decisions about whether to include or exclude particular provisions, whether to draft them narrowly or broadly, precisely or in vague terms. The most important provisions in this regard are likely to be those most often at issue in investor claims such as the FET provision. A second area of obvious interest is express provisions addressing the right to regulate, although some have pointed to risks that broad clauses to protect the right to regulate could create new areas of possible misinterpretation.

A partial list of additional techniques used recently to allow for greater policy space would likely include the following: clarifications of treaty language; interpretative statements; joint interpretive statements; general exceptions; specific exceptions; reservations; conditions precedent to consent to arbitration; standards of review; limits or exclusions of MFN clauses; or limits on injunctions, damages or other remedies. Reforms to ISDS provisions or consideration of alternatives such as a court-like model may also be relevant considerations.

Opportunities for investment treaties to address sustainable development and responsible business conduct

Thailand may wish to reconsider its approach to investor responsibilities in investment treaties, including in relation to sustainable development and responsible business conduct (RBC). This could be a way of strengthening and complementing Thailand's First National Action Plan on Business and Human Rights (2019-2022) which was published in October 2019 following approval by the Cabinet of Ministers (see Chapter 9 on Thailand's approach to RBC). Addressing business and human rights (BHR) and RBC issues in investment treaties may be one way of improving policy coherence across government on these issues although governments have taken a range of different approaches on whether and how to address RBC/BHR issues in investment treaties.

The OECD's FOI Roundtable is currently considering how trade and investment treaties can affect business responsibilities including through their impact on policy space for governments, their provisions that buttress domestic law or its enforcement, or their provisions that directly address business by, for example, encouraging observance of RBC standards or establishing conditions for access to investment treaty benefits (Gaukrodger, 2020).

Ten of Thailand's investment treaties make express references to RBC-related objectives. Many of these treaties contain language establishing that non-discriminatory environmental measures taken in order to protect public welfare objectives do not constitute indirect expropriation or language aimed at preserving space for policy-making in areas important to RBC.[34] Others clarify the parties' understanding that it is inappropriate to encourage investment by relaxing environmental or health measures[35] or reaffirm the parties' commitments to the fight against corruption.[36]

Investment treaties concluded by some other governments impose obligations on investors to uphold human rights and maintain an environmental management system,[37] exclude investments procured by corruption from the scope of protections under the treaty[38] or exclude the possibility for ISDS in relation to government measures relating to the treaty's environmental and labour provisions.[39] Other examples refer to the parties' commitments to implement international standards related to RBC,[40] recognise that investments should contribute to the economic development of the host state[41] or recognise the importance of requiring companies to respect corporate social responsibility norms (Gordon et. al., 2014).[42]

Thailand may wish to consider whether and how investor responsibilities might be included in more of its existing investment treaties. Possible options may include cross-referring to domestic law RBC obligations or ensuring that treaty protections are restricted to investments made in accordance with Thai law. Some of Thailand's treaties stipulate expressly that only investments made in accordance with host state laws will be protected under the treaty (see, e.g., Bahrain-Thailand BIT (2002), Article 2; Thailand-Romania BIT (1993), Article 1(1)). Such requirements may incentivise investors to respect domestic law obligations by conditioning access to treaty protections on compliance. The issue of whether such a requirement is implicit in investment treaties appears uncertain in light of inconsistent ISDS decisions, but an express clause would remove doubt in this regard.

Developing approaches to prevent ISDS claims and manage them effectively if they arise

The government is prioritising the development of strategies for prevention and early settlement of investment-related disputes and its approach to case management of ISDS cases. In 2019, it established the Committee on the Protection of International Investments in 2019.[43] The Committee is chaired by the Deputy Prime Minister and comprises of ministers and other high-level officials in various government departments and agencies. The Committee's work is funded from the budget of the Ministry of Foreign Affairs. The functions of the Committee can be divided into three broad areas:

- ***dispute prevention*** (by serving as a permanent advisory body for line agencies on potential investment disputes and opportunities for settlement or compromise);
- ***policy coherence*** (proposing and reviewing policies, strategies, work plans and positions regarding reform options for existing treaties and negotiations regarding new treaties or treaty amendments/interpretations); and
- ***dispute settlement*** (supervising the government's defence of investor-state arbitrations that might arise in the future, including through establishing a dedicated Taskforce to report to the Committee and make proposals for the Council of Ministers regarding the handling of individual cases).

Other OECD governments have established similar committees and reported successful outcomes with respect to dispute prevention. The government should monitor and measure the outcomes of this Committee to ensure that it is functioning effectively in practice. The Committee's role as a centralising body for investment treaty policy is particularly commendable and could serve a valuable role in harmonising treaty practices in line with existing domestic laws and international good practices. The Committee may wish to consider whether it could play a role in developing policies with respect to harmonising and proposing updates to domestic laws on investment protection and dispute resolution if its mandate were to expand in the future.

Thailand's 2013 model BIT provides for good offices, conciliation and mediation regarding investment disputes but relatively few of Thailand's investment treaties in force envisage non-binding dispute resolution besides pre-arbitration negotiation. The government has recently made proposals in this respect as part of the UNCITRAL Working Group III process, including for preparation of guidelines on how states can manage investment disputes, improvement of capacity-building for governments on dispute prevention, renewed focus on the role for conciliation and mediation in investment disputes and the

establishment of a low-cost legal advisory centre for international investment law (UNCITRAL, 2019c; UNCITRAL, 2018b).

Aside from participating in inter-governmental fora on these topics, the government may wish to consider taking certain steps at a domestic level. In terms of dispute prevention, it may be worth exploring options to build awareness within government ministries, agencies and local or sub-national government entities regarding Thailand's obligations under investment treaties and the potential impact that government decisions may have on investor rights under these treaties. Internal written guidelines or a handbook for relevant ministries, departments and line agencies could be a useful way to disseminate information and establish best practices for interactions with investors to minimise the risk of ISDS claims. Such materials could also help to encourage continuity of institutional knowledge as personnel changes occur over time. As part of existing capacity-raising efforts for treaty negotiators and line agencies, Thailand co-hosted the 13th Annual Forum for Investment Negotiators with the International Institute for Sustainable Development (IISD). The Forum was held virtually from 3-11 September 2020 and focused on investment policy-making during COVID-19 and beyond. Such efforts should be encouraged to continue.

Thailand may also wish to explore ways to share and learn from its experiences with ISDS and those of other governments. Several states that have been frequent respondents in ISDS cases – including Argentina, Spain, the United States, Canada and Mexico – have developed dedicated teams of government lawyers to advise the government on investment disputes. Evaluating investor claims candidly before any form of binding arbitration is initiated can be an important step in preventing a protracted and costly legal process.

Thailand may also wish to consider drawing on examples of institutional frameworks for the prevention of investment disputes in other countries. At a domestic level, some countries, such as Colombia and Peru, have adopted comprehensive legislative and regulatory frameworks to encourage the early detection and resolution of investment disputes (OECD, 2018b; Joubin-Bret, 2015). Other countries, such as Chile, have opted for an informal prevention system where sectoral agencies directly manage disputes with investors. As noted above, Brazil does not include ISDS in its investment treaties but instead establishes with each treaty partner a Focal Point or ombudsman within each government to address investor grievances, with a Joint Committee of government representatives to oversee the administration of the agreement. Korea has also had a successful track-record of early dispute resolution with its Foreign Investment Ombudsman since it was established in 1999 (Nicolas, Thomsen and Bang, 2013).

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Annex 8.A. Thailand's international investment agreements

Annex Table 8.A.1. Bilateral investment treaties in force

No	Treaty partner	Date of signature	Date of entry into force
1	Argentina	18/02/2000	07/03/2002
2	Bahrain	21/05/2002	17/07/2002
3	Bangladesh	09/07/2002	12/01/2003
4	Belgium/Luxembourg	12/06/2002	19/09/2004
5	Bulgaria	11/09/2003	12/08/2004
6	Cambodia	29/03/1995	18/04/1997
7	Canada	17/01/1997	24/09/1998
8	China	12/03/1985	14/12/1985
9	Croatia	18/02/2000	10/08/2005
10	Czech Republic	12/02/1994	04/05/1995
11	Democratic People's Republic of Korea	01/03/2002	24/05/2002
12	Egypt	18/02/2000	27/02/2002
13	Finland	18/03/1994	18/03/1996
14	Germany	24/06/2002	20/10/2004
15	Hong Kong, China	19/11/2005	12/04/2006
16	Hungary	18/10/1991	18/10/1991
17	Indonesia	17/02/1998	05/11/1998
18	Israel	18/02/2000	28/08/2003
19	Jordan	15/12/2005	25/11/2007
20	Korea	24/03/1989	29/09/1989
21	Lao PDR	22/08/1990	07/12/1990
22	Myanmar	14/03/2008	08/06/2012
23	Netherlands	06/06/1972	03/03/1973
24	Peru	15/11/1991	15/11/1991
25	Philippines	30/09/1995	06/09/1996
26	Poland	18/12/1992	10/08/1993
27	Romania	30/04/1993	20/08/1994
28	Slovenia	18/02/2000	20/10/2002
29	Sri Lanka	03/01/1996	14/05/1996
30	Sweden	18/02/2000	23/11/2000
31	Switzerland	17/11/1997	21/07/1999
32	Chinese Taipei	30/04/1996	30/04/1996
33	Turkey	24/06/2005	21/07/2010
34	United Arab Emirates	23/02/2015	16/12/2016
35	United Kingdom	28/11/1978	11/08/1979

No	Treaty partner	Date of signature	Date of entry into force
36	United States	29/05/1966	06/08/1968
37	Viet Nam	30/10/1991	07/02/1992

Note: It is difficult to be precise about the exact status of Thailand's BITs due to some inconsistencies in publicly-available information, especially entry into force dates. The Ministry of Foreign Affairs' (MFA) Department of Treaties and Legal Affairs (DTLA) publishes an annual fact sheet on Thailand's BITs. The full texts of Thailand's investment treaties (including in some cases an exchange of letters to document entry into force) are available for download from the MFA's treaty database: see Ministry of Foreign Affairs 2019a, 2019b; Ministry of Commerce (2019). MFA's Department of International Economy also publishes general background information in Thai on investor protections under investment treaties (Ministry of Foreign Affairs, 2019c). Some of the information published by MFA is inconsistent with information published by Thailand's treaty partners, in particular with respect to dates of signature and entry into force. For example, the fact sheet indicates that Thailand's revised BIT with Germany entered into force on 20 October 2006 while Germany's Ministry of Economy and Energy treaty database indicates that it took effect on 20 October 2004. Similarly, the fact sheet indicates that the Thailand-United Kingdom BIT was signed on 26 May 1978 while the UK Foreign & Commonwealth Office treaty database indicates that the BIT was signed on 28 November 1978.
Source: Ministry of Foreign Affairs; OECD treaty database.

Annex Table 8.A.2. Bilateral investment treaties signed but not in force

No	Treaty partner	Date of signature	Comments
1	Bangladesh	30/03/1988	Never in force; replaced by newer treaty
2	Germany	13/12/1961	Initially came into force on 10/04/1965; replaced by newer treaty
3	India	10/07/2000	Initially came into force on 13/07/2001; terminated with effect from 22/03/2017 following unilateral denunciation by India
4	Tajikistan	09/08/2005	-
5	Tanzania	30/07/2013	-
6	Zimbabwe	18/02/2000	-

Source: Ministry of Foreign Affairs; OECD treaty database.

Annex Table 8.A.3. Bilateral trade and investment agreements in force

No	Treaty partner	Date of signature	Date of entry into force
1	Australia-Thailand Free Trade Agreement	05/07/2004	01/01/2005
2	Japan-Thailand Economic Partnership Agreement	03/04/2007	01/11/2007
3	New Zealand-Thailand Closer Economic Partnership Agreement	19/04/2005	01/07/2005

Source: Ministry of Foreign Affairs; OECD treaty database.

Annex Table 8.A.4. Plurilateral agreements containing investment protections, investment liberalisation provisions and/or ISDS

No	Treaty	Date of signature for Thailand	Date of entry into force	Date of entry into force for Thailand
1	Regional Comprehensive Economic Partnership Agreement	15 November 2020	-	-
2	ASEAN-Hong Kong, China SAR Investment Agreement	12/11/2017	17/06/2019	17/06/2019
3	ASEAN-India Investment	12/11/2014	-	-

No	Treaty	Date of signature for Thailand	Date of entry into force	Date of entry into force for Thailand
	Agreement			
4	ASEAN-China Investment Agreement	15/08/2009	01/01/2010	01/01/2010
5	ASEAN-Korea Investment Agreement	02/06/2009	01/09/2009	01/09/2009
6	ASEAN-Australia/New Zealand Free Trade Agreement	27/02/2009	10/01/2010	12/03/2010
7	ASEAN Comprehensive Investment Agreement (ACIA)	26/02/2009	09/03/2012	09/03/2012
8	ASEAN-Japan Economic Partnership Agreement	28/03/2008	01/12/2008	01/06/2009
9	First Protocol to the ASEAN-Japan Economic Partnership Agreement (including provisions on investment protection)	27/02/2019 (Japan); March and April 2019 (ASEAN members)	01/08/2020	01/08/2020
10	ASEAN Investment Agreement	15/12/1987	02/08/1988 (terminated and replaced by ACIA on 24/02/2012)	02/08/1988 (terminated and replaced by ACIA on 24/02/2012)

Source: Ministry of Foreign Affairs; OECD treaty database.

Notes

[1] A bilateral trade agreement with Chile (2013) does not contain an investment chapter but the parties agreed to continue their negotiations regarding a future possible investment chapter. Thailand has also signed several other bilateral treaties relating to investment cooperation that do not contain investment protections or ISDS. These include framework agreements with the European Economic Community (1981), Cambodia (2001), Bahrain (2002), Peru (2003), India (2003), Bhutan (2004), Jordan (2004), Maldives (2013) and several ASEAN+ partners as well as memoranda of understanding with Korea (2003), Sri Lanka (2004) and Gambia (2006).

[2] The coverage is assessed based on FDI stock data (2017 or, where 2017 data was unavailable, data of preceding years, giving preference to more recent data, based on data released by OECD and IMF) and investment treaties in force in September 2019. For several reasons, reported FDI stock data is not a valid measure for assets that benefit from treaty protections (Pohl, 2018) and available data does not allow to determine ultimate ownership of assets. The proportions of FDI stock data may nonetheless serve as a rough approximation of stock held by the immediate investing country to illustrate features and outcomes of Thailand's past investment treaty policies.

[3] Japan-Thailand EPA (2007); Netherlands-Thailand BIT (1972); Thailand's bilateral relationship with Singapore under the ASEAN Comprehensive Investment Agreement (2009); and the Thailand-US Treaty of Amity (1966).

[4] Thailand's relationship with Australia under AANZFTA (2009); Belgium/Luxembourg-Thailand BIT (2002); China-Thailand BIT (1985); Chinese Taipei-Thailand BIT (1996); Germany-Thailand BIT (2002); Hong Kong (China)-Thailand BIT (2005); Korea-Thailand BIT (1989); Thailand's relationship with Malaysia under ACIA (2009); Sweden-Thailand BIT (2000); Switzerland-Thailand BIT (1997); and Thailand-United Kingdom BIT (1978).

[5] Argentina, Bahrain, Bangladesh, Brunei Darussalam, Bulgaria, Cambodia, Canada, Croatia, Czech Republic, Egypt, Finland, Hungary, Indonesia, Israel, Jordan, Laos PDR, Myanmar, New Zealand, Peru, Philippines, Poland, Romania, Slovenia, Sri Lanka, Turkey, United Arab Emirates and Viet Nam.

[6] Argentina, Bahrain, Bangladesh, Brunei Darussalam, Bulgaria, Chinese Taipei, Croatia, Czech Republic, Egypt, Finland, Hungary, Israel, Jordan, Korea, New Zealand, Peru, Poland, Romania, Slovenia, Sri Lanka, Sweden, Switzerland, Turkey and United Arab Emirates.

[7] Argentina, Bahrain, Bangladesh, Brunei Darussalam, Bulgaria, Croatia, Czech Republic, Egypt, Finland, Hungary, Israel, Jordan, New Zealand, Peru, Poland, Romania, Slovenia, Sri Lanka, Turkey and United Arab Emirates.

[8] The comparison of GDP per capita in PPP terms between Thailand and its respective treaty partners was determined for the year when the treaty was concluded; where this data were not available, data for the earliest year available for the country-pair were used. The values of per capita GDP PPP in current terms were taken from the World Bank's World Development Indicators as of mid-2019.

[9] The agreement between Thailand and Chile does not contain an investment chapter. The parties plan to negotiate on investment issues in the future.

[10] For further details, see: https://www.iisd.org/event/international-investment-agreement-reform-modernizing-existing-stock-treaties.

[11] See generally, *Walter Bau AG (in liquidation) v Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009.

[12] Kingsgate Consolidated Limited, "Commencement of Arbitration Against Thailand", Media Release, 2 November 2017, http://www.asx.com.au/asxpdf/20171102/pdf/43nx46y27z949y.pdf (accessed 24 September 2019); IA Reporter, "Australian investor makes good on BIT arbitration threat against Thailand – and also takes its political risk insurer to court", 2 November 2017.

[13] IA Reporter, "In echoes of Walter Bau case, shareholders in a Thai project disagree among themselves as to wisdom of using investment treaty arbitration – this time in relation to controversial gold mine", 4 September 2015.

[14] IA Reporter, "Boonsom Boonyanit v. Malaysia: Rare dispute under terminated Asean investment treaty is resolved", 23 June 2019.

[15] IA Reporter, "Lignite company threatens renewed arbitration claim against Laos", 21 April 2020.

[16] Global Arbitration Reporter, "Egyptian court hears billion-dollar BIT claim", 20 July 2020.

[17] The only exception is the New Zealand-Thailand Closer Economic Partnership Agreement (2005). Given that investors from New Zealand may rely on FET protection from Thailand under AANZFTA, all of Thailand's investment treaty relationships involve FET guarantees. Thailand's first BIT with Germany (1961) omitted the FET standard but the revised Germany-Thailand BIT (2002) currently in force refers to FET.

[18] The Tanzania-Thailand BIT (2013), which both Parties have signed but not brought into force, also specifies that FET does not require any treatment in addition to the customary international law standard for the treatment of aliens.

[19] Gaukrodger, D. (2016) (reviewing the applicable law on joint interpretations of investment treaties without express provisions on the issue); Gordon, K. and Pohl, J. (2015). For a recent example of a joint interpretation, see the Joint Interpretative Declaration between Columbia and India (2018) regarding the Columbia-India BIT (2009).

[20] This phrase is used broadly herein to describe the power for a beneficial owner of an investment to choose between investment treaties or between provisions of different investment treaties. See further detail on treaty shopping below.

[21] For a recent discussion of the uncertainty surrounding the interpretation of MFN clauses in ISDS, see Batifort, S. and Benton Heath, J. (2018) "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", *American Journal of International Law*, Volume 111, Issue 4 (October 2017), pp. 873-913.

[22] See, for example, United States-Mexico-Canada Agreement (2018), Article 14.5(4) ("For greater certainty, whether 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.")

[23] Thailand's BITs with Argentina, Bangladesh, Cambodia, China, Czech Republic, Egypt, Finland, Hong Kong (China), Hungary, Korea, Peru, Poland, Romania, Sri Lanka and the United Kingdom create an exception for persons and companies with the status of a "promoted person" under the Investment Promotion Act 1977.

[24] India omitted MFN from its 2015 model BIT in response to what it considered was an unduly expansive interpretation of an MFN provision by an arbitral tribunal. In the *White Industries* case, the arbitral tribunal allowed the investor to import an "effective means" clause from a third-party treaty via the MFN clause in the India-Australia BIT with no analysis of how it considered the relevant MFN clause to operate: *White Industries Australia Limited v. Republic of India*, UNCITRAL, *ad hoc*, Final Award, 30 November 2011, paras 11.2.1-11.2.9.

[25] See EU-Canada CETA (2016); EU-Singapore Investment Protection Agreement (2018); EU-Mexico Agreement (2018); EU-Viet Nam Investment Protection Agreement (2019).

[26] See, for example, Brazil-Chile FTA (2018), Article 15; Brazil-Angola BIT (2015), Article 15.

[27] Canada-Thailand BIT (1997), Article XIII(3); Japan-Thailand EPA (2007), Article 106(6). The Tanzania-Thailand BIT (2013) also contains a time limits for ISDS claims but this treaty is not currently in force.

[28] Thailand-United Arab Emirates (2015), Articles 10(3), 14. The Tanzania-Thailand BIT (2013) also provides for binding joint interpretations by the contracting governments but this treaty is not currently in force.

[29] Canada-Thailand BIT (1997), Article XIII(8), (9); Japan-Thailand EPA (2007), Article 106(12).

[30] Hong Kong, China-Thailand BIT (2005), Article 8 (ad hoc arbitration under the UNCITRAL Arbitration Rules).

[31] See, for example, EU-Canada CETA (2016), Article 8.4; EU-Vietnam FTA (2018), Article 8.4.

[32] Japan-Thailand EPA (2007), Article 93(1); ACIA, Articles 3(3), 5, 6; ASEAN-Korea Investment Agreement, Articles 3, 4; AANZFTA, Chapter 11, Article 4; ASEAN-India Investment Agreement, Article 3; Thailand-Australia FTA (2004), Article 904; Thailand-New Zealand FTA (2005), Article 9.6; Japan-ASEAN EPA (2008), Article 51.3 (after the entry into force of the first protocol in 2020).

[33] Each of these treaties exclude pre-establishment NT and MFN from the scope of the ISDS provisions in those agreements by allowing claims to be brought by investors only in relation to loss or damage suffered "with respect to the management, conduct, operation or sale or other disposition" of a covered investment (c.f. admission or establishment): ACIA, Article 32(a); ASEAN-Korea Investment Agreement, Article 18(1); AANZFTA, Chapter 11, Article 20(a); ASEAN-India Investment Agreement, Article 20(1); Japan-Thailand EPA, Article 106(15)(c); Japan-ASEAN EPA (2008), Article 51.13(6) (after the entry into force of the first protocol in 2020).

[34] AANZFTA (in an annex to the investment chapter); ACIA (Article 17 and Annex 2); ASEAN-China Investment Agreement (Article 16); ASEAN-Hong Kong (China) Investment Agreement (Article 9 and Annex 2); ASEAN-India Investment Agreement (Articles 8(9) and 21); ASEAN-Korea Investment Agreement (Article 20); Australia-Thailand FTA (2004) (in an annex to the investment chapter); Canada-Thailand BIT (1997) (Article XVII); Japan-Thailand EPA (2007); and New Zealand-Thailand CEPA (preamble and Chapter 15.2). Articles 7 and 111 of the also contain language that seeks to reinforce the parties' commitment to the fight against corruption and discourage them from loosening their environmental or labour regulations in order to attract investment.

[35] Japan-Thailand EPA (2007), Article 111. For other examples, see Japan-Viet Nam BIT (2003), Article 21; Netherlands Model BIT (2018), Article 6(3); Argentina-United Arab Emirates BIT (2018), Article 12.

[36] Japan-Thailand EPA (2007), Article 7.

[37] Morocco-Nigeria BIT (2016), Article 18.

[38] See, e.g., EU-Canada CETA, Article 8.18(3); Brazil-Chile FTA (2018), Article 8.16.

[39] See, e.g., Belgium/Luxembourg-Colombia BIT (2009), Articles VII(5) and VIII(4).

[40] See, e.g., Chile-United States FTA (2003), Article 18.1.

[41] See, e.g. China-Peru FTA (2009), which states in the preamble that the State Parties "RECOGNIZE that this Agreement should be implemented with a view toward raising the standard of living, creating new employment opportunities, reducing poverty and […]".

[42] See, e.g. Australia-Indonesia CEPA (2019), Article 14.17; United States-Mexico-Canada Agreement (2018), Article 14.17; Brazil-Chile FTA (2018), Article 8.16.

[43] See Regulation of the Office of the Prime Minister on Work Relating to the Protection of International Investments B.E. 2562 (2019).