TPPA and Southeast Asian Labour

Malaysia Investment

The Trans-Pacific Partnership Agreement (TPPA) is a trade, investment and economic integration that involves 12 Asia-Pacific countries, including Vietnam and Malaysia. The concluded agreement is around 6000 pages long, comprising 30 chapters, multiple annexes, appendixes general notes and side agreements. Trade unions, environmental, development and public health campaigners have all raised issues with various parts of the TPPA, and large-scale protests have animated much of the public discourse in other parts of the world. The deal's proponents have pointed to the economic gains, while arguing that the safeguards negotiated into the agreement will protect the public interest.

The technical legalistic jargon of the Agreement make it largely impenetrable for working class people to engage with it on a meaningful level. This project aims to address that issue, presenting information based on text, secondary analyses. The project has been funded by Friedrich Ebert Stiftung's Singapore Office, research has been undertaken by the Building and Wood Workers' International Asia-Pacific Regional Office, and consultation has taken place with union leaders through the ASETUC network.

Contents

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While global trade volumes are actually falling, cross-border investment has been increasing steadily, rising 38% to reach US$1.76 trillion in 2015, its highest level since the global financial crisis of 2008-09.[1] Flows to developing Asia remained the largest recipient region, and amongst that grouping Malaysia sits as the eighth largest host of investment, with an inflow of US$11 billion in 2015. According to a survey of corporate executives included in the UNCTAD World Investment Report, Malaysia is the fourteenth prospective host country for investment. In 2015 Malaysia was also responsible for around US$10 billion of FDI outflows.

Given this significant reliance on foreign investment, the investment chapter of TPPA is therefore of great importance to Malaysian workers. The TPPA's investment chapter also contains its most controversial and widely-derided provisions: the Investor-State Dispute Settlement (ISDS) provisions in Section B of the Investment Chapter (Chapter 9). These provisions are designed to protect investors from state action that undermines the value or profitability of their investment, and therefore can be seen as a form of insurance for investors, or even a subsidy.

History

ISDS provisions initially become prominent in the 1950s as the former colonial powers sought to protect their investments from the threat of direct expropriations from the wave of popular nationalist governments that were winning elections across the Global South. Bilateral investment treaties were a way of ensuring that companies would receive due compensation when an expropriation took place, particularly where judicial systems couldn't be guaranteed of being free from corruption. The inclusion of ISDS provisions in the 1994 NAFTA deal market the beginning of a new era for ISDS, extending their reach much further than originally anticipated. These provisions are now increasingly being used by investors to attack democratically-implemented law and policy, including environmental, public health, financial stability and labour rights rules.

There is now an emerging and overlapping web of 3000 investment treaties worldwide, many of which have been signed "without neogotiation or consideration of the consequences".[2] The growth of the number of these claims has been staggering. Over the fifteen year period of 1987 to 2002, a total of around 100 known claims were initiated, while from 2003 to 2013 the number of claims filed quadrupled, reach a total of 568.[3] 2015 was a high-water mark for ISDS usage, with a record 70 claims being brought, bringing the overall number of known ISDS claims to 696.[4] It should be noted that the United States (the key mover in TPPA negotiations) is by far the most litigious state, accounting for 138 of these known claims. Cases are now being initiated much faster than they can be resolved.

How does it work?

Most ISDS cases are now argued as breaches of the obligation to accord "Fair and Equitable Treatment" (FET) to covered investments, contained in

1. http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf
2. Quote from Pakistani Minister, from Kahale speech.
3. World Investment Report, 2014. United Nations Conference on Trade and Development (UNCTAD), p. 124
4. http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf

ISDS cases and facts

ISDS cases have challenged laws and regulations across the world, including:

- US tobacco giant **Philip Morris** sued the **Australia** for over US$1 billion for plain packaging rules. While Australia won they case it took years and cost millions in legal fees.
- A firm called **Lone Pine Resources** sued the Quebec Government (**Canada**) for hundreds of millions for imposing a moratorium on dangerous hydraulic fracturing.
- Pharmaceutical company **Eli Lilly** sued the **Canadian** government over evidential requirements for bringing a new drug to market.
- ISDS bypasses domestic court systems, and there are concerns around individuals that can both serve as judges and bring cases.
- Countries in the **developing world** are particularly vulnerable due to their diminished legal capacity.
- Vulerable post-crisis countries like **Greece, Cyprus, Spain, Libya, Egypt** and the **Ukraine** are also under attack.

Article 9.6 (Minimum Standard of Treatment) of the TPPA. The FET standard has been widely used by investors and MNCs to challenge all kinds of state action, include law, policy and regulation. Prominent arbitrator George Kahale argues that there is now emerging an entirely new body of international law developing, spurred on by private actors and with little regard for for the public interest.

Private individuals sit at the core of this system. Cases are argued in three-person private arbitration tribunals, comprised of international lawyers and academics. Due to the high level of specialization and expertise required there is limited number of individuals with the legal capacity to take on these roles, there have been accusations of conflicts of interests and a revolving door between judge and lawyer positions. There is no appeal process and hearings take place behind closed doors.

Legal scholars have expressed grave concerns around the threat ISDS presents to domestic legal systems. A letter from over 100 jurists in 2012 called for ISDS to be excluded from TPPA, arguing that investment chapter interpretations were prioritising the economic interest of transnational corporations over the sovereign right of nations to govern their affairs:

> ...[i]ncreasingly decisions issued under this system see foreign investors being granted greater rights than are provided to domestic firms and investors under the Constitutions, laws and court systems of host countries.

Another letter signed by over 100 US law professors to Congress said that "ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement.[6]

The economics of ISDS

We have already noted in Section 2 that the costs associated with ISDS are rarely factored into cost-benefit analyses of trade agreements. Presumably, however, since their higher degree of protection is intented to encourage investors to pursue investments in that country, there would be value in studying this connection In its 2010 report 'Bilateral and Regional Trade Agreements', the Australian Productivity struggled with this question:

> There does not appear to be an underlying economic problem that necessitates the inclusion of ISDS provisions within agreements. Available evidence does not suggest that ISDS provisions have a significant impact on investment flows … Experience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions.

Investors looking to invest across borders already have a multitude of risk protection mechanisms available to them, including political risk insurance. The case for this subsidy has not been made out, and risks breaking the link between risk and reward that ought to encourage due diligence in investment. The conservative US Cato Institute, which has been outspoken in its opposition to ISDS in trade agreements, argues that while investment is inherently risky,

5. https://tpplegal.wordpress.com/open-letter/
6. http://www.afj.org/press-room/press-releases/more-than-100-legal-scholars-call-on-congressadministration-to- protect-democracy-and-sovereignty-in-u-s-trade-deals
6. Australian Productivity Commission. (2010). Bilateral and regional trade agreements: Productivity Commission research report. Melbourne, Australia: Productivity Commission. Retrieved from http://www.pc.gov.au/projects/study/trade-agreements

> …that doesn't mean special institutions should be create to protect MNCs from the consequences of their business decisions. Multinational companies are savvy and sophisticated enough to evaluate risk and determine whether the expected returns cover that risk. Among the risk factors is the strength of the rule of law in the prospective investment jurisdiction MNCs may want assurances, but why should they be entitled to them? ISDS amounts to a subsidy to mitigate the risk of outsourcing [emphasis added].[7]

As well as providing a regulatory subsidy for investors, ISDS claims impose a a heavy cost on states, both in terms of legal costs of compliance and the quantum of awards. Figures from the OECD indicate that the average legal costs associated with defending an ISDS claim have now reached US$8 million. The legal costs involved for Australia defending its plain-packaging legislation reached to US$ 60 million, a high watermark for now.

The real winner of this legal bonanza is the small number of law firms that have monopolized this area of law. Research from the Corporate Europe Observatory indicates that three boutique law firms were involved in over 130 investment arbitrations in 2011 alone.[8] However increasingly investors aren't even required to front these legal costs – private equity firms are now funding ISDS claims on a speculative basis, such that they engage the investor with the potential claim, cover the legal costs and then receive a proportion of the award. Here there is practically no risk and a responsible chance of a reward - there is practically no reason that an investor wouldn't take such a case.

Will Malaysia be sued?

Government officials often try to underplay the risk of ISDS claims being by stating there is a low likelihood of being sued. It is true that Malaysia is already a signatory to multiple FTAs and BITs that contains ISDS provisions, however it is a significant capital exporter and host of foreign investment. As it stands, until 2015 Malaysia had been sued three times under ISDS and, as a significant capital exporter, Malaysian investors had initiated three cases against other states.

While the legal costs may seem high they pale, however, in comparison to the quantum of awards in recent cases. The magnitude of awards has increased massively over the last decade, now pushing into the multiple billion dollar territory. After the announcement that Germany would progressively phase out nuclear energy the Swedish investor Vattenfall filed a US$6 billion claim for lost profits. The case is currently working its way through the arbitration proceedings. The largest award that has ever been made in an ISDS claim was a US$50 billion (NZ$66 billion) claim against Russia in September of 2014,[9] equivalent to 10% of Russia's annual state budget. Post-crisis Libya has provided a very profitable opportunity for lawyers and speculative investors to make money off significant legal changes heavy cost on states, both in terms of legal costs of compliance and the quantum of awards.

TPPA's ISDS provisions

ISDS was hotly debated in the public space as TPPA was under negotiation, and its backers claims that the resulting framework of obligations is balanced by numerous safeguards. However there are few substantive changes. Like other such agreements its starting off point was the US model bilateral investment treaty, an approach broadly considered more pro-investor than others. TPPA however both grants more extensive investor protections than Malaysia's current trade and invest agreements prescribe while providing fewer safeguards.

TPPA's (non-binding) preamble notes that parties "recognise their inherent right to regulate". This reinforced by a more forthright statement in the Investment Chapter itself noting that nothing in the chapter shall be construed

7. Ikenson, D. J. (2015, February 26). Hyperbole Aside, Elizabeth Warren Is Right About the Risk of Investor-State. Retrieved from http://www.cato.org/blog/hyperbole-aside-elizabeth-warren-right-about-risk-investor-state
8. http://corporateeurope.org/trade/2012/11/chapter-3-legal-vultures-law-firms-driving-demand-investmentarbitration
9. http://www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf

as preventing a part from adopting any measure to ensure that investments are undertaken in a manner sensitive to environmental, health or other regulatory objectives (9.15). As Kawharu notes about this provision, there is a lack of case law detailing the extent to which a tribunal would prefer an interpretation more deferential to regulatory autonomy.[10]

Responding to questions around TPPA preserving the rights of states to regulate, prominent arbitrator George Kahale told The Guardian that he saw 9.15's potential benefit as being negated by the words “unless otherwise consistent with this chapter,” due to the presence of a ‘most favoured nation’ provision.[11] Like many of Malaysia's other FTAs TPPA's investment chapter contains ‘most favoured nation’ provisions, which requires foreign investors to receive no less favourable treatment to other investors from third countries. Analysts have defined this as a ‘ratchet’ clause, whereby successive treaties broaden the scope of substantive protections available to existing investors. In other words investors from TPPA countries must receive the same level of protection that other investors do under other agreements, which Kahale calls a “major mistake”.

TPPA is the first trade and investment agreement which expands the use of ISDS provisions to allow investors to bring claims based on alleged breaches of their rights under contracts with TPPA governments. The agreement even allows investors to make claims regarding government contracts entered into before TPPA comes into effect.[12]

Cases concerning labour

Past ISDS cases have challenged significant points of law and public policy. Where a challenge to these policy arise, Government officials may be forced to make significant trade-offs and difficult economic calculations as to whether future policies are are worth risking the costs of an expensive lawsuit and award. These cases have a chilling effect on democracy, undermining the ability of peoples' movements (such as the labour movement) that organise democratically within their community our country to make political and legal changes for the better.

Veolia (France) v Egypt – In 2012 the multinational services operator Veolia lodged a claim against the Egyptian Government for $110 million, in part due to the decision by the Egyptian Government to introduce a minimum wage for public sector workers. This case was one of a host of cases filed against the post-dictatorship governments that emerged out of the Arab Spring, hampering the ability of those young democracies to reflect the new social compact in those countries.

Noble Ventures v Romania - Another case involved a firm called Noble Ventures Inc that had invested in a privatised Romanian steel mill. They argued, among other things, that the failure of the Romanian government to protect the company from labour unrest was a breach of the obligation to ensure and equitable treatment. While the claim was ultimately dismissed, the arbitration panel did not rule out labour unrest as grounds for such a claim. And, considering the expanding scope of ISDS claims in recent years, this is well within the realm of possibility.

10.https://tpplegal.files.wordpress.com/2015/12/tpp-investment.pdf, page 9.
11. https://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer
12. See Lori Wallach and Ben Beachy “Analysis of Leaked Trans-Pacific Partnership Investment Text” (Public Citizen, 25 March 2015) < citizen.org/documents/tpp-investment-leak-2015.pdf>

Piero Foresti & others v South Africa – In 2007 investors from Italy and Luxembourg lodged a claim against South Africa for US$350 million, claiming that rules pursuant to the Black Economic Empowerment Act (that had aimed redress historic injustices from the apartheid era) had affected their investment. The claim was dropped in 2010 after the investors were granted new licenses with a much lower share divestment requirement attached to them.

Renco (US) v Peru – In 2010 US investor Renco notified Peru that, despite failing to fulfil its commitments and clean up grievous pollution create by its La Oroya smelter, it was launching an investor-state case against the country for US$800 million. The case began in October 2007 when a US law firm filed a series of personal injury lawsuits against Renco in Missouri state courts on behalf of 162 sickened Oroyan children.[13] Renco settled in October 2010 and agreed to pay $65 million to clean up the site. Renco subsequently launched the ISDS claim, and in doing so was able to escape the jurisdiction of the Missouri courts. The case was decided in favour of the Peruvian Government in June 2016, after which Renco immediately announced they would appeal the case.[14] Renco's poor business practices have resulted in the poisoning of many workers, their families and their communities, and now Renco are using ISDS to delay and counter-claim against the Peruvian Government.

Abitibi-Bowater (US) v Canada – In 2008 the Canadian forestry giant AbitibiBowater (which is registered in Delaware for tax purposes) closed its pulp and paper mill in grand rapids, putting 800 employees out of work. At the same time AbitibiBowater asserted its rights to sell its assets, including timber harvesting licences and water use permits. These assets had been granted conditional to production, and so the Newfoundland government moved to re-appropriate them. AbitibiBowater filed a US$500 million claim against the Government under NAFTA's ISDS provisions, and a US$130 million settlement was reached in 2010.[15] The cost of severance packages and pensions for workers, as well as bills owing to local business and relation to environmental remediation of mill and mining sites were dumped on the Canadian Government.[16]

Legitimacy Crisis

The United Nations Conference for Trade and Development (UNCTAD) World Investment Report 2015 described the current international investment regime as facing a 'legitimacy crisis'. A number of countries are currently in the process of withdrawing from their existing investment agreements (e.g. South Africa, Indonesia, Argentina and Poland, Ecuador, Venezuela and Bolivia). Resistance to ISDS has been the key plank of opposition to the Trans-Atlantic Trade and Investment Partnership (TPPA's Transatlantic sister agreement) which has now been put on the backburner after a massive popular campaign supported by nearly 3.5 million people.[17]

The legitimacy of the industry has been further questioned by a report that suggests that companies and executives accused or convicted of crimes have used to escaped punishment. One case involves a real estate investor found guilty of corruption charges in Egypt that was order to return illegally purchased land and serve a five-year prison sentence. With a team of international arbitrators he was able to put the Egyptian government over a barrel, which dropped the charges against him in exchange for him dropping his ISDS claim. In another case from El Salvador the owners of a factory that had poisoned a village with lead despite government directives used ISDS provisions to avoid a criminal conviction and responsibility for cleaning up the area and providing medical aid. These cases indicate the direction in which the ISDS system is developing.

13. https://www.citizen.org/documents/renco-la-oroya-memo.pdf
14. http://www.bloomberg.com/news/articles/2016-07-18/peru-wins-arbitration-dispute-with-renco-over-smelter-cleanup
15. http://www.theglobeandmail.com/report-on-business/ottawa-pays-abitibibowater-130-million-for-expropriation/article1378193/
16. https://www.policyalternatives.ca/publications/commentary/130-million-nafta-payout-sets-troubling-precedent
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18. https://www.buzzfeed.com/chrishamby/super-court?utm_term=.veMGMGvjZ#.qyKOQOX7v