

TPPA signatories must be set to lose assets in disputes

MalaysiaKini.com

Nov 21st, 2015

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Governments that fail to pay up after losing an Investor-State Dispute Settlement (ISDS) lawsuit are likely to see their foreign assets seized by investors, Klang MP Charles Santiago said.

Charles said the Trans-Pacific Partnership Agreement, which also has provisions for an ISDS, allows for such seizures to take place.

As an example, he said, a German company that won an ISDS case against Thailand had once learned that Thai Crown Prince Maha Vajiralongkorn had landed in Germany in a private jet.

Working under the assumption that the jet belonged to the Thai government, the company obtained a court order to impound the aircraft, with the intention of seizing it.

However, the company's plan fell apart when it turned out that the aircraft belonged to the crown prince himself, not the Thai government.

"If it had belonged to the Thai government, the prince would have gone back in a commercial flight. He couldn't have come back on his own flight

"So that is what they do. They take possession of your properties anywhere in the world, and this (TPPA) allows that," Charles (*photo*) told reporters at a press conference in Petaling Jaya yesterday.

According to a report in *The New York Times* on July 13, 2011, an international arbitration panel had found two years earlier that the Thai government was liable in a lengthy contractual dispute with German construction consortium Walter Brau.

The company had built the Don Muang Tollway in Bangkok, and later accused Thailand of failing to meet its obligations, including raising the toll rate.

The arbitration panel awarded the company €30 million (RM137 million) in damages and costs, but the company said the Thai government had been stalling on its payments.

The report said the Boeing 737-400 aircraft of the Thai crown prince would have been worth between US\$5 million (RM21.4 million) and US\$6 million (RM25.6 million), if seized and sold.

Charles - who is a member of bipartisan parliamentary caucus on TPPA - said the awards, running into the hundreds of millions and even billions of ringgit, have created a booming business in the legal practice for the suing of governments under the ISDS scheme.

Government decisions - whether from Parliament, the executive, or the courts - would not be spared from challenges when foreign investors are unhappy with it, he said.

All for the money

“A huge industry has developed, and now what they are doing is they have third-party involvement. Third party means individuals who have the money, or companies with the money, that can go over (to investors) and say, ‘Hey this country is violating your profits. So challenge them’.

“They first give the money to the lawyers. The lawyers will go fight the case, and if they win, a good chunk of it will go to the third party. This has become a huge industry,” Charles said.

According to *Malaysiakini's* analysis, 265 ISDS cases have been decided by tribunals between 1987 and 2014, of which 41.5 percent (110 cases) were decided in favour of the investors. An additional 105 cases were settled out of court.

The highest award ever was in the case of Yukos, a Russian oil company that was dismantled in 2003 after its owner, Mikhail Khodorkovsky, was arrested and convicted for fraud. It was at the time the largest oil company in Russia and Khodorkovsky was the richest man in the country.

This was widely seen in the West as trumped-up charges to remove Khodorkovsky from politics and nationalise Yukos' assets.

Yukos' shareholders subsequently sued Russia through affiliates based in Cyprus and the Isle of Man, and had US\$50 billion (RM214 billion) last year - or about 2.5 percent of Russia's GDP - and about half the sum the shareholders had sought.

The case is being appealed, but according to a report in British newspaper *The Guardian* in June, claimants for the case have already moved to freeze Russian state-owned bank accounts and seized buildings in Belgium and France, while Russia warned of retaliation.

Such lawsuits, Charles said, would have lawmakers second guessing their decisions out of fear of being sued.

As an example, when Uruguay attempted to reduce tobacco consumption by introducing plain cigarette packets, it was sued by the United States-based tobacco company Philip Morris.

The US did not have an investment treaty with Uruguay, but there was a bilateral investment treaty between Switzerland and Uruguay. Thus, the lawsuit was filed through a Philip Morris subsidiary in Switzerland.

When Australia did the same, it too was sued by Philip Morris through a Hong Kong-based subsidiary, despite the Australian Supreme Court having ruled that Australia has the right to introduce plain packing in interest of public health.

Following this, New Zealand, which planned to introduce a similar policy, rescinded from doing so.

Charles said he had asked in Parliament about Malaysia's own plain packaging plans before, and the written reply he received was that the government is awaiting the outcome of the Australia-Philip Morris case.

While the TPPA investment chapter specifically excludes public health and environmental policies from being challenged, especially by the tobacco industry, the industry may still challenge regulations on tobacco advertising through TPPA's services chapter, he said.

In addition, a challenge may still come through any of the eight free trade agreements and 12 bilateral trade agreements that Malaysia has already signed.

'Malaysia not stranger to ISDS suits'

While International Trade and Investment Minister Mustapa Mohamed has argued that Malaysia is no stranger to ISDS suits due to the earlier trade agreements, Charles countered that TPPA is far more wide-ranging if compared with the earlier agreements.

The TPPA has 30 chapters dealing with areas such as intellectual property, labour, financial services, and others, he said, whereas in comparison, the recently concluded Malaysia-Turkey free trade agreement only has eight chapters.

He argued that these agreements containing ISDS provisions should not have been signed in the first place.

What is needed to drum up investor confidence is not the ISDS but to strengthen Malaysia's own judicial system so that foreign investors will see it as independent.

"You need to strengthen the Malaysian courts. That is the final solution to this problem. You need to strengthen the perceptions of people that our courts are indeed free and independent, and not appointed for political reasons or can be bought over.

“But instead of dealing with the country's problems, you are dealing with these guys, he said.

In the ISDS, Charles said, the legal fees are very expensive and minimum sum needed to even start one is US\$8 million (RM34.2 million).

There is also a conflict of interest in the arbitration panel, because none of the three arbitrators are judges, he said.

Instead, each of the arbitrators are arbitration lawyers themselves, who may be representing other governments or other countries in another case, but are being paid US\$3,000 per hour to sit on the arbitration panel.

Under International Centre for Settlement of Investment Disputes (ICSID) rules that would govern proceedings lodged under TPPA, the government and the investor would each appoint one person to the panel.

The third person, he said, would be appointed by the secretary-general of the World Trade Organisation.

Indonesia has stopped signing new deals

Charles said Indonesia has already stopped signing additional investment treaties, and pulling out from the ones that it has already signed.

This came after UK-based Churchill Mining Company sued Indonesia in 2012, demanding US\$2 billion (RM8.55 billion).

“Based on that, they (Indonesia) said, ‘We should have have control over what we have in our country, over the resources of our country, and that right should not be given to foreign investors.’

“Their perceptions have already changed. Their argument is this: Your businesses need Indonesia; we don’t need you.

“The way that they operate is different: They say, ‘We (Indonesia) are big, we are a growing economy, we have resources, we are confident. So you sign an agreement based on what we want you to do, not what you want us to do.’ The tables under Jokowi are shifting now,” Charles said, referring to Indonesian President Joko Widodo by his nickname.

He said although Joko has **expressed interest** in the TPPA, his real interest is in the non-binding Regional Comprehensive Economic Partnership (RCEP) that is being negotiated.

By expressing interest in TPPA, he said, Jokowi was actually trying to extract greater concessions from China under the RCEP negotiations.

“And China is going to give the concessions, because China wants to break the US hegemony here (in Asean),” Charles added.