

## **Winning Over IMFA, The Government Must Remain Alert**

JAKARTA 3 April 2019. Indonesia for Global Justice (IGJ) welcomed Indonesia's victory over the IMFA.

However, IGJ requested that the Indonesian Government not be unaware of Indonesia's victory over India Metal Ferro Alloys (IMFA) at the Permanent Court of Arbitration (PCA). This is because the potential of the IMFA to avoid the obligations stipulated in the PCA decision can occur.

IGJ Executive Director, Rachmi Hertanti, explained that learning from the experience of the Churchill Mining lawsuit against Indonesia, there was an effort that the Annulment of the Awards petition against the ICSID verdict was one of the tricks to avoid the obligation to pay court fees ordered in the verdict.

"It is true that the victory over the IMFA has prevented the State from losing US \$ 469 million. But there is the fact that the submission of an annulment of the award is one of the strategies of losing investors to avoid the obligation that causes enforcement of the verdict not to be carried out. Churchill's case must be a lesson for the Indonesian Government," Rachmi explained.

Even though the Indonesian Government wins, the State will always be the defeated party. This is because multinational companies will continue to seek legal loopholes to avoid liability even though the court or arbitration has issued a verdict.

"Including the refusal of Churchill's application for the Annulment of the Awards by ICSID does not mean that Churchill will easily pay its obligations in accordance with the Decision. If in the end the government forces to confiscate Churchill's assets or conduct MLA, there will still be diplomatic costs that must be issued by the Government," Rachmi said.

### **Urging Commitment To Avoid ISDS Mechanism**

Rachmi again reminded that Indonesia still has the potential to be sued by foreign investors in international arbitration institutions. This is because the Indonesian International Trade and Investment Agreement still regulates the mechanism of the Investor-State Dispute Settlement (ISDS), which is a mechanism that gives investors the right to sue the state in international arbitration.

"Although the Indonesian Government has stopped many Bilateral Investment Treaties (BIT), the rules for survival clauses in the agreement do not invalidate the right of foreign investors to sue for a period of typically 10 to 15 years since the BIT was terminated. In addition, the Indonesia-Singapore BIT and the Indonesia-Australia CEPA which have just been signed by the Indonesian Government reload the ISDS mechanism and will certainly open opportunities for investors to sue," Rachmi said

Especially in practice, many of the ISDS lawsuits are used by investors who do not have good intentions by using shopping nationality and shopping tax treaty. So that the increase in ISDS cases is also dominated by Frivolous claims that are detrimental to the state.

"Responding to a lawsuit by an investor who is not in good faith will harm Indonesia and will only burden the state budget. So, the ISDS mechanism should have been avoided by Indonesia," Rachmi added.

Therefore IGJ urges the Indonesian Government not to forget the commitments that have been taken to avoid the ISDS mechanism and not to be regulated in Indonesia's international agreements, both BIT and FTA / CEPA.\*

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