Investment Disputes Bankrupting The State

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A recent story of Indonesian Government's winning over an Indian mining company, India Metal & Ferro Alloys Ltd. (IMFA) on March 29, 2019, continues to attract public attention. Previously, Indonesian Government also affirmed its absolute winning over Rafat Ali Rizvi and Churcill Mining. Those British investors then took a serious step by bringing Indonesia to an arbitration dispute based on the Bilateral Investment Treaty (BIT) between Indonesia and Britain in 1976.

In the past 9 years, since 2011, Indonesia had often faced investment disputes with international arbitration institutions. The dispute was mostly filed by foreign investors on charges of breaching the agreements of Bilateral Investment Treaty (BIT). Of the total cases, most of plaintiffs came from foreign mining companies, such as Churchill Mining, Planet Mining, Newmont, and IMFA. Two other cases came from palm oil processing industry and financial sector, namely Oleovest and Rafat Ali Rizvi.

The legal victory raises confidence of the Indonesian Government in facing investment disputes. However, this should not necessarily make them negligent. The State must remain cautious with the possibility of similar disputes and the impact that will arise from ratified international investment agreements, both in the Bilateral Investment Treaty (BIT) and in the FTA or CEPA. Since, these agreements also contain the investment protection chapter. In conclusion, the regulated dispute mechanism will still open opportunities for foreign investors to sue Indonesia. This mechanism is known as the Investor-State Dispute Settlement (ISDS).

Under the presidency of Susilo Bambang Yudhoyono, precisely in 2013, Indonesia has reviewed and stopped totally 63 BIT. Abdul Kadir Jailani, Indonesian Ambassador to Canada who previously served as Director of the Ministry of Foreign Affairs's Economic and Social Affairs Agreement, in his article "Indonesia's Perspective on Review of International Investment Agreement "(Journal of South Center, 2015), stated explicitly that one of the reasons for the Indonesian Government to review BIT was because the ISDS mechanism has directly increased Indonesia's exposure to investment claims in international arbitration.

Furthermore, KrzystofJ.Pelc, an international trade expert, in his article "Does the International Investment Regime Frivolous Litigation?" (SSRN Journal, 2016) described how investment disputes arising from investment agreements threatening state sovereignty and democracy. He argued explicitly that investor lawsuits against the state based on investment agreements were more driven by the desire to seek monetary compensation from the legal policies of countries with characteristics of stable democracy and independent justice.

In its report, the 2018 Colombia Center on Sustainable Investment, entitled "Costs and Benefits on Investment Treaties", argued about the potential cost of losses if an investment agreement with the ISDS mechanism was adopted by a country. There were four out of the seven the most important losses; litigation costs, compensation payments, political costs due to the loss of state policy space, and reputation costs.

In brief, even though the Indonesian Government might win the dispute, it still remained the defeated party, because all the economic and political risks arising from the investment dispute would still be borne by the Government. Krzystof's statement above has been proven, for instance, in case where multinational companies losing in the dispute, they would continue to find legal loopholes to avoid compliance from arbitration award. This has been shown by Churchill Mining, in 2016, where ICSID committee has declared Indonesia's winning in its dispute, but until now, Churcill, as defeated party, never performed any political will to enforce the award.

Churchill's 'Evil Tricks' To Avoid Compliance

The Indonesian government's statement in various mass media stated that the victory over the IMFA saves Indonesia from the threat of compensation payment for losses suffered by investors amounting to US $ 469 million or equivalent to Rp.6.6 trillion. The Attorney General in the case is considered a hero by Sri Mulyani (Finance Minister), for returning the state funds amounting to US $ 2.9 million plus 361,247 pounds or equivalent to Rp 50 billion which spent to pay court costs. This is because the arbitration award on ***Award on Cost*** has ordered the IMFA as the losing party to pay the case costs incurred by Indonesia.

Yet, We really need to learn much from Churchill's case. The government takes a complicated process to get its rights over ICSID award. In addition, Churchill seems showing bad will to eliminate Indonesia's right to ***Award on Cost*** in the previous award.

In the case of Churchill Mining Plc and Planet Mining Pty Ltd which was decided on December 22, 2016, ICSID ordered that Churcill Mining shall bear the fees and expenses of the arbitral tribunal as well as ICSID'S administrative fees, plus 75% of the total costs incurred by the Indonesian Government of US $ 8.6 Million. The Churcill Mining dispute against the Indonesian Government was submitted on June 22, 2012 based on the Bilateral Investment Treaty (BIT) between Indonesia and Britain in 1976.

However, on March 31, 2017 Churcill Mining and Planet Mining filed for an Annulment Application to ICSID,which automatically resulted in a provisional stay of the Award (including the costs order). There were also indications that this was one of the strategies for Churcill and Planet to avoid compliance in paying the legal cost to Indonesian Government.

Departing from the ICSID award on March 18, 2019 (ICSID Case No. ARB / 12/14 and 12/40), on the Annulment Application submitted by Churchill, the Indonesian Government urged the ICSID Committee to order Churcill Mining to provide a security fee of US $ 2 Million to an agreed deposit account within 14 days of the ICSID Committee Decision. Furthermore, the government also urged Churchill to reimburse all costs incurred relating to the termination application.

The ICSID Committee's interim decision on June 27, 2017 stated that the annulment application would be continued with the condition that Churcill and Planet did their best efforts to pay the guarantee (security cost). This was then responded by Churchill by pledging a property located

in the Province of East Kalimantan (Indonesia), namely a "Port Land" claimed by Churchill and Planet owned on behalf of PT. Techno Coal Ultama Prima (TCUP)

However, the Indonesian Government, in its objection, stated that PT. TCUP could not own land, according to Law No.5 of Basic Agrarian Law, which regulates that only 'physical person' who are Indonesian citizens can have ownership rights over land. The only right that can be owned by a legal entity, such as a company, is Business Use Rights Title (HGU) and Building Use Rights Title (HGB).

The Indonesian government tried to prove legally that PT TCUP has never acquired any form of land certificate for Port Land due to the absence of applications submitted to obtain location permits, as legal requirements determined by the National Land Agency (BPN). Moreover, the Government statement opened the fact that PT. TCUP provides compensation to villagers who had no rights of ownership, which are otherwise State land.

Another evil trick that Churcill mining did, to breach their obligation, was that on November 22, 2017, they transferred all its assets to a third party, Pala Investment Ltd, which resulted in the Government of Indonesia's rights not being prioritized over any rights granted to assets owned by Churchill. In the perspective of British law, this placed Indonesia as an "unsecured creditor", which results in uncertainty over the guarantee of reimbursement of court fees. It is considered that the ratified agreement has been breached by Churchill.

Thus, though on March 18, 2019 the Indonesian Government again won a victory over Churcill Mining, ICSID has rejected the Annulment of the Awards. They will continue to face similar problems, due to the lack of good faith from the multinational companies to comply their obligation. Even if government forces to confiscate Churchill's assets or conduct Mutual Legal Assistance (MLA), there is still the diplomacy cost incurred.

In fact, to obtain legal certainty over the Annulment Application filed by Churchill Mining, the Government has spent US $ 1.85 Million or Rp.26.1 Billion. These fees were allocated to pay fees and attorney's expenses, and the overall expenditure of Government team. The fee must be borne by the Government itself during the case process because in its decision the ICSID did not order Churchill to pay.

Regarding Churcill's case, the IMFA might be relatively similar. Therefore, in order to avoid investment disputes that potentially causing state loses, the only one panacea is to avoid the ISDS mechanism which often regulated in Indonesia's international agreements, both in BIT and FTA / CEPA. At this point, state heroism is being examined to preserve economic and political sovereignty of nation.

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