Full Research Report

The Legal Problems of the Intersection between Tax Measures and International Investment Law: A Comparative Analysis with Tax-Related Disputes under the World Trade Organization and Recommendations for Thailand regarding Tax Policies, the Enactment of Tax Law, Tax Administration and the Dispute Resolution

By

Dr Patharawan Chongchit

Submitted to

The Research Promotion Committee

Faculty of Law, Thammasat University

May 2025

Abstract

Tax sovereignty is one of the most fundamental public policies of states; nevertheless, a state's authority to regulate taxation is constrained by both domestic law and public international law. In the area of public international law, nations' tax sovereignty is constrained not only by international trade and tax treaties but also by international investment agreements (IIAs), complicating tax policy design and increasing the number of tax-related conflicts across various jurisprudences. Previous research by the author examined the intersection of tax sovereignty and international trade rules under the World Trade Organization (WTO); however, similarities and differences can be drawn between the two, causing additional complications for tax policymakers, legislators, administrators, and adjudicators around the world.

To increase awareness of the intersections between tax sovereignty, international trade, and international investment laws, as well as the limitation of Thailand's tax sovereignty under these agreements, this study analyses the legal issue of the intersection between tax measures and IIAs, as well as the ramifications for Thailand's tax regime. By employing a comparative analysis with the previous research, this study examines the justification for the limitation of tax sovereignty under IIAs, the extent of the regulatory space afforded to states in investment treaty standards, exception clauses, tax carve-out clauses that are provisions that remove all or some tax measures from the scope of the treaty, and dispute resolutions applicable to tax-related disputes, as well as the jurisprudence of investment tribunals in cases involving tax measures such as, the enactment of tax law, tax administration and the dispute resolution. The limitations of tax sovereignty under Thailand's IIAs are then examined in light of this context. A comparative study yields four major conclusions and a two-fold recommended course of action.

First, through an examination of international political and economic theory, this research identifies neoliberalism as the prevailing ideology of the post-World War II era, which prioritises economic liberalisation while constraining states' sovereignty to certain degree. In light of this ideology, both WTO rules and IIAs constrain states' ability to create and implement tax policies to some extent. However, while the WTO has a defined goal of balancing trade liberalisation with legitimate nations' right to regulate by limiting tax measures that restrict or distort international trade, the IIAs' goal is not consistent. The states' goal of improving IIAs' functions to achieve a balance between investment protection and sustainable development is only

found in a small number of IIAs, certain free trade agreements (FTAs) with an investment chapter and new-generation IIAs, whereas the majority of first-generation IIAs, which are still in force and dominate in terms of number, focus on investment protection.

Second, a comparative analysis of WTO agreements and IIAs demonstrates that WTO provisions limiting states' authority to regulate in taxation have a far greater scope than IIAs; nonetheless, as multilateral agreements, they are consistently interpreted and applicable to WTO members' tax measures by the WTO dispute settlement mechanism to balance between tax sovereignty and free trade. In contrast, the standards of protection applicable to domestic tax policies, the right to regulate exceptions, tax carve-out clauses, and investor-state dispute settlement (ISDS) for tax-related disputes under IIAs are fragmented, ranging from the pro-investor perspective to the pro-state perspective resulting in a lack of equilibrium between tax sovereignty and investment protection.

Third, a comparative analysis of tax-related disputes under the WTO and IIAs shows that tax-related issues under the WTO and IIAs revolve around domestic tax compliance and international economic law. Any sort of domestic tax measures such as, the enactment of tax law and regulations, tax administration as well the dispute resolution might be accused of violating the WTO, IIAs, or both. The features of tax measures that breach WTO agreements and IIAs are different depending on the criteria set by the relevant agreements. Despite their similarities, although WTO disputes are interstate, IIA disputes are between investors and states. The legal concepts asserted, and the nature of putative tax measures differ but may overlap. Discriminatory taxes were the most contested in the WTO, whereas the fair and equitable treatment standard and expropriation were the most challenged in ISDS. The WTO's remedy is to adjust domestic taxation or retaliation, while losing governments in ISDS are compelled to compensate foreign investors.

Fourth, a comparative review of Thailand's obligations under the WTO agreements and IIAs indicates that all sorts of Thai tax measures are governed by WTO rules and IIAs. While Thailand's obligations under the WTO agreements align with those of other WTO members, its obligations under IIAs differ significantly. In addition, while WTO standards require members to exercise their ability to use exceptions in good faith to defend legitimate interests, the majority of Thailand's IIAs include the right to regulatory exclusions. Furthermore, whereas tax disputes arising under WTO agreements must be addressed through the WTO dispute settlement system,

dispute resolution under Thailand's IIAs is fragmented. The majority of Thailand's IIAs provide international arbitration without a modified procedure similar to private commercial arbitration and without a particular mechanism for tax-related disputes. These traits pose significant hazards to tax policymaking, legislation, administration, and adjudication.

In light of the aforementioned findings, the recommendations made were twofold. This study recommends that both domestic and international methods are required to address the issues raised above. First, Thailand's tax policymakers, lawmakers, administrators, and adjudicators must consider IIAs and WTO laws while developing tax policies, formulating tax legislation, enforcing tax laws, and adjudicating tax disputes. Second, Thailand's investment treaty negotiators should think about how to provide a higher level of lawful regulatory independence while attracting long-term and high-quality foreign direct investment. Among the options offered in this research were improving the clarity of the concept of taxes, strengthening substantive investment safeguards, including the right to regulate exceptions and tax carve-out clauses, as well as a special mechanism for tax-related disputes in Thailand's IIAs. Recommendations will assist Thailand in avoiding adverse impacts and future disputes under the WTO and IIAs and preserve a balance between public and private interests and achieve sustainable development.

บทคัดย่อ

อำนาจอธิปไตยทางภาษีอากรเป็นหนึ่งในนโยบายสาธารณะขั้นพื้นฐานที่สำคัญที่สุดของรัฐ อย่างไรก็ตาม ในปัจจุบันเป็นที่ยอมรับว่าอำนาจอธิปไตยทางภาษีอากรของรัฐนั้นอาจถูกจำกัดภายใต้กฎหมายภายในประเทศและกฎหมายระหว่างประเทศได้ ในด้านกฎหมายระหว่างประเทศ อำนาจอธิปไตยทางภาษีอากรของรัฐนั้นไม่ได้ถูกจำกัดภายใต้สนธิสัญญาทางภาษีและการค้าระหว่างประเทศเท่านั้น แต่ยังถูกจำกัดภายใต้สนธิสัญญาคุ้มครองการลงทุนระหว่างประเทศด้วย อันมีผลให้การออกแบบนโยบายภาษี การออกกฎหมายภาษี การจัดเก็บและการบังคับใช้กฎหมายภาษี รวมทั้ง การระงับข้อพิพาททางภาษีอากรมีความซับซ้อน นอกจากนี้ยังปรากฏว่า ข้อพิพาทที่เกี่ยวกับมาตรการทางภาษีภายใต้ข้อตกลงทางเศรษฐกิจระหว่างประเทศมีแนวโน้มมากขึ้นเรื่อยๆ งานวิจัยก่อนหน้านี้โดยผู้เขียนได้ศึกษาวิเคราะห์ความสัมพันธ์ระหว่างอำนาจอธิปไตยทางภาษีอากรของรัฐและกฎหมายการค้าระหว่างประเทศภายใต้องค์การการค้าโลก อย่างไรก็ตาม แม้ว่ากฎหมายการค้าระหว่างประเทศและกฎหมายการลงทุนระหว่างประเทศจะมีหลักการบางประการที่คล้ายคลึงกันแต่ก็ยังมีความแตกต่างกันในลักษณะที่สำคัญหลายประการทำให้เกิดความยุ่งยากเพิ่มเติมสำหรับผู้กำหนดนโยบายภาษี ผู้ออกกฎหมาย หน่วยงานจัดเก็บภาษี และการระงับข้อพิพาททางภาษีในประเทศต่างๆทั่วโลก

เพื่อเพิ่มความตระหนักถึงความสัมพันธ์ระหว่างอำนาจอธิปไตยทางภาษีอากรของรัฐกับกฎหมายการค้าระหว่างประเทศ และกฎหมายการลงทุนระหว่างประเทศ ตลอดจนข้อจำกัดอำนาจอธิปไตยทางภาษีอากรของรัฐภายใต้กฎหมายระหว่างประเทศเหล่านี้ รายงานวิจัยฉบับนี้มีวัตถุประสงค์ในการวิเคราะห์ประเด็นทางกฎหมายเกี่ยวกับปัญหาความสัมพันธ์ระหว่างอำนาจอธิปไตยทางภาษีอากรของรัฐและสนธิสัญญาคุ้มครองการลงทุนระหว่างประเทศและผลกระทบต่ออำนาจอธิปไตยทางภาษีอากรของประเทศไทย โดยใช้วิธีการวิเคราะห์เปรียบเทียบกับผลการวิจัยฉบับก่อนหน้าเรื่องปัญหาความสัมพันธ์ระหว่างอำนาจอธิปไตยทางภาษีอากรของรัฐและกฎหมายการค้าระหว่างประเทศภายใต้กรอบขององค์การการค้าโลก ในรายงานวิจัยฉบับนี้ ผู้เขียนศึกษาเหตุผลในการจำกัดอธิปไตยด้านภาษีภายใต้สนธิสัญญาคุ้มครองการลงทุนระหว่างประเทศ ขอบเขตการจำกัดอำนาจอธิปไตย ข้อยกเว้นทั่วไป ข้อยกเว้นเฉพาะสำหรับมาตรการทางภาษีอากร และการระงับข้อพิพาททางการลงทุนที่เกี่ยวข้องกับมาตรการภาษีอากร รวมถึงคำชี้ขาดของอนุญาโตตุลาการการลงทุนที่เกี่ยวข้องกับมาตรการภาษีอากรอันได้แก่ กฎหมายภาษี การจัดเก็บภาษีและการระงับข้อพิพาททางภาษีอากร รวมทั้ง ข้อจำกัดของอธิปไตยทางภาษีอากรภายใต้สนธิสัญญาคุ้มครองการลงทุนระหว่างประเทศของประเทศไทย โดยวิเคราะห์เปรียบเทียบกับผลการวิจัยฉบับก่อนหน้าเรื่องปัญหาความสัมพันธ์ระหว่างอำนาจอธิปไตยทางภาษีอากรของรัฐและกฎหมายการค้าระหว่างประเทศภายใต้กรอบขององค์การการค้าโลก การศึกษาวิเคราะห์เปรียบเทียบนำมาสู่ข้อสรุปที่สำคัญสี่ประการและข้อเสนอแนะดังต่อไปนี้

ประการแรก จากการศึกษาทฤษฎีเศรษฐศาสตร์การเมืองระหว่างประเทศ พบว่าเหตุผลสำหรับการจำกัดอำนาจอธิปไตยทางภาษีอากรของรัฐภายใต้กฎหมายการค้าระหว่างประเทศและกฎหมายการลงทุนระหว่างประเทศมีที่มาจากแนวคิดเสรีนิยมใหม่ซึ่งเป็นแนวคิดที่มีอิทธิพลต่อระบบเศรษฐกิจโลกในช่วงหลังสงครามโลกครั้งที่ 2 ภายใต้แนวคิดนี้องค์การการค้าโลกได้ถูกจัดตั้งขึ้นเพื่อเปิดเสรีการค้าระหว่างประเทศ โดยขจัดอุปสรรคทางการค้าที่เกี่ยวกับภาษีศุลกากรและไม่ใช่ภาษีศุลกากรที่ก่อให้เกิดการบิดเบือนและกีดกันทางการค้าโดยยังคงคำนึงถึงการสร้างสมดุลระหว่างการเปิดเสรีทางการค้ากับนโยบาย

สาธารณะขั้นพื้นฐานที่สำคัญของรัฐ ในทางตรงข้ามสนธิสัญญาคุ้มครองการลงทุนส่วนใหญ่ให้ความสำคัญกับการคุ้มครองการลงทุน ในขณะที่เป้าหมายในการสร้างความสมดุลระหว่างการคุ้มครองการลงทุนและนโยบายสาธารณะขั้นพื้นฐานที่สำคัญของรัฐพบได้ในสนธิสัญญาคุ้มครองการลงทุนจำนวนเล็กน้อยเท่านั้น

ประการที่สอง จากการศึกษาเปรียบเทียบข้อจำกัดอำนาจอธิปไตยทางภาษีของรัฐภายใต้ความตกลงขององค์การการค้าโลกและสนธิสัญญาคุ้มครองการลงทุนพบว่าบทบัญญัติขององค์การการค้าโลกที่จำกัดอำนาจอธิปไตยในทางภาษีอากรของรัฐนั้นมีขอบเขตกว้างกว่าสนธิสัญญาคุ้มครองการลงทุนเนื่องจากเป็นข้อตกลงพหุภาคี แต่อย่างไรก็ตาม ความตกลงขององค์การการค้าโลกได้กำหนดข้อยกเว้นหลายประการซึ่งหลักการและข้อยกเว้นเหล่านี้ได้ถูกตีความและใช้บังคับกับมาตรการภาษีอากรของรัฐสมาชิกโดยองค์การระงับข้อพิพาทขององค์การการค้าโลกอย่างสอดคล้องกันและสร้างสมดุลระหว่างการค้าเสรีและอำนาจอธิปไตยในทางภาษีอากรของรัฐ ในทางตรงกันข้ามบทบัญญัติที่เกี่ยวกับหลักการคุ้มครองนักลงทุน ข้อยกเว้น และวิธีการการระงับข้อพิพาทระหว่างรัฐและนักลงทุนภายใต้สนธิสัญญาคุ้มครองการลงทุนมีความหลากหลายไม่เป็นอันหนึ่งอันเดียวกันตั้งแต่สนธิสัญญาที่มุ่งเน้นการคุ้มครองผลประโยชน์ของนักลงทุนไปจนถึงสนธิสัญญาที่มุ่งเน้นในการคุ้มครองประโยชน์ของรัฐ ทำให้เกิดปัญหาเกี่ยวกับการขาดดุลยภาพระหว่างอำนาจอธิปไตยทางภาษีและการคุ้มครองนักลงทุนต่างชาติ

ประการที่สาม จากการศึกษาเปรียบเทียบข้อพิพาทภายใต้องค์การการค้าโลกและสนธิสัญญาคุ้มครองการลงทุนพบว่าข้อพิพาทที่เกี่ยวกับภาษีอากรภายใต้องค์การการค้าโลกและสนธิสัญญาคุ้มครองการลงทุนเกิดขึ้นหลายรูปแบบ ภาษีทุกประเภทรวมทั้ง มาตรการทางภาษีต่างๆ ไม่ว่าจะเป็นกฎหมาย ระเบียบ ข้อบังคับ การกระทำทางฝ่ายปกครอง การระงับข้อพิพาททางภาษีอากรอาจถูกฟ้องร้องว่าขัดกับความตกลงทางการค้าภายใต้องค์การการค้าโลกและสนธิสัญญาคุ้มครองการลงทุนได้ทั้งสิ้น นอกจากนี้ ลักษณะของมาตรการทางภาษีอากรที่ขัดกับความตกลงขององค์การการค้าโลกและสนธิสัญญาคุ้มครองการลงทุนเกิดได้หลายกรณีขึ้นอยู่กับหลักเกณฑ์ที่กำหนดในความตกลงนั้นๆ โดยส่วนใหญ่มาตรการทางภาษีที่ขัดกับความตกลงทางการค้าขององค์การการค้าโลกได้แก่ มาตรการภาษีที่มีลักษณะเป็นการเลือกปฏิบัติอันขัดกับความตกลงทั่วไปว่าด้วยภาษีศุลกากร ในขณะที่หลักปฏิบัติที่เป็นธรรมและเท่าเทียม และหลักการเวนคืนเป็นสองหลักที่นักลงทุนฟ้องมาตรการทางภาษีอากรของรัฐภายใต้การระงับข้อพิพาทระหว่างนักลงทุนและรัฐ หากรัฐแพ้คดีภายใต้องค์การการค้าโลกรัฐต้องแก้ไขมาตรการทางภาษีอากรให้สอดคล้องกับพันธกรณี ในขณะที่ภายใต้สนธิสัญญาคุ้มครองการลงทุนรัฐต้องชดเชยค่าเสียหายให้กับนักลงทุนต่างชาติ

ประการที่สี่ จากการศึกษาเปรียบเทียบข้อจำกัดอำนาจอธิปไตยทางภาษีอากรของประเทศไทยภายใต้องค์การการค้าโลกและสนธิสัญญาคุ้มครองการลงทุนพบว่าในขณะที่ข้อจำกัดอำนาจอธิปไตยทางภาษีอากรของประเทศไทยภายใต้องค์การการค้าโลกเหมือนกับประเทศสมาชิกอื่นและประเทศไทยสามารถใช้ข้อยกเว้นโดยสุจริตเพื่อปกป้องผลประโยชน์อำนาจอธิปไตยทางภาษีที่ชอบด้วยกฎหมาย สนธิสัญญาคุ้มครองการลงทุนของประเทศไทยส่วนใหญ่ไม่มีข้อยกเว้นดังกล่าว นอกจากนี้ ในขณะที่ข้อพิพาทด้านภาษีที่เกิดขึ้นภายใต้ข้อตกลงองค์การการค้าโลกจะต้องการระงับผ่านองค์การระงับข้อพิพาทขององค์การการค้าโลกแต่การระงับข้อพิพาททางภาษีภายใต้สนธิสัญญาคุ้มครองการลงทุนของประเทศไทยมีความหลากหลาย สนธิสัญญาการลงทุนส่วนใหญ่ของประเทศไทยจัดให้มีอนุญาโตตุลาการระหว่างประเทศแบบดั้งเดิมในลักษณะคล้ายคลึงกับ

รูปแบบการระงับข้อพิพาทระหว่างเอกชนกับเอกชนและไม่มีกลไกเฉพาะสำหรับข้อพิพาทที่เกี่ยวข้องกับภาษี ลักษณะเหล่านี้ก่อให้เกิดความเสี่ยงอย่างมากต่อการกำหนดนโยบายภาษี การบัญญัติกฎหมาย การบริหารจัดเก็บภาษี และการตัดสินคดี

จากผลการศึกษาข้างต้น รายงานวิจัยฉบับนี้นำเสนอข้อเสนอแนะสองประการ ได้แก่วิธีการทั้งในประเทศและต่างประเทศเพื่อแก้ไขปัญหาที่ยกมาข้างต้น ประการแรก ผู้กำหนดนโยบายภาษีของประเทศไทย ผู้บัญญัติกฎหมาย หน่วยงานบริหารจัดเก็บภาษี และผู้ตัดสินคดีภาษีควรพิจารณาข้อจำกัดอำนาจอธิปไตยทางภาษีอากรประกอบการกำหนดนโยบายภาษี กฎหมายภาษี การบังคับใช้กฎหมายภาษีและการระงับข้อพิพาททางภาษีอากร ประการที่สอง ผู้เจรจาสนธิสัญญาการลงทุนของประเทศไทยควรคำนึงถึงวิธีการในการสงวนอำนาจอธิปไตยทางภาษีอากรในระดับที่สูงขึ้นในขณะที่ดึงดูดการลงทุนโดยตรงจากต่างประเทศในระยะยาวและมีคุณภาพสูง โดยการปรับปรุงความชัดเจนของคำจำกัดความของมาตรการภาษีอากรที่ถูกจำกัดภายใต้สนธิสัญญาการลงทุนระหว่างประเทศ หลักการคุ้มครองนักลงทุน ข้อยกเว้นทั่วไป ข้อยกเว้นเฉพาะสำหรับมาตรการภาษีอากร ตลอดจนกลไกพิเศษสำหรับข้อพิพาทที่เกี่ยวข้องกับภาษีในสนธิสัญญาการลงทุนของประเทศไทย ข้อเสนอนี้สามารถเป็นแนวทางให้ประเทศไทยป้องกันข้อพิพาทภายใต้องค์การการค้าโลกและสนธิสัญญาการลงทุนระหว่างประเทศอันอาจเกิดขึ้นในอนาคต รวมทั้ง สร้างดุลยภาพระหว่างอำนาจอธิปไตยทางภาษีอากรอันเป็นนโยบายสาธารณะขั้นพื้นฐานที่สำคัญของรัฐ และการคุ้มครองการลงทุนเพื่อนำไปสู่การพัฒนาที่ยั่งยืนต่อไป

Table of Contents

List of Abbreviations	
AI	Artificial Intelligence
AB	Appellate Body
ACIA	ASEAN's Comprehensive Investment Agreement
ADA	Anti-Dumping Agreement
ADR	Alternative Dispute Resolution
AoA	Agreement on Agriculture
ASEAN	Association of Southeast Asian Nations
BEPS	Base Erosion and Profit Shifting
BOI	Board of Investment
CEPAs	Comprehensive Economic Partnership Agreement
CIL	Customary International Law
CSR	Corporate Social Responsibility
CVA	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement)
DTA	Double Tax Agreement
EC	European Communities
EEC	Eastern Economic Corridor
EPA	Economic Partnership Agreement
EU	European Union
FCN	Treaties of Friendship, Commerce, and Navigation
FET	Fair and Equitable Treatment Standard
FPS	Full Protection and Security
FTA	Free Trade Agreement
G20	Government 20
GATS	General Agreement on Trade and Service
GATT	General Agreement on Tariffs and Trade
GST	Good and Service tax
IEAT	Industrial Estate Authority of Thailand
IIA	International Investment Agreement
ICSID	International Centre for Settlement of Investment Disputes
IGO	International Governmental Organization

IMF	International Monetary Fund
IPE	International Political Economy
ISDS	Investor-State Dispute Settlement
ITO	International Trade Organization
MFN	Most-Favoured-Nation
MNCs	Multinational Companies
MST	Minimum Standard of Treatment of Aliens
NAFTA	North American Free Trade Agreement
NPM	Non-Precluded Measures
NT	National treatment
OECD	Organisation for Economic Co-operation and Development
PIL	Public International Law
PDMO	Public Debt Management Office
RCEP	Regional Comprehensive Economic Partnership
SDGs	Sustainable Development Goals
SEPO	State Enterprise Policy Office
TIP	Treaties with Investment Provisions
TNCs	Transnational Companies
TPRM	Trade Policy Review Mechanism
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Trade and Development
US	United States
VAT	Value Added Tax
WCO	World Customs Organization
WTO	World Trade Organization

List of Figures/Tables

Chapter 1

Introduction to the Research

1.1 Background and Significance of the Problem

Since the end of World War II, globalisation has made tax policy formulation more complicated. As presented in the author's previous research on the intersection between taxation and international trade rules under the World Trade Organization (WTO), there are several ways in which WTO rules intersected with states' tax measures[1] and, in some cases, created tax-related disputes under WTO jurisprudence.[2] Aside from WTO frameworks, a number of states have concluded international investment agreements (IIAs),[3] which have created another possible interference of international investment norms on states' domestic tax measures.[4] As will be discussed in more detail in the research, international trade and investment are part of globalisation;[5] however, similarities and differences can be drawn between the two, causing additional complications for tax policymakers, legislators, administrators, and adjudicators around the globe. Without policy coherence between tax and international investment laws, it may even lead tax-related disputes under the international investment framework. This research addresses the legal issue of the intersection between tax sovereignty and IIAs and their implications for

---

1 In this research, the term 'tax measures' encompass all forms of tax legislation, tax administrative actions, and tax dispute resolutions.

2 Patharawan Chongchit, *An Analysis of Tax-Related Disputes under the World Trade Organization Jurisprudence: Lessons Learnt and Recommendations for Thailand's Tax Policy Makers, Legislators, Administrators, and Adjudicators* (Full Research Report, Faculty of Law, Thammasat University, 2022) 41-82.

3 In this research, the term 'international investment agreements (IIAs)' encompass bilateral investment agreements (BITs), international economic agreements (IEA) with investment chapters, free trade agreement (FTAs) with investment chapter and international economic partnership (IEP) with investment chapters.

4 For previous literatures on the intersection between taxation and international investment law, see, e.g., Thomas W. Wälde and Abba Kolo, 'Coverage of Taxation Under Modern Investment Treaties' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008) 305-362; Julien Chaisse, 'Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?' (2016) 35 *Virginia Tax Review* 149-222; Pasquale Pistone, 'General Report' in Michael Lang, et al., *The Impact of Bilateral Investment Treaties on Taxation* (IBFD, 2017) 1-41; Julien Chaisse and J. Kirkwood, 'Foreign Investors vs. National Tax Measures: Assessing the Role of International Investment Agreements' in Irma Johanna Mosquera Valderrama, Dries Lesage and Wouter Lips (eds), *Taxation, International Cooperation and the 2030 Sustainable Development Agenda* (Springer Nature, 2021) 149-169.

5 World Trade Organization (WTO), 'Trade and Foreign Direct Investment' (Press Releases, Press/57, 9 October 1996 < https://www.wto.org/english/news_e/pres96_e/pr057_e.htm> accessed 1 May 2025. (The WTO states that '[t]he keen interest in FDI is also part of a broader interest in the forces propelling the ongoing integration of the world economy, or what is popularly described as "globalization"').

Thailand's tax system. The comparative analysis with the previous research's findings will expand the understanding of the intersections between tax, international trade and international investment laws and the country's role in them. Additional recommendations will help Thailand's tax policymakers, legislators, administrators, and adjudicators to avoid undesired effects and future disputes under IIAs.

Similar to the intersection between tax and trade, the significance of the intersection between tax and investment stems from the fact that tax is a major source of most governments' revenues, but it is a cost for exporters, importers, traders and investors.[6] Accordingly, a government's tax policies and tax measures can positively or negatively affect cross-border trade and investment (as well as other economic activities).[7] Thus, most first generation IIAs contain substantive legal provisions that aim to protect, liberalise, promote and facilitate foreign direct investment from capital exporting countries to capital importing countries.[8] In a nutshell, substantive provisions under IIAs protect investors from unfair or illegitimate actions of capital importing countries (also called 'host states') that are detrimental to or have damaging effects on foreign investments.[9] Accordingly, disputes arising under the IIAs encompass claims initiated by foreign investors against host states' actions and/or regulatory measures (such as measures relating to environmental, public health, and tax) breach investment treaty norms,[10] similar to trade-disputes under the WTO frameworks (discussed in the previous research).

---

6 Michael Daly, *The WTO and Direct Taxation* (WTO Discussion Paper No 9, 2005) 1-29; Michael Daly, *Is the WTO a World Tax Organization? A Primer for WTO Rules for Policy Makers* (IMF, 2016); Vallespinos, Martin 'Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO' (2020) 40 *Virginia Tax Review* 93-174.

7 For economic theory on taxation and foreign direct investment, see, OECD, *Tax Effects on Foreign Direct Investment –Recent Evidence and Policy Analysis* (OECD Publishing, 2007) 45-65.

8 As will be discussed in more details in this research, the objective and purpose of IIAs are often expressed in the treaty preambles. However, it should note that since IIAs are based on bilateral and regional agreements; the objectives and substantive provisions under each may be drafted differently. However, the common policy goals indicated in most first-generation BITs are to protect, liberalise and promote foreign investment, see, e.g., *Thailand - United Arab Emirates BIT* (2015), preamble, paras 1-2 (states that both parties desire 'to create conditions favorable for fostering greater investment by investors of one Contracting Party in the territory of the other Contracting Party.' The second paragraph further states that both parties recognize 'that the encouragement and reciprocal protection of such investment, made in accordance with the law and regulations of the host Contracting Party, will be conductive to the stimulation of individual business initiatives and will increase prosperity in both countries.').

9 As will be further discussed in the research, the ways in which treaty norms are drafted may vary because the treaties are derived from bargaining powers between capital-exporting countries and capital-importing countries. In addition, investment protection norms may be drafted as different typologies under different treaties.

10 But note that some investment cases involved both tax and non-tax measures, see, e.g., *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Final Award)* (ICSID Arbitral

Despite the similarities, several differences can be drawn between international trade and investment systems,[11] creating complexity for tax policy makers. While international trade concerns importing and exporting goods (including trade in services and trade-related intellectual property) between nations,[12] international investment concerns the transfer of ownership of financial and assets from one country to another.[13]In the post-World War II era , capital often flew from private sectors (often the multinational companies [MNCs] or transnational companies [TNCs]) of capital exporting countries (often developed countries, particularly the United States (US)[14]to capital importing countries (often developing countries).[15] Thus, the rationale of first-generation bilateral investment treaties (BITs) was to protect the overseas investment of capital exporting countries against 'the interventionist policies' of capital importing countries[16]rather than to promote multilateral trade and sustainable development[17] as the WTO frameworks.

Against this rationale, the obligations of host governments under IIAs are also different from WTO rules. First, due to the failures of multilateral investment frameworks (as will be further discussed in this research), the international investment system has operated based on bilateral and regional agreements rather than multilateral agreements, as the WTO. Second, while WTO rules

---

Tribunal, Case No. ARB/10/7, 8 July 2016) paras 96-132. In this case, Philip Morris challenged Uruguay's new rules on cigarette packaging as well as increases to tobacco taxes as breaches of the FET standard and indirect expropriation.

11 Mann, Howard, *The Right of States to Regulate and International Investment Law* (Paper presented at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Contexts, Geneva, 6–8 November 2002) 6.

12 Amita Narlikar, Martin Dauntion and Robert M Stern, 'Introduction' in Amita Narlikar, Martin Dauntion and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 3.

13 Rober Grosse, 'The Bargaining Theory and the Obsolescing Bargain' in Rober Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005) 273–289.

14 Ibid.

15 But note that in 2024, the United States was the top FDI destination, followed by China, Canada and Brazil. At the same time, the United States was also the largest source of FDI outflows, followed by Germany, Japan, China and the United Kingdom followed, see, OECD, *FDI in Figures* (October 2024), 1-3.

16 For historical development of IIAs, see Kenneth J Vandevelde, 'The Political Economy of Bilateral Investment Treaties' (1998) 92 (4) *The American Journal of International Law* 621-641; Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12(1) *UC Davis Journal of International Law and Policy* 157-194; Kenneth J Vandevelde, 'The Liberal Vision of the International Law on Foreign Investment' in C L Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essay in Honour of Muthucumoraswamy Sornarajah* (Cambridge University Press, 2016) 43.

17 Note that some RTAs and FTAs indicate sustainable development in the preambles, such as the *North American Free Trade Agreement* (*NAFTA)*, states that it 'recognize the promotion of sustainable development while ensure a predictable commercial framework for business planning and investment'.

contain principles as well as exception clauses to promote sustainable development, most first-generation IIAs provide investment protection norms but lack the right to regulate exceptions, as they particularly operate to induce foreign investment. Third, trade disputes under the WTO affect not only goods or services originating from a WTO member which is a party to the disputes, but also those originating from other WTO members. However, most investment disputes affect a specific foreign investor,[18] rather than investors at large.[19] Fourth, the remedies in the WTO and investor–state disputes are also different. While the remedy for a trade dispute usually requires the losing states to modify the domestic laws and regulations (such as tax measures and/or tariff rate for the goods or services under dispute), the remedy under the IIAs typically takes the form of compensation for a specific investor.[20]

Globally, tax-related disputes arising under IIAs have been increasing. The United Nations Trade and Development (UNCTAD) reports that approximately 165 ISDS cases have been initiated by investors challenging various tax-related measures.[21] As with other countries, Thailand is not only a WTO member but also a contracting party to several IIAs.[22] Aside from tax-related disputes under the WTO, as discussed in the previous research, Thailand allegedly breached of IIAs by foreign investors in two major cases. In the first case, Thailand was challenged by a German investor, claiming that the failure of the Thai Government to approve the toll hikes as contemplated in the concession contract (thus reducing the road's competitiveness), violated the investor's legitimate expectations and accordingly, constituted a breach of the fair and equitable treatment (FET) standard under the *Thailand– Germany BIT*.[23] In the second, Thailand was

---

[18] Christoph H Schreuer, 'Do We Need Investment Arbitration?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor–State Dispute Settlement System: Journey for the 21st Century* (Brill Nijhoff, 2015) 879 (Schreuer states that 'investment disputes, unlike trade disputes, are usually highly individualized').

[19] However, in some ISDS cases, such as claims against Argentina during its economic depression between 1998–2002, the government' measures effected several investors under the *US-Argentina* and other BITs (UNCTAD, *Investment Policy Hub, Argentina: Cases as Respondent State* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/8/argentina/investor> accessed 1 May 2025.

[20] Jeff Waincymer, 'Balancing Property Rights in Expropriation' in Pierre Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law* (Oxford University Press, 2009) 275.

[21] UNCTAD, *Facts on Investor-State Arbitration in 2021: With a Special Focus on Tax-Related ISDS Cases* (IIAs Issue Note, No. 1, July 2022) 5-6.

[22] UNCTAD, *Investment Policy Hub, Thailand* <https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand> accessed 1 May 2025.

[23] *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand) (Final Award)* (UNCITRAL, 1 July 2009) paras 14.27– 14.28.

challenged by an Australian investor, claiming that the Thai Government's actions (in relation to decision to renew license, the order to close gold mine, and the Prime Minister's order suspending all gold mining operations and other gold mining activities in Thailand) constituted unlawful expropriations under the *Thailand–Australia BIT*.[24] Although ISDS claims against Thailand's tax measures have not yet been raised, a review of the literature suggest that the legal issue arising from the intersection between domestic taxation and international investment laws is worthy of critical analysis.

Thus, the intersection between tax measures and IIAs is a critical issue in the global economic system. As a capital-importing country and a contracting party to several IIAs, it is important for Thailand's tax policymakers, legislators, administrators, and adjudicators to take the intersection between tax and international investment law into consideration. The present research will elaborate on the interactions between tax, trade, and investment regimes and their implications for Thailand. Together with the previous research findings, the additional recommendations proposed in this research would add value to Thailand's tax policymakers, legislators, administrators, and adjudicators for preventing future tax-related disputes that may be raised under IIAs.

1.2 Research's Objectives and Questions

The main objective of this research is to elucidate the differences and similarities of the interaction between tax measures and international investment law on the one hand, and the interaction between tax measures and international trade laws on the other hand. It also seeks to provide recommendations on what Thailand's tax policymakers, legislators, administrators, and adjudicators should take into consideration in formulating tax policy, tax law, and implementation law to prevent future disputes under the investor-state dispute settlement (ISDS). To provide a comparative view of the author's previous research on the intersection between tax and international trade rules under the WTO, the sub-research questions are formulated as follows:

---

[24] *Kingsgate Consolidated Ltd v. The Kingdom of Thailand (PCA Case No. 2017-36).* The proceedings to be kept confidential. Details are available at Australian Stock Exchange (ASX), Kingsgate Consolidated Limited ASX Announcement (10 November 2017) <https://www.asx.com.au/asxpdf/20171110/pdf/43p3tbzmrgdhk4.pdf> accessed 1 May 2025.

First, this research will examine the questions of why and to what extent international investment treaty law interferes with the domestic tax policies and tax laws of states.

Second, this research will examine the questions of which investment protection norms under IIAs are applicable to domestic tax policies and the laws of states and how these investment norms are enforced.

Third, this research will examine how tax-related disputes occur as a result of the intersection of tax and international investment treaty law and the key characteristics of tax-related disputes under the ISDS.

Fourth, this research will examine Thailand's policies and practices towards IIAs and ISDS, especially with respect to domestic tax measures and whether any of Thailand's measures were allegedly in breach of IIAs.

Fifth, based on the above findings, this research will conduct a comparative analysis and elucidate similarities and differences between tax-related disputes under the ISDS and WTO, as well as synthesis the lessons that can be learnt from both jurisprudences.

Finally, it will also discuss the implications of the findings for Thailand and propose additional recommendations for Thailand's tax policymakers, legislators, administrators, and adjudicators to take into consideration when to enact, implement, and enforce tax laws or adjudicate tax disputes to avoid future disputes under ISDS, thereby answering the main research questions.

1.3 Research Methodology

To achieve the research's objectives and answer the questions, this research employs both theoretical and empirical studies. Theoretical studies are used to gain an understanding of the underlying reasons for the intersection between tax and international investment law. Empirical studies, on the other hand, offer insights into the issue arising from the intersection between tax and international investment law. Additionally, a comparative research method will also be used to identify, analyse, and explain similarities and differences between the intersections between tax and international investment law on the one hand, and between tax and international trade law, on the other. Similar to the previous research, reliable and updated sources of evidence

are considered crucial elements; thus, the most thorough, meticulous, and up-to-date research possible has been planned and executed. Both primary sources and secondary documentary sources are used for analysis. Altogether, these methods will advance academic and practical viewpoints on the intersection between tax, international trade, and international investment laws.

1.4 Research Structure and Chapter Outlines

In parallel with previous research, this research is structured into six chapters. The beginning of each chapter outlines its research questions and methodology, while the end of each chapter summarises and discusses the main points raised as well as the contribution of each chapter's findings to the main research question.

Chapter 1 provides an overview of the research, including the background and significance of the research problem, research objectives, research questions, research methodology, research structure, chapter outlines, limitations, and expected benefits of the research to Thailand's tax policymakers, legislators, administrators, and adjudicators.

Chapter 2 provides an evolution of the theory, policy, and legal framework of the international investment system. As noted at the outset, similarities and differences can be drawn between international trade and investment systems. International political economy (IPE) ideologies are considered the most relevant theories used for the analysis of the intersection between tax and the international investment system, however, the evolution and economic rationales of each system are distinct. Thus, chapter 2 starts with the theory, policy and legal framework of the international investment system during the pre-World War II era which were dominated by the ideology of economic nationalism. This will be followed by the theory, policy and legal framework of the first generation IIAs during the post-World War II era which have been influenced by the neoliberalism ideology. Following this, this chapter will discuss the paradigm shift and reforms of international investment policy, which has been evolving from protecting investment to balancing the interests of host states and foreign investors, thus promoting sustainable development.

Chapter 3 explores the evolution of international investment law frameworks and their implications for domestic tax measures. This chapter explores the evolution of core investment protections under IIAs that are applicable to tax measures and public policy exceptions (including

tax carve-out provisions) under the first and new generations of IIAs. The key features of different methods of investment dispute resolutions (including domestic dispute resolutions, arbitrations under the International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID arbitrations, bilateral investment courts and other methods provided under the IIAs) and the consequences of the disputes if domestic tax measures are found to breach the IIAs are also discussed. This chapter also emphasises differences between the international investment system and the international trade system, particularly in relation to each system's substantive laws, public policy exceptions, and dispute resolutions.

Chapter 4 examines key tax-related disputes under the international investment law framework. By way of case studies, this chapter will show real-world examples of how international investment laws have interfered with domestic tax measures in past cases and the different ways such interference has occurred. In addition, this chapter will highlight the key characteristics of tax-related disputes in the international investment system. In this chapter, five main aspects will be explored: types of tax allegedly in breach of the IIAs, tax measures allegedly in breach of the IIAs, core investment protections at the issues, characteristics of domestic tax measures that were allegedly in breach of IIAs, and tax measures that have invoked exception clauses under IIAs (if any).

Chapter 5 examines Thailand's policies and practices towards IIAs and ISDS. Hereby, this chapter will start by overviewing the evolution of Thailand's investment policies and legal framework. This chapter then examines Thailand's existing IIAs, including those that without tax carve-out provisions and contain tax carve-out provisions, followed by an examination of different methods for resolving investor-state disputes under Thailand's IIAs. After that, the characteristics of ISDS disputes against Thailand that have been brought forth during settlements before the investment arbitral tribunal are discussed, as well as lessons that can be learnt from Thailand's past disputes.

Chapter 6 will provide a comparative analysis of these research findings with previous research on the intersection between tax and the WTO and will identify, analyse, and explain similarities and differences across jurisprudences. Based on the comparative study, this chapter will synthesise lessons that can be learnt from both jurisprudences and their implications for Thailand's tax system and will provides additional recommendations that may guide Thailand's

tax policymakers, legislators, regulators, or adjudicators to prevent future disputes under the ISDS, thereby answering the main research question.

1.5 Limitations of the Research

The issue of interference of international investment law rules on domestic tax measures has been addressed in numerous IIAs and ISDS case laws. To provide a comparative analysis, this research is limited to the analyses of five parallel aspects to the previous research: the rationale for and extent of interference of international investment law with tax policy and legal framework; core investment protections, public policy exceptions, and enforcement mechanisms; key characteristics of tax-related disputes under ISDS jurisprudence; Thailand's investment policies, existing IIAs and ISDS, and past ISDS disputes against Thailand. Based on this, this research will propose additional recommendations for Thailand's tax policymakers, legislators, administrators, and adjudicators to prevent future violations of the IIAs.

1.6 Expected Contributions

It is expected that this research will make an additional contribution to research in the fields of tax, international investment laws, and international trade law at theoretical, policy, and practical levels. At the theoretical level, this research sheds some light on the interplay between conventional tax theory and IPE theory and explains why tax policymakers should adopt IPE theory when formulating tax policies and laws that affect international trade and investment. At the policy level, this research explains why tax policymakers should take the country's trade and investment policies into consideration when formulating or designing tax policies and laws. At the practical level, this research highlights the importance of IIAs commitments in implementing, enforcing tax laws, or adjudicating tax disputes. Additional recommendations to be proposed could offer some guidelines for Thailand's tax policymakers, legislators, regulators, or adjudicators to prevent future investor-state disputes under the IIAs, making additional contributions to the fields of taxation, international investment law, and international trade law.

Chapter 2

Theoretical Basis of Tax Sovereignty and Its Intersection with International Investment Law

2.1 Chapter Introduction

Tax is one of the fundamental public policies of states; however, in the modern tax system, a state's right to regulate in the area of tax is constrained by both domestic and public international laws. In the realm of international economic law, tax sovereignty of nations is not only restricted by international trade[25] or tax treaties,[26] but also international investment treaties. To understand the intersection between tax sovereignty and international investment law, this chapter explores the theoretical basis of taxation sovereignty, including concept, history, political controversy, principles underlying a rational tax system; and the peculiarities of modern tax systems in the globalisation period, in which tax sovereignty are bound by both domestic and public international law. Following that, it discusses the differences in ideology underpinning the intersection of tax sovereignty and international investment law in the pre- and post-World War II periods. Then, a paradigm shift in international investment law and policy, as well as its impact on tax sovereignty, will be explored. Along with the primary findings, the concluding section will make some remarks about the complexities of the link between national tax sovereignty and international investment law, which may have implications for states, firms, traders, and investors.

2.2 Theoretical Basis of Tax Sovereignty

Tax is a key part of the state's sovereignty, referring to the power of a state to decide its own tax policies, enact its own tax laws, collect taxes from individuals and businesses, and adjudicate tax disputes inside its borders.[27] Although tax has been viewed as the main source of

---

25 For tax and the WTO, see *Chongchit* (n 2) 41-69.

26 For tax treaties, see, e.g., UNCTAD, *Taxation* (Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/16, United Nations, 2000) 7-18, 69-73.

27 For functions of states and public finance, see, e.g. Michael Taggart, 'The Nature and Functions of the States' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 101; Richard A. Musgrave and Peggy B. Musgrave, *Public Finance in Theory and Practice* (McGraw-Hill College, 1989) 3-21; Harvey S. Rosen, *Public Finance: Essay for the Encyclopaedia of Public Choice* (CEPS Working Paper No. 80, Princeton University, 2002) 1-30; Richard A Musgrave, *The Theory of Public Finance : A Study in Public Economy* (McGraw-Hill College, 1959)1-40.

income for governments throughout the world,[28] there is no global agreement on tax terminology, thus, tax definitions differ between each state's domestic laws and international legislation. Even within the multilateral legal framework, such as the WTO, the meanings of taxes vary amongst agreement.[29] This uncertainty has caused concerns among governments around the world regarding their obligations under public international law. To offer a foundation for study, this section begins with a discussion of the concepts, history, and political conflicts surrounding tax, which led to the adoption of prominent principles underlying a rational tax system. It then examined the unique characteristics of modern tax systems throughout the globalisation period, emphasising on the limitations of tax sovereignty while increasing taxpayer rights and protection under domestic and international laws.

2.2.1 Concepts, History and Political Controversy of Taxation

Tax has been an integral part of human society for thousands of years, stretching back to ancient civilisations like Egypt and Greece. Throughout history, taxes have been used to finance government operations, fund public goods, and redistribute wealth, serving the function of the state to care for their citizens 'from cradle to grave'[30] by providing education, pensions, medical services, and public utilities, as well as providing a safety net for the less fortunate so that they have food, shelter, and other necessities of life.[31]

As previously said, viewpoints differ on what exactly constitutes taxes. For example, in the 18th century, Adam Smith believed that tax is a compelled payment made by the government on individuals or businesses to finance the spending required for public welfare.[32] Currently, the Organisation for Economic Co-operation and Development (OECD) defines tax as 'compulsory, unrequited payments to the general government.'[33] According to the OECD, taxes are unrequited in the sense that the benefits supplied by the government to taxpayers are typically not proportional

---

28 OECD, *Global Revenue Statistics Database 2024* < https://www.oecd.org/en/data/datasets/global-revenue-statistics-database.html> accessed 1 May 2025.

29 See Chongchit (n 2) 41-69.

30 See Taggart (n 27) 101.

31 Ibid.

32 Jim Manis (ed), *An Inquiry into the Nature and Causes of the Wealth of Nations by Adam Smith* (The Electronic Classics Series Publication, The Pennsylvania State University, 2005) [edited of Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)] <https://www.rrojasdatabank.info/Wealth-Nations.pdf> accessed 1 May 2025.

33 OECD, *Tax* < https://www.oecd-ilibrary.org/taxation/tax/indicator-group/english_76e12892-en> accessed 1 May 2025.

to their payments.[34]However, it is generally accepted that what makes taxes unique is that they are obligatory levies that governments impose on the private sector in an unrequited (nonreciprocal) way; in other words, taxes are presumably collected for the benefit of taxpayers as a whole (to fund public expenditures), and each taxpayer's liability is independent of any specific benefit received. Regardless of the benefits received, taxpayers who neglect to pay taxes may face civil and criminal fines.[35]

But it should be noted that because taxes are dynamic in nature—for example, certain nations levy fees, charges, or contributions to support particular industries or sectors— whether they are regarded as taxes is still up for debate because of the probable relationship between benefits received and taxes paid. For example, according to the OECD methodology, compulsory social security contributions paid to the general government are also considered taxes.[36]In contrast, Mooij and Keen believe that such social security contributions should not be classified as taxes.[37] Some others, such as Taylor, interpret tax as a mandatory contribution from the individual to the government to cover expenses incurred in the common interest of everyone, with minimal regard for unique benefits granted.[38]

Back in ancient times, the first taxes were levied on harvests of grain, and real estate until being extended to other assets by the Pharaoh.[39] Later, during the Greek times, additional taxing forms were added, most notably tariffs or levies on imported products. Many types of consumption and direct taxes were developed in the early Roman era.[40] The Middle Ages saw the emergence of several direct levies and indirect taxes, including market fees, transit duties, and taxes on specific foods and beverages. These taxes were meant to be paid for in part by producers and tradesmen and in part by consumers. Later Middle Ages saw the introduction of various new direct taxes, as well as taxes on land and houses, in certain German and Italian cities.[41]

In the 18th century, taxes were a major source of political contention, and they remained a persistent issue in many countries' domestic policies. The American Revolution (1775 and 1783),

---

34 Ibid.
35 Ibid.
36 Ibid.
37 Ruud De Mooij and Michael Keen, 'Back to Basics Taxing Principles' (2014) 51 (4) *Finance & Development* 50.
38 Philip E. Taylor, *The Economics of Public Finance* (Macmillan, 1948) 236.
39 Daniel Rathbone, 'Egypt, Augustus and Roman Taxation' (1993) 4 *Cahiers du Centre Gustave Glotz* 81.
40 Ibid.
41 Ibid.

a rebellion of the American colonies against Great Britain, is a well-known example. The colonists refused to pay taxes imposed by a parliament in which they had no voice—hence the phrase, 'no taxation without representation.'[42] Another example is the French Revolution of 1789, in which the unequal distribution of the tax burden was a crucial element.[43] The evolutions were followed by wartime when many taxes were introduced in many countries, for instance, income tax and stamp duty were introduced in the Great Britain to fund enormous extra expenditure on the army and navy in the war against France occurred in 1793 .[44] These uprisings and wars led in an attempt to conceive good tax principles that underpin a rationale tax system, as discussed below.

2.2.2 Evolutions of Principles underlying a Rational Tax System

Due to revolutions and war, Adam Smith, an economist and philosopher, endeavored to organize the norms that should govern a sensible tax system. In his book, The Wealth of Nations (book V, chapter 2, 1776), Smith stated that taxation should adhere to four key principles: fairness, certainty, convenience, and efficiency.[45] These concepts have been reinterpreted over time, advanced further by subsequent economists, and have become the guiding principles of good tax policy in the majority of countries around the world.

According to Smith, fairness means that the subjects of each state should contribute to the support of the government in proportion to their respective abilities, that is, in proportion to the revenue that they receive under the state's protection. Second, the tax that each individual is required to pay should be certain and not arbitrary. The time of payment, the method of payment, and the amount to be paid should all be obvious and understandable to the contributor and everyone else. Third, every tax ought to be assessed at the time, or in the way in which it is most likely to be convenient for the contributor to pay it. Fourth, every tax should be designed to take and keep as little money out of people's pockets as possible, in addition to what it brings into the state's public budget.[46]

---

42 John Passant, 'Taxation and the American Revolution' (2017) 11(3) *Australasian Accounting, Business and Finance Journal* 20-29. See also, Chantal Stebbings, 'No Taxation without Representation: The Relationship between Taxes and Revolutions' in Peter H.J. Essers, *History and Taxation: The Dialectical Relationship between Taxation and the Political Balance of Power* (IBFD, 2022) 41-56.

43 Edgar Kiser and Joshua Kane, 'Revolution and State Structure: The Bureaucratization of Tax Administration in Early Modern England and France' (2001) 107(1) *American Journal of Sociology* 183-223.

44 Ibid.

45 Manis (ed) (n 32).

46 Ibid.

In practice, Smith's concepts were adopted into the British taxation system during the reign of William Pitt the Younger. Smith's principles were used to introduce new levies. According to British Parliament, the implementation of good tax principles resulted in the elimination of revenue theft and the reduction of administrative costs, which contributed to an increase in government revenue in 1792.[47] However, in 1793, Britain was at war with revolutionary France. Massive increases in military spending necessitated unprecedented borrowing and taxation, and as a result, taxation became regarded as a necessary cost of waging the war against Napoleon, with the private sector viewing tax as a patriotic responsibility.[48]

Following economic changes, numerous economists evaluated and advocated good tax concepts. The principle has been expanded to encompass equity and fairness (similarly situated taxpayers should be taxed similarly), certainty (the tax rules should clearly specify how the amount of payment is determined, when payment should occur, and how payment is made), convenience of payment (facilitating a required tax payment at a time or in a manner that is most likely convenient for the taxpayer is important), effective tax administration (costs to collect a tax should be kept to a minimum for both the government and taxpayers), information security (tax administration must protect taxpayer information from all forms of unintended and improper disclosure), simplicity (simple tax laws are necessary so that taxpayers understand the rules and can comply with them correctly and in a cost-effective manner), neutrality (minimizing the effect of tax law on a taxpayer's decisions about how to carry out a particular transaction or whether to engage in a transaction is important), and economic growth and efficiency (the tax system should not unduly impede or reduce the economy's productive capacity).[49] These ideas, combined with Smith's original tax principles, have served as guiding principles in the formation of tax policy in the vast majority of governments worldwide.

---

47 United Kingdom Parliament, *War and the Coming of Income Tax* < https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/taxation/overview/incometax/> accessed 1 May 2025.

48 Ibid.

49 OECD, *Fundamental Principles of Taxation in Addressing the Tax Challenges of the Digital Economy* (OECD Publishing, 2014) 29-32.

2.2.3 Characteristics of Modern Tax System: Limits of Tax Sovereignty and Increase of Taxpayers' Right

Though the above-mentioned principles are now used as a guiding concept in the formulation of tax policy in the majority of governments around the world, the adoption of such principles for tax laws and policies may vary from one country to the next depending on the provisions of each country's domestic law.[50] Furthermore, different countries may have different tax policies, tax laws, tax administration structures, and tax dispute resolution procedures depending on a variety of factors, including level of development and political, economic, and legal cultures.[51] Because of these differences, this section examines what modern tax systems have in common, particularly the limitations of tax sovereignty and the expansion of taxpayer rights and protections.

As previously noted, tax laws and policies differ slightly across nations. The differences can be noted between developed and developing countries. Some countries, particularly developing countries may primarily rely on domestic consumption taxes, such as value-added tax (VAT), while some industrialized countries often rely more on income taxes, or social contributions than do less developed nations.[52] In addition, sources of tax legislation differed across common law and civil law, as well as between federal and unitary states. Moreover, while many nations throughout the world saw a growing devolution of taxing powers to subnational governments in the final decade of the 20th century, each nation may have a distinct structure for its tax administration. Furthermore, even if administrative review and judicial appeals are the two main components of tax dispute resolution, the procedures may differ. For instance, certain nations offer alternative dispute resolution, or dispute prevention, as a means of settling domestic tax issues between tax authorities and taxpayers, while these mechanisms are absent in some countries.[53]

---

50 Vito Tanzi and Howell Zee, *Tax Policy for Developing Countries* (International Monetary Fund, 2001) 1-15.

51 See generally, Chris Evans, John Hasseldine, Andrew Lymer, Robert Carlton Ricketts, Cedric Sandford, *Comparative Taxation: Why Tax Systems Differ* (Fiscal Publications, 2017) 1-376.

52 OECD, *Global Statistics Revenue Database* <https://www.oecd.org/en/data/datasets/global-revenue-statistics-database.html> accessed 1 May 2025.

53 See generally, Pasquale Pistone, 'General Report' in Pasquale Pistone (ed), *Tax Procedure* (IBFD, 2020) 3-108.

Nevertheless, contemporary tax laws generally have the following features. First, in most countries, the power to tax now generally resides in parliamentary bodies, and consequently the authority of the state to levy taxes in an arbitrary fashion has been lost.[54] Second, the majority of taxes, with the exception of a few categories like land taxes, are self-assessment systems which place the responsibility on taxpayers to ensure tax return and other tax forms comply with taxation laws.[55] Third, taxes today are collected in money, not in goods, and fourth, the collection of taxes by outside contractors has been abolished. Fifth, because of the international trade treaties, in particular the WTO and free trade agreements (FTAs), there has been a decrease in the use of customs charges during the globalisation age, while many nations are depending more and more on alternative forms of tax. Sixth, not only revenue-raising but also the range of taxes has been implemented to achieve non-revenue-raising objectives in promoting social, economic, and environmental development, such as taxes to influence behaviour like tax incentives for investment, environmental taxes, health taxes, and carbon credits.[56] Currently, digitalisation, the expansion of e-commerce, buyer and seller anonymity, the ability to conduct business from offshore tax havens, the flow of digitised products, digital assets[57] and artificial intelligence (AI)[58] have fuelled the development of new types of taxes and new methods of tax administration.

The most essential element of the modern tax system is that states' taxing power can be evaluated by courts or tribunals, while taxpayers' rights and protections are becoming more widely recognised on both a local and international levels. On the domestic level, some countries provide for domestic mechanisms to examine the legitimacy of tax legislation,[59] such as constitution courts or tax ombudsman, to defend taxpayer rights.[60] In the field of public international law, tax, trade and investment treaties limit a state's ability to develop and implement tax law in various ways

---

54 See, Passant (n 42), 20-29.

55 Liam P. Ebrill, Michael Keen, and Victoria J. Perry, *The Modern VAT* (International Monetary Fund, 2001) 138-145.

56 United Nations, *Tax for SDGs* <https://www.undp.org/uzbekistan/projects/tax-sdgs> accessed 1 May 2025.

57 See, OECD (n 49).

58 See, European Parliament, *Artificial Intelligence Act* (2024); Julien Chaisse, 'We Must Pursue an AI Tax' (2024) *FDI Intelligence Magazine* 7.

59 Victor Thuronyi, *Tax Law Design and Drafting* (International Monetary Fund, 1996) 15-70.

60 Fernando Serrano Anoton, Anoton, Fernando Serrano, 'Taxpayer's Rights and the Role of the Tax Ombudsman: An Analysis from a Spanish and Comparative Law Perspective' (2007) 35(5) *International Tax Review* 337.

and to differing degrees. As a result, domestic tax measures are scrutinised by various international tribunals.

The history of taxes reveals the significance of tax laws and policies for both governments and private sectors. Because tax is an important topic in economics and politics, the modern tax system generally acknowledges that tax policy and law should be driven by sound tax principles. Furthermore, in today's environment of economic liberalisation, tax sovereignty have limits under international economic law. The delicate nature of a state's sovereignty to tax creates challenges, particularly with regard to limits of tax sovereignty under international economic law. The following part will look at the connection between tax sovereignty and international investment law.

2.3 Intersections between Tax Sovereignty and International Investment Law

Similar to the international trade system, the impact of international investment law on domestic taxation has evolved over time, based on the IPE philosophy that dominated the global economy at the time. Against this backdrop, this part investigates the connection between tax sovereignty and international investment law in two distinct phases: prior to the end of World War II and after the end of WW II.

2.3.1 The Period Prior to the End of World War II

International investment may be traced back centuries. In ancient times, it was recognised that a state has the right to govern within its territory, and hence to impose limitations on foreign entry. After being admitted, foreigners are governed by local laws, and the state has an obligation to protect them in the same way that it protects its own citizens. Ancient Rome is one example. During invasion, the Roman Empire took property from non-Romans, which eventually led to the practice of exploiting private Roman property to support public initiatives. These approaches were followed by the Civil Codes in subsequent centuries and spread to common law countries.[61]

Between the 15th and late 17th centuries, economic nationalism emerged as the dominant ideology in the global economy. It holds that foreign economic transactions are typically zero-sum in nature, meaning that one side can only gain if the other side loses; for example, exports are

---

[61] Eva Jakab, Jakab, Eva, 'Property Rights in Ancient Rome' in Paul Erdkamp et al (ed), *Ownership and Exploitation of Land and Natural Resources in the Roman World* (Oxford Academic Book, 2015) 107-131.

profitable while imports are unprofitable. Based on this concept, states exploited their sovereign power to strengthen their economies using a variety of political economic techniques, including colonialism, economic incentives, economic disincentives, protectionism laws, and domestic economic support.[62] At the time, international economic relations between states were governed by international diplomatic protection, which was based on the idea that foreigners and their property were part of their home nation's wealth. Thus, a host state's mistreatment of foreigners or their property was an injury to the foreigners' home state.[63]

In the 18th century, the industrial revolution process began in Britain and, from there, spread to the US and western Europe. The process of change from an agrarian and handicraft economy to one dominated by industry and machine manufacturing led to novel ways of working and living and fundamentally transformed society.[64] In relation to investment protection, the British Parliament developed the practice of paying compensation when appropriating land for public purposes.[65] Shortly after the American Revolution, the US and the UK signed *the Jay Treaty*, which, among other things, stipulated the protection of their investor nationals from the host government.[66]

By the late 19th century, the US and Western Europe began their second industrial revolutions. As a result, international trade and investment have increased. Foreign direct investment (FDI) took the form of the desire for imperial control over the resources and people of the colonial nations. During this time, there was debate over customary international law (CIL). On the one hand, major powers and capital exporting states, particularly the US and the UK, argued that foreign nationals and their property were entitled to life and security standards under CIL (the

---

62 Simon Lee, 'Ideologies of Political Economy' in R J Barry Jones (ed), *Routledge Encyclopedia of International Political Economy* (Routledge, 2001) 704; Stefan Fritsch, 'International Political Economy and Trade' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2011) 407; Jeffry A Frieden and David A Lake, 'International Politics and International Economics' in C Roe Goddard, Patrick Cronin and Kishore C Dash (eds), *International Political Economy: State –Market Relations in Changing Global Order* (Lynne Rienner, 2nd ed, 2003) 25; David N Balaam and Michael Veseth, *Introduction to International Political Economy* (Routledge, 2014) 9.

63 Andrew Newcombe, Paul and Paradell, Lluis, *Historical Development of Investment Treaty Law in Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) 5-6.

64 Lalita Som, 'Industrial Revolution in Britain' in Lalita Som, *The Capitals of Nations: The Role of Human, Social, and Institutional Capital in Economic Evolution* (Oxford Academic) 83-101.

65 Dan Bogart and Gary Richardson, 'Property Rights and Parliament in Industrializing Britain' (2011)54(2) *Journal of Law & Economics* 241-274.

66 The United States Library of Congress, *Jay's Treaty: Primary Documents in American History* < https://guides.loc.gov/jays-treaty > accessed 1 May 2025.

Minimum Standard of Treatment of Aliens, or MST).[67] However, several countries, particularly those in Latin America, have adopted a national treatment or equality of treatment criterion. This position is most usually identified with Argentine jurist Carlos Calvo, who argued against diplomatic protection and the existence of MST in 1868.[68]At the period, problems between foreign investors and host countries were settled through military intervention, diplomatic protection, or domestic courts.[69] CIL and traditional systems of dispute settlement were viewed as barriers to cross-border investment.

Economic nationalism led to trade battles which was one of the underlying causes of World War II and a period of depression between 1913 and 1948. During WWII, the global economy experienced great economic tragedy, including the worldwide depression, currency disorders, destroying the basis for international trade and investment. This resulted in unemployment and poverty around the globe. The experience of the World War II led to a change of political economic ideology in the post-World War II era.

2.3.2 The Period After the End of World War II

After the end of World War II, neoliberalism became the most influential economic philosophy in the global economy. Economic liberalism asserts that the global economy is a non-zero-sum game in which wealth is available to all. Economic liberals believe that removing political barriers to commerce and other types of economic exchange will help to share prosperity. Furthermore, neoliberalism, an advanced liberalism, promotes a mixed economy and uses the state to discourage the worst abuses of capitalism by preventing the formation of monopolies and taking other steps to alleviate the brutal competition and unequal distribution of wealth inherent in capitalism, and thus employs international governmental organizations (IGOs) to promote and regulate international economic interchange.[70]

---

67 Edwin Borchard, 'Minimum Standard of the Treatment of Aliens' (1940) 38 (4) *Michigan Law Review* 445-461.

68 Chittharanjan F. Amerasinghe, *Diplomatic Protection* (Oxford Monographs in International Law, 2008) 191-211.

69 Ibid.

70 See, John H Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 2nded, 1997)134-141; David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 64-86; Alfredo Sadd-Filho and Deborah Johnson, *Neoliberalism: A Critical Reader* (Pluton Press, 2005) 1-6; Ravi K Roy, Arthur T Denzau and Thomas D Willett (eds), *Neoliberalism: National and Regional Experiments with Global Ideas* (Routledge, 2006) 3-13; Jeffrey A Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (WW Norton, 2006) 556.

The post-WWII political and economic philosophy sparked a number of projects aimed at creating a multilateral legal framework for trade, tax, and investment. On July 1, 1944, *the Bretton Woods Agreement* was signed to combat economic depression and promote economic freedom.[71] While several IGOs, such as the United Nations (UN), the World Bank, and the International Monetary Fund, were successfully founded, the proposal to establish an International Trade Organization (ITO) was rejected.[72] This failure, however, resulted in the conclusion of the *General Agreement on Tariffs and Trade* (*GATT*) 1947, and after several rounds of negotiation,[73] the WTO was established, as an international organisation governing multilateral trade.[74]

It is crucial to highlight that, while the ITO, GATT, and WTO all share the purpose of promoting free trade, the historical development of the international trade system demonstrates a stronger commitment to promoting sustainable development than the international investment system. The policy of maintaining a balance between commerce and other values was addressed by the preparatory committee when preparing a draft for the ITO. During the ITO's first full session, held in London between October and November 1946, the preparatory committee considered articles 30 and 32, which deal with exceptions to the ITO Charter's commercial policy chapter. [75] Though the establishment of the ITO failed as previously said, the policy to balance free trade with other values was inherited by *the GATT 1947*,[76] and later the WTO. The commitment to balance trade and other values to achieve sustainable development under the WTO is clearer, as expressed in the opening recitals of the preamble to *the Marrakesh Agreement Establishing the WTO*.[77]

---

71 F Margaret Garritsen de Vries, 'The Bretton Woods Conference and the Birth of the International Moneytary Fund' in Orin Kirshner (ed), *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996) 3-18; Raymond F Mikesell, 'Some Issues in the Bretton Woods Debates' in Orin Kirshner (ed), *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996) 19-29.

72 Richard Toye, 'The International Trade Organization' in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 85.

73 Thomas W Zeiler, 'The Expanding Mandate of the GATT: The First Seven Rounds' in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012) 102-121.

74 *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*. See also Ernest H Preeg, 'The Uruguay Round Negotiations and the Creation of the WTO' in Amrita Narlikar, Martin Daunton and Robert M Stern (eds), *The Oxford Handbook of World Trade Orga*nization (Oxford University Press, 2012) 122.

75 WTO, 'WTO Analytical Index: GATT 1994' (WTO Analytical Index, 23 Jan 2023) 595.

76 *GATT 1947*, art XX.

77 *Marrakesh Agreement*, preamble.

With respect to cross-border investment, *the Bretton Woods Agreement* led to a shift in international investment flows away from currency manipulation and toward FDI, which includes the transfer of ownership of financial and physical assets, technology transfer, and job creation. In general, capital is likely to flow from states with abundant economies to states where capital is scarce or private industry capabilities are limited. Thus, unlike domestic investors, cross-border investors incur more risks since they are more susceptible to price and cost uncertainty, particularly as a result of inflation and currency fluctuations,[78] and other non-commercial risks including regime change, a general shift or sectoral economic policy, and economic and political crises in the host country, including public violence.[79]

There are several ways to minimise the risks associated with cross-border investment—for example, by limiting the volume and direction of FDI through hedging or internalisation strategies, or by incorporating a stabilisation clause into investment agreements between investors and states.[80] However, such strategies may not suffice to minimise systematic risks or political risks; instead, domestic public policies and regulatory frameworks may be needed to benefit all foreign investors. Domestic frameworks, however, may also not adequately minimize the risks associated with cross-border investment because they are determined by various local factors and differ across states, which may increase transaction costs and uncertainty for foreign investors.[81] Domestic dispute resolution procedures are also prove disadvantageous.[82]

Several attempts have been made to establish multilateral international investment frameworks, including the Havana Charter's establishment of the ITO,[83] *the 1959 Draft Convention on Investment Abroad*[84] and *the 1967 OECD's Draft Convention on the Protection of Foreign Property*[85] and *the 1995 OECD's Multilateral Investment Agreement*,[86] but all have failed.

---

78 John N Kallianiotis, *International Financial Transactions and Exchange Rates: Trade, Investment and Parities* (Palgrave Macmillan, 2013) xv.

79 Christoph H Schreuer, 'Do We Need Investment Arbitration?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System: Journey for the 21st Century* (TDM, Brill Nijhoff, 2015) 879.

80 Kallianiotis (n 78), 149-150.

81 Schreuer (n 79), 884-885.

82 Ibid.

83 WTO (n 5).

84 *Draft Convention on Investment Abroad.*

85 *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention.*

86 *Draft Multilateral Agreement on Investment: Draft Consolidated Text.*

Due to the failure of multilateral investment framework, early investment treaties were created and advocated by wealthy countries attempting to protect their offshore investments against emerging countries' interventionist policies.[87] In this regard, the US was the first to sign the *Treaties of Friendship, Commerce, and Navigation* (*FCNs treaties*) to establish friendly commercial and investment relations with other countries, before transitioning to the US BIT program in the 1990s to support and protect American businesses investing in developing nations.[88] Consequently, the majority of first-generation IIAs tend to focus on foreign investment protection, however exception clauses for vital and valid public policies can be found in a few FTAs with an investment chapter, such as *the North American Free Trade Agreement* (*NAFTA*). These IIAs provide a legal foundation for investor-state disputes over tax measures brought by foreign investors against host countries through international arbitration including the ICSID which was established under the auspices of the World Bank in 1966,[89] the ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL)[90] and other private arbitration institutions.

The history of global economy reveals a considerable divergence in ideologies regarding the control of global economy in the pre-and post-World War II, which had an impact on tax sovereignty. Prior to the World War II, states had more latitude to regulate in a number of areas, including tax. However, following the war, state sovereignty has been constrained by international economic law, which included trade, tax, and investment treaties. Even though trade, taxes, and investment are all aspects of globalisation, there is a stark contrast in the international trade and investment system when it comes to striking a balance between economic liberalisation and other crucial national values. This phenomenon creates issues of legitimacy and has led to a paradigm shift in international investment policy, which will be discussed further below.

---

87 Kenneth J Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, 2010) 75-115.

88 Kenneth J Vandevelde, 'The Political Economy of Bilateral Investment Treaties' (1998) 92 (4) *The American Journal of International Law* 621; Kenneth J Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12(1) UC *Davis Journal of International Law and Policy* 157; Kenneth J Vandevelde, 'The Liberal Vision of the International Law on Foreign Investment' in C L Lim (ed), *Alternative Visions of the International Law on Foreign Investment: Essay in Honour of Muthucumoraswamy Sornarajah* (Cambridge University Press, 2016) 43; Louis T Wells, 'Protecting Foreign Investors in the Developing World: A Shift in US Policy in the 1990s?' in Robert Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005) 421-444.

89 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

90 *UNCITRAL Arbitration Rules* (2010).

2.4 Paradigm Shift in International Investment Policy and Effects on State's Tax Sovereignty

IIAs' objective in advancing sustainable development was not acknowledged until around 2012, when there was a significant shift in the underlying concepts of international investment law and policy.[91] Since then, the policy rationales of new-generation IIAs have evolved away from first-generation IIAs, which aimed to protect foreign investment, and toward advancing sustainable development. As discussed below, this amendment has implications for how investment protection and the right to regulate exceptions are formulated, as well as how investor-state disputes are settled, as discussed below.

In terms of substantive investment protection, new-generation IIAs tend to preserve states' flexibility in setting legislative and regulatory priorities in important areas such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system, public morals, and tax. These elements have been accomplished by excluding critical public policies from investment protections using general and specific exclusion clauses. They also clarify investment protection principles more than previous generations of IIAs, such as by defining investment, investors, the FET standard, direct and indirect expropriations, and other substantive investment protections. Some IIAs exclude umbrella clauses, while others include a reference provision to corporate social responsibility (CSR).[92]

Several new solutions for resolving investor-state disputes have emerged. At the global level, the UNCTAD has advocated a number of reform options, including promoting alternative dispute resolutions (ADRs), customizing the present system through individual IIAs, limiting investor access to ISDS, establishing an appeals mechanism, and establishing a permanent international investment court.[93] In 2013, UNCITRAL adopted *the Rules on Transparency in Treaty-based Investor-State Arbitration* to improve transparency for states that wish to adopt the

---

91 See, e.g., UNCTAD, *Investment Policy Framework for Sustainable Development [2012 Edition]* (Series on Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2012/5, United Nations, 22 September 2012) 1-7; UNCTAD, *Investment Policy Framework for Sustainable Development [2015 Edition]* (Series on Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2015/5, 23 December 2015) 13-24, 125-144; UNCTAD, *Investing in the SDGs: An Action Plan* (World Investment Report, UNCTAD/WIR/2014, 24 Jun 2014) 135-189; UNCTAD, *Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment* (IIA Issues Note No 2 (2013), UNCTAD/WEB/DIAE/PCB/2013/4, 24 May 2013) 1-12; UNCTAD, *Report on the Expert Meeting on the transformation of International Investment Agreement Regime: The Path Ahead* (TD/B/C.II/EM 4/3, 17 April 2015) 1-21.

92 Ibid.

93 Ibid.

rules in their investor-state arbitration procedures.[94] Since 2015, certain new-generation IIAs have added provisions for the establishment of an appeals procedure. At the same time, the EU proposed an international investment court as part of its economic pact.[95] In 2016, the ICSID began amending its rules and regulations, which included changes to key ICSID rules.[96] In 2017, the Government 20 (G20) adopted the Guiding Principles for Global Investment Policymaking: A Steppingstone for Multilateral Rules on Investment.[97] In July 2017, the UNCITRAL approved a mandate to work on the European Union (EU)'s proposal to convert investor-state arbitration into a multilateral investment court, and in 2014, the UNCITRAL concluded its work on the draft statute of an advisory centre on international investment dispute resolution, which is another step of ISDS reforms.[98]

It is clear that the paradigm shift in international investment law and policy has had an impact on states' rights to regulate and tax sovereignty in ways that give states more policy space. Although new generational IIAs have enacted improvements to international investment policy, substantive investment protections, and ISDS, each IIA takes a unique approach. Furthermore, the current international investment framework combines old and new generation IIAs, as well as diverse mechanisms of ISDS, hence complicating the intersection of domestic taxation and international investment treaties.

2.5 Chapter Findings and Observations

This chapter aimed to answer the first research question: why foreign investment treaties interact with domestic tax measures. An examination of history and IPE theory reveals that the intervention of international investment law in domestic tax measures has evolved throughout time from pro-states, pro-investors, to a balancing approach, based on the ideology that ruled the global economy in each age. To that end, this chapter demonstrated that tax is critical to the development

---

94 *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*.

95 European Commission (EC), *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (Press Release, IP/15/5651, 16 September 2015) < https://ec.europa.eu/commission/presscorner/detail/en/ip_15_5651> accessed 1 May 2025.

96 ICSID, *About the ICSID Rules Amendment* < https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about> accessed 1 May 2025.

97 Joubin-Bret, Anna and Cristian Rodriguez Chiffelle, *G20 Guiding Principles for Global Investment Policymaking: A Steppingstone for Multilateral Rules on Investment* (White Paper, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, February 2017) 1-22.

98 UNCITRAL, *Working Group III: Investor-State Dispute Settlement Reform* < https://uncitral.un.org/en/working_groups/3/investor-state> accessed 1 May 2025.

of strong, prosperous, and inclusive communities by helping to raise the money required to offer much-needed public goods and infrastructure, as well as to provide various types of public services beneficial to general welfare. Though tax systems vary by country, one common feature of modern tax systems is that tax sovereignty can be regulated by both domestic and international laws in order to preserve taxpayer rights. Following this, this chapter discovered that, in the period following WWII, states' right to regulate, including tax, are limited by international economic law to promote free trade and an economy with minimal government intervention. In the first-generation IIAs, the autonomy available to states to pursue public policies is very limited because most IIAs were concluded to protect foreign investment, raising concerns about the legitimacy of the international investment system. This chapter then noted that since 2012, there has been a major shift in the underlying notions of IIAs from protecting foreign investment to reconciling private interests with the state's role to regulate public interests. Because international investment law is in transition, this chapter observes that without a consistent approach, the existing international investment framework is a mix of old and new generation IIAs, thus complicating the intersection of domestic tax measures and international investment treaties. The application of IIAs and ISDS to domestic tax legislation will be demonstrated in the following chapter.

Chapter 3

Global Perspectives of Limitations of Tax Sovereignty under IIAs and ISDS

3.1 Chapter Introduction

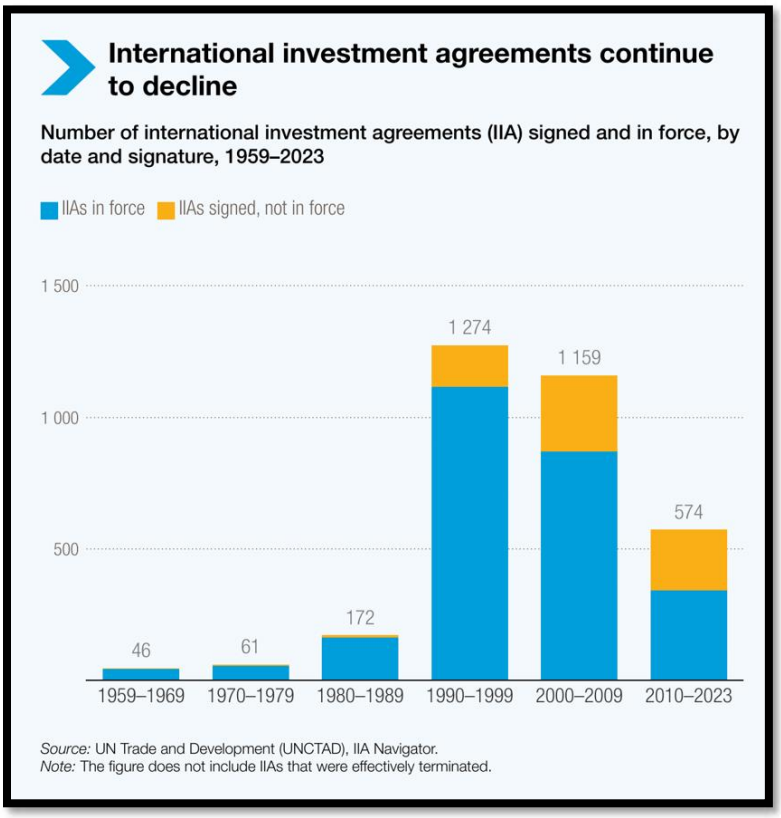
Since the end of World War II, there has been an expansion of taxpayer rights, while international trade and investment agreements have progressively expanded in an effort to limit the host state's power to regulate a number of areas, including tax, and therefore support economic liberalisation. Unlike the multilateral trading framework of the WTO, the current system of international investment treaties, is made up of both early and new generations of IIAs that concluded in a variety of forms and contents due to a paradigm shift in the field of international investment policy. Against this background, this chapter delves into the standard of protections under existing IIAs that play a role in limiting domestic tax measures, and how these substantive rights are enforced. It begins with an overview of the current system of IIAs and ISDS. Next, it looks at how the standard of protection under IIAs applies to domestic tax measures. This is followed by the design of the right to regulate exception and tax carve-out clauses in IIAs that apply to tax measures. Following the substantive aspect, this chapter discusses various ISDS models that can be used to resolve tax-related investment disputes brought by investors against nations that host investments under IIAs. The final section summarises the main findings and offers some observations.

3.2 Overview of the Current IIA and ISDS Systems

As covered in the previous chapter, IIAs are international legal frameworks that work to promote economic liberalisation in a neoliberal economic environment by providing foreign investors and/or foreign investment with an international legal standard of protection, lowering risk and thus promoting cross-border investments. In the absence of a multilateral framework, the current system of international investment treaties is made up of both old and new generations of IIAs signed as bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), which offer comparable investment protections to BITs such as FTAs, economic partnership agreements (EPAs), and comprehensive economic partnership agreements (CEPAs). According to UNCTAD (2024), these accords total over 3,000 IIAs. In terms of quantity, BITs continue to be

the most common (2,834 signed, 2,221 in force), followed by TIPs (467 signed, 390 in force).[99] Old-generation agreements still cover half of global foreign direct investment stock – with greater exposure for developing countries, nonetheless IIAs continue to fall between 2010-2023.[100]

Diagram 1: Number of IIAs (1959-2023)



Source: UNTAD, Word Investment Report (2024)[101]

The old and new generations of IIAs contain substantive international investment norms that define the host state's obligations to provide investment protection to foreign investors, and foreign investors' rights to claim compensation if the host state breaches these norms. Each investment protection norms emerged in response to the special characteristics of cross-border investment, such as the migration of capital that requires protection against unlawful expropriation, long-term investment that requires the stability of a business legal framework and the free transfer

---

99 UNCTAD, *IIA Navigator* <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 1 May 2025.

100 UNCTAD, *World Investment Report* (UNCTAD/WIR/2024, United Nations, 2024) 6-8.

101 Ibid.

guarantee to ensure that the investment proceedings will return to investors and their home countries. Substantive protection under old generation IIAs is usually characterised by broad scope and lacks rights to regulate exception/tax carve-out clauses;[102] while substantive protection under new IIAs tends to be more precise and clearer, and provides more rights to regulate exceptions, including tax.[103]

To enforce substantive investment protections, the old and new generations of IIAs include ISDS. However, without multilateral framework, there are various models of ISDS under each IIA including unreformed ISDS mechanisms (typically used in the old generation of IIAs), IIAs without ISDS, standing ISDS tribunal (a standing court-like tribunal including appellate level), limited ISDS and investor-state arbitration with improved procedure (such as enhancing suitability and impartiality of arbitrators, increasing efficiency of proceedings, and transparency).[104] In practice, most ISDS cases have been resolved through international arbitration of which the *ICSID Convention* and *ICSID Arbitration Rules* are most frequently used, followed by ad hoc arbitration under the *UNCITRAL Arbitration Rules* and other commercial arbitration rules.[105]

3.3 Limitations of Tax Sovereignty Imposed by IIAs

As previously stated, IIAs contain substantive international investment norms to define the host state's obligations to provide investment protection for foreign investors. Though those norms may be drafted as different typologies under different agreements, the eight core norms commonly found in IIAs include the FET standard, protection against unlawful expropriation, full protection and security (FPS) standard, an umbrella clause, prohibition against arbitrary and discriminatory impairment of investments, most-favoured-nation (MFN) treatment and national treatment (NT) standard, each of which set out different concept protecting foreign investment. Due to the lack of a multilateral investment treaty, it is challenging to pinpoint the precise characteristics of each standard of protection. Nevertheless, the table below outlines key concept of each treaty protection, and its applicability to tax measures.

---

[102] UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know* (UNCTAD/DIAE/PCB/INF/2021/3, United Nations, 2021) 7.
[103] UNCTAD, *Reform Package for the International Investment Regime* (United Nations, 2018) 33-47.
[104] Ibid.
[105] UNCTAD, *Investment Dispute Settlement Navigator* <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 1 May 2025.

Table 1: Limits of Tax Sovereignty under Substantive Investment Protections		
Core Investment Protections	**Key Concept / Sub-Typologies**	**Applications on TaxMeasures**
3.3.1 The Fair and Equitable Treatment (FET) Standard	The FET standard has its origin in the CIL on MST aiming to protect aliens from acts that constitute denial of justice. Eventually, the scope of the FET standard has been broadened to encompass several duties, such as an obligation to provide stability of business and legal framework to foreign investments.	√
3.3.2 Protection against Unlawful Expropriation	The protection against unlawful expropriation aims to protect investors' property rights Thus, as general principle, a state has the sovereign right to expropriate private foreign investments located within its territory for public purposes on a non-discriminatory basis, in accordance with due process and against the payment of compensation. Indirect expropriation is found in cases where investors have succeeded in showing substantial deprivation of property as a result of the host states' regulatory measures.	√
3.3.3 Full Protection and Security (FPS) Standard	The FPS standard usually require host nations to avoid damage caused by third-party or host-state agency operations, or to strongly penalise persons who have unfairly harmed an investor or its investment. In light of past cases, investors used the FPS standard to challenge the	√

Table 1: Limits of Tax Sovereignty under Substantive Investment Protections		
Core Investment Protections	**Key Concept / Sub-Typologies**	**Applications on TaxMeasures**
	government's tax policies, saying that they harmed their investments.	
3.3.4 Umbrella Clause	Subject to the conditions mentioned in each agreement, the umbrella clauses generally require host countries to ensure that the responsibilities they have entered into respecting investments are met.	√
3.3.5 Free Transfers	The transfer-of-funds clause grants the right to free movement of investment-related financial flows into and out of the host country.	√
3.3.6 Prohibition against Arbitrary and Discriminatory Impairment of Investments	The prohibition against arbitrary and discriminatory impairment of investments requires host countries to refrain from actions that are either 'arbitrary' or 'discriminatory'. Arbitrariness may refer to a wilful disregard for due process of law, an act that shocks, or at least surprises, a sense of juridical propriety, whereas 'discrimination' may refer to measures that on their face treat people or entities differently, or measures that appear neutral on their face but result in differential treatment.	√

Table 1: Limits of Tax Sovereignty under Substantive Investment Protections		
Core Investment Protections	**Key Concept / Sub-Typologies**	**Applications on TaxMeasures**
3.3.7 National Treatment (NT) Standard	The NT standard mandates the host state to treat foreign investments no less favourably than its own investors, thereby providing foreign investors with the same competitive possibilities as host state nationals. In the preceding caselaw, foreign investors challenged the host state's discriminatory tax action on the basis of the NT standard.	√
3.3.8 Most-Favoured-Nation (MFN) Treatment Standard	The MFN treatment standard requires the host state to grant all the competitive advantages that any other nation also receives with respect to the matters to which the MFN treatment standard applies. Considering past disputes, the MFN treatment standard was used to incorporate the application of other investment protection standards under other BITs on domestic tax measures.	√
Source: Created by the author		

To elaborate, the first essential investment protection under IIAs that plays an important role in limiting tax sovereignty is the FET standard. This standard has its roots in the CIL on MST, which seeks to protect aliens against acts that constitute denial of justice. Later, the FET standard's scope has been broadened to cover a number of requirements, including the need to guarantee

commercial and legal stability to foreign investors, legitimate expectations, manifest arbitrariness denial of justice and due process, discrimination, abusive treatment.[106] In light of this, tax measures containing these components are governed by the FET standard.[107] In practice, this standard has been used to challenge domestic tax laws in various cases, but the outcomes vary depending on the criterion applied by each tribunal (see chapter 4 section 4.4.4.1).

Following the FET standard, tax measures are frequently determined to be purportedly in violation of the protection against unlawful expropriation. This standard also has its origin in the CIL aiming to protect aliens' property rights in response to the special characteristics of cross-border investment, such as the migration of capital that requires protection against unlawful expropriation by host states. As a general principle, a state has the sovereign right to expropriate private foreign investments located within its territory for public purposes on a non-discriminatory basis, in accordance with due process and against the payment of compensation.[108] Because of this, tax policies are constrained by this norm.[109] In fact, indirect expropriation happens when investors are able to show that their property has been significantly deprived due to the host state's efforts to impose tax and non-tax regulatory measures (see chapter 4 section 4.4.4.2).

The FPS standard is complementary to the state's monopoly over the use of physical force and the prohibition of vigilante justice. Subject to the terms and conditions of each IIA, this standard creates an obligation for the host state not to harm investors/investments through acts of state organs or acts otherwise attributable to the state and to protect investors and investments against actions of private parties, e.g. during civil unrest. According to UNCTAD, tax measures are restricted by this standard even though the scope of FPS standard is unclear—for instance, some tribunals view the FPS standard as restricted to the physical security of foreign investors, while others read FPS standard more widely as extending beyond physical security.[110] As shown in chapter 4 section 4.4.4.3, in practices, this standard has been used as basis for challenging domestic tax measures along with the FET standard.

---

106 UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012) 61-88.

107 UNCTAD (n 102) 25-26.

108 UNCTAD, *Expropriatio*n (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012) 5-53.

109 UNCTAD (n 102) 30-33.

110 Helge Elisabeth Zeitler, 'Full Protection and Security' in Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2011) 183-212.

An umbrella clause is an additional layer of protection that requires host countries to comply with the obligations and commitments they have made in relation to foreign investments; nevertheless, its reach is unknown. In some circumstances, the tribunal reads an umbrella clause as immediately altering the contract, while others apply additional criteria.[111]Based on this feature, the UNCTAD states that an umbrella clause can limit tax sovereignty by changing contract violations into treaty breaches.[112] Some examples will be explored in tax measures that are allegedly in violation of an umbrella clause (see chapter 4, section 4.4.4.4).

The free transfer aims to ensure that the investment proceeds are returned to investors and their home nations. Based on this reasoning, this standard requires host governments to ensure that transfers of investment profits and other capital can be made freely and without delay into and out of the territory.[113] According to UNCTAD, various practices of tax measure might be allegedly in breach of free transfer standard. [114] Some examples will be discussed in chapter 4 section 4.4.4.5.

The sixth standard is a prohibition against arbitrary and discriminatory impairment of investments, of which the exact meanings remain vague. Subject to the terms and conditions of each IIA, arbitrariness may refer to a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety,[115] and 'discrimination' may refer to measures that on their face treat people or entities differently (de jure discrimination), or measures that are neutral on their face, but result in differential treatment (de facto discrimination).[116] This provision restricts arbitrary and discriminatory tax sovereignty,[117] but, as indicated in chapter 4, interpretations and outcomes differ depending on the criterion used by each tribunal (see chapter 4, section 4.4.4.6).

The last two standards are the MFN treatment and NT standards. Unlike the previous standards, the rationale behind NT and MFN treatment standards is to promote investment liberalisation. As a general principle, the NT requires the host state to treat foreign investments no

---

111 Ibid.
112 Ibid.
113 UNCTAD, *Free Transfer of Fund* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2020) 5-6.
114 UNCTAD (n 102) 34-35.
115 Christoph H. Schreuer, 'Protection against Arbitrary or Discriminatory Measures' in Catherine A Rogers (ed.), *The Future of Investment Arbitration* (Oxford University Press, 2009) 183–198.
116 Ibid.
117 UNCTAD (n 102) 25-30, 39.

less favourably than the investments of its own nationals and companies to give foreign investors the same competitive opportunities as host state nationals.[118] Similarly, the MFN treatment standard requires the beneficiary state to grant all the competitive advantages that any other nation also receives with respect to the matters to which the MFN treatment standard applies.[119] Based on this feature, the NT and MFN treatment standards can limit tax sovereignty in different ways.[120] In practices, the NT standard was used as a basis for challenge discriminatory tax measures (see chapter 4 section 4.4.4.7), while the MFN treatment standard has been used as basis for incorporate other standards into the applicable treaty to challenge challenging domestic tax measures in conjunction with another standard (see chapter 4 section 4.4.4.8).

To summarize, tax is a nation's sovereign right to raise revenue or for other reasons, although it can be limited by any substantive rights under IIAs. However, rather than a single norm establishing a standard for domestic tax measures, each standard outlines the principles in response to the unique peculiarities of cross-border investment. Without a tax carve-out clause, every investment treaty standard can be applied to domestic tax policies. The issue for tax policymakers, legislators, administrators, and adjudicators lies in the variability of the design of treaty rules. Most of them are not precisely defined and generally lack the criteria by which a state's behaviour ought to be reviewed, leading to the adoption of numerous standards of assessment under each treaty protection, from pro-state, pro-investors to a balanced methods like a margin of appreciation and a proportionality test.

3.4 Defences of Tax Sovereignty

While all IIAs specify the host country's duty to offer foreign investors investment protection, the majority of them do not have the right to regulate exceptions or tax carve out. These clauses are found in few IIAs, in particular recent concluded IIAs, and certain early IIAs based on US models BIT and FTAs/EPAs with investment chapters.[121] In the absence of a multilateral investment treaty, the right to regulate exceptions and tax-carve outs may be drafted as different

---

[118] UNCTAD, *National Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 1999) 7-12.

[119] UNCTAD, *Most-Favoured-Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2011) 21-30.

[120] UNCTAD (n 102) 20-24.

[121] Danielle Morris, Yarik Kryvoi, Sam Winter-Barker, Tunç Savaş, *Empirical Study: Tax-related Measures in Investor-State Arbitration* (BIICL & WilmerHale 2024) 5-13.

typologies under different agreements, each of which provides a different degree of deference to tax policymakers, legislators, administrators, and adjudicators, ranging from pro-investor to pro-state perspectives. Nonetheless, the table below highlights the major typologies of the right to regulate exceptions and tax carve-out clauses, as well as their application on tax measures.

Table 2: Defences available for Tax Measures		
Typologies of Right to Regulate Exception	**Sub-Typologies**	**Application on Tax Measures**
3.4.1 Customary International Law	Force majeure, the CIL on state of necessity, bribery/international public policy, and legitimate exercise of sovereignty	√
3.4.2 Essential Security Exception	Non-self-judging essential security exception	√
	Self-judging essential security exception	√
3.4.3 General Exception Clauses	The WTO-style general exception	√
	Adapted WTO-style general exception	√
3.4.4 Tax Carve-Out Clauses	Partial tax carve-out clauses (certain type of taxation/or from certain investment protection)	√
	Full tax carve-out clauses (without a clawback clause/with a clawback clause)	√
Source: Created by the author		

States have various choices for defending their tax measures. In essence, all governments are able to deploy CIL to effectively defend their national tax policy, regardless of the existence of the right to regulate exceptions or tax carve-out clauses. Force majeure, state of necessity,

bribery/international public policy, and legitimate exercise of sovereignty are examples of CIL defenses that have emerged as a result of governmental practices.[122] Though the CIL defense is also applicable to tax measures, its long and contentious history has presented issues for investment tribunals when applying it to investment disputes.[123] Thus, CIL defences under public international laws (PILs) may not be appropriate for states defending taxing measures stemming from tax-related investment disputes.

Some early IIAs have an essential security exception, often known as non-precluded measures (NPM). During the World War II, an essential security exception was introduced in trade and investment treaties to balance international commitments with state essential security needs.[124] Unlike the WTO's essential security exceptions, IIAs have seen several ideas for an essential security interest exception. The first sub-category is a non-self-judging security exception, which is commonly seen in IIAs based on *US model BITs* and derives from the model clauses of *US FCN treaties*, such as article XI of the *US-Argentina BIT*.[125] Another is a self-judging essential security interest exception, which is frequently seen in the investment chapter of FTAs that are influenced by article XXI of *GATT*,[126] such as art 2102(1) of the *NAFTA*.[127] Even both give deference to states in the protection of its essential security interests, IIAs with 'a self-judging' essential security interest exception tends to give more deference to state than 'a non-self-judging' security exception.

Alongside the essential security exception, a general exception provision was created to reconcile international responsibilities with states' legitimate public agendas.[128] Without a multilateral framework such as the WTO, general exception clauses in IIAs are drafted differently. The classic WTO-style general exception and its adaptation are the two basic typologies. The classic WTO-style general exception allows host nations to apply measures that are inconsistent

---

122 Derek W Bowett, *Self-Defense in International Law* (Manchester University Press, 1958) 182–192; Burleigh C Rodick, *The Doctrine of Necessity in International Law* (Columbia University Press, 1928) 5–6.

123 M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 311.

124 WTO, *WTO Analytical Index: GATT 1994* (WTO, 2023) 599-600.

125 *US-Argentina BIT*, article XI states that 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests'.

126 *GATT*, article XXI.

127 *NAFTA*, article 2102(1).

128 WTO (n 124).

with substantive investment protection in order to pursue overriding public policy goal. Nevertheless, in order to invoke, host states must meet the conditions outlined in the chapeau which states that 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.'[129]

Furthermore, exceptions can only be invoked for public policies listed in article XX (a)-(j) such as public morals, life or health of human, animal or plant, important or exportation of gold or silver,[130] and in the case of article XX(a),[131] (b),[132] and (d),[133] the tribunal must perform a weight-and-balance test developed by the WTO Appellate Body (AB).[134] In a slightly different vein, the adaptive WTO general exception imposes special requirements for certain tax measures, for instance the *ASEAN Comprehensive Investment Agreement* (*ACIA*) provides that '(d) aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of investments or investors of any Member State.'[135] It can be shown that the adapted WTO style gives governments more leeway in terms of tax measures, increasing the possibility of successfully using the general exception.

The final type includes IIAs with a tax carve-out clause, which assures that tax measures are excluded from the scope of an investment treaty, either completely or partially, in order to safeguard governments' economic sovereignty. Although tax carve-out clauses account for only 10% of investment treaties, nations are progressively including them in recent accords.[136] However, in the absence of a multilateral investment framework, tax carve out clauses in IIAs have been constructed in a variety of formats. There are two primary types of tax carve outs: partial and full.

---

129 *GATT*, article XX.
130 Ibid, article XX (a)-(j).
131 Ibid, article XX (a) states that 'necessary to protect public morals.'
132 Ibid, article XX (b) states that 'necessary to protect human, animal or plant life or health.'
133 Ibid, article XX (d) states that 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices.'
134 Chongchit (n 2).
135 *ASEAN Comprehensive Investment Agreement (ACIA)*, article 17 para 1(d).
136 Danielle Morris, Yarik Kryvoi, Sam Winter-Barker, Tunç Savaş (n 121).

Partial tax carve-out clause ensures that tax measures are excluded 'partially' from the scope of an investment treaty, which can include excluding certain types of taxes (such as income tax) from all or some investment protections or exempting tax measures for specific types of investment protection (such as the NT or MFN treatment standards).[137] For example, the *French Model BIT*, in its NTand MFN treatment provisions, contains a sub-clause indicating that 'the provisions of this article do not apply to tax matters.'[138] The *Mexico–the United Kingdom (UK) BIT*, article 4(b) includes a stand-alone provision on tax exceptions that 'This Agreement shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

> [A]ny international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation. Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any international agreement or arrangement relating wholly or mainly to taxation to which Contracting Party is a party. In the event of any inconsistency between the provisions of this Agreement and any such agreement or arrangement, the provisions of the latter shall prevail of national treatment and MFN.[139]

In contrast, full tax carve-out clause ensures that all tax measures are 'fully' excluded from the ambit of an investment treaty.[140]For example, the *India– United Arab Emirates (UAE) BIT* states that 'the provisions of this Agreement shall not apply to any matters of taxation.'[141] Similarly, the *Denmark–Russian Federation BIT* indicates that 'the provisions of this Agreement shall not apply to taxation.'[142] The *China–New Zealand BIT* provides as follows: 'the provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party. Such matters shall be governed by the domestic laws of each Contracting Party and the terms of any agreement relating to taxation concluded between the Contracting Parties.'[143] As will be detailed in chapter 4, in practice, some tribunals have concluded that only legitimate (good faith) tax measures are justified under the full tax carve-out clause.

---

137 See, e.g., *Lao People's Democratic Republic–Viet Nam BIT (1996)*, article 4(c); *Cambodia–Malaysia BIT (1994)*, article 3(3)(b).
138 *France Model BIT (2006)*, article 4.
139 *Mexico - United Kingdom BIT (2006)*, article 5.
140 *Argentina–New Zealand BIT (1999)*, article 5(2); *Chile–New Zealand BIT (1999)*, article 8; *Hong Kong, China SAR–New Zealand* BIT (1995), article 8(2).
141 *India–United Arab Emirates BIT* (2013), article 2(3).
142 *Denmark–Russian Federation BIT* (1993), article 11(3).
143 *China–New Zealand BIT (1998)*, article 5(2).

In some treaties, the full tax carve-out clause still claws back an application for particular investment protection on tax measures, implying that taxes might still be argued to violate some treaty provisions. This category includes the *US Model BIT*, *Energy Charter Treaty* (*ECT*), and *NAFTA*. For example, the *ECT* carve-out clause in article 21(1) states that 'except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to tax measures of the Contracting Parties,'[144] but sub-clauses 21(2)-(5) of the *ECT* exclude specific standards of protection, i.e., the MFN treatment standard in article 21(3) and protection from expropriation in article 21(5) from the general carve-out. In simple terms, clawback clauses bring certain tax-related things back into the purview of the treaty.

Furthermore, clawback clauses may be subject to further qualification. For example, article 21(3) only allows for the MFN treatment standard for indirect taxes and excludes income, capital, and substantially similar taxes.[145] The expropriation clawback in article 21(5) is more sophisticated and includes a filtering system that requires the expropriation claim to be sent to the host and home states' revenue authorities first.[146] As will be discussed in chapter 4, it should be emphasised here that previous arbitral tribunals have addressed the requirement's binding nature in different ways. While some tribunals have acknowledged the existence of the prior referral obligation, others have pointed out that in some cases, the requirement would be pointless, hence failing to do so would not necessarily be fatal to the claim.

To summarise, governments can defend their tax measures using a variety of arguments, including CIL, essential security exception, general exception, and tax carve-out clauses. Without a multilateral framework, each category can be subdivided into sub-categories that provide varying levels of deference to nations and investment protection. Among these protections, IIAs without the right to regulate exceptions give the greatest level of investment protection but have limited policy space for states. The essential security exception also applies to tax measures, but only in limited circumstances, namely, to preserve essential security interests. A general exception clause often balances investment protection with important legitimate public policies. IIAs with full tax-carve out clause provide considerable policy space for the state, but the least degree of protection

144 *Energy Charter Treaty*, article 21(1).
145 Ibid article 21(3).
146 Ibid article 21(5).

to foreign investors. It should be noted here that, in practice, arbitral tribunals have interpreted and applied each defence differently, as will be covered in chapter 4.

3.5 Dispute Resolutions for Tax-Related Investment Disputes

In addition to substantive matters, IIAs incorporate a dispute resolution clause to enforce substantive investment safeguards and resolve resulting disputes. However, in the absence of multilateral dispute resolution, such as the WTO dispute settlement system, there are several settlement methods available. The added challenge is that, due to a paradigm shift in international investment policy and legal frameworks, nearly all IIAs signed in 2018 feature at least one, if not many, ISDS reform measures, which countries undertook as part of larger IIA reform initiatives.[147] As a result, tax-related investment conflicts can be resolved through a variety of approaches. Nonetheless, the chart below depicts the basic typologies of ISDS and their uses on tax-related investment disputes.

Table 3: International Dispute Resolutions for Tax-Related Investment Disputes

Typologies	Sub-Categories/Example	Application on Tax-Related Disputes
3.5.1 Alternative Dispute Resolutions	Consultation/Negotiation	√
	Mediation	√
	Conciliation	√
3.5.2 Conventional International Arbitrations	ICSID Arbitrations	√
	Non-ICSID Arbitrations	√

[147] UNCTAD, *Reforming Investment Dispute Settlement: A Stocktaking* (IIA Issue Note 1, United Nations, 2019) 2.

Table 3: International Dispute Resolutions for Tax-Related Investment Disputes		
Typologies	**Sub-Categories/Example**	**Application on Tax-Related Disputes**
3.5.3 International Arbitrations with Improved Procedure	There are several improved processes available, including expanding state control over proceedings, upgrading arbitrators' suitability and impartiality, improving proceedings efficiency, raising transparency, and reducing ISDS tribunals' remedial powers.	√
3.5.4 International Arbitrations with Appeal Mechanism	International arbitration includes an appeal system that allows disputing parties to appeal legal or factual issues (depending on each treaty).	√
3.5.5 Investment Court	A court-like system with a permanent tribunal in the first instance and an appeal mechanism in the second instance to hear appeals of the first instance's legal or factual questions (dependent on each treaty).	√
3.5.6 Limiting Investors' Right to Recourse ISDS	Some of the restrictions include limiting the scope of ISDS subject matter, imposing time limits on investors to submit ISDS, and compelling them to exhaust local judicial remedies or to litigate in local	√

Table 3: International Dispute Resolutions for Tax-Related Investment Disputes		
Typologies	**Sub-Categories/Example**	**Application on Tax-Related Disputes**
	courts for an extended length of time before resorting to international dispute settlements.	
3.5.7 Special Mechanisms for Tax-related Disputes	A requirement for states to commence consultation at ADRs stage to ascertain critical questions, such as whether the measure at issue is tax measures, whether such a taxation measure constitute 'indirect expropriation'.	√
	A requirement for investors to exhaust the competent authorities (the Ministry of Finance) before submitting their claim to international arbitration.	√
	A requirement for tribunals to look into state decisions on certain topics such as definition of tax measures and 'whether tax measures constitute expropriation'.	√
3.5.8 No ISDS	International dispute resolution is not available for foreign investor meaning that foreign investors cannot access international dispute resolution.	√

Table 3: International Dispute Resolutions for Tax-Related Investment Disputes		
Typologies	**Sub-Categories/Example**	**Application on Tax-Related Disputes**
Source: Created by the author		

States have numerous methods for resolving tax-related investment disputes, depending on the drafting. Prior to going to international arbitration or local courts, the majority of IIAs provide ADRs (i.e., consultation/negotiation, mediation, and conciliation) to help resolve disputes in the early stages. According to UNCTAD, IIAs rarely explicitly mention the possibility of using ADR techniques.[148] However, some treaties refer to them as part of the negotiation and consultation process, for instance the *Colombia-Japan BIT (2011)* provides: 'In the event of an investment dispute, the disputing parties shall, as far as possible, settle the dispute amicably through consultations and negotiations which may include the use of non-binding and third-party procedures.'[149]

If a disagreement is not resolved through ADRs within a certain period of time, an investor may file a claim through the investor-state arbitration procedure in compliance with the requirements of the applicable IIA.[150] In this regard, conventional arbitration, ICSID and non-ICSID arbitrations, is available for investor-state disputes in the majority of older IIAs. For example, the *Belgium/Luxembourg Colombia BIT (2009)* provides for competent jurisdiction" of the host State; domestic arbitration; *UNCITRAL Rules*; *ICSID Rules*; *ICSID Additional Facility*; the Arbitral Court of the ICC, and Conciliation and Arbitration Centre of the Chamber of Commerce of Bogotá.[151] In contrast, the *Croatia-Republic of Korea BIT (2005)* only provide for ICSID arbitration.[152]

---

148 UNCTAD, *Investor-State Dispute Settlement* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2014) 17, 60-62.
149 *Colombia-Japan BIT (2011)*, article 26.
150 UNCTAD (n 148) 60-62.
151 *Belgium/Luxembourg Colombia BIT (2009)*, article XXI.
152 *Croatia-Republic of Korea BIT (2005)*, article 8.

In spite of the variations, it should be highlighted that under the conventional arbitration system, each arbitral tribunal is constituted for each case. The membership, nationality, and qualification requirements of the investment tribunal are preliminary and determined by the disputing parties' agreement. In the absence of the parties' agreement, arbitral procedures are governed by the arbitral rules, and in the absence of arbitral rules, tribunals have the authority to determine their own procedures. To maintain party autonomy and the efficiency of investor-state dispute resolution, the arbitral decision is final and binding. Though international arbitration is likely to improve the investment climate, it raises several concerns, most notably the lack of permanence and independence of the arbitral tribunal, which increases the risk of inconsistent interpretation of similar facts and law, as well as the correctness of dispute outcomes that cannot be appealed. Arbitrators' dual roles as counsels may also have an impact on arbitral tribunal independence and impartiality.[153]

Some new generation IIAs, thus, tend to address those concerns by improved and/or modified arbitral procedures, such as increasing states' control over the proceedings, enhancing the suitability and impartiality of arbitrators, increasing the efficiency and transparency of proceedings, and limiting the remedial powers of ISDS tribunals.[154] Some, particularly the EU's economic agreements, such as the *EU-Singapore IPA* and *EU–Vietnam IPA*, went further to include an international investment court which is the system of a standing court-like tribunal with an appellate level consisting of members appointed by contracting parties.[155] Some new generation IIAs went even further by imposing requirements to limit investors' access to ISDS, such as the requirement to exhaust local judicial remedies or to litigate in local courts for an extended period of time before turning to international dispute resolutions, the setting of a time limit for submitting

---

[153] For review of literature on problems in ISDS, see, e.g., Patharawan Chongchit, *A Proposed Alternative Tribrid Framework for A Multilateral Reform of the Investor-State Dispute Settlement Regime* (PhD Thesis, Monash University, 2019).

[154] See, e.g., *Argentina-Japan BIT(2018), Argentina-UAE BIT(2018), Armenia-Japan BIT (2018), Australia-Peru FTA(2018), Belarus-India BIT(2018), Central America-Republic of Korea FTA(2018), Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)(2018) (except bilateral opt-outs), EU-Singapore FTA, Japan-UAE BIT(2018); Singapore-Sri Lanka FTA(2018), United States-Mexico-Canada Agreement (USMCA)(2020).*

[155] See, e.g. *EU - Singapore Investment Protection Agreement (2018)*, chapter 3, section A, articles 3.9 and 3.10; *EU - Viet Nam Investment Protection Agreement (2019)*, chapter 3, section A, subsection 4, articles 3.38 and 3.39.

ISDS, and the narrowing of the ISDS subject matter scope (for example, limiting treaty provisions subject to ISDS and excluding policy areas from the ISDS scope).[156]

With respect to tax, some IIAs include extra mechanisms dedicated to tax-related issues to provide states with more influence over the dispute settlement process. The specific requirements can be found at numerous phases, including the ADRs stage, before and after the submission of claims to international arbitration. Some treaties require an investor to request that its home state engage with the contesting host state to determine whether the measure in question is a tax measure or has the effect of expropriation or nationalisation. Some IIAs require investors to submit their claims only if states fail to commence consultations or to reach a joint conclusion during the consultation stage. Some demand that, even if the policy in question is regarded as a tax measure or constitutes indirect expropriation, an investor must first exhaust the competent authorities (Ministry of Finance) before resorting to international dispute settlement. Finally, even if the case has been referred to international dispute resolution, some IIAs compel the international tribunal to consider state decisions on taxation and expropriation.[157] Some nations, such as India, have excluded tax matters from the purview of international arbitration.[158] For instance, the *Indian Model BIT*, article 2.4 states that 'For greater certainty, it is clarified that where the State in which investment is made decides that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation, such decision of that State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review such decision.'[159]

Ultimately, some treaties, such as *the Regional Comprehensive Economic Partnership (RCEP)*, and Brazil's BITS with Ethiopia, Guyana, and Suriname, do not allow investors to refer investor-state disputes with host countries to international dispute resolution mechanisms. This alternative provides states with the most procedural protection but investors with the least. Without multilateral dispute resolution, the present system of IIAs offers ADRs, international arbitrations,

---

156 See, e.g. *Argentina-Japan BIT(2018)*, *Argentina-UAE BIT(2018)*, *Armenia-Japan BIT (2018)*, *Australia-Peru FTA (2018)*, *Belarus-India BIT(2018)*, *Central America-Republic of Korea FTA(2018)*, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)* (2018) (except bilateral opt-outs), *EU-Singapore FTA*, *Japan-UAE BIT(2018)*, *Kazakhstan-Singapore BIT(2018)*; *Singapore-Sri Lanka FTA(2018)*, *United States-Mexico-Canada Agreement (USMCA)(2020)*.

157 See, e.g., *ASEAN Comprehensive Investment Agreement (ACIA)*, article 36.6-36.9 (Conduct of the Arbitration).

158 Suranjali Tandon, 'Issues and Challenges with Applying Investment Agreements to Tax Matters in the Context of India's Experience' (2023) 31(1) *Asia Pacific Law Review* 235-252.

159 *Indian Model BIT*, article 2.4.

international arbitration with better procedures, international arbitration with an appeal mechanism, an international investment court, and no ISDS. As a result, tax-related investment disputes can be addressed in a variety of ways, ranging from pro-investor to pro-state, with varying levels of regard for tax policymakers, lawmakers, administrators, and adjudicators.

3.6 Chapter Findings and Observations

This chapter addresses the second research question, which standards of protection under IIAs play a role in limiting domestic tax measures, as well as how these substantive rights are enforced. This chapter discovers that IIAs and ISDS have varying effects on domestic tax policies. Instead, interference is determined by how each treaty is drafted and the availability of ISDS under each IIA, which ranges from pro-state to pro-investor to a balanced approach. To that end, this chapter first noted that the existing system of international investment law is made up of old and new generations of IIAs that were signed in various forms, resulting in a wide range of substantive investment protections and right to regulation exceptions. Second, despite differences and the lack of a right to regulate exception, any of the IIA protection standards (i.e., the FET standard, protection against unlawful expropriation, the FPS standard, an umbrella clause, prohibition against arbitrary and discriminatory impairment of investments, the MFN treatment, and NT standards) can apply to domestic tax measures. Third, public policy exclusions and tax carve-out clauses are constructed differently, ranging from no treaty exception (pro-investor) to full tax carve-out (pro-state). Fourth, there was a significant variety in ISDS approaches, ranging from ADRs (pro-investor) to no international dispute resolution accessible (pro-state). The findings lead to the observation that nations' tax measures are subject to a number of substantive obligations and exception clauses, rather than a single norm that establishes a standard for tax measures, and that such substantive provisions have been drafted in various typologies under different treaties. Furthermore, tax-related investment conflicts can be handled through a variety of dispute resolution methods, ranging from pro-investor to pro-state approaches. Conventional international arbitrations, which are accessible under older-generation IIAs, have been utilized to resolve large tax issues. These elements, taken together, raise concerns about how international tribunals examine tax policies and measures, particularly the criteria used to judge a state's taxing action. To illustrate, the next chapter will look at tax-related conflicts that arise under IIAs.

Chapter 4

Global Outlook of Tax-Related Investment Disputes

4.1 Chapter Introduction

As was previously discussed, the fundamental component of IIAs is their substantive international investment protection, which outlines the host state's duties to safeguard foreign investors' investments and their rights to compensation in the event that the host state violates these standards. In light of this characteristic, it has been claimed that over the last ten years, a number of significant public policies implemented by governments, including taxmeasures, have violated the IIAs' investment protection provisions.[160] Host states are at a loss about how to strike a balance between investment protection and justifiable public policy objectives in light of the sharp rise in claims. Against this backdrop, the objective of this chapter is to examine the worldwide pattern of investors' claims against tax measures and to pinpoint the salient features of tax-related disputes under IIAs. It first gives an overview of international tax-related investment disputes arising under IIAs. Then, it clarifies the traits of tax-related disputes covered by IIAs. Analyses of the main issues resulting from tax-related disputes are then presented, together with details of tax measures that are considered to be justified by the IIA's right to regulate exceptions, or tax carve-out clauses. The concluding part offers some observations along with a summary of the main findings.

4.2 An Overview of Tax-Related Disputes Occurring Under IIAs

Investor-state disputes are growing in tandem with the number of IIAs. As of 31 July 2024, the total number of known investment treaty arbitrations reached 1,368 cases.[161] According to the UNCTAD,[162] investors have claimed that various states' acts, and legislative initiatives have violated the terms of international investment agreements on a global scale. There have been claims against important public policies including taxation, public health, and environmental

---

160 UNCTAD, *ISDS Navigator Update: New Cases and Awards Available* < https://investmentpolicy.unctad.org/news/hub/1764/20250210-isds-navigator-update-new-cases-and-awards-available> accessed 1 May 2025.

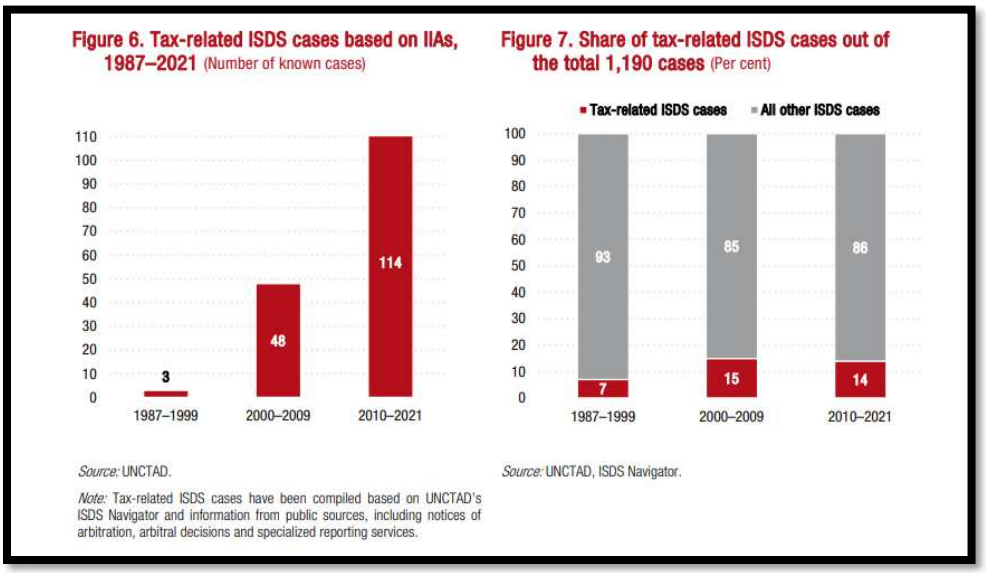
161 Ibid.

162 Ibid.

regulation. Additional policies that fall within this category include those pertaining to export control, bankruptcy, water tariffs, and anti-money laundering initiatives.[163]

Among 1190 ISDS cases, there are 165 investment disputes pertaining to taxes.[164] Specifically, tax-related investment disputes refer to claims that state's specific sovereign actions in the area of taxation constitute a breach of an investment treaty.[165] In fact, tax measures were only one component of the alleged violations; nevertheless, some of tax-related disputes involved multiple government's measures.[166] For instance, Philip Morris contested Uruguay's new cigarette packaging regulations and higher tobacco taxes in 2010 on the grounds that they violated the FET standards and amounted to indirect expropriation.[167]

Figure 2: Numbers of Tax-Related Investment Disputes



Source: UNCTAD, IIA Issues Note, No. 1, July 2022.[168]

Regarding the disputing parties, developed countries were the target of 60% of tax-related disputes, with the remaining 40% going to developing nations. With 42 cases—roughly 25% of

---

163 Ibid.

164 UNCTAD, *Facts on Investor-State Arbitration in 2021: With a Special Focus on Tax-Related ISDS Cases* (IIAs Issues Note No. 1, July 2022) 1.

165 Ibid.

166 Ibid.

167 *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Final Award)* (ICSID Arbitral Tribunal, Case No. ARB/10/7, 8 July 2016) paras 108-132.

168 UNCTAD (n 164) 5.

all tax-related ISDS disputes—Spain was the most frequent respondent. Ecuador and Italy came in second and third, respectively, with 10 cases apiece. However, over 90% of tax-related IIA claims were filed by investors from nations with advanced economies, notably from Germany (24 cases), the US (26 cases), and the Netherlands (30 cases). Noticed also that around 40% (63 instances) of all tax-related ISDS proceedings included so-called intra-EU disputes between EU respondent states and EU investors.[169]

Regarding IIAs, the most often cited IIA in tax-related ISDS cases was the *ECT (1994)*, with 68 instances, followed by *NAFTA (1992)* with 12 cases and the *Ecuador-US BIT (1993)* with 6 cases. Intra-EU disputes accounted for the majority of tax-related lawsuits under *the ECT* (57 cases). The supply of electricity, gas, steam, and air (75 cases), information and communication (11 cases), wholesale and retail trade (7 cases), construction (e.g., building construction and civil engineering (4 cases)), arts, entertainment, and recreation (e.g., gambling and betting activities (3 cases), transportation and storage (3 cases), financial and insurance activities (3 cases). Of the new instances, manufacturing accounted for around 15% and primary industries, primarily comprising mining and quarrying operations, accounted for roughly 25%.[170]

The great majority of ISDS lawsuits were filed under both ICSID and non-ICSID arbitration procedures. Overall, while tax-related conflicts make up 15% of all ISDS cases, the number of tax-related issues has been rising, according to the UNCTAD.[171] Since tax is a vital public policy that supports government operations and allows them to provide necessities such as healthcare and social welfare, a number of nations and IGOs have thought about the implications of IIAs for tax policymaking and are looking for recommendations on how to reduce the risk of ISDS claims pertaining to tax measures.

4.3 Demystifying Characteristics of Tax-Related Disputes under IIAs

Unlike domestic tax disputes and other international tax or tax-related conflicts, such as the WTO, FTAs, and double tax agreement (DTAs), tax-related investment disputes emerging under IIAs have unique characteristics. To set the stage for analysing the most important issues,

---

169 Ibid 5-6.
170 Ibid.5-6.
171 Ibid 5-6.

this section will discuss the general characteristics of an investor-state dispute. Then, the unique features of tax-related issues under IIAs will be clarified.

The following five key elements are typically present in ISDS disputes resulting from IIAs. First, claims made by foreign investors against the host state are the subject of investor-state disputes. Second, investor-state disputes can result from either treaty violations, breach of contract, or both. Third, investor-State disputes entail determining whether a host state's regulatory measures comply with investment treaty standards. Fourth, investor-state disputes are governed by multiple legal sources encompassing private or contract law of host states, the public or mandatory domestic law of host states and public international law. Fifth, rather than compelling the host state to change its domestic rules and regulations, the IIAs typically require host countries to compensate investors. The arbitral ruling is normally enforced by national courts, either in the host state, in the home state of the investors, or in the states where the assets are located, if the host state refuses to pay compensation. In fact, the selection is mostly made in accordance with asset accessibility.

More precisely, tax-related investment disputes have unique features. Initially, disputes emerge between foreign investors who are also taxpayers and the host state's tax authorities. Second, because taxes are public economic laws, conflicts pertaining to taxes typically result from treaty violations by states. In some cases, tax-related disputes arose from contracts between host state and foreign investors, particularly those that have a tax stabilising clause.[172] Third, tax-related issues entail evaluating whether a host state's regulatory authority complies with investment treaty requirements, just like other ISDS challenges. Fourth, rather than requiring the host state to change its tax laws and regulations, investors typically seek compensation for state' breaches of IIAs. Similar to other ISDS disputes, tax-related disputes under IIAs may be brought under one investment treaty by one or more foreign investors (taxpayers) against a state, or under several investment treaties by multinational corporations against one or more States. As in previous ISDS

---

[172] See, e.g. *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (Award)* (ICSID, Case No. ARB/03/28, 18 August 2008) paras 2, 39, 190, 438 (The investor argued that Peru imposed a tax assessment in violation of certain guarantees in the legal stability agreement); *Shell Nigeria Exploration and Production Company Ltd., Esso Exploration and Production Nigeria (Deepwater) Ltd., Nigerian AGIP Exploration Ltd., Total E & P Nigeria Ltd. v. Nigerian National Petroleum Corporation* (Partial Award, 30 May 2013) paras 13.9.28 (The parties concluded a PSC relating to a deep offshore oil prospecting license in Nigeria which included the tax stabilization clause).

cases, a number of unrelated foreign investors (taxpayers) may also bring claims under different treaties against a single state.

Thus, it is evident that investor-state disputes are distinct from domestic tax disputes, other international tax disputes, or tax-related disputes with regard to the parties involved, the basis for the dispute, the relevant laws, and the remedies accessible to foreign investors. The fact that various claims based on comparable facts in relation to one or more states under the same or different international investment agreements may be involved in investor-state disputes adds another layer of complication. The resolution of investor-state dispute not only ends the problem between the involved parties, but also has the potential to impact other investors, states, and the global investment community. Therefore, tax-related investment disputes are quite important. Some of the main points that usually came up in these arguments are discussed below.

4.4 Key Controversies in Tax-Related Disputes under IIAs

Following characteristics of tax-related disputes, this section portrays important contentious issues that frequently surfaced in tax-related disputes. The arbitrability of tax measures, the definition of tax or taxation under IIAs, the scope of tax measures, and the characteristics of tax measures purportedly in violation of each substantive investment protection under IIAs are the four primary problems explored in this part.

4.4.1 Arbitrability of Tax Measures under IIAs

As stated in chapter 2, tax policies or tax measures are commonly recognised as a significant public policy on a global scale; thus, the main question raised in tax-related investment disputes is whether tax policies are subject to IIAs.[173] In general, the significance of tax policy is acknowledged both domestically and internationally. In the realm of public international law, the limitation of tax sovereignty may differ between CIL and treaties. While CIL places few constraints on a state's freedom to establish and execute tax law, treaties (such as the WTO, FTAs, IIAs, and DTAs) may limit tax sovereignty in different ways and to varying degrees.

In the context of IIAs, the tribunal in *Cairn v. India* confirmed the arbitrability of tax measures under IIAs. The tribunal said that the arbitrability of tax-related claims under IIAs is

---

[173] William W Park, 'Arbitrability and Tax' in Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009) 183.

determined by the treaty and cannot be equated to CIL. Therefore, as a general principle, taxmeasures are covered by IIAs, and foreign investors may challenge such tax measures under IIAs provided that they do not specifically exclude measures relating to taxation.[174] Conversely, if a tax is excluded from the treaty (a tax carve-out clause), the tribunal may decline to hear a claim against tax measures. However, as will be discussed in section 4.5, in some cases, even IIAs contain tax carve-out clauses that limit investors' ability to file tax-related claims under an investment treaty; states should be aware that in some cases, arbitral tribunals have determined that the tax carve-out clause under IIAs is limited to bona fide (legitimate, or good faith) tax measures. Against this concept, tax measures that were not made in good faith, or actions performed by a state under the guise of taxation through the improper or abusive use of the power to tax, were not excluded from the scope of applicability of an IIA, regardless of the presence of a tax carve-out clause.

4.4.2 Definition and Types of Taxation subject to IIAs

As it is agreed that taxes are arbitrable, the definition of a 'taxation' or 'tax' has become a critical subject in tax-related disputes. The fundamental source of this issue is the lack of consensus over the meaning of 'taxation', since different national and international legal systems have different definitions of what taxes entail, as noted in chapter 2 of this study. In the context of tax-related investment disputes, the definition of taxation is crucial because if a tax is carved out under the applicable IIA and is deemed to be a tax measure, the tribunal may decline to have jurisdiction over the measure. Conversely, if it is not a tax, foreign investors may still challenge such measures under IIAs. Therefore, the definition of 'taxation' or 'tax' is determined by the wording of each treaty. However, the ways in which IIAs handle the extent of taxation differ. While most IIAs do not, some, like the *ECT*, *NAFTA*, and the *Argentina-Chile FTA*, offer guidelines on what constitutes 'tax' or 'taxation'.[175] For instance, when defining 'tax' or 'taxation' under the *ECT*, the tribunals typically concentrated on actions that are driven by the desire to increase overall state revenue when defining 'tax' or 'taxation'.[176]

---

[174] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India (I)* (Award) (PCA Case No. 2016-07, 21 December 2020) para 834.

[175] *ECT*, article 21(7); *NAFTA*, article 2107; and *Argentina–Chile FTA*, article 19.

[176] *EnCana Corporation v. Republic of Ecuador (Final Award and Partial Dissent)* (LCIA, Case No. UN3481, 3 February 2006) para 142; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (Award)* (ICSID, Case No. ARB/03/28, 18 August 2008) para 174; *Burlington v. Ecuador* (Decision on Jurisdiction)

In the absence of a precise definition for the terms 'tax' and 'taxation' in the treaty, decisions on whether a measure qualifies as either have been made based on the arbitral tribunal's methodology for resolving each individual case, which has occasionally resulted in inconsistent outcomes. For instance, two arbitral tribunals reached different conclusions in relation to the Ecuador's windfall oil levy (namely '*Law 42*') (which revised the hydrocarbon law and provided Ecuador a participation of initially 50% and subsequently 99 percent of the extraordinary income from the sale of crude oil when the sale price of the oil exceeded a reference price). In *Burlington v. Ecuador*, the Ecuador's *Law 42* was classified as a tax measure and so qualified for the applicable IIA's tax carve-out clause, hence jurisdiction over it was denied.[177] On the other hand, in *Occidental and Murphy*, the same measure (Ecuador's *Law 42*) was not considered as a tax legislation and so did not qualify for the applicable IIA's tax carve out.[178]

Moreover, there have been other reported cases about the interpretation of the terms 'tax' and 'taxation'.[179] In 2020, there were five decisions on the *ECT* that looked into whether certain provisions challenged by the plaintiffs were tax measures that were excluded from the scope of the invoked IIA.[180] In the three cases against Spain, the tribunals decided that disputed measures, a series of energy reforms under taken by the government affecting the renewables sector, including seven (7) percent tax on power generators' revenues and a reduction in subsidies for

---

(ICSID Case No. ARB/08/5, 2 June 2010) para 165; *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)* (Partial Final Award) (PCA Case No. 2012-16, 6 May 2016) para 159; *Sun Reserve Luxco Holdings SRL v. Italy (Final Award)* (SCC, Case No. V (2016/32), 25 March 2020) para 521; *Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award)* (UNCITRAL PCA, Case No. 2005-04/AA227, 18 July 2014) para 1407.

177 *Burlington Resources Inc. v. Republic of Ecuador (Decision on Liability)* (ICSID Case No. ARB/08/5, 14 December 2012) para 167; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Decision on Jurisdiction and Liability)* (ICSID Case No. ARB/08/6, 12 September 2014) para 375.

178 *Occidental v. Ecuador (Award)* (ICSID Case No. ARB/06/11, 5 October 2012) para 509; *Murphy Exploration & Production Company International v. Republic of Ecuador (Award)* (PCA Case No. 2012-16, 10 Feb 2017) para 190.

179 UNCTAD, *Review of 2020 Investor–State Arbitration Decisions: IIA Reform Issues at A Glance* (IIA Issue Note, August 2022) 1-56.

180 These five cases included *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (Final Award)* (ICSID, Case No ARB/16/5, 14 September 2020) paras 179, 355, 946 and 951; *Hydro Energy 1 and Hydroxana v. Spain Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain (Decision on Jurisdiction, Liability and Directions on Quantum)* (ICSID, Case No. ARB/15/42, 9 March 2020) para 158; STEAG GmbH v. Kingdom of Spain, (Decision on Jurisdiction, Liability and Directions on Quantum) (ICSID, Case No. ARB/15/4, 8 October 2020) para 822; *Sun Reserve Luxco Holdings SRL v. Italy (Final Award)* (SCC, Case No. V (2016/32), 25 March 2020) paras 503-562; *Watkins Holdings S.à r.l. and others v. Kingdom of Spain (Award)* (ICSID, Case No. ARB/15/44, 21 January 2020) paras 227-274.

renewable energy producers, were tax measures under Spanish law and is a prima facie tax measures under international, and thus were outside of the *ECT*'s scope.[181] In the two cases against Italy, the tribunals determined that some of the challenged measures (i.e. a series of governmental decrees to cut tariff incentives for some solar power projects) were taxmeasures, and thus carved out under the *ECT*, while some other measures (i.e. administrative charges and imbalanced fee measures) were not considered tax measures, and thus did not qualify for the *ECT*'s tax carve-out.[182]

In practice, states around the world implement a variety of taxes. Without a defined definition of taxation or tax, different types of domestic taxation have been accused of violating investment treaty protection, including but not limited to corporate income tax, VAT or sales tax, tariffs (or customs duties), excise tax, windfall profit taxes, property tax, royalties, capital gains tax, and land tax.[183] Subject to IIAs' wording and interpretation by tribunals in each case, examples of taxes alleged to breach investment treaty protections are presented in the table below.

Table 4: Examples of Taxes Alleged Breach of Investment Treaty Protections

Types	Examples of Past ISDS Disputes
Income taxes	• Capital gains taxes[184] • Windfall profit tax and royalties[185]
Consumption taxes	• VAT (e.g. withdrawal of subsidies, VAT exemptions, or non-payment of VAT refunds)[186] • Suspension of tariff adjustments for public utilities • Legislative reforms in the renewable energy sector related to feed-in tariffs and incentives for solar energy[187]

[181] The three cases against Spain include *Hydro Energy 1 and Hydroxana v. Spain* (n 180); *STEAG v Spain* (n 180); *Watkins v Spain* (n. 180).

[182] Two cases against Italy include *ESPF v. Italy* (n 180); *Sun Reserve v Italy* (n. 180).

[183] Danielle Morris, Yarik Kryvoi, Sam Winter-Barker, Tunç Savaş (n 121) 18-19.

[184] *Cairn v. India* (n. 174); *Vodafone International Holdings BV v. Government of India [I] (Notice of Arbitration)* (PCA, Case No. 2016-35, 17 April 2014) (not public); *Burlington v Ecuador (Decision on Liability)* (ICSID, Case No ARB/06/08/5, 14 December 2012) para 450.

[185] *Burlington v. Ecuador* (n. 184).

[186] *Ioan Micula, Viorel Micula and others v. Romania (II) (Final Award)* (ICSID, Case No. ARB/14/29, 5 March 2020) paras 554-556.

[187] *The PV Investors v. Spain, Charanne and Construction Investments v. Spain (Final Award)* (PCA, Case No. 2012-14, 28 February 2020) paras 78-142.

Table 4: Examples of Taxes Alleged Breach of Investment Treaty Protections	
Types	**Examples of Past ISDS Disputes**
Others[188]	• Extraordinary revenues • Fines and asset freezes
Source: Created by the author	

In comparison to certain WTO agreements that define definitions of taxes (such as direct taxes, import charges, and 'indirect taxes),[189] this study believes that IIAs lack clear definitions of these terms, creating uncertainty for tax policymakers, tax law drafters, tax administrators, and tax adjudicators. This analysis suggests that future IIAs incorporating a definition of tax or taxation akin to the WTO's agreements may bolster legal certainty in investor-state dispute settlement, thereby improving predictability for tax policymakers, tax law drafters, tax administrators, and tax adjudicators.

4.4.3 Scope of Tax Measures subject to IIAs

The third issue that developed in tax-related disputes under ISDS jurisprudence is the forms of 'measure' that can be argued to violate IIAs. In general, governments' taxation actions can take many forms. Examples include the development of tax policies, tax law and regulations, tax administrative actions such as tax audits, tax investigations, tax assessments, customs valuation, tax notices, tax refunds, and others, and tax dispute resolution such as administrative, judicial review, or alternative dispute resolution. In light of previous tax-related investment disputes, IIAs sometimes lack clear definitions of these terms; various sorts of tax measures have been challenged under different IIAs, as shown in the table below.

Table 5: Examples of Tax Measures Alleged Breach of Investment Treaty Protections	
Measures	**Examples of Past ISDS Disputes**
Tax Law and Regulations	•The imposition of capital gains taxes[190] •Increased windfall profit tax and royalties[191]

[188] UNCTAD (n 102) 11.
[189] Chongchit (n 2).
[190] *Cairn v. India* (n 174).
[191] *Burlington v. Ecuador* (n 184); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela (Final Award)* (ICSID, Case No. ARB/07/30, 8 March 2019) 717-777.

Table 5: Examples of Tax Measures Alleged Breach of Investment Treaty Protections	
Measures	**Examples of Past ISDS Disputes**
	• Legislative improvements in the renewable energy sector, including feed-in tariffs and solar energy incentives[192] • The state levied retroactive taxes through a legislative amendment.[193] • The decision to increase the state's participation in 'extraordinary revenues' to 99 percent, effectively forcing investors to abandon their rights under participation contracts and migrate to service contracts[194]
Tax Administrations	• Tax investigations, tax audit proceedings and large tax assessments[195] • The withdrawal of subsidies or tax exemptions[196] •The government's alleged failure to enforce its tax laws and prevent the growth of illegal alcohol sales, causing harm to the claimants' spirits business[197] • The denial of VAT credits and refunds amounting to 10 per cent of the value of transactions associated with the company's oil production and export activities[198]

[192] *The PV Investors v. Spain, Charanne and Construction Investments v. Spain (Final Award)* (PCA, Case No. 2012-14, 28 February 2020) 198-223; *Charanne and Construction Investments v. Spain Charanne and Construction Investments v. Spain Charanne B.V. and Construction Investments S.a.r.l. v. Spain* (SCC, Case No 062/2012, 21 Jan 2016) paras 82-186.

[193] *Vodafone International Holdings BV v. Government of India [I] (Notice of Arbitration)* (PCA, Case No. 2016-35, 17 April 2014) (not public, but backgrounds sources are available at Investment Arbitration Reporter < https://www.iareporter.com/>

[194] *Burlington Resources, Inc. v. Republic of Ecuador (Decision on Liability)* (ICSID, Case No. ARB/08/5, 14 Dec 2012) paras 30, 140-150, 291, 378.

[195] *Hulley Enterprises v. Russia Hulley Enterprises Ltd. v. Russian Federation (PCA Case No. 2005-03/AA226)* paras 88-105; *Veteran Petroleum v. Russia Veteran Petroleum Limited v. The Russian Federation (Final Award)* (PCA, Case No. 2005-05/AA228, 18 July 2014 paras 503-754*; Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award)* (UNCITRAL PCA, Case No. 2005-04/AA227, 18 July 2014) para 756.

[196] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I] (Award)* (ICSID, Case No. ARB/05/20, 11 November 2013) paras 234, 730, 773.

[197] *Ioan Micula, Viorel Micula and others v. Romania (II) (Final Award)* (ICSID Case No. ARB/14/29, 5 March 2020) paras 204-224.

[198] *EnCana Corporation v. Republic of Ecuador (Final Award)* (LCIA, Case No. UN3481, 3 February 2006) paras 41-106.

Table 5: Examples of Tax Measures Alleged Breach of Investment Treaty Protections	
Measures	**Examples of Past ISDS Disputes**
	• The suspension of tariff adjustments for public utilities and changes to the monetary parity system[199] • The tax reassessments, VAT charges, fines and asset freezes, threats to revoke licenses and duress to sell the investor's main production facility.[200] • (Forcible) collection of taxes, customs or other liabilities allegedly due[201]
Tax Dispute Resolution	• The treatment of the investor by Russian tax authorities, the bailiffs and the courts.[202]
Source: Created by the author	

Without a clear definition of measure, a variety of measures, including tax legislation, regulations, administrative actions, and administrative review processes, were accused of violating IIAs. In comparison to many WTO agreements, which define 'measures' under specific agreements,[203] IIAs often lack explicit definitions of these terms, creating ambiguity for tax policymakers, law drafters, administrators, and adjudicators. According to this analysis, future IIAs should incorporate a scope of measure equivalent to the WTO's agreements.

4.4.4 Characteristics of Tax Measures Alleged to Breach of IIAs

Following tax measures, the most important issue concerns the characteristics of tax measures that have been found to breach treaty protection standards. As discussed in chapter 3, substantive investment protection provisions such as the FET standard, protection against unlawful expropriation, the FPS standard, an umbrella clause, prohibition against arbitrary and discriminatory impairment of investments, the MFN treatment standard, and the NT standard can

---

199 *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/23, 11 June 2012) paras 141-169.

200 *Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award)* (UNCITRAL PCA, Case No. 2005-04/AA227, 18 July 2014) para 756.

201 *Julian Crespo Santamargarita, Juan Ricardo Crespo Santamargarita, Valencja Sp. z.o.o. v. Republic of Poland (Award)* (ICC, Case No. 11392/KGA, 22 September 2005) (not public). See, UNCTAD (n 102) 7, 3.

202 *Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award)* (UNCITRAL PCA, Case No. 2005-04/AA227, 18 July 2014) para 756.

203 Chongchit (n 2).

limit a country's ability to regulate its own taxation policies. Among these, the FET standard and expropriation are the most frequently invoked standards by investors against tax measures.[204]However, because each provides a specific criterion for measures that are regarded to violate treaty standards, the characteristics of tax measures alleged to violate each standard differ. In addition, due to the lack of a multilateral investment treaty and a standardised procedure for resolving investment disputes, it is challenging to pinpoint the specific characteristics of tax measures that violate IIAs in light of previous tax-related disputes. Nevertheless, certain conclusions can be drawn from past cases as follows.

4.4.4.1 The Fair and Equitable Treatment Standard

To begin with the most frequently invoked standards by investors against tax measures, the FET standard is the most contentious issue due to its broad scope, which includes requiring the host state to refrain from acts that constitute denial of justice and is expanded to include other obligations, such as providing business and legal stability to foreign investments. In previous tax-related disputes, the FET standard was used as the foundation for challenging domestic tax laws in several cases. However, interpretations, standards of review, and dispute results varied. The table below lists some features of tax measures that are allegedly in violation of the FET standard. Nonetheless, it should be highlighted that the outcomes of the disputes differed depending on a number of conditions, including the facts of each case, the tribunal's interpretation, and the wording employed in the investment protection.

Table 6: Example of Tax Measures Allegedly Breach the FET Standard

Tax measures that were found to violate the FET standard	**Tax measures that were not found to violate the FET standard**
• The retroactive taxes imposed by the state through a legislative amendment without appropriately balancing investors' interest in legal certainty with its own regulatory	• The government's imposition of export taxes on crude oil, natural gas, and LPG, which are generally applicable to crude oil exporters and are part of the general fiscal legislation to which the investors were subject, did not violate the

[204] Danielle Morris, Yarik Kryvoi, Sam Winter-Barker, Tunç Savaş (n 121).

Table 6: Example of Tax Measures Allegedly Breach the FET Standard	
Tax measures that were found to violate the FET standard	**Tax measures that were not found to violate the FET standard**
interests were deemed 'grossly unjust' and thus violated the FET standard.[205] • The government's decision to increase the state's participation in 'extraordinary revenues' to 99 percent, effectively forcing investors to abandon their rights under participation contracts and migrate to service contracts, was a violation of the FET standard.[206] • The government's legislation that 'fundamentally, and prejudicially' altered the economic and legal framework in the context of an increasingly hostile and coercive investment environment violated the FET standard.[207] • The government's denial of VAT reimbursement claims substantially altered the framework within which the investment	FET standard unless their application was shown to be discriminatory.[210] • The government's failure to enforce tax laws and prevent the growth of illegal alcohol sales, which harmed the claimants' spirits business, and the government's imposition of unilateral price increases related to the investors' mineral water business conducted under a long-term sale and purchase contract with a national company did not constitute a breach of the FET standard because it did not frustrating the claimants' legitimate expectations, nor by failing to provide a stable and consistent legal framework.[211] • The government's series of energy reforms affecting the renewables sector, including a 7% percent tax on power generator revenues and a reduction in subsidies for renewable energy producers that were not unreasonable, arbitrary,

[205] *Cairn v. India* (n 174).

[206] *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Decision on Jurisdiction and Liability)* (ICSID, Case No. ARB/08/6, 12 September 2014) paras 603-606.

[207] *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II) (Final Award)* (PCA, Case No. 2012-16, 10 Feb 2017) paras 281-282.

[210] *Total S.A. v. Argentine Republic (Decision on Liability)* (ICSID Case No. ARB/04/1, 27 December 2010,) paras. 352–354, 434-435.

[211] *Ioan Micula, Viorel Micula and others v. Romania (II) (Award)* (ICSID, Case No. ARB/14/29, 5 March 2020) paras 373-375.

Table 6: Example of Tax Measures Allegedly Breach the FET Standard	
Tax measures that were found to violate the FET standard	**Tax measures that were not found to violate the FET standard**
was made, therefore violating the FET requirement.[208] • A series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers that lacked transparency, were unreasonable or disproportionate breached the FET standard.[209]	disproportionate, or lacking transparency, did not violate the FET standard.[212]
Source: Created by the author	

As demonstrated by the aforementioned example, the tribunal employed a range of standards in evaluating tax measures, from a good faith test to more stringent requirements such as the requirement that the tax policy be oppressive, unreasonable, or discriminatory. A few tribunal members (such as *Cairn v. India*) supported striking a compromise between investors' rights to operate in a stable regulatory environment and governments' authority to enact changes to regulations, such as balancing tax measures with investment protection. Though the outcomes of the disputes differed depending on a number of conditions, including the facts of each case, the tribunal's interpretation, and the wording employed in the investment protection, some scholars,

---

208 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II) (Award)* (ICSID Case No. ARB/06/11, 5 October 2012) para 190.

209 *Watkins Holdings S.à r.l. and others v. Kingdom of Spain (Award)* (ICSID, Case No. ARB/15/44, 21 January 2020) para 201.

212 *The PV Investors v. Spain, Charanne and Construction Investments v. Spain (Award)* (PCA, Case No. 2012-14, 28 February 2020) paras 475-542.

such as Ranjan notes an important lesson learned from past tax-related cases that 'while countries have a right to change their tax-related legal regimes, these changes should be reasonably related to a legitimate public welfare objective and should be proportional to the public purpose they seek to achieve,' by contrast, 'any drastic or unproportionate modification in the tax-related legal regime could violate the principle of legal certainty, and thus the FET provision.'[213]Because the FET standard covers a broad range of government's activities and components that allow tribunals to employ various standards of review, this study observes that IIAs have started to exclude tax measures from the FET standard.

4.4.4.2 Protection Against Unlawful Expropriation

Following the FET standard, expropriation is the most frequently used standard by investors as a violation of the host state's tax regulations.[214] Subject to the criteria specified in each agreement, the protection against unlawful expropriation requires the host state to refrain from taking any measure that would deprive or restrict the investor's right to ownership, including any measure that would have a similar effect. The table below outlines some characteristics of tax initiatives that are purportedly in violation of expropriation. Nonetheless, it should be underlined that the outcomes of the disputes vary based on a number of variables, including the facts of each case, the tribunal's interpretation, and the wording employed in the investment protection as well as the claims and facts presented by investors.

Table 7: Example of Tax Measures Alleged Breach of Protection against Unlawful Expropriation

Tax measures constituted indirect expropriation	**Tax measures did not constitute indirect expropriation**
• The revocation of tax and customs exemptions for precious metal production which obliged the investors to cease all activities, depriving them of any advantage	• A series of energy reforms implemented by the government affecting the renewables sector including a 7% tax on power generator revenues and a reduction in subsidies for renewable

[213] Prabhash Ranjan, 'Investor-State Dispute Settlement and Tax Matters: Limitations on State's Sovereign Right to Tax (2023) 31(1) *Asia Pacific Law Review* 219-234.

[214] Danielle Morris, Yarik Kryvoi, Sam Winter-Barker, Tunç Savaş (n 121).

Table 7: Example of Tax Measures Alleged Breach of Protection against Unlawful Expropriation	
Tax measures constituted indirect expropriation	**Tax measures did not constitute indirect expropriation**
they could have derived from their investment.[215] • The revocation of the consortium's tax-free status in a tax-free zone system, which was an essential component of the investor's investment strategy amounted to expropriation.[216]	energy producers that resulted in a loss of some expected returns or a mere loss in value did not constitute indirect expropriation (The tribunal noted that a substantial deprivation of all economic value is required).[217] • The government's denial of VAT credits and refunds totaling 10% of the value of transactions associated with the company's oil production and export activities, which did not impair the investor's ability to conduct normal commercial activities or render the value derived from its investment "so marginal or unprofitable as to effectively deprive them of their character as investments," did not constitute expropriation.[218] • The retrospective changes in domestic law that entailed a loss of the investor's right, but the tax authorities' policy on oil refunds did not rise to the level of repudiation of a legal right to amount

[215] *Antoine Goetz and others v. Republic of Burundi (I)* (Decision on Liability) (ICSID Case No. ARB/95/3, 2 September 1998) para 124.

[216] *Ampal-American and others v. Egypt* (Decision on Liability and Heads of Loss), ICSID Case No. ARB/12/11, 21 February 2017 para 158.

[217] *Hydro Energy 1 and Hydroxana v. Spain Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain* (Decision on Jurisdiction, Liability and Directions on Quantum) (ICSID Case No. ARB/15/42, 9 March 2020) paras 535-538.

[218] *EnCana Corporation v. Republic of Ecuador (Final Award)* (LCIA, Case No. UN3481, 3 February 2006) para 177.

Table 7: Example of Tax Measures Alleged Breach of Protection against Unlawful Expropriation	
Tax measures constituted indirect expropriation	**Tax measures did not constitute indirect expropriation**
	to a direct expropriation, thus did not constitute expropriation.[219] • The windfall profit tax of 68 per cent on sales of gold at prices higher than US$500 per ounce that caused an accounting loss of US$1 million for one year could not be seen as indicating the destruction of an ongoing enterprise with a history of strong annual profits, in the context of favourable market conditions and subsequent favourable legislation, and thus the measures had not led to 'destruction' of the enterprise that would qualify as tantamount to expropriation.[220] • The government's measure resulted in a 58 per cent reduction in the investor's total oil revenues from one block of the oil field and a 70.2 per cent reduction in respect of another block did not indicate a substantial deprivation, as the tax did not render the claimant's investment 'unprofitable or worthless,' thus did not amounted to an expropriation of its investment.[221]

[219] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II) (Award)* (ICSID, Case No. ARB/06/11, 5 October 2012) paras 79- 89.

[220] *Paushok v. Mongolia Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia (Award on Jurisdiction and Liability)* (UNCITRAL, 28 April 2011) para 334.

[221] *Burlington v. Ecuador Burlington Resources, Inc. v. Republic of Ecuador (Decision on Liability)* (ICSID, Case No. ARB/06/08/5, 14 December 2012) para 450.

Table 7: Example of Tax Measures Alleged Breach of Protection against Unlawful Expropriation	
Tax measures constituted indirect expropriation	**Tax measures did not constitute indirect expropriation**
	• The financial burden of paying 99 per cent of the revenues above the reference price, which disadvantageous to the investor, but did not bring its operation to a halt or, to revert to the tests previously cited, effectively neutralise the investment or render it as if it had ceased to exist, did not amounted to an expropriation of its investment.[222]
Source: Created by the author	

As seen from the above, a determination of expropriation is essentially a factual inquiry. When faced with claims of expropriation, most tribunals have focused on whether the host state's tax measure 'substantially deprives property of foreign investors' and have established expropriation in circumstances where investors successfully show substantial deprivation. If the claimant failed to prove that it had been substantially deprived of the value of its investment, the claim was often unsuccessful. This study observes that in recent IIAs, indirect expropriation remains relevant to tax policies and measures, but the government established unique mechanisms to grant respect to the state in determining whether the measure constitutes indirect expropriation in the early stages of conflicts.

4.4.4.3 The Full Protection and Security Standard

Subject to the terms of each agreement, the FPS standard usually requires host nations to avoid damage caused by third-party or host-state agency operations, or to strongly penalise persons

[222] *Perenco v. Ecuador Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador) (Decision on Jurisdiction)* (ICSID Case No. ARB/08/6, 30 June 2011) paras 237-238.

who have unfairly harmed an investor or its investment. In light of past cases, investors used the FPS standard to challenge the government's tax policies, saying that they harmed the legal basis for their investments. For example, in *PV Investors v. Spain*, the investor claimed that the Spanish government violated the FET and the FPS standards by implementing energy reforms that affected the renewables sector, such as a 7% tax on power generators' revenues and a reduction in subsidies for renewable energy producers. However, the tribunal ruled that in order to violate the FPS standard, the government's measures must violate legal protection rather than physical protection, hence this claim was dismissed.[223] Although investors do not frequently use the FPS to oppose tax measures as the FET standard and expropriation, recent investment agreements typically omit tax measures from the FPS standard.

4.4.4.4 The Umbrella Clause

Subject to the conditions mentioned in each agreement, the umbrella clauses generally require host countries to ensure that the responsibilities they have entered into respecting investments are met. In light of previous cases, investors used the umbrella clause to challenge the government's changes to the tax regulatory framework. For example, in *Eskosol v. Italy*, a set of legislative restrictions that reduced tariff incentives for some solar power projects and caused the investor's company to fail violated the *ECT*'s umbrella clause. The panel ruled that because the investor was never qualified for the incentives, the State did not "enter into" any obligations.[224] States should be aware that in some decisions, such as *ESPF and others v. Italy*, laws, letters, and agreements might constitute duties to states and hence be used as the basis for umbrella clause claims.[225]

4.4.4.5 Free Transfer Standard

Subject to the terms of each agreement, the free transfer-of-funds clause grants the right to free movement of investment-related financial flows into and out of the host country. There are no previous cases recorded, but according to UNCTAD, the transfer-of-funds rule can come into play

---

223 *The PV Investors v. Spain, Charanne and Construction Investments v. Spain (Final Award) (PCA Case No. 2012-14*, 28 February 2020) paras 477-479.

224 *Eskosol S.p.A. in liquidazione v. Italian Republic (Award)* (ICSID Case No. ARB/15/50, 4 September 2020) paras 462-463.

225 *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (Award)* (ICSID Case No. ARB/16/5, 14 September 2020) paras 787-828.

when tax audits are done on a transfer, and revenue authorities are legally allowed to verify that the correct amount of tax has been declared and paid. The implementation of measures intended to dissuade enterprises from moving their earnings to low-tax countries frequently allow host nation revenue agencies to tax those profits in their jurisdiction to low tax jurisdictions often also enable host country revenue authorities to tax those profits in their jurisdiction.[226] Although tax measures can restrict or delay transfers, modern investment treaties often exempt taxmeasures from free transfer protection, while others scale back the application of free transfer standard on tax measures under certain conditions.

4.4.4.6 Prohibition against Arbitrary and Discriminatory Impairment of Investments

As a general principle, according to the terms of each IIA, the prohibition against arbitrary and discriminatory impairment of investments requires host countries to refrain from actions that are either 'arbitrary' or 'discriminatory'. Arbitrariness may refer to a wilful disregard for due process of law, an act that shocks, or at least surprises, a sense of juridical propriety, whereas 'discrimination' may refer to measures that on their face treat people or entities differently, or measures that appear neutral on their face but result in differential treatment. In light of previous cases, such as *Occidental v. Ecuador*, the investor claims that the host state's tax authority (SRI)'s inconsistent practice regarding the reimbursement of value-added tax violates the provision of the BIT between Ecuador regarding impairment by arbitrary and discriminatory measures. However, the tribunal acknowledged that the BIT provides some protection against arbitrariness, but in the current dispute, the decisions taken by the tax authority do not appear to have been founded on prejudice or preference rather than on reasons of fact, so some form of arbitrariness was not found.[227]

4.4.4.7 National Treatment Standard

Generally, the NT standard mandates the host state to treat foreign investments no less favourably than its own people and enterprises, thereby providing international investors with the same competitive possibilities as host state nationals. Taking into account the preceding instance, foreign investors challenged the host state’s discriminatory tax action via the NT standard. How

---

226 UNCTAD (n 102).

227 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II) (Final Award)* (ICSID Case No. ARB/06/11, 1 July 2004) paras 163-165.

to interpret "in like situations" was the primary issue with the NT standard. Different criteria were used by some tribunals, such as a narrow approach by some and a broad approach by others as discussed below.

In the case of *Occidental v. Ecuador*, for example, the tribunal determined that the government had violated the NT on the grounds that comparators do not have to belong to the same economic sector. On the one hand, the investor claimed that Ecuador had violated the NT obligation because, while the tax authority refuses to reimburse investors for VAT paid on purchases required for its activities, including export, in the field of oil production, other companies involved in the export of other goods—specifically flowers, mining, and seafood products—, received VAT refunds. On the other hand, the Ecuadorian government contended that 'in like conditions' must be read narrowly in terms of the sector in which that particular activity is carried out. However, the tribunal rejected Ecuador's contention that national treatment would apply only to industries or companies involved in the same sector of activity, ruling that 'in like situations cannot be interpreted in the narrow sense advanced by Ecuador because the purpose of national treatment is to protect investors as compared to local producers, which cannot be accomplished by addressing only the sector in which that particular activity is undertaken.'[228]

Note that some tribunals took a narrow approach. For example, in *Vento v. Mexico*, *NAFTA (1992)*, the investors claimed that Mexico's tax policies violated the NT and MFN treatment standards under the *NAFTA* by subjecting Vento's motorcycles to a 30% import duty (since the motorcycles are actually made in China, not the US). Meanwhile, the claimant's competitors were not subject to the import duty. The tribunal determined that the claimant investor had not identified 'comparators' in similar circumstances, and that the joint venture's structure was 'significantly different from those of the relevant Mexican investments, thus such tax measures did not breach NT and MFN treatment clauses.'[229]

4.4.4.8 Most-Favoured-Nation Treatment Standard

The MFN treatment standard requires the host state to grant all the competitive advantages that any other nation also receives with respect to the matters to which the MFN treatment clause

---

[228] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II) (Final Award)* (LCIA Case No. UN3467, 1 July 2004) paras 173-177.

[229] *Vento Motorcycles, Inc. v. United Mexican States (Final Award)* (ICSID Case No. ARB(AF)/17/3, 6 July 2020) paras 259-267.

applies. In light of past tax-related disputes, the MFN treatment clause was used to incorporate the application of other investment protection standards under various BITs on domestic tax measures. Nonetheless, as with the NT standard, it is required to demonstrate that the investor is in similar circumstances as comparators. In *Micula v. Romania (II)*, for instance, the investors successfully invoked the MFN treatment provision to include the FPS standard in the BITs between Romania and Iran and Albania and Romania in its allegations against the government's tax measures. In this case, the tribunal allowed the FPS standard to be included in the *Romania-Iran BIT* and the *Albania-Romania BIT* by virtue of the MFN treatment standard, though the claims were dismissed at the merits stage.[230]

In summary, states can design their tax regimes in a variety of ways. Nevertheless, the discretion is limited as taxes are arbitrable under IIAs. Certain aspects of tax measures may cause a state to violate its treaty obligations if it has ratified IIAs that do not forbid tax measures. The difficulty in precisely defining what constitutes taxation under IIAs, the scope of tax measures, and the kind of tax measures that are alleged to breach each substantive investment protection under IIAs is the primary cause of the added complexity associated with IIAs. Even though taxes are a significant public policy, most arbitral tribunals looked at the matter in the same way that they would have looked into other host state regulations. Even in the case that tribunals attempted to reconcile private and public interests, various approaches have been adopted, including proportionality and margin of appreciation. Thus, the right to regulate exceptions, notably tax carve-outs, is crucial for balancing regulatory power in taxes with investor protection.

4.4.5 Characteristics of Tax Measures invoked Defenses

Most contemporary IIAs and certain old-generation IIAs (especially those based on the *US model BIT* and FTAs with investment chapter) feature rights to regulate exceptions and tax carve-out clauses in order to strike a balance between the state's right to regulate and investment protection. However, in the absence of a multilateral framework, states lack a consistent way of structuring these exclusions, resulting in diverse typologies. This section looks at the many kinds of exceptions that states have used to defend their tax measures in light of previous rulings. The

---

[230] *Micula v. Romania (II) Ioan Micula, Viorel Micula and others v. Romania (II) (Final Award)* (ICSID, Case No. ARB/14/29, 5 March 2020) paras 486-506.

CILs on state of necessity, treaty essential security exception, general exception, and tax carve-out clauses are explored below.

4.4.5.1 The CIL on State of Necessity

As discussed in chapter 3, in IIAs without the right to regulate exceptions or tax carve-outs, the state may invoke PILs such as force majeure, the CIL on state of necessity, bribery, international public policy, and legitimate exercise of sovereignty. In light of previous tax-related investment cases, the Argentine government raised the CIL on state of necessity in numerous cases arising during the Argentine economic crisis between 2001 and 2003, in which investors from various countries challenged several government policies, including taxation (Argentina's suspension of tariff adjustments for public utilities and changes to the monetary parity system) in response to the economic crisis.[231]

In brief, the CIL on state of necessity has its roots in Grotius' 17th-century theory of the rights of self-preservation and has evolved over time. In 2001, state practice on state necessity was codified in article 25 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Act*.[232] According to article 25 of the *Draft Articles on the Responsibility of States*, in order to successfully invoked the CIL on state of necessity, the state must meet four requirements: first, necessity may only be invoked if the act is the only way to safeguard an essential security interest from a grave and imminent peril;[233] second, the state conduct in question must not seriously impair an essential security interest of the other state or states concerned, or of the international community as a whole;[234] third, necessity cannot be invoked to exclude wrongfulness of non-conforming measures in which the international obligation in question explicitly or implicitly

---

231 *LG&E Energy Corp. v. Argentine Republic (Decision on Liability)* (ICSID Case No. ARB/02/1, 3 October 2006) paras 226–266 (necessity accepted for part of the period); *CMS Gas Transmission Company v. Argentine Republic (Final award)* (ICSID Case No. ARB/01/8, 12 May 2005) paras 315–331 (necessity rejected); *Sempra Energy International v. Argentine Republic (Final Award)* (ICSID Case No. ARB/02/16, 28 September 2007) para 346–388 (necessity rejected); *Continental Casualty Company v. Argentine Republic (Final Award)* (ICSID, Case No ARB/03/9, 5 September 2008) paras 187–188; *El Paso Energy International Company v. The Argentine Republic (Final Award)* (ICSID, Case No ARB/03/15, 31 October 2011) para 588.

232 *Reponsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*').

233 Ibid article 25(1)(a).

234 Ibid article 25(1)(b).

excludes the plea of necessity;[235] and fourth, necessity may not be used as an excuse if the responsible state has contributed to the situation of necessity.[236]

Considering the abovementioned requirements, particularly the only way standard, invoking the CIL on state of necessity is difficult. In several Argentina cases, the tribunal of did not conduct a detailed analysis of the first element, and was not persuaded that the only way Argentina could satisfy that fundamental interest was to implement measures that would subsequently breach the investors' treaty rights to treaty protection. Moreover, it appears that only the tribunal of *Suez v Argentina* conducted a balance test, which is the second element of the CIL on state necessity. As to the third element, the tribunals had different views regarding whether the applicable BIT explicitly excludes the CIL in state of necessity or not. Furthermore, most tribunals concluded that Argentina had contributed to the economic crisis and thus could not effectively invoke the defence. The CIL on state necessity has been criticised as unsuitable for investment disputes since it would be nearly hard for the state to meet this criterion.[237]

4.4.5.2 Essential Security Exception

Aside from CIL on necessity, states may raise defence under treaty's essential security exceptions. In the framework of investment treaties, *the Treaty of Friendship, Commerce, and Navigation* between the US and the Republic of Nicaragua included an essential security interest exception,[238] which was followed by other first-generation IIAs. Governments have chosen to address essential security interest exceptions in different ways. These include IIAs without a security exception, which are typically found in IIAs based on *European model BITs*, which have historically placed an emphasis on investment protection;[239] IIAs with a non-self-judging essential security interest exception, which are frequently found in IIAs based on *US model BITs*, which are derived from the model clause of *US FCN treaties*; and IIAs with a self-judging essential security interest exception, which are frequently found in the investment chapter of FTAs that are impacted by article XXI of *the GATT*.

---

235 Ibid article (2) (a).
236 Ibid article (2) (b).
237 M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 312.
238 *Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua*, article XXI.
239 See, e.g., *Spain–Argentina BIT* (1991); *Germany –Thailand BIT 2022*; *Argentina - United Kingdom BIT (1990)*.

In light of prior tax-related disputes, the Argentine government raised an essential security exception under the *US-Argentina BIT*, which offers a non-self-judging essential security interest exemption based on the *US model BITs*. In this respect, article XI of the *US–Argentina BIT* states that 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.'[240] The arbitrators concluded that article XI of the *US-Argentina BIT* is a non-self-judging essential security interest exception without explicit self-judging language, as required.[241] This means that it does not specify who has the authority to judge the legitimacy of claiming important security interests; thus, invoking article XI was subject to some type of scrutiny by arbitral tribunals.

In past ISDS cases, the standard employed by each arbitral tribunal was different ranging from the only way standard,[242] the WTO necessity test[243] to the margin of appreciation,[244] which resulted in different dispute outcomes. In contrast, if the applicable BITs include a self-judging essential security interest exception, as influenced by the *GATT* article XXI, the Argentine government would be able to determine the legality of invoking essential security interests without seeking the opinion of any adjudicator; therefore, some commentators view that a self-judging is considered the pro-state approach,[245] and may create the risk of abuse by governments.[246]

Compared to the CIL on state of necessity, the standards for the treaty's essential security exception are less stringent than those of the CIL on state of necessity, making it potentially simpler to apply. Among the two types of essential security exceptions, the self-judging clause is more likely to accord states greater deference than the non-self-judging clause when it comes to

---

240 *US–Argentina BIT*, article XI.

241 *CMS v Argentina* (n 231) para 373; *LG&E v Argentina* (n 231) para 212; *Enron v Argentina* (n 231) para 339; *Sempra v Argentina* (n 231) para 373-374; *Continental v. Argentine* (n 231) paras 187-188]; *El Paso v Argentina* para 588.

242 *CMS v Argentina* (n 231) para 373; *LG&E v Argentina* (n 231) para 212; *Enron v Argentina* (n 231) para 339; *Sempra v Argentina* (n 231) para 373-374

243 *Continental v. Argentine* (n 231) para 167.

244 *El Paso v. Argentine* (n 231) para 552.

245 Alvarez, José E, 'The Return of the State' (2011) 20(2) *Minnesota Journal of International Law* 223.

246 Stephen W Schill and Robyn Briese, 'If State Consider": Self-Judging Clause in International Dispute Settlement' in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Koninklijke Brill NV, 2009) 61.

important security exceptions. Accordingly, this analysis believes that states would be better off using a self-judging essential security interest exemption for taxation purposes.

4.4.5.3 General Exception Clause

Apart from the essential security exception, general exception clauses are included in early and recent FTAs with investment chapters. These clauses draw inspiration from the general exceptions found in *GATT* article XX and *General Agreement on Trade and Service* (GATS) article XIV, which were eventually integrated into the WTO framework.[247] However, in the context of FTAs containing investment chapters, governments employ different approaches to general exception clauses, in contrast to the WTO's unified approach. General exception clauses contained in FTAs with investment chapters can be broadly divided into two categories: the *GATT/GATS* general exception and the adaptive *GATT/GATS* general exception

In essence, the *GATT/GATS* general exception allows states to impose trade-restrictive measures that are inconsistent with the *GATT/GATS* in order to achieve overarching public policy goals such as environmental protection, public health, and public morals, as well as the prevention of deceptive practices. According to the author's previous study, in order to invoke the article XX exemption, states must meet the conditions outlined in the chapeau (introductory clause) as well as the public policies outlined in (a) through (j). A little different, IIAs with adaptive *GATT/GATS* general exclusions grant nations the authority to achieve specific public policy objectives by enforcing regulatory measures that aren't compliant with investment protection criteria. They also grant a unique exception in the case of tax issues, for example, measures intended to guarantee the fair or efficient imposition or collection of direct taxes with regard to state's investments or investors (see chapter 3).

There is currently neither an adapted WTO general exception nor a case law interpreting the general exception for tax-related investment disputes; nonetheless, in certain instances, the tribunal used the WTO's necessity test in the context of an essential security interest exemption. In the case of *Continental v Argentina*, for instance, the arbitral tribunal applied the WTO's "necessity test" on the grounds that the parallel model provision of the *US FCN treaties*, which in turn mirrors the *GATT* 1947's formulation, is where article XI of the *US-Argentina BIT* originates. In applying the

[247] WTO, *WTO Analytical Index: GATT 1994* (World Trade Organization, 2023).

WTO necessity standard, the tribunal weighed and balanced various factors, concluding that there was no treaty-consistent, or less inconsistent, alternative measure that Argentina could reasonably have been expected to use, and that the Argentine Government's measures, including taxation, during the economic crisis were reasonable and proportionate, and thus justified under an essential security exception.[248]

The aforementioned example demonstrates how the general exception clause in the WTO style may be able to better balance the governments' public interest with investor protection. Nevertheless, it remains unclear how arbitral tribunals will actually interpret and apply these exceptions in practice, given there is currently no case law indicating that respondent states used general exclusions. Furthermore, this study holds the opinion that, given the importance of tax as a public policy, the adaptive WTO general exception may offer an appropriate balance between safeguarding the interests of investors and the right to regulate in the areas of tax.

4.4.5.4 Tax Carve-Out Clauses

Unlike earlier IIAs, contemporary IIAs frequently feature tax carve-out clauses that are particularly relevant to tax initiatives. As usual, governments take a range of approaches to tax carve-out clauses which can be divided into two main types: partial and full tax carve-out. Each is further divided into subcategories. Partial tax carve-out exempt tax measures from certain investment protection standards (such as NT and MFN treatment) or some forms of taxation (such as direct taxation) from investment protection. The full tax carve-out, on the other hand, excludes tax measures from all investment protection standards; however, some treaties claw back the applicability of specific investment protections to tax measures, particularly protection against unlawful expropriation and transfer.

In previous situations, governments have raised tax-carve out clauses in some ISDS cases when they are available. With respect to a full tax carve outs, in Yukos v. Russian Federation, the Russian tax authorities used a full tax carve out to explain violations of the Russia BIT's investor protection standards, which include a full tax carve out. However, the tribunal applied a good faith standard and determined that the Russian tax authorities' treatment of Yukos (i.e., tax reassessments, VAT charges, fines and asset freezes, threats to revoke licenses, and duress to sell

[248] *Continental v. Argentina* (n 231) para 167.

Yukos' main production facility) did not constitute bona fide tax measures, and thus did not justify the full tax-carve out clause.[249]

Despite a treaty clawback on the applicability of specific investment protections to tax measures, governments' legitimate tax measures were excluded from the applicability of such protections. Investors claimed, for example, in *Eiser v. Spain* that the state had violated investment protection by imposing taxes on renewable energy installations that were not legitimate. However, the tribunal ruled that 'the present case does not on the facts reach a situation where the tax enforcement measures are found to have been used as part of a pattern of behavior aimed at destroying Claimants,'[250] and that since the tax measures were implemented in good faith, they would not be covered by the claw back clause.

In sum, as demonstrated by previous cases, the public policy exception and tax carve-out clauses are essential to strike a balance between the public interest of states and the private interest of foreign investors. However, without a multilateral framework, no uniform approach exists among states as to how to structure these exceptions. States may cite the CIL on state necessity, the essential security exception of a treaty, the general exception, and tax carve-out clauses to defend their tax measures; however, the level of deference to host states varies from extremely low to high. Of these exceptions, tax-carve-out clauses are one type that frequently allows governments a great deal of discretion, but the state is still required to act in good faith.

4.5 Chapter Findings and Observations

This chapter sought to examine the characteristics of tax-related disputes arising from IIAs, as well as the key problematic issues that frequently arose in previous cases, in order to develop lessons for Thailand's tax policy makers, tax law drafters, tax administrators, tax adjudicators, and investment treaty negotiations. This examination yields three major conclusions and some critical observations, which are as follows. First, this chapter explained that, in the global context, approximately 165 tax-related investment disputes were filed under ICSID and non-ICSID arbitrations, with the *ECT (1994)* being the most frequently invoked IIA in tax-related ISDS cases, followed by *NAFTA (1992)* and the *Ecuador-US BIT (1993)*. Although tax-related issues

---

[249] *Yukos Universal Limited (Isle of Man) v The Russian Federation (Interim Award on Jurisdiction and Admissibility)* (UNCITRAL, PCA, Case No. 2005-04/AA227, 30 November 2009) para 568.

[250] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain (Award)* (ICSID, Case No. ARB/13/36, 4 May 2017) para 270.

make up 15% of all ISDS cases, the figure indicates a rise in tax-related disputes over time. Second, there are three unique features of tax-related disputes arising under IIAs: first, they occur between tax authorities of the host state and foreign investors who are also taxpayers; second, they typically result from states' treaty violations; and third, they entail determining whether a host state regulatory power complies with investment treaty standards. Fourth, rather than asking the host state to change its own laws and regulations, the remedies available to an investor for breaches of a foreign investment treaty usually take the form of compensation for a particular investor. Third, given the general consensus that tax measures are arbitrable in the absence of tax carve-outs, some contentious issues arising from previous cases have created uncertainty for tax policymakers. These include the lack of a global consensus regarding the definition of taxation under IIAs, the possibility of a wide range of tax measures being in violation of IIAs, and—above all—the fact that, rather than a single norm articulating an international standard for domestic tax measures, several criteria determining the characteristics of tax measures found to violate each treaty protection varied under IIAs. Even though IIAs include a right of regulate exception clause and a tax carve-out clause, previous cases have shown that general exception clauses are difficult to exercise, and in some cases, even if a tax carve-out clause exists, it must be done in good faith. In addition to the findings above, this study observes that, while taxes are an important public policy of states, in most tax-related disputes, tax measures are handled in the same way as other regulatory measures substantively and procedurally. It is proposed that proper standards of review, tax carveout clause, and unique mechanisms for resolving tax disputes should be considered and developed in the future. Drawing upon the insights gained from a worldwide perspective, the following chapter will look at the relationship between domestic tax policies and treaty protections in the context of Thailand's IIAs.

Chapter 5

An Analysis of the Limits of Tax Sovereignty in the Context of Thailand's IIAs

5.1 Chapter Introduction

Globally, the number of IIAs and tax-related investment disputes is on the rise, thus creating concerns for tax policymakers, law drafters, administrators, and adjudicators, as well as for investment treaty negotiators. FDI is a key driver of Thailand's economic growth, much as it is for other developing countries. Foreign investors are subject to several types of Thailand's tax and non-tax regulatory measures. The country has introduced several policies and laws to attract foreign investment, at the domestic and international levels. At the international level, Thailand has made various treaties to protect foreign investment by limiting the government's right to regulate in several areas, including tax. Against this backdrop, this chapter examines the intersection of Thailand's tax sovereignty and investment treaty protection in the context of IIAs. To this end, it firstly provides a snapshot of Thailand's investment policy, IIAs, and ISDS. It then delves into analyses of the right to regulate exception and tax carve-out clauses under Thailand's IIAs. Next, it reviews various methods for resolving tax-related disputes available under Thailand's IIAs. Finally, the chapter synthesises lessons learnt from past ISDS cases against Thailand and ends with a summary of findings and some observations.

5.2 A Snapshot of Thailand's Investment Policy and Regulatory Framework

Economic policies play a pivotal role in shaping a country's investment climate. Investors make decisions based on a wide range of economic factors, from fiscal and monetary policies to trade regulations and government stability.[251] From the early 1960s through the early 1970s, Thailand pursued economic liberalism policies generally aimed at agriculture-based growth. Following this period, the country's economic policies evolved to a focus on export-based growth (1980-1996), the buildup to and recovery from the 1997 crisis (1997-2006), and then moderate growth, political uncertainty, and larger global crises (1996-2020).[252] The 13th National Economic

---

[251] Archanun Kohpaiboon and Juthathip Jongwanicheria, *Changes in Trade and Investment Policies in Thailand and the Implications for Medium-Term Growth* (Discussion Paper Series No. 436, Research Centre in International Competitiveness, Faculty of Economics, Thammasat University (2022) 1-4.

[252] OECD, *OECD Investment Policy Reviews: Thailand* (OECD, 2021) 51.

and Social Development (NESD) Plan (2023-2027) outlines Thailand's present economic priorities, and aims to reconcile the country's economic development model with sustainable development principles, in line with the UN global goals.[253]

In the legal context, foreign investors are subject to all relevant domestic legislation, including the *Foreign Business Act* and Thai laws on public-private partnerships, business organisations, industrial regulation, property, the environment, intellectual property, taxation, employment, bankruptcy, export-import, money exchange, and more.[254] In pursuing economic liberalism policies and promoting FDI, Thailand has introduced several investment policies since 2011, including granting permission to foreign banks to establish a subsidiary in Thailand (2011), revising the tax package for regional operating headquarters (2012), exempting foreign business from licence requirements in certain banking and insurance industries (2016), adding new measures to promote technology-based activities (2017), exempting certain business activities from the requirement to obtain a licence under the *Foreign Business Act*, abolishing the ministerial regulations on minimum capital for foreign companies (2019), waiving personal income tax for three groups of foreign investors, reducing import tariffs for four major investment projects (2022), and permitting foreigners to work or invest in eighteen targeted industries (2023).[255]

Beginning in 1966, laws on investment promotion were passed and associated agencies were created to increase Thailand's competitiveness and to help the country avoid falling into the middle-income trap by offering both tax-based and non-tax-based incentives to foreign and local investors. In 1966, the Board of Investment (BOI) was established to promote investment in particular industries, as well as to provide support to Thai investors seeking to invest abroad.[256] Following the creation of the BOI, the Industrial Estate Authority of Thailand (IEAT) was established in 1979 under the Ministry of Industry to promote investment in industrial estate zones.[257] In 2017, the *Competitiveness Enhancement Act* was introduced, aimed at promoting investment in research & development to advance technology and innovation by offering

---

253 Office of the National Economic and Social Development Council (ONESC), Office of the Prime Minister, *The Thirteenth National Economic and Social Development Plan (2023-2027)* (Unofficial Translation) < https://www.nesdc.go.th/article_attach/article_file_20230615134223.pdf> accessed 1 May 2025.

254 Dej-Udom Krairit, *International Investment Law* (Thammasat University Press, 2015) 18-25.

255 UNCTAD, *Investment Policy Measures: Thailand* <https://investmentpolicy.unctad.org/investment-policy-monitor/214/thailand> accessed 1 May 2025.

256 BOI, *History* <https://www.boi.go.th/index.php?page=our_history2> accessed 1 May 2025.

257 IEAT, *About the IEAT* < https://www.ieat.go.th/en> accessed 1 May 2025.

incentives as well as special funding to targeted industries.[258] Then, in 2018, the National Legislative Assembly passed the *Eastern Economic Corridor (EEC) Act*, which focuses on supporting targeted industries in the three eastern provinces of Thailand: Rayong, Chonburi, and Chachoengsao.[259]

At the international level, Thailand has become a member of several intergovernmental organisations related to the economy, both regionally and bilaterally, such as the WTO, World Customs Organization (WCO), World Bank, International Monetary Fund (IMF), and ASEAN. It has ratified several regional and bilateral international economic agreements, including the FTAs, EPAs, IIAs, and DTAs. In terms of treaties, Thailand concluded its first investment treaty with the US – *the US-Thailand Amity Treaty* – in 1833, followed by the *Germany-Thailand BIT* in 1961, and other IIAs over the next decades.[260] At present, Thailand's IIAs are concluded in different forms, including in Thailand's BITs, and TIPs. The first, BIT, refers to an agreement between Thailand and another nation about the promotion and protection of investments, while the latter, TIP, covers a variety of investment treaties, including FTAs with investment chapters, treaties with minimal investment-related provisions, and treaties that only have framework clauses, such as those on investment cooperation and/or as a mandate for future investment-related negotiations.[261]

Table 8: Main Types of Thailand's IIAs[262]

Typologies	Sub-Typologies	Number
Thailand's BITs		42
Thailand's TIPs	Thailand's FTAs/EPAs with investment chapters	3
	ASEAN+'s FTAs/EPAs with investment chapters	3
	ASEAN and ASEAN+ investment agreements	5
	Others	17
Source: Created by the author		

[258] BOI, *Competitiveness Enhancement Act* <https://www.boi.go.th/index.php?page=contact_csip&language=en> accessed 1 May 2025.
[259] EEC, *About* < https://www.eeco.or.th/th/home> accessed 1 May 2025.
[260] UNCTAD, *International Investment Agreements Navigator: Thailand* < https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand> accessed 1 May 2025.
[261] Ibid.
[262] Ibid.

Like IIAs everywhere, Thailand's IIAs contain substantive international investment standards and define Thailand's obligations to provide investment protections to foreign investors and those investors' rights to claim compensation if Thailand breaches these norms. Depending on the language of each treaty, the core investment protections include the FET standard, a protection against unlawful expropriation, the FPS standard, an umbrella clause, a prohibition against arbitrary and discriminatory impairment of investments, MFN treatment standard, and NT standard. Without the exceptions or tax carve-out clauses, any of these investment protections can be applied to Thailand's domestic tax measures, meaning that Thailand's tax law, administrative actions, and tax adjudications can allegedly be in breach of IIAs.

5.3 An Analysis of Right to Regulate Exceptions and Tax Carve-Out Clauses under Thailand's IIAs

As discussed previously, any investment protections can be applied to domestic tax measures. Thus, the most obvious technique that governments around the globe use to ensure space for domestic regulation is to include a right to regulate exception and tax carve-out clauses in their treaties. As examined in chapters 3 and 4, there are various typologies of these provisions. This section examines right to regulate exceptions and tax carve-out clauses in the context of Thailand's IIAs, including Thailand's BITs, Thailand's FTAs/EPAs with investment chapters, ASEAN's FTAs/ EPAs with investment chapters, and ASEAN's investment agreements.

5.3.1 Thailand's BITs

BITs are bilateral international agreements between Thailand and another country regarding the promotion and protection of investments made in each other's territories.[263] As presented in the table below, Thailand has established BITs with forty-two countries (thirty-seven are in force, two were terminated, and three are not yet in effect). Subject to each treaty's language, Thailand's BITs usually start with definitions of investment and investors, followed by provisions pertaining to the promotion, protection, and treatment of investment, compensation for damages or loss, expropriation, transfer of payment related to investment, subrogation, and settlement of disputes between investors and states. Also, the agreements generally include provisions regarding limitation of benefits, joint investment committees, entry into force,

[263] Ibid.

amendment, and termination, but the majority of them lack a right to regulate and tax carve-out clauses as presented in the table below.

Table 9: Right to Regulate Exceptions and Tax Carve-Out Clauses under Thailand's BITs

NO.	BITs	Status	General Exception	Essential Security Exception	Tax Carve-Out
1.	*Germany - Thailand BIT (1961)*	Terminated	-	-	-
2.	*Netherlands - Thailand BIT (1972)*	In force	-	-	-
3.	*Thailand - United Kingdom BIT (1978)*	In force	-	-	-
4.	*China - Thailand BIT (1985)*	In force	-	-	-
5.	*Bangladesh - Thailand BIT (1988)*	Terminated	-	-	-
6.	*Korea, Republic of - Thailand BIT (1989)*	In force	-	-	-
7.	*Lao People's Democratic Republic - Thailand BIT (1990)*	In force	-	-	-
8.	*Hungary - Thailand BIT (1991)*	In force	-	-	-
9.	*Thailand - Viet Nam BIT (1991)*	In force	-	-	-
10.	*Peru - Thailand BIT (1991)*	In force	-	-	-
11.	*Poland - Thailand BIT (1992)*	In force	-	-	-
12.	*Romania - Thailand BIT (1993)*	In force	-	-	-
13.	*Czech Republic - Thailand BIT (1994)*	In force	-	-	√
14.	*Finland - Thailand BIT (1994)*	In force	-	-	-
15.	*Cambodia - Thailand BIT (1995)*	In force	-	-	-

Table 9: Right to Regulate Exceptions and Tax Carve-Out Clauses under Thailand's BITs					
NO.	**BITs**	**Status**	**General Exception**	**Essential Security Exception**	**Tax Carve-Out**
16.	*Philippines - Thailand BIT (1995)*	In force	-	-	-
17.	*Sri Lanka - Thailand BIT (1996)*	In force	-	-	-
18.	*Taiwan Province of China - Thailand BIT (1996)*	In force	-	-	-
19.	*Canada - Thailand BIT (1997)*	In force	-	-	-
20.	*Switzerland - Thailand BIT (1997)*	In force	-	-	-
21.	*Indonesia - Thailand BIT (1998)*	In force	-	-	-
22.	*Croatia - Thailand BIT (2000)*	In force	-	-	-
23.	*Israel - Thailand BIT (2000)*	In force	-	-	-
24.	*Sweden - Thailand BIT (2000)*	In force	-	-	-
25.	*Thailand - Zimbabwe BIT (2000)*	Signed (not in force)	-	-	-
26.	*Argentina - Thailand BIT (2000)*	In force	-	-	-
27.	*Egypt - Thailand BIT (2000)*	In force	-	-	-
28.	*Slovenia - Thailand BIT (2000)*	In force	-	-	-
29.	*India - Thailand BIT (2000)*	Terminated	-	-	-
30.	*Korea, Dem. People's Rep. of - Thailand BIT (2002)*	In force	-	-	-
31.	*Bahrain - Thailand BIT (2002)*	In force	-	-	-
32.	*Belgium-Luxembourg Economic Union - Thailand BIT (2002)*	In force	-	-	-

Table 9: Right to Regulate Exceptions and Tax Carve-Out Clauses under Thailand's BITs					
NO.	**BITs**	**Status**	**General Exception**	**Essential Security Exception**	**Tax Carve-Out**
33	*Germany - Thailand BIT (2002)*	In force	-	-	√
34	*Bangladesh - Thailand BIT (2002)*	In force	-	-	-
35	*Russian Federation - Thailand BIT (2002)*	Signed, not in force	-	-	-
36	*Bulgaria - Thailand BIT (2003)*	In force	-	-	-
37	*Thailand - Turkey BIT (2005)*	In force	-	-	-
38	*Tajikistan - Thailand BIT (2005)*	Signed, but not in force	-	-	-
39	*Hong Kong, China SAR - Thailand BIT (2005)*	In force	-	-	-
40	*Jordan - Thailand BIT (2005)*	In force	-	-	-
41	*Myanmar - Thailand BIT (2008)*	In force	-	-	-
42	*Thailand - United Arab Emirates BIT (2015)*	In force	-	-	√
Source: Created by the author					

In the context of Thailand's BITs, the policy space of the country is very limited as none of Thailand's BITs provides a general exception, nor an essential security exception. Although tax carve-out clauses are found in three of Thailand's BITs – *Czech Republic-Thailand BIT (1994)*,[264] *Germany-Thailand BIT (2002)*,[265] and *Thailand-UAE BIT (2015)*[266] – tax measures are not included in any agreements. In the BITs with the Czech Republic and Germany, Thailand's tax

[264] *Czech Republic-Thailand BIT (1994)*, article 5.
[265] *Germany-Thailand BIT (2002),* article 3.
[266] *Thailand-United Arab Emirates BIT (2015)*, article 5.

measures are excluded only from the NT and MFN treatment standards, while the BIT with the UAE only carves out Thailand's tax measures from the NT standard. Based on this examination, it appears that Thailand's BITs are 'old-style' generation BITs, which are designed to protect foreign investment in Thailand but do not contain a right to regulate exception and tax carve-out clauses. This practice creates significant risk to tax policymakers, law drafters, administrators, and adjudicators, who may theoretically be in breach of investment protections under the majority of Thailand's BITs.

5.3.2 Thailand's FTAs/EPAs with Investment Chapters

The second type of IIAs in Thailand is FTAs/EPAs with investment chapters. Thailand's FTAs are international agreements between Thailand and one or more countries that aim to eliminate barriers to the free movement of goods, services, and investment between signatories.[267] EPAs (or CEPAs) cover a broader range of economic integration, such as economic and technical cooperation, intellectual property, competition, and e-commerce.[268] Thailand has entered FTAs and EPAs with three countries: Australia in 2004, New Zealand in 2005, and Japan in 2007. These three FTAs/EPAs each contain several chapters, ranging from general to specific topics (e.g., trade in goods, investment, and e-commerce). Every agreement includes a chapter on investment. As presented in the table below, all of Thailand's FTAs/EPAs provide a set of exceptions and tax carveout clause in their general exception chapters, which are applicable to their investment chapters as well.

Table 10: Right to Regulate Exceptions and Tax- Carve Out under Thailand's FTAs/EPAs with Investment Chapter

No.	TIPs	Status	General Exception Chapter			Investment Chapter
			General exception	Essential Security Exception	Tax Carve-Out	Right to Regulate/ Tax Carve-Out
1.	Australia - Thailand FTA (2004)	In force	√	√	√	-

[267] UNCTAD, *Investment Provisions in Economic Integration Agreements* (UNCTAD/ITE/IIT/2005/10, United Nations, 2006) 1-2.
[268] Ibid.

Table 10: Right to Regulate Exceptions and Tax- Carve Out under Thailand's FTAs/EPAs with Investment Chapter						
No.	**TIPs**	**Status**	**General Exception Chapter**			**Investment Chapter**
			General exception	**Essential Security Exception**	**Tax Carve-Out**	**Right to Regulate/ Tax Carve-Out**
2.	New Zealand - Thailand CEPA (2005)	In force	√	√	√	-
3.	Japan - Thailand EPA (2007)	In force	√	√	√	√
Source: Created by the author						

Despite different wordings in each of the three agreements, some observations regarding the limitation of tax sovereignty under Thailand's FTAs/EPAs can be made. Firstly, these exceptions and carve-out clauses do not only apply to the investment chapters; they affect other chapters according to conditions prescribed in each agreement.[269] Secondly, the general exceptions[270] and essential security exceptions[271] in these three agreements tend to be influenced by the WTO's article XX and article XXI of *GATT*. Lastly, all of these three of Thailand's FTAs/EPAs contain tax carve-out clauses, but they claw back an application of certain investment protections on tax measures.[272] Only the *Japan-Thailand EPA* further provides detailed criteria of these carve-out clauses with respect to expropriation.[273]

In comparison with Thailand's BITs, its FTAs/EPAs tend to give more policy space to Thai tax policymakers, law drafters, administrators, and adjudicators through the abovementioned

---

269 See *Australia - Thailand FTA (2004),* chapter 16; *New Zealand - Thailand CEPA (2005)* chapter 15, *Japan - Thailand EPA (2007),* chapter 1.

270 See *Australia - Thailand FTA (2004),* Article 1601; *New Zealand - Thailand CEPA (2005)* Article 15.1-15.2, *Japan - Thailand EPA (2007),* article 68.

271 See *Australia - Thailand FTA (2004),* Article 1601; *New Zealand - Thailand CEPA (2005)* Article 15.1-15.2, *Japan - Thailand EPA (2007),* article 68.

272 See, *Australia - Thailand FTA (2004)*, article 1607; *New Zealand - Thailand CEPA (2005)* Article 15.7, *Japan - Thailand EPA (2007)*, article 9.

273 *Japan - Thailand EPA (2007)*, article 110 (taxation measures as expropriation).

exceptions. These exceptions are generally applicable, not specific to tax-related disputes arising under their investment chapters. Additionally, the WTO's general exception and essential security exception are not easy to invoke. Finally, although Thailand's tax measures are carved out from these agreements' investment chapters, all three treaties claw back an application of expropriation on tax measures. As a result, Thailand's internal tax measures can still allegedly breach the protection against unlawful expropriation.

5.3.3 ASEAN+'s FTAs/EPAs with Investment Chapters

The third type of IIAs in Thailand is ASEAN+'s FTAs/EPAs with investment chapters. ASEAN+'s FTAs are international agreements between ASEAN and non-ASEAN countries that aim to eliminate barriers to the free movement of goods, services, and investment among trade partners.[274] On top of FTAs, ASEAN+'s EPAs cover a broader range of economic integration between ASEAN and non-ASEAN countries, such as intellectual property, competition, e-commerce, and small and medium enterprises.[275] ASEAN entered into an EPA with Japan in 2008 and FTAs with Australia and New Zealand in 2009. In 2020, ASEAN entered into the *RCEP* with Australia, China, Japan, New Zealand, and South Korea.

Table 11: Right to Regulate Exceptions and Tax- Carve Out under Thailand's under ASEAN and ASEAN+'s FTAs and EPAs

		General Provisions and Exceptions Chapter			**Investment Chapter Right to Regulate/ Tax Carve-Out**
No.	Title	Public policy Exception	Essential Security Exception	Tax Carve Outs	
1.	ASEAN - Japan EPA (2008)	√	√	√	-
2.	AANZFTA (2009)	√	√	√	√
3.	RCEP (2020)	√	√	√	√
Source: Created by the author					

[274] UNCTAD (n 267) 23-24.
[275] Ibid.

As presented in the table above, the general chapter of ASEAN's FTAs/EPAs provides general exceptions,[276] essential security exceptions,[277] and tax carve-out clauses,[278]but tax carve-out clauses under their investment chapters are varied. Except for the *ASEAN-Japan EPA*, which provides a mandate for future investment-related arrangements,[279] the investment chapters of *ANZFTA* and *RCEP* contain further criteria regarding tax carve-out clauses with respect to transfers and expropriation.[280] It is clear that the right to regulate exceptions and tax carve outs in ASEAN+'s FTAs/EPAs are comparable to those in Thailand's FTAs/EPAs, as both categories are based on a trade and economic agreement paradigm. Based on these exceptions, ASEAN's FTAs/EPAs tend to give policy space to tax policymakers, law drafters, administrators, and adjudicators to a similar extent as Thailand's FTAs/EPAs. It should be emphasised, nevertheless, that Thailand and other ASEAN nations may still purport to violate the protections provided by *ANZFTA* and *RCEP* because tax carve-out clauses under these two treaties claw back an application of expropriation and transfer on tax measures.

5.3.4 ASEAN and ASEAN+'s Investment Agreements

The final type of Thailand's IIAs include *ASEAN's Comprehensive Investment Agreement* (*ACIA*) and ASEAN+'s investment agreements. The former is an intra-ASEAN agreement that aims to promote investment among the ten ASEAN nations,[281] while the latter constitutes international agreements between ASEAN and non-ASEAN countries with the objective of promoting investment between ASEAN and trade partners, like China, Korea, Hong Kong, China SAR and India. Unlike ASEAN+'s FTAs/EPAs (discussed in section 5.3.3), ASEAN and ASEAN+'s investment agreements focus only on investment protection instead of broader

---

276 *ASEAN - Japan EPA (2008)*, chapter 1, article 7; *AANZFTA (2009)* chapter 1, article 1; *RCEP (2020)*, chapter 17, article 17.12.

277 *ASEAN - Japan EPA (2008)*, chapter 1, article 7; *AANZFTA (2009)* chapter 15, article 2; *RCEP (2020),* chapter 17, article 17.13.

278 *ASEAN - Japan EPA (2008)* chapter 1, article 6; *AANZFTA (2009)*, chapter 15, article 3; *RCEP (2020)*, chapter 17, article 17.14.

279 *ASEAN - Japan EPA (2008)* chapter 7 article 51.

280 *AANZFTA (2009)*, chapter 15, article 8.3(f) (transfer) and article 9 (expropriation and compensation); *RCEP (2020)* chapter 10, article 10.9 (transfers) and article 10.13 (expropriation).

281 ASEAN, *ASEAN's Comprehensive Investment Agreement (ACIA), Handbook: A Guidebook for Businesses & Investors* (ASEAN, 2015) 11-12.

economic policy. As presented in the table below, all contain general exceptions, essential security exceptions, and tax carve-out clauses applicable to investment treaty protections.

Table 12: Right to Regulate Exceptions and Tax- Carve Out under ASEAN and ASEAN+'s Investment Agreements

No.	Title	General Exception	Essential Security Exception	Tax Carve Out Clauses
1.	*ASEAN Comprehensive Investment Agreement (2009)*	√	√	√
2.	*ASEAN - China Investment Agreement (2009)*	√	√	√
3.	*ASEAN - Korea Investment Agreement (2009)*	√	√	√
4	*ASEAN - Hong Kong, China SAR Investment Agreement (2017)*	√	√	√
5.	*ASEAN - India Investment Agreement (Signed, but not in force)*	√	√	√

Source: Created by the author

ASEAN and ASEAN+'s investment agreements are unique in it that their exception clauses have been tailored to give more deference to tax measures while still protecting foreign investment and investors. First, with respect to the general exceptions, ASEAN and ASEAN+'s investment agreements have modified article XX of *GATT* to give more policy space to taxation.[282] Second, rather than incorporating article XXI of *GATT*, ASEAN's FTAs/EPAs also provide their own versions of the essential security interest exception.[283] Third, although ASEAN's investment agreements provide tax carve-out clauses that claw back an application of expropriation and transfer on tax measures, compared to ASEAN's FTAs/EPAs, these clauses tend to provide more

[282] *ASEAN Comprehensive Investment Agreement (2009)*, article 17; *ASEAN - China Investment Agreement (2009)* article 16; *ASEAN - Korea Investment Agreement (2009)*, article 20; *ASEAN - India Investment Agreement*, article 21.

[283] *ASEAN Comprehensive Investment Agreement (2009)*, article 18; ASEAN - China Investment Agreement (2009) article 17; *ASEAN - Korea Investment Agreement (2009)*, article 21; *ASEAN - India Investment Agreement*, article 22.

detailed criteria.[284] For example, the agreements hold that certain characteristics of tax measures, such as rules that are inequitable, discriminatory, or not on a good faith basis, remain subject to expropriation and free transfer.

Overall, this analysis of the four main categories of Thailand's IIAs suggests that there is variation of right to regulate exceptions and tax carve outs under each category. These varied regulations thus offer different degrees of deference to states in the area of taxation and fiscal measures. This study observes that, among the four categories, the older-style BITs without the right to regulate exceptions are likely to create the highest chance of claims by foreign investors against Thailand's tax measures. The FTAs/EPAs that contain the WTO-style general exceptions and essential security exceptions tend to give more policy space to the state, but the WTO style may not be suitable for tax-related disputes under these investment chapters. ASEAN's investment agreements contain innovations in treaty language that vest host states with more freedom to regulate, reflecting ASEAN's cautious approach to economic integration. These agreements provide conditions for tax measures in greater detail, offering deference to states over investment protection. However, the presence of tax carve-out clause that claw back the application of certain protections means that tax measures may still be in breach of the standard of protection, particularly concerning expropriation and transfer.

5.4 An Analysis of ISDS for Tax-Related Disputes under Thailand's IIAs

Beyond the right to regulate exceptions and tax carve-out clauses discussed in section 5.3, another technique that governments around the globe use to ensure space for policy regulation is through investor-state dispute settlements. As discussed in chapter 3, there are various methods of dispute resolution, ranging from ADR, international arbitration – with improved procedures and appeal mechanisms – international investment court, and special mechanisms specifically used for tax-related disputes. Against this backdrop, this section will examine investor-state dispute settlements available for tax-related investment disputes in the context of Thailand's IIAs,

---

[284] *ASEAN Comprehensive Investment Agreement (2009)*, article 3 (scope) and articles 13-14 (expropriation and compensation); *ASEAN - China Investment Agreement (2009)*, article 3 (scope) and article 8 (expropriation); *ASEAN - Korea Investment Agreement (2009)* article 1 (scope), article 10 (transfers) and article 12 (expropriation and compensation); *ASEAN - India Investment Agreement*, article 1 para 2(d) and article 11 (transfer).

including Thailand's BITs, Thailand's FTAs/EPAs with investment chapters, ASEAN's FTAs/EPAs with investment chapters, and ASEAN's investment agreements.

5.4.1 Thailand's BITs

As examined in section 5.3.1, Thailand's BITs are old-style BITs intended to protect foreign investment in the country. In terms of substantive investment protections, the majority of these agreements lack the right to regulate exceptions and tax carve-out clauses. In terms of ISDS, the methods available for resolving disputes between investors and government are not uniform across the BITs, as shown in the table below.

Table 13: ISDS Available for Tax-Related Investment Disputes under Thailand's BITs

NO.	BITs	ISDS	Improved ISDS	Extra Mechanism for Tax-Related Disputes	NO ISDS
1.	*Germany - Thailand BIT (1961)*	-	-	-	√
2.	*Netherlands - Thailand BIT (1972)*	-	-	-	√
3.	*Thailand - United Kingdom BIT (1978)*	-	-	-	√
4.	*China - Thailand BIT (1985)*	-	-	-	√
5.	*Bangladesh - Thailand BIT (1988)*	√	-	-	-
6.	*Korea, Republic of - Thailand BIT (1989)*	√	-	-	-
7.	*Lao PDR- Thailand BIT (1990)*	-	-	-	√
8.	*Hungary - Thailand BIT (1991)*	√	-	-	-
9.	*Thailand - Viet Nam BIT (1991)*	√	-	-	-
10.	*Peru - Thailand BIT (1991)*	√	-	-	-

Table 13: ISDS Available for Tax-Related Investment Disputes under Thailand's BITs					
NO.	**BITs**	**ISDS**	**Improved ISDS**	**Extra Mechanism for Tax-Related Disputes**	**NO ISDS**
11.	*Poland - Thailand BIT (1992)*	√	-	-	-
12.	*Romania - Thailand BIT (1993)*	√	-	-	-
13.	*Czech Republic - Thailand BIT (1994)*	√	-	-	-
14.	*Finland - Thailand BIT (1994)*	√	-	-	-
15.	*Cambodia - Thailand BIT (1995)*	√	-	-	-
16.	*Philippines - Thailand BIT (1995)*	√	-	-	-
17.	*Sri Lanka - Thailand BIT (1996)*	√	-	-	-
18.	*Taiwan Province of China - Thailand BIT (1996)*	√	-	-	-
19.	*Canada - Thailand BIT (1997)*	√	-	-	-
20.	*Switzerland - Thailand BIT (1997)*	√	-	-	-
21.	*Indonesia - Thailand BIT (1998)*	√	-	-	-
22.	*Croatia - Thailand BIT (2000)*	√	-	-	-
23.	*Israel - Thailand BIT (2000)*	√	-	-	-
24.	*Sweden - Thailand BIT (2000)*	√	-	-	-
25.	*Thailand - Zimbabwe BIT (2000)*	√	-	-	-
26.	*Argentina - Thailand BIT (2000)*	√	-	-	-
27.	*Egypt - Thailand BIT (2000)*	√	-	-	-
28.	*Slovenia - Thailand BIT (2000)*	√	-	-	-

Table 13: ISDS Available for Tax-Related Investment Disputes under Thailand's BITs					
NO.	**BITs**	**ISDS**	**Improved ISDS**	**Extra Mechanism for Tax-Related Disputes**	**NO ISDS**
29.	*India - Thailand BIT (2000)*	√	-	-	-
30.	*Korea, Dem. People's Rep. of - Thailand BIT (2002)*	√	-	-	-
31.	*Bahrain - Thailand BIT (2002)*	√	-	-	-
32.	*BLEU (Belgium-Luxembourg Economic Union) - Thailand BIT (2002)*	√	-	-	-
33	*Germany - Thailand BIT (2002)*	√	-	-	-
34	*Bangladesh - Thailand BIT (2002)*	√	-	-	-
35	*Russian Federation - Thailand BIT (2002)*	√	-	-	-
36	*Bulgaria - Thailand BIT (2003)*	√	-	-	-
37	*Thailand - Turkey BIT (2005)*	√	-	-	-
38	*Tajikistan - Thailand BIT (2005)*	√	-	-	-
39	*Hong Kong, China SAR - Thailand BIT (2005)*	√	-	-	-
40	*Jordan - Thailand BIT (2005)*	√	-	-	-
41	*Myanmar - Thailand BIT (2008)*	√	-	-	-
42	*Thailand - United Arab Emirates BIT (2015)*	√	-	-	-
Source: Created by the author					

As detailed, the majority of Thailand's BITs provide for international arbitration as a method for resolving investor-state disputes. Only five out of Thailand's forty-two BITs include no ISDS (the BITs with the Netherlands, the UK, China and Laos PDR, and Germany), meaning that the investing party will have a jurisdiction to resolve the disputes. The rest of Thailand's BITs provide for international arbitration as the method for resolving disputes, but the procedural options are prescribed differently under each treaty, ranging from ICSID arbitration, UNCITRAL arbitration, non-ICSID arbitrations, or a combination thereof. None of Thailand's BITs provide for international arbitration with improved or modified procedures, nor do they offer any additional requirements or mechanisms for tax-related disputes.

As a result, tax-related investment disputes may be subject to different models of dispute resolution, just like disputes in other arenas. In most cases, tax-related disputes under BITs are likely to be resolved by international arbitration. Given their vague substantive protections, without the right to regulate exceptions and tax carve-out clauses, this research is of the view that Thailand's BITs create a high risk to tax policymakers, drafters, administrators, and adjudicators, in the sense that if tax measures allegedly breach investment protections, disputes are to be adjudicated by party-appointed arbitral tribunals in a confidential manner but without an appeal mechanism.

5.4.2 Thailand's FTAs/EPAs with Investment Chapters

Thailand's FTAs/EPAs with investment chapters not only aim to protect investment but also to eliminate barriers to the free movement of goods, services, and investments and address other matters pertaining to economic integration between Thailand and trade partners. Unlike its BITs, Thailand's FTAs/EPAs contain exception clauses, but they are based on the WTO model, which renders the exceptions applicable to all or some chapters, as prescribed in each agreement. In terms of ISDS, all three of Thailand's FTAs/EPAs provide ISDS for resolving disputes arising from substantive investment protection between investor and host state, as well as special conditions for tax-related disputes as presented in the table below.

Table 14: ISDS Available for Tax-Related Disputes under Thailand's FTAs/EPAs with Investment Chapter					
No.	**TIPs**	**ISDS**	**ISDS with Improved Procedure**	**Extra Conditions for Tax-Related Disputes**	**No ISDS**
1.	*Australia - Thailand FTA (2004)*	√	-	√	-
2.	*New Zealand - Thailand CEPA (2005)*	√	-	√	-
3	*Japan - Thailand EPA (2007)*	√	-	√	-
Source: Created by the author					

As previously stated, all of Thailand's FTAs/EPAs with investment chapters include provisions for conventional international arbitration to resolve investor-state issues,[285] as well as unique requirements for tax-related disputes.[286] None of Thailand's FTAs/EPAs with an investment chapter include upgraded or amended processes for international arbitration. As a result, while tax-related investment disputes may be resolved using different models (as specified by each treaty, including ICSID arbitration, UNCITRAL arbitration, and non-ICSID arbitrations), special conditions for tax-related disputes tend to give states deference in the dispute resolution proceedings.

5.4.3 ASEAN's FTAs/EPAs with Investment Chapter

Similar to Thailand's FTAs/EPAs, ASEAN's FTAs/EPAs aim to eliminate barriers to the economic integration of ASEAN and trade partners. As noted above, ASEAN's FTAs/EPAs usually contain a general exception chapter that incorporates WTO article XX and article XXI of *GATT*. They also often contain specific tax carve-out clauses that apply to some or all commitments prescribed in the agreements. In terms of ISDS, the practices are varied, as presented in the table below.

---

[285] *Australia - Thailand FTA (2004)*, article 917; *New Zealand - Thailand CEPA (2005)*, article 9.16; *Japan - Thailand EPA (2007)*, article 106.

[286] *Australia - Thailand FTA (2004)*, article 1607; *New Zealand - Thailand CEPA (2005)*, article 15.7; *Japan - Thailand EPA (2007)*, article 110 para 3 (b)-(c).

Table 15: ISDS Available for Tax-Related Disputes under ASEAN's FTAs/EPAs					
No.	**IIAs**	**Conventional ISDS**	**ISDS with Improved Procedure**	**Extra Conditions for Tax-Related Disputes**	**No ISDS**
1.	ASEAN - Japan EPA (2008)	-	-	-	-
2.	AANZFTA (2009)	√	-	√	-
3.	RCEP (2020)	-	-	-	√
Source: Created by the author					

As seen from the above, only *AANZFTA (2009)* provides ISDS for resolving investment disputes,[287] as well as special conditions for tax-related disputes,[288]similar to investment chapters in recent Thailand's FTAs/EPAs. The other two do not have ISDS provisions due to differing reasons. The *ASEAN-Japan EPA* provides a mandate for future investment-related arrangements,[289] while the investment chapter in *RCEP* does not include ISDS. With respect to the *RCEP*, Lugg, Ganeson, Elsig, Chaisse, and Jusoh explain that as the negotiations advanced, the new Malaysian government radically modified its position, tipping the balance against ISDS in the final round of negotiations.[290]

5.4.4 ASEAN and ASEAN+'s Investment Agreements

ACIA and ASEAN+'s investment agreements contain all types of right to regulate exceptions and tax carve-out clauses. In terms of ISDS, ASEAN and ASEAN+'s investment agreements contain more specifics, reflecting recent treaty practices that address investor-state arbitration reforms.

---

287 *AANZFTA (2009)*, article 18.
288 Ibid, article 25 paras 6-7.
289 *ASEAN - Japan EPA (2008)* chapter 7 article 51.
290 Andrew Lugg, et al, 'Why is there no investor-state dispute settlement in RCEP? Bargaining and Contestation in the Investment Regime' (2024) *Business and Politics* 1–28.

Table 16: ISDS Available for Tax-Related Disputes under ASEAN and ASEAN+'s Investment Agreements					
No.	IIAs	**Conventional ISDS**	**ISDS with Improved Procedure**	**Special Conditions for Tax-Related Disputes**	**No ISDS**
1.	*ASEAN Comprehensive Investment Agreement (2009)*	-	√	√	-
2.	*ASEAN - China Investment Agreement (2009*)	-	√	√	-
3.	*ASEAN - Korea Investment Agreement (2009)*	-	√	√	-
4.	*ASEAN - India Investment Agreement (2014) (Signed, but not in force)*	-	√	-	-
5.	*ASEAN - Hong Kong, China SAR Investment Agreement (2017)*	-	-	-	-
Source: Created by the author					

Except for the *ASEAN-Hong Kong Investment Agreement (2017),* which states that ISDS is to be agreed upon by the parties,[291] the distinctive feature of ASEAN and ASEAN+'s investment agreements is that they contain ISDS with improved procedures and special conditions for tax-related disputes. With respect to ISDS, ASEAN and ASEAN+'s investment agreements have tailored arbitral procedures, such as conditions and limitations on claim submission, enhanced suitability and impartiality of arbitrators, transparency in proceedings, and an appeal mechanism for an interim award.[292]

On top of these protections, three of five of ASEAN and ASEAN+'s investment agreements include special mechanisms for dispute resolution for tax-related investment disputes,

[291] *ASEAN - Hong Kong, China SAR Investment Agreement (2017)*, article 20.

[292] *ASEAN Comprehensive Investment Agreement (2009)*, articles 28-41; *ASEAN - China Investment Agreement (2009)*, article 14; *ASEAN - Korea Investment Agreement (2009)*, article 18; *ASEAN - India Investment Agreement (2014)*, article 20.

like requiring states to hold consultations to determine whether the measure in question is a taxation measure and whether the measure has an effect equivalent to expropriation or nationalisation.[293] However, it should be noted that these unique tax structures were not included in *the ASEAN-Hong Kong, China SAR Investment Agreement (2017)* or *ASEAN-India Investment Agreement (2014)*. Nonetheless, taken together with the right to regulate exceptions and tax carve-out clauses (examined in section 5.4.4), these provisions mean that ASEAN and ASEAN+'s investment agreements give more deference to the state, in particular to tax policymakers, law drafters, administrators, and adjudicators.

Overall, this analysis of the availability of ISDS under four main categories of Thailand's IIAs suggests that there is significant variation. Each form of IIA offers a different degree of deference to states in the area of taxation and fiscal measures, ranging from pro-investor to pro-state approaches. Among the four categories of treaties, this study is of the view that the older-style BITs that provide for international arbitration without improved procedures create the highest chance of claims by foreign investors, as tax-related disputes arising under this type of treaty are likely to be resolved by party-appointed arbitral tribunals, in a confidential manner, and the award is binding without a chance to appeal. By contrast, FTAs/EPAs that contain a special mechanism for tax-related disputes tend to give more policy space to the state in the areas of taxation and fiscal measures, but concerns regarding conventional arbitral proceedings based on the commercial arbitration model remain. Unlike other agreements, ASEAN's investment agreements contain innovations in ISDS as well as special mechanisms for resolving tax-related disputes, offering deference to the state over investment protection.

5.5 Lessons Learnt from Past ISDS Disputes Against Thailand

So far, Thailand has been involved in ISDS in two cases. The first ISDS case was brought in 2005 by Walter Bau, a German investor, under the *Germany-Thailand BIT (2002)*. This dispute was resolved under the *UNCITRAL rules* without the assistance of the administering institution.[294] The second dispute was initiated in 2017 by an Australian investor under the investment chapter of the *Australia-Thailand FTA*, which was also resolved under the *UNCITRAL rules* but

---

[293] *ASEAN Comprehensive Investment Agreement (2009),* article 36 para 6-7; *ASEAN - China Investment Agreement (2009)*, article 14 para 9-10; *ASEAN - Korea Investment Agreement (2009)*, article 18, para 8-9.

[294] *Walter Bau v. Thailand* (n 23).

administered by the Permanent Court of Arbitration.[295] In the former case, the award was decided in favour of the investor; in the latter, the arbitral proceeding is still pending

Table 17: Past ISDS Disputes against Thailand				
Case/Applicable IIA	**Government's Measures**	**Legal Basis**	**ISDS**	**Outcome**
Walter Bau v. Thailand Germany Thailand BIT (2002)	The failure of Thai authorities to approve toll hikes as contemplated in the concession contract	•FET standard Indirect •Expropriation •No right to regulate exception	The *UNCITRAL rules* without administering institution	Award decided in favor of the investor (1 July 2009)
Kingsgate v. Thailand Australia Thailand FTA (2004)	The Government's orders not to renew the investor's processing license for the mine and an order to close the mine and to suspend all gold mining and related activities in the country.	•FET standard •Indirect Expropriation	The *UNCITRAL rules* administered by the Permanent Court of Arbitration	Pending
Source: Created by the author				

Although neither dispute was related to tax measures, some lessons can be learnt from these two cases. Firstly, these cases challenge Thai administrative action, which is one of the key areas of concern of the Thai government. In both cases, administrative actions of Thai governmental authorities were alleged to be in breach of IIAs. In *Walter Bau v. Thailand*, the challenged administrative action was the failure of Thai authorities to approve toll hikes as contemplated in a

[295] *Kingsgate v. Thailand* (n 24). See also, Australian Stock Exchange (ASX) (n 24).

concession contract, which prevented the investor from making a reasonable rate of return on its investment in constructing and operating a toll highway in Bangkok.[296] In *Kingsgate v. Thailand*, the administrative action alleged to be in breach of the *Australia-Thailand FTA* was the Thai government's order not to renew a metallurgical processing licence for the investor, as well as its order to close the mine and to suspend all gold mining and related activities in the country by the end of 2016.[297]

The second lesson is that in both cases, the FET standard and indirect expropriation were used as bases for complaints against Thailand's administrative actions. In *Walter Bau v. Thailand*, the Thai authorities' failure to approve toll hikes was allegedly a breach of these provisions. In essence, the FET standard requires host states to treat foreign investors fairly and equitably. Indirect expropriation aims to safeguard the property rights of foreign investors. However, these provisions were drafted differently in a range of treaties. Under the *Germany-Thailand BIT* used to challenge the Thai authorities' actions involving toll hikes, the FET was drafted as an unqualified or autonomous FET standard (without any references to the CIL on MST or PIL). In the *Bau* case, the tribunal interpreted the FET standard to include a protection of the investor's legitimate expectation regarding a secure and stable legal framework.[298]

Thus, the tribunal held that the violation of the concession contract was tantamount to a violation of the FET standard because the investor's legitimate expectations were affected by the Thai government's actions. With respect to expropriation claims, the tribunal determined that the government's measures must be a substantial deprivation in order to constitute expropriation. Applying this principle, it was found that even though profits may have been diminished by the action or inaction of the Thai government, the investment continued to operate, and thus there was no substantial deprivation. Therefore, the expropriation challenge failed.[299] Although exception clauses were not raised in either case, these clauses are crucial to ensuring a balance between investor protection and the state's right to regulate in the public interest. Public policy exceptions are absent in the *Germany-Thailand BIT*. An environmental exception is available under the

---

296 *Walter Bau v. Thailand* (n 23), paras 10 [10]-[18].
297 Australian Stock Exchange (ASX), Kingsgate Consolidated Limited ASX Announcement (10 November 2017) <https://www.asx.com.au/asxpdf/20171110/pdf/43p3tbzmrgdhk4.pdf> accessed 1 May 2025.
298 *Walter Bau v. Thailand* (n 23), paras 12 [1]-[44].
299 Ibid, paras 11[1]-[3].

general exception chapter of the Thailand-Australia FTA,[300] but the government did not invoke the exception in *Kingsgate v. Thailand*.

The final lesson gleaned from these past ISDS disputes is the importance of the method of investor-state dispute resolution. The *Walter Bau* case was resolved under UNCITRAL rules without an administering institution, while in *Kingsgate v. Thailand*, the dispute was resolved by the Permanent Court of Arbitration under the *UNCITRAL arbitral rules*. This means that some investor-state disputes are resolved in the same way as private commercial disputes: adjudicated by a different arbitral tribunal, in private proceedings, and without the possibility of appeal. This may not be suitable for disputes that involve both domestic and international laws as well as private and public interests. Overall, past ISDS disputes reveal valuable insight pertaining to the government's challenged actions, substantive investment protections, right to regulate exceptions, and methods of dispute resolution under Thailand's IIAs

5.6 Chapter Findings and Observations

This chapter sought to examine the fourth research question regarding the extent to which Thailand's tax sovereignty is constrained by its IIAs. The study finds that the degree of interference of IIAs with domestic taxation policy depends on whether the IIAs involve substantive investment protection, the right to regulate exceptions, tax carve-out clauses, and ISDS. The study's four main findings and some observations are as follows. Firstly, while tax is a major source of Thailand's revenue, FDI can be an important catalyst for national economic development as well. To attract FDI, Thailand has created various forms of IIAs that offer protections to foreign investors and allow foreign investors to file a claim against the country directly before an international tribunal. In this respect, Thailand's IIAs can be categorised into four main groups: Thailand's BITs, Thailand's FTAs/EPAs, ASEAN's FTAs/EPAs and ASEAN's investment agreements. Second, among the four categories, the older-style BITs without the right to regulate exceptions are likely to create the highest chance of claims by foreign investors against Thailand's tax measures, while ASEAN's investment agreements offer more deference to the state over investment protection. Third, tax-related disputes under Thailand's IIAs can be enforced by various dispute resolution systems as provided for by each treaty. These systems vary in terms of their stance as pro-investor

[300] *Australia - Thailand FTA (2004)*, article 1601.

or pro-state. Among the four categories, dispute resolution available under the older-style BITs tends to favour foreign investors, since the dispute can be resolved in the same way as private commercial disputes, while dispute resolutions available under ASEAN's investment agreements tend to give the state considerable power to control the proceedings to protect public interests. Fourth, past ISDS disputes instruct that Thailand should pay attention to its commitment under IIAs, particularly its obligations under the FET standard and indirect expropriation. Since the level of interference by IIAs in Thailand's tax sovereignty is associated with the negotiation powers of the state and language of each treaty, not only should the Thai government rely on ensuring tax laws, administrative actions, and tax dispute resolution procedures are consistent amongst the IIAs, but it should also devote resources to improve IIAs that require more detail. Future IIAs should include more specific policy rationales, clarity on the substantive investment protections, the right to regulate exceptions, and tax carve-out clauses, as well as special mechanisms uniquely applicable to tax-related disputes.

Chapter 6

Summary of Findings, Comparative Analysis, Recommendations, and the Path Forward

6.1 Chapter Introduction

Tax, trade, and investment laws exert a significant influence on the business, trade, and investment climate of a country, and thereby its overall economic development. Poorly designed tax measures can cause unintended tax-related disputes under international economic laws, that is, under both the WTO and IIAs, which in turn divert trade and investment from the country, thus hindering economic development. This final chapter consolidates the findings of this present study, provides a systematic legal comparison of the limitations of tax sovereignty under IIAs with the findings of the author's previous work on the intersection between taxation and the WTO laws,[301] and outlines the implications on Thailand's tax system. It also seeks to provide the policy actions and recommendations necessary to address these challenges, to support trade, investment, and sustainable development, and to prevent possible tax-related disputes under IIAs and the WTO.

6.2 Summary of Findings, Comparative Analysis, and Implications

The main research question presented in chapter 1 is: How is tax sovereignty limited under IIAs, and does this limitation have a distinct characteristic from WTO law? To address this primary research question, this study answers four sub-questions as follows:

6.2.1 Justification for Limitation of Tax Sovereignty under IIAs and WTO

The very first issue addressed in this study is why IIAs interfere with states' domestic taxing methods and what similarities and differences exist between them and WTO laws. This study demonstrates both similarities and differences between the policy rationales underlying the interference of IIAs and the WTO laws in domestic tax measures. The WTO laws and IIAs are international legal frameworks that aim to promote economic liberalisation in a neoliberal economic world. The WTO laws aim to promote trade liberalisation, which allows goods, services, and ideas to flow freely across borders. IIAs provide an international legal standard of protection

[301] see Chongchit (n 2).

to foreign investors and/or foreign investment, minimising risk and thus encourage cross-border investments, from capital-exporting countries to capital-importing countries.

Since the tax burden has been considered a major barrier to cross-border businesses, to liberalise trade and investment, both the WTO law and IIAs limit the abilities of states to design and implement tax measures to a certain extent. Through several agreements encompassing goods, services, and intellectual property, the WTO laws limit tax measures utilised by states to distort international trade. IIAs safeguard foreign investors and/or foreign investments against harmful tax measures of states through the implementation of an international standard of protection, covering the FET standard, protection against unlawful expropriation, the FPS standard, free transfers, the umbrella clause prohibition against arbitrary and discriminatory impairment of investments, the NT, and MFN treatment standards.

Despite similarities, the WTO and IIAs differ significantly, which affects the autonomy available to states to pursue important legitimate tax policies that support their economic growth and sustainable development. On the one hand, the WTO's multilateral framework has a clear objective to balance trade liberalisation with legitimate states' right to regulate, which allows policy space to WTO member states to address legitimate domestic priorities through various exception clauses. On the other hand, having no multilateral framework, IIAs' functions to support sustainable development depend on the specific type of IIAs concluded. The distinction can be drawn between the first and new generations of IIAs. In the first-generation IIA, the autonomy available to states to pursue public policies is very limited since most IIAs were concluded to protect foreign investment from capital-exporting countries, rather than to promote sustainable development. By contrast, the new-generation IIAs tend to reflect the states' aim to enhance IIAs' functions to achieve a balance between investment protection and sustainable development and thus tend to provide greater policy space to states than the first-generation IIAs.

This finding suggests that both the WTO laws and IIAs affect the national policy space of states in tax matters, but the amount of interference between the two regimes is associated with the negotiation powers of states. Without a multilateral framework, the policy rationale of each IIA depends on the language used in the preamble of each IIA, which affects the ability of states to retain policy autonomy in their treatment of investors and investments under IIAs. States,

therefore, need to navigate carefully when voluntarily sacrificing sovereignty in order to gain economic benefits from investment agreements.

6.2.2 Limitations of Tax Sovereignty under IIAs and WTO

Following the first sub-question, the second question was which substantive investment protection principles and exception clauses under IIAs are applicable to domestic tax measures of states; how are they enforced; and in comparison, with the WTO, what are their similarities or differences? This study illustrates some overlap and differences between both substantive legal principles and the right to regulate exception clauses that are applicable to states' tax measures under IIAs and the WTO laws. Overall, the WTO legal framework applicable to tax measures is much broader than that of the IIAs. However, many but not all WTO agreements limit states' right to regulate in the areas of taxation. By contrast, only eight standards of protection under IIAs are applicable to domestic tax measures, but each standard of protection may be drafted differently in each IIA. Despite differences, both the WTO and IIAs include the overlapping principles that limit tax sovereignty, notably the NT and MFN treatment standards. However, these principles are interpreted differently in trade and investment contexts.

Table 18: Comparative Substantive Principles under the WTO and IIAs Applicable to Tax Measures

The WTO	IIAs
• *GATT* •*Agreement on Agriculture* •*Agreement on Trade Related Aspects of Investment Measures* •*Agreement on the Implementation of Article VI* •*Agreement on the Implementation of Article VII* •*Agreement on Rules of Origin* •*Agreement on Subsidies and Countervailing Measures*	• Fair and Equitable Treatment Standard • Protection is against unlawful expropriation. • Full protection and security standard • Free transfers • Umbrella clause • Prohibition against arbitrary and discriminatory impairment of investments • National Treatment Standard

Table 18: Comparative Substantive Principles under the WTO and IIAs Applicable to Tax Measures	
The WTO	**IIAs**
•*General Agreement on Trade in Services* •*Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* •*Agreement on Trade in Civil Aircraft*	• Most-Favoured-Nation Treatment Standard
Source: Created by the author	

In terms of the right to regulate exceptions, the WTO laws provide numerous exception clauses allowing WTO members' right to implement measures to achieve legitimate policy objectives, which include but are not limited to general exception clauses, security exception clauses, and specific exception clauses under each of the agreements. By contrast, the right to regulate exceptions under IIAs is not uniform. Some IIAs include the right to regulate exceptions, while others do not. Furthermore, in IIAs, various types of right to regulate exception clauses are found, ranging from a pro-investor to a pro-state approach, and each exception may be drafted differently in each IIA. There are, for example, general exception clauses (similar to article XX of *GATT* and modified article XX of *GATT*), security exception clauses (self-judging and non-self-judging), and various types of tax carve-out clauses (e.g., partial tax carve-out, full tax carve-out with exception, and full tax carve-out without exception).

Table 19: Comparative Right to Regulate Exceptions under the WTO and IIAs applicable to Tax Measures	
The WTO	IIAs
General exception clauses	General exception clauses • Classic WTO Style • Adapted WTO Style

Table 19: Comparative Right to Regulate Exceptions under the WTO and IIAs applicable to Tax Measures	
The WTO	IIAs
Security exception clauses	Essential Security exception clauses • Self-judging • Non-self-judging
Specific exception clauses under each agreement	Tax Carve Out •Partial •Full with exception •Full without exception
Source: Created by the Author	

This research further highlighted that tax-related disputes arising from the WTO agreements and IIAs are enforced through different mechanisms. In the context of the WTO, all tax-related disputes are resolved by the WTO dispute settlement system, which is a uniform mechanism consisting of the consultations stage, panel stage, appellate body stage, and implementation stage; but states may opt to resolve the dispute through interstate arbitration. On the other hand, the dispute resolution mechanism for tax-related disputes under IIAs is fragmented, ranging from domestic court, ADRs (including consultation, negotiation, mediation, conciliation), conventional international arbitrations (ICSID and non-ICSID arbitrations), international arbitration with improved or modified procedures, international arbitration with appeals procedure, and international investment court. Some IIAs limit investors' right to recourse to ISDS (such as imposing the requirement to exhaust local judicial remedies or to litigate in local courts for a prolonged time period before turning to international dispute resolutions, establishing a time limit for submitting ISDS, or narrowing the ISDS subject matter scope), while some IIAs provide no ISDS at all. In addition to the general procedure, some IIAs prescribed additional requirements or mechanisms for tax-related disputes.

Table 20: Comparative Dispute Settlement Mechanisms for Tax-Related Disputes under the WTO and IIAs	
The WTO	IIAs
The WTO dispute settlement system	•ADRs, such as consultation/negotiation, mediation, conciliation • International arbitrations (ICSID and Non-ICSID Arbitrations) • International arbitration with improved or modified procedures • International arbitration with appeal procedure • International Investment Court • Limiting investors' right to recourse ISDS • No ISDS for all investor-state disputes •Additional requirements for tax-related disputes
Source: Created by the Author	

These findings suggest that substantive investment protection principles and exception clauses applicable to domestic tax measures of states under IIAs are different from those of the WTO. The coverage of WTO agreements applicable to domestic taxation is broader but more uniform than IIAs. In the context of IIAs, any substantive protections can be applicable to domestic taxation, but they are without a multilateral framework; thus, the extent to which each substantive protection limits tax sovereignty depends on the language used in each IIA. Furthermore, IIAs' dispute resolution mechanism is fragmented, allowing tax-related disputes to be resolved by various methods. Altogether, this fragmentation is a critical feature of IIAs, creating uncertainty for both investors and tax policymakers around the globe in formulating tax policy, enacting and enforcing tax law, and adjudicating tax disputes in compliance with commitments under each IIA.

6.2.3 Key Characteristics of Tax-Related Disputes under IIAs and WTO

As to the third question of what key characteristics of tax-related disputes under IIAs are, and in comparison, with the WTO, what are the similarities or differences, this study presented the similarities and differences between characteristics of tax-related disputes under IIAs and the WTO. Tax-related disputes under IIAs and the WTO share several similarities. First, disputes under the WTO and IIAs concern compliance of domestic tax measures and public international economic law. Second, a survey of the ISDS and WTO cases demonstrated that any type of domestic taxes (such as taxes on income, taxes on consumption, or tax on property) can allegedly be in breach of WTO law and IIAs, although WTO laws focus on customs duties (tariff). The complexity arises from the interrelation of several taxes, such as VAT, excise duty, and customs duty. Third, any of a state's tax measures (including domestic tax law, tax administrative actions, and domestic tax dispute resolutions) can allegedly be in breach of both WTO laws and IIAs.

Table 21: Similarities between Tax-Related Disputes under the WTO and IIAs

	WTO	IIAs
Characteristics of Disputes	Compliance of domestic tax measures with PIL	Compliance of domestic tax measures with PIL
Type of Domestic Taxation	•Unless otherwise provides in each agreement, all type of domestic taxation is subject to the WTO agreements. •Among others, Customs duty is more constrained by WTO agreements	•Unless otherwise provides in the IIAs, any type of domestic taxation can be subject to IIAs. •Note that majority of IIAs lack a clear definition of taxation and are subject to different interpretation by arbitral tribunal.
Type of Domestic Tax Measures	• Unless otherwise provides in each agreement, any type of state's tax measures ranging from tax law, tax	• Unless otherwise provides in each agreement, any type of state's tax measures ranging from tax law, tax administrative

Table 21: Similarities between Tax-Related Disputes under the WTO and IIAs		
	administrative actions, and tax dispute resolution	actions, and tax dispute resolution • Note that Majority of IIAs lack a clear definition of measures and are subject to different interpretation by arbitral tribunal.
Source: Created by the author		

Despite the similarities, several distinctions between tax-related disputes under the WTO and IIAs also exist. First, tax-related disputes under the WTO must be initiated by WTO members, while IIAs allow foreign investors to take legal action against states directly. Second, the legal basis for challenges is different. In the context of the WTO, the *GATT*, *Anti-Dumping Agreement (Implementation of Article VI of the GATT)* (*ADA*), and *Customs Valuation Agreements (Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994)* (*CVA*) are frequently used as the basis for challenging domestic tax measures; while in the context of IIA, the FET standard and indirect expropriation are used as the basis for challenges. In practice, the WTO dispute settlements tend to apply consistent standards when reviewing domestic tax measures, but for IIAs, the standard of review depends on the discretion of each arbitral tribunal. In the context of the WTO, the losing state must change domestic tax measures in accordance with the WTO panel or AB rulings, while in the context of ISDS, the losing states are required to pay compensation to foreign investors.

Table 22: Distinctions between Tax-Related Disputes under the WTO and IIAs		
	WTO	**IIAs**
Disputing parties	Inter-State Disputes (only WTO members)	Foreign investor and host states

Table 22: Distinctions between Tax-Related Disputes under the WTO and IIAs		
	WTO	**IIAs**
Legal Basis for Challenge	•WTO agreements applicable to tax measures (see Table 6.4) • Considering past case, the *GATT*, *ADA* and *CVA* are frequently used as basis for challenge domestic tax measures.	•Substantive investment protection (see Table 6.4) • Considering past case, the FET standard and indirect expropriation are frequently used as basis for challenge domestic tax measures,
Standard of Review	Depends on legal provisions and standard developed by the WTO dispute settlement.	Depended on discretion of each arbitral tribunal.
Outcome	States must change of domestic tax measures	States must pay compensation to foreign investors
Source: Created by the author		

These findings suggest that tax-related disputes under IIAs and the WTO have both similarities and differences. The key concern is that, in both contexts, without limitation, any type of domestic tax measures can be allegedly in breach of the WTO and IIAs. In addition, since the legal basis for challenges both overlaps and differs under the WTO and IIAs, a single domestic tax measure can allegedly be in breach of either WTO laws, IIAs, or both. Lastly, unlike the WTO, since tax-related disputes under IIAs are to be resolved by various means, there is a risk that these different methods of dispute resolution may lead to various interpretations and inconsistent dispute outcomes.

6.2.4 Tax-Related Commitments of Thailand under the IIAs and WTO

Finally, this study answers the question of what Thailand's tax and investment policies in relation to IIAs, as well as the parallels and differences between them and the WTO. It highlighted similarities and differences between Thailand's commitments to the WTO laws and IIAs, while

emphasising the risks of Thailand's IIAs without the right to regulate exceptions. Thailand's tax sovereignty and the country's commitments to the WTO and IIAs are both recognised under the *Constitution of the Kingdom of Thailand*, which is the supreme law of the country. Section 62 of the *Constitution* sets out the duty of the state to establish a fair tax system on the one hand,[302] and principles on how Thailand can enter into international agreements that impact national sovereignty on the other hand. By virtue of the *Constitution*, international trade and investment agreements classify as treaties that have 'wide scale effects on the security of economy, society, or trade or investment of the country';[303] accordingly, they must be approved by the National Assembly as section 178 of the *Constitution* states below:

> Any treaty which provides for a change in the Thai territories or external territories over which Thailand has sovereign right or jurisdiction under treaty or international law or requires the enactment of an Act for its implementation or has wide scale effects on the economic or social security of the country or results in a significant obligation on trade, investment or budget of the country must be approved by the National Assembly.[304]

Thailand has committed to all the WTO members since 1995, but Thailand has concluded BITs with 42 countries and TIPs with 28 countries. Subject to the definition provided under each WTO agreement and IIAs, all types of existing and future Thailand domestic tax measures are constrained by the WTO agreements and IIAs. However, besides legal principles applicable to domestic tax measures, major distinctions between Thailand's commitments to the WTO laws and IIAs include the right to regulate exceptions and dispute settlement mechanisms. The WTO laws ensure that members' right to avail themselves of exceptions is exercised in good faith to protect legitimate interests, whereas less than half of Thailand's IIAs provide the right to regulation exceptions, creating a risk to tax policymakers, legislators, administrators, and adjudicators.

Besides substantive matters, this study further highlights the concern relating to dispute resolution mechanisms for resolving tax-related disputes under Thailand's IIAs. As mentioned above, while tax-related disputes arising from the WTO agreements must be resolved by the WTO dispute settlement system, dispute resolution for tax-related disputes under Thailand's IIAs is

---

302 *Constitution of the Kingdom of Thailand, B.E. 2560 (2017)*, section 62.
303 Ibid section 178.
304 Ibid section 178 para 2.

fragmented, ranging from domestic court, ICSID arbitration, non-ICSID arbitration, and both ICSID and non-ICSID arbitrations. Importantly, none of Thailand IIAs include international arbitration with improved or modified procedures, international arbitration with appeals procedures, an international investment court, limitations on investors' right to recourse to ISDS, or additional requirements or mechanisms for tax-related disputes, creating risks for the country.

Table 23: Comparative Thailand's Commitments under the WTO and IIAs regarding Tax Measures

	The WTO	IIAs
Types of Taxation	Like other WTO members	•Depending on the context and treaty language • Thailand's IIAs lack of clear definition of taxation
Types of Measures	Like other WTO members	•Depending on the context and treaty language •Thailand's IIAs lack of clear definition of 'measure'
Substantive Aspects	Like other WTO members	• All substantive investment protection is applicable to Thailand's tax measures • However, typologies of each substantive protection depending on each IIAs
Right to Regulate Exceptions	Like other WTO members	• Less than half of Thailand's provide right to regulate exception and tax carve-out clause. • Only 3 out of 43 of Thailand's BITs contain tax carve outs. •16 out of 23 Thailand's' TIPS contain public policy exception; 11 out of 23

Table 23: Comparative Thailand's Commitments under the WTO and IIAs regarding Tax Measures		
	The WTO	IIAs
		Thailand's' TIPS contain essential security exception, and 12 out of 23 Thailand's' TIPS contain tax carve-out.
Dispute resolution for tax-related disputes	The WTO dispute settlement system	• Variation of dispute resolutions depending on each IIA. • None of Thailand IIAs include international arbitration with improved or modified procedures, appeal procedure, international investment court, limit investors' right to recourse ISDS, nor additional requirements or mechanisms for tax related disputes, creating risks to the country.
Source: Created by the author		

More specifically, this study reported that Thailand has been involved in both WTO and ISDS disputes. As a respondent, Thailand has been involved in four cases with the WTO and in two cases with the ISDS. There are similarities and differences between WTO and ISDS cases. Firstly, in the context of the WTO, three of the four cases in which Thailand was a respondent, tax measures were at the core of the disputes, while the two ISDS cases were not related to tax measures. Secondly, in the context of the WTO, the *ADA, CVA,* and *GATT 1994* were used as the basis for complaints against Thailand's tax measures; while in the context of ISDS, the FET standard and indirect expropriation were used as the basis for complaints against Thailand's administrative actions. Thirdly, the WTO cases were resolved through the WTO dispute settlement process, but ISDS cases were resolved by international arbitrations (UNICTRAL), though under different arbitral administrations.

Table 24: Comparative Thailand's Past Disputes under the WTO and IIAs	
The WTO (Thailand as a respondent)	IIAs (Thailand as a respondent)
•DS122 Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland *•DS370 Thailand — Customs Valuation of Certain Products from the European Communities (EC)* *•DS371 Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines* *• DS507 Thailand — Subsidies concerning Sugar from Brazil (In this case, several Thailand's measures relating to a quota system and price controls on ex-factory, wholesale, and retail sales of cane and sugar in the country were alleged in breach of the GATT 1994, SCM and AOA)*	*•Walter Bau v. Thailand (the case was resolved under UNCITRAL rule without an administering institution,* *• Kingsgate v. Thailand (the disputes were resolved under the UNCITRAL rule administered by the Permanent Court of Arbitration)*
Source: Created by the author	

This finding highlighted the concerns regarding Thailand's IIAs without the right to regulate exceptions. While WTO law ensures that members' right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, less than half of Thailand's IIAs provide right to regulation exceptions. Additionally, unlike the WTO, various methods of ISDS under Thailand's IIAs, a pro-investor approach, are available; but none of Thailand IIAs compels improved procedures to balance investor protection with the state's right to regulate. Compared to the WTO agreements, Thailand's right to regulate in the area of taxation under BITs is very limited, both substantively and procedurally. If a dispute arises, investors can challenge domestic tax measures on various grounds and under various methods of dispute

resolution, including non-ICSD arbitrations. These practices create risk to tax policymakers, legislators, administrators, and adjudicators.

Overall, comparing the findings of this study on tax and ISDS to those of the author's prior study on an intersection of tax and the WTO reveals the complexity of the intersections between tax, trade, and investment laws. Similarities and differences of commitments under the WTO and IIAs on tax sovereignty create difficulties for Thailand's tax policymakers, legislators, administrators, and adjudicators to fully comply with the commitments. The following section seeks to provide some recommendations to mitigate the challenges raised under the WTO and IIAs and a formulation of tax measures to support trade and investment policies and sustainable development.

6.3 Challenges and Recommendations for Thailand

To address the challenges arising from the intersection between domestic taxation, the WTO laws, and IIAs, this research proposes a two-fold course of action: the first is to establish a more unified and coherent approach towards tax, trade, and investment in the domestic context (i.e., tax policymaking, tax law drafting, tax law enforcement, and tax adjudication processes); and the second is to improve existing and future IIAs, in particular to include tax carve-out clause and special mechanisms for resolving tax-related disputes in a greater number of Thailand's IIAs. These recommendations are discussed, respectively.

6.3.1 Domestic Approach: Enhancing the Compliance of Tax Measures with the WTO Laws and IIAs

6.3.1.1 Tax Policymaking Process

First, at the policy level, it recommends that Thailand should consider developing a more unified and coherent policy in tax, trade, and investment.

Even though the government's policy is not subject to the WTO and IIAs, policy formulation is a critical and fundamental component in ensuring the compliance of domestic tax measures and international commitments with the WTO and IIAs. The *Constitution of the Kingdom of Thailand B.E. 2560 (2017)* (the *Constitution*), chapter VI (Directive Principles of Fundamental State Policies) prescribes the broad framework that guides the government in

formulating public policies,[305] and the *State Administration Act B.E. 2534 (1991)* gives authority to the Prime Minister, with approval from the Cabinet, to establish a policy subcommittee responsible for the formulation of public policies in different fields, such as the economy, city, youth, and education.[306]

For matters concerning public finance and taxation, the Ministry of Finance was established by virtue of the *Reorganization of Ministry, Sub-Ministry, and Department Act B.E. 2545 (2002)* as the main authority to oversee matters concerning public finance, taxation, treasury, government property, the operation of state-own enterprise (SOE), or enterprises in which the state directly owns more than 50 percent of the voting rights, revenue-generating enterprises, as well as the power to provide loan guarantees for government agencies, financial institutions, and state enterprises.[307] To serve these duties, three clusters under the Ministry of Finance were established.

The first cluster is the asset cluster, which contains the Treasury Department and the State Enterprise Policy Office. The second cluster is the revenue cluster, which includes the Customs Department, Excise Department, and Revenue Department. The third cluster is the Expenditure and Liability cluster, which contains the Comptroller General's Department and the Public Debt Management Office (PDMO). Additionally, government units not part of a cluster include the Office of the Minister, the Office of the Permanent Secretary, and the Fiscal Policy Office (FPO).[308]

In respect to tax policy formulation, the Fiscal Policy Office, an agency of the Ministry of Finance, studies, analyses, research, and participates in policy formulation. Furthermore, it manages operations regarding fiscal policies, tax policies, monetary and financial system policies, coordination with IGOs (e.g. the Work Bank, IMF, and Asian Development Bank), saving and investment policies, economic policies (including the performance of economic analysis by macroeconomic models, policies on regional economic integration, and multilateral negotiation policy). Finally, it performs supervision of and coordination with offices of economic and financial

---

305 *Constitution of the Kingdom of Thailand, B.E. 2560 (2017)*, chapter V.
306 *Act on Rules for Public Administration of the State B.E. 2534 (1991).*
307 *Reorganization of Ministry, Sub-Ministry, and Department Act B.E. 2545 (2002).*
308 Ministry of Finance, *Organization Info* <http://www2.mof.go.th/government_agencies.htm.> accessed 1 May 2025.

counsellors abroad.[309] The Fiscal Policy Office consists of experts specialising in formulating tax policies, but it lacks experts in international trade and investment laws. This may lead to the noncompliance of domestic taxation with commitments under the WTO laws and IIAs.

This study provides four possible methods for draughting coherence policy to address the issue. The fundamental concept is the creation of a Ministry of Economy to deal tax, trade, and investment concerns. The Deputy Prime Minister for Economics should be responsible for formulating tax, trade, and investment policies. The Fiscal Policy Office should consider appointing specialists in taxation, commerce, and investment to guarantee that tax strategies adhere to international laws. Ultimately, collaboration between the Fiscal Policy Office and other governmental entities involved in trade and investment would alleviate the difficulties stemming from the interplay of domestic taxation and international trade and investment regulations.

6.3.1.2 Tax Law Drafting Process

Second, with respect to the legislative process, it is recommended that additional review mechanisms for both primary and secondary legislation be established to mitigate the concerns arising from the intersection between tax measures, the WTO, and IIAs.

Similar to most countries around the world, the tax law system is complex, as it consists of comprehensive primary legislation (Acts of the Parliament) and subordinate legislation (made under the authority contained in Acts of Parliament). As discussed, any level and form of domestic tax law can be alleged to breach the WTO and IIAs; thus, the legislative process is critical in ensuring the compliance of domestic taxation with international commitments under the WTO and IIAs.

In Thailand's system, the tax law drafting process is governed by the Constitution.[310] For primary legislation, a tax bill is considered a 'money bill' according to the *Constitution*[311] and is therefore subject to special requirements. According to section 134 of the *Constitution*, a money bill is a measure that contains provisions dealing with any of the following matters:

---

309 Fiscal Policy Office, *About FPO* <https://www.fpo.go.th/main/Home.aspx.> accessed 1 May 2025.
310 *Constitution of the Kingdom of Thailand*, part 7.
311 Ibid section 143.

(1) the imposition, repeal, reduction, alteration, modification, remission, or regulation of taxes or duties.

(2) the allocation, receipt, custody, payment of the State funds, or transfer of expenditure estimates of the State.

(3) the raising of loans, or guarantee or redemption of loans, or any binding of State's properties.

(4) currency. [312]

If there is any uncertainty about whether a law is a money bill that requires the Prime Minister's approval, a joint sitting of the President of the House of Representatives and the Presidents of all its standing committees shall have the authority to decide on it.[313] Following this, the President of the House of Representatives will convene a joint session to consider the case within fifteen days of its occurrence. The joint sitting's resolution under paragraph two shall be decided by a majority vote. In the event of a tie vote, the President of the House of Representatives will cast an additional vote.

Unlike other bills that may be introduced by not less than twenty-five members of the National Legislative Assembly, the Council of Ministers, or the National Reform Council, money bills must be introduced only by the Council of Ministers.[314] The bill must subsequently pass both Houses of Parliament (the House of Representatives and the Senate)[315] before it proceeds to the Constitutional Court, where it is reviewed for consistency with the Constitution.[316] After a bill has been approved by the National Assembly, the prime minister presents it to the monarch (the King) for royal assent.[317] Following the King's assent, it is published in the Government Gazette and comes into force.[318] Thailand' primary tax legislation includes, for example, *the Signboard Tax Act B.E. 2510,*[319] *the Petroleum Income Tax Act B.E. 2514 (as amended),*[320] *the Revenue Code,*[321]

---

312 Ibid para 2.
313 Ibid para 3.
314 Ibid section 142.
315 Ibid sections 146-149.
316 Ibid part 8.
317 Ibid sections 150.
318 Ibid sections 151-153.
319 *Signboard Tax Act B.E. 2510.*
320 *Petroleum Income Tax Act, B.E.2514 (1971) (as amended).*
321 *Revenue Code.*

the Inheritance Tax Act B.E. 2558 (2015),[322] *the Excise Act B.E.2560 (2017),*[323] *the Customs Act B.E.2560 (2017),*[324] *and the Land and Building Tax Act B.E. 2562 (2019).*[325]

Each of Thailand's primary tax legislations confers a government body or person to enact subordinate legislation supplementing acts of the parliament. In Thailand, subordinate legislation can take different forms and levels, including emergency decrees, royal decrees, ministerial regulations, ministerial notifications, departmental notifications, and, in some cases, orders, regulations, rules, schemes, or guidance issued by the Director-General of each government authority, as summarised in the table below.

Table 25: Thailand's Tax Legislations subject to the WTO and IIAs

Levels	Forms	Enactment Process
Primary Legislation	Acts of Parliament	As stated above, acts of parliament require approval from the National Assembly, subsequent assent from the King, and publication in the Government Gazette prior to being put into effect.
Governmental Level	Emergency Decree	An emergency decree is proposed by the cabinet. After the emergency decree has been approved by the cabinet, the prime minister presents it to the monarch for royal assent. Following the King'assent, it will be published in the Government Gazette, and enters into force without an approval from the parliament.
	Royal Decree	A royal decree is proposed by the Minister of each Ministry under the power conferred by the Constitution, Act of the Parliament of

322 *Inheritance Tax Act B.E. 2558 (2015).*
323 *Excise Tax Act B.E. 2560 (2017).*
324 *Customs Act B.E. 2560 (2017).*
325 *Land and Buildings Tax Act, B.E. 2562 (2019).*

Table 25: Thailand's Tax Legislations subject to the WTO and IIAs		
		Emergency Decree. After the cabinet's approval, the prime minister presents it to the monarch for royal assent. Following the King's assent, it will be published in the Government Gazette, and enters into force without an approval from the parliament.
Ministerial Levels	Ministerial Regulation	A Ministerial Regulation is proposed by the Minister of each Ministry under the power confer by Act of the Parliament, or Emergency Decree. After the cabinet's approval, ministerial signatory and announcement in the Government Gazette, it enters into force.
	Ministerial Notification	Ministerial Notification is enacted by the Minister of each Ministry under the power conferred by Act of the Parliament without. approval from the cabinet.
Departmental Level	Department Notification	Departmental Notification is enacted by the Department under the power conferred by Act of the Parliament, or subordinate legislation which are in higher level. In most cases, it provides details in relation to specific matters.
	Notification of the Director-General	Notification of the Director-General is enacted by the Director-General of each Department under the power conferred by Act of the Parliament, or subordinate legislation which are in higher level. In most cases, it provides details (such as rules,

Table 25: Thailand's Tax Legislations subject to the WTO and IIAs		
		procedures, or condition, or explanation) in relation to specific matters.
	Rules or Regulations	Rules or regulations is enacted by the Director-General of each Department under the power conferred by Act of the Parliament, or subordinate legislation which are in higher level.
Source: Created by the author		

Since all levels of tax law can be challenged under the WTO and IIAs, it is suggested that legislators should consider commitments under IIAs and the WTO when drafting tax laws. An additional review mechanism for both primary and secondary legislation may be established to mitigate the concerns raised. Special attention should be paid to subordinate tax legislation enacted by government bodies or persons without approval from the parliament. Without a review mechanism, there is a high likelihood that subordinate legislation will not be in line with the commitment under the WTO and IIAs.

6.3.2.3 Tax Administration

Third, it is recommended that, at the administrative level, there should be a mechanism ensuring that all levels of tax administrators and other relevant government authorities take the WTO and IIAs commitments into consideration when enforcing tax laws. In Thailand, the State Administration Act separates government agencies into central, provincial, and local levels. All levels and forms of administrative actions concerning the conduct of tax administrations (such as tax assessments, tax audit, issuance of tax notices, tax collections, and tax refunds) can be alleged breaches of the WTO and IIAs. Thus, it is critical to ensure the compliance of administrative actions with international commitments under WTO and IIAs.

Table 26: Thailand's Tax Administration subject to the WTO and IIAs		
Tax Administration	WTO	IIAs
Ministry of Finance/Other Government Authorities	√	√
Central Tax/Other Authority	√	√
Provincial Tax/Other Government Authorities	√	√
Local Tax/Other Governmental Authorities	√	√
Others	√	√
Source: Created by the author		

At the central level, the Ministry of Finance is empowered to oversee various matters concerning public finance and taxation as well as revenue generation. With respect to revenue generation, the three main tax administrations are the Revenue Department, the Excise Department, and the Customs Department.[326] The Revenue Department is in charge of the collection of taxes based on income and domestic consumption as provided under the Revenue Code, namely, personal income tax, corporate income tax, value added tax, specific business tax, and stamp duties,[327] as well as related laws, including the inheritance tax[328] and petroleum income tax[329] as well as negotiation with other countries on DTAs to promote trade and investment.[330]

The Customs Department is in charge of the collection of the customs tariff levied by the Customs Department itself or of taxes and duties on behalf of other departments that are levied on imports and exports. It is additionally responsible for the promotion of exports through tax measures and services, such as tax refunds and compensation, and for supporting and approving the establishment of bonded warehouses and container yards outside the Bangkok port in adherence to the government policy regarding the facilitation of international trade.[331] The Excise Department is accountable for excise tax collection and carrying out suppression activities to ensure strict law enforcement.[332] Furthermore, other government authorities are empowered to

---

326 *Act on Rules for Public Administration of the State B.E. 2534 (1991).*
327 *Revenue Code.*
328 *Inheritance Tax Act B.E. 2558 (2015).*
329 *Petroleum Income Tax Act B.E. 2514* (as amended).
330 The Revenue Department, *Double Tax Treaties* < https://www.rd.go.th/english/766.html > accessed 1 May 2025.
331 *Customs Act B.E. 2560 (2017).*
332 *Excise Tax Act B.E. 2560 (2017).*

collect particular types of tax; for example, the Ministry of Interior and Ministry of Finance are empowered to enforce the *Land and Building Tax Act*.[333] Other government authorities including the BOI,[334] the Industrial Estate Authority of Thailand,[335] the Committee on Competitiveness,[336] and the EEC[337] have the power to grant, reject and/or withdraw tax incentives for foreign investors under investment laws. Each authority is further subdivided into regional, provincial, and local levels according to the relevant legislation.

Within the domestic legal framework, administrative actions of state agencies or public officials can be reviewed by the Administrative Court of Thailand, which is composed of two tiers: the Administrative Courts of First Instance and the Supreme Administrative Court.[338] Although the Thai Administrative Court has specialisations in reviewing administrative actions against domestic public laws, there is no review mechanism ensuring that tax administrative actions comply with the WTO laws and IIAs. Thus, it may be worth exploring options (such as establishing internal written guidelines or a handbook of best practices) to build awareness within government ministries, agencies, and local or sub-national government entities regarding Thailand's obligations under the WTO and investment treaties and the potential impact that administrative actions may have on investors. This mechanism could serve to minimise the risk of ISDS claims on the basis of administrative actions.

6.3.2.4 Tax Adjudication Process

Finally, it is recommended that there be a mechanism in the adjudication process ensuring that all levels of tax adjudication (such as administrative review and judicial appeal) take the WTO and IIAs commitments into consideration when adjudicating tax disputes. Under Thailand's framework, tax disputes arise when taxpayers disagree with tax authorities. To resolve these disputes, Thailand's tax laws provide for administrative review and judicial appeals processes. Administrative review aims to ensure that tax collections made by tax authorities comply with the rule of law and help minimise tax court caseloads.[339] Under the current framework, various

---

333 *Land and Buildings Tax Act, B.E. 2562 (2019).*
334 *Investment Promotion Act of B.E. 2520 (1977) (as amended).*
335 *Industrial Estate Authority of Thailand Act B.E. 2522 (1979).*
336 *National Competitiveness Enhancement for Targeted Industries Act, B.E. 2560 (2017).*
337 *Eastern Special Development Zone Act B.E. 2561 (2018).*
338 *Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999).*
339 Chakapong Kearod, *Legal Issue regarding Administrative Review Tribunal under the Revenue Code* (Independent Study, Faculty of Law, Ramkhamhaeng University, 2021) 1-2.

administrative review processes are available, including administrative review under the *Revenue Code*,[340] the *Customs Act*,[341] the *Excise Act*,[342] the *Inheritance Tax Act*[343] and the *Land and Building Tax Act*.[344] Following administrative review, Thailand provides for the Central Tax Court of Thailand, which is a specialised court that has jurisdiction to resolve tax disputes, the Court of Appeals of Thailand, and the Supreme Court of Thailand.[345]

Table 27: Thailand's Tax Dispute Procedures subject to the WTO and IIAs

Tax Dispute Resolution	WTO	IIAs
Administrative Review Procedures	√	√
The Central Tax Court of Thailand	√	√
The Court of Appeals of Thailand	√	√
The Supreme Court of Thailand	√	√
Other methods, such as tax mediation (if available)	√	√

Source: Created by the author

Since all levels of tax adjudication are subject to the WTO and IIAs, it may be worth exploring options to build the awareness of tax adjudicators regarding Thailand's obligations under investment treaties and the potential impact that tax adjudication may have on investors. This mechanism has the potential to minimise the risk of ISDS claims on the basis of the tax adjudication process.

6.3.2 International Approach: Enhancing the Compliance of Tax Measures with the WTO Laws and IIAs

Along with the domestic approach, the international approach is necessary to enhance the compliance of Thailand's tax measures with the WTO laws and IIAs. However, at the international level, the WTO laws and IIAs possess different characteristics. While the WTO is a multilateral

340 *Revenue Code.*
341 *Customs Act B.E. 2560 (2017).*
342 *Excise Tax Act B.E. 2560 (2017).*
343 *Inheritance Tax Act B.E. 2558 (2015).*
344 *Land and Buildings Tax Act, B.E. 2562 (2019).*
345 *Act for the Establishment of and Procedure for Tax Court B.E. 2528 (1985).*

trade agreement, IIAs are constituted by bilateral and regional agreements. Based on these distinct characteristics, three key recommendations have been developed as follows.

6.3.2.1 Ensuring the Compliance of Tax Measures with the WTO Laws Through the Trade Policy Review Mechanism (TPRM)

The first recommendation is to improve the compliance of domestic tax measures with the WTO laws through the Trade Policy Review Mechanism (TPRM) under the WTO framework.[346] The TPRM aims to facilitate adherence by all members to rules, disciplines, and commitments made under the multilateral trade agreements. Under the TPRM, the trade policies and practices of all WTO members are subject to periodic review by the Trade Policy Review Body. After the review, the reports (i.e., a report supplied by the member under review and a report drawn up by the WTO Secretariat), together with the minutes of the meeting of the Trade Policy Review Body, will be published.[347] Although the TPRM is not intended to enforce specific obligations under the WTO agreements or to settle the dispute, by publicly evaluating a member's trade policy or practices, the TPRM, at least, plays a crucial role in enhancing the compliance of tax policy and practices with WTO law and preventing possible disputes.

6.3.2.2 Ensuring the Compliance of Tax Measures with Thailand's Existing IIAs

The second recommendation is to reinforce the compliance of domestic tax measures with existing IIAs by establishing a mechanism to monitor the implications of each IIA on Thailand's domestic tax measures. In this respect, collaboration (including mutual agreements, establishment of common objectives, and sharing of information or knowledge) between government authorities (specifically, the Ministry of Finance and Ministry of Foreign Affairs) will alleviate the issues arising from the intersection between domestic taxation and investment protection under IIAs. However, reflecting the complexity of IIAs, unlike the WTO laws, Thailand's IIAs were concluded in different forms including BITs, FTAs, EPAs, Association of Southeast Asian Nations (ASEAN)'s FTAs, and ASEAN's investment agreements. Substantive investment protection, the right to regulate exceptions, tax carve-out, and tax-related dispute resolution vary among each. Among these, special attention should be paid to older-style BITs without the right to regulate

---

346 *Marrakesh Agreement Establishing the World Trade Organization*.

347 WTO, *Trade Policy Review Mechanism as Amended by the General Council: Revision, effective as of 1 Jan. 2019* < https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm> accessed 1 May 2025.

exceptions, which dominate in terms of the number and potential exposure to ISDS claims and damages. Even though tax carve-out clauses are available under the two older-style BITs, Thailand must still be aware of the applicability of certain investment protections on domestic tax measures.

Thailand's FTAs/EPAs with investment chapter and ASEAN and ASEAN+'s investment agreements are likely to provide greater policy space through right to regulate exceptions and/or tax carve-out clauses. With respect to Thailand's FTAs/EPAs and ASEAN+'s FTAs/EPAs, the government should be aware that even these types of exceptions give policy space to Thailand to a certain extent via the right to regulate exceptions. Previous WTO and ISDS cases suggested that in order to successfully invoke these types of exceptions, states must meet the requirements prescribed under each treaty, which was not easy to do. With regard to ASEAN and ASEAN+'s investment agreements containing tax carve-out clauses, Thailand must still be aware of the applicability of indirect expropriation and free transfer on domestic tax measures.

Overall, the government should assess whether it is appropriate to renegotiate, update, or amend Thailand's existing investment treaties to bring them in line with the country's current economic policies (i.e., the Thailand 4.0 economic model and the emphasis on sustainability). However, it may not be easy, as renegotiating existing IIAs requires time and resources; thus, governments may use other options as appropriate, such as replacing older BITs with new BITs. The termination of existing BITs without the right to regulate exceptions may be appropriate in some cases.

6.3.2.3 Balancing the Right to Regulate and Investor Protections under Future IIAs Through Substantive Investment Protection, Tax Carve-Out, and Special Mechanisms for Tax-Related Disputes

The third recommendation is to balance tax sovereignty and investor protections in Thailand's future investment treaties. Although negotiations of future IIAs (as well as renegotiations of existing ones) will need to be tailored on the basis of each individual country, this research proposes that at least four points should be taken into consideration: first, the policy rationale of IIAs in promoting sustainable development; second, clarification of substantive investment protections; third, inclusion of tax carve-out and right to regulate exceptions; and, fourth, improvement of ISDS as well as the inclusion of special mechanisms for tax-related disputes.

On the policy level, policymakers should consider the costs and benefits of IIAs and their potential impact on Thailand's legitimate tax measures, together with foreign and domestic investors, and potential exposure to ISDS claims and damages. If the benefits of new IIAs outweigh the risks, the government should specify the policy rationale of IIAs in promoting sustainable development to bring them in line with Thailand's 4.0 economic model and the emphasis on sustainability. Following the policy rationale, the government should improve clarity on substantive investment protections. Among other concerns, clarity of the definition of 'taxation' under IIAs and the greater specification of investment protection provisions applicable to domestic taxation would help to reflect government intent more effectively and assist tax policymakers, tax law drafters, administrators, and adjudicators in bringing tax measures in compliance with a treaty's commitment. Optionally, the government may consider including interpretative statements or joint interpretative statements in the treaty.

Third, the most obvious technique to balance tax sovereignty and investor protections is to include the right to regulate exceptions and tax carve-out clauses in the new IIAs. An examination of global IIAs suggested that there is a wide range of the right to regulate exceptions and tax carve-out provisions, which ensure policy space for government regulation. Thailand can take this range of pro-investors to pro-state approaches into consideration. As summarised in the table below, among these options, a full tax carve-out without exception tends to provide a high level of protection for tax sovereignty, but it may discourage foreign investment. Since foreign investors invest in Thailand, but more Thai investors invest abroad, this research is of the view that a combination of the general exceptions (adapted WTO style) could potentially provide a right balance in protecting the interests of those overseas as well as of the Thai government at home.

Table 28: Options for Preserving Thailand's Tax Sovereignty under IIAs

Exception Clauses	Spectrum
No Right to Regulate Exception	Pro-Investors
General Exception (Classic WTO Style)	
General Exception (Adapted WTO Style)	

Table 28: Options for Preserving Thailand's Tax Sovereignty under IIAs	
Exception Clauses	**Spectrum**
Essential Security Exception (non-self-judging)	
Essential Security Exception (self-judging)	
Partial Tax Carve-Out	
Full Tax Carve-Out with Claw Back Cluse	
Full Tax Carve-Out without Exception	Pro-State
Source: Created by the author	

Besides substantive matters, Thailand's IIAs negotiator may consider improving ISDS and including a special mechanism for resolving tax-related disputes under Thailand's future IIAs. A global overview of IIAs suggested various ISDS reform options, ranging from ADRs (consultation, negotiation, mediation, conciliation), international arbitration with improved or modified procedures, international arbitration with an appeal procedure, and international investment court. Some IIAs limit investors' right to recourse to ISDS (such as imposing a requirement to exhaust local judicial remedies or to litigate in local courts for a prolonged time period before turning to international dispute resolutions, establishing a time limit for submitting ISDS, or narrowing the ISDS subject matter scope), while some IIAs provide no ISDS at all.

Table 29: Options for Resolving Thailand's Tax-Related Dispute under IIAs	
Exception Clauses	**Spectrum**
ADRs	Pro-Investors
Conventional International Arbitrations	

Table 29: Options for Resolving Thailand's Tax-Related Dispute under IIAs	
Exception Clauses	**Spectrum**
International Arbitration with Improved Procedure	
International Arbitration with Appeal Mechanism	
International Investment Court	
Limiting Investors' right to recourse international dispute resolution	
Special mechanisms for tax-related disputes	
No ISDS	Pro-State
Source: Created by the author	

Since tax is such an important public policy, Thailand's IIAs negotiator may consider imposing special mechanisms specifically applicable to tax-related disputes in addition to general ISDS. A global overview of IIAs suggests that in addition to general ISDS procedures, some IIAs prescribe additional requirements or mechanisms for tax-related disputes. The special requirements can be included in several stages (i.e., ADRs stage, before, or after submitting the claims to international arbitrations).

Table 30: Options for Extra Mechanism for Resolving Tax-Related Disputes under IIAs	
Stage	**Special Requirement on tax-related investment disputes**
ADRs Stage	A requirement on states to initiate consultation, such as to determine whether the measure at the issue is 'taxation' measures, or whether the tax measures are constituting 'indirect expropriation'.

Table 30: Options for Extra Mechanism for Resolving Tax-Related Disputes under IIAs	
Stage	**Special Requirement on tax-related investment disputes**
Before submitting the claims to international dispute resolutions	A requirement to exhaust the competent authorities before turning to international arbitration, such as the investor shall refer the issue to the Ministry of Finance of both Parties to determine whether the investor may submit its claim to international arbitration.
After submitting the claims to international dispute resolutions	The tribunals must take into consideration of decisions of members states regarding tax measures/expropriation.
Source: Created by the author	

All in all, domestic and international approaches together will help address the challenge arising from the intersection between domestic taxation, the WTO laws, and IIAs. On the one hand, an increase in awareness of commitments under WTO laws and IIAs in tax policymaking, tax law drafting, tax law enforcement, and tax adjudication processes will improve compliance of tax measures with WTO laws and IIAs from within. On the other hand, improving IIAs, particularly the clarity of subjective investment protection, and including tax carve-out clauses as well as special mechanisms for resolving tax-related disputes in IIAs, will balance tax sovereignty with investment protection. In practice, negotiations of future IIAs will depend on the dynamics between Thailand and its investment partners. Accordingly, a party's bargaining power can significantly shift the outcome of negotiations, leading to more advantageous positions for those who possess greater leverage. As a final note, this research is of the view that, as Thailand is a developing country, negotiation via ASEAN+ may be more effective in addressing a power imbalance than individual negotiation of future IIAs, FTAs, or EPAs.

6.4 Conclusion and the Path Forward

In conclusion, this research provided a systematic legal comparison of the limitations of tax sovereignty under IIAs and the WTO laws, reviewed implications on Thailand's tax system, and proposed the policy actions that are needed to address these challenges and support trade, investment, and sustainable development, while also preventing possible tax-related disputes under IIAs and the WTO. This examination leads to four main conclusions and a two-fold recommended course of action as follows:

First, the WTO laws and IIAs are international legal frameworks that aim to promote economic liberalisation in a neoliberal world by limiting the abilities of states to design and implement tax policies to a certain extent. However, the key distinction is that while the WTO has a clear objective to balance trade liberalisation with legitimate states' right to regulate, the first-generation IIAs focused on investment protection rather than balancing states' right to regulate with investment protection. At present, the states' objective of enhancing IIAs' functions to achieve a balance between investment protection and sustainable development is found only in certain FTAs with an investment chapter and the new-generation IIAs.

Second, the coverage of WTO laws limiting states' right to regulate in the areas of taxation is much broader than that of IIAs; but, as a multilateral agreement, they are applicable to the WTO's members' tax measures consistently. By contrast, although only eight standards of protection under IIAs are applicable to domestic tax measures, each standard of protection may be drafted differently in each IIA. An additional complexity is that, unlike the WTO laws, the right to regulate exceptions under IIAs is not uniform. They range from the pro-investor approach (no right to regulate exceptions) to the pro-state approach (full tax carve-out from IIAs). Unlike the WTO dispute settlement system, dispute resolution mechanisms for tax-related disputes under IIAs are also fragmented, ranging from the pro-investor approach (ADRs and international arbitration) to the pro-state approach (no ISDS available).

Third, tax-related disputes under the WTO and IIAs concern compliance of domestic tax measures and public international economic law. Any type of domestic taxation and tax measures (tax law, tax administrative actions, and tax dispute resolution) can allegedly be in breach of the WTO and IIAs. Despite similarities, the crucial distinction between tax-related disputes under the WTO and IIAs is that while the dispute under the WTO is interstate, the parties to the disputes

under IIAs are investors and states. The legal principles invoked, and the characteristics of alleged tax measures are also different. In the context of the WTO, discriminatory tax was most challenged; while in the context of ISDS, unfair domestic tax was most challenged. The remedy under the WTO is to change domestic tax measures or retaliation, while under the IIAs the losing states are required to pay compensation to foreign investors (taxpayers).

Fourth, Thailand's commitments under both the WTO laws and IIAs have some similarities and differences. All types of Thailand's domestic taxation and tax measures are constrained by the WTO laws and IIAs. However, while WTO laws ensure that members' right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, less than half of Thailand's IIAs provide right to regulation exceptions. Moreover, while tax-related disputes arising from the WTO agreements must be resolved by the WTO dispute settlement system, tax-related dispute resolutions under Thailand's IIAs are fragmented. In addition, none of Thailand's IIAs include international arbitration with improved or modified procedures, appeal procedure, international investment court, the limitation of investors' right to recourse to ISDS, or additional requirements or mechanisms for tax-related disputes. These features of Thailand's IIAs create high risks to tax policymakers, legislators, administrators, and adjudicators.

The recommendations proposed were twofold. It is argued that both domestic and international approaches are needed to address the challenges described above. First, it is important for Thailand' tax policymakers, tax legislators, tax administrators, and adjudicators to take IIAs and WTO laws into consideration in tax policy formulation, tax law drafting, tax enforcement, and tax adjudication processes. Second, Thailand's investment treaty negotiators should consider ways in which they can guarantee a higher degree of legitimate regulatory freedom while attracting sustainable and quality FDI. Among others, the options suggested in this research included improving the clarity of the definition of taxation, strengthening substantive investment protections, and including right to regulate exceptions and tax carve-outs, as well as a special mechanism for tax-related disputes in Thailand's IIAs.

Bringing together the findings, comparative analysis, implications, and recommendations, this research resolves important questions and contributes new perspectives to the study of the intersection between taxation, international investment law, and international trade rules under the WTO. Alongside the findings, the suggested recommendation could contribute to the field of tax

law on policymaking and practical levels and thereby help Thailand to design tax measures that support trade and sustainable development and avoid future disputes under the WTO and ISDS. Through comparative analysis, this research reports only a broader picture of the intersection between domestic taxation, IIAs, and WTO rules; thus, further analyses in greater detail on certain issues mentioned in this research, such as definitions of tax measures under domestic law, IIAs, and WTO would be beneficial. It is also proposed that suitable standards of reviews for taxation policies in the context of IIAs, tax carve-out clauses, and unique procedures for resolving tax disputes that balance tax sovereignty and investment protection are the areas that still have potential for improvement. Moreover, since domestic and international law can limit tax sovereignty, a comparative study of the limitation of tax sovereignty under the Constitution and other public international laws, or of the intersection between international frameworks, such as the implementation of Base Erosion and Profit Shifting (BEPS), DTAs, IIAs, and the WTO, as well as their dispute resolutions, would be beneficial to the fields of tax, trade, and investment.

Selected Bibliography

Books/Edited Books

Amerasinghe, Chittharanjan F., *Diplomatic Protection* (Oxford Monographs in International Law, 2008)

Balaam, David N., and Michael Veseth, *Introduction to International Political Economy* (Routledge,2014)

Bowett, Derek W., *Self-Defense in International Law* (Manchester University Press, 1958)

Ebrill, Liam P., Michael Keen, and Victoria J. Perry, *The Modern VAT* (International Monetary Fund, 2001)

Essers, Peter H.J., *History and Taxation: The Dialectical Relationship between Taxation and the Political Balance of Power* (International Bureau of Fiscal Documentation, 2022)

Evans, Chris et al, *Comparative Taxation: Why Tax Systems Differ* (Fiscal Publications, 2017)

Frieden, Jeffrey A., *Global Capitalism: Its Fall and Rise in the Twentieth Century* (WW Norton, 2006)

Harvey, David, *A Brief History of Neoliberalism* (Oxford University Press, 2005)

Jackson, John H., *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 1997)

Kallianiotis, John N, *International Financial Transactions and Exchange Rates: Trade, Investment and Parities* (Palgrave Macmillan, 2013)

Krairit, Dej-Udom, *International Investment Law* (Thammasat University Press, 2015)

Lang, Michael et al., *The Impact of Bilateral Investment Treaties on Taxation* (IBFD, 2017)

Manis, Jim (ed), An Inquiry into the Nature and Causes of the Wealth of Nations by Adam Smith (The Electronic Classics Series Publication, The Pennsylvania State University, 2005) [edited of Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776)] <https://www.rrojasdatabank.info/Wealth-Nations.pdf> accessed 1 May 2025.

Musgrave, Richard A, *The Theory of Public Finance: A Study in Public Economy* (McGraw-Hill College, 1959)

Musgrave, Richard A. and Peggy B. Musgrave, *Public Finance in Theory and Practice* (McGraw-Hill College, 1989)

Newcombe, Andrew and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009)

Pistone, Pasquale (ed), Tax Procedure (International Bureau of Fiscal Documentation, 2020)

Rodick, Burleigh C., *The Doctrine of Necessity in International Law* (Columbia University Press, 1928)

Roy, Ravi K, Arthur T. Denzau, and Thomas D Willett (eds), *Neoliberalism: National and Regional Experiments with Global Ideas* (Routledge, 2006)

Sadd-Filho, Alfredo and Deborah Johnson, *Neoliberalism: A Critical Reader* (Pluton Press, 2005)

Sornarajah, M., *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015)

Tanzi, Vito, Howell Zee, *Tax Policy for Developing Countries* (International Monetary Fund, 2001)

Taylor, Philip E., *The Economics of Public Finance* (The Macmillan Company, 1948)

Thuronyi, Victor, *Tax Law Design and Drafting* (International Monetary Fund, 1996)

Vandevelde, Kenneth J., *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, 2010)

Chapter in Edited Books

Chaisse, Julien and J. Kirkwood, 'Foreign Investors vs. National Tax Measures: Assessing the Role of International Investment Agreements' in Irma Johanna Mosquera Valderrama, Dries Lesage and Wouter Lips (eds), *Taxation, International Cooperation and the 2030 Sustainable Development Agenda* (Springer Nature, 2021)

de Vries, F Margot Gerritsen, 'The Bretton Woods Conference and the Birth of the International Monetary Fund' in Orin Kirshner (ed), *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996)

Frieden, Jeffry A and David A Lake, 'International Politics and International Economics' in C Roe Goddard, Patrick Cronin and Kishore C Dash (eds), *International Political Economy: State – Market Relations in Changing Global Order* (Lynne Rienner, 2003)

Fritsch, Stefan, 'International Political Economy and Trade' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, 2011)

Grosse, Rober, 'The Bargaining Theory and the Obsolescing Bargain' in Rober Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005)

Jakab, Eva, 'Property Rights in Ancient Rome' in Paul Erdkamp et al (ed), *Ownership and Exploitation of Land and Natural Resources in the Roman World* (Oxford Academic Book, 2015)

Lee, Simon, 'Ideologies of Political Economy' in R J Barry Jones (ed), *Routledge Encyclopaedia of International Political Economy* (Routledge, 2001)

Mikesell, Raymond F, 'Some Issues in the Bretton Woods Debates' in Orin Kirshner (ed), *The Bretton Woods-GATT System: Retrospect and Prospect After Fifty Years* (M E Sharpe, 1996)

Narlikar, Amita, Martin Dauntion and Robert M. Stern, 'Introduction' in Amita Narlikar, Martin Dauntion, and Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012)

Park, William W, 'Arbitrability and Tax' in Loukas A. Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives* (Kluwer Law International, 2009)

Preeg, Ernest H, 'The Uruguay Round Negotiations and the Creation of the WTO' in Amrita Narlikar, Martin Daunton, and Robert M Stern (eds), *The Oxford Handbook of World Trade Organization* (Oxford University Press, 2012)

Schill, Stephen W and Robyn Briese, 'If State Consider": Self-Judging Clause in International Dispute Settlement' in A. von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Koninklijke Brill NV, 2009)

Schreuer, Christoph H, 'Do We Need Investment Arbitration?' in Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor–State Dispute Settlement System: Journey for the 21st Century* (Brill Nijhoff, 2015)

Schreuer, Christoph H. 'Protection against Arbitrary or Discriminatory Measures' in Catherine A Rogers (ed), *The Future of Investment Arbitration* (Oxford University Press, 2009)

Som, Lalita, 'Industrial Revolution in Britain' in Lalita Som (ed), *The Capitals of Nations: The Role of Human, Social, and Institutional Capital in Economic Evolution* (Oxford Academic)

Taggart, Michael, 'The Nature and Functions of the States' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005)

Toye, Richard, 'The International Trade Organization' in Amrita Narlikar, Martin Daunton, and Robert M. Stern (eds), *The Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012)

Vandevelde, Kenneth J, 'The Liberal Vision of the International Law on Foreign Investment' in C. L. Lim (ed), Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumoraswamy Sornarajah (Cambridge University Press, 2016)

W Zeiler, Thomas 'The Expanding Mandate of the GATT: The First Seven Rounds' in Amrita Narlikar, Martin Daunton, and Robert M Stern (eds), T*he Oxford Handbook on the World Trade Organization* (Oxford University Press, 2012)

Waincymer, Jeff, 'Balancing Property Rights in Expropriation' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law* (Oxford University Press, 2009)

Waincymers, Jeff, 'Australia' in Michael Lang et al (eds), *The Impact of Bilateral Investment Treaties on Taxation* (International Bureau of Fiscal Documentation, 2009)

Wälde, Thomas and Abba Kolo, 'Coverage of Taxation Under Modern Investment Treaties' in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008)

Wells, Louis T, 'Protecting Foreign Investors in the Developing World: A Shift in US Policy in the 1990s?' in Robert Grosse (ed), *International Business and Government Relations in the 21st Century* (Cambridge University Press, 2005)

Zeitler, Helge Elisabeth, 'Full Protection and Security' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2011)

Journal Articles

Alvarez, José E, 'The Return of the State' (2011) 20 (2) *Minnesota Journal of International Law* 223

Anoton, Fernando Serrano, 'Taxpayer's Rights and the Role of the Tax Ombudsman: An Analysis from a Spanish and Comparative Law Perspective' (2007) 35(5) *International Tax Review* 337

Bogart, Dan and Richardson, Gary, 'Property Rights and Parliament in Industrializing Britain' (2011) 54 (2) *Journal of Law & Economics* 241

Borchard, Edwin, 'Minimum Standard of the Treatment of Aliens' (1940) 38 (4) *Michigan Law Review* 445

Chaisse, Julien, 'Investor-State Arbitration in International Tax Dispute Resolution: A Cut Above Dedicated Tax Dispute Resolution?' (2016) 35 *Virginia Tax Review* 149

Chaisse, Julien, 'We Must Pursue an AI Tax' (2024) *FDI Intelligence Magazine* 7

De Mooij, Ruud and Michael Keen, 'Back to Basics Taxing Principles' (2014) 51 (4) *Finance & Development* 50

Kiser, Edgar and Joshua Kane, 'Revolution and State Structure: The Bureaucratization of Tax Administration in Early Modern England and France' (2001) 107(1) *American Journal of Sociology* 183

Lugg, Andrew et al, 'Why is there no investor-state dispute settlement in RCEP? Bargaining and Contestation in the Investment Regime' (2024) *Business and Politics* 1

Passant, John, 'Taxation and the American Revolution' (2017) 11(3) A*ustralasian Accounting, Business and Finance Journal* 20

Ranjan, Prabhash, 'Investor-State Dispute Settlement and Tax Matters: Limitations on State's Sovereign Right to Tax (2023) 31(1) *Asia Pacific Law Review* 219

Rathbone, Daniel, 'Egypt, Augustus and Roman Taxation' (1993) 4 *Cahiers du Centre Gustave Glotz* 81

Tandon, Suranjali, 'Issues and Challenges with Applying Investment Agreements to Tax Matters in the Context of India's Experience' (2023) 31(1) *Asia Pacific Law Review* Volume 235

Vallespinos, Martin 'Can the WTO Stop the Race to the Bottom? Tax Competition and the WTO' (2020) 40 *Virginia Tax Review* (forthcoming)

Vandevelde, Kenneth J, 'A Brief History of International Investment Agreements' (2005) 12(1) *UC Davis Journal of International Law and Policy* 157

Vandevelde, Kenneth J, 'The Political Economy of Bilateral Investment Treaties' (1998) 92 (4) *The American Journal of International Law* 621

Theses/Reports/ Papers

Chongchit, Patharawan, *A Proposed Alternative Tribrid Framework for A Multilateral Reform of the Investor-State Dispute Settlement Regime* (PhD Thesis, Monash University, 2019)

Chongchit, Patharawan, *An Analysis of Tax-Related Disputes under the World Trade Organization Jurisprudence: Lessons Learnt and Recommendations for Thailand's Tax Policy Makers, Legislators, Administrators, and Adjudicators* (Full Research Report, Faculty of Law, Thammasat University, 2022)

Chakapong Kearod, *Legal Issue regarding Administrative Review Tribunal under the Revenue Code* (Independent Study, Faculty of Law, Ramkhamhaeng University, 2021)

Daly, Michael, *The WTO and Direct Taxation* (WTO Discussion Paper No 9, 2005)

Daly, Michael, *Is the WTO a World Tax Organization? A Primer for WTO Rules for Policy Makers* (IMF, 2016)

Joubin-Bret, Anna and Cristian Rodriguez Chiffelle, *G20 Guiding Principles for Global Investment Policymaking: A Steppingstone for Multilateral Rules on Investment* (White Paper, ICTSD and WEF, 2017)

Kohpaiboon, Archanun, and Jongwanicheria, Juthathip, *Changes in Trade and Investment Policies in Thailand and the Implications for Medium-Term Growth* (Discussion Paper Series No. 436, Faculty of Economics, Thammasat University, 2022)

Mann, Howard, *The Right of States to Regulate and International Investment Law* (Paper presented at the Expert Meeting on the Development Dimension of FDI: Policies to Enhance the Role of FDI in Support of the Competitiveness of the Enterprise Sector and the Economic Performance of Host Economies, Taking into Account the Trade/Investment Interface, in the National and International Contexts, Geneva, 6–8 November 2002)

Morris, Danielle et al, *Empirical Study: Tax-related Measures in Investor-State Arbitration* (British Institute of International & Comparative Law & WilmerHale, 2024)

Rosen, Harvey S., *Public Finance: Essay for the Encyclopaedia of Public Choice* (CEPS Working Paper No. 80, Princeton University, 2002)

International Governmental Organisations' Publications

ASEAN, *ASEAN Comprehensive Investment Agreement (ACIA): A Guidebook for Businesses & Investors* (ASEAN, 2015)

European Commission (EC), *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (Press Release, IP/15/5651, 16 September 2015)

OECD, *Consumption Tax Trends 2020: VAT/GST and Excise Rates, Trends and Policy Issues* (OECD Publishing, 2020)

OECD, *Fundamental Principles of Taxation in Addressing the Tax Challenges of the Digital Economy* (OECD Publishing, 2014)

OECD, *FDI In Figures* (OECD Publishing, 2024)

OECD, *Investment Policy Reviews: Thailand* (OECD Publishing, 2021)

OECD, *Tax Effects on Foreign Direct Investment –Recent Evidence and Policy Analysis* (OECD Publishing, 2007)

UNCTAD, *Expropriation: A Sequel* (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2011/7, 2011)

UNCTAD, *Fair and Equitable Treatment: A Sequel* (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2011/5, 2010)

UNCTAD, *Fair and Equitable Treatment* (Series on issues in International Investment Agreements, United Nations, UNCTAD Doc UNCTAD/ITE/IIT/11 (Vol III), 1999)

UNCTAD, *Free Transfer of Funds* (UNCTAD Series on Issues in International Investment Agreements, UNCTAD Doc UNCTAD/ITE/IIT/20, 2000)

UNCTAD, *International Investment Agreements and Their Implications for Tax Measures: What Tax Policymakers Need to Know* (UNCTAD/DIAE/PCB/INF/2021/3, 2021)

UNCTAD, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal* (IIA Issues Note No. 4 (2013), UNCTAD/WEB/DIAE/PCB/2013/9, 2013)

UNCTAD, *Interpretation of IIAs: What States can do* (IIA Issues Note No. 3 (2011) , UNCTAD/WEB/DIAE/IA/2011/10, 2012)

UNCTAD, *Investing in the SDGs: An Action Plan* (World Investment Report, UNCTAD/WIR/2014, 2014)

UNCTAD, *Investing in the SDGs: An Action Plan* (World Investment Report, UNCTAD/WIR/2014, 2014)

UNCTAD, *Investment Policy Framework for Sustainable Development [2012 Edition]* (Series on Investment Policy Framework for Sustainable Development, UNCTAD Doc No UNCTAD/DIAE/PCB/2012/5, 2012)

UNCTAD, *Investment Policy Framework for Sustainable Development [2015 Edition]* (Series on Investment Policy Framework for Sustainable Development, UNCTAD Doc No UNCTAD/DIAE/PCB/2015/5, 2015)

UNCTAD, *Investment Policy Framework for Sustainable Development [2012 Edition]* (Series on Investment Policy Framework for Sustainable Development, UNCTAD/DIAE/PCB/2012/5, United Nations, 2012)

UNCTAD, *Investor–State Dispute Settlement: A Sequel* (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2013/2, United Nations, 2014)

UNCTAD, *Investor–State Dispute Settlement: An Information Note on the United States and the European Union* (IIA Issue Note No. 2 (2014), UNCTAD/WEB/DIAE/PCB/2014/4, 2014)

UNCTAD, *Investor–State Dispute Settlement: Review of Developments in 2014* (IIA Issue Note No. 2, (2015), UNCTAD/WEB/DIAE/PCB/2015/2, 2015)

UNCTAD, *Investor–State Dispute Settlement: Review of Developments in 2015* (IIA Issue Note No 2 (2016), UNCTAD/WEB/DIAE/PCB/2016/4, 2016)

UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/DIAE/IA/2009/11, 2010)

UNCTAD, *Latest Developments in Investor–State Dispute Settlement* (IIA Issues Note No. 1 (2012), UNCTAD/WEB/DIAE/IA/2012/10, 2012)

UNCTAD, *Most-Favoured-Nation Treatment* (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2010/1, 2011)

UNCTAD, *Phase 2 of IIA Reform: Modernizing the existing stock of old-generation treaties* (IIA Issue Note No. 2 (2017), UNCTAD/DIAE/PCB/2017/3, 2017)

UNCTAD, *Recent Developments in Investor–State Dispute Settlement (ISDS)* (IIA Issue Note No. 1 (2013), UNCTAD/WEB/DIAE/PCB/2013/3, 2013)

UNCTAD, *Recent Developments in Investor–State Dispute Settlement (ISDS)* (IIA Issue Note No. 1 (2014), UNCTAD/WEB/DIAE/PCB/2014/3, 2014)

UNCTAD, *Recent Trends in IIAs and ISDS* (IIA Issue Note No 1 (2015), UNCTAD/WEB/DIAE/PCB/2015/1, 2015)

UNCTAD, *Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment* (IIA Issues Note No 2 (2013), UNCTAD/WEB/DIAE/PCB/2013/4, 2013)

UNCTAD, *Reform of Investor–State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment* (IIA Issues Note No 2 (2013), UNCTAD/WEB/DIAE/PCB/2013/4, 2013)

UNCTAD, *Reform of the IIA Regime: Four Paths of Action and a Way Forward* (IIA Issue Note No. 3 (2014), UNCTAD/WEB/DIAE/PCB/2014/6, 2014)

UNCTAD, *Reforming International Investment Governance* (World Investment Report, UNCTAD/WIR/2015, 2015)

UNCTAD, *Report on the Expert Meeting on the transformation of International Investment Agreement Regime: The Path Ahead* (Report, TD/B/C.II/EM 4/3, 2015)

UNCTAD, *Taking Stock of IIA Reform* (IIA Issue Note No 1 (2016), UNCTAD/WEB/DIAE/PCB/2016/3, 2016)

UNCTAD, *The Protection of National Security Interest in IIAs* (Series on International Investment Policies for Development (UNCTAD Doc UNCTAD/DIAE/IA/2008/5, 2009)

UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (Series on International Investment Policies for Development, UNCTAD Doc UNCTAD/DIAE/IA/2009/5, 2009)

UNCTAD, *Towards a New Generation of International Investment Policies: UNCTAD's Fresh Approach to Multilateral Investment Policymaking* (IIA Issues Note No 5 (2013) , UNCTAD/WEB/DIAE/PCB/2013/6, 2013)

UNCTAD, *Towards a New Generation of Investment Policies* (World Investment Report 2012, UNCTAD/WIR/2012, 2012)

UNCTAD, *Transparency* (Series on Issues in International Investment Agreements II, UNCTAD Doc UNCTAD/DIAE/IA/2011/6, 2012)

UNCTAD, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012)

UNCTAD, *Facts on Investor-State Arbitration in 2021: With a Special Focus on Tax-Related ISDS Cases* (IIAs Issues Note No. 1, July 2022).

UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2012)

UNCTAD, *Free Transfer of Fund* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2020)

UNCTAD, *International Investment Agreements and Their Implication for Tax Measures: What Tax Policymakers Need to Know: A guide based on UNCTAD's Investment Policy Framework for Sustainable Development* (UNCTAD/DIAE/PCB/INF/2021/3, United Nations, 2021)

UNCTAD, *Investor-State Dispute Settlement* (UNCTAD Series on Issues in International Investment Agreements II, 2014)

UNCTAD, *Investor–State Dispute Settlement: Review of Developments in 2016* (IIA Issue Note No 1 (2017), UNCTAD/DIAE/PCB/2017/1, 2017)

UNCTAD, *Investment Provisions in Economic Integration Agreements* (UNCTAD/ITE/IIT/2005/10, 2006)

UNCTAD, *Most-Favoured-Nation Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations,2011)

UNCTAD, *National Treatment* (UNCTAD Series on Issues in International Investment Agreements II, United Nations, 1999)

UNCTAD, *Reforming Investment Dispute Settlement: A Stocktaking* (IIA Issue Note 1, 2019).

UNCTAD, *Review of 2020 Investor–State Arbitration Decisions: IIA Reform Issues at A Glance* (IIA Issue Note, 2022).

UNCTAD, *Taxation* (UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/16, United Nations, 2000)

UNCTAD, *Reform Package for the International Investment Regime* (United Nations, 2018)

UNCTAD, *World Investment Report* (UNCTAD/WIR/2024, United Nations, 2024)

WTO, *WTO Analytical Index: GATT 1994* (WTO, 2023)

WTO, *Trade and Foreign Direct Investment* (Press Releases, Press/57, 9 October 1996)

European Parliament, *Artificial Intelligence Act* (2024)

International Governmental Organisations' Websites/Databases

ICSID, *About the ICSID Rules Amendment* <https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about>

OECD, *Details of Tax Revenue - Thailand* <https://stats.oecd.org/Index.aspx?DataSetCode=REVTHA>

OECD, *FDI Flow (Indicator)* <https://data.oecd.org/fdi/fdi-flows.htm>

OECD, *Global Statistics Revenue Database 2024* <https://www.oecd.org/en/data/datasets/global-revenue-statistics-database.html>

OECD, *Tax* < https://www.oecd-ilibrary.org/taxation/tax/indicator-group/english_76e12892-en>.

UN, *Tax for SDGs* <https://www.undp.org/uzbekistan/projects/tax-sdgs>

UNCTAD, *IIA Navigator (2024)* <https://investmentpolicy.unctad.org/international-investment-agreements>

UNCTAD, *Investment Policy Hub, Investment Policy Measures: Thailand* <https://investmentpolicy.unctad.org/investment-policy-monitor/214/thailand>

UNCTAD, *Investment Policy Hub, Thailand* <https://investmentpolicy.unctad.org/international-investment-agreements/countries/207/thailand>

UNCTAD, *ISDS Navigator Update: New Cases and Awards Available* < https://investmentpolicy.unctad.org/news/hub/1764/20250210-isds-navigator-update-new-cases-and-awards-available>

WTO, *Thailand, and the WTO*,
<https://www.wto.org/english/thewto_e/countries_e/thailand_e.htm>.

WTO, *Trade Policy Review Mechanism as Amended by the General Council: Revision, effective as of 1 Jan. 2019* < https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm>.

National Governmental Organizations' Websites/Databases

Board of Investment (BOI), *Competitiveness Enhancement Act*
<https://www.boi.go.th/index.php?page=contact_csip&language=en>.

Board of Investment (BOI), *History* <https://www.boi.go.th/index.php?page=our_history2>.

Customs Department, About Us <https://www.customs.go.th/>.

EEC, *About* <https://www.eeco.or.th/th/home>.

Excise Department, *About Us* http://interweb.excise.go.th/home.php?lang=en.

Fiscal Policy Office of the Ministry of Finance, *About FPO*
<https://www.fpo.go.th/main/Home.aspx.>

Fiscal Policy Office of the Ministry of Finance, *Economic Policies*
<https://www.fpo.go.th/main/Economic-Policies/Tax-Policies>.

IEAT, *About the IEAT* <https://www.ieat.go.th/en>.

Ministry of Finance, *Organization Info* <http://www2.mof.go.th/government_agencies.htm.>.

Office of the National Economic and Social Development Council, Office of the Prime Minister, *The Thirteenth National Economic and Social Development Plan (2023-2027)*
< https://www.nesdc.go.th/article_attach/article_file_20230615134223.pdf>

Revenue Department, About Us <https://www.rd.go.th/english/6046.html>.

The United States Library of Congress, *Jay's Treaty: Primary Documents in American History*
<https://guides.loc.gov/jays-treaty>.

United Kingdom Parliament, *War and the Coming of Income Tax*
<https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/taxation/overview/incometax/>

Thailand's Domestic Legislative Materials

Act for the Establishment of and Procedure for Tax Court B.E. 2528 (1985).

Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999).

Act on Rules for Public Administration of the State B.E. 2534 (1991).

Constitution of the Kingdom of Thailand B.E.2560 (2017)

Customs Act B.E. 2560 (2017)

Eastern Special Development Zone Act B.E. 2561 (2018).

Excise Tax Act B.E. 2560 (2017)

Industrial Estate Authority of Thailand Act B.E. 2522 (1979)

Inheritance Tax Act B.E. 2558 (2015)

Investment Promotion Act of B.E. 2520 (1977) (as amended)

Land and Buildings Tax Act, B.E. 2562 (2019)

National Competitiveness Enhancement for Targeted Industries Act, B.E. 2560 (2017)

National Government Organisation Act, BE 2534 (1991).

Petroleum Income Tax Act, B.E.2514 (1971) (as amended)

Revenue Code

Signboard Tax Act B.E. 2510

International Legislative Materials

Argentina - Chile Free Trade Agreement (2017)

Argentina - Japan BIT (2018)

Argentina - United Arab Emirates BIT (2018)

Argentina - United States of America BIT (1991)

Argentina–New Zealand BIT (1999)

Armenia - Japan BIT (2018)

ASEAN - China Investment Agreement (2009)

ASEAN - Hong Kong, China SAR Investment Agreement (2017)

ASEAN-India Investment Agreement (2014)

ASEAN - Korea, Republic of Investment Agreement (2009)

ASEAN Comprehensive Investment Agreement (2009)

ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) (2009)

ASEAN-Japan Comprehensive Economic Partnership (2008)

Australia - Thailand FTA (2004)

Belarus - India BIT (2018)

BLEU (Belgium-Luxembourg Economic Union) - Colombia BIT (2009)

Cambodia - Malaysia BIT (1994)

Central America Republics - Korea, Republic of FTA (2018)

Chile - New Zealand BIT (1999)

Colombia - Japan BIT (2011)

Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018)

Convention on the Settlement of Investment Disputes between States and Nationals of Other States

Croatia - Korea, Republic of BIT (2005)

Czech Republic - Thailand BIT (1994)

Denmark - Russian Federation BIT (1993)

Draft Convention on Investment Abroad

Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention.

Draft Multilateral Agreement on Investment: Draft Consolidated Text.

Energy Charter Treaty

EU - Viet Nam Investment Protection Agreement (2019)

EU-Singapore Free Trade Agreement (2018)

France Model BIT (2006)

Germany - Thailand BIT (2002)

Germany –Thailand BIT (2002)

Hong Kong, China SAR - New Zealand BIT (1995)

India - United Arab Emirates BIT (2013)

Indian Model BIT (2016)

Japan - Thailand EPA (2007)

Japan - United Arab Emirates BIT (2018)

Kazakhstan - Singapore BIT (2018)

Lao People's Democratic Republic - Viet Nam BIT (1996)

The Marrakesh Agreement Establishing the World Trade Organization

New Zealand - Thailand CEPA (2005)

North American Free Trade Agreement

Peru-Australia Free Trade Agreement (2018)

Regional Comprehensive Economic Partnership (2020)

Responsibility of States for Internationally Wrongful Acts

Spain–Argentina BIT (1992)

Sri Lanka – Singapore Free Trade Agreement (SLSFTA) (2018)

Thailand - United Arab Emirates BIT (2015)

Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

UNCITRAL Arbitration Rules

United Kingdom –Northern Ireland– Argentina BIT (1993)

United States-Mexico-Canada Agreement (USMCA)

WTO Cases

Appellate Body Report, Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland, WTO Doc WT/DS122/AB/R (12 March 2001, adopted on 5 April 2001)

Appellate Body Report, Thailand — Customs and Fiscal Measures on Cigarettes from the Philippines, WTO Doc DS371 WT/DS371/45 (17 June 2011, adopted on 15 July 2011)

Thailand — Subsidies concerning Sugar from Brazil, WTO Doc G/AG/GEN/131; G/L/1146; G/SCM/D110/1 WT/DS507/1 (4 April 2016) (Request for consultations by Brazil)

Thailand — Customs Valuation of Certain Products from the European Communities, WTO Doc G/L/846; G/VAL/D/10; WT/DS370/1 (25 January 2008) (Request for Consultation by European Communities)

Investor-State Dispute Settlement Cases

Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v Arab Republic of Egypt (*Decision on Liability and Heads of Loss*) (ICSID, Case No ARB/12/11, 21 February 2017)

BG Group Plc. v. The Republic of Argentina (Final Award) (UNCITRAL, 24 December 2007)

Burlington v Ecuador (Decision on Liability) (ICSID, Case No ARB/06/08/5, 14 December 2012)

Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v Republic of India (I) (Final Award) (PCA, Case No 2016-07, 21 December 2020)

Charanne and Construction Investments v. Spain (SCC, Case No 062/2012, 21 Jan 2016)

CMS Gas Transmission Company v. The Republic of Argentina (Final Award) (ICSID, Case No ARB/01/8, 12 May 2005)

ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela (Final Award) ICSID Arbitral Tribunal, Case No. ARB/07/30, 8 March 2019)

Continental Casualty Company v. Argentine Republic (Final Award) (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008)

Julian Crespo Santamargarita, Juan Ricardo Crespo Santamargarita, Valencja Sp. z.o.o. v. Republic of Poland (Final Award) (ICC, Case No. 11392/KGA, 22 September 2005)

Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru (Award) (ICSID, Case No. ARB/03/28, 18 August 2008)

EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic (Award) (ICSID Arbitral Tribunal, Case No ARB/03/23, 11 June 2012)

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain (Final Award) (ICSID, Case No. ARB/13/36, 4 May 2017)

El Paso Energy International Company v. The Argentine Republic (Final Award) (ICSID, Case No ARB/03/15, 31 October 2011)

EnCana Corporation v. Republic of Ecuador (Final Award) (LCIA, Case No. UN3481, 3 February 2006)

Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (Final Award) (ICSID, Case No ARB/01/3, 22 May 2007)

Eskosol S.p.A. in liquidazione v Italian Republic (Final Award) (ICSID, Case No. ARB/15/50, 4 September 2020)

ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic (Final Award) (ICSID, Case No ARB/16/5, 14 September 2020)

Goetz v. Burundi (I) Antoine Goetz and others v. Republic of Burundi (I) (Decision on Liability) (ICSID, Case No. ARB/95/3, 2 September 1998)

Hulley Enterprises v Russia, Hulley Enterprises v. Russia Hulley Enterprises Ltd. v. Russian Federation (Final Award) (PCA, Case No. 2005-03/AA226, 18 July 2014)

Hydro Energy 1 and Hydroxana v. Spain Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v Kingdom of Spain (Decision on Jurisdiction, Liability and Directions on Quantum) (ICSID, Case No. ARB/15/42, 9 March 2020)

Impregilo SpA v Argentine Republic (Final Award) (ICSID, Case No ARB/07/17, 21 June 2011)

Kingsgate Consolidated Ltd v. The Kingdom of Thailand (PCA, Case No. 2017-36) (Not public)[348]

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc v Argentine Republic, (Decision on Liability) (ICSID Arbitral Tribunal, Case No ARB/02/1, 3 October 2006)

Ioan Micula, Viorel Micula and others v. Romania (II) (Final Award) (ICSID Case No. ARB/14/29, 5 March 2020)

Murphy Exploration & Production Company – International v. The Republic of Ecuador (II) (Final Award) (PCA, Case No. 2012-16, 10 Feb 2017)

National Grid plc v The Argentine Republic (Final Award) (UNCITRAL, 3 November 2008)

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II) (Decision on Jurisdiction) (ICSID Case No. ARB/06/11, 9 September 2008)

Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II) (Final Award) (ICSID Case No. ARB/06/11, 5 October 2012)

Paushok v. Mongolia Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, (Award on Jurisdiction and Liability) (UNCITRAL, 28 April 2011)

Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Decision on Jurisdiction and Liability) (ICSID, Case No. ARB/08/6, 12 September 2014)

Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay (Final Award) (ICSID Arbitral Tribunal, Case No. ARB/10/7, 8 July 2016).

---

[348] For backgrounds sources, see UNTAD, *Investment Policy Hub* < https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/825/kingsgate-v-thailand> accessed 1 May 2025.; Australian Stock Exchange (ASX) https://www.asx.com.au/asxpdf/20171110/pdf/43p3tbzmrgdhk4.pdf>.accessed 1 May 2025.

Sempra Energy International v. The Argentine Republic (Final Award) (ICSID Arbitral Tribunal, Case No ARB/02/16, 28 September 2007)

*Shell Nigeria Exploration and production Company Ltd., Esso Exploration and Production Nigeria (Deepwater) Ltd., Nigerian AGIP Exploration Ltd.,Total E & P Nigeria Ltd. v. Nigerian National Petroleum Corporation (Partial Award) (*Ad Hoc Arbitration, 30 May 2013)

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic, (Decision on Liability) (ICSID, Case No ARB/03/19, 30 July 2010)

Sun Reserve Luxco Holdings SRL v. Italy (Final Award) (SCC, Case No. V (2016/32), 25 March 2020)

The PV Investors v. Spain, Charanne and Construction Investments v. Spain (Final Award) (PCA, Case No. 2012-14, 28 February 2020)

Vento Motorcycles, Inc. v. United Mexican States (Final Award) (ICSID, Case No. ARB(AF)/17/3, 6 July 2020).

Veteran Petroleum v. Russia Veteran Petroleum Limited v. The Russian Federation (Final Award) (PCA Case No. 2005-05/AA228, 18 July 2014)

Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I] (Final Award) (ICSID, Case No. ARB/05/20, 11 December 2013)

Vodafone International Holdings BV v. Government of India [I] (Notice of Arbitration) (PCA, Case No. 2016-35, 17 April 2014) (not public)[349]

Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. Kingdom of Thailand, UNCITRAL (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand) (Final Award) (UNCITRAL, 1 July 2009)

Watkins and others v. Spain Watkins Holdings S.à r.l. and others v. Kingdom of Spain (Final Award) (ICSID, Case No. ARB/15/44, 21 January 2020)

[349] For backgrounds sources, see Investment Arbitration Reporter < https://www.iareporter.com/> accessed 1 May 2025.

Yukos Universal Limited (Isle of Man) v The Russian Federation (Interim Award on Jurisdiction and Admissibility) (UNCITRAL, PCA, Case No. 2005-04/AA227, 30 November 2009)

Yukos Universal Limited (Isle of Man) v The Russian Federation (Final Award) (UNCITRAL PCA, Case No. 2005-04/AA227, 18 July 2014)