

The Role of Parliament in Solving CPTPP Dispute in Thailand

Miss Channachon Nathong

(นางสาวชญชนม์ นาทอง)

Senior Official Foreign Officer

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Introduction

On 5 August 2020, during the recent CPTPP Commission meeting, Thailand decided not to file the application for CPTPP membership after missing the initial participation in TTP¹. Such decision was supported by a Parliamentary study on the impacts of CPTPP on Thai society that coincidental with the global pandemic of coronavirus (COVID-19). Due to the unexpected national recession that turn into a crisis of confidence, Thailand had shown away from CPTPP. The cabinet, however, agrees to follow up on some effective CPTPP practices to help sustain the economy before considering whether Thailand is ready to negotiate the terms and conditions with CPTPP members in the foreseeable future.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as TPP-11, is a free trade agreement between Canada and 10 other countries in the Asia-Pacific: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The ratification process began on 8 March 2018, but CPTPP entered into force on December 30 2018, under the condition of 60 days after the first six signatories have ratified²: Canada, Australia, Japan, Mexico, New Zealand, and Singapore. On 14 January 2019, Vietnam became the latest participating country signing the deal. The remaining signatories to ratify the agreement, however, are Brunei, Chile, Malaysia, and Peru.

¹ The Trans-Pacific Partnership (TPP) began in March 2010 and concluded on 5 October 2015. The US was party to those talks, but the election of President Trump in 2016 led to its withdrawal from the agreement before ratification. The remaining 11 participants signed the newly renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership in March 2018 and came into force in December 2018.

² On 28 June 2018, Mexico became first country to ratify the deal, followed by Japan on 6 July 2018, Singapore on 19 July 2018, Australia on 17 October 2018, New Zealand as well as Canada on 25 October 2018

For Thailand, the government has taken a very keen interest in joining CPTPP. As the Asia-Pacific region is now the world's leading region of economic growth, offering big opportunities for trade and expansion. The government sees CPTPP as a new challenge of a highly substantive trans-regional market that would not only extend ASEAN economies, but also encompass the latest RCEP³ to which Thailand is a signatory in November 2020. As CPTPP is a highly ambitious agreement, Thai products, services, and trade firms will earn benefits from the export markets when nearly tariff on goods trade drop to zero inside CPTPP countries.

Even though an engagement in CPTPP is attempting, it is difficult to implement as it had been strongly opposed by both the public and civil society against provisions on various components of the deal. The Protected Variety Plant (PVP) system, for example, limit farmers from commercial seed trade without having much effect on productivity, as investigated in the *Journal of Agrobiotechnology Management & Economics* (2005). Also, the Trade-Related Aspects of Intellectual Property Rights⁴ (TRIPS) under World Trade Organization (2006), which attempts to encourage new inventions such as new drugs, can block access to affordable medicines in countries that cannot make medicines themselves. Considering between trade opportunities and impacts on those industries, it will be more difficult to negotiate such terms and conditions without hurting farmer and medical communities that lay the foundation for Thailand's sustainable development.

Together with trade opportunities, however, comes the obligation to abide to the rights under the process of Investor-state dispute settlement, known as "the ISDS." In Bilateral Investment Treaties⁵ (BITs), the ISDS mechanism in a free trade agreement (FTA) provides foreign investors, including Thai foreign investors overseas, with the right to access an international tribunal to resolve investment disputes. As pointed out by Department of

³ The Regional Comprehensive Economic Partnership (RCEP) Agreement is an agreement to broaden and deepen ASEAN's engagement with Australia, China, Japan, Korea and New Zealand, accounting for 30% of the global GDP and the world population, with an objective to establish a modern, comprehensive, high-quality, and mutually beneficial economic partnership.

⁴ The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) attempts to strike a balance between the long term social objective of providing incentives for future inventions and creation, and the short term objective of allowing people to use existing inventions and creations. The agreement covers a wide range of subjects, from copyright and trademarks to patents for pharmaceuticals and other products that are part of the agreement.

⁵ Bilateral investment treaties (BITs) are international agreements establishing the terms and conditions for private investment by nationals and companies of one state in another state.

International Economic Affairs (2558), even though the ISDS provisions provide protection for companies investing overseas to seek compensation for certain breaches of a country's investment obligations, it potentially pose a risk to a state for being claimed by foreign-based companies with "bad faiths" or unexpected "legal loopholes" found in the law.

Although the government has not negotiated the ISDS, Thailand is apparently in Spaghetti bowl effect⁶, entering into BITs over 40 countries and signing 18 FTAs with both countries and regions that have different regulations on Rules of Origin⁷. The rules allow Thai companies to have zero export tariffs to one country, but it may not be eligible for preferential policies in other countries. As such, entering into CPTPP where more than one FTA available will offer greater benefits for both Thai exporters and importers. Unlike RCEP negotiations at this time that exclude the compulsory ISDS from the agreement, CPTPP has cooperated provisions with the ISDS mechanism into the agreement. Trade benefits and state interests therefore remains one of the most sensitive issues on CPTPP.

The COVID-19 and National Crisis of Confidence

On 11 March 2020, the World Health Organization (WHO) was firstly declared COVID-19 as "a new pandemic disease." The worldwide economic and social disruption caused by the pandemic is devastating. A joint statement by WHO, the International Labour Organization (ILO), Food and Agriculture Organization (FAO), and International Fund for Agriculture Development (IFAD) estimated that tens millions people would become at risk of falling into extreme poverty, while the number of nearly 690 million of undernourished people could increase by up to 132 million by the end of 2020.

In Thailand, the COVID-19 shock inevitably hit the country in early 2020. World Bank reported that adding to pre-existing vulnerabilities, Thai economy is projected to contract sharply at 5 percent in 2020, which is among the sharpest declines in the region. Exports and

⁶ Spaghetti bowl effect refers to a problem of free trade agreements (FTAs) in rules of origin that designate which country a product comes from.

⁷ Rules of origin are the criteria needed to determine the national source of a product. Their importance is derived from the fact that duties and restrictions in several cases depend upon the source of imports.

tourisms, whose contribution on GDP is the largest amount of value, were also ruined as a result of a sudden global economic halt and a temporary shutdown in domestic industries under a state emergency decree.

This circumstance led to a crisis of confidence on CPTPP whether the government would risk people's lives on trade benefits from the deal. With a significant pushback from both public and civil society, the government finally did not practice contemplation to join CPTPP: the proposal for the cabinet to endorse CPTPP was withdrawn by the Commerce Ministry in June 2020.

The Role of Parliament in CPTPP Dispute

On 10 June 2020, following the proposal withdrawal was a setup of *the Parliamentary House Committee on CPTPP* to study the impacts of the treaty on society before the final date to join the deal in August 2020. As representatives are elected by the majority of Thai people and membership of CPTPP need parliamentary approval, the Parliament is a key intermediary body entrusted by the government to resolve both the social disputes and the state's concern over CPTPP. Starting from 11 June 2020, the committee had been working competently to utilize its soft power through a series of meeting with potential CPTPP experts within a timeframe of 120 days,

On 8 October 2020, *the Report of the House Committee on the Feasibility of Thailand joining CPTPP* was officially announced to the public with recommendations provided by three Sub-Committees, identifying each main areas that have actual and potential negative impacts on society in 3 areas: agricultures and seeds, medication and public health as well as economy, trade and investment. In brief, the reasons behind this decision are:

(1) Agricultures and Seeds

Thai farmers as well as small and medium enterprises (SMEs) in the agriculture sector will highly risk at losing from the treaty due to the country's openness to FTAs and the rights to access commercial strains if Thailand associates with the International Union for the

Protection of New Varieties of Plants⁸ or “UPOV 1991.” Thai agricultural sector is unprepared to enter CPTPP until the government equip farmers with knowledge on UPOV and improve their manufacturing structures to reach the minimum wage standard so that they can stand the global competitive market. A comprehensive assistance must also include funding on Research and Development (R&D) in plant propagation, biological diversity, and the amendment of Plant Varieties Protection Act B.E. 2542 to conform to the Convention on Biological Diversity⁹ (CBD) and the 20-Year National Strategy.

(2) Medication and Public Health

The negative impacts of CPTPP on medication and public health can be prevented by long-term state policies and budget planning on the development of Patent Linkage¹⁰. The involved sectors need to urgently update an integral database on plant strains existing in the country to protect domestic herbal industries regardless of Thailand’s compulsory to enter UPOV.

For medical equipment considered as “Remanufactured Goods”¹¹, the government must provide each a distinctive name and definition for effective tax classifications. In governmental budget, a support given to medical staff should prevail to help develop remanufacturing skills and secure the standard of medical equipment for the safety of Thai people. Before joining CPTPP, the government must thoroughly review the new Drugs (Amendment) Bill with respect to Drug Registration and Regulation for Microbes in Medicine to secure the benefits of Thai pharmaceutical industries under TRIPs.

⁸ The International Union for the Protection of New Varieties of Plants (UPOV) is an intergovernmental organization with headquarters in Geneva (Switzerland). UPOV was established by the International Convention for the Protection of New Varieties of Plants. The Convention was adopted in Paris in 1961 and it was revised in 1972, 1978 and 1991.

⁹ The Convention on Biological Diversity (CBD) is the international legal instrument for “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources” that has been ratified by 196 nations, including Thailand.

¹⁰ Patent linkage refers to the relationship between the market approval of a generic drug and the patent status of its branded equivalent. The main purposes of patent linkage include early resolution of disputes on infringements and invalidity, and prevention of regulatory bodies facilitating patent infringement via their own administrative actions.

¹¹ Remanufactured goods is used products that are in “like-new” functional state with matching warranty. Its production is regarded as a more sustainable mode of manufacturing because it can be profitable and less harmful to the environment than conventional manufacturing. The production is particularly applicable to complex electromechanical and mechanical products which have cores that, when recovered, will have value added to them which is high relative to their market value and to their original cost.

If the government implements all the above practices and continues to negotiate the ISDS, a propose of reservations and a side letter must be prepared for sensitive sectors such as some drugs and medical supplies in order to refrain from the Right to Regulate¹² on the standard of public health and protect the state from being claimed under the ISDS mechanism.

(3) Economy, Trade and Investment

Before joining CPTPP, Thailand should be ready with both the competitiveness and the liberalization of economy. The government need to push for the restructures of traditional and digital economy by lowering Import Duties to zero and equalizing tariffs on E-Commerce business with the levy of at least 2% on Digital Tax. Obviously, in reference to provisions on the agreement, there will has both a beneficiary and a loser from trades: the government should therefore prolong funding schemes that are easy and accessible for private and social sectors.

For problems on Rules of Origin and Free Zone under CPTPP, the government need to create an effective agricultural list of Thai Industrial Standards (TISI) to protect import of low-quality products that can be cheaper than domestic products. Thai exporters to CPTPP countries should be trained to gain knowledge about the rules of origin for their utmost benefits from the deal. In particular, for domestic trade sectors of tobaccos and liquors, the government need a proposal of reservation-refrain from liberalization or a transition period before joining CPTPP.

With regards to Labour Protection Right, Ministry of Labour may contemplate amending the Labour Relations Act B.E. 2518 without depriving foreign workers of their right to establish trade unions. The Article of International Labour Organization (ILO) Convention needs a quality determination on the eligibility of trade union founders; however, it does not require trade union founders to identify their nationalities.

¹² The right to regulate can be defined as states' sovereign right to regulate in the public interest

On digital trade and E-Commerce, Thailand can use WTO as a main global arena to make a request for the Protection of Personal Information both nationally and internationally. In the same time, the platforms for Thailand's E-Commerce merchandisers and digital service providers should be potentially developed to be more competitive in the global markets, especially ASEAN where Thailand stands as a model for regional development. The code of E-Commerce conduct in Thailand must also be free and fair to protect the monopoly of multi-national service providers that now dominate the market.

For the process of Governmental Procurements, the Comptroller General's Department (CGD) under Commerce Ministry is responsible to conform any involved treasury regulations to the provisions on CPTPP; for examples, Regulations on Innovation Name Lists and Performance Requirements¹³. In case of FDA, state must review its process on special methods of procurements that may cause drugs price increase in the country. Apart from this, the audit process on Donation Procurements should be carefully scrutinized for transparency and legal protection of capital group's briberies.

For Investor-State Dispute Settlement (ISDS) and Technical Barriers to Trade (TBT), Thailand need to reiterate "right to regulate" in all dimensions, including state security: negotiations may include an attached "Annex" on investment to propose reservations or a side latter with any particular partied countries. Regardless of any future parties or signatories of agreement, Thailand must develop a state-owned mechanism to follow up with rules and regulations of the agreement to protect any possible claims by foreign companies.

By means of state budgetary allocations to cover Product Standardization, Thailand's Import Product Quality would be upgraded to the compulsory standard and level where Thai operators can meet. Also, for other state procurement sectors, they need to review any unnecessary practices that obstruct trades such as the measure of Proposed Labelling Requirements for alcoholic beverages.

¹³ Performance requirements may be considered a part of the broader concept of "technical requirements" or "technical specifications", which in general terms refers to the specifications in the contract for what is requested of the private partner in terms of quality and/or quantity.

For concerns over Hazardous Waste Products as well as Sanitary and Phytosanitary (SPS) that Thailand has already abided by WTO rules, Thailand can bring these ongoing issues into the ISDS negotiation. Under CPTPP, the government should also study the actual and potential impacts of the Basel Convention Ban Amendment¹⁴ before Thailand becomes prohibited from exporting such recycling products to the destination countries. Under Factory Act of Parliament B.E. 2562, the government must force a policy update on the Request of Permission given to foreign companies to manage waste recycling in Thailand with respect to environmental problems and local community healths.

Conclusion & Writer Recommendation

Parliamentary Accountability on CPTPP:

It is clear to many countries in the world that CPTPP is one of the most ambitious frameworks to liberalize and deregulate the economies of the countries involved. Although Thailand was not in the state parties in 2018, the government still expressed its strong intention to join the deal.

Parliamentary accountability on CPTPP, however, is premised on the fact that a parliament has the duty to provide checks and balances on the activities of the Executives. In particular, the CPTPP Committee report reiterated the problems of the agreement on Thai society in the three main areas that are major part of development of the country. Apart from the ISDS mechanism, the provisions about seeds and drugs are main obstacles that impede progress in joining CPTPP, and therefore Thailand needs more time to modernize the laws and regulations.

This article on CPTPP also reflects a good balance of power, in which the parliament utilizes its “soft power” to help restore the country from “crisis” to “confidence.” With support from the parliament, the CPTPP dispute now comes to an end and the civil society finally welcomes the decision of the government not to apply for the agreement.

¹⁴The Basel Ban Amendment is international law adopted by the parties to the Basel Convention in 1995, prohibits the export of hazardous wastes from member states of the European Union, Organization for Economic Cooperation and Development (OECD), and Liechtenstein to all other countries.

Thailand's Road to CPTPP:

The road to ratify CPTPP may seem far and take longer than expected as the drawbacks of the agreement far outweigh the benefits. The agreement is designed to extend and concentrate corporate power at the expense of Thai people's rights. However, under the context of "New Normal" in the aftermath of COVID-19, the ratification of CPTPP can contribute to economic recovery as it is one of the few levers available to stimulate growth without creating additional fiscal pressure.

The possibility to revisit CPTPP depends a great deal on how far the government can follow necessary preparedness to be able to reach a consensus from society as a whole. Until that day comes, Thailand will be able to earn more than lose from this Pacific trade bloc.

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