TRENDS IN INVESTOR-STATE DISPUTE SETTLEMENT IN THE ASIA PACIFIC: REASSESSING THE ROLE OF ASIAN INTERNATIONAL ARBITRATION CENTRE (AIAC)

by

DATUK SUNDRA RAJOO[1]

INTRODUCTION

The profile of international transactions in South East Asia has no doubt owed its existence to the development of trade and investment throughout the region. This 'Golden Asian Era' of growth began to find its roots in the late 20th Century and has continued relentlessly into the 21st Century, as evidenced by the influx of foreign and domestic investments within the region.

Such tremendous development in an increasing globalised world has induced deep and significant changes in South East Asian countries' policies regarding foreign investments.

For example, the multiplication of international investments agreements is particularly insightful. These agreements date back to the 1960s and aim to create a neutral legal environment conducive to foreign investments, notably by setting up a framework for the settlement of investor-state disputes and ensuring that commitments that countries have made to one another to protect mutual investments are respected. Today there are more than 2,900 international investment agreements containing investor-state dispute settlement ('ISDS') provisions.[2]

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1 President, Asian Institute of Alternate Dispute Resolution (AIADR), Certified International ADR Practitioner (AIADR) (2019 to date), Chartered Arbitrator (CIArb) (1999 to date), Advocate & Solicitor (Non-Practising). Architect and Town Planner, Director, Asian International Arbitration Centre (2010–2018), Chairman, Asian Domain Name Dispute Resolution Centre (2018), Deputy Chairman, FIFA Adjudicatory Chamber (2018), Member of the Monetary Penalty Review Committee under the Financial Services Act 2013 (2014–2019), President, Chartered Institute of Arbitrators (2016), President, Asian Pacific Regional Arbitration Group (APRAG)(2011), Founding President, Society of Construction Law Malaysia, Founding President, Malaysian Society of Adjudicators, Founding President, Sports Law Association of Malaysia.

2 Investment Treaties (*International Institute for Sustainable Development*), http://www.iisd.org/investment/law/treaties.aspx accessed 4 May 2020.

Behind this trend, the International Centre for Settlement of Investment Disputes ('ICSID') has played a significant role. ICSID is the leading arbitration institution whose purpose is to facilitate alternative dispute resolution ('ADR') between foreign investors and states. Established in 1966 by the Convention on the Settlement of Investment Disputes between states and Nationals of Other States (the 'ICSID Convention' or 'Washington Convention') under the auspices of the World Bank, the ICSID Convention counts over 150 countries as members.[3]

Since their emergence, ISDS mechanisms have met with a resounding success. One of the most striking testaments to this success is the steady increase in the number of investor-state arbitrations over the past several years.

However, over the past decade an increasing sceptical attitude of states towards ISDS mechanisms is palpable. One of the recurring themes in the current debate around investor-state dispute settlement clauses is that they are tools of crafty multinationals or big capitalist investors looking to dictate policy to governments or impede their sovereign regulatory power.

The overall consensus that this article intends to draw out would be the discernible shift in the approach to ISDS whose culmination is the noteworthy *Philip Morris v Australia* case and whose repercussions extend to South East Asian waters and beyond.

Focus will also be on the debates surrounding the inclusion of ISDS clauses in major Free Trade Agreements ('FTAs') such as the Trans-Pacific Partnership Agreement ('TTPA') under negotiation between several groups of states in the region and Bilateral Investment Treaties ('BITs') more broadly.

The discussion reveals that ISDS mechanisms are also making headline news around the world, and particularly in Europe within the context of the now not so successful attempt a trade pact, namely, the Transatlantic Trade and Investment Partnership ('TTIP').

Building on the Asian International Arbitration Centre example, the article finally examines the role of Asian arbitral institutions have played so far in promoting ISDS in the region and in fostering the trust and confidence of states and investors in ISDS mechanisms as a response to the growing tense climate.

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3 International Centre for Settlement of Investment Disputes | ICSID Arbitration (*International Arbitration Law*) http://www.internationalarbitrationlaw.com accessed 4 May 2020.

OVERVIEW OF THE *PHILIP MORRIS* CASE AGAINST AUSTRALIA

The *Philip Morris v Australia* case is one of the main chapters of a long running saga and legal battle initiated by one of the biggest players in the international tobacco industry.

Following a first pending case started on February 2010 against Uruguay,[4] a second case won against the Thai Government[5] and a third case lost against Norway in 2012,[6] Philip Morris' action against Australia stands testament to the company's ambition to hinder states from adopting restrictions targeting the tobacco industry.

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4 The company brought its claim before ICSID under the Switzerland-Uruguay BIT. It claims that Uruguay's regulatory measures violated the investment protection agreement signed in 1991 between Uruguay and Switzerland, where Philip Morris is headquartered. Specifically, Philip Morris complained about three measures imposed by Uruguay: (1) an increase in the size of health warnings on cigarette packets from 50% of the total pack size to 80%; (2) the design of six messages that will fill the 80% space; and (3) a regulation that forces companies to sell only one variation of cigarettes per brand. For more information: Jim Armitage, 'Big Tobacco puts countries on trial as concerns over TTIP deals mount' (*The Independent*, 21 October2014), http://www.independent.co.uk/ accessed 2 September 2015.

5 In June 2013, Philip Morris International and The Thai Tobacco Trade Association (TTTA), which represents 1,400 retailers across the Kingdom, sued the Thai government over a new anti-tobacco regulation that required the area covered by graphical health warnings on cigarette packs be increased from 55% to 85% on each side. In August of the same year, the court ordered suspension of the government's 2nd October deadline to implement the new rule until it reaches a decision on the pending litigation. For more information: Khettiya Jittapong, Jason Szep & Michael Perry, 'Thailand to appeal after Philip Morris wins tobacco case' (*Reuters*, 28 August 2013), http://www.reuters.com/article/2013/08/28/us-thailand-tobacco-philipmorris-idUSBRE97R0AB20130828 accessed 10 September 2015.

6 Philip Morris sued Norway before the Oslo District Court, alleging that the Norwegian ban on tobacco advertising, which included a prohibition on visual product displays in retail locations, was incompatible with the European Economic Area Agreement (EEA). Accordingly, quantitative restrictions on imports and measures having the same effect are prohibited unless they are justified by non-arbitrary and non-discriminatory public health grounds. Prior to issuing an opinion in the case, the district court requested two preliminary rulings from the Court of Justice of the European Free Trade Association States (EFTA) Court. The EFTA Court determined that if the ban did not affect the tobacco products manufactured in Norway as much as it affected the tobacco products imported from other EEA States, the ban would be incompatible with the EEA. Further, the EFTA Court declared that the district court would have to decide whether Norway's ban was necessary — that Norway's legitimate health objective of reducing tobacco use could not be achieved by measures less restrictive than a tobacco product display ban.
For more information: 'Philip Morris Loses Tobacco Lawsuit against Norway' (*The Norway* Page, 14 September 2012), http://www.tnp.no/norway/panorama/3204-philip-morris-loses-tobacco-lawsuit-against-norway accessed 2 September 2015.

The *Philip Morris v Australia* case is the first investor-state dispute that has been brought against Australia.

Philip Morris Asia ('PMA') is a company incorporated in Hong Kong and is the regional command post of the Philip Morris International group of companies for the Asia Region since 1984.[7]

PMA holds all of the shares of the Australian branch of the group, Philip Morris Australia ('PM Australia'),[8] which in turn owns all of the shares of Philip Morris Ltd ('PML'), a trading company incorporated in Australia, whose corporate purpose is the manufacturing, import and export, sale, marketing and distribution of tobacco products within Australia, New Zealand the Pacific Islands.[9]

On 1st December 2011, the Australian government passed the *Tobacco Plain Packaging Act 2011* ('the Act').[10] The Act forms a range of tobacco control measures aiming at making tobacco products less attractive to consumers in Australia. The Act requires notably that all tobacco products sold in Australia were to be sold in plain packaging from 1 December 2012. In concrete terms, the Act obliges players in the tobacco market to cover a substantial portion of their products with health warnings and prohibits all logos, visual specificities along with different colouring and layout on cigarette packs.

Following UK's and New Zealand's winding attempts to adopt similar restrictions for cigarette packaging,[11] Australia was the first country to implement such measures.[12]

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7 Pmi.com, 'Philip Morris International Hong Kong', http://www.pmi.com/marketpages/pages/market_en_hk.aspx accessed 2 September 2015.

8 Pmi.com, 'Philip Morris International Australia', http://www.pmi.com/marketpages/pages/market_en_au.aspx accessed 2 September 2015.

9 'Philip Morris (Australia) Limited — Retail' (*IBIS Word*), http://www.ibisworld.com.au/enterprisefull/default.aspx?entid=94 accessed 2 September 2015.

10 Tobacco Plain Packaging Act 2011 (No 148, 2011).

11 Hannah Kuchler, Jim Pickard & Duncan Robinson, 'UK government abandons plain cigarette packaging plan' (*Financial Times*, 2013) http://www.ft.com/intl/cms/s/0/d44ff478-b2ff-11e2-b5a5-00144feabdc0.html accessed 10 September 2015). Howard Schneider, 'Australia 'plain packaging' stubs out cigarette branding, prompting backlash' (*Washington Post*, 29 October 2013), http://www.washingtonpost.com/business/economy/australias-plain-packaging-stubs-out-cigarette-branding-prompting-backlash/2013/10/29/317e58cc-3ccd-11e3-a94f-b58017bfee6c_story.html accessed 10 September 2015).

12 'Philip Morris Launches Legal Battle Over Australian Cigarette Packaging' (*Bridges* Volume 15 - Number 24, 29 June 2011, http://www.ictsd.org/bridges-news/bridges/news/philip-morris-launches-legal-battle-over-australian-cigarette-packaging accessed 2 September 2015).

Building on the provisions of the agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments ('the Hong Kong agreement'),[13] PMA challenged the Australian tobacco plain packaging legislation.

The two main grounds of PMA's challenge were article 2(2) relating to the parties' commitment to give the other party's investors fair and equitable treatment, and article 6, which addresses the issue of expropriation.

The arbitral tribunal that has been constituted is composed of three prominent arbitrators. PMA appointed Professor Gabrielle Kaufmann-Kohler, while Australia appointed Professor Don McRae of the University of Ottawa. The Secretariat of the Permanent Court of Arbitration appointed Professor Dr Karl-Heinz Böckstiegel as the chair arbitrator.

The arbitration is being conducted under the United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules 2010.

In its Notice of Arbitration, PMA has raised a number of arguments. As already mentioned, PMA alleged that the Australian measure constitutes an expropriation of its Australian investments that is inconsistent with Australia's obligations under the Hong Kong Agreement.

The Claimant further argued that those new restrictions are in breach of the respondent's commitment to accord fair and equitable treatment to Philip Morris Asia's investments in the light of article 2(2) of the investment agreement. In addition, the company asserted that the new legislation constitutes an unreasonable and discriminatory measure, violating their trademarks and intellectual property rights, and would make it difficult for consumers to distinguish cigarette brands from one another.[14]

Concluding its notice of arbitration, PMA sought the suspension of the enforcement of the legislation and compensation for the loss suffered through compliance of the legislation; or the compensation for loss suffered as a result of the enactment and continued application of the legislation.

Australia, on the other hand, argued that those restrictions do not breach the Hong Kong agreement as they are just part of a reasonable approach to

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13 Agreement between the Government of Australia and the Government of Hong Kong concerning the Promotion and Protection of Investments [1993] ATS 30.

14 Notice of Arbitration — Philip Morris Asia, (21 November 2011). http://www.ag.gov.au/

public health issues raised by tobacco consumption in Australia. By adopting those measures, Canberra alleged that the government's simply exercised its legitimate regulatory powers with the aim of protecting the health of its citizens.[15]

Besides, the Australian government raised three procedural objections relating to the admission of the claimed investments and an abuse of process and claimant's legal ownership of key assets including cigarette trademarks.[16] Canberra requested that its procedural objections be heard in a preliminary phase of the proceedings, prior to any consideration of the merits of PMA's claim.

In a decision on bifurcation, the arbitral tribunal decided that the Respondent's first and second procedural objections should be examined in a sole preliminary phase and ruled that the analysis of the third objection shall be reserved to an eventual merits phase.[17]

The arbitral tribunal agreed to the procedural objections raised by the Respondent.[18] PMA not only lost but was criticised by the Arbitral Tribunal which found the case to be 'an abuse of rights'.

The Philip Morris' collateral effects are far reaching. Apart from Australia's attitude change towards ISDS, this case has influenced the negotiations surrounding major FTAs and by way of consequence, investor-state dispute settlement mechanisms.

IN THE CONTEXT OF NEGOTIATION OF THE TRANS-PACIFIC PARTNERSHIP AGREEMENT ('TPPA') AND BILATERAL INVESTMENT TREATIES ('BITS')

Philip Morris' legal battles have changed the landscape of investor-state arbitration. The Australian chapter of the saga, whose bill for the country

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15 Response to Notice of Arbitration — Australia, (21 December 2011). http://www.ag.gov.au/.

16 Philip Morris Asia Challenge (*Mccabecentre.org*, 2015), http://www.mccabecentre.org/focus-areas/tobacco/philip-morris-asia-challenge accessed 2 September 2015).

17 Luke Eric Peterson, 'Latest developments in the Philip Morris arbitrations against Australia and Uruguay' (*Investment Arbitration Reporter*, 12 February 2015) http://www.sfc.org.nz/documents/263-latest.pdf.

18 *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12 | (*italaw*, 2015) http://www.italaw.com/cases/851 accessed 2 September 2015).

reached about USD50m[19] has significantly impacted its international relations and attitude towards investor-state dispute resolution mechanisms.

In the wake of Philip Morris' notice of arbitration, Australia announced that it would no longer include investor-state arbitration provisions in its future international treaties.[20]

In its statement, the Australian Government noted that the greater legal rights granted by international treaties to foreign investors are unfair for local business which cannot benefit from the protection deriving from such instruments. It has also noted that such dispute resolution mechanisms have gutted the country's legitimate right to determine its own public policy, and by way of consequence its sovereignty.[21]

Indeed, opponents of ISDS provisions argue that such clauses effectively undermine free trade, by giving an unfair advantage to global corporations who can dictate legislation and cement their market power.[22]

As one concrete illustration of the Australia's rejection of investor-state arbitration, the Australia-Malaysia Free Trade Agreement ('MAFTA'), which entered into force on 1 January 2013, contains no investor-state dispute settlement provisions, but limits itself to establish a dispute resolution mechanism for inter-state disputes.[23]

In this respect, Chapter 20 of MAFTA establishes a process for consultations and for settlement of disputes between contracting states but it does also specify that its scope does not extend to disputes arising from Chapters on Sanitary and Phytosanitary Measures, the Chapter on Electronic Commerce, the Chapter on Economic, technical co-operation and the Chapter on Competition policy.

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19 Glyn Moody, 'Australia's Legal Bill For Fighting Philip Morris Corporate Sovereignty Case: $35 million — So Far' (*Techdirt*, 5 August 2015) http://www.techdirt.com/ accessed 2 September 2015.

20 Australian Government, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity spec. 14 and seq. (2011).

21 *Ibid*, p 14.

22 For illustration: Finbarr Bermingham, 'Meet the Aussie politicians hoping to derail TPP' (*Global Trade Review*, 17 June 2015) http://www.gtreview.com/news/asia/australia-tpp-opponents/ accessed 10 September 2015.

23 Malaysia-Australia Free Trade Agreement (MAFTA), entered into force on 1 January 2013.

The Chapter sets out procedures and timelines for consultations and if they are unsuccessful, it also provides for arbitration. The Chapter then provides for implementation of the findings of such arbitral tribunal.

The Chapter also contains commitments on non-violation complaints, which will provide for consultations between the Parties in the event that any measures are taken by a contracting state, which, while not inconsistent with MAFTA, have the effect of nullifying and impairing benefits that could reasonably have been expected to accrue to the other Party. Should the Parties not be able to resolve the matter through consultations, the matter may be referred to the FTA Joint Commission, which may meet at Ministerial level.

The Australian intelligentsia also expressed its concerns about the impact of ISDS provisions on the Australian judicial system and the country's sovereignty. Robert French, Chief justice of the High Court of Australia, expressed the following views in the *Eli Lilly v Government of Canada* case:[24]

> After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treaty agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law?[25]

Likewise, in the context of negotiation of the TPPA, Australia is resisting other prospective parties' requests to include such kind of provisions in the instrument,[26] and is raising numerous restrictions and exceptions to the application of a dispute resolution clause.[27]

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24 *Eli Lilly and Company v The Government of Canada*, UNCITRAL, ICSID Case No UNCT/14/2 — See more at: http://www.italaw.com/cases/1625#sthash.jJtWkUY8.dpuf.

25 Melissa Parke, 'Why support the TPP when it will let foreign corporations take our democracies to court?' (*The Guardian*, 29 October 2014), http://www.theguardian.com/commentisfree/2014/oct/29/why-support-the-tpp-when-it-will-let-foreign-corporations-take-our-democracies-to-court accessed 2 September 2015.

26 'Leaked TPPA trade chapter: Australia says no to investor rights to sue, fair trade groups demand release of all text' (*Australian Fair Trade & Investment Network Ltd*, June 2012), http://aftinet.org.au/cms/trans-pacific-partnership-agreement/leaked-tppa-trade-chapter-australia-says-no-investor-rights-sue- accessed 2 September 2015.

27 Tom Iggulden, 'Trans-Pacific Partnership opposition blamed on dispute clauses' (*ABC News*, 31 March 2015), http://www.abc.net.au/news/2015-04-01/transpacific-partnership-why-so-much-opposition/6363326 accessed 2 September 2015.

There is then a question whether other countries will follow Australia's attitude and join the backlash and the answer is seemingly yes.

Within the framework of negotiation of the TPPA, other countries have expressed reluctance to the inclusion of ISDS provisions,[28] notably New Zealand,[29] Mexico,[30] Chile[31] and Canada,[32] in such a way that the current version of the draft dispute resolution clause is surrounded by numerous exemptions.[33]

On a wider scale, a shift in the attitude of a certain number of states towards investor-state arbitration is perceptible.

A number of countries beyond the Pacific waters are actively reconsidering their exposure to these processes. One may say that Australia is setting a trend, but more likely, the country is following a trend that finds its roots in the beginning of the second millennium.

In Latin America, Bolivia withdrew from the ICSID Convention in 2007, then in July 2009, Ecuador in turn announced its withdrawal from the ICSID Convention;[34] example followed by Venezuela in 2012, which has also

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28 Henry Farell, 'People are freaking out about the Trans Pacific Partnership's investor dispute settlement system. Why should you care?' (*Washington Post*, 26 March 2015), http://www.washingtonpost.com/ accessed 2 September 2015.

29 Liam Hehir, 'Concerns about redress overstated' (*Stuff*, 20 July 2015), http://www.stuff.co.nz/national/politics/opinion/70360101/concerns-about-redress-overstated accessed 2 September 2015

30 Symone Sanders & Lori Wallach, 'TPP Leak Reveals Extraordinary New Powers for Thousands of Foreign Firms to Challenge U.S. Policies and Demand Taxpayer Compensation' (*Public Citizen*, 25 March 2015), http://www.citizen.org/documents/tpp-investment-leak-2015-release.pdf accessed 2 September 2015.

31 Greg Grandin, 'Never Mind ISIS, It's ISDS That's the Real Threat' (*The Nation*, 11 November 2014), http://www.thenation.com/article/never-mind-isis-its-isds-thats-real-threat/ accessed 2 September 2015.

32 Scott Sinclair & Stuart Trew, 'The implications for Canada of a fast-tracked Trans-Pacific Partnership' (*Canadian Centre for Policy Alternatives*, 4 June 2015), http://www.policyalternatives.ca accessed 2 September 2015.

33 'Sovereignty at stake? Wikileaks releases draft TPPA chapter on investment' (*Cut Your Teeth*, 2015), http://cutyourteeth.co/2015/03/27/sovereignty-at-stake-wikileaks-releases-draft-tppa-chapter-on-investment/ accessed 2 September 2015.

34 Tolga Yalkin, 'Ecuador Denounces ICSID: Much Ado About Nothing?' (*Ejiltalk.org*, 30 July 2009), http://www.ejiltalk.org/ecuador-denounces-icsid-much-ado-about-nothing/ accessed 2 September 2015.

signalled its intention to terminate its existing BITs.[35] Argentina, facing claims totalling USD65 billion, announced in early 2013 that it would withdraw from the ICSID Convention.[36]

Nicaragua has passed legislation to avoid investment arbitration.[37] Romania attempted to withdraw from the Swedish-Romanian BIT, while the Philippines negotiated to exclude investment arbitration in its free trade treaty with Japan in 2007.[38] In South Africa, the Government Cabinet decided to stop negotiating new BITs and to re-negotiate existing ones.[39]

Recently, India started a review of its existing BITs and suspended all BIT negotiations to protect itself from frivolous litigation.[40]

A palpable increasing phenomenon is also noticeable in South East Asia, close to Malaysia's borders. After having terminated the BIT with Germany in 2014, Indonesia announced on 12 May 2015 its intention to renegotiate its BITs with the aim of providing greater certainty and balance both to foreign companies carrying out business in Indonesia and to the Indonesian

35 Sergei Ripinsky, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve' (*Investment Treaty News*, 13 April 2012), http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/ accessed 2 September 2015.

36 Daniel E González et al., 'If Argentina withdraws from the ICSID convention: implications for foreign investors' (*Lexology*, 4 February 2013), http://www.lexology.com/library/detail.aspx?g=080c79bc-cce7-485f-97aa-27a5b2bdec5c accessed 10 September 2015.

37 Scott Appleton, 'Latin American arbitration: the story behind the headlines' (*International Bar Association*, 31 March 2010) http://www.ibanet.org/Article/Detail.aspx?ArticleUid=78296258-3B37-4608-A5EE-3C92D5D0B979 accessed 2 September 2015.

38 Leon Trakman, 'Investor State Arbitration or Local Courts: Will Australia Set a New Trend?' (2012) 46 Journal of World Trade 83-120 http://law.bepress.com/cgi/viewcontent.cgi?article=1333&context=unswwps-flrps12.

39 'South Africa begins withdrawing from EU-member BITs' (*Investment Treaty News*, 30 October 2012), http://www.iisd.org/itn/2012/10/30/news-in-brief-9/ accessed 10 September 2015.

40 Kavaljit Singh of Madhyam, 'Guest post: India and bilateral investment treaties – are they worth it?' (*Financial Times*, 2015), http://blogs.ft.com/beyond-brics/2015/01/21/guest-post-india-and-bilateral-investment-treaties-are-they-worth-it/ accessed 10 September 2015.

government.[41] It also highlighted its intention to narrow the dispute resolution clauses' scope and to alleviate the protection granted to foreign investors under those treaties.[42]

Some observers note that this recent trend in the developing countries finds its roots in the growth of their economies that allows them to share the same playground as established economies and, by way of consequence, to renegotiate or reject the international treaties they have signed when their economies were just starting to flourish.

Another common critic to ISDS, and that explains the frustration of a growing number of emerging countries, is the developed-countries based framework: on one hand, the main investment arbitration institutions are based in developed countries, so are the vast majority of key players such as arbitrators and counsels. Indeed, it has been reported that only 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes in the world.[43]

With regard to Malaysia, so far, the government's attitude towards investor-state arbitration is much more friendly. Malaysia has signed more than 70 BITs and the vast majority of them provide for arbitration as one of the dispute settlement procedures available to foreign investors.

Malaysia is also a signatory to the ICSID Convention[44] and enacted the Convention on the Settlement of Investment Disputes Act in 1966.[45]

Malaysia is also a signatory of the Comprehensive Investment Agreement that was signed by the members of the Association of Southeast Asian Nations in 2009 ('the 2009 ASEAN Agreement'). It is worth mentioning that section B of the said agreement provides for the resolution of investment disputes

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41 Out-law.com, 'Indonesia 'to renegotiate investment treaties', says economic minister' (*Pinsent* Masons, 20 May 2015), http://www.out-law.com/en/articles/2015/may/indonesia-to-renegotiate-investment-treaties-says-economic-minister/ accessed 10 September 2015.

42 John Lumbantobing, 'Renegotiating the bite of our BITs' (T*he Jakarta Post*, 18 May 2015), http://www.thejakartapost.com/news/2015/05/18/renegotiating-bite-our-bits.html accessed 2 September 2015.

43 Martin Khor, 'Fuelling an Investment Arbitration Boom' (*IDN-InDepthNews*, 2013), http://www.indepthnews.info/index.php/global-issues/1702-fuelling-an-investment-arbitration-boom accessed 2 September 2015.

44 Signature (22 Oct 1965); Deposit of Ratification (8 August 1966).

45 (Act 392).

between an investor and a member state. In particular, article 33 the same section allows for such disputes to be referred, inter alia, to the AIAC.

In the discussions on major FTAs, notably the TPPA, Malaysia's position has been on the whole supportive of the inclusion of an ISDS clause in the treaty.[46] However, it does not mean that the ISDS is not a controversial issue in Malaysia. Indeed, several business, professional and public-interest groups exert pressure on the government aiming to exclude ISDS from the TPPA negotiations.[47]

In the light of the words of the then Prime Minister of Malaysia, investment policy and ISDS are one of the issues in the TTPA that may impinge on national sovereignty.[48]

Nevertheless, Putrajaya said yes to the inclusion of the ISDS clause in the treaty.[49]

THE DEFUNCT TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP ('TTIP')

The discussions surrounding the now defunct TTIP, a major international trade and investment agreement between the United States and the European Union ('EU') mark the culmination of the increasingly sceptical attitude of EU Member States and more strikingly the EU, which handles trade policy for 28 European Countries, towards ISDS mechanisms.

On 8 July 2015, while debates and negotiations relating to the agreement were raging, the European Parliament voted favourably on a non-binding resolution that aims to remove investor-state arbitration from the TTIP.[50] As an alternative, the European Parliament moved towards:

> [A] new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny where potential cases are treated in

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46 Sheridan Mahavera, 'Putrajaya okay with investor-state dispute clause in trade pact, says DAP lawmaker' (*The Malaysian Insider*, 2015), http://www.themalaysianinsider.com/malaysia/article/putrajaya-okay-with-invester-state-dispute-clause-in-trade-pact-says-dap-la accessed 10 September 2015.

47 Martin Khor, 'Investor treaties in trouble' (*The Star*, 24 March 2014), http://www.thestar.com.my/ accessed 11 September 2015.

48 *Ibid*.

49 Sheridan Mahavera, op. cit.

50 Robin Emmott, 'EU lawmakers back arbitration in U.S. trade deal' (*Reuters*, 28 May 2015), http://www.reuters.com/article/2015/05/28/eu-usa-trade-idUSL5N0YJ25120150528.

> a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.[51]
>
> ISDS is dead. It must be replaced by a new public and transparent system of investment protection, in which private interests cannot undermine public policy and which is subject to public law.[52]

Although the European Parliament in not involved in the TTIP negotiations, a final agreement would be impossible to reach without its prior approval. By drawing up recommendations on the TTIP, the European Parliament sends a clear message on what it wants to see in the final version of the agreement.

Another addition to the hot debate on the ISDS issue has to be mentioned. Matthias Fekl, the French Minister of Foreign Trade, submitted to the European Commission a comprehensive set of proposals regarding the ISDS mechanism that was inserted in the previous version of the draft.[53]

The measures proposed by the Minister included provisions aiming to safeguard and ensure states' legitimate power to decide on their public policy as to regulate, and states' power to sanction foreign investors for violation of national legislation or regulation; and above all, the creation of an European permanent court for investment arbitration that would have jurisdiction over arbitrations against the EU or EU Member States.[54]

Although this proposal did not encounter the success that was hoped by its initiators, it can be argued that it echoes the perceptible shift in developed

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51 European Parliamentary Research Service, 'TTIP: EP recommendations for an EU-US trade deal' (*European Parliament Research Service Blog*, 14 July 2015), http://epthinktank.eu/2015/07/14/ttip-ep-recommendations-for-an-eu-us-trade-deal/ accessed 2 September 2015.
Text of the resolution: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN.

52 Aline Robert, 'European Parliament backs TTIP, rejects ISDS' (*EurActiv*, 9 July 2015), http://www.euractiv.com/sections/global-europe/european-parliament-backs-ttip-rejects-isds-316142 accessed 2 September 2015.

53 Cécile Barbière, 'Matthias Fekl: 'The EU should have its own arbitration court' ' (*EurActiv*, 3 June 2015), http://www.euractiv.com/sections/eu-priorities-2020/matthias-fekl-eu-should-have-its-own-arbitration-court-315073 accessed 2 September 2015.

54 Athina Fouchard Papaefstratiou, 'TTIP: The French Proposal For A Permanent European Court for Investment Arbitration' (*Kluwer Arbitration Blog*, 22 July 2015), http://kluwerarbitrationblog.com/blog/2015/07/22/ttip-the-french-proposal-for-a-permanent-european-court-for-investment-arbitration/.

states' policies and attitude towards investor-state arbitration, to such an extent that some observers wonder if the end of the era of investment treaties and investment arbitration has come.

Throughout the discussions, Germany has also expressed its concerns through its Economy Minister, Brigitte Zypries: 'From the perspective of the [German] federal government, US investors in the European Union have sufficient legal protection in the national courts', therefore, there is no reason for the inclusion of a ISDS mechanism in the treaty.[55]

In such a tense atmosphere, arbitral institutions may play a key role in rebuilding trust in investor-state arbitration.

THE ROLE OF REGIONAL INSTITUTIONS: THE CASE OF AIAC

The AIAC, a mission based international organisation established under the auspices of the Asian-African Legal Consultative Organisation, has made a point of setting up a comprehensive and efficient framework for investment disputes in South East Asia.

The abiding cooperation between the AIAC and leading institutions devoted to investment dispute settlement stands testament to this.

Since 1979, the AIAC and ICSID have been collaborating partners. The AIAC signed its first collaboration agreement with ICSID in 1979 and this latter agreement has been renewed and updated in 2014. The present agreement supersedes the previous version and further encourages cooperation and knowledge sharing between the two institutions.[56]

In addition to fostering cooperation between the AIAC and ICSID, the agreement provides, inter alia, that the AIAC can be used as an alternative hearing venue for ICSID cases and participate in the administration of cases, should the parties to proceedings conducted under the auspices of ICSID desire to conduct proceedings at the seat of the AIAC. The AIAC was in the process of finalising a similar agreement with the Permanent Court of Arbitration.

Besides the agreements concluded with key institutions in the investment arbitration field, the AIAC is one of the designated venues for settlement of

55 Sheridan Mahavera, op. cit.
56 Icsid.worldbank.org, ICSID News Release (2014), https://icsid.worldbank.org/en/Pages/AllNewsItems.aspx.

disputes that may arise from the 2009 ASEAN Agreement.[57] Indeed, pursuant to Article 33 of the agreement, investors are allowed unilaterally to commence a claim against an ASEAN host state. It also provides for dispute resolution through various fora, including ICSID and the AIAC.

Knowledge sharing and capacity building is also a cornerstone of AIAC's policy with regard to investment arbitration that also aims to restore the trust of the main key players in ISDS.

The AIAC commonly shares with various players, eclectic types of resources and expertise, and cultivates with them a dynamic information and discussion platform through seminars, conferences and numerous other events.

As an illustration, AIAC had conducted workshops to educate legal stakeholders on the workings and advantages of using ICSID as a preferred institution for settlement of investment disputes. It is through such education that both sides in foreign investment will boast greater awareness of their rights and obligations under international law.[58]

CONCLUSION

The ISDS system was designed to create neutral dispute resolution fora for both investors and states and to promote capital exchanges and investments in an increasingly globalised economic world.

Proponents of ISDS state that it benefits nations at every stage of development. It allows states to enhance their attractiveness towards foreign investors while companies can invest safe in the knowledge that, if they end up in a dispute with the host state arising out of their investment, they can take their dispute to a neutral forum that complies with widespread practices and applies international standards. It ensures that foreign companies will be treated on an equal footing with their competitors and that their investments are safeguarded.

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57 ASEAN Comprehensive Investment Agreement (2013), http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf accessed 8 June 2020. Date of adoption: 26 Feb. 2009; Date of entry into force: 29 March 2012.

58 'ICSID 101: ICSID Practice & Current Trends In Investment Arbitration' Asian International Arbitration Centre, 21 November 2014), http://www.aiac.world/news/79/ICSID-101:-ICSID-Practice-&-Current-Trends-In-Investment-Arbitration accessed 8 June 2020.

Today, over 2,900 treaties providing for ISDS mechanisms link numerous countries around the world; they connect emerging countries with developed nations and leading companies with resourceful nations. This multilateral flux of information, technology and capital fostered by investment treaties is crucial for the global economy and each player in this field, states just as well as investors. Proponents opine that such bridges are essential and have to be preserved.

However, opponents say that ISDS mechanisms as in the *Philip Morris v Australia* case have been misused. They insist that it is not random abuse. There is now an element of disquiet in the 'Investment Dispute Resolution Era'. Further developments are to be expected as states opt to settle disputes outside the ISDS system. How these mechanisms will emerge and morph is left to be seen.

Only the future will tell whether the palpable mistrustful state's attitude towards ISDS is volatile and purely the result of a transitory trend or if it is indeed an established and irreversible approach.