

# Investor-State Dispute Settlement

by

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# Investment Chapter

- In TPP, a Chapter on Investment contains clauses on Investment-State Dispute Settlement.
- Although they are not the mirror-image of the ISDS clauses contained in the bilateral investment treaty (BIT), the TPP ISDS are by some degree considered less rigorous than expected and previously anticipated. Certainly less rigorous than that practised in the US.

# BIT-ISDS

- In the US , a BIT requires Senate ratification by a 2/3 majority. This "supermajority" can be a prolonged, and painful process.
- In contrast, under an FTA , a simple majority vote by both houses of Congress can be taken by a fast-tracked procedure.
- The US model normally requires the rights of establishment without limits on the operation of financial institutions, or suppliers , and due exercise of Performance Requirement.

# BIT-ISDS

- These PR puts conditional limits on investors , such as number of providers allowed to operate, or to use or purchase a certain percentage of local goods.
- In the US, the laws require no , and will not allow effective protection from expropriation, and require a strong ISDS legal proceeding.

# BIT-ISDS

- The US first included the ISDS mechanism in 1982 under US-Egyptian BITs, and NAFTA. NGOs, human right activists, environmentalists, are expressing concern over the possible greater rights for the firms of investing countries over the domestic ones. They are also concerned about new regulations that cannot be developed as they are preempted by the nullification of performance requirements and indirect expropriation.

# BIT-ISDS

- There are different levels of BITs in WTO members and TPP.
- How the integrity of the Government policies can be safeguarded, and public policies rather than companies' interests be protected. And yet the challenge may be found in the coverage, and the exclusions of sectors as well as the sovereignty sectors that a country may wish to compromise in this seemingly controversial notion.

# BIT-ISDS

- Another challenge is how to preserve the government public policies on the new regulatory safeguards that had not been foreseen at the time of the drafting of the Agreement.
- Negotiators would have to consider the technicality of the question whether any legal innovating mechanism can be assured to safeguard judicial, fair, independent, and balanced deliberation and adjudication, and to guard against frivolous lawsuits.

# BIT-ISDS

- Others contended that the system of investment treaty arbitration as currently constituted is not a fair, independent and balanced method, for the resolution of investment disputes.
- During the ratification, although the US Business Coalition for the TPP, and tobacco has been excluded from entering into the TPP altogether, NZ environmental groups and Australia continue to oppose it. Australia-US FTA does not contain it, although other Australian PTAs contain such a clause.

# BIT-ISDS

- Brunei, Malaysia, Singapore and Vietnam are parties to ISDS with Australia and NZ in their BITs and PTAs. Australia and Japan have dictated the terms on RCEP. But Australia and New Zealand have reserved some of their commitment under TPP. Others have excluded the ISDS from sensitive sectors, or excluded measures from being applicable.

# BIT-ISDS

- Extreme examples in ISDS cases :
  1. UNCITRAL arbitration under the Netherlands-Czech Republic BIT resulted in an award and payment of \$ 355 million to an injured investor in 2003.
  2. Bolivia withdrew from ICSID convention, while Ecuador terminated many BITs to avoid investment disputes.

# NAFTA-ISDS

3. Ely Lili had taken the Canadian Government to the ISDS arbitration on one of its AHDA drugs and demanded the the legal structure of the Canadian at issue be overhauled. The arbitration may cost the Canadian government to the amount of \$500 million.

# TPP - INVESTMENT

- Coverage: Forms include:-
  1. Enterprises.
  2. Shares, stocks, and other forms of equity participation in an enterprise.
  3. Bonds, debentures, loans and other debt instruments.
  4. Futures, options, and other derivatives.
  5. Turnkeys, construction management, production, concession, revenue sharing, and other similar contracts.

# TPP-INVESTMENT

6. Intellectual Property Rights

7. Licenses, authorisations, permits, and similar rights conferred pursuant to the Parties' laws.

8. Other tangible or intangible , movable or immovable, and related property rights, such as leases, mortgages, liens, and pledges.

# TPP-ISDS

- In TPP , performance requirements prohibit the following:-

Article 9.9 in TPP Investment Chapter

No Party shall impose or enforce any requirement , or enforce any commitment or undertaking in connection with sale or disposal of investment of an investor of a Party , or of a non-Party in its territory, establishment, acquisition, expansion, management, conduct , or operation

# TPP-ISDS

1. To export a given level or percentage of goods or services.
2. To achieve a given level or percentage of domestic contents.
3. To purchase , use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory.
4. To relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with investment.

# TPP-ISDS

5. To restrict sales of goods or services in its territory that the investment produces or supplies by relating in any way those sales to the volume or value of its exports or foreign exchange earnings.

6. To transfer a particular technology, a production process or other proprietary knowledge to a person in its territory.

7. To supply exclusively from the territory of the Party the goods that the investment produces,

# TPP-ISDS

7. ( contd.) or the services it supplies to a specific regional market or to the world market.

8. To supply exclusively from the territory of the Party the goods that the investment produces or the services that it supplies to a specific regional market or to the world market.

9 a. To purchase, use or accord a preference to , in its territory , technology of the Party or of the person of a Party.

# TPP-ISDS

9b. Or, to prevent the purchase or use of , or according of a preference , to its territory, a particular technology.

10a. Or to adopt a given rate or amount of royalty under a license contract.

10b. Or a given duration of the term of a license contract, in regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future contract.

# TPP-ISDS

- No Party shall condition the receipt or continued receipt of an advantage on the following:-
  1. To achieve a given level or percentage of domestic content.
  2. To purchase , use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory.
  3. To relate the volume and the value of imports or exports to the amount of foreign exchange inflows.

# TPP-ISDS

4. Or requirement to locate production, supply a service, train or employ workers, construct or expand any facilities, or carry out R&D in its territory.

5. If a Party complies with Article 31, and 39 of TRIPs agreement then it can obligate the right to place conditions as in the transfer of technology, or to purchase technology or a particular technology, or adopt an amount of royalty , or a duration of the term of a license contract.

# TPP-ISDS

6. Or if the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority in remedy a practice determined after judicial or administrative process to be anti-competitive under the Party's competition laws.

7. Paragraph 1 on transfer of technology shall not apply if the requirement is imposed by a tribunal as equitable remuneration under the Party's copyright laws.

# TPP-ISDS

8. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade, or investment paras 1b percentage of domestic content, 1c , relating values or volume of exports or imports, 1f, technology transfer , 2a domestic content, and 2b, to purchase domestically, and that the measures are necessary to protect human, animal, or plant life or health; necessary to secure compliance with laws and regulations NOT inconsistent with ISDS.

# TPP-ISDS

8. ( contd.) Or conservation of living or non-living exhaustible natural resources.
9. Certain paras shall not apply to trade and investmebt promotion , and foreign aid programmes.
10. Certain paras shall not apply to government procurement.
11. Certain paras shall not apply to GSP.or preferential tariffs and preferential quotas.

# TPP-ISDS

12. Shall not prevent Parties to protect legitimate public welfare objectives, provided that such measures are not applied in an arbitrary and unjustifiable manner, or in a manner that constitutes a disguised restriction on international trade and investment.

13. Shall not prevent from employing or training workers provided that it shall not require to transfer a particular technology, or production process, or other proprietary knowledge.

# TPP- ISDS

- Article 9.10 : Senior Management and Board of Directors:-
  1. Shall not require that an enterprise of a covered investment appoint to a senior management position a natural person of any particular nationality.
  2. May not require a majority of the Board of Directors, or any committee thereof be of a particular nationality or resident in the territory of the Party, provided that it does not materially impair the ability of the investor to control.

# TPP-ISDS

- Article 9.11: Non-conforming Measures:-
  - 1.Exclusions and Exeptions are made in central , regional and local governments where Article 9.4 ( National Treatment), 9.5 ( MFN ), 9.9 ( Performance Requirements), and 9.10 (Senior Management and Board of Directors).shall not apply. Parties shall consult each other wgere measures are causing impairments or material impediment to investment.

# TPP-ISDS

2. After the entry into force no Party shall require any investor by reason of its nationality to sell or dispose of an investment existing at the time the measure becomes effective.

# TPP-ISDS

- Article 9.13: Special Formalities and Information Requirements

1. Specific formality requirement such as a residency requirement for registration or a requirement that a covered investment be legally constituted under the laws or regulations of the Parties shall be recognized, provided that these formalities do not impair materially the protection afforded by the Party to investor of another Party.

# TPP-ISDS

2. Nothing shall prevent a Party from access to information that may be confidential , or prevent any disclosure in order to prejudice the competitive position of an investor.

# TPP- ISDS

## Article 9.14: Denial of Benefits:-

1. A Party may deny the benefits of this Chapter to an investor of another Party if the enterprise is owned or controlled by a person of a non-Party or of the person of the denying Party.
2. A Party may deny if the enterprise of the covered investment has no substantial business activities in the territory of any Party except for the denying Party.

# TPP-ISDS

- Article 9.15: Environment, Health and Other Regulatory Objectives:-

If the investment threatens environment or health or other regulatory objectives, a Party may adopt, maintain, or enforce any measures consistent with this Chapter as appropriate .

- Article 9.16: CSR:-

Enterprises are encouraged to incorporate into their internal policies those internationally recognised standards of CSR.

# ISDS

- Article 9.17: Consultation and Negotiation

May include non-binding third party procedures such as good offices, conciliation and mediation.  
No recognition of the tribunal jurisdiction.

- Article 9.18: Submission of a Claim to Arbitration

1. That the claimant has incurred loss or damage by reason of the breach on an obligation under Section A, or a breach on an investment authorization, or an investment agreement.

# ISDS

2. A claimant on behalf of an enterprise who owns or controls the enterprise directly or indirectly may submit a claim of the same as above.
3. At least 90 days the claimant shall deliver to the respondent a notice of its intention to submit a claim to arbitration.
4. Or it may submit a claim under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings provided that both Parties are parties to ICSID Convention.

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2. Or it may submit a claim to the ICSID Additional Facility Rules provided that EITHER is a party to ICSID Convention.
3. Or the UNCITRAL Arbitration Rules.
4. Or any other arbitral institutions.
5. Request for arbitration shall be received by the Secretary Generals of the ICSID Convention, ICSID Additional Facility Rules, or UNCITRAL Arbitration Rules received by the respondent, or any arbitral institutions received by the respondent.

# ISDS

- Article 9.19: Consent to Arbitration:-

Consent shall be deemed to satisfy the Chapter II of ICSID Convention ( Jurisdiction of the Center), or Article II of the New York Convention for an agreement in writing, or Article I of the Inter American Convention for an agreement.

Article 9.21: Selection of Arbitrators.

Secretary General shall be appointing authority under this Section. If a tribunal has not been appointed for a period of 75 days, the SG shall appoint .

# ISDS

- Chapter 28 on DS shall apply including any modifications of the Code of Conduct. Within 45 days after the tribunal is constituted , the tribunal shall decide on an expedited basis that an objection on the grounds that the dispute is not within the tribunal competence including jurisdiction. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefore no later than 150 days after the date of the request.

# ISDS

- However, if a disputing party requests a hearing, or in the event of showing an extraordinary cause, the tribunal may take an additional 30 days to issue a decision or award.
- At the request of the a disputing party, the tribunal shall, before issuing a decision or an award on liability, transmit its decision to the disputing parties, allowing the disputing parties to submit written comments to the tribunal and the tribunal shall consider any comments, and issue the decision no later than 45days.

# ISDS

- Article 9.33: Transparency.
- Articles 9.28 and 9.34: Governing Law and Awards
  1. If otherwise agreed, may use the law of the respondent, or applicable international law.
  2. When the tribunal makes a final award, it may award separately or in combination only, monetary damages plus interest.
  3. Restitution of property, or monetary award plus interest in lieu of restitution.

# ISDS

4. May award compensation for costs and attorney fees.
5. A tribunal shall not award punitive damages.
6. An award shall have no binding force except between the disputing parties.
7. In the case of ICSID Convention 120 days shall have elapsed before enforcement of the final award.

# ISDS

8. For ICSID Additional Facility Rules, UNCITRAL Arbitration Rules, the disputing party shall not seek enforcement until 90 days shall have elapsed from the date the award was rendered, and no disputing party has commenced a proceeding to revise, set aside, or annul the award.

9. A court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

# ISDS

10. If the respondent fails to comply with the final award, a panel shall be established under Article 28.7 to determine if the failure is inconsistent with the obligations of this Agreement, or to recommend that the respondent abide by the decision.

11. Regardless of 10, a disputing Party may seek enforcement of arbitration award under the ICSID Convention, NY Convention, or Inter-American Convention.

# ISDS

- Annex 9-x Submission of a Claim to Arbitration

There are exceptions and exclusions contained in the individual member Parties of TPP that are exempted from arbitration and Section B of this agreement.

# TPP-ISDS

- In the TPP, there are provisions that allow flexibility in the performance requirement - related ISDS which stated thus:-" will include provisions for expeditious, fair, and transparent investor-State dispute settlement.. subject to appropriate safeguards".
- In TPP, countries may wish to exchange side letters among each other on their legal preferences on the ISDS procedures and performance requirements.

# Criticisms of ISDS

- In the US the Center for Strategic and International Studies has submitted a report in January 2015 that provides for strong arguments against the ISDS.
- ISDS clauses have been regarded as unnecessary for investment breach. Of 2400 BITs , 90 % has been operated without a single investor claim.

# Criticisms of ISDS

- As the world economy grows , in 1982 the US introduced for the first time the ISDS in the US-Egyptian BIT, and under NAFTA
- Compensation for indirect expropriation means guarantees for foreign investor to compensation from Treasuries any actions tantamount to indirect expropriation that may lessen the value of investment , something that does not exist in the US and the EU laws.
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# Criticisms of ISDS

- Free Transfers forbids countries from using capital control, or speculation taxes. Governments may not prohibit the movement of capital in and out of the territory. US does not include limited exception to this rule as provided for in WTO for balance of payments emergencies.

# Criticisms of ISDs

- National Treatment Pre-Establishment creates the RIGHTS of market access for foreign investors to acquire land, natural resources, utilities, telecommunication and broadcast operations, and other investment of domestic preferences or review of anti-trust and other considerations.
- MFN obligations to member Parties.
- Ban on Performance Requirements.

# Criticism of ISDS

- Minimum Standard Treatment refers to fair and equitable treatment interpreted by the tribunal to mean that an investor is entitled to compensation for any government policies that undermine the expectation of investor.

# Thailand Position

- The modification can be negotiated with the newer bilateral investment parties under BITs.
- If Thailand were to increase her exposure in RCEP and TPP countries, it is imperative that Thailand should adopt these investment rules, the TPP being the most recent.
- Thailand needs to be utmost meticulous , and leaves no stone unturned in the negotiations if she wanted to enter into the RCEP and TPP.

# Thailand Position

- The Thai Government is trying to propose a modified version of ISDS as distinct from the BITs. The new version may exclude portfolio investment and others , as well as putting a cap in the like manner of UNCTAD on the shareholding of an enterprise.
- This may not in compliance with the principles of the TPP or any other FTAs or other regional configurations such as RCEP.

Thank you.