

นโยบายของรัฐในการดึงดูดการลงทุนทางตรงโดยใช้  
BIT เป็นเครื่องมือ : จุดสมดุลในการให้ความคุ้มครอง  
การลงทุน และการรักษาพื้นที่ทางนโยบายในการ  
พัฒนาประเทศควรอยู่ตรงไหน

Thailand and its Right to regulate : Overview of FDI in Thailand  
and How to strike a balance between Foreign Investor Protection  
and the State's Right to regulate

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# BIT

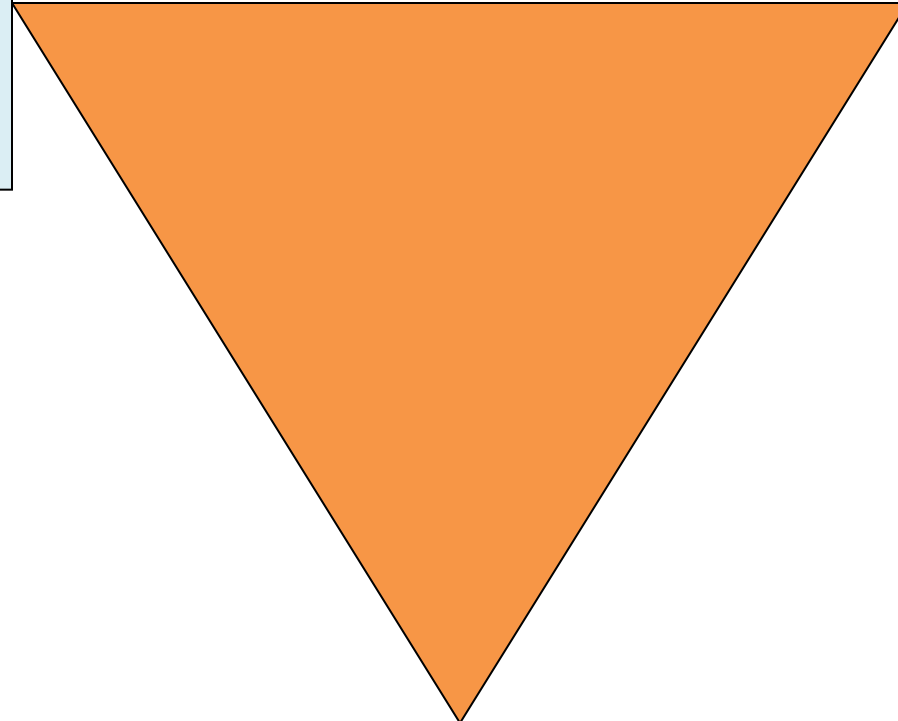
ประเทศส่งออก  
ลงทุน  
(Home Country)

outward  
investment

ประเทศรับการ  
ลงทุน  
(Host Country)

inward  
investment

นักลงทุน (Investors)  
Multinational Corporations



# BIT

- เป็นกลไกในการส่งเสริมและคุ้มครองการลงทุนของนักลงทุนไทยในต่างประเทศ
  - เป็นกลไกในการส่งเสริมและคุ้มครองการลงทุนของนักลงทุนต่างชาติในประเทศไทย
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- เป็นกลไกในการพัฒนาประเทศ (การพัฒนาอย่างยั่งยืน Sustainable Development)
  - เป็นกลไกในการให้สิทธิแก่นักลงทุนต่างชาติ

# BIT : สิทธิของนักลงทุน (Investor's Rights)

- สิทธิที่จะได้รับการคุ้มครอง และความปลอดภัยอย่างเต็มที่อย่างเต็มที่ (Full protection and security) ในประเทศที่ลงทุน
- สิทธิที่จะได้รับการปฏิบัติที่เป็นธรรม และเที่ยงธรรม (Fair and Equitable Treatment)
- สิทธิที่จะได้รับการปฏิบัติไม่น้อยกว่าคนชาติ หรือคนชาติอื่นๆ ที่ได้รับความอนุเคราะห์ยิ่ง (National Treatment/Most-Favored-Nation)
- สิทธิที่จะได้รับการคุ้มครองจากการเวนคืนและการชดเชยค่าเสียหายจากการเวนคืน (Expropriation and Compensation)
- สิทธิที่จะได้รับการชดเชยความสูญเสียจากเหตุการณ์รุนแรงที่เกิดในประเทศที่ลงทุน (Compensation for Damage or Losses)
- สิทธิในการโอนเงินและผลกำไรโดยเสรีในสกุลเงินที่ใช้ได้โดยเสรี (Free Transfers of Investments and Returns)
- สิทธิในการระงับข้อพิพาทโดยใช้กระบวนการอนุญาโตตุลาการ (ISDS : Investor-State Dispute Settlement)

# BIT : สิทธิของนักลงทุน (Investor's Rights)

## Article 2

### Admission, Protection and Treatment of Investments

(1) Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.

(2) The Treaty shall apply only to investments that have been specifically approved in writing by the competent authority, if so required by the laws and regulations of that Contracting Party.

## ข้อ 2

### การยอมรับ การคุ้มครอง และการปฏิบัติต่อการลงทุน

1. ภาคีสัญญาแต่ละฝ่ายจะให้การส่งเสริมการลงทุนโดยผู้ลงทุนของภาคีสัญญาอีกฝ่ายหนึ่งในดินแดนของตน ให้มากที่สุดเท่าที่จะสามารถกระทำได้ และยอมรับการลงทุนเช่นว่านั้นตามกฎหมายและข้อบังคับของตน

2. สนธิสัญญานี้จะใช้บังคับเฉพาะกับการลงทุนที่ได้รับความเห็นชอบเป็นการเฉพาะเป็นลายลักษณ์อักษรโดยเจ้าหน้าที่ผู้มีอำนาจ หากกำหนดไว้เช่นนั้นโดยกฎหมายและข้อบังคับของภาคีสัญญานั้น

# BIT กลไกในการดึงดูดการลงทุนทางตรง?

- **Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite** (*Mary Hallward-Driemeier ,World Bank, DECRG, June 2003*)
- **Do BIT increase FDI in Developing countries?**
- **How Bilateral Investment Treaties Impact on Foreign Direct Investment to Developing countries?**

## 2015 WIR : New IIAs factor in safeguards for the right to regulate in the public interest

- New IIAs factor in safeguards for the right to regulate in the public interest
- IIAs with pre-establishment commitments are on the rise
- There were fewer new ISDS cases, with a continued high share of cases against developed States

## 2015 WIR offers an action menu for such reform : five main challenges

- Safeguarding the right to regulate for pursuing sustainable development objectives.
- Reforming investment dispute settlement.
- Promoting and facilitating investment.
- Ensuring responsible investment.
- Enhancing systemic consistency



# Safeguarding the right to regulate for pursuing sustainable development objectives

- IIAs can limit contracting parties' sovereignty in domestic policymaking.
- IIA reform therefore needs to ensure that such limits do not unduly constrain legitimate public policymaking and the pursuit of sustainable development objectives.
- IIA reform options include refining and circumscribing IIA standards of protection (e.g. FET, indirect expropriation, MFN treatment) and strengthening “safety valves” (e.g. exceptions for public policies, national security, balance of payments crises).

# Ensuring responsible investment

- Foreign investment can make a range of positive contributions to a host country's development, but it can also negatively impact the environment, health, labour rights, human rights or other public interests.
- Typically, IIAs do not set out responsibilities on the part of investors in return for the protection that they receive.
- IIA reform options include adding clauses that prevent the lowering of environmental or social standards, that stipulate that investors must comply with domestic laws and that strengthen corporate social responsibility.

# The right to regulate

The balance between investment protection and the right to regulate in the public interest :

- Most-favoured-nation (MFN) Treatment
- Fair and equitable treatment (FET)
- Indirect expropriation (Creeping expropriation)
- Performance requirements
- Pre-establishment treatment

# Most-favoured-nation (MFN) Treatment

- MFN clause aims to ensure a level playing field between investors of different foreign nationalities (UNCTAD, 2010b)
- Investors have invoked the MFN clause to benefit from higher protection standards than the one found in the base treaty : Investors “cherry picking” in the most advantageous clauses from different treaties concluded by the host State
- States will need to be careful that the desired effects of newly crafted treaty provisions are not obviated by the application of a broadly worded MFN clause.

# Fair and equitable treatment (FET)

- FET clause is designed to protect foreign investors from government misconduct not captured by other standards of protection
- Almost all ISDS cases to date have included an allegation of a FET breach
- There is a great deal of uncertainty concerning the precise meaning of the concept of FET – the notion of “fairness” and “equity” ?
- FET & Principle of customary international law “International minimum standard of treatment” ?
- FET Standard to protect investors’ “legitimate expectation” “ability to change investment-related policies or introduce new policies which have a negative impact on FDI” ?

# Indirect expropriation (Creeping expropriation)

- Indirect expropriation covers acts, or serie of acts, whose effects are “tantamount to” or “equivalent to” a direct formal taking
- Investor have used provisions on Indirect expropriation to challenge general non-discriminatory regulations that have had a negative effet on their investments
- Ex. : a ban or the imposition of restrictions on a certain economic activity on environmental or public health ground

# Public Policy & National security exceptions : Energy Charter Treaty (ECT)

## ARTICLE 24 EXCEPTIONS <sup>37</sup>

- (1) This Article shall not apply to Articles 12, 13 and 29.
- (2) The provisions of this Treaty other than
  - (a) those referred to in paragraph (1); and
  - (b) with respect to subparagraph (i), Part III of the Treatyshall not preclude any Contracting Party from adopting or enforcing any measure
  - (i) necessary to protect human, animal or plant life or health;
  - (ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that
    - (A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and
    - (B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or
  - (iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure
    - (A) has no significant impact on that Contracting Party's economy; and
    - (B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended,



## Public Policy Exceptions

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### Questions for consideration

1. Should you agree that there is a need to preserve the right to regulate (e.g. for public interest policies), what are the pros and cons of using public policy exceptions in this regard?
2. In your view, does the absence of public policy exceptions in an IIA create uncertainty as to whether legitimate policy interests other than investor protection are properly accounted for?
3. What issues should be considered when formulating a public policy exception clause in an IIA? Which public policy areas require particular attention in this regard?
4. Is the issue important enough to be considered as part of IIA reform (for future and/or existing IIAs)?



# Performance requirements : NORTH AMERICAN FREE TRADE AGREEMENT

## Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

# Performance requirements : NORTH AMERICAN FREE TRADE AGREEMENT

- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement;  
or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

# Pre-establishment treatment

## ความตกลงการค้าเสรีไทย-ออสเตรเลีย

### ข้อ 904 การปฏิบัติเยี่ยงคนชาติก่อนการจัดตั้ง

ในสาขาที่ระบุในภาคผนวก 8 และภายใต้เงื่อนไขและคุณสมบัติใดที่กำหนดไว้ด้านใน ภาคีแต่ละฝ่ายจะให้การปฏิบัติต่อผู้ลงทุนของภาคีอีกฝ่ายหนึ่งที่เป็นการอนุเคราะห์ที่ไม่ด้อยไปกว่าที่ภาคีนั้นให้ ในสถานการณ์คล้ายกันแก่ผู้ลงทุนของตนในการจัดตั้งหรือการได้มาซึ่งการลงทุนในอาณาเขตของตน

# BIT

ประเทศส่งออก  
ลงทุน  
(Home Country)

outward  
investment

ประเทศรับการ  
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นักลงทุน (Investors)  
Multinational Corporations

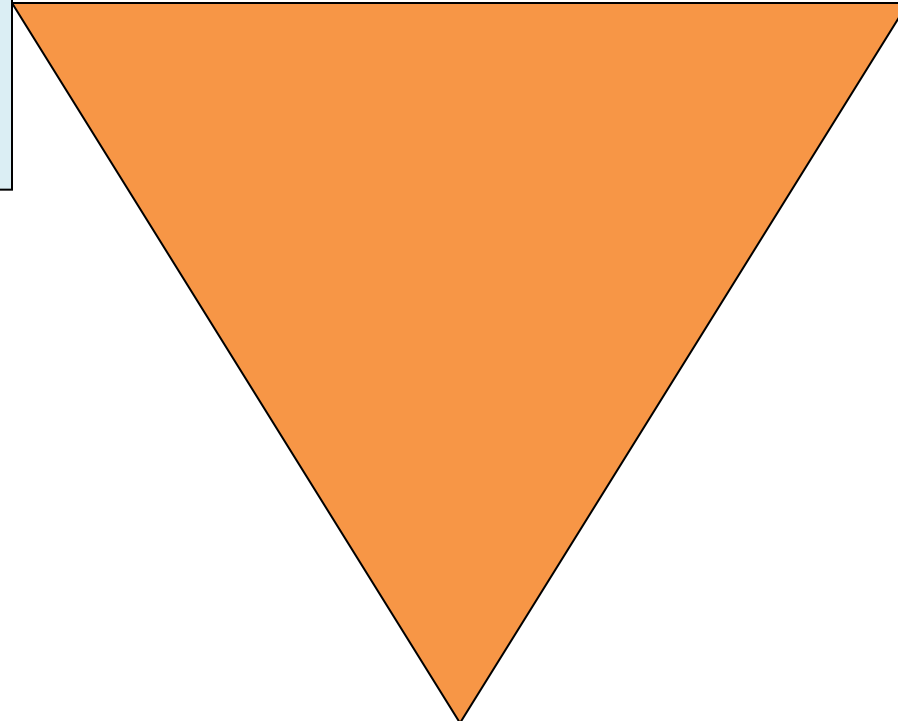


Table 1: Basic Elements of a Balanced IIA

	Pre-establishment	Post-establishment
Foreign investor	<div>■ rights</div> <div>■ obligations</div>	<div>■ rights</div> <div>■ obligations</div>
Host state	<div>■ rights</div> <div>■ obligations</div>	<div>■ rights</div> <div>■ obligations</div>
Home state	<div>■ rights</div> <div>■ obligations</div>	<div>■ rights</div> <div>■ obligations</div>

Source : UNCTAD

# Potential Foreign Investor Rights and Obligations

Foreign Investor	Pre-establishment	Post-establishment
Rights	<ul style="list-style-type: none"> <li>■ Scope of right of establishment</li> <li>■ National treatment</li> <li>■ MFN</li> <li>■ Minimum standards of treatment/transparency</li> <li>■ Performance requirements</li> </ul>	<ul style="list-style-type: none"> <li>■ National Treatment</li> <li>■ MFN</li> <li>■ Minimum standards of treatment/transparency</li> <li>■ Performance requirements</li> <li>■ Expropriation</li> <li>■ Repatriation, staffing</li> </ul>
Obligations	<ul style="list-style-type: none"> <li>■ Minimum standards in:                             <ul style="list-style-type: none"> <li>● Environmental impact assessment</li> <li>● Anti-corruption</li> <li>● Full disclosure of purposes, history</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>■ Minimum standards in:                             <ul style="list-style-type: none"> <li>● Environmental management</li> <li>● International environmental standards</li> <li>● Anti-corruption</li> <li>● Corporate accountability</li> <li>● Compliance with national laws</li> <li>● Basic human rights</li> <li>● Core labour standards</li> </ul> </li> <li>■ Liability of the investor and investment</li> </ul>
-common minimum floor		

Source : UNCTAD

# Potential Host State Rights and Obligations

Host State	Pre-establishment	Post-establishment
Rights	<ul style="list-style-type: none"> <li>■ Maintain development priorities</li> <li>■ Performance requirements (market disciplines)</li> <li>■ To establish high environmental/human health standards</li> </ul>	<ul style="list-style-type: none"> <li>■ Maintain development priorities as agreed, under law</li> <li>■ Right to regulate in public interest (public welfare, environment, etc.)</li> </ul>
Obligations	<ul style="list-style-type: none"> <li>■ Establish transparent legal and administrative processes</li> <li>■ Anti-corruption</li> <li>■ Not to reduce environmental standards to attract investment</li> <li>■ Prevent subversion of MEAs, international labour standards</li> </ul>	<ul style="list-style-type: none"> <li>■ Not to reduce standards to maintain investment</li> <li>■ Non-discrimination, pay for expropriated property, due process, etc.</li> <li>■ Prevent subversion of MEAs, international labour standards</li> </ul>

Source : UNCTAD

# Potential Home State Rights and Obligations

Home state	Pre-establishment	Post-establishment
Rights	■ Promote agreed terms	■ Assist investors
		■ Subrogation of rights
		■ State-state disputes
Obligations	■ Respect for basic norms of sustainable development	■ Respect for basic norms of sustainable development
	■ Anti-corruption obligations	■ Ensure impediments to liability of investor are removed
	■ Assist host states in institutional development	■ Anti-corruption obligations

Source : UNCTAD