Investor State Dispute Resolution (ISDS) and Trans-Pacific Partnership Agreement (TPPA); Malaysia and Challenges

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Abstract

The significant contribution of Investor State Dispute Settlement (ISDS) in Trans-Pacific Partnership Agreement (TPPA) is highly indisputable. Among the concerns is any Investment Treaty Arbitration (ITA) negatively affects the developing countries to the benefit of developed countries. Albeit the oppositions many observers in Malaysia lack in analysing how ISDS may affect the state's interest without argument that does it really affect Malaysia in practice. Historical evidence proven that ISDS never affects Malaysia though it never excludes the possibility of such occurrence. Therefore, this article intends to explore the nature of ISDS, its objective, 'modus operandi' and significance contribution in light of International Centre for Settlement of Investment Disputes (ICSID) and its on-going improvements. Thereafter, we will ponder upon criticism encountered especially deriving from European Unions' discussion with America pertaining to Transatlantic Trade and Investment Partnership (TTIP); how the EU communities reacted upon the inclusion of ISDS in TTIP in general. Later, the discussion will begin on the effect relating to Malaysia circumstances, the challenge faced in long term. There will be pro and cons, yet the deciding factor will depend on the will of Malaysians to integrate our business sectors condition with ISDS standard especially in foreign countries. In conclusion, assuming that ISDS's repercussion is parlous, it is up to Malaysians; either government or private sector to take it as advantage or vice versa to ensure that national interest is preserved.

Keywords - Investor State Dispute Settlement (ISDS), International Centre for Settlement of Investment Disputes (ICSID), Trans-Pacific Partnership Agreement (TPPA), Transatlantic Trade and Investment Partnership (TTIP).

Introduction

4th of February 2016 (Bernama, 2016) remarked the date where Malaysia became the signatories of Trans-Pacific Partnership Agreement(TPPA). Albeit the ruckus and internal disagreement, Malaysia had decided democratically to confer their future on the success of TPPA's agreement (Arfa Yunus, 2016). By accepting this reality, Malaysia may move forward and prepare for upcoming challenges and hurdle to ensure that the national interest is protected and the agreement itself is profitable for the country. Therefore, this article seeks to discern the huge challenge faced by Malaysia in TPPA; the enforcement of Investor State Dispute Settlement(ISDS) clause. There will be three (3) main issues concern; the nature of ISDS and its reality, why some practitioners strenuously oppose ISDS in the light Transatlantic Trade and Investment Partnership (TTIP) discussions, and Malaysia's commitment in ISDS historically and challenges in the future (European Commission, 2016).

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ISDS History

Trade between countries had started since time in memorial. Multinational companies (MNCs) had invested in developing countries consistently, for profits and at the same time assist the development of the country especially through Foreign Direct Investment (FDI). The emerging international trade especially Bilateral Investment Treaties (BIT) post 1950s had prospered many countries yet developed another problem; the protection of the investment (Fox, 2014). Some cases involving public elements like breach of contracts but some are more peculiar on public elements like de facto disparate impact from a national policy and expropriation (Funnekotter V Republic of Zimbabwe, 2009). It is because of that some are settlements are needed and naturally MNCs will demand on monetary compensation from states. It is unclear why MNCs is reluctant to resort to local jurisdiction, but some studies suggest local jurisdiction special characters (Commission, 2013), which defeat the purpose of petition. Therefore, investors have options which is bad; either disregard the loss as a natural risk taken for any business activities or insured it under political risk and transfer the risk to others (Franck, 2014). Some resorted to radical actions; declaration of war, gunboat policy, invokes diplomatic relief or even appears before International Court of Justice (ICJ) to demand for their remedies. Despite that, all of these have proven to be unsatisfactory because it is not neutral, it attracts political intervention between states in business activities and only generates relief for states rather than investors. After that, states came with solution of Investment Treaty Arbitration (ITA) where a direct forum was given to investors to file a petition of claim against a state through arbitration clause recognized by both contracting states' bilateral agreement. The objective of this clause is clear; to encourage justice by maximizing the law agreed rather than political exposition. The predominant system of rules recognized by Malaysia resulted in endorsement of two (2) conventions; The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also a.k.a. "New York Arbitration Convention 1958" in 5 November 1985 and International Centre for Settlement Investment Disputes a.k.a. "ICSID 1966" in 22 October 1965 with the hope to protect Malaysia's interest in general.

Being a signatory of ICSID, the years to come prove that ICSID is well accepted by states as 151 members (as of 4 September 2015,) and the membership is free. Each state will be given a seat in ICSID Administrative Council which equal to one (1) vote. States in principle with commitment submitted themselves in these ITAs because it is based on voluntary basis; states are encouraged to accommodate local laws with this convention. Another reason is ICSID should be sorted as a last resort of the conflict, indirectly support states to willingly implement best governance practice to attract investors. ICSID reflects neutrality and indifferent from a normal court where supremacy and highest authority are given to them. This Centre is oriented more on facilitating conciliation and arbitration between disputing parties only by referring to the agreed agreements (Kinnear, 2014). Therefore, the supreme and referred laws are the consented agreements conferred in conventions/treaties/agreements by parties involved. Apart from that, ICSID's modus operandi is according to the principle of fair and justice where each state is allowed to appoint panel of arbitrators (Article 13 of ICSID Conventions) representing the state either nationals or non-nationals to the maximum of four (4) panels (Malaysia's arbitrators are: Tan Sri Dato' Cecil

W. M. Abraham, Dato' Azmel Haji Maamor, Dato' Azmi Mohd Ali and Tan Sri Datuk Amar Steve Shim Lip Kiong) for a designation of renewable six (6) years period till 17 December 2020. This to ensure that all states are treated equally and all have the rights to appoint their own arbitrators in case any arbitration proceeding occurs. In most cases, arbitration will be preceded by three (3) arbitrators, one appointed by each disputing party and other arbitrators with the consent of disputing parties. As agreed, disputing states will be governed by ICSID Conventions particularly rules adopted by ICSID Administrative Council; Administrative and Financial Regulations, Rules of Procedure for the Institution of Proceedings, Rules of Procedure for Conciliation Proceedings, and Rules of Procedure for Arbitration Proceedings (Arbitration Rules). These rules are generally institutional and procedural frameworks prepared to guide conciliation commissions and arbitration tribunals. As stated before, decisions are based solely on what parties had agreed, signifying that ICSID did not decide on cases, it only accommodates parties on receiving the best decisions for the dispute happened. Naturally, ICSID only accepts cases where parties had agreed and will not entertain cases where it is beyond the roles and power conferred upon Rules 41(1) Rules of Procedure for Arbitration Proceedings (Arbitration Rules) ICSID. Yet, ICSID also maintains flexibility; ICSID Administrative Council may adopt Additional Facility Rules (AF Rules) that authorize ICSID to handle proceedings that fall outside the scope of the ICSID Convention such as dispute that does not arise directly out of an investment and disputing parties status; one of the parties is not a Contracting State or a national of a Contracting State (Rules 41(1) Rules of Procedure for Arbitration Proceedings (Arbitration Rules) ICSID pg. 3). Also, ICSID may administer proceedings governed by UNCITRAL Arbitration Rules on ad hoc basis, depending on the cases involved such as the composition of North American Free Trade Agreement (NAFTA), other Free Trade Agreements (FTA) and Bilateral Investment Treaty (BIT).

Interestingly, ICSID depicts the highest check and balance standard. For instance, arbitrators must be highly moral in character and recognized in his/her competency in law, commerce, industry and finance (Article 14 of ICSID Conventions). Fulfilling these requirements is not enough; arbitrators need to affirm a written independency, impartiality and disclosure of circumstances before indulging in any resolution. This is required throughout the proceeding to ensure reliability in maintaining an independence decision. Again, disputing parties may propose disqualification of an arbitrator before closing of the proceeding such as if their integrity is in question (Article 14 of ICSID Conventions, Rules 8 – 9). Furthermore, ICSID is extremely transparent; public can access any case-related information daily; case name, parties, economic sector, registration date, tribunal constitution date, tribunal members, parties' representatives, current status of the case, and all significant procedural steps. The necessary authority to arbitrate will also be published in the ICSID website. ICSID website also facilitates as a repository medium for instances like Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) and manages its publication logistics. This could be achieved via ICSID's practice to request parties consent before any proceeding for any publication, even if parties refused ICSID still will publish excerpts award; especially the ratio decidendi of the case. Nevertheless, ICSID submits to comply with confidentiality of some information related to disputing parties, hence protected interest are preserved. Due to this fact, to date ICSID website has become one of the primary resources of investment law available to

public. Moreover, protection of parties' interest can be seen in ICSID's proceeding. ICSID restrict proceeding application by investors proving three (3) thresholds; (1) a qualifying investor (2) a qualifying investment and (3) enforceable under convention/ treaty/agreement. Failing to prove the elements given will absolve states from any liabilities. Again, if the threshold is proven, the merits of investors' claim will depend on states' substantive breach by states within the agreements clause and whether the host state promise those specific protections. If the tribunals determine that the elements have been fulfilled, then awards will be given to the MNCs against the state. ICSID is also equipped with measures against frivolous claims as in 41(5) and 45 (6) AF Arbitration Rules where ICSID can reject petitions filed base on its merit and jurisdiction. At the same, ICSID induces transparent proceeding by admitting open hearing in advance stages like broadcast via closed-circuit television to a separate room or streamed live through ICSID website (videos are available through ICSID Website). ICSID allows amicus participation with the consent of disputing parties; sometimes allowing public participation if required in the Arbitration Rules where in some cases, public invitations for amicus applications have been made through announcements on the ICSID website. At the end, ICSID displays an international standard of check and balance as well as maximum transparency which allows public to access the validity of ICSID's objective; "to promote investor confidence by offering an impartial, efficient and cost-effective dispute settlement mechanism where parties can be confident that they are on a level playing field" as stated in Arbitration Rules page 2.

Besides that, ICSID allows constant improvements on what accommodate contracting state at the maximum. For example, an award decided by tribunal is final and no appeal is provided under ICSID mechanism. This is due to the findings that appellate mechanism was considered premature. Still, ICSID is committed to discuss on whatever needed to improve its establishment considering European Union's Commission's proposal of appellate mechanism for Transatlantic Trade and Investment Partnership (TTIP) in Arbitration Rules pages 10 - 11; between European Union and United States of America. These constant improvements via discussion and meetings with stakeholders are crucial to render ICSID as relevant and neutral to all parties. Being so, though ICSID normally handles arbitration tribunals, 36% of all registered cases are settled or discontinued prior to a close proceeding (Secretariat, 2016), signified flexibility of ICSID's dispute to shape accordingly with individual needs. To date, ICSID had handled over 65% of all ISDS known cases; administered 549 cases under ICSID Convention and the AF Rules, served more than 78 investment cases under UNITCRAL Arbitration Rules (Secretariat, 2016).

Nonetheless, ICSID comes with huge criticism especially in light of multinational treaties like Trans-Pacific Partnership Agreement (TPPA) and Transatlantic Trade and Investment Partnership (TTIP). There is much legal intelligence in those contracting countries who oppose the inclusion of ICSID as medium of solution for disputes. Many believe ICSID is not the best option and controversial. Some regards ITAs in general as "legal monster (Malik, 2011)" or "injustice since agreeing to arbitration states has indeed accepted to be sued by the devil in hell (Olivet, 2012)". Some protests even led to use force (Ramstad, 2011); physical fights and use tear gas, surprisingly because of the reciprocal rights to sue in arbitration. Some states opted

out from ICSID. Russia withdrew from Energy Charter because of disputes about dissolution of Yukos Oil, where Russia might be subjected to $50 billion damages (Gaillard, 2009). Some countries like Bolivia, Ecuador and Venezuela walked out from ICSID and declared ICSID is liken to slavery and unjust claimed by the President of Ecuador in Gaillard 2009. Therefore, it is important to note these weaknesses and regard them as challenges foreseeable by Malaysia. Many researches outline these issues inter alia; domestic jurisdiction could serve the justice better than ICSID, arbitrator's tendency to be bias and unacceptable tendency of ICSID to prevail in America's MNCs.

Opposition believes that domestic court had served justice. Some countries like the United Kingdom, France, America and German are advance that some of their legal principle is widely adopted by various countries. Some principles even far exceeded international standard. It is because of that, some argues that domestic jurisdiction had already served the purpose of justice between states and investors. Moreover, both parties able exhaust the remedies to the highest appellate jurisdiction if necessary to preserve the interest within. But, ICSID currently cannot provide this option. Though ICSID contemplates annulment on ground of corruption (Article 52 of ICSID Conventions) or allows review in non-ICSID cases (Article V(2)(b) New York Conventions), in practice it is still unclear amid no demand arise. Thus, decision of tribunal ought to be the final and appeal is disallowed. This policy confines justice order especially for the losing party, the states. Ignoring the awards, legal intelligence questions arbitrators' power to set aside national public policy when it affects MNCs' interest. It is frightening that some elements conserve public wealth or public security can be set aside; tribunals can actually define national policy and not the highest authority of the land; the court. Moreover, though ICSID may opt to request intention behind the treaties/policy signed between parties, there are times when these are not referred in tribunals' decision. Philip Morris's case (Philip Morris Asia Limited V the Commonwealth of Australia, 2015) signified a horror haunted the Australian government when was sued for plain-packaging cigarette regulations as an unlawful expropriation (UNICITRAL, PCA Case No. 2012-12). Though the claim was rejected, it indirectly suggests that even frivolous claims potentially can be conferred upon a government; restricting their ability to enact policy for public health. Furthermore, though ITA ought to be regarded as last resort and parties may opt to courts and other alternatives, arbitrators have tendency to allow claims by foreign investors although it runs parallel with other forums, allowing conflicting claims and wasteful litigation upon a single issue (Harten, 2014). At the end, ICSID is horrid and unless policy makers together with legal intelligence in Malaysia cooperate to meticulously solve the riddle behind ICSID's trap, it is feared that Malaysia will be potentially be in huge danger of loss in TPPA unpredictably.

Another important reason is the tendency of arbitrators to act bias. Arbitrators are paid by parties. Therefore, the tendency is to strive for MNC's sake, and to side with them rather than states especially in case of reoccurrence. Furthermore, it is unfortunate that arbitrators are exposed to external influence; susceptible to astray from integrity and independence. This can be seen in Loemen's case (Loewen Group Inc and Raymond L. Loewen V United States of America, 2005), where an arbitrator publicly conceded that he met America's officials prior this appointment and

here are some of the conversation transpired, “You know, judge, if we lose this case we could lose NAFTA” and replied: “Well, if you want to put pressure on me, then that does it (Kleinheisterkamp, 2014). Although this case reflects integrity and affirmation of good will on arbitrators’ side, this did not absolve the risk that arbitrators may be persuaded to decide on what to do than what they should do. Even without external pressure, some tribunals are inconsistence in protecting the interests of states and companies. Though this article imposes a blunt assumption, there are allegations that tribunals are generally aligned towards developed states rather than developing states; exposed the states to an unpredictable risk. In Methane’s case (Methanex V United States, 2005), where California banned the use of MTBE in reformulated gasoline, as a policy to protect public interest prevail in the tribunals. Phillip Morris’s case was decided on the same ratio too; protection of society. Despite that, in Arab Republic of Egypt’s case (Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt , 1993), the decision was otherwise though it involved protection of antiquities near the Pyramids Oasis; as required under UNESCO Convention for the Protection of the World Cultural and Natural Heritage 1972 but no avail. Later on, it was submitted that the states’ argument ought to be accepted in 1979 (Schreuer, 2001); after the state lost $27.6 million. Hence, though there are no definite statistical data substantiated this assertion, it is a warning that Malaysia ought to be prepared for this challenge.

It is amazing that United States of America always benefited from arbitration. Approximately 54% of the total compensation awarded (about $5.1 billion) in the 38 known investment treaty awards of over $10 million up to June 2, 2014 was awarded to U.S. companies. 97% of this compensation was awarded to U.S. companies with more than $1 billion in annual revenue. The U.S. share of total compensation in these cases rises to about 59% after accounting for apparent forum-shopping. It is astounding that America is not known to suffer any loss in any investment arbitrations. Many question this impeccability and believe that ICSID is at fault. Furthermore, America was the one who suggested on ICSID’s establishment and propagated the idea of justice through this method. The main reason is because of dogmatic principle applied by America’s court not to appertain international conventions as references for any disputes involved. In Mondev’s case (Mondev International Ltd. v. United States of America, 2002), an investor was denied rights under Chapter 11 of NAFTA to sue the Boston Redevelopment Authority because of an immunity clause bestowed by local jurisdiction. The local court upholds the immunity and though it was brought before tribunals, the decision remained. This decision proved that America is adamant in recognizing international conventions although they are the signatories unless it is approved by Congress as a national law. By this virtue, America’s policy makers believe that ISDS vis-à-vis ICSID facilitate investment disputes between America and other states. However, this is regarded as a bad excuse. Firstly, states especially European Countries practise the same, but EU manage to respect conventions accordingly in the local law. Secondly, being signatories for BITs with a lot of states, America had respected the convention and international law consistently within their own legislation and courts’ decision. This shows that ISDS not an excuse for private exclusivity. It is because of that, America should transform its legal application; restoring the justice via proper channel of law. Applying ISDS through ICSID is just an exclusive channel only for big companies; people see it as a symbol of slavery to Washington, questions the reliability of ICSID to represent state’s justice.

Other Challenges

ISDS as a medium of solution for disputes is already written. By far, this is the best method conceived in forwarding Malaysia's interest under the TPPA. Notwithstanding above, there are some other challenges perceived as obstacles that policy makers refer to as a future reference:-

i. ISDS is Exorbitantly Expensive

The cost incurs upon ISDS proceeding (in case of being sued) will be within $8 million to $30 million (T. P. P Australia Roundtable). Moreover, if Malaysia loses the case, an extra liability might be imposed. Mexico, Egypt and others had suffered under ISDS. Mexico paid $16 million to Metal clad after losing in the Canadian jurisdiction. Extra caution is needed to ensure that Malaysia will not fall as a victim of ISDS. Besides that, with such high cost, it is unthinkable that Malaysia's investors might sue the host state in case of improperly treated. Big companies like PETRONAS or banks will be able to do so, but some private companies and Small Medium Enterprise (SMEs) will have a hard time. In most cases, it is feared that Malaysian's investors will submit to the loss as risk ascertain in a business.

ii. Lack of local experts

Cases of ISDS vis-à-vis ICSID which involved Malaysia; either the Malaysian government or Malaysian companies (Chaisse, 2015) until now are as follow:-

Table 1: Malaysia's ISDS Cases

CASES	YEAR	OUTCOME	REPRESENT MALAYSIA
Philippe Gruslin v. Malaysian Government ICSID Case No. ARB/99/3	1999	In favour of Malaysian government	Attorney General's Chamber (AGC) of Malaysia
MTD Equity Sdn. Bhd. v. MTD Chile S. A. ICSID Case No. ARB/01/7	2001	In favour of Malaysian company	Non-Malaysian
Telekom Malaysia Bhd. v. The Republic of Ghana Case No. HA/RK 2004, 788	2003	Settled	Non-Malaysian
Malaysian Historical Salvors Sdn. Bhd. v Malaysian Government ICSID Case No. ARB/05/10	2005	In favour of Malaysian government	Attorney General's Chamber (AGC) of Malaysia
Ekran Berhad v People's Republic of China ICSID Case No. ARB	2011	Settled	Unknown

Statistics above denotes an important acknowledgement that Malaysian government is ready for ISDS. Being a signatory for approximately fifty one (51) years, Malaysia had survived ISDS since sixteen (16) years ago without any loss to foreign companies. This reflects competency and readiness to protect the national interest. Despite that, the biggest concern is the lack of ISDS experts among practitioners. Malaysia had established an Institute of Arbitrators for more than twenty (20) years but regrettably none was chosen to represent private companies worldwide. Furthermore, it is a sign that Malaysia's arbitrators are still not up to international standard that is why Malaysian companies preferred experience foreign intelligence. This is grave since TPPA will reflect our investors' performance worldwide. They will be exposed to unwanted challenges and this is where local intelligence facilitates the proceedings at the very best. Later on, these experts will be referred again as specialist in assisting Malaysia to formulate our policy against ISDS later.

Conclusion

Malaysia had recognized TPPA and this is irreversible for the time being. Opposing TPPA should be gone and now it is the time to move forward together with Malaysia's policy. ISDS especially via ICSID had become the most established dispute settlements yet open to a lot of criticism; nationally and internationally. The general principles and practice are amazing and in theory had surpassed Malaysian standard of legal system; either via court or alternative dispute resolutions. Some of the well-established practices in ITA especially ICSID should be imitated for instance amicus participation and open hearing to all public respectively. Yet, there are some doubts about ITA, especially ICSID. The constitution of the center, the integrity of arbitrators and one sided victory align to America remain the biggest issue arise. Regardless, Malaysia still has ample time to prepare. Some agreements might be reviewed and laws to be amended but this needs cooperation both from government and private sectors to ensure the success rate achieved pride fully.

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