

7-30-2019

## Achieving Multilateral Investment Court Through EU-ASEAN Expansion of Bilateral Investment 'Court': Is It Possible?

Rizky Banyualam Permana  
*Faculty of Law, Maastricht University, the Netherlands*

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

---

### Recommended Citation

Permana, Rizky Banyualam (2019) "Achieving Multilateral Investment Court Through EU-ASEAN Expansion of Bilateral Investment 'Court': Is It Possible?," *Indonesian Journal of International Law*: Vol. 16: No. 4, Article 2.

DOI: 10.17304/ijil.vol16.4.775

Available at: <https://scholarhub.ui.ac.id/ijil/vol16/iss4/2>

This Article is brought to you for free and open access by the Faculty of Law at UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

# ACHIEVING MULTILATERAL INVESTMENT COURT THROUGH EU-ASEAN EXPANSION OF BILATERAL INVESTMENT ‘COURT’: IS IT POSSIBLE?

Rizky Banyualam Permana\*

\* Faculty of Law, Maastricht University, the Netherlands  
Correspondence: rizky.permana@gmail.com

---

## Abstract

*Legitimacy of international investment law is in crisis. One particular area of international investment law that has been progressively re-developed is the area of investment dispute settlement. The EU sees the multilateral investment court as a proper solution to reform ISDS in the future. To achieve this final goal, starting from the bilateral level, the EU has included investment court provisions as an ISDS mechanism in its latest trade and investment agreement with its trading partners, among others, EU-Viet Nam FTA and IPA, as well as EU-Singapore FTA & IPA. This paper addresses central questions on how could existing investment court system in EU and ASEAN member states' Investment Protection Agreements (IPA) can be expanded towards multilateral investment court in the future, and what are the challenges that can be expected from such expansion. It critically analyses concluded agreements between the EU and some of ASEAN Member States. I argue that for now, it is unlikely that multilateral investment court expansion will happen soon considering the challenges and concerns expressed by both sides.*

**Keywords:** ASEAN, EU, investment court system, ISDS

---

Submitted : 30 March 2019 | Revised : 17 May 2019 | Accepted : 30 June 2019

## I. INTRODUCTION

Legitimacy of international investment law is in crisis. One particular area of international investment law that has been progressively re-developed is the area of investment dispute settlement. Backlashes and criticism of existing traditional investor-state dispute settlement (ISDS) from the society driven the demand to reform of the system. Critics attack the ISDS system based on several arguments, among others, arbitrator impartiality and ethical issues, divergent decision based over the similar factual circumstances, irreversible erroneous decision, nationality shopping by the investor, high costs proceeding, lack of transparency and so forth.<sup>1</sup> Several incremental steps to reform have been taken to reform the system, including the enhancement of

---

<sup>1</sup> UNCTAD, Improving Investment Dispute Settlement: UNCTAD Policy Tools, IIA Issue Note, issue no. 4, November 2017, 8.

transparency in ISDS through UNCITRAL's initiative of Mauritius Convention,<sup>2</sup> as well as undergoing amendment efforts of ICSID rules and regulation.<sup>3</sup> But more radical change is coming to replace the entire system through the establishment permanent institution so-called multilateral investment court, proposed by the European Union (EU).<sup>4</sup>

The EU sees the multilateral investment court as a proper solution to reform ISDS in the future.<sup>5</sup> To achieve this goal, EU has started from the bilateral level with EU's trading partners, through the inclusion of investment court provisions as the prevailing ISDS mechanism in its latest trade and investment agreement. The first agreement to include such provisions is the EU-Canada Comprehensive Economic and Trade Agreement (CETA),<sup>6</sup> and the second being EU-Viet Nam Free Trade and Investment Protection Agreement.<sup>7</sup> Just recently, the EU also signed the FTA-IPA with Singapore in October 2018,<sup>8</sup> which also contain the investment court system (ICS) provisions. In addition, the Transatlantic Trade and Investment Agreement (TTIP) which is still under negotiation with the US will likely to feature ICS.<sup>9</sup> Albeit the differences in some parts of the provisions, investment disputes procedure across the EU-negotiated treaties has the common elements as proposed by the EU,

---

<sup>2</sup> Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2004) UNTS 54749 (Mauritius Convention)

<sup>3</sup> ICSID, 'ICSID Rules and Regulations Amendment Process,' <<https://icsid.worldbank.org/en/amendments>> accessed 8 March 2019.

<sup>4</sup> European Union, 'Submission of the European Union and its Member States to UNCITRAL Working Group III,' (18 January 2019) <[http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf)> accessed 12 March 2019.

<sup>5</sup> Cecilia Malmström, 'A Multilateral Investment Court: a contribution to the conversation about reform of investment dispute settlement' (European Commission, 22 November 2018), <[http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157512.pdf](http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf)> accessed 8 March 2019.

<sup>6</sup> Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and Its Member States

<sup>7</sup> The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part concluded December 2015, entry into force 2018

<sup>8</sup> The Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part

<sup>9</sup> European Commission, 'The Transatlantic Trade Investment Partnership: Making Trade Work for You,' <<http://ec.europa.eu/trade/policy/in-focus/ttip/>> accessed 8 March 2019

namely, presence of standing tribunal member, the division proceeding between first instance and appeal tribunal, inception of ethical rules for arbitration, disclosure of finding, and so forth.<sup>10</sup> Thus, through the recent efforts by the EU, we can see that investment court system is already in its test drive phase, marking the radical reform of ISDS that is taking place gradually.

A regional organisation such as ASEAN could be the stepping-stone towards the establishment of multilateral investment court. Other than Singapore and Viet Nam, some of ASEAN member states are still in negotiation with the EU with regard to trade and investment agreement.<sup>11</sup> In the recent EU-ASEAN Ministerial Meeting, both organisations expressed the adherence to multilateralism and commitment for creation of EU-ASEAN FTA in future.<sup>12</sup> Therefore, it is interesting to see the development of investment court from inter-regional cooperation perspective. This paper addresses central questions on how could existing investment court system in EU and ASEAN member states' Investment Protection Agreements (IPA) can be expanded towards multilateral investment court in the future, and what are the challenges that can be expected from such expansion. It critically analyses concluded agreements between the EU and the ASEAN Member States, among others, EU-Viet Nam and EU-Singapore IPA, and agreements which are still undergoing negotiation such as Indonesia-EU Comprehensive Economic Partnership (IEU-CEPA).

EU approach of ISDS reform indeed has been commented many

---

<sup>10</sup> Kyle Dylan Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Mode' (2016) 773 *Journal of World Investment & Trade* 17, 774

<sup>11</sup> Among others, Indonesia (ongoing), Philippines (ongoing, Myanmar (ongoing), Malaysia (ongoing), Thailand (postponed). See European Commission, 'Overview of FTA and other Trade Negotiations,' <[http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)> accessed 8 March 2019.

<sup>12</sup> European Union External Action, 'Joint statement of the 22nd EU-ASEAN ministerial meeting' (European Union External Action, 22 January 2019) <[https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting\\_en](https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting_en)> accessed 8 March 2019.

times in the scholarship recently.<sup>13</sup> However, the discussion on the prospect to expand ICS into a multilateral investment court is not a recurring discussion, particularly from the perspective of Asian countries. Therefore, this paper serves to fill the gap in the literature. This paper will be divided as follows, in the first part it will address the EU's reform initiatives. While in the second part, it mainly discusses the investment court system from the ASEAN (Member States) perspective. In the concluding part, I will deliver the conclusion that multilateral investment court is a promising proposal to tackle the concerns over ISDS and replace the ISDS mechanism. However, challenges are coming from either side of EU and ASEAN in terms of multiplication of ICS in the future investment protection agreement. Plus, the inconsistency of EU practice with Japan may discourage further participation of ASEAN Member States in participating in EU's project in establishing multilateral investment court in the future. Thus, it is unlikely that multilateral investment court expansion will happen soon considering these challenges.

## **II. DEVELOPMENT OF INVESTMENT COURT SYSTEM**

As briefly mentioned above, the Investment Court System is a reform proposed by the EU. The rationale for reform was driven by the backlashes and criticism from the society against the prevailing ISDS mechanism to solve the foreign investment disputes. This part elaborates those criticisms and arguments against current ISDS mechanism employed by various IIA, and how the EU proposal to reform ISDS by creating 'investment court system' become a realisation through the bilateral agreements.

### **A. CRITICISM OF EXISTING ISDS**

About half of century ago, the ISDS mechanism was created to overcome the shortcomings of available avenue for an investor to protect its investment in the developing countries from the interference of the host state. Inter-state dispute settlement through enabled by

---

<sup>13</sup> See Dickson-Smith, note 10; Umair Ghori, 'The International Investment Court System: The Way Forward for Asia,' (2018) 205 *International Trade & Business Law Review* 21, 209.

diplomatic protection of investor's government involves a lot of chains of bureaucracy and consumes time. But on the other hand, resolution of the dispute through the host state's domestic court did not promise a fair and impartial process, as alleged by investors. Consequently, dispute settlement mechanism that allows the investor to directly raise a claim against the host state government through arbitration channel was considered an innovative solution at that time. However, time and circumstances changed and the ISDS mechanism considered not suitable anymore.

Through the course of its existence, we have seen ISDS mechanism judged the state's macroeconomic policy during the crisis with inconsistent decisions,<sup>14</sup> proceedings that took years to resolve<sup>15</sup> and costs millions of dollars for both parties. These controversial cases were mainly 'judged' by relatively small pool of arbitrator, which due to their lack of diversity being called "*pale, male, and stale*" club.<sup>16</sup> Some arbitrators' lack of public interest lenses contributed to the decision that often undermined and overlooked the right to regulate of the host country.<sup>17</sup> Rules of international investment law that scattered across the international investment agreements (IIAs) without any precedent rules binding the arbitrator also created open norm interpretation that often went far-fetched and created uncertainty. Even some of the interpretations of IIA provisions went against the initial intention of concluding States. These criticisms and shortcomings pushed the call for reform of existing ISDS mechanism.

Several states adopted different attitudes and policy options with regard to ISDS that bound upon them. First policy option is to terminate the IIAs and withdraw from agreements that enabled ISDS proceeding.

---

<sup>14</sup> This refers to series of ISDS litigation faced by Argentina

<sup>15</sup> Victor Pey Casado case took 17 years to resolve. See Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2.

<sup>16</sup> Adrian Lai, 'ISDS Reform Conference: Mapping the Way Forward Discussion Paper for the Session on Appointment of Arbitrators and Related Issues' (ISDS Reform Conference – Mapping the Way Forward, Hong Kong, 13 February 2019), 18

<sup>17</sup> Stephan W. Schill, 'Reforming Investor-State Dispute Settlement: Conceptual Framework and Options for the Way Forward' E15 Task Force on Investment Policy Think Piece, July 2015, 2

Indonesia terminated BITs with its partners in 2014,<sup>18</sup> the reason is most likely to limit the exposure to ISDS claim. Even more extreme policy was taken by Venezuela by withdrawing from ICSID in 2012.<sup>19</sup> Some other states working towards the ISDS reform that pushes for strengthened institutionalisation, including by introducing appeal mechanism to create check and recheck mechanism for ISDS ruling. The EU and the US had indicated the adherence to introduce appeal mechanism modeled after the success of WTO Appellate Body.<sup>20</sup> The appeal mechanism is crucial to ensure coherence and predictability of international investment law. Further, the reform of ISDS can also be enabled by increasing transparency by allowing participation of non-disputing parties' *amicus curiae*. A major initiative to reform the transparency is the introduction of Mauritius Convention that provides an opt-in procedure for UNCITRAL Rules for Transparency. Arbitrator's ethics and accountability also proposed to be enhanced the introduction of a strong code of conduct and ethical rules. The discussion of reform is underway at the international level through UNCTAD and UNCITRAL (Working Group III) as the platforms of stakeholders' discussion on the matter of ISDS reform.<sup>21</sup>

## B. EU PROPOSAL OF ISDS REFORM

Lisbon Treaty mandated EU matter of foreign direct investment to be under a broadened Common Commercial Policy (CCP) of the Union.<sup>22</sup> Since then, the EU has been progressively negotiating trade and investment agreement with its trading partners, proposing the EU's own approach on an investment agreement on behalf of EU Member States.<sup>23</sup> EU Member States are not involved in negotiations

---

<sup>18</sup> Anthony Crockett, 'The Termination of Indonesia's BITs: Changing the Bathwater, but Keeping the Baby?' (2017) 836 *The Journal of Investment and Trade* 18, 837.

<sup>19</sup> IISD, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve' (IISD, 13 April 2012) <<https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>> accessed 8 March 2019.

<sup>20</sup> Schill, (n. 16), 8.

<sup>21</sup> UNCTAD (n. 1).

<sup>22</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 of 17 December 2007.

<sup>23</sup> August Reinisch, 'The EU on the Investment Path, Quo Vadis Europe: The Future of EU BITs and Other Investment Agreements' (2013) 111 *Santa Clara Journal of International Law* 12, 124.

of IIAs, instead it is the Commission in Brussels that conclude the IIAs. However, the European Court of Justice (ECJ) issued Opinion 2/15 which determined that investment protection and ISDS section of EU-Singapore FTA are outside of EU CCP competence.<sup>24</sup> Meaning that agreements which contain the ISDS provision is not an exclusive competition of EU, but rather, it must be negotiated and agreed along with EU member states as a “mixed agreement”. This sets the precedent for the following EU’s trade and investment agreement negotiation practice with its partners.<sup>25</sup> In the negotiation with its trading partners, EU always promotes ‘the gold standard’ for investment protection that goes beyond lowest common denominator, but at the same time, the EU attempt to preserves the right to regulate of the State.<sup>26</sup> Public consultation held in 2014 during the TTIP negotiation yields to more than 150,000 replies from the public, which particularly addressed the concerns over the need to introduce tribunal of the second instance to promote correctness in ISDS decision, thus this fuelled the Commission to conclude ‘reformed’ IIAs in the future.<sup>27</sup>

The push for better ISDS also called by the European Parliament. In July, it adopted a resolution urging the Commission to replace existing ISDS mechanism with a new better mechanism which is transparent, independent judges-ruled, and contain a limitation of private interests so that they could not defeat the public policy objectives.<sup>28</sup> Within the same year, the EU published a concept paper titled “Investment in TTIP and beyond – the path for reform.”<sup>29</sup> In this paper it was revealed that the new investment and trade agreements with partner countries, Canada and Singapore, will feature the new approach aimed for ISDS reform. Key points of the initiatives directly addressed the criticism

---

<sup>24</sup> ECJ, Opinion 2/15 of the Court, ECLI:EU:C:2017:376

<sup>25</sup> Marise Cremona, ‘Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017’ (2018) 231 *European Constitutional Law Review* 14, 233.

<sup>26</sup> Reinisch, (n. 22) 124.

<sup>27</sup> Catherine Titi, ‘The European Union’s Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead,’ (2016) *Transnational Dispute Management* 1

<sup>28</sup> *Ibid.*, 3.

<sup>29</sup> European Commission, ‘Concept Paper: Investment in TTIP and beyond – the path for reform’ <[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)> accessed 12 March 2019



and shortcomings of existing ISDS framework. Proposed mechanism excludes the possibility of forum shopping by imposes strict ‘real business operation’ condition requirement to establish the jurisdiction of dispute settlement; strict government-controlled rule interpretation reference; ethics rules and code of conduct for arbitrator; early dismissals and fast track system that disallows frivolous claims; introduction of “loser pays principle”; introduction of appeal mechanism; and prohibition of parallel proceedings.<sup>30</sup>

Presently, the texts of the agreement are already apparent, it has indeed laid down the EU’s vision of ISDS reform. The new agreements which include the EU’s proposal are among others, EU-Canada Comprehensive Economic Trade Agreement (CETA), EU-Singapore FTA-IPA, EU-Viet Nam FTA-IPA. However, with regard to its investment and investment dispute part, no case has been submitted under the new mechanism.

## **II. BUILDING MULTILATERAL INVESTMENT COURT: ASEAN PERSPECTIVE**

Relationship of the EU and ASEAN as regional organisations has always been a strategic one. In 2016, Commission sought the authorisation from the Council to negotiate the free trade agreement with ASEAN, and the authorisation was issued on the condition where it could not reach the agreement with ASEAN, the negotiation would proceed with each of ASEAN Member States bilaterally.<sup>31</sup> Recently, the EU and ASEAN expressed its commitment to continue the negotiation of EU-ASEAN FTA which aims for expansion of inter-regional trade, business, and investment.<sup>32</sup> As we recall, the EU has concluded the negotiation of FTA-IPA with Singapore and Viet Nam, therefore further expansion of trade and investment agreement would be foreseeable. However, whether it will feature ICS as a substitute for existing ISDS mechanism, is till questionable. This section attempts to assess the ICS

<sup>30</sup> Ibid., 2-3.

<sup>31</sup> ECJ, (n. 23)

<sup>32</sup> European Union External Action, ‘ASEAN-EU Action Plan 2018-2022’ <[https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting\\_en](https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting_en)> accessed 8 March 2019.

proposal and multilateral investment court from the lens of ASEAN and its Member States.

## **A. ASEAN EXPERIENCE OF ISDS AND CALL FOR REFORM**

ASEAN consisted of a pool of developing and less-developed countries. The Member States regard foreign direct investment as a key component to boost the development nationally and regionally.<sup>33</sup> Thus, a domestic and regional regulation policy that modeled to attract investment still prevails in the region. It is important to note that even though ASEAN has the competence to conclude an investment treaty,<sup>34</sup> the agreement does not have direct effect, unlike EU-concluded treaties that directly enforceable to Member States. Despite the ASEAN's power to engage in external relations, each of ASEAN Member States also has and still actively engaged in the conclusion of IIAs with each own trading partners. Malaysia has the most IIAs at hand with 91 IIAs, second and third being Singapore and Viet Nam respectively.<sup>35</sup> In terms of investment dispute settlement, with the exception of Singapore, Cambodia, and Brunei, all ASEAN Member States have faced investors' lawsuit through ISDS mechanism as a respondent state.

Indonesia in 2014 reviewed and terminated IIAs that are concluded between 1960s and 1990s.<sup>36</sup> This move is high likely to minimise the risk of exposure from ISDS. Even stronger call for Indonesia to withdraw from ICSID also expressed by a commentator.<sup>37</sup> Even though strong opposition of ISDS remains, let alone withdrawing from ICSID, Indonesia is still continuing to conclude IIAs with ISDS

---

<sup>33</sup> ASEAN, ASEAN Economic Community Blueprint (Jakarta: ASEAN Secretariat), p. 44.

<sup>34</sup> ASEAN Charter, Art. 41.7. "ASEAN may conclude agreements with countries or sub-regional, regional and international organisations and institutions."

<sup>35</sup> UNCTAD, 'Investment Policy Hub' <<https://investmentpolicyhub.unctad.org>> accessed 8 March 2019

<sup>36</sup> David Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?' (2017) 124 Asian Journal of International Law 7, 124.

<sup>37</sup> Hikmahanto Juwana, 'Indonesia Should Withdraw from the ICSID!' (Jakarta Post, 2 April 2014) <[www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html](http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html)> accessed 14 March 2019.

provision within it,<sup>38</sup> but in a more careful manner.<sup>39</sup> Inclusion of ISDS provisions justified by the need to attract foreign investment according to Indonesia's policy approach.<sup>40</sup> Similar tone also observable with Malaysian practice. Despite Malaysia's experience with ISDS, it chooses not to abandon the ISDS system entirely but taking a more cautious and careful approach in drafting future IIAs. Malaysia seek future IIAs which could better in balancing the State's right to regulate of and the interests of investor.<sup>41</sup> While Thailand in UNICTRAL Working Group III submitted its position with regard to ISDS reform. It addressed the issue of ethical concern of arbitrator, third-party funding, incoherent treaty interpretation and calls for capacity building and legal assistance for developing countries as can be found in WTO dispute settlement through Advisory Centre for WTO Law (ACWL).<sup>42</sup>

Preference to ISDS mechanism is still apparent in the ASEAN's investment treaty. In the ASEAN-India Investment Agreement<sup>43</sup> for instance, ISDS provision still exists although crafted cautiously and modernised. It features incremental enhancement such as expertise requirement for the third arbitrator, limited transparency rule.<sup>44</sup> In ASEAN Comprehensive Investment Agreement (ACIA), it still has the ISDS provision. The disputes under ACIA are not exclusively only can be submitted to arbitration institutions such as ICSID or ad hoc under UNCITRAL arbitration rules, or Kuala Lumpur's Regional Centre for Arbitration, but also the provision acknowledge the recourse to a domestic administrative tribunal.<sup>45</sup> The agreement also attempted to create transparency rules for parties to publish awards and decision

<sup>38</sup> J. J. Losari & M. Ewing-Chow, 'Regional Considerations - Reflective or Reactionary? Indonesia's Approaches to International Investment Agreements and Recommendations for the Future,' (2015) *Transnational Dispute Management* 12.

<sup>39</sup> Crockett, (n. 17), 844.

<sup>40</sup> UNCITRAL, A/CN.9/WG.III/WP.156

<sup>41</sup> Sufian Jusoh, Muhammad Faliq Abd Razak, Mohamad Azim Mazlan, 'Malaysia and Investor-State Dispute Settlement: Learning From Experience' (2017) 890 *Journal of World Investment and Trade* 18, 916.

<sup>42</sup> UNCITRAL, 'Possible reform of Investor-State dispute settlement (ISDS) Comments by the Government of Thailand A/CN.9/WG.III/WP.147

<sup>43</sup> The Agreement on Investment Under The Framework Agreement on Comprehensive Economic Cooperation (ASEAN-India)

<sup>44</sup> *Ibid.*, Art. 20.16 & 20.17.

<sup>45</sup> ASEAN Comprehensive Investment Agreement, Art. 33

publicly, but with a weak “may” clause.<sup>46</sup> Other than that, the two agreements contain typical provisions of ISDS without significant difference but tailored in a more detailed way. Despite the concern and experience of some ASEAN Member States over the past practice of ISDS, there is no significant breakthrough to introduce reform of ISDS, at least in intra-ASEAN level. This situation is more or less can be regarded as preference to *status quo* of existing ISDS rules. Therefore, the invitation of ISDS reform by EU through the inclusion of ICS mechanism under the investment agreement can be seen as a positive sign for ASEAN to reform the ISDS in the future.

## **B. ICS IN EU-VIET NAM AND EU-SINGAPORE IPA**

With the conclusion of EU-Viet Nam and EU-Singapore IPA, for EU, the ICS and ISDS reform is not a theoretical debate anymore. Despite negotiated in a bilateral manner by each party, dispute settlement sections of both IPAs have similarity and followed a common structure. However, there are slight differences in the wording of the ISDS provisions, for instance, EU-Viet Nam IPA clearly excludes the application of Most Favoured Nations (MFN) rule to dispute settlement, while for EU-Singapore IPA, it does not feature MFN clause at all. Consequently, the ICS provisions on both agreements cannot be applied cross-ASEAN member states.<sup>47</sup> Regarding the scope of dispute settlement, EU-Viet Nam IPA put a stricter measure to exclude fraudulent investment from accessing the dispute settlement, but in contrast, a similar clause is absent in EU-Singapore IPA.<sup>48</sup> Both agreements adhere to amicable dispute resolution, which enables the parties to settle the dispute through agreement at any time of the dispute.<sup>49</sup> The time frame of dispute also slightly different in both agreements. Both parties can enter the consultation, in case of EU-Singapore IPA, within 30 months starting since treatment breaching the obligation under the agreement

---

<sup>46</sup> *Ibid.*, Art. 39

<sup>47</sup> The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam (EU-Viet Nam IPA) Art. 2.4.5

<sup>48</sup> *Ibid.*, Art. 3.27.2

<sup>49</sup> The Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part (EU-Singapore IPA) Art. 3.2; EU-Viet Nam IPA Art. 3.29.

was known, or 10 years if local remedies were pursued. In the case of EU-Viet Nam IPA, it should be within 3 years from the first breach, and if local remedies pursued no later than 7 years.<sup>50</sup>

If no solution found in the consultation phase, the claimant can bring the case to the tribunal of the first instance. The disputing parties may choose arbitration rules either from ICSID Convention, ICSID Additional Facilities Rules, UNCITRAL Arbitration Rules, or any other arbitral rules.<sup>51</sup> Different from traditional arbitration procedure, the disputing party bring the case to a standing tribunal which composes from nationals of both parties of IPA, and third state nationals. However, there are differences in terms of the size of Tribunal in each IPA. In EU-Singapore, there are six persons of standing tribunal in total, where two of them from EU Member States, two from Singapore, while two others are from the third country, serving for eight years term. In EU-Viet Nam IPA, there are nine Tribunal members in total, with each party appoint three persons serving for four years term.<sup>52</sup> Because of the this standing ‘court’-like nature, each of the members of Tribunal is entitled to monthly retainer fee from each party, and the fee is administered by ICSID Secretariat.<sup>53</sup> However, the amount of retainer fee is unknown from the text of the agreement. While for appeal Tribunal, both agreements set six members with similar composition, but 8 years terms for EU-Singapore IPA and four years for EU-Viet Nam IPA.<sup>54</sup> Members of both Tribunals chosen by its qualification standard, must be independent beyond doubt, and bound to ethics rule and comply with the code of conduct.<sup>55</sup>

Disputing party can bring the ruling into appeal procedure within 90 days. The grounds of appeal are among others, manifest error in interpretation or application of the law, and application of facts. In addition to these grounds, annulment conditions set by Art. 52 ICSID Convention is applicable *mutatis mutandis*.<sup>56</sup> The appeal tribunal has

---

<sup>50</sup> EU-Singapore IPA, Art, 3.3.3; EU-Viet Nam IPA Art. 3.30.

<sup>51</sup> EU-Singapore IPA, Art. 39; EU-Viet Nam IPA Art. 3.33.2.

<sup>52</sup> EU-Singapore IPA, Art, 3.9; EU-Viet Nam IPA Art. 3.38.2 & 3.38.5.

<sup>53</sup> EU-Singapore IPA, Art. 3.9; EU-Viet Nam IPA Art. 3.38.14.

<sup>54</sup> EU-Singapore IPA, Art. 3.10; EU-Viet Nam IPA Art. 3.39.

<sup>55</sup> EU-Singapore IPA, Art. 3.11; EU-Viet Nam IPA Art. 3.40

<sup>56</sup> EU-Singapore IPA, Art. 3.19; EU-Viet Nam IPA Art. 3.54.

the power to modify even reverse the previous ruling.<sup>57</sup> To discourage frivolous claim, both ICS applies the principle of losing party pays.<sup>58</sup> Other than disputing party, the third parties can be involved in the proceeding as the non-disputing parties through *amicus curiae* submission mechanism.<sup>59</sup> In terms of procedure, the most significant difference from both IPAs is the fact that EU-Viet Nam IPA has an anti-circumvention mechanism that gives the power to Tribunal to reject jurisdiction if forum shopping practice is *prima facie* foreseeable.<sup>60</sup>

Although similar, there are differences in the details ICS procedure between the two agreements. But ICS procedure in both IPAs drew a rough illustration of what multilateral investment court would like in the future. The drafters of both agreements also included a unique clause to future-proof the agreement, preparing towards the creation of multilateral investment court.<sup>61</sup> In EU-Singapore IPA, it is even more clearly stated that both parties intend to pursue the creation of multilateral investment court. The provision within EU-Singapore IPA stated the obligation to actively “pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal.” In this sense, the two agreements could serve as the building blocks in establishing a multilateral investment court in the future.

#### IV. IT’S TIME TO JOIN FORCES WITH EU?

Bilateral negotiations of IPAs have become the laboratory for EU to experimenting with its ISDS reform proposal. Up until now, the implementation of ICS is still pending and there are no cases that brought under the newly established mechanism. Thus, to this point empirical experience of dispute settlement through ICS is practically absent. Some commentators have argued theoretically that ICS would likely to be incompatible with ICSID Convention, as ISDS reform through

---

<sup>57</sup> EU-Singapore IPA, 3.19; EU-Viet Nam IPA Art. 3.54.

<sup>58</sup> EU-Singapore IPA, Art. 3.21; EU-Viet Nam IPA Art. 3.53.4.

<sup>59</sup> EU-Singapore IPA, Art. 3.16 & 3.17; EU-Viet Nam IPA Art. 3.51.

<sup>60</sup> EU-Viet Nam IPA Art. 3.43. VN

<sup>61</sup> EU-Singapore IPA, 3.12; EU-Viet Nam IPA 3.40.

the establishment of ICS is criticised too fundamental and radical.<sup>62</sup> However, on the other hand, at least the EU did not end up with *status quo* favoring existing ISDS mechanism which has been proven to be more problematic. The EU also has actively pushed towards the reform involving other like-minded partner, even a commentator argued the possibility that the ICS will become ‘the next inevitable paradigm’ in foreign investment dispute settlement.<sup>63</sup>

The success of making multilateral investment court obviously dependant on the reaction of other EU’s partners. The EU as a global economic bloc has the political influence towards its partners to support its agenda. In order to achieve the multilateral investment court, inter-regional bloc cooperation should also be taken into account by EU. In this case, involving ASEAN as an EU’s strategic economic partners may help to agenda to build the EU’s dream. As mentioned earlier, the intention to create EU-ASEAN FTA inter-regional is expressed clearly by EU, following the recent EU approach to newer trade and investment agreement, it is highly likely that future EU-ASEAN FTA/IPA to include ICS mechanism. EU-Singapore and EU-Viet Nam IPAs were just the starting point of the expansion. Multilateral investment court clauses found in EU-Viet Nam and EU-Singapore IPAs likely to function to enable ASEAN’s participation towards multilateral investment court. This inter-regional approach in the future would ease up the negotiation towards multilateral investment court at the global stage.

However, it is important to keep reminding that up until now there is no empirical success of EU’s ICS because it is still in dormant stage and practically ineffective. Despite the success in negotiating ICS mechanism as a replacement of ordinary ISDS provision in recent IPAs, EU Commission itself still struggling to convince EU Member States about the viability of ICS mechanism. In recent case, CETA was put on provisional entry into force excluding the investment part, this is due to Belgium’s request for an opinion to ECJ with regard to ICS

---

<sup>62</sup> N. Jansen Calamita, ‘The Challenge of Establishing a Multilateral Investment Tribunal at ICSID,’ (2017) 611 ICSID Review 32, 612.

<sup>63</sup> Ghori, (n. 13), 209.

compatibility with EU law.<sup>64</sup> Consequently, Belgium's move delayed the ratification process of CETA in general. Until whole ratification process is completed ICS is a practically dormant paper tiger. This lack of empirical proof and EU's internal disagreement likely to motivate other states to wait and see to decide whether to support and join forces with the ISDS reformist through ICS.

Recent EU's agreement concluded Japan<sup>65</sup> in fact does not feature any ICS provision or any investment protection provisions at all. Investment matter under this agreement is a small part of a chapter titled "Trade in services, investment liberalisation and electronic commerce."<sup>66</sup> Thus, this approach can be seen as the inconsistency of EU's practice to promote ICS as the new mechanism to replace ISDS. It is questionable why EU was able to push the conclusion of ICS with Canada under CETA and pushes the US in TTIP negotiation with regard to ICS mechanism, but entirely excluded Japan. Considering these countries are also like-minded developed state, this inconsistency is such an anomaly of EU practice. Thus, exclusion of ICS with Japan would possible discourage some of ASEAN Member States' engagement with EU in terms of establishment ICS under respective IPAs, even would create doubt about the formation multilateral investment court in the long run.

In addition, some of the technical details of ICS also problematic from the view of developing countries and LDCs. Such as, regarding administration costs, to retain the members of Tribunal, each party shall make a monthly expenditure to cover the retainer fee. It is not known how exactly the amount in EU-Singapore and EU-Viet Nam IPA, but elsewhere in TTIP, it was estimated 2000 Euro per individual per month.<sup>67</sup> This administrative cost would push prospect states to conduct extensive cost and benefit calculation in incorporating ICS

---

<sup>64</sup> IISD, 'Belgium requests CJEU for an opinion on the compatibility of ICS in CETA with EU law' (IISD, 21 December 2017), <<https://www.iisd.org/itn/2017/12/21/belgium-requests-cjeu-for-an-opinion-on-the-compatibility-of-ics-in-ceta-with-eu-law/>> accessed 13 March 2019.

<sup>65</sup> EU-Japan Economic Partnership Agreement, 17 July 2018.

<sup>66</sup> *Ibid.*, Chapter 8.

<sup>67</sup> Ghori, (n. 13) 211.



mechanism or joining multilateral investment court in the future.<sup>68</sup> One huge constraint by developing the country and LDCs in facing ISDS, as expressed by Thailand in UNICTRAL Working Group III is regarding the capacity and financial constraint to face the ISDS litigation.<sup>69</sup> Due to the novelty of the working procedure, developing country and LDCs might also facing difficulties in using ICS mechanism, thus training and capacity building needs to be addressed.<sup>70</sup> So far only two out of ten ASEAN Member States have concluded a bilateral agreement with the EU, these two are indeed exceptional minority. Currently, Indonesia is still in the negotiation process of its own agreement with the EU, yet reception towards ICS proposal remains inconclusive.<sup>71</sup> Thus, from this point we can observe that it would be difficult for the EU to achieve uniform establishment of ICS throughout ASEAN, and consequently the multilateral investment court.

## V. CONCLUSION

Long established ISDS mechanism has been the subject of criticism being impartial, lack of legitimacy, costly and lengthy procedure, small pool of arbitrator, and inconsistent interpretation of rules. Yet, the reform of ISDS was rather slow and gradual. The EU, after gaining constitutional power to participate in the negotiation of international investment agreement, pursued more ambitious trade and investment cooperation with its partners. In its proposal with trading partners, the EU took public inputs and criticism of traditional ISDS mechanism into account. Based on the public input, EU then introduce a novel mechanism labeled as ‘investment court system.’ It features strict rules on standing tribunal members’ qualification and ethical standard, two-tier proceeding to correct the erroneous decision and increase coherence,

---

<sup>68</sup> Catherine Li, “The EU’s Proposal Regarding the Establishment of the Investment Court System and the Response from Asia,” (2018) 943 *Journal of World Trade* 52, 965.

<sup>69</sup> UNCITRAL, (n. 38)

<sup>70</sup> Li (n. 63)

<sup>71</sup> European Commission, ‘Report of the 5th Round of Negotiation for a Free Trade Agreement between EU and Indonesia’ < [http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc\\_157137.pdf](http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157137.pdf)> accessed 8 March 2019.

enhanced transparency, and third-party access.

This proposal began to be realised, incorporated within the texts of economic partnership agreement and investment protection agreement with EU's trading partners, a couple of them are Singapore and Viet Nam. These agreements serve as the working prototype of ICS in reality, with EU's final aim is to establish a multilateral investment court to replace current arbitrators-ruled ISDS mechanism. In this paper, I have explained that the inter-regional cooperation of ASEAN and the EU could serve as a stepping-stone towards realising multilateral investment court. The EU regards ASEAN as a strategic partner in its external economic policies, and two of EU IPAs with the ASEAN Member States have established the ICS. The next step needed is to enlarge the participation of ASEAN Member States in making multilateral investment court. EU-Viet Nam and EU-Singapore have a clause that would enable the creation of multilateral investment court.

However, the challenges of such expansion coming from EU's internal dynamics as well as other's state status quo attitude of developing states. Belgium's political move in asking an Opinion to ECJ delayed overall ratification process of CETA, causing ICS to remain non-operational. Recent conclusion of EU-Japan Comprehensive Economic *sans* any ICS or ISDS mechanism demonstrated the inconsistency of EU approach in promoting its ISDS reform agenda by ICS. We could also point out that so-called ICS is a dormant paper tiger, the absence of practical experience and lesson learned would be the biggest hindrance towards multilateral investment court. Without the empirical proof on how the mechanism would work practically, other prospective EU's partners, including ASEAN Member States, which comprises of developing the country and LDCs could be skeptical about the agenda. One of the main constraint of developing and LDCs are capacity and financial constraint in engaging in ISDS proceeding, without addressing this constrain, any reform is not really attractive. Thus, in order to chase further expansion of multilateral investment court, the EU must settle its own internal problem with ICS, and create an inclusive framework for developing and LDCs to work with its novel proposal on investment dispute mechanism.

## REFERENCES

### Articles

- Calamita, N. J. 'The Challenge of Establishing a Multilateral Investment Tribunal at ICSID,' (2017) 611 ICSID Review 32.
- Cremona, M. 'Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017' (2018) 231 European Constitutional Law Review 14.
- Crockett, A. 'The Termination of Indonesia's BITs: Changing the Bathwater, but Keeping the Baby?' (2017) 836 The Journal of Investment and Trade 18.
- Dickson-Smith, K. D. 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Mode' (2016) 773 Journal of World Investment & Trade 17.
- Ghori, U. 'The International Investment Court System: The Way Forward for Asia,' (2018) 205 *International Trade & Business Law Review* 21.
- Jusoh, S., Abd Razak, M.F., Mazlan, M.A. 'Malaysia and Investor-State Dispute Settlement: Learning From Experience' (2017) 890 Journal of World Investment and Trade 18, 916.
- Lai, Adrian. 'ISDS Reform Conference: Mapping the Way Forward Discussion Paper for the Session on Appointment of Arbitrators and Related Issues' (ISDS Reform Conference – Mapping the Way Forward, Hong Kong, 13 February 2019)
- Li, C. "The EU's Proposal Regarding the Establishment of the Investment Court System and the Response from Asia," (2018) 943 Journal of World Trade 52
- Losari, J. J. & Ewing-Chow, M. 'Regional Considerations - Reflective or Reactionary? Indonesia's Approaches to International Investment Agreements and Recommendations for the Future,' (2015) *Transnational Dispute Management* 12.
- Price, D. 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?' (2017) 124 *Asian Journal of International Law* 7.
- Reinisch, A. 'The EU on the Investment Path, Quo Vadis Europe: The Future of EU BITs and Other Investment Agreements' (2013) 111 *Santa Clara Journal of International Law* 12.
- Schill, S. W. 'Reforming Investor-State Dispute Settlement: Conceptual Framework and Options for the Way Forward' *E15 Task Force on Investment Policy Think Piece*, July 2015.
- Titi, C. 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead,' (2016) *Transnational Dispute Management* 1.
- UNCTAD, *Improving Investment Dispute Settlement: UNCTAD Policy Tools*, IIA Issue Note, issue no. 4, November 2017.

### Laws

- ASEAN Comprehensive Investment Agreement
- Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and Its Member States
- Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2004) UNTS 54749 (Mauritius Convention)

- The Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation (ASEAN-India)
- The Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part
- The Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part
- Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 of 17 December 2007.

### **Decision**

ECJ, Opinion 2/15 of the Court, ECLI:EU:C:2017:376

### **Websites**

- Cecilia Malmström, ‘A Multilateral Investment Court: a contribution to the conversation about reform of investment dispute settlement’ (European Commission, 22 November 2018), <[http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc\\_157512.pdf](http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf)> accessed 8 March 2019.
- European Commission, ‘Concept Paper: Investment in TTIP and beyond – the path for reform’ <[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)> accessed 12 March 2019
- European Commission, ‘Overview of FTA and other Trade Negotiations,’ <[http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)> accessed 8 March 2019.
- European Commission, ‘Report of the 5th Round of Negotiation for a Free Trade Agreement between EU and Indonesia’ <[http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc\\_157137.pdf](http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157137.pdf)> accessed 8 March 2019.
- European Commission, ‘The Transatlantic Trade Investment Partnership: Making Trade Work for You,’ <<http://ec.europa.eu/trade/policy/in-focus/ttip/>> accessed 8 March 2019
- European Union External Action, ‘ASEAN-EU Action Plan 2018-2022’ <[https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting\\_en](https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting_en)> accessed 8 March 2019.
- European Union External Action, ‘Joint statement of the 22nd EU-ASEAN ministerial meeting’ (European Union External Action, 22 January 2019) <[https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting\\_en](https://eeas.europa.eu/headquarters/headquarters-Homepage/56912/joint-statement-22nd-eu-asean-ministerial-meeting_en)> accessed 8 March 2019.
- European Union, ‘Submission of the European Union and its Member States to UNCITRAL Working Group III,’ (18 January 2019) <[http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157631.pdf](http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf)> accessed 12 March 2019.
- ICSID, ‘ICSID Rules and Regulations Amendment Process,’ <<https://icsid.worldbank.org/en/amendments>> accessed 8 March 2019.
- IISD, ‘Belgium requests CJEU for an opinion on the compatibility of ICS in CETA with EU law’ (IISD, 21 December 2017), <<https://www.iisd.org/itn/2017/12/21/belgium-requests-cjeu-for-an-opinion-on-the-compatibility-of-ics-in-ceta-with-eu-law/>> accessed 13 March 2019.
- IISD, ‘Venezuela’s Withdrawal From ICSID: What it Does and Does Not Achieve’

(IISD, 13 April 2012) <<https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>> accessed 8 March 2019.

Juwana, H. 'Indonesia Should Withdraw from the ICSID!' (Jakarta Post, 2 April 2014) <[www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html](http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html)> accessed 14 March 2019.

UNCITRAL, 'Possible reform of Investor-State dispute settlement (ISDS) Comments by the Government of Thailand A/CN.9/WG.III/WP.147

UNCTAD, 'Investment Policy Hub' <<https://investmentpolicyhub.unctad.org>> accessed 8 March 2019