



Investment / ISDS

5 November 2015



INTERNATIONAL & DOMESTIC LAW

The monist system

- International law is part of national law automatically without the necessity for the interposition of a constitutional ratification procedure
- If there is conflict between the two – ***international law prevails***

The dualist system

- International law and national law are two separate legal systems which exist independently of each other
- International law regulates the relationship between States
- National law regulates the rights and duties of individuals within a State
- If conflict exists – ***international courts apply international law and national courts apply national law***



MALAYSIA'S APPROACH : DUALIST

- For provisions of an international treaty of which Malaysia is a party to have effect in Malaysia it has to form a part of Malaysian law unless those provisions have been **incorporated into municipal law by statute**
- Where the policy and legal frameworks are in place, **Cabinet approval** is required for purposes of becoming a State Party to international treaty.
- All matters in relation to external affairs, such as treaties, agreements and conventions and their implementation are matters under the executive authority of the Federation (Articles 74 and 80 of the Federal Constitution)
- The executive authority shall be exercisable by the Cabinet over matters, such as entering into and implementing, international treaties and agreements (Articles 39, 40 and 43 of the Federal Constitution)



Relations between the Federal and the States under the Federal Constitution

Art. 74

- Subject matter of Federal and States jurisdiction

Art. 74(1)

- Matters under Federal as in Federal List and Concurrent List (9th Schedule)

Art. 74(2)

- Matters under State as in the State List and the Concurrent List (9th Schedule)

**EXAMPLES OF LAWS AND POLICIES ENACTED / AMENDED BY PARLIAMENT TO
GIVE EFFECT TO TREATIES CONCLUDED BY MALAYSIA**



Laws / Policies	Relevant Chapters in FTA
<p>Customs Act 1967 National Automotive Policy</p>	<p>Customs Chapter, Rules of Origin, Market Access</p>
<p>Land Acquisition Act Sabah Land Ordinance Sarawak Land Code New Economic Model</p>	<p>Investment Chapter</p>
<p>Legal Profession Act</p>	<p>Trade in Services Chapter</p>
<p>Environmental Quality Act 1974 and Environmental Quality (Scheduled Wastes) (Amendment) Regulations 2007</p>	<p>Environment Chapter, Investment Chapter, Economic Co-operation Chapter</p>
<p>Copyright Act Patent Act</p>	<p>Intellectual Property Rights Chapter</p>

The TPPA: Objectives

Objectives of Investment Chapter



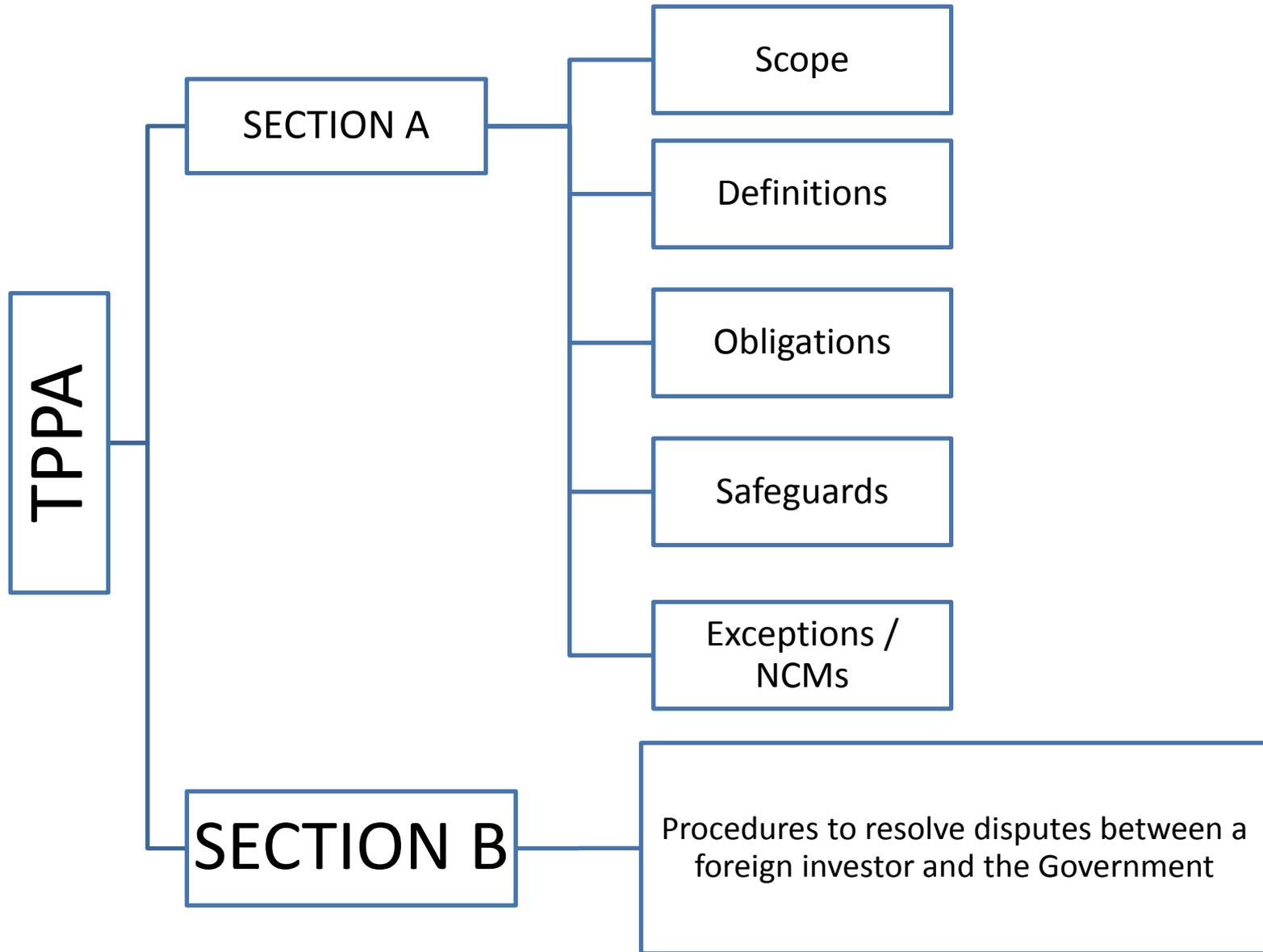
- Predictability of government measure
- Avoid discriminatory / unfair advantage
- Right to compensation – expropriation
- Right to international arbitration

Impact



- Promote inward / outward flows
- Promote economic growth
- Specialised expertise / technology
- Joint venture opportunities – larger market access
- Inject competitiveness
- Wider choice for consumers
- Create jobs

Structure





Section A: Scope

- Investments in **all sectors**
(manufacturing, agriculture, mining, forestry / services)
- **All levels of government**, including non-governmental authority delegated with regulatory functions
- **Measures** adopted by the government - law, policy, regulation, procedure, requirement or practice



Section A: Key Definitions

- **Investor:** either the individual or an enterprise
- **Categories of investment:** illustrative lists, including enterprise, shares, concession, contracts, IPR, licenses, permits, tangible and intangible property



Section A: Obligations

- **Non-discriminatory treatment:** treat foreign investors the same as domestic investors, unless reservations are taken for a particular sector/activity
- **Minimum standard of treatment of aliens:** in accordance with customary international law:
 - Fair and Equitable treatment: assurance non-denial of due process
 - Full protection and security: assurance of police protection
- **Prompt, effective and adequate compensation for expropriation**
 - Direct expropriation: In the case of land expropriation, compensation will be governed by relevant Malaysian laws
 - Indirect expropriation: government measures which result in deprivation of the economic value of the investment
- **Transfers:** allow repatriation of profits, earnings, etc; with exceptions to manage volatile capital flows in the event of macro economic difficulties



Section A: Obligation (cont...)

Performance Requirements

- Cannot impose as a condition for investment:
 - Export condition
 - Local content
 - Domestic sales
 - Technology transfer
 - Use of own technology
 - Link export /import/foreign exchange earnings

Exceptions

- For **purpose of providing incentives**, can impose technology transfer / own technology, R&D.
- GP – **can impose** local content, preference to domestic goods, technology transfer, own technology.
- Can impose to meet **lawful conditions, public health, protect environment, conservation of resources** etc.



Section A: Obligation (cont...)

Senior Management & Boards of Directors

- Cannot require appointment to senior management positions individuals of a particular nationality.
- Nationality based appointment on board of directors cannot impair investor control of its investment:
 - Can impose condition to say that at least **2 members** of the **board of directors** must be **Malaysian PROVIDED** this does not limit the foreign investor **right to exercise control**

If the above conditions are required for a particular sector/activity, a reservation must be taken.



Section A: Safeguards

- Government has the right to regulate to achieve legitimate public welfare objectives: including for health and environmental reasons
- General and Security exceptions in General Provisions also apply to Investment Chapter



Section A: Exceptions

Exclusion from Obligations

- **Text based exceptions:** eg national treatment does not apply to subsidies, government procurement
- **Country specific exclusions** from obligations (non-conforming measures):
 - **Negative list approach:** only sectors or activities listed are exempted from the obligations; especially in areas where foreign investors are treated differently from domestic investors
 - **Annex I** – bind existing rules that are discriminatory to foreign investors; and future amendments cannot be more restrictive
 - **Annex II** – policy space needed for existing or future rules; future rules/amendments can be more restrictive



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SECTION B: What is the ISDS Mechanism?



Investor-State Dispute Settlement Mechanism

- Outlines the **procedures for the settlement of disputes** between **foreign investor and the host state** government
- Different from **state-to-state dispute settlement**: outlines the procedures to address issues arising from the implementation of an agreement, and involves only **governments** who are signatory to an agreement



Scope of Section B

- Outlines the **procedures** for **dispute** arising from:
 - breach of the **obligation** in **Section A**
 - breach of an “**investment authorisation**” (Australia, Canada, Mexico, and New Zealand)
 - breach of an “**investment agreement**”, concluded and takes effect **after** the date of **entry into force** between an authority at the **central level** with respect to:
 - i. **Natural resources, excluding land, water and radio spectrum;**
 - ii. **Concession** to supply services on behalf of the Party for consumption by the general public for power generation or distribution, water treatment or distribution, telecommunication or other similar services
 - iii. **Infrastructure** projects, such as construction of roads, bridges, canals



ISDS –The Process

- Aggrieved investor seek to resolve dispute within 6 months through conciliation or mediation;
- Failing which, foreign investor can submit the dispute for arbitration under either of the following forum:
 - ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings;
 - ICSID Additional Facility Rules;
 - UNCITRAL Arbitration Rules; or
 - any other arbitration institution or under any other arbitration rules.
- **Tribunals to comprise 3 arbitrators;** each disputing party to appoint one each, while the third arbitrator to be agreed jointly.



ISDS - Safeguards

- Provisions on **mandatory consultation and mediation**
- Investor/claimant – **must prove losses** suffered arising from a breach of the obligations of the investment chapter; burden on investor to prove its claims
- Discourage **frivolous claims**:
 - preliminary objection procedure to quash frivolous claims
 - requiring investor to **pay attorney fees and reasonable costs** to the host state government
- No claims allowed if **more than 3-year 6months have lapsed**
- In the case of **Malaysia**, **no claim for a period of 3 years** from the date of entry into force for **specified government procurement contract values**



ISDS – Safeguards (cont.)

- Governments (thru the TPP Commission) can issue **interpretation** of the **investment chapter** which is **binding** on a **tribunal**
- **Transparent proceedings:**
 - open hearing to public
 - notices of arbitration, pleadings, submissions, awards **made public**
- Permit **submission of amicus curiae briefs** by experts
- **Consolidation** of claims, arising out of similar events, relating to issue of law or fact

What's new in TPP ISDS versus IGAs/FTAs



- **Transparency** provisions.
- **Interpretation** by governments are binding on tribunals.
- **Frivolous** claims investor pays.
- Explicit mention of government **right to regulate**.
- **Inclusion** of 'investment agreement' and investment authorisation violation as treaty breaches.

How different ISDS in TPP versus other IGAs/FTAs template



Common Elements

- Provisions on ISDS
- Choice of arbitration forum:
 - ICSID Rules
 - ICSID Additional Facility Rules
 - UNCITRAL Additional Rules
 - Other ad-hoc arbitration rules
- No U-turn to domestic courts once claim submitted to arbitration

Additions in TPP

- Transparency provisions
- Objection on grounds of frivolous claims
- 3 years 6 months limitation on claims
- Clarity on indirect expropriation in an Annex (none in IGA)
- Contains “investment agreement” and ‘investment authorisation’ as part of the ISDS provisions



ISDS – Mitigation Measures

- Laws, regulation and policies to comply with obligations.
- Strengthen good regulatory practices:
 - obtain feedback from industry when introducing new regulations at all levels of Government
 - contracts between the Government and investors to comply with its commitments. Contract and Project Management at post-establishment stage
 - monitored and executed so as to avoid breach by the Government
 - remove discretionary practices and ambiguity as well as provide clarity to mitigate the risks of disputes.
- Strengthen the conciliation and mediation process in order to address investors' grievances at the federal, state and local government level.



Claims ISDS: Malaysia

Against Malaysia

- IGA Malaysia - Belgo-Luxemburg Economic Union: 1979: *Philippe Gruslin*
 - the dispute arose out of exchange controls measures; Claimant alleged resulted in loss of KLSE investment; **Tribunal rejected the claim**
- IGA Malaysia-UK: Malaysian Historical Salvors Sdn. Bhd.
 - contracted with the Malaysian Government to salvage the cargo of a ship that sank in 1817 carrying antique Chinese porcelain.
 - MHS is seeking an amicable settlement with the Malaysian Government.

Malaysian Investors Abroad

- IGA Malaysia-Chile: MTD (2001)
 - the tribunal held that the approval granted to MTD was unfair and inequitable – given that the investment was bound to be frustrated due to Chile's Urban Development policies.
- Ghana v. Telekom Malaysia (2003)
 - confidential arbitral proceeding / settled amicably



Thank you



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