# Constitutional Lawsuit On International Treaty Law No.24/2000 Government's Expert: "BIT Has Fundamental Consequences"

The closing of public participation and access to the information besides the draft text of treaty in the free trade agreement negotiation and international investment has been threatened the democracy and the protection of human rights. Moreover, free trade and international investment agreement were ratified without approval from the House of Representatives of the Republic of Indonesia and created the loss of the function of people's control/DPR over the authority of the Government.

This is then become the basis for Indonesian civil society groups to submit a lawsuit of judicial review of Law No.24 of 2000 on International Treaties (UUPI) to the Constitution in the Constitutional Court. The lawsuit was submitted on February 14, 2018 with case number NO.13 / PUU-XVI / 2018. The trial has reached at the hearing session to hear the explanation from Government's expert.

**Problem Context**

One of the issues in this lawsuit relates to Article 10 and Article 11 the Law of International Agreement concerning the distribution of international agreements which require the approval of the House of Representatives and those which do not. These two articles are confronted with Article 11 Paragraph (2) the Constitution of 1945 which states: *"The President in making other international agreements which have broad and fundamental consequences for the life of the people related to the financial burdens of the state and / or requires the amendment or the formation of the law should be with the approval of the House of Representatives ".*

The approval of the House of Representatives of Indonesia which is a representation of people's vote becomes very important to international treaties that have a wide impact on people's lives, including those affecting the state's finances and causing changes and / or the formation of laws.

Article 10 of UUPI regulates the category of International Agreement which requires the approval of DPR RI, that is related to the problem of: *(1) political, peace, defense and state security issues; (2) a change of territory or stipulation of the territorial boundary of the Republic of Indonesia; (3) sovereignty or sovereign rights of the state; (4) human rights and the environment; (5) the establishment of new legal norms; (6) foreign loans and / or grants.*

While Article 11 of UUPI regulates the category of international agreements that do not require the approval of the House of Representatives, which is related to *the material that is procedural and requires application in a short time without affecting the national legislation, including the master agreement concerning to the cooperation in the field of science and technology,* ***economics,*** *engineering,* ***trade,*** *culture, commercial shipping,* ***avoidance of double taxation****, and* ***investment protection cooperation****, and other technical agreements.*

Civil society considers that the division of international treaties in Articles 10 and 11 is contradictory to the Article 11 paragraph (2) of the Constitution of 1945 because in practice there are international agreements which have a wide impact on people's lives but not through the process of approval of the House of Representatives of Republic of Indonesia so that checks and balances by the House of Representatives are not working.

For example, trade and investment treaties (Bilateral Investment Treaty (BIT) in its implementation they have a broad impact on people's lives but in the process of ratification they do not require the approval from the House of Representatives.

This is what next become the basis for argumentation for civil society in its lawsuit where the categorization restrictions of article 10 and article 11 are incorrectly prepared and contrary to the Constitution.

**BIT Should Gets the Approval from the House of Representatives**

In its lawsuit, the petitioners (civil society) considered[1] that during this time the investment protection agreements have only been approved by Presidential Decree or Presidential Regulation and without the approval from the House of Representatives of Indonesia. For example Agreement on Enhancement and Protection of Investment (P4M) or known as Bilateral Investment Treaty (BIT), between Indonesia and Singapore that ratified by Presidential Decree no. 6 Year 2006. Or P4M between Indonesia and India with Presidential Decree no. 93 Year 2003.

Whereas the contents in the agreement are not linked to the procedural or technical which according to Article 11 International Agreement Law is considered does not require the approval from Parliament. In the agreement concerning to the provisions in which contains the obligation of Indonesia to provide the certainty of investor's protection by not doing acts that harm foreign investors, such as discrimination, nationalization, as well as security measures against foreign investors. If Indonesia violates this rule, then

1 Summarized from the Petitioners' Lawsuit in the Case No.13/PUU-XVI/2018

Indonesia could be sued by foreign Investor in international arbitration. This mechanism is called as Investor to State Dispute Settlement / ISDS.

Indonesia already has at least 8 experience cases of foreign investors suing against Indonesia with the value of claims of losses requested for compensation by investors reaching billions of US dollars. Some of the cases such as Rafat Ali Rizvi (BIT Indonesia-UK), Churcill Mining (BIT Indonesia-UK), Newmont (BIT Indonesia-Netherlands), India Metal Ferro Alloys (BIT Indonesia-India) and Oleovest Ltd (BIT Indonesia-Singapore ).

The impact of P4M or BIT has been realized by the Government of Indonesia where the international investment agreement that contains the ISDS mechanism has eliminated the policy space of the state and the function of the state in fulfilling the obligation to fulfill Human Rights to its people. In fact, the Government of Indonesia has decided to review and suspend BIT with several countries due to BIT raises major problems regarding to the practices of state policy making.

There are four basic reasons for Indonesia to review the BIT, namely: ***First,*** *the absence of a balance between investor protection and national sovereignty;* ***Second****, the terms of the agreement provide broad protection and rights for foreign investors, and leaving the host country with no policy space for implementing its own development goals.* ***Third****, the problem arises from Investor to State Dispute Settlement (ISDS), which has increased Indonesia's exposure to the investor claims in international arbitration.* ***Fourth,*** *the provisions of international investment agreements have the potential to override national laws*[2] .

Therefore, seeing the impact arising from BIT, before ratified this agreement, it should get the approval from the House of Representatives at the first.

During the Constitutional Court on 25 June 2018[3] , the explanation from the expert of the Government of Indonesia is strengthening the views of civil society groups in the lawsuit. Prof.Hikmahanto Juwana, Professor of University of Indonesia, in the court stated that the categorization of international agreement in Indonesian Agreement Law has been caused many mistakes of the House of Representation and Government in its application to determine which international agreements require the House of Representatives approval and which are not. Moreover, in his statement, Prof. Hikmahanto Juwana stated that the categorization of the International Treaty is surely not seen from the naming or the term but should be seen from the substance or material set forth in the international agreement.

Linked with BIT, he stated that the implementation of BIT signed by the Government at that time has turned out to have an impact which is no longer technical. But there are fundamental consequences of BIT or investment protection agreements in which investors can sue the State in international arbitration and potentially could be defeated

2 Abdul Kadir Jailani "Indonesia's perspective on review of the international investment agreement", in a book entitled "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices"

3 Can be read in full in the minutes of Court MK case No.13 / PUU-XVI / 2018, at the following link: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/risalah/risalah_sidang_10074_PERKARA%20NOMOR%2013.PUU -XVI.2018% 20tgl% 2025% 20Juni% 202018.pdf

by Investors. Therefore, Prof. Hikmahanto in his opinion stated that international agreements specifically related to the investment protection materials or BIT should be done carefully by the state, and the gray areas related to the what international agreements are necessary with the approval of the House of Representatives and which are not, according to the expert should be immediately looking for its consistency.

From the above expert's view, it can be understood that BIT is indeed an agreement that cannot be substantially categorized as an international agreement that is not require the approval of Parliament. So the categorization of BIT in article 11 International Agreement Law is not right on the implementation of International Agreement Law. The misconduct of international treaty categorization, in this case is BIT, it should be made as a legal fact by the Panel of Constitutional Justices to be able to interpret how should the categorization of international treaties requiring the approval of the House of Representatives and which are not, to be regulated in the international treaty law in the future. Thus, people's control over the BIT governing ISDS mechanism could be done.

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