

Some Common Claims about the TPPA's Investment Chapter and Investor-State Dispute Settlement – a Rebuttal by Third World Network

CLAIM: Malaysia already has Investor-State Dispute Settlement (ISDS) provisions in the 74 bilateral investment treaties (BITs) and 8 free trade agreements (FTAs) that it has signed. Certain groups are making a big deal out of the small issue of ISDS in the Trans-Pacific Partnership Agreement (TPPA).

Yes, there are ISDS provisions in a number of Malaysia's FTAs and BITs with other countries. However,

- ISDS provisions were originally included to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments. It was a system to settle disputes between foreign investors and governments, such as when a foreign investor accused a government of directly taking away (expropriating) the business of the investor – as when some governments (usually upon gaining independence) nationalised enterprises or industries or the property and other assets of foreign companies. Access to justice and/or compensation was tricky as the judiciaries of these countries were considered not fully independent nor developed. Thus, the international arbitration court was considered a more neutral framework decades ago to ensure a fair enforcement of the host state's obligations towards investors.
- But the ISDS system of international arbitration has come under heavy criticism

recently, because it departs from its original goal of protecting the property and assets of foreign investors. It now adjudicates complaints relating to an extraordinarily wide area of measures, even matters that, many argue, may not even be considered as the 'property' of the foreign investor – such as the 'expected' profits of such investors.

- Secondly, the substance, structures and processes of the ISDS regime of international arbitration as well as the impartiality of arbitrators hearing the cases have all become lopsided. The way in which the international tribunals have interpreted investor-state disputes has led to an imbalance between the right of a state to regulate in the public interest and the investor's right to protection. The scope for investors' protection under the TPPA has expanded greatly and now extends to a complex variety of situations and governmental measures that investors can face. The number of ISDS cases has thus rapidly increased as foreign investors are empowered to challenge – and get compensation for – an increasing range of government measures that they claim has affected their investments.
- Thirdly, the corporations of the 1950s and 1960s seeking to invest in Malaysia are not the same corporations of today. Unlike in past decades, individual multinational corporations today have revenues that far exceed the GDP of nations – some MNCs

have individual budgets that exceed the GDP of whole regions. In other words, the powers that MNCs had decades ago cannot compare to the immense powers enjoyed by MNCs today. The current system of ISDS only tips the balance in favour of these corporations' power. Needless to say, ISDS is not aimed at helping the small- or medium-sized enterprise to access justice.

- For the above reasons – and more – a number of countries (such as Indonesia, South Africa, and India, and a number of Latin American countries) have embarked on a considerable rethink of their earlier support for ISDS, which they had earlier thought was relatively harmless, but are now discovering otherwise.

CLAIM: Foreign investors in Malaysia can bring an ISDS claim against the government, but that means Malaysian investors abroad also can sue other governments under ISDS.

- Opposition to being sued by foreign investors does not mean we support the ability of Malaysian firms to sue other governments over public interest policies under the current ISDS system of arbitration. We are not in favour of firms suing governments in international arbitration courts if that also means circumventing domestic judicial and legal systems and taking advantage of arbitration courts that do not have the transparency, conflict-of-interest, code of conduct, and other forms of checks and balances against abuse of the system.
- The TPPA's investment chapter only protects investors from TPPA countries in fellow-TPPA countries. Malaysia already has ISDS via its BITs/FTAs with all TPP countries except Canada, Mexico and USA. So Malaysian investors in the other 8 TPP countries already are protected via ISDS in Malaysia's existing BITs/FTAs. Malaysian investors in the 3 countries without ISDS - Canada, Mexico and the USA - can already get the protection of these countries' domestic law and courts. In Canada and USA particularly, the courts are known to be impartial and willing to give large awards to foreign investors, etc., so it is unlikely that Malaysian investors in these countries would need more protection than what their law and courts already provide.

- Furthermore, there are number of ways to address the risks inherent in investing anywhere in the world – risks that domestic businesses all have to take – such as:

- taking out political risk insurance the same way we pay for fire insurance for our homes.
- signing an investment contract with the government with the same (or more) protection than under the TPPA's investment chapter, including ISDS. This would then protect the domestic company's investments without restricting our government's ability to regulate and be exposed to more legal liability.

CLAIM: There are sufficient safeguards for health and environment in the Investment Chapter, so we don't need to fear that the government will not be able to regulate or take measures in the public interest.

- According to the Investment Chapter, nothing prevents TPPA countries from enacting measures to ensure that investment activity in its territory is conducted in a manner sensitive to its environmental, health and other regulatory objectives. But these measures must be *consistent with the investment chapter*.ⁱ This effectively negates the value of this provision. Measures to safeguard the public interest will very likely abridge the broad rights of a foreign investor under the TPPA. Yet their enactment could be threatened with an ISDS suit by a foreign corporation.
- While the TPPA says that non-discriminatory regulatory actions (as required by the TPPA) that are designed and applied to protect legitimate public welfare objectives - such as public health, safety and the environment – do not constitute 'indirect expropriation', the investor can still challenge these "in rare circumstances".ⁱⁱ The international tribunal would then decide on a case-by-case basis.
- There are a large number of performance requirements that a government cannot impose on investors. And while the restriction on imposing certain performance requirements does not prevent a party from adopting or maintaining measures, including environmental ones, that are necessary to

secure compliance with a Party's laws and regulations, this is negated by the provision that *it must not be inconsistent with the TPPA Agreement*.ⁱⁱⁱ

- Performance requirements are also allowed by the TPPA when these are measures necessary to protect human, animal or plant life or health^{iv}. This provision replicates Article XX(b) of the General Agreement on Tariffs and Trade (GATT) 1947, an agreement under the World Trade Organization. In fact, however, the GATT exception is wider in scope. Furthermore, Art XX(g) of GATT allows parties to take measures relating to the conservation of exhaustible natural resources, a provision that is wider than comparable provision in the TPPA.^v In terms of the numbers, 43 out of 44 attempts to employ Article XX in disputes before WTO panels have failed. This does not bode well for the successful use of the more restrictive TPPA exceptions.

CLAIM: TPPA Parties can prevent ISDS claims over tobacco control measures^{vi}.

- Yes, TPPA governments can *choose* to do this for the tobacco control measures listed in Footnote 13 of the Article. It is, however, not a mandatory exception.
- Article 29.5 still allows ISDS challenges against governments for laws and regulations over tobacco leaf (unless it is in a manufactured tobacco product or in the possession of a tobacco manufacturer) or tobacco farming.
- TPPA governments can still be sued over their tobacco control measures by other TPPA governments (under state-to-state dispute settlement (SSDS)) under the TPPA Investment chapter.^{vii}
- Various other TPPA chapters can still restrict governments' ability to regulate tobacco,^{viii} such as the chapters on tariffs, intellectual property, technical barriers to trade, regulatory coherence, transparency, and so on.
- In summary, while the voluntary and limited exception for tobacco control measures from ISDS is a good start, it is not enough from a public health perspective, and there remain many constraints to effective tobacco control measures in the TPPA.

CLAIM: TPPA countries have improved on weaknesses in the ISDS system by: (i) expediting review and dismissal of frivolous claims; (ii) allowing for the possibility that investors pay attorney fees and costs for claims found to be frivolous; (iii) ensuring investors cannot make a claim under ISDS if more than 3.5 years have passed from the time of the action on which the claim is made; (iv) requiring Parties to resolve claims via consultation and negotiation before elevating to formal dispute.

- The 'improvements' to the ISDS system touted above by proponents of the TPPA are minor changes that do not fix the fundamental problems with ISDS (such as the lack of an appeals mechanism, the lack of a vigorous code of conduct for the ISDS judges comparable to most domestic judicial systems, the broad scope and definitions that favour investors; problematic concepts such as Most Favoured Nation, National Treatment, Indirect Expropriation, Fair and Equitable Treatment, and so on.)

More specifically, on each 'positive' touted about the procedural improvements:

- **'expediting review and dismissal of frivolous claims'**: This doesn't solve the rest of the problems with the ISDS system itself.
- **'allowing for the possibility that investors pay attorney fees and costs for claims found to be frivolous'**: This applies only if an ISDS tribunal finds claims to be frivolous and decides to award the costs to the investor. An ISDS tribunal could also order the Malaysian government to pay the investor's lawyers' fees and costs^{ix}.
- **'ensuring investors cannot make a claim under ISDS if more than 3.5 years has passed from the time of the action on which the claim is made'**^x: However, the rest of the TPPA's investment chapter allows broad legal liability by: a) protecting even investors who entered Malaysia before the TPPA goes into effect (as well as those who come afterwards);^{xi} b) a broad definition of the types of investment which are protected;^{xii} c) broad rights of investors in Section A.

- Secondly, under Malaysia's Public Authorities Protection Act 1948 any action brought against the government for an act done as part of its statutory duty must be brought within three years. How is this slightly extended period under the TPPA an 'improvement'?
- **'Requiring Parties to resolve claims via consultation and negotiation before elevating to formal dispute'**^{xiii}: This is unlikely to deter any investors from going ahead with a formal ISDS claim. Moreover, this is only a 'should' obligation. Since the final TPP investment chapter text still allows the ISDS tribunal to order the Malaysian government to pay compound interest, compounded monthly at commercial interest rates from the date the government took the action,^{xiv} this interest can be compounding during any consultation/negotiation period. Therefore consultation/negotiation may end up prolonging the period during which interest is compounded, if the Malaysian government loses the case.

ⁱ Article 9.15

ⁱⁱ Annex 9-B.3(b)

ⁱⁱⁱ Article 9.9.3(d)(i)

^{iv} Article 9.9.3(d)(ii)

^v Article 9.9.3(d)(iii)

^{vi} Article 29.5 of the exceptions chapter,

<http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership-Text.php>

^{vii} E.g. see WTO's tobacco disputes:

https://www.wto.org/english/tratop_e/dispu_e/dispu_subject_s_index_e.htm#selected_subject

^{viii} See dispute settlement chapter of

<http://www.mfat.govt.nz/Treaties-and-International-Law/01-Treaties-for-which-NZ-is-Depositary/0-Trans-Pacific-Partnership-Text.php>

^{ix} Article 9.22.6 and 9.28.3

^x Article 9.20.1

^{xi} Article 9.2 and 9.1

^{xii} Article 9.1

^{xiii} Article 9.17

^{xiv} As this is how some past ISDS tribunals have interpreted 'any applicable interest' in Article 9.28.1(a).