Confidentiality versus Transparency of ICSID Arbitration Award: Sustainability of The Quality Practice for Good’s Governance and Investor to Support Public Accountability

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Abstract

ICSID is an arbitration institution of dispute settlement between the ICSID Convention signatory countries (Contracting State) and investor from the other countries who undertake investment activities in its country. Disputes will always involve state action that must be accountable to its citizens. This paper issue relate with the confidentiality of the arbitration award. Stressing on the lack of transparency arbitration award will weaken the accountability of government to its citizens. If the arbitration award involving a state being kept confidential from public access, then can violate the sustainability of the quality practice of good’s governance and investor.

Keywords: confidentiality, transparency, ICSID arbitration award, good’s governance principle, public accountability

1. Introduction

Arbitration is generally recognized as confidential nature of the arbitration award. However, the award results were kept in the ICSID arbitration that involving a State and investors from other countries will put aside the good’s governance principle as a form of the State accountability to its citizens. If the International Centre for Settlement of Investment Disputes or namely ICSID arbitration award entirely open and can be accessed by the public, then it will achieve one of the conditions of good’s governance principles and it will develop public knowledge.

Arbitration is a dispute resolution the parties through a third neutral party and agreed upon before or after the onset of the dispute by agreement. Van Houtte (1995) said that settlement of disputes through arbitration is dispute in international trade are not always resolved by court, contracting parties often agree that possible disputes concerning the contract will be settled through arbitration. Then, Garner (1999) in Black’s Law Dictionary state that
arbitration is a method of dispute resolution involving one or more neutral third parties who are agreed to by the disputing parties and whose decision is binding. The notion of “arbitration agreement” now applies both to an agreement to arbitrate future dispute included in a contract and to an agreement to arbitrate entered into by the parties after the dispute has arisen (Naon, et al., 2011).

Arbitration is generally known should be confidential, but now are widely published award. However, the publish award not losing the essence of the confidentiality of arbitration because the parties can make an agreement to keep the confidentiality of the arbitration award or to publish in which they are involved.

The purpose of the publish award is to ensure the objectivity of the judicial examination to account for a fair, impartial, accountable truth and open opportunity of society control. Thus, this article will show that the award be better if in open to the public because of confidentiality award will put aside the good’s governance principle as a form of state accountability to its citizens. This paper will help the government to consider whether the award involving the country must be kept secret or publish to create good’s governance and good regulation for it citizens and investors.

2. The Confidentiality of ICSID Arbitration: Past, Present and Future

Confidentiality of the process of arbitration, as distinct from privacy, relates to the obligations of the parties not to divulge information relating to arbitration in respect of: the existence of arbitration, what is said and done at that arbitration and the documents created by or disclosed in the course of those proceedings (Fesler, 2012).

Confidentiality is naturally inherent in arbitration, contends that the concepts of privacy and confidentiality combine to ensure complete confidentiality, as far as the law will permit. This view asserts that the privacy of arbitration is rendered meaningless if a participant to that arbitration is permitted to divulge that which transpires to a third party otherwise prevented from attending (Tackaberry et al., 2003).

ICSID is an autonomous institution established by the Washington Convention in 1965, under the auspices of the World Bank. The stated purpose of this institution is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. According to ICSID, the core of the Washington Convention was to ease the flow of capitals between nations by: (a) removing barriers to private investment posed by non-commercial [mainly political] risks, and (b) establishing a specialized international method to resolve investment disputes, which did not then exist, thus maximizing microeconomic conditions for capital-exporting countries and entrepreneurs and capital-importing nations. The story of State-investor dispute resolution is one that relates to the process of decision-making that transnational corporations undertake in risk factor analysis when considering whether to invest capital in a particular country (jurisdiction). In this sense, the international community has created a variety of international dispute or resolution methodologies, including the Washington Convention for Settlement of Investment Disputes (“Washington Convention or the ICSID Convention”), and the International Centre for the Settlement of Investment Disputes (“ICSID”), that enable less developed countries (“LDCs”) to signal the Community of Nations, particularly, and perhaps most significantly, capital-exporting countries, that they have embraced a system of protection of foreign direct investments (“FDI”) (Vincentelli, 2010).

Prior to 2006, although not regulated obligations regarding confidentiality. But still any investors and the State governing the confidentiality in their Bilateral Investment Treaty (BITs) before the dispute. Furthermore, in 2006 ICSID amendment their regulation where
The made to ICSID's rules and regulations address (1) the ability of non-parties to intervene in arbitration proceedings and attend hearings; (2) the public disclosure of ICSID awards; (3) the independence of arbitrators and the fees arbitrators can charge; and (4) the ability to use fast-track procedures to obtain interim relief and have groundless claims dismissed (McDougall, 2006).

The ability of non-parties participation in arbitration proceedings and attend hearings has been a longstanding debate as to whether non-parties with an interest in an investment dispute. New Rule 37 of the ICSID Arbitration Rules incorporates amicus curiae ("friend of the court" means a "person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter") practice into ICSID arbitration, subject to certain conditions. Instead of going as far as what was proposed, new Rule 32 of the ICSID Arbitration Rules provides that “unless either party objects” the tribunal, after consultation with ICSID's Secretary-General, may allow non-parties to attend or observe all or part of the arbitration hearings. While explicit consent of the parties is no longer necessary, each party retains a veto right by way of objection to non-parties being allowed to attend.

The other amendment is Rule 48 of the ICSID Arbitration Rules provided that “the Centre may … include in its publications excerpts of the legal rules applied by the Tribunal”. Rule 48 of the ICSID Arbitration Rules has been amended so that the Centre shall promptly include in its publications excerpts of the legal reasoning of the Tribunal. This amendment thus makes publication of ICSID awards mandatory and expands publication from excerpts of the legal rules applied by the tribunal to excerpts of the legal reasoning of the tribunal. In addition, the expanded publication makes ICSID awards, and the reasoning underlying the outcome, more accessible to the public. It also ensures the existence of a body of case law that can be drawn upon to attempt to persuade an ICSID tribunal to reason in a manner consistent with reasoning by other ICSID tribunals. While the decision of one ICSID tribunal is not binding on another, such decisions can be used as persuasive authority and guidance as to how another tribunal has dealt with the same or a similar issue. The amendments demonstrate an effort to improve confidence in the ICSID arbitration process and to make it less private and confidential.

Confidentiality has been the myth of Alternative Dispute Resolution (ADR), especially arbitration (Reuben, 2006). Confidentiality has varied meanings. Confidentiality in arbitration refers to the state of having the dissemination of certain information restricted. Confidentiality in arbitration shows the confidentiality of information about the process and the award. In this paper we will discuss only confidentiality of arbitration award.

Confidentiality in arbitration is used for a variety of reasons. First, parties to the arbitration may not wish to depiction certain allegations to the public. Second, parties to the arbitration may not want a loss published, especially if the party is involved in other cases with similar claims and defenses. Third, confidentiality protected confidential or sensitive business information and trade secrets” (Buys, 2003). What exactly needs to be kept confidential? Guarded secret is “the existence of the dispute or the arbitration, the substance of the proceedings include evidence produced during process and all or part of the award” (Buys, 2003).

However, confidentiality is currently becoming obsolete. In ICSID Rule 48 (4) of the ICSID Arbitration Rules prohibits the publication of the decision without the consent of the parties. If the parties agree to publish their award so ICSID will be publish. Based on the result of research from Naimark and Keer (Buys, 2003) that confidentiality is not one of the most valued aspects of international commercial arbitration and other elements such as a fair
and just result, a monetary award, the finality decision, and arbitrator expertise, all ranked significantly higher than privacy in term of importance to the participants.

Rule 48 (4) of ICSID Arbitration Rules was amendment in 2006 and Furthermore, based on research of the author, the data obtained in 2006 of the ICSID Rules regulating the same approach (transparency) with the exception that the Centre gave after amendment of the ICSID Convention in 2006 now has an duty to publish excerpts from the legal considerations Assembly arbitration. Noted that in the last five years (2004-2008), from 105 ICSID decision resolved through a final award (concluded cases), it is known that 59 awards have been published, while 46 awards is still not publish and then in the last five years (2009-2013), from the 143 final awards (concluded cases) through ICSID, it is known that 80 awards have published while 63 the awards is still not publish (see Table 1).

Table 1. Tendency to Publish ICSID Arbitration Award in 2004–2008 and 2009-2013

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Award</th>
<th>Publish Award</th>
<th>Not Publish Award</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004 – 2008</td>
<td>105</td>
<td>59</td>
<td>46</td>
</tr>
<tr>
<td>2009 – 2013</td>
<td>143</td>
<td>80</td>
<td>63</td>
</tr>
</tbody>
</table>

(Source: ICSID Website 2013)

Based on data obtained in ICSID website From the table which in 2004, there were at least 14 are completed award in accordance with the ICSID arbitration rules and 10 awards has been in publication. In 2005, there were 16 completed awards in accordance with the ICSID rules, and 8 awards has been in publication. Then in 2006, at least 19 completed award in accordance with the decision of the ICSID arbitration rules, and 10 has been published. In 2007, there were 29 awards given according to ICSID arbitration and 20 have been published. In 2008, there were 27 awards given and 11 ICSID arbitration awards has been published. With so much more that has been in publication compared unpublished. Furthermore in 2009, there were at least 32 awards in accordance with the ICSID arbitration rules, 15 awards has been published and 17 awards are still secret. In 2010, there were at least 32 awards are completed in accordance with the decision of the ICSID arbitration rules and 16 has been in publication. In 2011, there were 29 awards completed and 23 awards have been published. Then in 2012, there were at least 22 completed awards and 11 awards have been published. In 2013, there were 28 awards given appropriate and 15 ICSID arbitration awards have been published.

Insistence on transparency has been discussed in ICSID and be very special in order to increase the number of cases resolved through ICSID, some even question the transparency issue of the dispute were later pending. For examples Apotex Holding Inc. and Apotex Inc., v. United States of America (ICSID Case No. ARB (AF)/12/1) on confidentiality agreement at 24 July 2012 and Mobile Tele Systems OJSC v. Republic of Uzbekistan (ICSID Case No. ARB (AF)/12/7) which pending a moment related with confidentiality. Thus the sum of all the more that has been in publication compared the awards while maintaining confidentiality.

3. **Good’s Government and good’s investor for the sake of public accountability**

The foregoing shows the spirit of greater transparency inspired by arbitration between investors and the State. Although the ICSID arbitration system is different from other inter-
national arbitration institutions e.g. commercial arbitration, but the seeds of similar, even precedent and procedure of arbitration is also transferred into the context of commercial arbitration and is also a lot of commercial arbitration awards has been published, as revealed by Lon L. Fuller (1964, p. 42-44) that transparency is an inherent feature of the Rule of Law, so the Rule of Law requires the rules that can be accessed publicly known in the future. If users want the benefits of investment arbitration over a system that is based on the law, then it is advisable not reject transparency to the arbitration award.

Therefore, to conceptualize then frame the concept of the benefits of investment arbitration shall bring about new contribution to be further discussed. The study shall refer to the quality framework to able to frame the concept into more structures manner (Rika Fatimah & Abdul Aziz 2011). In addition, the multiple concepts can be deploy clearer then can be refer as a simple yet comprehensive reference for those who want the benefits of investment arbitration over a system. The multiple concepts need to discuss are good governance principle, good investor, public accountability with regard to transparency of the arbitration award.

The first concept is good’s governance principles that are to be achieved: first, responsive in the sense responsive to the nation’s problems. Second, transparency in the sense of openness of the government to the citizens of the entire program and actions taken. Third, the rule of law. Fourth, people’s participation in nation building and Fifth, effective and efficient in the sense that every government program should be carried out effectively and efficiently. Because arbitration tends secret, there is criticism that ICSID’s system is rigged and represents the inequities of an international system biased against the developing countries (Gerbay, 2011). Transparency in the meaning of openness governance is widely seen to be a key hallmark of contemporary democratic practice and is often linked to the passing of freedom of information legislation. Transparency in government is often credited with generating government accountability, transparency often allows citizens of a democracy to control their government, reducing government corruption, bribery and other malfeasance and some commentators contend that an open, transparent government allows for the dissemination of information, which in turn helps produce greater knowledge and societal progress (Schauer, 2011).

Second concept is good investor. Investor is who make investments into the state jurisdiction of investment (host state) with the intention to generate measurable social and environmental impact alongside a financial return. Good investor will make a profit from its investments, both for the host state and financial benefits for investor. If the investor is good, it will create a good investment, welfare for citizens. Good investor thus making a more sustained and better accepted by local community.

The third and fourth concepts are transparency and public accountability and the support of good practice of government and investor. As refer to the confidentiality ICSID arbitration, transparency of ICSID award has ruled the fulfillment of the principles of good governance, because one of the principles of good governance are openness (transparency) as a form of state. In this regard, in investment arbitration, transparency in the arbitrable proceedings is closely linked to the public need to review state conduct (Marian, 2010), and the other side Grossman (2010) state that:

Transparency is also linked to legitimacy through the concept of accountability, it allows constituencies of accountable actors, such as adjudicator and litigants, not only to observe them but also to attempt to exert some degree of control over their behavior and allow domestic and other constituencies to hold governments accountable for their action and results.

As public access, the main goal of transparency is to facilitate the control against the decision-makers, in line with Mark Fenster (2006) explains that work on transparency in execu-
tive branch contexts that transparency enables free flow of information among public agencies and private individuals, allowing input, review, and criticism of government action, and thus increases the quality of governance”. Technically good governance is a universal condition for happiness, and not just a western ideology (Ott, 2010).

Transparency is the key of accountability and sustainability (see Figure 1). Through the transparency of the decision maker in the arbitrators and arbitration institutions will be more sustain in performing their duties and responsibilities. Conventionally, a form of openness is open to the public hearing process and the reading of the verdict is open to the general public and can be accessed. Transparency is also one of the main pillars in the good governance concept. In Supreme Court Indonesia (2008) there are 3 (three) public right related with transparency, that are (1) Public right to monitor and observe the behavior of public officials; (2) Public right of information; and (3) The right to raise objections.

![Figure 1. Quality Framework of Public Accountability for the Sustainability of Good Governance and Investor’s Practice](image)

Transparency in various aspects of law has played an important role, especially in international law. Means of word transparency become long debate in international where always anchored with the other concept that is public access and disclosure. And transparency that it mean always synonym by accountability or openness. It’s the same view by Zoellner (2006) that:

> Transparency has become a subject of debates concerning the democratic legitimacy of the changing international legal order, particularly with respect to new obligations that arguably require the partial transfer of sovereignty and previously national competences to international regimes.

Although the host state has authority to regulate the open or keep secret of the arbitration award, but the host state did not abolish accountability to its citizens for any actions. So if the arbitration award relate the state must confidential, it will be put aside the good’s governance principle and it will be keep from blooming of citizens knowledge.

4. **Confidentiality Vs. Good’s Government: Impact to The Practice of Good’s Gov-
The trade agreements that set the rules should direct arbitration panels to take a much broader view to consider not just corporate interests but the needs of governments and citizens. The panels should also be required to invite a wider range of views. Because their decisions have great public impact, arbitration panels owe the public a hearing.

ICSID Arbitration as an institution that has an eventual public effect, which has consequently fuels tensions between parties autonomy and state control. ICSID has mixed character in which as dispute settlement involving a government of the state, then the object of dispute related with public welfare issue and political action that impact on the state’s budget if the state was mistakes to make regulation for the investment.

In generally there has been a shift from confidentiality to transparency. Especially with ICSID Rules after amendment in 2006 that explained duty of Tribunal to publish the verdict citation of tribunal decision. Then in the new bilateral agreement we will see transparency approach compared to the past which there is no duty confidentiality again and submit to ICSID arbitration policy. By the award publication data we can see increasing of ICSID award publication. So, several state in the world did not regulate about duty confidentiality of arbitration award, if there are duty confidentiality, it will follow this the exception, if one of the reasons parties choose arbitration is because it offers confidentiality, arbitrations are not automatically confidential, and the degree of confidentiality will depend on the legal framework appropriate to the procedure of the arbitration, and in particular the institutional rules governing the arbitration (if any) and the express requirements in the parties’ arbitration agreement (Gerbay, 2012). If the state still use the confidentiality in arbitration, so that the public knowledge of arbitration will not develop and turn aside the good’s governance principle for its citizens and investor that make investment in that state.

5. Conclusion

Some of the Contracting State of the ICSID has been set on the openness of their arbitration award to the achievement of good governance principles. Not a myth if ICSID arbitral award is open to the public access. ICSID arbitration involving State which has a good’s governance principles and transparency is one of them. Through the openness of the arbitration award will create good’s governance and so that allows for the dissemination of information for its citizens, which in turn helps produce greater knowledge and societal progress citizens, if both the government and its citizens are good then investor who invests capital will also follow the good rules and the result will be a rapid growth in investment.

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