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THE INDONESIAN GOVERNMENT'S PARTICIPATION IN INTERNATIONAL INVESTMENT LAW AND ITS REFORM

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Abstract

International investment between countries is aimed at improving economic development of the state parties and its integration to the world economy. To attract foreign investors, the Government of Indonesia provides investment guarantees through BITs and domestic investment laws. However, in its implementation, those guarantees brought several disputes between Indonesian government and its foreign investors. Moreover, the BIT also shows an imbalance in the position between Indonesia as the host country and its foreign investors which affects the host state's sovereignty. Reforms must be carried out in this area of law to strike a balance between the protection of foreign investors and the sovereignty of the host state. In addition, reforms in BIT must also be able to provide an equilibrium between economic improvement, human rights, and environmental sustainability. This article describes the participation of the Indonesian government in international investment law and the reforms that must be undertaken in the field of investment law, both at the domestic and international levels.

Keywords : *bilateral investment treaty, international investment law, investor-state dispute settlement*

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I. INTRODUCTION

Foreign investment plays significant role in the interactions between state and non-state actors for their economies. By foreign investment, host states can boost their economic development and foreign investors can gain financial benefit from their investments. Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets.¹ Under foreign investment law, foreign investors can invest in the host state's projects, which usually in the vital infrastructure projects of the country.

Indonesia, the largest country in Southeast Asia, is rich in natural resources. It is the world's biggest exporter of mining products, the leading producer

¹ Muthucumaraswamy Sornarajah, *The International Law of Foreign Investment, Fourth Edition* (Cambridge: Cambridge University Press, 2010), 8.

and exporter of palm oil, the second-largest producer of rubber, coffee and fisheries products, and the holder of 40% of the world's geothermal energy reserves.² Given these conditions, it is important for Indonesia to open itself to foreign investment since greater integration with the world economy can further increase investment opportunities in the country.³

However, the openness of the Indonesian government to foreign investment through BIT and domestic legislation has given rise to investment disputes and sovereignty issues. This is because the guarantee for foreign investors embedded in the BIT does not bring about an equal position among the state parties, which in turn raises the issue of state sovereignty. The Indonesian government itself has also faced investment disputes since the first foreign investment law was enacted in 1958 because the regulation does not provide basic protection for foreign investment. The Indonesian government then changed its investment law in 2007 by adding some basic principles of international investment protection and still facing investment disputes but with different results. Despite having amended its investment law in 2007, the Indonesian government still needs to reform its international investment law as the world of international investment has changed to pay more attention to current issues such as transparency and the protection of environmental and human rights.

These problems lead into the main research question on how Indonesian government's participation in international investment law and how it should be reformed. In order to answer the research question, this article provide a legal analysis of the Indonesian government's participation in the international investment law, especially with regard to BITs and international investment arbitration. Moreover, it also examines the types of international investment law reforms that Indonesia can enact in its domestic legal system and in the international community.

II. THE INDONESIAN GOVERNMENT'S PARTICIPATION IN INTERNATIONAL INVESTMENT LAW

A. INDONESIA'S BIT IN INTERNATIONAL INVESTMENT LAW

After achieving independence in 1945, Indonesia began its participation in international investment by establishing a set of foreign investment

² Richard Dutu, "Making the Most of Natural Resources in Indonesia," OECD Economics Department Working Papers No. 1236 (Organization for Economic Co-operation and Development, 2015), 7.

³ Gonzalo J. Varela, *Policy Note 1: Openness, Growth, and Productivity in Indonesia's Development Agenda* (The World Bank, 2015), 9.

regulations, the first being is Foreign Investment Law Number 78 Year 1958. Under this regulation, foreign investors received several incentives, such as land rights, tax relief, and guarantees against expropriation for investments in vital domestic sectors such as transportation, telecommunication, electricity, irrigation, weapons manufacturing, and atomic energy.⁴ This law was revoked in 1966 due to regime change and continued in the following year by the enactment of the Foreign Investment Law Number 1 Year 1967. This law was later revoked through Foreign Investment Law Number 25 Year 2007 and amended in 2020 through the Job Creation Law Number 11 Year 2020. The government also established the Domestic Investment Law Number 6 of 1968, which was amended through Domestic Investment Law Number 12 of 1970, as a complementary regulation. Through these regulations, the Indonesian government hoped to attract more foreign investors to invest in Indonesia.

In addition to new laws, the Indonesian government has established BITs with the home countries of foreign investors. BIT is an important legal document for foreign investor and the host state as it provides guarantees for investments from one contracting state to the other.⁵ Most BITs also contain dispute settlement clause which grants foreign investors direct access to international arbitral tribunal to settle disputes with the host state relating to obligations of the host state specified in the investment treaty.⁶

There is a total of 2,895 BIT's globally, of which 2,335 are in force.⁷ Since its first enactment of foreign investment law in 1958, the Indonesian government has established 72 BITs with countries around the world: 30 BITs have been terminated, 26 BITs are currently in force, and 16 BITs have been signed but are not yet in force:⁸

Continent	States
Asia	Algeria, Bangladesh, Cambodia, China, India, Iran, Jordan, Korea, Kyrgyzstan, Laos, Malaysia, Mongolia, Pakistan, Philippines, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Tajikistan, Thailand, Turkmenistan, Uzbekistan, Vietnam, Yemen

⁴ Indonesia. *Undang-Undang tentang Penanaman Modal Asing*, UU No. 78 Tahun 1958. (*Law on the Foreign Investment Law*, Law No. 78 Year 1958), art. 3 and 6-13.

⁵ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law, Second Edition* (New York: Oxford University Press, 2012), 13.

⁶ Eric de Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge: Cambridge University Press, 2014), 26.

⁷ UNCTAD, "International Investment Agreements Navigator," UNCTAD Investment Policy Hub, accessed 24 January 2020, <https://investmentpolicy.unctad.org/international-investment-agreements>.

⁸ UNCTAD, "International Investment Agreements Navigator: Indonesia," UNCTAD Investment Policy Hub, accessed 24 January 2020, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia>.

Europe	Bulgaria, Croatia, Czechia, Denmark, Finland, France, Germany, Hungary, Italy, Netherlands, Norway, Poland, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom
Africa	Egypt, Libya, Mauritius, Morocco, Mozambique, Sudan, Suriname, Tunisia, Zimbabwe
America	Argentina, Chile, Cuba, Guyana, Jamaica, Venezuela
Oceania	Australia

As in any other BIT, provisions in BITs between Indonesian government and the home state of foreign investors revolve around most-favoured-nation treatment, fair and equitable treatment, full protection and security, expropriation, and dispute settlement mechanism. With regards to dispute settlement mechanism, in its BITs, the settlement of investment disputes with foreign investors can be conducted through an investment treaty arbitration tribunal without resorting to Indonesian domestic courts beforehand. That dispute settlement mechanism is important because it provides a more independent arbitral tribunal to resolve investment disputes and to create trust in foreign investors that Indonesian government applies an international standard of dispute settlement mechanism in international investment.

B. INDONESIA'S PARTICIPATION IN INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT

Based on data from UNCTAD, there were seven cases involving Indonesia as the respondent in international investment treaty arbitration, with most arbitrated under ICSID and UNCITRAL.⁹ They are summarized in the following table.

No.	Case	Arbitration	Year	Result
1	Cemex Asia Holdings Ltd. v. the Republic of Indonesia	ICSID	2007	Settled
2	Rafat Ali Rizvi v. the Republic of Indonesia	ICSID	2011	Decided in favor of state
3	Hesham Talaat M. Al-Warraq v. the Republic of Indonesia	UNCITRAL	2011	Decided in favour of neither party (liability found but no damages awarded)
4	Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia	ICSID	2012	Decided in favour of state

⁹ "Investment Dispute Settlement Navigator: Indonesia."

5	<i>Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. the Republic of Indonesia</i>	UNCITRAL	2014	Discontinued
6	Indian Metals & Ferro Alloys Ltd. v. the Republic of Indonesia	PCA	2015	Decided in favour of state
7	Oleovest Pte. Ltd v. the Republic of Indonesia	ICSID	2016	Discontinued

However, these data are different from those of the IICB. According to the latter, there were twelve cases involving Indonesia as the respondent in the international investment arbitration tribunal:¹⁰

No.	Case	Arbitration	Year	Result
1	<i>Amco Asia Corporation and others v. the Republic of Indonesia</i>	ICSID	1990	Decided in favor of investor
2	<i>Himpurna California Energy Ltd. v PT. Perusahaan Listrik Negara (Indonesia's SOE)</i>	UNCITRAL	1999	Decided in favor of investor
3	<i>Patuha Power Ltd. v PT. Perusahaan Listrik Negara (Indonesia's SOE)</i>	UNCITRAL	1999	Decided in favor of investor
4	<i>Karaha Bodas Company LLC. v. PT. Pertamina and PT. Perusahaan Listrik Negara (Indonesia's SOE)</i>	UNCITRAL	2000	Decided in favor of investor
5	<i>Cemex Asia Holdings Ltd. v. the Republic of Indonesia</i>	ICSID	2007	Settled (Indonesia ordered to pay USD 337 million in compensation)
6	<i>Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. the Republic of Indonesia</i>	UNCITRAL	2009	Discontinued
7	<i>PT. Kaltim Prima Coal and others v. Government of the Province of East Kalimantan</i>	ICSID	2009	Discontinued
8	<i>Rafat Ali Rizvi v. the Republic of Indonesia</i>	ICSID	2011	Decided in favor of state

¹⁰ Fritz Horas Silalahi, *Indonesia Arbitration Update* (IICB 2016).

No.	Case	Arbitration	Year	Result
9	<i>Hesham Talaat M. Al-Warraq v. the Republic of Indonesia</i>	UNCITRAL	2011	Decided in favor of state
10	<i>Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia</i>	ICSID	2012	Decided in favor of state
11	<i>Indian Metals & Ferro Alloys Ltd. v. the Republic of Indonesia</i>	UNCITRAL	2015	Decided in favor of state
	<i>Oleovest Pte. Ltd v. the Republic of Indonesia</i>	ICSID	2016	Discontinued

Investment treaty arbitration involving the Indonesian government can be separated into two categories: before and after the establishment of the Foreign Investment Law Number 25 Year 2007 since it brings a reform in Indonesian foreign investment policy by providing fundamental protections in international investment law.

1. INDONESIA'S INVESTMENT TREATY ARBITRATION BEFORE THE ESTABLISHMENT OF FOREIGN INVESTMENT LAW NUMBER 25 YEAR 2007

Before the establishment of Foreign Investment Law Number 25 Year 2007, there were four cases involving the Indonesian government in investment treaty arbitration: *Himpurna California Energy Ltd. and Patuha Power Ltd. v. PT. Perusahaan Listrik Negara, Karaha Bodas Company LLC v. PT. Perusahaan Listrik Negara and PT. Pertamina, Government of the Province of East Kalimantan v. PT. Kaltim Prima Coal*, and the *Republic of Indonesia v. Amco Asia Corporation*.

a. HIMPURNA CALIFORNIA ENERGY LTD. AND PATUHA POWER LTD. V. PT. PERUSAHAAN LISTRIK NEGARA

The case was about two energy sales contracts that entitled Himpurna California Energy Ltd. and Patuha Power Ltd. (claimant) to establish a geothermal power plant in the Patuha and Dieng regions of Indonesia and sell the power they produced to PT. Perusahaan Listrik Negara (respondent), an Indonesian SOE.¹¹ The project contracts were specifically allocated to the Indonesian side the risks arising from force majeure, such as actions or failures to act by any Indonesian government instrumentality without justifiable reasons and compliance with Indonesian legal requirements.¹²

¹¹ Irina Petrova, "Stepping on the Shoulders of a Drowning Man the Doctrine of Abuse of Right as a Tool for Reducing Damages for Lost Profits: Troubling Lessons from the Patuha and Himpurna Arbitrations," *Georgetown Journal of International Law* 35, no. 2 (2004): 456.

¹² Andrea Saldarriaga and Mark Kantor, "Damages in International Commercial Arbitration: Methods of

When the Indonesian economy experienced severe impacts associated with the 1997-1998 economic crisis, the president issues a decree in 1998 which ordered the government to review, postpone, and shut down several infrastructure projects. As a result, the respondent refused to buy electricity from the claimant.¹³ In response, the claimant commenced arbitration proceedings to recover the contract. The arbitral tribunal found that the respondent had breached the contract and duties of good faith by failing to provide guarantees that it would fulfil its obligations and by preventing the companies from completing the development of the power plant facilities to the contractually stipulated capacity. The tribunal awarded the project companies a total of USD 572 million in damages.¹⁴ The tribunal also found that, by failing to provide assurances to the project companies, the respondent had breached its duty to perform its contractual obligations in good faith.¹⁵

The violation of good faith obligations by the host state's government is crucial and can lead to distrust from foreign investors. This is because the violation of good faith is essentially a violation of the BIT itself, as the good faith principle is embedded in the BIT's provision of fair and equitable treatment. This provision requires the contracting parties to treat international investments in a manner that does not affect the basic expectations considered by the foreign investor to make the investment.¹⁶

b. KARAHA BODAS COMPANY LLC V. PT. PERUSAHAAN LISTRIK NEGARA AND PT. PERTAMINA

In November 1994, Karaha Bodas Company LLC (claimant) signed a joint operation contract with PT. Pertamina that granted them with geothermal development rights in West Java, Indonesia. The company also signed an energy sales contract with PT. Perusahaan Listrik Negara in which PT. Perusahaan Listrik Negara agreed to purchase the electrical energy produced by PT. Pertamina at the Karaha Bodas geothermal facility.¹⁷ In January 1998, the president of Indonesia issued a decree to terminate the project. As a result, both the respondents did not wish to continue their cooperation with the claimant. In response, the latter brought the dispute to an arbitration tribunal in Switzerland under the UNCITRAL Arbitration Rules.¹⁸ In the final award,

Calculation," in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Arthur W. Rovine (Brill Nijhoff, 2010), 224.

¹³ Petrova, "Troubling Lessons from the Patuha and Himpurna Arbitrations," 456.

¹⁴ *Ibid.*, 460.

¹⁵ *Ibid.*

¹⁶ Dolzer and Schreuer, *Principles of International Investment Law*, 143.

¹⁷ Sujayadi, "Interaction between the Setting Aside of an Award and Leave for Enforcement," *Yuridika* 30, no. 2 (2015): 335.

¹⁸ *Ibid.*

the tribunal held that the respondent breached the contract with the claimant and awarded the company USD 261 million in damages, including USD 111 million in sunk costs, USD 150 million in lost profits, and 4% post-judgment interest. The claimant initiated legal proceedings to enforce the arbitral award in the United States, Hong Kong, Canada, and Singapore (the countries in which assets of the respondents were located) under Article V of the New York Convention 1958.¹⁹ However, PT. Pertamina attempted to annul the arbitral award through the District Court of Central Jakarta.²⁰ In August 2002, the latter set aside the arbitral award in its judgement.

This case brought adverse international attention to the investment conditions in Indonesia since it demonstrated that Indonesian judges could interpret the law in a manner that eliminates legitimate international awards.²¹ However, the Indonesian courts were not the appropriate forum for overriding the Switzerland arbitral award in the Karaha Bodas case; the parties had agreed that the arbitration tribunal would be in Geneva, and there was no sufficient evidence that the Indonesian civil procedure applied to the arbitration process.²² Moreover, there was no arbitration principle or practice to support PT. Pertamina's argument that the Indonesian courts had primary jurisdiction over the award.²³ Under the 1958 New York Convention, the Indonesian courts have jurisdiction to enforce or refuse to enforce the award in Indonesian territory but not to set aside the award from the arbitral tribunal.

c. GOVERNMENT OF THE PROVINCE OF EAST KALIMANTAN V. PT. KALTIM PRIMA COAL

This is a dispute regarding unpaid dividends. Based on the contract, the government of East Kalimantan, a province under administration of the Republic of Indonesia (claimant) had 51% shares in PT. Kaltim Prima Coal (respondent).²⁴ This meant that the respondent owed a dividend of USD 144.18 billion (based on the company's profits from 2001 to 2010) to the claimant.²⁵ However, the respondent failed to carry out its obligations and the claimant brought the case to ICSID. In its award, the tribunal stated that the requirements for the jurisdiction of arbitration established by Article 25 of the ICSID Convention were not met, which meant that the tribunal did not have

¹⁹ Sujayadi, "Interaction between the Setting Aside," 336.

²⁰ *Ibid.*

²¹ Noah Rubin, "The Enforcement and Annulment of International Arbitration Awards in Indonesia," *American University International Law Review* 20 no. 2 (2005): 398.

²² *Ibid.*, 348.

²³ *Ibid.*, 349.

²⁴ The Government of the Province of East Kalimantan v PT Kaltim Prima Coal, Rio Tinto PLC, BP P.L.C., Pacific Resources Investment Limited, BP International Limited, Sangatta Holdings Limited, Kalimantan Coal Limited, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009, para 18.

²⁵ *Ibid.*

jurisdiction over the dispute.²⁶ Article 25(1) of the ICSID Convention states that ‘the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that state) and a national of another Contracting State.’ In its conclusion, the tribunal stated that only the government of Indonesia could validly consent to ICSID arbitration on behalf of the Republic of Indonesia. However, there was no authorisation from the Indonesian government to the government of East Kalimantan to represent in the case, and the state of Indonesia had not validly designated the government of East Kalimantan as a constituent subdivision.²⁷ Therefore, the claimant could not be held to have a right to represent the Republic of Indonesia before an ICSID tribunal.²⁸

d. THE REPUBLIC OF INDONESIA V. AMCO ASIA CORPORATION

Amco Asia Corporation (claimant) had invested in a hotel in Indonesia with PT. Wisma as its local partner. According to the contract, PT. Wisma had a right to lease and manage the hotel. However, they ultimately assisted the Indonesian armed force in taking over Amco’s property. Though the armed forces of the host state were involved in the acquisition of a foreign investor’s property, the tribunal stated that there was no attributability to the Indonesian government, as the army acted in its private business.²⁹ However, the tribunal found the Indonesian government was in breach of international law since they failed to protect investors from the expropriation of foreign property by their people. In its award, the tribunal stated, ‘It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a state has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens’.³⁰ A similar issue also occurred in *Wena Hotels v. Egypt*, where agents of an Egyptian company that affiliated with the Egyptian government forcibly took control of a foreign investment. Though the actors who took over the foreign investor’s property had an affiliation with the government of the host state, the tribunal preferred to base its decision on the Egyptian government’s failure to protect the investment of its foreign investor.³¹

2. INDONESIA’S INVESTMENT TREATY ARBITRATION AFTER THE ESTABLISHMENT OF FOREIGN INVESTMENT LAW NUMBER 25

²⁶ *Ibid.*, para 53.

²⁷ *Ibid.*, 185 and 200.

²⁸ *Ibid.*

²⁹ See Somarajah, *The International Law of Foreign Investment*, 405.

³⁰ See *Amco Asia Corporation and Others v The Republic of Indonesia*, ICSID Case No. ARB/81/1 Awards on Jurisdiction, 21 November 1984, para 172.

³¹ See Dolzer and Schreuer, *Principles of International Investment Law*, 226-227.

YEAR 2007

Based on the data from UNCTAD, the Indonesian government was involved in seven cases in the ISDS after the establishment of the Foreign Investment Law Number 25 Year 2007 in which Indonesia was the respondent in all of those cases: *Cemex Asia Holdings Ltd. v. the Republic of Indonesia*, *Rafat Ali Rizvi v. the Republic of Indonesia*, *Hesham Talaat M. Al-Warraq v. the Republic of Indonesia*, *Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia*, *Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. the Republic of Indonesia*, *Indian Metals & Ferro Alloys Ltd. v. the Republic of Indonesia*, and *Oleovest Pte. Ltd v. the Republic of Indonesia*.³²

a. RAFAT ALI RIZVI V. THE REPUBLIC OF INDONESIA

Rafat Ali Rizvi (claimant) is a foreign investor who invested in Bank Century in Indonesia through Chinkara Capital Limited. On November 2008, Bank Century nearly collapsed, and the Indonesian government stated that this could cause a systemic impact to the country's economy. In response, the Indonesian government provided a bail-out to Bank Century. As the majority shareholder in Bank Century, the claimant felt aggrieved by the government's actions and sued them to ICSID. The claimant argued that his investment fell under Article 2(1) of the 1976 UK-Indonesia BIT and Articles 1 and 5 of the Indonesia Foreign Investment Law Number 1 Year 1967 and therefore had to be protected under both the BIT and Indonesian law.³³ For this reason, the claimant argued that the respondent violated the most-favored-nation provision by presenting a bail-out to Bank Century, which violated Indonesia's obligation under Article 2(1) and Article 4(1) of the 1976 UK-Indonesia BIT. In its award, the tribunal stated that the purpose of the investment must not only be included in the definition of investment as regulated by Article 1 of the 1976 UK-Indonesia BIT, but it must also comply with Article 2(1) of the BIT.³⁴ The article stipulates that permission for investments made by foreign investors must be obtained from IICB under Foreign Investment Law Number 1 Year 1967. As the claimant's investment was not recognised under the Indonesia Foreign Investment Law as required in Article 2(1) of the BIT, then it did not fall within the scope of the agreement, and therefore, not considered as a direct investment.³⁵ In his separate concurring opinion, Professor Sornarajah stated that the indirect investment made by the claimant through Chinkara Ltd. was

³² UNCTAD Investment Policy Hub, "Investment Dispute Settlement Navigator: Indonesia."

³³ See *Rafat Ali Rizvi v. the Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013, paras 52 and 109.

³⁴ *Ibid.*, paras 65-71.

³⁵ *Ibid.*, 74.

not protected by the BIT since investments in Indonesia can only be made through companies incorporated in the country.³⁶ The tribunal also rejected the claimant's reliance on the most-favored-nation provision of the BIT as inapplicable to the question of the BIT's scope in the present case.³⁷

b. HESHAM TALAAT M. AL-WARRAQ V. THE REPUBLIC OF INDONESIA

The circumstances of this case were similar to *Rafat Ali Rizvi v. the Republic of Indonesia* in that the claimant made the same claim: the bail-out action by the Indonesian government to Bank Century was a violation of the investor's fundamental rights of fair trial under Article 10 of the OIC Agreement and fair and equitable treatment and protection and security under Article 10(1) of the OIC Agreement. In its award, the UNCITRAL arbitral tribunal decided the case in favour of neither party (liability was found, but no damage was awarded). The tribunal found that the claimant's indirect shareholding in Bank Century meant that he was considered an investor, as indirect shareholding still fell within the meaning of Article 1 of OIC Agreement, in which the definition of 'capital' and 'investment' refers broadly to 'all assets'.³⁸ The tribunal also rejected the claimant's claim that the respondent violated his rights under Article 10 OIC Agreement since the meaning of basic rights in Article 10 is relative to the basic property rights of the investor, not their rights relative to fair trial.³⁹ Moreover, the tribunal upheld the claimant's claim of the violation of fair and equitable treatment because the Indonesian government tried and convicted him without proper notification of the criminal charges and sentences.⁴⁰ Though the respondent violated the claimant's due process rights, the tribunal stated that they did not violate the protection and security standard under Article 2 of OIC agreement; the violation of due process rights did not have any adverse impact on the claimant's investment, as the bail-out had already been concluded by the time that the Indonesian authorities had conducted their investigation and prosecution of the claimant.⁴¹

The tribunal's decision, which stated that the respondent had violated the claimant's due process rights by trying and convicting him without proper notification of the criminal charges and sentences, was not an appropriate decision. First, there was no fair and equitable treatment guarantee in the

³⁶ Rafat Ali Rizvi v. the Republic of Indonesia, ICSID Case No. ARB/11/13, Separate Concurring Opinion of Professor Muthucumaraswamy Sornarajah, paras 31-32.

³⁷ *Ibid.*, 74.

³⁸ Hesham Talaat M. Al-Warraq v. the Republic of Indonesia, UNCITRAL, Final Award, 15 December 2004, paras. 516 – 517.

³⁹ *Ibid.*, paras 521-523.

⁴⁰ *Ibid.*, para 621.

⁴¹ *Ibid.*, paras 629-630.

OIC Agreement.⁴² The tribunal concluded that the claimant was entitled to fair and equitable treatment protection through the OIC Agreement's most-favored-nation clause, because many BITs that Indonesia was a party to mentioned fair and equitable treatment.⁴³ This reasoning is incorrect, because BITs can vary in content according to the specific needs of the negotiating states⁴⁴ and the contracting parties within the OIC Agreement have their own rights to determine the provision of the investment agreement. Secondly, a proceeding *in absentia* is allowed under Article 14(3)(d) of the ICCPR only if the accused person, when informed of the proceedings sufficiently in advance, voluntarily declines to exercise their right to be present.⁴⁵ The claimant stated that the police had never investigated him nor his attorney in Indonesia and that the Indonesian government did not take reasonable steps to ensure that he was informed in a timely manner of the criminal investigation that was being carried out against him. Furthermore, the claimant said that, though the Indonesian government was well aware of his presence in Saudi Arabia, they failed to seek the assistance of the Saudi Arabia authorities to interrogate him or even allow investigators from Indonesian government to travel to Riyadh to hear the claimant and take statements from him.⁴⁶ However, on 29 October 2009, the respondent submitted a request to the government of Saudi Arabia which mentioned that 'should the Government of Saudi Arabia is unable to grant the request for extradition, the Government of the Republic of Indonesia seeks the assistance of the Government of Saudi Arabia to carry out investigations and prosecute Hesham Talaat Al Warraq under Article 16(10) UNTOC'.⁴⁷ Moreover, on Orders dated 23 May 2010 and 4 June 2010, the Jakarta Central Court had by interlocutory judgment declared the summons to have been duly served on the claimant.⁴⁸ In light of these facts, the tribunal's view that the respondent failed to establish that it made any efforts to verify that the claimant received any of the summonses allegedly sent to him⁴⁹, that it did not attempt to serve the court summonses to the claimant via letters rogatory, and that it failed to use reasonably available mechanism (i.e., its embassies in Singapore and Saudi Arabia and requesting to Interpol to issue a Blue Notice) to verify which of the claimant's addresses was his place of residence⁵⁰ is cannot be accepted.

⁴² *Ibid.*, para 540.

⁴³ *Ibid.*, paras 554-555.

⁴⁴ De Brabandere, *Investment Treaty Arbitration as Public International Law*, 25.

⁴⁵ *Ibid.*, paras 564-565.

⁴⁶ *Ibid.*, para 581.

⁴⁷ *Ibid.*, para 593.

⁴⁸ *Ibid.*, para 588.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

A similar understanding of BIT provisions between the contracting parties is essential. In *Rafat Ali Rizvi v. the Republic of Indonesia* and *Hesham Talaat M. Al-Warraq v. the Republic of Indonesia*, the claims were about dispute regarding definition of ‘investment’ in the BIT. The different meanings amongst BITs are normal since BITs are vary in content according to the specific needs of the negotiating states.⁵¹ That is why it is important to use the *travaux préparatoires* of the BIT. *Travaux préparatoires* is a law drafts or records of discussions relating to legislation or a treaty under consideration.⁵² Based on Article 32 of the VCLT, *travaux préparatoires* can be used as a supplementary means of interpretation and are important for conforming the meaning of a provision.⁵³ Courts and tribunals that interpret treaties regularly review the *travaux préparatoires* whenever they are brought to their attention.⁵⁴ For example, in *Government of the Province of East Kalimantan v. PT. Kaltim Prima Coal*, the tribunal used *travaux préparatoires* to establish facts about state’s consent to the BIT.⁵⁵ However, the negotiating history of BITs is typically poorly documented.⁵⁶ This can cause difficulties for contracting parties when a disagreement arises about BIT provisions, which can further escalate a dispute. However, if detailed *travaux préparatoires* are available, the contracting parties can refer to them to determine the meaning of original terms or to find a middle ground in the disagreement.

c. CHURCHILL MINING PLC AND PLANET MINING PTY LTD. V. THE REPUBLIC OF INDONESIA

In this case, Churchill Mining PLC and Planet Mining Pty Ltd (claimants) argued that the revocation of their permission in the East Kutai Coal Project by the Government of East Kalimantan on behalf of the government of Indonesia (respondent) amounted to indirect expropriation, violation of fair and equitable treatment, and violation of arbitrary, unreasonable and/or discriminatory measures. The claimants argued that the Indonesian government violated Article 3(2) and Article 5(1) of the 1976 UK-Indonesia BIT. The respondent stated that the tribunal should dismissed all claims brought by the claimants since their claims were based on forged documents,⁵⁷ they were not good

⁵¹ De Brabandere, *Investment Treaty Arbitration as Public International Law*, 25.

⁵² Jennifer Speake and Mark LaFlaur, *The Oxford Essential Dictionary of Foreign Terms in English* (New York: Oxford University Press, 2002), 365.

⁵³ Dolzer and Schreuer, *Principles of International Investment Law*, 31.

⁵⁴ *Ibid.*

⁵⁵ ICSID, *The Government of the Province of East Kalimantan v PT Kaltim Prima Coal, Rio Tinto PLC, BP P.L.C., Pacific Resources Investment Limited, BP International Limited, Sangatta Holdings Limited, Kalimantan Coal Limited*, para 186.

⁵⁶ *Ibid.*

⁵⁷ *Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Award, 6 December 2016, para 478.

faith investors, and did not exercise ‘a reasonable level of due diligence in investigating the forgery of the impugned licenses’.⁵⁸ By contrast, the claimants replied that a finding of forgery would not be dismissive of the entire case, that the effect of a finding of forgery on the validity of the exploitation licenses would still need to be determined, and that a failure to investigate third-party wrongdoing did not automatically deprive an investor of treaty protection.⁵⁹ In its award, the ICSID tribunal decided in favor of the respondent and held that all claims were inadmissible since they were based on forged documents and the claimants’ lack of diligence in carrying out their investment.⁶⁰ The tribunal also decided that the claimants should bear all the costs associated with the proceedings since they persisted in asserting claims based on ‘obviously forged documents’, without making a ‘genuine effort’ to discover the truth as well as mischaracterizing relevant evidence.⁶¹

Based on this case, it is important to note that the contracting parties must make cooperation of investment based on good faith principle. The obligation to act in good faith include the obligation not to inflict damage upon an investment purposefully.⁶² The good faith principle also applies when the contracting parties decide to solve a dispute through the arbitral tribunal. In this case, by using forged evidence to confirm their claims, the claimants demonstrated that they were not good faith investors and did not exercise ‘a reasonable level of due diligence in investigating the forgery of the impugned licenses’, nor did they behave like ‘reasonably prudent investors in the circumstances’.⁶³ The tribunal’s decision to hold all claims as inadmissible is acceptable as they arose from rights based on fraud and forged evidence. This consideration also applies in the *Metal Tech v. Uzbekistan* case, when the ICSID tribunal found that it lacked jurisdiction to hear the claims from the claimant due to corruption in the Metal-Tech’s investment in Uzbekistan.⁶⁴

d. INDIAN METALS AND FERRO ALLOYS LTD. V. THE REPUBLIC OF INDONESIA

The claimant’s claim is about the violation if non-expropriation and fair and equitable treatment committed by the Indonesian government. The claimant argued that the respondent is unable to clear out the claimant’s mining overlapping concession permission and put it on the government’s Clean and Clear list (list of non-overlapping mining concession), did not

⁵⁸ *Ibid.*, para 481.

⁵⁹ *Ibid.*, paras 484-485.

⁶⁰ *Ibid.*, paras 528-529.

⁶¹ *Ibid.*, para 535.

⁶² *Ibid.*

⁶³ ICSID, *Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia*, para 481.

⁶⁴ ICSID, *Metal-Tech Ltd. v. the Republic of Uzbekistan*, ARB/10/3 (2013), para 372.

inform the claimant about the process being followed for issuance of the Clean and Clear list, nor give any reason for non-inclusion of claimant's investment from the Clean and Clear list, while the respondent let other companies' overlapping concession permissions to be solved and put it on the Clean and Clear list.⁶⁵ In response to the claimant's accusation concerning the violation of fair and equitable treatment, the respondent argued that the Claimant did not conduct proper due diligence. The claimant should consider at the first place that there is a risk of overlapping mining license in Indonesia, which means that the claimant should make a proper legal due diligence before making its investment.⁶⁶ The Indonesian government have tried to solve the overlapping license issue by solving each case in a 'first come first served' basis and the claimant did not file any evidence to support its assertion that its license should be preferred because of 'first come first served' nor file any evidence that its investment should be in the Clean and Clear list.⁶⁷ In its award, the Tribunal did not find any merit in any of the claimant's complain.⁶⁸ In their judgement, the Tribunal was on the opinion that, firstly, the respondent is not bound by international law to reconcile its internal boundaries dispute or overlapping internal licenses.⁶⁹ Secondly, there is no legal obligation in Indonesian domestic legislation which guarantees or warrants any timeframe within which overlapping boundaries are to be resolved.⁷⁰ The Tribunal also cannot find any violation of the fair and equitable treatment standard in the application of 'first come first served' basis by the respondent in resolving the overlapping mining licenses.⁷¹ Lastly, the Tribunal did not find any evidence of *de jure* and *de facto* discrimination against the claimant.⁷²

It is crucial for foreign investors to aware of any risks of their investment in the host state and must do a proper due diligence beforehand. The BIT between the host state and the home state of the foreign investor also cannot be treated as insurance policy for their investment. It is because the host state cannot give a guarantee that it can solve its internal investment issue immediately, which means that the investor must manage its own risk. The fair and equitable treatment can be understood as embodying the rule of law as a standard that the legal systems of host states have to embrace in their

⁶⁵ PCA, *Indian Metals & Ferro Alloys Limited (India) v. the Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, para 59.

⁶⁶ *Ibid.*, para 207.

⁶⁷ *Ibid.*, para 219.

⁶⁸ *Ibid.*, para 243.

⁶⁹ *Ibid.*, para 244.

⁷⁰ *Ibid.*, para 245.

⁷¹ *Ibid.*, para 246.

⁷² *Ibid.*

treatment of foreign investors.⁷³ The host state will not violate the fair and equitable treatment principle just because it is unable to solve its internal legal problem concerning foreign investment as long as the effect of that failure also applies to other investors and the host state government did not act discriminatively. Moreover, the claimant also needs to provide firm evidence for its claim that the respondent has violated the fair and equitable treatment since the burden of proof of that claim is on the side of the claimant.

No information about awards is available in *Cemex Asia Holdings Ltd. v. the Republic of Indonesia and Nusa Tenggara Partnership B.V.*, and *PT. Newmont Nusa Tenggara v. the Republic of Indonesia* since the cases were not made public. By consequence, they cannot be further analyzed.

III. THE INDONESIAN GOVERNMENT'S PARTICIPATION IN THE CURRENT REFORM ON INTERNATIONAL INVESTMENT LAW

A. CURRENT REFORM ON INTERNATIONAL INVESTMENT LAW

1. Issues of BITs

a. INEQUAL POSITION OF BIT

When conducting a BIT, the host state and the home state of foreign investors would negotiate about kinds of protections that the host state can provide for the foreign investors. However, at the same time, the BIT's permits the home state to dictate the circumstances under which its investors will be permitted to invest abroad, while leaving its investors in a legally preferred position within the host state.⁷⁴ This problem can be even worse if the host state is a developing country. The host state may admit request of extraordinary protections from the home state for its investors which may risk economic, environmental, or human rights condition of the host state, just because the host state needs investment from the home state. In due time, the existing inequalities will cause the host state to take illiberal action in the name of economic development, and, when developing states will not feel the same compulsion to attract foreign investment, they may be tempted to renege on their promise of investment security.⁷⁵ This will be particularly true if inward foreign investment does not appear to be contributing to economic

⁷³ Stephan W. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law* (Oxford: Oxford University Press, 2010), 151.

⁷⁴ Kenneth J. Vandeveld, "The Political Economy of a Bilateral Investment Treaty," *American Journal of International Law* 92, (1998): 636, DOI: 10.2307/2998126.

⁷⁵ *Ibid.*

development, either because it has failed to raise productivity sufficiently or because it is exacerbating existing inequalities.⁷⁶

b. ENVIRONMENTAL AND HUMAN RIGHTS PROVISION IN THE BIT

Currently, there is a global protest which alleges that investment agreements only focus on economic development between the contracting parties of the BIT instead of giving more concern to environmental and human rights issues despite the fact that many environmental damages and human rights violations resulted from the establishment of investment agreements.⁷⁷ Even though investment agreements can boost economic development of the host state, the investments can lead to adverse consequences for the host state itself. For example, the investment treaties secure the export of highly polluting industries into the developing world⁷⁸ and human rights violations committed by the parent companies of multinational corporations.⁷⁹ Moreover, studies by Non-Government Organizations have demonstrated that many natural resource projects are initiated despite their adverse consequences on human rights.⁸⁰

Under international law, the protection of environment and human rights are *jus cogens*. The ICJ and other international courts have recognized in recent cases that the *jus cogens* norms reflect the fundamental or essential values of international law.⁸¹ Article 53 of the VCLT states that ‘*jus cogens* is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.’ If a provision in a treaty is in violation of *jus cogens* at the time of its conclusion, the treaty as a whole would be void *ab initio* (devoid of all legal effect from the outset).⁸² Considering the important position of *jus cogens* in international law, which gives explicit responsibility to the contracting state not to violate the environmental and human rights, the protection of these rights should be accommodated in investment treaties.

2. Issues of ISDS

a. NATIONAL THREAT THROUGH ISDS

Provisions of investment treaty arbitration embedded in BIT has a purpose to give protection of rights and other interests between the contracting

⁷⁶ *Ibid.*

⁷⁷ Sornarajah, *The International Law of Foreign Investment*, 224-225.

⁷⁸ *Ibid.*, 225.

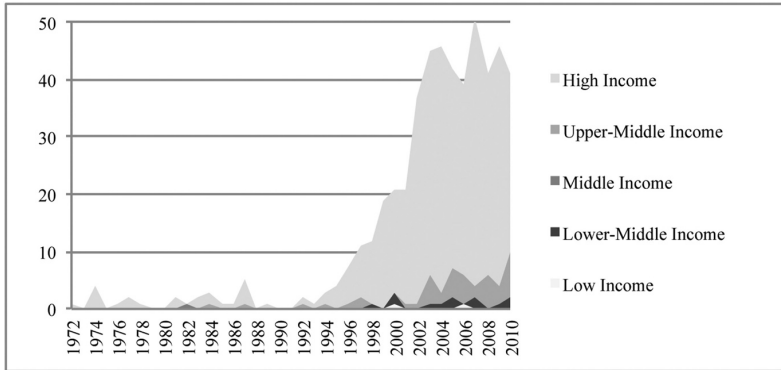
⁷⁹ *Ibid.*, 227.

⁸⁰ *Ibid.*

⁸¹ Hernandez G, *International Law* (Oxford University Press, 2019), 62.

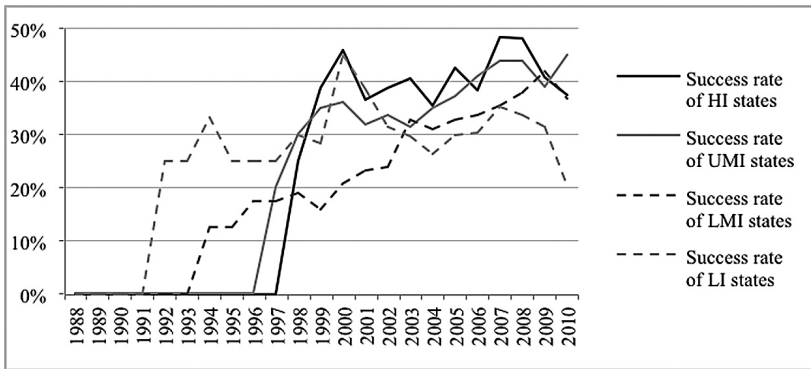
⁸² *Ibid.*, 67.

parties. However, what investment arbitration really does is help developed countries to regulate the activities of developing countries regarding foreign investments.⁸³



Number of investment arbitration claims filed per year, by development status of investor's home state⁸⁴

The data above shows that the home state of the foreign investors is very dominant in claiming ISDS against its contracting parties, while middle-income, lower-middle income, and low-income country only have a very minimum number in claiming the investor-State dispute.



Percentage of claims won by host states (legal definition of success), out of the claims that were filed against states of each economic development status (high income=HI, upper-middle income=UMI, lower-middle income=LMI, lower income=LI) and that were concluded, by year of filing (10-year moving

⁸³ Thomas Schultz and Cedric Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study," *European Journal of International Law* 25, no. 4 (2015): 1151-1152, DOI:10.1093/ejil/chu075

⁸⁴ *Ibid.*, 1155.

average)⁸⁵

The data above shows that the high-income states have a higher success rate of claims than the low-income states. Economic power disparities seem to be a factor of success since the high-income states has a better rule of law and better legal counsel it can afford.⁸⁶ The dominance of high-income states in filing claims and win the ISDS, and the provision of the foreign investors protections in BIT can be seen as a practice of neo-colonialism since the high-income states can control the developing countries through their foreign investors and the system serves to maximize the protection of foreign investors from developed countries.⁸⁷ Developing states derive no benefit from the system of protections devised through arbitration that they stand to lose from multimillion-dollar arbitral awards resulting from the violation of the treaties at times when they are least able to meet such awards.⁸⁸

The practice of neo-colonialism can lead to a ‘regulatory chill’, where the government of the host state cannot establish a legitimate regulatory measure in the public’s interest due to fear of claims from foreign investors. In practice, foreign investors have used ISDS to punish countries for limiting investment profits during economic crises (e.g. *LG&E Energy Corp., LG&E Capital Corp.* and *LG&E International Inv v. Argentina*), reforming tax and environmental regulations (e.g. *S.D. Myers Inc. v. Canada*), or prosecuting executives accused of crimes.⁸⁹ However, threat practices are usually difficult to prove. A recent study for the Dutch government concluded that ‘It would therefore be nearly impossible to find enough of these individual cases to prove any overall pattern of regulatory chill’.⁹⁰

2. TRANSPARENCY ISSUE IN ISDS

Parties of the dispute or the tribunal itself have the option not to publish awards made by arbitration tribunals because there are rules concerning the confidentiality of the award resulting from an investment dispute. Several rules in the ICSID Convention or Arbitration Rules are intended to maintain a certain degree of privacy in the conduct of the proceedings, because it is

⁸⁵ *Ibid.*, 1166.

⁸⁶ *Ibid.*, 1165-1166.

⁸⁷ *Ibid.*, 1153.

⁸⁸ Muthucumaraswamy Sornarajah, “Developing countries in the investment treaty system: A law for need or a law for greed?” in *International Investment Law and Development: Bridging the Gap*, Stephan W. Schill, Christian J. Tams and Rainier Hofmann, eds. (Cheltenham: Edward Elgar Publishing, 2015), 44.

⁸⁹ Chris Hamby, “The Secret Threat that Makes Corporations More Powerful than Countries,” *BuzzFeed News*, 30 August 2016, accessed 4 June 2020, <https://www.buzzfeednews.com/article/chrishamby/the-billion-dollar-ultimatum>.

⁹⁰ Christian Tietje and Freya Baetens, *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership: Study prepared for: Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands* (2014), para 69.

necessary to safeguard the fairness and efficiency of the proceedings.⁹¹ For example, Article 48(5) of the ICSID Convention stipulates that ‘the Centre shall not publish the award without the consent of the parties’. Moreover, Rule 6(2) of the ICSID Arbitration Rules mentions that the arbitrator should sign a declaration that they will keep confidential all information and the contents of any award made by the tribunal. However, Article 3 of the UNCITRAL Rules on Transparency differs from this, as most documents from arbitral proceedings are made available to the public. The UNCITRAL Rules on Transparency demonstrates a clear departure from the principle of confidentiality with regard to investment treaty arbitration.⁹²

The investment treaty arbitration should be transparent and public because foreign investors should have fully knowledge about the implementation of investment agreements in the host state, the kinds of investment disputes which occur in the host state, and the treatment of foreign investors by the host state. Eric de Brabandere listed five reasons why international treaty arbitration should be transparent and public: 1) Investment protection treaties have broader objectives than the investment disputes settlement which means that a BIT does not have the private and closed character of international arbitration; 2) The public international law character of investment treaty arbitration is not only about its private function, but also has a very important public aspect, which exceeds private bilateral relations between the parties; 3) The State’s public reporting responsibilities may be applicable in the sense that states may be bound by principles of open government expected of public authorities; 4) The legitimacy of the arbitral process is essential in investment treaty arbitration since public access to the outcome and conduct of the arbitral process is important for inspiring confidence in the arbitral mechanism; 5) The public availability of decisions enhances access to the reasoning of arbitral tribunals and thus enables host states and foreign investors to be better acquainted with the strengths and weaknesses of their case.⁹³

The transparency of investment treaty arbitration has also been reflected in recent BITs. For example, the 2012 US Model BIT provides that after receiving the notice of intent, the notice of arbitration, pleadings, memorials and briefs, the respondent should submit to the tribunal by a disputing party. Moreover, the Canadian Model Foreign Investment Protection Agreement stipulates that ‘all documents submitted to, or issued by, the Tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information’ and that ‘any Tribunal award under

⁹¹ De Brabandere, *Investment Treaty Arbitration as Public International Law*, 154.

⁹² *Ibid.*, 158.

⁹³ *Ibid.*

this Section shall be publicly available, subject to the deletion of confidential information'.⁹⁴

3. The Need of International Investment Law Reform

In the regime of international investment law, BIT and ISDS mechanism is important because it offers foreign investors protection and mechanism to hold states accountable for breaches of promises made in investment treaties.⁹⁵ This transforms investment treaties from political declarations into readily enforceable rules to stabilize investor-state relations.⁹⁶ It also determines how serious the government of the host state in protecting foreign investments made by other states. In the past decades, an increasing number of investor-state arbitration cases have been initiated:

With the increasing number of investor-state arbitration cases used to solve the disputes between foreign investors and the host state, it is necessary to resolve the problems in international investment law: Inequality position between the host states and the home state in the BIT and the practice of neo-colonialism from high-income states to low-income states. When imbalances occur as a result of a tilt that favors certain interests over others within a regime, there is bound to be a reaction by those whose interests are affected.⁹⁷ One of the reactions is the withdrawal from the regime. On the part of some states, there is an outright rejection of international investment law regime, either through the threat of termination of treaties or withdrawal from the ICSID Convention.⁹⁸ This condition started when Bolivia, Ecuador, Nicaragua and Venezuela stated intention to withdraw from ICSID Convention and terminate several BITs.⁹⁹ The impact of withdrawal or change on existing disputes is yet to be assessed, but the more restrictive the views of the tribunals are on the effect of these withdrawals, the greater would be the disenchantment with the regime.¹⁰⁰

The national threat issue is very sensitive since it involves state sovereignty. When the law begins to affect the sovereignty of states, it will be put into reversal.¹⁰¹ In order to solve this problem, there needs to be an obligation

⁹⁴ *Ibid.*, 160.

⁹⁵ "The Virtues of Inter-State Arbitration," EJIL Talk, 19 November 2013, accessed 3 June 2020, <https://www.ejiltalk.org/the-virtues-of-investor-state-arbitration>.

⁹⁶ *Ibid.*

⁹⁷ Muthucumaraswamy Sornarajah, "Toward Normlessness: The Ravage and Retreat of Neo-Liberalism in International Investment Law" in *Yearbook on International Investment Law & Policy 2009-2010*, Karl P. Sauvant. (New York: Oxford University Press, 2010), 635.

⁹⁸ *Ibid.*

⁹⁹ United Nations Conference on Trade and Development, *Denunciation of the ICSID Convention and Bits: Impact on Investor-State Claims* (UNCTAD IIA Issue Note, 2010), 3.

¹⁰⁰ Sornarajah, "Toward Normlessness: The Ravage and Retreat of Neo-Liberalism," 636.

¹⁰¹ *Ibid.*, 642.

in ISDS for the foreign investors to make mediation or to local remedies before resorting to international arbitration. ISDS also should preserve the equal rights and obligations between the foreign investors and the host state. Preserving greater regulatory space and unilateral commitments in legislation and through contracts remain the alternatives that are realistic at present are also needed to bring the contracting parties to return to a regime that permits state sovereignty.¹⁰²

Another increasing debate about the ISDS mechanism in terms of issues with consistency and erroneous arbitral decisions (different legal interpretations of similar treaty provisions and differences in the assessment of the merits in cases involving the same facts), the position of arbitrators (appointed arbitrators can be biased since they can be re-appointed in future cases and their frequent ‘changing of hats’, or serving as arbitrators in some cases and counsel in others), and the high cost and time-intensive nature of the arbitrations.¹⁰³ To solve these issues, the UNCTAD’s Investment Commission and Expert Meetings released the World Investment Report in 2013 in which member states agreed to enact reforms in five areas of ISDS:¹⁰⁴

a) Promoting alternative dispute resolution

This approach proposes the non-binding methods such as conciliation and mediation to save time and money, find mutually acceptable solutions, prevent escalation of disputes, and preserve a workable relationship between the disputing parties.¹⁰⁵

b) Tailoring the existing system through individual investment agreement

Each country applies specific modifications to certain aspects of ISDS system in their new investment agreement, such as setting time limits for bringing claims, increasing the contracting parties’ role in interpreting the treaty, or establishing a mechanism for consolidation of related claims.

c) Limiting investor access to ISDS

This option envisages narrowing down the range of situations in which investors may resort to ISDS in numerous ways, such as by reducing the subject-matter scope for ISDS claims, restricting the range of investors who qualify for benefiting from the treaty, and introducing a requirement to exhaust local remedies before resorting to international arbitration.¹⁰⁶

¹⁰² *Ibid.*, 599.

¹⁰³ United Nations Conference on Trade and Development, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (UNCTAD IIA Issue Note, 2013), 3-4.

¹⁰⁴ *Ibid.*, 4.

¹⁰⁵ *Ibid.*, 5.

¹⁰⁶ *Ibid.*, 7.

d) Introducing an appeals facility

An appeals facility implies a standing body with the competence to undertake a substantive review of awards rendered by arbitral tribunals to improve their consistency, correct erroneous decisions made by first-level tribunals, and enhance the predictability of the law.¹⁰⁷

e) Creating a standing international investment court

This option entails the replacement of the current system of ad hoc arbitral tribunals with a new institutional structure and the appeals chamber, which would consist of judges appointed or elected by states for a fixed term.¹⁰⁸

Such reform is important to improve the ISDS mechanism in resolving disputes between foreign investors and host states. However, implementation can be difficult. For example, it is challenging to set up an international investment court since it would need to be approved by a large number of states. It also cannot guarantee the consistency of awards resulting from a dispute since there would be numerous investment disputes that could be litigated through the new mechanism of ISDS.

B. INDONESIA'S INTERNATIONAL INVESTMENT LAW REFORM

1. THE ESTABLISHMENT OF OMNIBUS LAW

The government of Indonesia has reformed its international investment law by included fundamental guarantees in international investment in the Foreign Investment Law Number 25 Year 2007. The Job Creation Law Number 11 Year 2020 (also called "Omnibus Law"), which amended 76 overlapping government regulations, including the Foreign Investment Law Number 25 Year 2007, made a bigger reform, such as simplify investment licensing, ease foreign investment restrictions which provide more investment sector for foreign investment (this was further regulated by the Presidential Regulation No. 10 of 2021 regarding Investment Sectors), make the labor law more flexible, and streamline corporate tax regulations.¹⁰⁹

The Indonesia's Omnibus Law has given a positive impact to its economy. Based on the data from Indonesia Ministry of Finance, the foreign investment in Indonesia (excluding investment in banking and the oil and gas sector) jumped 19.6 percent year-on-year to Rp116.8 trillion (USD 8.06 billion) in the second quarter of 2021, following a 14 percent increase in the previous

¹⁰⁷ *Ibid.*, 8-9.

¹⁰⁸ *Ibid.*, 9.

¹⁰⁹ The Job Creation Law Number 11 Year 2020

period.¹¹⁰ Even though the growth of its foreign investment could be declined due to the rising of COVID-19 cases and tighter restrictions on people's activities starting in July 2021 which likely to affect the foreign investment figures for the third quarter of 2021, the Omnibus Law has played an important part of the economic recovery strategy and significantly improve the foreign investment in Indonesia.

However, the regulation is by no means comprehensive since there is no provision regarding the transparency. The latter is important, because the Indonesian government would be able to gain the confidence of foreign investors if it provided up-to-date and reliable information about the condition of foreign investment within the country.

2. REFORM IN BIT AND ARBITRATION LAW

In 2015, the Indonesian government initiated BIT reform by reviewing and terminating its 64 BITs since those BITs are considered unsuitable with Indonesia's current development.¹¹¹ The goal of the review was to strike a balance between investor protections and national sovereignty, maintain its policy space to implement its own development goals, fix ISDS provisions, and review provisions in investment agreements that may potentially override national legislation.¹¹² Although the investment protections still applied under survival clause of the BITs and the Indonesian government only seek to renegotiate the investment treaties and not to terminate those treaties permanently, the review and termination has raised concerns among current and prospective foreign investors.

The BIT review was important since it focused on limiting the scope of application for ISDS provisions and five issues: the definitions of investment, national treatment, most-favored-nation treatment, fair and equitable treatment, and indirect expropriation.¹¹³ Unfortunately, it was not very comprehensive since it did not include the issue of environmental and human rights protections in the review. It is crucial for the Indonesian government to add such provisions in its BITs; as a developing country, most foreign investments in Indonesia are in the mining and manufacturing sectors which make Indonesia very vulnerable to environmental damage and human rights violations.¹¹⁴

¹¹⁰ Bramantya Saputro, "Di Balik Undang-Undang Cipta Kerja [Behind Job Creation Law]," *Warta Fiskal* 3, no. 1 (2021): 17.

¹¹¹ Abdulkadir Jailani, "Indonesia's Perspective on Review of International Investment Agreements," *South Centre: Investment Policy Brief*, no.1 (2015): 1.

¹¹² *Ibid.*, 1-2.

¹¹³ *Ibid.*, 5.

¹¹⁴ Organization for Economic Co-operation and Development, "Indonesia 2010 Executive Summary," OECD Investment Policy Reviews (2010), 19; Organization for Economic Co-operation and Development,

The Indonesian government must also reform its arbitration law. This is because the substances of the Indonesia arbitration law (Arbitration and Alternative Dispute Resolution Law Number 30 Year 1999) do not follow the general provisions of international arbitration under the 1985 UNCITRAL Model Law on International Commercial Arbitration (UN General Assembly Resolution Number 40/72). This causes difficulties in the execution or implementation of awards made by the Indonesian arbitral tribunal abroad. In addition, the current Indonesian arbitration law does not clearly define international arbitration awards; this is a problem when foreign investors want to execute the latter in Indonesia.¹¹⁵ Based on Article 1(9) of the Indonesia Arbitration and Alternative Dispute Resolution Law Number 30 Year 1999, there are two international arbitration awards recognized by the Indonesian government: 1) an arbitration decision made by an arbitration institution or an individual arbitrator outside the jurisdiction of the Republic of Indonesia; 2) the decision of an arbitration institution or individual arbitrator that accordance with the legal provisions of the Republic of Indonesia. The second alternative has a potential to create multiple interpretations since it does not clearly state the scope of international arbitration awards.¹¹⁶ The act also does not explicitly regulate aspects governing international arbitrations conducted in Indonesia, which may result in unclear international arbitration awards made in Indonesian arbitral tribunals and add to the reluctance of foreign investors to settle investment disputes through Indonesian arbitration.¹¹⁷ This issue arose in the dispute between PT. Lirik Petroleum (international corporation operated in Indonesia) and PT. Pertamina (Indonesian SOE), in which PT. Pertamina did not recognize the international arbitration award decided in Indonesia and requested its annulment. PT. Pertamina argued that, since the arbitral tribunal in this case was domestic (as the arbitration process and award took place in Indonesia), the arbitral mechanism fell under Indonesian arbitration law. According to Article 59(1) of Indonesia Arbitration Law Number 30 Year 1999, the arbitral award must be registered with a district court within 30 days of its pronouncement; however, because the arbitration award was registered 54 days after it was determined, it was considered invalid based on Indonesian arbitration law.¹¹⁸ The Jakarta District Court and the Indonesia Supreme Court, in its award, rejected the annulment request from PT. Pertamina since the

“Indonesia 2010 Overview of Progress and Policy Challenges,” OECD Investment Policy Reviews (2010), 31.

¹¹⁵ Huala Adolf, “Urgensi Pembentukan Undang-Undang tentang Arbitrase Internasional Internasional [The Urgency of Creating International Arbitration National Act],” *Fiat Justitia* 10, no. 2 (2016): 326, DOI: 10.25041/fiatjustisia.v10no2.684.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 327.

contracting parties agreed to resolve their dispute in an Indonesian arbitral tribunal under the rule of the International Chamber of Commerce, which recognized the award as being from an international arbitral tribunal.¹¹⁹

IV. CONCLUSION

Foreign investment is essential for Indonesia as host state to increase its economy. In order to attract foreign investors, the Indonesian government must provide investment guarantees in its BITs and national regulations. Since their first establishment of foreign investment regulation in 1958, the Indonesian government has faced several foreign investment cases that were litigated under ICSID and UNCITRAL. Most cases involved Indonesia as the respondent, in which it was accused of violating fair and equitable treatment, protection and security, and illegal expropriation. After being found guilty in some arbitral cases, the Indonesian government amended its foreign investment policy by establishing Foreign Investment Law Number 25 Year 2007. The new law included fundamental investment protections that were not addressed in the previous regulations, such as full protection and security, fair and equitable treatment, most-favoured-nation treatment, non-expropriation, and a dispute settlement mechanism.

Currently, there is an international issue regarding international investment law reform. Many global protests said that there should be an equal position of BIT between the contracting states and provide greater consideration to environment and human rights issues. The practice of ISDS must also be reformed since it is frequently used by foreign investors to threaten the host state. Moreover, ISDS must also be more transparent since foreign investors have a right to know how host states treat foreign investments. It is also very important for the ISDS to be more efficient in litigating international treaty arbitration in order to enable arbitration cases to conclude more rapidly and at lower expense.

Despite improvements, the Indonesian government must further reform its international investment law. The latest Indonesia Foreign Investment Law does not give any provisions regarding transparency in investment treaty arbitration. It is important for the Indonesian government to add such provisions since it is essential for foreign investors to be appraised of any investment cases that have occurred in the host state and how they have been handled. The Indonesian government must also include environmental and human rights protections in its BITs, because Indonesia is at high risk of environmental damages and

¹¹⁹ *Ibid.*, 328.

human rights abuses when foreign investors invest in mining, manufacturing, or other sectors that are vulnerable to the exploitation of natural resources or human rights. In addition, it is also important for the Indonesian government to reform the field of international arbitration. The existing arbitration law has potential to cause difficulties concerning the execution of international arbitration awards conducted beyond and within the Indonesian jurisdiction. This reform would create greater trust amongst foreign investors to invest in Indonesia and allow them to resolve any investment disputes in an Indonesian arbitral tribunal.

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