

Issues Concerning Investor-State Dispute Settlement and the Idea of World Investment Court

¹Fadilla Jamila, ²Aidir Amin Daud, ³Iin Karita Sakharina, ⁴A. Melantik Rompegading, ⁵Ahsan Yunus

ABSTRACT--- *Investor-State Dispute Settlement is a settlement dispute system in the field of investment law. However, as it turns out into practice along the way it tends to adjudicate disputes which implicate public law matters and affects public interest in the host state. It is now becoming a controversial topic. This study is a normative-legal research by using statute, case, and conceptual approaches. The results show that ISDS as an investment dispute settlement mechanism has received number of critics along its operations. Firstly, it lacks of transparency. Secondly, it has produced inconsistent decisions. Thirdly, its arbitrators lacks of independency and accountability. Last but not least, it often impugned the host state's right to regulate on behalf of public interest. In order to work effectively, WIC should reform the drawbacks of the previous system. It is urged to have transparency and become more open to public as investment disputes have big impact on public interest.*

Keywords--- *Investor-State Dispute Settlement; Investment; World Investment Court*

I. INTRODUCTION

Investor-State Dispute Settlement or known as ISDS is a settlement dispute system in the field of investment law. It allows an investor to directly sue the host state before an arbitration tribunal. Initially, it was designed primarily to settle dispute on specific commercial matter which is foreign direct investment (Butler and Subedi, 2017). Yet, along the way it tends to adjudicate disputes which implicate public law matters and affects public interest in the host state. It is now becoming a controversial topic. Experts have come up with the idea of establishing the World Investment Court in order to repair the lacks of the current system (Howard, 2017).

This paper will be divided into two parts. The first part will discuss the criticisms towards ISDS referring to some relevant literatures. Whereas the second part will discuss the idea of the establishment of World Investment Court as the replacement of ISDS and the need of appellate mechanism.

¹ Faculty of Law, Universitas Hasanuddin, Indonesia, fadillajamila@gmail.com

² Faculty of Law, Universitas Hasanuddin, Indonesia, amindaud@unhas.ac.id

³ Faculty of Law, Universitas Hasanuddin, Indonesia, ik.sakharina@gmail.com

⁴ Faculty of Law, Universitas Sawerigading, Indonesia, melantikrompegading@yahoo.com

⁵ Faculty of Law, Universitas Hasanuddin, Indonesia, ahsanyunus@unhas.ac.id

II. METHODOLOGY

This study is a normative-legal research by using statute, case, and conceptual approaches (Marzuki, 2009). Meanwhile, data were analyzed descriptively, consisting of quotes. Data were analyzed with descriptive qualitative analysis with content analysis.

III. RESULTS

Issues Concerning ISDS

Since its establishment, it has been receiving numbers of critics. (Herman, 2014). Those criticisms can be classified into several categories.

1. Lack of transparency

One of the main issues of ISDS is that it lacks of transparency (Butler and Subedi, 2017). Confidentiality is one of the main features of arbitrations (Da Fonseca and Correia, 2013). Commercial arbitration particularly tends to be kept private (Poorooye and Feehily, 2017). It is important especially when the dispute contain sensitive matters which will bring harm to the private parties if it becomes public. Confidentiality also has advantages as it can reduce the possibilities of ruining the future business prospects and relations and the private parties can avoid negative publications from the media and their competitors (Cremades and Cortes, 2013). However, investment dispute is not like any other commercial dispute as it is often involving public international law and public issues (Howard, 2017).

ISDS awards would not be published and the hearings will be remained closed without the consent of both parties. Investment dispute usually involves life of people in a particular state, therefore, it has been criticized that it should be more transparent and some information should not be kept confidential. It is said that citizens have rights to be informed about the investment disputes as the investment dispute often involve important public issues. In certain cases, the dispute claimed a quite large amount of money for the dispensations. It can reach hundreds or billions of dollars (Gaukrodger and Gordon, 2012). This amount of money could really affect the country's fiscal. State is accountable to its people. Considering the impacts that can be raised from such disputes, these matters should not be kept confidential.

2. Inconsistent Decisions

ISDS has been criticized for having inconsistent awards. The same or quite similar provisions and fact could be interpreted differently. The inconsistency could lead to another problem which is unpredictability. The unpredictability could threaten the legitimacy of international investment law (Howard, 2017; Burke-White & Staden, 2010). ICSID as the mother convention of ISDS aims to give protection and reduce the risk on investment. Nevertheless, this inconsistency would prevent the achieving of these objectives (Kalb, 2005; Kadir & Farsia, 2020).

One of the leading examples is the Lauder Arbitrations. There were two different arbitrations taken place in London and Stockholm. Both concerning the standards of expropriation contained within two BITs which are "functionally identical". The former was involving BIT between US and Czech Republic while the latter was involving BIT between Netherland and Czech Republic. It turned out that both of the arbitrations resulted into two opposite awards. The former one declared that the government measure was not expropriation whereas the latter

declared that such measure was expropriation and ordered the Czech Republic to pay a fine for almost US\$270 million. These differences lead to unpredictability.

More consistent decisions are urged. It is important and could bring number of benefits. Consistency can promote predictability for both investors and host states. It can guide the states in making future decisions regarding investments and policies. It can also reinforce public perceptions of fairness and legitimacy of the system. Furthermore, consistency can help the parties to anticipate the procedures and make proper decision in settling the dispute so that it can reduce the cost of the prospect disputes.

3. Issue on Arbitrators' Independency and Accountability

The arbitrator's independency has been questions for a while. The parties choose the arbitrators (Butler and Subedi, 2017). It is highly likely that the parties will choose arbitrators who they believe will provide the bigger chance for them to win the dispute. Mostly the arbitrators consist of lawyers. They could represent the investors one day and in the upcoming future sit as panels of arbitrators for the investment disputes. It raised bias of the independency of these arbitrators. In addition, as it has been explained, the investment dispute could have major impacts on public interest. However, arbitrators may never have to explain their private decisions that create bias and could not be held accountable. Due to the important role that ISDS hold, it demands more accountable and independent arbitrators.

4. Impugning the host state's sovereign right to regulate

Government has rights to issue regulation in order to protect the public interest. Nevertheless, investment tribunals tend to limit the sovereign power of the host state in regulating its internal affair (Schill, 2011). One of the cases that lead to criticism was *Technicas Medioambientales Techmed S.A. v United Mexican States*. Within that case, the US government declared to breach the fair and equitable treatment for its action to refuse the renewal of Techmed's license which was found to be hazardous. It was argued that government is supposed to have legitimate right to refuse granting a license for any companies and investors which might threat the public health (Ryan, 2008). As this dispute concerns public law matters, it was argued that it should not be addressed before the private arbitration.

The Idea of the Establishing World Investment Court

Considering numbers of shortages of the current ISDS system, numbers of academics have proposed the establishment of World Investment Court (Subedi, 2016). As explained earlier, investment disputes tend to be involving public issues. Public matters which could affect the environment, labour rights, fiscal reform, and public welfare could have huge impacts. Therefore, it was proposed that the investment dispute to be handled before the World Investment Court. It should be in the form of public court instead private arbitration which tend to have a lot of confidentiality and lack of transparency (Katz, 2016).

In order to bring significant improvements towards the international investment world, it should bring essential reforms and carefully review the drawbacks of the current system. There are several important aspects that should be brought by the WIC. Firstly, as international court, it should provide transparency to the public. Its proceeding would be open to third parties and public. In addition, its decisions and legal reasoning should be disclosed to public. Transparency can be symbol that neither the host states nor the investors have anything to hide (Howard,

2017). Unlike, any other commercial matter, investment dispute has significant impacts for public and should be subject to public scrutiny. It is very essential that the new WIC provides transparency.

Secondly, WIC should consist of permanent and independent judges. It can replicate the structure of the International Court of Justice (ICJ). For instance, it can elect 15 judges to serve for certain years and include an exclusive clause which prohibit them to act as adjudicator outside the WIC. Independency is one of the crucial issue of the ISDS. The permanent judges are expected to eliminate this problem. States should be the one to appoint these judges. States have conflicting interest as they have to protect their public interests from investors but they also have their nationalities and companies who act as investors in other states. Thus, in order to protect this conflicting interest, states will appoint the fair and impartial judges instead of judges who may favour either side (Posner and Yoo, 2005). By hiring permanent judges, it could also increase the impartiality of the panel of judges as they will be given permanent salary regardless the number of cases they settled. It will decrease the incentive of the judges to be pro-investor. Furthermore, it will also eliminate the issue of the current ISDS system where there is a high probability that the arbitrator could act as lawyer of the investors in different occasion.

Finally, WIC should provide appellate mechanism. There are significant benefits that are offered by the appellate mechanism. Firstly, it will provide greater opportunity in obtaining consistent interpretations of the substantive principles of international investment law. Secondly, it can establish corrective mechanism. If the court of first instance made an error for whatever reason, there will be an opportunity for the party to appeal the decision. It is one of the issues of the current system of ISDS. It was argued that ISDS was design to be efficient. Its decisions are to be made final and binding. It is assumed to be important for both parties, host state and investors, as the entire process requires reliability and assurance of enforcement of the arbitration awards. It should be carefully reconsidered whether it is better to have an assumed to be efficient process which is final or should the appellate mechanism be provided in order to avoid error which have crucial impacts. Nevertheless, the concern of the inefficiency can be prevented by only limiting the types of decisions that can be appealed. It is suggested that the appellate mechanism in WIC imitate the system provided by WTO where only the decision containing errors of law that could be reviewed (Butler & Subedi, 2017; Ngangjoh-Hodu & Ajibo, 2015). This way the number of appeals can be minimized.

It is also suggested that the WIC adopts doctrine of precedent. It has not been implemented in the current system (Bungenberg et al., 2015). Currently, the arbitral precedents have no binding power. A previous decision would not be considered as primary source of rules. However, if it is applied, it could promote greater predictability and it can enhance the application of rule of law in the field of international investment (Butler & Subedi, 2017). It can reduce the number of inconsistent decisions and eliminate the problem of the current system.

IV. CONCLUSION

ISDS is an investment dispute settlement mechanism allowing the investor to directly sue the host state. It has received number of critics along its operations. Firstly, it lacks of transparency. Secondly, it has produced inconsistent decisions. Thirdly, its arbitrators lacks of independency and accountability. Fourthly, it often impugned the host state's right to regulate on behalf of public interest.

In relation to those criticisms, the idea to establish the World Investment Court has been proposed. In order to work effectively, WIC should reform the drawbacks of the previous system. It is urged to have transparency and become more open to public as investment disputes have big impact on public interest. It should also have permanent and independent judges to increase impartiality. Thereto, the mechanism of appeal is urged. It is expected to provide greater predictability and create corrective mechanism. The mechanism can reflect from the WTO Appellate Body by only allowing error of law to be reviewed in order to maintain effectivity. Finally, some also proposed for the WIC to adopt doctrine of precedent to obtain more consistent decisions.

REFERENCES

1. Butler, N., and Subedi, S. (2017). "The Future of International Investment Regulation: Towards a World Investment Organisation?" *Neth Int Law Rev*, 64: 44.
2. Howard, D.M. (2017). "Creating Consistency through a World Investment Court", *Fordham International Law Journal*, 41: 16.
3. Marzuki, P.M. (2009). *Penelitian Hukum*. 5th ed. Jakarta: Kencana.
4. Herman, L.L. (2014). "Confronting the Investor-State Dispute Settlement Controversy", *The Estey Centre Journal of International Law and Trade Policy*, 15(2): 232.
5. Da Fonseca, R.G., and Correia, A.D.L. (2013). "The Limits of Confidentiality in Arbitration: A Brazilian Perspective" *Y.B. on Int'l Arb.* 3: 119-23.
6. Poorooye, A., and Feehily, R. (2017). "Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance" *Harvard Negotiation Law Review* 22: 278.
7. Cremades, B.M., and Cortes, R. (2013). "The Principle of Confidentiality in Arbitration: A Necessary Crisis" *J. of Arb. Stud.* 23: 2.
8. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, ICSID, 17 U.S.T. 1270, art. 48(5).
9. Gaukrodger, D., and Gordon, K. (2012). "Investor-State Dispute Settlement" *OECD Working Papers on International Investment* 3: 7.
10. Burke-White, W.W., and von Staden, A. (2010). "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations" *Yale J. Int'l L.* 23: 299.
11. Kalb, J. (2005). "Creating an ICSID Appellate Body", *UCLA J. Int'l L and Foreign Affair* 10: 198.
12. Kadir, M.Y.A., and Farsia, L. (2020). The Inconsistency of ICSID Awards Over Argentina Cases. *Hasanuddin Law Review*, 6(1), 1-24. doi: <http://dx.doi.org/10.20956/halrev.v6i1.1844>
13. *Ronald S. Lauder v. Czech Republic*, UNCITRAL Arbitration, Final Award (Sept. 3, 2001).
14. *CME v. Czech Republic*, UNCITRAL Arbitration, Partial Award (Sept. 13, 2001).
15. *Enron Corporation and Ponderosa Assets, L.P. v Argentina*, ICSID Case No.ARB/01/3, Decision on Jurisdiction (14 January 2004).
16. Schill, S.W. (2011). "Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach", *VA. J. INT'L L.* 52: 67.
17. Ryan, C. (2008). "Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law", *U. PA. J. INT'L L.* 29: 729.

18. Subedi, S. (2016). *International investment law: reconciling policy and principle*. London: Hart Publishing.
19. Katz, R.L. (2016). "Modeling an International Investment Court After the World Trade Organisation Dispute Settlement Body", *Harvard Negotiation Law Review*, 22.
20. Posner, E.A., and Yoo, J.C. (2005). "Judicial Independence in International Tribunals", *California Law Review* 93(1): 21.
21. Ngangjoh-Hodu, Y., and Ajibo, C.C. (2015). "ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration" *Journal of International Dispute Settlement* 6: 308.
22. Bungenberg, M., Griebel, J., Hobe, S., Reinisch, A., and Kim, Y.I. (2015). *International Investment Law*. London: Hart Publishing.