



ISDS Lawsuit: WHEN CORPORATION IGNORES STATE SOVEREIGNTY

The compilation of ISDS Case Stories in Indonesia



IGJ



INDONESIA FOR GLOBAL JUSTICE

Indonesia for Global Justice (IGJ), formerly known as the Institute for Global Justice, was formed on August 7, 2001 which focuses on issues of global trade liberalization. IGJ's vision is a just global economic system through sovereign and democratic governance to ensure the fulfilment of the economic, political, social and cultural rights of the people. IGJ's Mission is IGJ develops knowledge and connects people and social movements to collectively advocate for global and national economic justice.

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1 Preface

Polemics on investment disputes at international arbitration institutions still become a hot debate at the global level. Civil society groups' pressure to the state to eliminate Investor-State Dispute Settlement (ISDS) mechanism in various international investment and trade agreements continue increasing. Indeed, many countries are increasingly allergic to the ISDS mechanism.

The impact of the ISDS mechanism is certainly not felt directly by the people. But when the country's sovereignty is hosted by investors' interests, then it can be also ensured that the deprivation of people's rights will become increasingly legitimate. The "regulatory chill" effect of the ISDS mechanism becomes a powerful tool for foreign investors to force the state to facilitate its interests.

The struggle of civil society groups to eliminate the ISDS mechanism in investment trade and international trade agreements is often faces the obstacles due to the lack of public involvement and transparency of negotiating texts. The pressure to the Government should be given continuously in order to not creating ISDS mechanism provisions in the agreement that is negotiated. Including expanding the public understanding on adverse effects of ISDS mechanism should be carried out, so that the pressure may extend.

The book is aim to provide an understanding to the public about the ISDS mechanism, by providing a clear description of real impact caused by ISDS lawsuit faced by the Government of Indonesia. The contents of this book are actually a collection of articles written by several authors, both by IGJ researchers and IGJ networks. Moreover, there are some of them have been published, and in this book was republished in the form of codification of Indonesian ISDS cases.

The expectation from the publication of this book is to encourage broader criticism to the ISDS mechanism that is stipulated in international trade and investment agreements, both that are being negotiated and or will be ratified by Indonesia. Finally, the Government of Indonesia could consistently take the position in rejecting the ISDS mechanism.

September 2019

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2 Introduction

INVESTOR LAWSUITS & DEPRIVATION OF PEOPLE'S RIGHTS

Oleh : Rachmi Hertanti & Rahmat Maulana Sidik

"PRO-INVESTOR POLICY"

In order to facilitate foreign investment, pro-investor policies are often enacted by the Government. Starting from implementing low-wage policies, legalizing land grabbing, exploitation on natural resources, to the legalizing investment permits without any environmental impact analysis. All legal system infrastructures are available for investors. But on contrary, not for people. There is no protection on people's rights regarding to the law violations done by investors. Including the loss of people's justice when state policies deprived their live rights.

However, when there are policies that are considered impede investment, investors could easily defend their rights that are violated by the government through an investment dispute mechanism between investors and the State. By ignoring the applicable of national legal system, foreign investors bring their claims directly to the dispute settlement institution at the international level. According to Peter Muchlinski (1999) the mechanism of international dispute

settlement is chosen as the most effective method to protect corporate interests due to the host state's legal system will not protect their interests.



AS PROOF, UNCTAD DATA SHOWS THAT FROM THE TOTAL OF ICSID VERDICT FROM 1987-2018, 61% ACCEPTED INVESTORS' PETITION AND 39% STANDED FOR STATE'S POSITION.¹

The losses suffered by the State are often due to the failure of the government to provide fair and reasonable protection to the investors, including in terms of enacting a policy that is considered hamper investment activities.

This kind of investment protection rules eventually leaves state's sovereignty in the hands of investors. The efforts to protect people's rights should defeated by the verdict of international arbitration institution that wins investors. By this lawsuit mechanism, investor's rights are above of all, including human rights.

The struggle to eliminate injustice is continue to the recent day, such as the struggle for the right to land grabbed, the struggle of workers for decent wages and working conditions, the struggle for the right to health and sustainable environment, and the right to health especially access to cheap medicines. With the mechanism of investor claims against the State, the people's struggle for justice arising from multinational corporate business activities should meet defeatness permanently.

¹ UNCTAD, "Review of ISDS Decisions in 2018", July, 2019. Link: https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d6_en.pdf

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INVESTOR-STATE DISPUTE SETTLEMENT



“WHAT AND HOW IS ISDS?”

The lawsuit mechanism between investors and the state is known as ISDS (Investor to State Dispute Settlement). The ISDS mechanism comes up as a legal instrument in order to resolve international investment disputes between foreign investors and recipient countries. The dispute settlement is usually settled in international arbitration institution. The most arbitral institution that is frequently used is ICSID (International Center for Settlement of Investment Dispute) and UNCITRAL (United Nation Commission International Trade Law).

Initially, the ISDS mechanism began to be regulated after World War II into the international investment agreement or known as Bilateral Investment Treaty (BIT). ISDS mechanism was first described in BIT between Germany and Pakistan in 1959.

The purpose of investment protection in the BIT is to provide a guarantee of

protection for the existence of foreign investments operating outside the borders of their home countries. There are 2 (two) reasons underlying the emergence of international investment agreements at the time, namely: *First*, the independence of colonized countries and; *Second*, the expropriation of assets or the nationalization of foreign companies during the colonial period, especially related to the control of natural resources that during the period of colonialization came under his control.²

The inception of the ICSID Convention in 1966 became an instrument that further strengthened the ISDS mechanism. As one of the World Bank's instruments, the ICSID was deliberately created to provide legal certainty guarantees for investors, especially investors who joined into International Finance Corporation (IFC) under the World Bank institution. In its later development, the ISDS mechanism was applied in various investment

² Rachmi Hertanti dan Rika Febriani, “Bilateral Investment Treaty: Investor VS Negara”, IGJ, 2014.

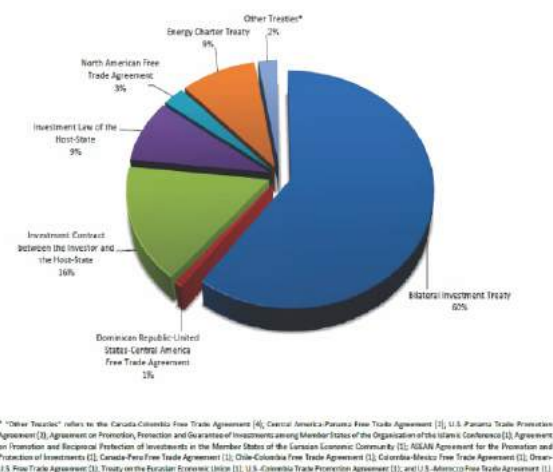
contracts between investors and host countries, such as mining, oil, and gas concessions. In addition, the Energy Charter Treaty which began to develop in 1994 also implements the ISDS mechanism as an investment protection instrument in the energy sector.

Along with the development of infiltrated capital movements in the free market, BITs also meet a transformation. The protection standards of BITs are adopted by countries in the world in a variety of free trade agreements (FTA) such as ASEAN Comprehensive Investment Agreement, Comprehensive Economic Partnership Agreement (CEPA), and are included to the national regulations of the state where invested.

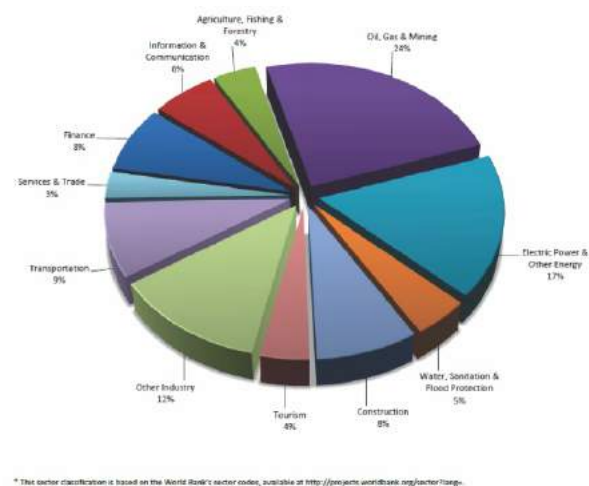
Zoe Phillips William (2016)³, in Rethinking Bilateral Investment Treaties, explains that investor-state disputes that lead to arbitration are triggered by various state actions taken by various domestic institutions. Most of disputes are centered on the domestic policy issues of investment

host country. Legislative action is the only institution that most frequently involved in the ISDS lawsuit, the majority is administrative or bureaucratic bodies. UNCTAD data in 2014 cited by Zoe Phillips shows, 61% of cases are triggered mainly by administrative measures; 26% were triggered by legislative steps, and 11% were related to court verdict. The rest was related to the cases where the state fails to act - for example, the State may fail to protect investments from physical harm. Regularly the type of state policy that is often sued by investors, such as: changes in investment incentive schemes, cancellation or alleged violations of contracts by the State, nationalization or direct expropriation, revocation of licenses, changes in tariffs, changes in land zoning, taxation, patent cancellation, and so on. Furthermore, the ICSID report shows that the ISDS lawsuit is highly concentrated in the mining, oil and gas industry, as well as electricity both in power project or distribution⁴ (See Picture 2).

Picture 1 - BASIS OF AGREEMENT IN ISDS LAWSUIT UNDER ICSID



Picture 2 – ECONOMIC SECTOR IN ISDS LAWSUIT



Source : ICSID Report

3 Zoe Phillips William, "What, When, Where, and Why?, Patterns in Investor-State Arbitration", dalam buku Rethinking Bilateral Investment Treaties, 2016, Pg.32-34.
 4 ICSID Report 2019, Pg.12



As a consequence of the ISDS lawsuit, the state is hostage by the investors' interests. It is then restricts the struggle of the people against the adverse impact of corporate business activities on their lives, both related to the human rights violations issue, economic losses, and wider environmental damage. Some of facts could be learned from the experiences of investors' lawsuit cases against countries in many countries in the world (See Box 1). This proves that, again, people's rights are silenced.

State sovereignty is threatened and held hostage by investors' interest. The implementation of ISDS mechanism shows that the position of investors is more powerful than the state, because it gives privileges to investors directly to sue the state if the investment is aggrieved. On contrary, the state does not have the privilege to sue investors if the state or people's interest are aggrieved by the investors' business activities. This is reinforced by the ICSID Convention that stated that the investment disputes that can be brought are only disputes involving between individuals or companies and the state, and not vice versa.

BOX 1 IMPACT OF ISDS LAWSUIT ON PEOPLE'S LIVES

AZURIX CORP (US) VS ARGENTINA: WATER PRIVATIZATION

The winning of lawsuit by the water company based in US, Azurix Corp (a subsidiary of Enron) against the Government of Argentine, has harmed people's rights to clean water. Moreover, the Government of Argentine should pay compensation as much as US \$ 165 Million to the Azurix Corp. Whereas the mistake was on company side that caused water contaminated by algae in their reservoir so the water smelled bad. The Government of Argentine has asked public to protest for not consume the water including to not paying water bills. This case is related to the water privatization contract since 1999 with a 30-year concession in Buenos Aires.

Abengoa (Spain) VS Mexico: Indigenous Peoples & the Environment

The defeat of indigenous peoples in Mexico against environmental damage again shows the power of investors over the State. The Spanish technology company, Abengoa, won the investment dispute at ICSID against the Government of Mexico who revoked the operating license for waste management facilities. The court instructed Mexico to pay Abengoa for more than \$ 40 million, plus interest, as compensation for expected profit from the waste management. Even though the revocation of operating license by the Mexican Government was carried out in order to protect the interests of indigenous peoples from environmental damage that would be resulted from Abengoa investments.⁵

The waste management facility that will be built by Abengoa is resisted by the local Zimapan community. This is due the facility

will be built in the geological fault line and the Sierra Gorda biosphere reserve (the world heritage site of UNESCO), and home for indigenous people of Nanhu and Otomi. The area has been contaminated by arsenic from the previous mining operations. The community believes that building waste facilities on the fault line, by building dams, in areas that are contaminated by arsenic, near indigenous communities and environmental reserves creates a significant environmental threat.

NOVARTIS VS COLOMBIA: ACCESS TO CHEAP CANCER MEDICINES

Novartis lodged a formal notice of dispute under the BIT, after Colombia's Health Ministry pressed the Swiss firm to agree to a more than 50% price cut for the blockbuster cancer chemotherapy drug, Imatinib. (Imatinib is marketed under the brand name Gleevec in most jurisdictions, but as Gleevec in the USA).

Novartis's notice of dispute came mere days after Colombia's health minister had written to the company in April of 2016 with a new price proposal, alluding to the prospect of outright "compulsory licensing" of the medicines if a steep price reduction is not agreed.

The medicines at the center of the dispute between Novartis and Colombia has been used to treat a number of forms of blood cancer since its introduction in 2001. (In 2015, global sales of the medicines totalled \$4.6 billion, making it Novartis's highest-earning product.)

⁵ Public Citizen, "Case Studies: Investor-State Attacks on Public Interest Policies". Link: https://www.citizen.org/wp-content/uploads/egregious-investor-state-attacks-case-studies_4.pdf

LAWSUIT WITH BILLIONS DOLLARS WORTH

Report from Colombia Center on Sustainable Investment in 2018, entitled "Costs and Benefits on Investment Treaties", explained the availability of the cost's potential loss will suffered if investment agreement with the ISDS mechanism is adopted by a country. At least from seven losses, there are four most important losses. *First*, litigation costs. *Second*, compensation payments cost. *Third*, political costs due to losses of state policy space. *Fourth*, reputation costs.⁶ These litigation costs and compensation payments are those that ultimately made the ISDS mechanism as controversial issue.

For investor's compensation claims, the value could reach up to billions of dollars. At the end the state could compel the compensation payments using public money. In other words, the ISDS Lawsuit effectively enables foreign investors to pass on their investment risks to the public and public budgets in the host country. The worst international arbitration investment dispute verdict along the history of the world is the case of Occidental . Ecuador II in 2012 where the investor's petition was granted with a compensation value of US \$ 1.77 Billion plus double interest ie before and after the verdict.⁷

As experienced by Indonesia against Churchill Mining. Churcill Mining lawsuit (2012) againsts Indonesia in claiming compensation as much as US \$ 1.2 billion or equivalent to Rp.14.4 Trillion. This amount in the 2015 State Budget (APBN) is almost equivalent to the allocation of food subsidies, which is valued Rp. 18.9 trillion and higher than the value of seed subsidies for farmers which is only Rp. 0.9 trillion, small micro medium enterprises (UMKM) interest subsidies and public transportation subsidies in the amount of Rp. 2.5 trillion and Rp. 8.7 trillion.⁸

Due to the high cost of disputes should be paid by the State, pragmatic choices is then made. At the end, the state stopped implementing the policy rather than dealing the investors at the arbitration table with a very high cost. Usually, this effect is called as "Regulatory Chill".

The implementation of the ISDS mechanism is also followed by bad faith from multinational corporations who deliberately filed a lawsuit for only get compensation. There are indications of the increasing of litigation (frivolous litigation) caused by the proliferation of ISDS mechanisms in BIT. Furthermore, Krzysztof J. Pelc, international trade expert, in his article "Does the International Investment Regime Induce Frivolous Litigation?" (SSRN Journal, 2016), firmly stated that investors' lawsuits against the state that use investment agreements are more driven by the desire to seeking monetary compensation from legal policies of state that have stable democratic systems and with independent justice.

Although some verdicts ultimately took the side of the State, but the State is still be aggrieved from this kind of dispute settlement. This is because the State still should pay the fees come from the process of dispute settlement in international arbitration. Investment disputes at the arbitration institutions are indeed very expensive. Both the state and investors should pay for the administration of a case. They also have to pay arbitrators, witnesses and experts who are often scatter throughout the world. Moreover, it requires translation services, travel and living costs, and also have to pay their lawyers. As predicted by Organization for Economic Cooperation and Development (OECD, the cost for one ISDS case could reach up to US \$ 8 million where only to pay for lawyers' fees and arbitration.⁹

Moreover, along with the increasing number of ISDS lawsuits it has made investment disputes in international arbitration as a money-making machine for international law offices. Pia

6 Rachmi Hertanti, "Sengketa Investasi Bikin Negara Tekor", Opini, IGJ, 2019. <https://igj.or.id/sengketa-investasi-bikin-negara-tekor/>

7 Brook K. Baker & Katrina Geddes, "ISDS, Intellectual Property rights, and Public Health", dalam buku Rethinking Bilateral Investment Treaties, 2016, Pg.191

8 Rachmi Hertanti dan Rika Febriani, "Bilateral Investment Treaty: Investor VS Negara", IGJ, 2014. Pg.9

Eberhardt & Cecilia Olivet (2012) argues that making international arbitration into a profitable business is being provided a great incentive for smart lawyers to maintain and expand the ISDS system to maximize the profits. They also estimate that 80% from the total cost of handling cases goes to the lawyer's pocket, with an estimation of service fee of US \$ 1000 / hour.

" CRITICS TO ISDS: ISDS REFORM? "

Critics to the ISDS mechanism are getting stronger. Moreover, critics to the mechanism also come from the north. This is certainly encourages various global dynamics towards international investment agreements, and specifically to the investment dispute mechanism.

A number of countries have been conducting BIT reviews since the early of 2000s which have led to both revising treaty rules and ending the BITs. For example, the US revised the BIT rules and the NAFTA Agreement, and Canada revised the BIT in 2004 and 2012. Australia refused to include the ISDS mechanism in the FTA with US applied in 2005, although then in 2014 re-included the ISDS mechanism with a case by case approach. The critics to the ISDS mechanism are also become obstacle to the completion of Transatlantic Trade and Investment Partnership (TTIP) negotiations.¹⁰ In southern countries, massive revisions to the BIT are also carried out. For example Bolivia became the first country in Latin America who

ended its membership in the ICSID in 2007, followed by Ecuador and Venezuela. Their actions were followed by the termination of their BIT. In addition, South Africa also terminated the BIT which was then replaced with a new national policy aimed to protecting the rights of investors but with rules that still maintain its domestic policy space. Some of Asian countries are also rethinking the benefits of the BIT including the lost costs due to the ISDS mechanism by taking various policy steps to protect themselves from expensive state-investor arbitration. India, Pakistan and Indonesia are reviewing the old model of BIT texts and preparing new rule models for future BIT agreements.¹¹

In response to criticisms to the ISDS mechanism, the European Union is trying to present a new proposal to replace the ISDS mechanism. In November 2015, the European Commission submitted a proposal called with Investment Court System (ICS) which will appear in all EU investment negotiations. For the European Union, the big aim of the ICS is to establish a permanent International Investment Court. However, the presence of ICS is still not considered as the right solution. This is because the EU Proposal in ICS only changes the substance and does not criticize the fundamental weaknesses related to the ISDS dispute settlement system. ICS still opens the possibility for investors to unilaterally sue the state.¹² **(See ICS elements in Table 1)**

Tabel 1 – Element in Investment Court System (ICS)¹³

Prosuderal Changes	Substance Changes
<ol style="list-style-type: none"> 1. The system more transparent and disclose more disputesettlement case information. 2. Set up a roster of arbitrators who would be appointed randomly on a rotational basis 3. Establish an appeals mechanism 4. The system more accountable and predictable as opposed to the current practice of the arbitrators conflict of interest 5. The submission of expert evidence in investment cases and for third-party interventions 6. Put some limits on how and when claims can be brought. Parallel claims in domestic courts and other ICS are not allowed 7. On compensation, the ICS proposal says that arbitrators may award monetary damages plus interest, and/or the restitution of property to an amount no greater that the loss suffered, and punitive damages are not allowed 	<ol style="list-style-type: none"> 1 In ICS, as in ISDS, investors still retain every opportunity to challenge all kinds of government measures that affect their bottom line as indirect expropriations. 2. ICS model largely leaves intact the FET clause. the FET clause is expanded to include a reference to 'legitimate expectations' of investors regarding their investments 3. It will still allow foreign investors to bring claims on the basis of virtually the same broad and openended protection clauses that are causing so many problems in the existing ISDS system. 4. The ICS proposal makes no mention of investor responsibilities. 5. The right of a sovereign state to regulate has not been unequivocally preserved.

A wider critic to the ISDS mechanism is continues lead to the discussion at the global level to find solutions. Moreover, encouragement to bring up alternative mechanism in the form of multilateral is often occurred. For example, the European Union submitted a proposal regarding Multilateral Investment Court (MIC). This EU proposal has been tried to be discussed at the WTO, including UNICTRAL. But it has not been positively respond by the southern countries. However, the discussions on the importance of new solutions of ISDS mechanism are being started at UNCITRAL regarding ISDS Reform.

The discussion of ISDS reforms in UNCITRAL carried out based on a mandate issued by the UNCITRAL Commission in July 2017 which commissioned the Working Group III UNCITRAL to discuss this issue in three phases. Three phases that were given to WG III, namely: **first**, identifying problems related to the ISDS; **second**, discuss whether the ISDS Reform is surely desirable; and **third**, if ISDS reform is desired, then a solution is needed to be recommended to the UNCITRAL commission.¹⁴

Initially, there was a debate about the UNCITRAL's mandate in discussing ISDS reforms were only responded to the procedural issues. However the urgency to discuss the substance issue is also often conveyed by UNCITRAL member countries.

This is because it cannot be separated between substance and procedural issues. Many countries assume that ISDS reform will not achievable if the substance and procedural issues are separated in the discussion. One of them is Indonesia who said that it would be very difficult to achieve fundamental change if separate between substance and procedural. This is because the contents of the rules in international investment agreements do not separate procedural from substance.¹⁵

Until April 2019, the discussion at UNCITRAL has reached the third phase, which discussed on what kind of reforms are desired, including making the solutions needed to address issues related to the ISDS. The discussion regarding to this issue is directed into the 3 major ISDS issues that have been identified in the UNCITRAL WG III Working Paper (**See Box 2**).¹⁶ The discussion at UNCITRAL is still running, and its success will certainly be greatly related to the ideas or proposals appear in the UNCITRAL forum itself. However, due to the lack of new system proposals, UNCITRAL discussions opened up opportunities to discuss EU proposals regarding to the Multilateral Investment Court (MIC). This MIC proposal is surely should be carefully addressed, especially by southern countries, because the MIC is not far from the previous ICS model offered by the European Union.

BOX 2 MAIN CONCERNS OF ISDS REFORM

1. "unjustifiably inconsistent interpretations of investment treaty provisions and other relevant principles of international law"
2. "the lack of a framework for multiple proceedings that were brought pursuant to investment treaties, laws, instruments and agreements that provided access to ISDS mechanisms"
3. "the fact that many existing treaties have limited or no mechanisms at all that could address inconsistency and incorrectness of decisions"
4. "the lack or apparent lack of independence and impartiality of decision makers"
5. "the adequacy, effectiveness and transparency of the disclosure and challenge mechanisms available under many existing treaties and arbitration rules"
6. "the lack of appropriate diversity amongst decision makers"
7. "the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules"
8. "cost and duration of ISDS proceedings"
9. "allocation of costs by arbitral tribunals"
10. "security for cost"

9. Pia Eberhardt & Cecilia Olivet, "Profiting from Injustice", TNI, 2012.

10. Kavaljit Singh and Burghard Ilge, "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices", 2016, pg.4-5

11. Ibid.

12. Roeline Knotnerrues, et.all, "The EU-Indonesia CEPA Negotiations - Responding the Calls For an Investment Policy Reset: Are The EU and Indonesia in the Same Page?", Joint publication by SOMO, TNI, and IGJ, 2018, Pg.16-19

13 Kavaljit Singh and Burghard Ilge, "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices", 2016, pg.4-5

14 Ibid.

15 Roeline Knotnerrues, et.all, "The EU-Indonesia CEPA Negotiations - Responding the Calls For an Investment Policy Reset: Are The EU and Indonesia in the Same Page?", Joint publication by SOMO, TNI, and IGJ, 2018, Pg.16-19

16 Ibid.



“INVESTOR LAWSUIT AGAINSTS INDONESIA”

In the last 9 years since 2011, there has been an increasing of 6 cases of investor lawsuits faced by Indonesia, since the two previous cases in 1983 and 2004. From the total of 8 cases faced by Indonesia, as much as 50% were in the mining sector, including those filed by Churchill Mining, Planet Mining, Newmont Mining, and Indian Metal Ferro Alloys (IMFA). Two other cases related to the lawsuit of Rafat Ali Rizfi Rizvi and Hesham Al-waraq in the financial sector and Oleovest Ltd in the palm oil processing sector.

The lawsuit of foreign mining corporations towards Indonesia aims to confront its efforts to restore people's control over natural resources, and improve mining governance in Indonesia. Some of the basis of these four foreign mining corporations' lawsuits leads to the implementation of Law No.4 year 2009 on minerals and coals and the policy of structuring the mining business permit through government regulation (PP) No.23 year 2010.

For example, the lawsuit of Churchill Mining, Planet Mining and IMFA were due to the revocation of overlapping mining permit by Regional Government because their status considered as non-clear and clean. Newmont Mining sued Indonesia because of government policy that prohibits the export of concentrate as a mandate from Minerals and Coal Law No.4 of 2009. Even in 2017, Freeport Mcmoran, a foreign mining company from the United States, ever threatened to sue the Indonesian Government if the process of renegotiating a mining contract does not accommodate Freeport interest.

Investment protection through the investor lawsuit mechanism against the state will certainly more legalize human rights violations by Investors. Up to this day, Indonesia's economic growth is highly dependent on its natural resources, especially in the mining sector. However, the economic impact created by investment in the mining sector does not produce a positive effect on people's welfare, it has even impacted on the increasing of human rights violations in this sector. This is caused by the problems arising from investment activities

in this sector, such as forest destruction, land

grabbing of indigenous peoples, land conflicts, social conflicts, including corruption, and tax crimes.¹⁷

The loss arising from the implementation of the ISDS mechanism regulated in the BIT has been realized by the Government of Indonesia. The Indonesian government believes that the Bilateral Investment Agreement (BIT) will only provide a little profit for Indonesia. In 2013, Indonesian government awareness was followed by conducting a critical review to the BIT as a basis for the termination of all Indonesian BITs with all countries. The rationale for reviews conducted by Indonesia is basically similar to the reasons for reviews conducted by other countries. **First**, a review has been carried out to achieve a balance between investor protection and national sovereignty; **Second**, most of BIT provisions provide a broad protection and rights for foreign investors, and leave the host country with a slighty or no policy space to implement its own development goals. **Third**, one of the biggest of Indonesian concerns on BIT is provision of Investor-State Dispute Settlement (ISDS), which has increased Indonesia's exposure towards investor claims in international arbitration. **Fourth**, the provisions in the BIT potentially rule out national legislation.¹⁸

Up to this moment, the Government of Indonesia has not wish to publish the latest text from the BIT review conducted. However, Indonesia has once more agreed on a Bilateral Investment Treaty (BIT) with Singapore. The BIT is signed by Indonesia and Singapore in 2018. There was no Indonesian-Singaporean BIT text published since its signing. Moreover, information on ratification process has never been open to the public. However, since civil society groups won a lawsuit in Constitutional Court in November 2018 for case No.13 / PUU-XVI / 2018, it is deservedly for the ratification of the Bilateral Investment Treaty (BIT) agreement should be submitted to the Parliament to get approval. This is because, before the Constitutional Court's verdict, the ratification of Indonesian BIT was always carried out unilaterally by the Executive and did not involve Parliament to obtain approval.

¹⁷ Paper of IGJ for The Human Rights Treaty on TNCS and Other Business, “*The TNCS Crimes in Indonesia's Mining Investment: The Needs of Binding Treaty*”, IGJ, Jakarta, 2016.

¹⁸ *Factsheet of Indonesia's BITs Review Experiences*, IGJ, 2017 <http://igj.or.id/wp-content/uploads/2017/05/FACT-SHEET-Indonesia-BITS-Bahasa.pdf>

The critical position of the Government of Indonesia towards the International Investment Agreement and the ISDS mechanism is often shown one of them by the liveliness of Indonesia in ISDS reforms discussion at the UNCITRALforum. Although on the other hand, the Government of Indonesia has never explicitly stated to seriously eliminate ISDS in the International Investment Agreement. Included in various free trade agreement negotiations such as: ASEAN RCEP, Indonesia-Australia CEPA, and Indonesia-EU CEPA. Some of critical position of the Government of Indonesia to the ISDS

mechanism and international investment agreements can be seen from Indonesia's position paper in the UNCITRAL Forum related to the discussion of ISDS Reform (**See Box 3**). However, critical position of the Government of Indonesia on the ISDS mechanism should be continue guarded by civil society groups. It is to ensure that no more ISDS provisions are regulated in international trade and investment agreements. The dependence of Indonesia's development to the foreign investment will certainly be a reason for the Government of Indonesia to re-open space for maximum protection for foreign investment.

BOX 3 Indonesian Proposal in ISDS Reform¹⁹

1. Providing more safeguards in both substantive and ISDS provisions so that the investor's rights and obligations could be equitable addressed.
Safeguards element such as: limitation on the definition of investment on asset-based definition with certain exceptions and limitation; covered investment; articles on right to regulate; measures against corruption; corporate social responsibility (CSR); exclusion of claims; general and security exceptions; balance of payments (BoP); prudential measures and public debt.
2. Allowing investors to make a claim to international arbitration after exhaustion of local remedies.
3. Requiring separate written consent as a requirement for an investor to make ISDS claims to international arbitration.
4. Introducing mandatory mediation as an alternative dispute resolution before going to ISDS.

¹⁹ UNCITRAL Document <https://undocs.org/en/A/CN.9/WG.III/WP.156> Submission from The Government of Indonesia, 37th Session 1-5 April 2019.

3 ISDS Cases in Indonesia

FOREIGN INVESTOR LAWSUIT AGAINST INDONESIA



INDONESIA
FOR GLOBAL JUSTICE

CASES INVESTOR VS INDONESIA	INVESTMENT TREATY	DISPUTE MATTER	INVESTORS CLAIM FOR COMPESATION
Amco Asia (subsidiary of AMCO, USA)	Contract	License to Manage a Hotel	US\$ 2,69 Million
Cemex Asia (Singapore)	ASEAN Agreement	Shares and an option to purchase shares in a SOEs	Settled Between the Parties
Rafat Ali (UK)	Bilateral Investment Treaty (BIT) UK - Indonesia	Shares, Loans, and Financing Agreements in banking investment	The Tribunal Decline Jurisdiction
Churcill Mining (UK)	Bilateral Investment Treaty (BIT) UK - Indonesia	Exploration and Exploitation licenses over a coal project area	US\$ 1,05 Billion
Planet Mining (Australia)	Bilateral Investment Treaty (BIT) Australia - Indonesia	Exploration and Exploitation licenses over a coal project area	The Company Lost
Newmont NusaTenggara (USA)	Bilateral Investment Treaty (BIT) Netherland - Indonesia	Export Ban of Raw Minerals	Withdrawn on 25 August 2015
India Metals & Ferro Alloys (India)	Bilateral Investment Treaty (BIT) India - Indonesia	Overlapping of seven Mining Business License (IUP)	US\$ 580 Million (On Going)
Oleovest Ltd (Singapore)	Bilateral Investment Treaty (BIT) Singapore - Indonesia	Defaulting on the joint venture	US\$ 70 Million (On Going)

Sumber : IGJ



Case 1

THE OVERSHADOWED MILLION DOLLAR LAWSUITS IN CENTURY'S SCANDAL

By Ricky Pratomo

BETWEEN 2009 AND 2010,
DEEP DOWN BENEATH THE SPOTLIGHT
OF BANK CENTURY'S CORRUPTION CASE,
TWO SELF-PROCLAIMED FOREIGN OWNERS OF BANK CENTURY,
NAMESLY RAFAT ALI RIZVI AND HESHAM AL-WARRAQ,
FILED INTERNATIONAL INVESTMENT LAWSUITS THROUGH
THE INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)
FORUMS WITH HUNDRED MILLION DOLLARS

Between 2009 and 2010, Indonesia was shaken by a mega-corruption of Bank Century that involved several higher-ups governmental officials. The case was immensely highlighted by both domestic and foreign media up to the point that several national television channels live broadcasted the deliberation meeting of members of the House of Representatives regarding this particular scandal, providing a public parody for the eyes and minds.

Amidst of such chaos, deep down beneath the spotlight of Bank Century's corruption case, two self-proclaimed foreign owners of Bank Century, namely Rafat Ali Rizvi and Hesham al-Warraq, filed international investment lawsuits through the investor-state dispute settlement (ISDS) forums with hundred million dollars being put on the table. The main argument of both lawsuits was simple, that the bailout of Bank Century was simply deemed as expropriation of claimants' investments in Bank Century, which was in fact highly debatable.

In response to such lawsuits, surprisingly the Indonesian government, upon the request of Boediono, the ex-Indonesian Vice President, launched the so-called Bilateral Investment Treaty (BIT) review which eventually triggered the cancellation of BIT Indonesia-Netherland in 2014 and formulation of modern Indonesian Model BIT.²⁰

Seeing such radical move by the Indonesian government, one can imagine how profound and concrete the threat of international investment lawsuits. Although Indonesia managed to win the case, an extensive change toward the international investment system should be urged in order to safeguard Indonesia from any frivolous lawsuits, such as the ones brought by Mr. Rizvi and Mr. al-Warraq.

Corruption Case

It was all started when Bank Century suddenly reached a near-collapse level which caused a panic attack toward Boediono, the Governor of Bank Indonesia at that time and ex-Indonesian Vice President, and Sri Mulyani, the current and then Indonesian Minister of Finance. After a rigorous meeting among the officials of the Indonesian Financial System Stability Committee (*Komite Stabilitas Sistem Keuangan – KSSK*), it was decided on 21 November 2008 that a IDR 632 billion bailout should be disbursed in order to save Bank Century.²¹

A year later, precisely on 27 August 2009, the House of Representatives summoned both Sri Mulyani and other officials from Bank Indonesia and the Indonesian Deposit Insurance Agency (*Lembaga Penjamin Simpanan– LPS*) to deliver explanation on why the bailout funds for Bank Century was

²⁰ David Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?", *Asian Journal of International Law*, Vol. 7, 2017, pages 125-126. See also Katadata, "Hapus Trauma Century Lewat Model Baru Perjanjian Investasi Asing," as published on 4 April 2017, accessed on 10 January 2019.

²¹ Kompas, "Centurygate: Mengurai Konspirasi Penguasa-Pengusaha," (Jakarta: PT Kompas Media Nusantara, 2010), page 330. Katadata, "Ke Mana Dana Bailout Bank Century Rp 6,76 Triliun Mengalir?"

<https://databoks.katadata.co.id/datapublish/2018/11/28/ke-mana-dana-bailout-bank-century-rp-676-triliun-mengalir>, as published on 28 November 2018, as accessed on 20 January 2019.

²² *Ibid.*, page 334.

exponentially increased to IDR 6.7 trillion.²² Unsatisfied with the answer, the House of Representatives initiated a Special Committee to investigate Bank Century's bailout and through the course of time, the House of Representatives was certain that the Bank Century's bailout was problematic and legal proceedings must be initiated.

However, although this case was underpinned by everyone, unfortunately only one person who was convicted of committing corruption in 2014, and he was Budi Mulya, ex-Deputy Governor of Bank Indonesia.²³ Up until the current condition, no other party has been criminally proceeded for the corruption of Bank Century.

Bank Century: Merger with Hundred Questions

Bank Century was nowhere near classified as a giant bank in Indonesia, compared to state-owned banks or prudent private banks. However, it was not a mere pebble in banking sector either. With approximately 65,000 consumers and 30 branch offices across Indonesia, its significant cannot be simply neglected.²⁴

Evidently, Bank Century was proven to be shady since its inception from the merger of three problematic banks on 28 December 2004 based on Decree of Governor of Bank Indonesia No. 6/92/KEP.GBI/2004, namely Bank CIC, Bank Pikko and Bank Danpac.²⁵

The Bank of Tantular Clan

It is widely known that nearly every Indonesian "New-Order" conglomerates had a bank which has the function to operate financial services as a supporting mean to their primary business lines. Such business practice was also implemented by Tantular clan through the ownership of Bank CIC.

Incorporated on 30 May 1989,²⁶ Bank CIC was initially operated by Hashim Tantular, none other than the father of Robert Tantular. Later on however, its management was handed over to Robert Tantular in 1995 because Hashim Tantular passed away.²⁷

Now, was it a decent bank? Not by any stretch, it was a very filthy business! Despite that Bank CIC managed to go public on 25 June 1997, it was put under special supervision by Bank Indonesia twice, 1999 and 2001 respectively. Not to mention the creation of fictive time deposits to bury the negative Capital Adequacy Ratio (CAR), forging the Letter of Credit (L/C) in order to manipulate the transactions relating to the utilization of funds derived from United States Department of Agriculture (USDA) and numerous financial schemes to shell companies.²⁸

Forgotten Tale of Bank Pikko

Do you know the tale of Bank Pikko? No one really knows or remembers any events relating to Bank Pikko due to overpopulation of Indonesian banks in the

²³ BBC, "Bank Century: Budi Mulya divonis 10 tahun," https://www.bbc.com/indonesia/berita_indonesia/2014/07/140716_vonis_budimulya, published on 16 July 2014, accessed on 15 January 2019.

²⁴ Metta Dharmasaputra, et al, *Mengejar Fajar: Ceritadan Fakta di Balik Penyelamatan Bank Century*, 1st print, (Jakarta: PT Katadata Indonesia, November 2018), page 6.

²⁵ PT Bank Century Tbk (a), *Annual Financial Statement 2008*, Balance per 31 December 2008 and 2007, page 8.

²⁶ *Ibid.*

²⁷ Dharmasaputra, *op. cit.*, page 36.

²⁸ *Ibid.*, pages 36, 40 and 45.

90's. However, there was a story that stands out among the Indonesian professional capital-market players up to the current moment.

The chapter began in 1997, when an Indonesian capital-market guru, Benny Tjokrosaputro, was involved in committing “cornering the market” practice against Bank Pikko's shares. The method was not novel, he created 13 fictive investors to buy Bank Pikko's shares and thus granting him the ability to control the price of the shares.

Such fraudulent practice obviously resulted in IDR 1 billion sanction by the Capital Market Supervisory Agency (BAPEPAM).²⁹ Two decades later, this capital-market fraud only successfully becomes nothing more than a dot in the dark history of Indonesian capital market.

Alas, not only prominent in being cited in capital-market fraud case, Bank Pikko evidently also had numbers of bad debts.³⁰ Then, on what ground that such problematic bank was not immediately shut down? No one really knew the answer, but one may freely consider that something illicit was going on in one's imagination.

Bank Danpac: The Only Positive Balance

Not much is known about Bank Danpac rather than it was involved in the 2004 merger of Bank Century. However, there was an article quoting statement from Heru Kristiyana, the Deputy Director of

Supervisory Directorate Bank I in 2009, who now assumes position as the Board of Commissioners of Financial Services Authority (*Otoritas Jasa Keuangan* – OJK), who explained that only Bank Danpac which is good (in terms of its financial performance) if compared to Bank CIC and Bank Pikko which carried non-rated securities and non-performance loans.³¹

From the description given above and the facts that are given, no wonder that Bank Century is often cited as a bank which was created with tons of problems vested within its body. Hence, since Bank Century was not a sound investment portfolio in the first place, then why its investors were still attracted to inject equity to this bank?

BANK CENTURY: FOUR HORSEMEN

Let's dig deeper to the “men behind the scene” of Bank Century, four individuals (three individuals and one company to be precise) who were labelled as the decision-makers of Bank Century through invisible hands, since all of them were practically not listed in Bank Century's legal documents.

Robert Tantular: The Domestic Partner

Starting with the elephant in the room and that is Robert Tantular. What is the connection between Robert Tantular with the failed Bank Century? Legal wise, he was the beneficial owner and

29 CNBC Indonesia, “Tangan Dingin Benny Tjokro di Pasar Saham,” <https://www.cnbcindonesia.com/market/20180124155209-17-2402/tangan-dingin-benny-tjokro-di-pasar-saham>, as published on 24 January 2018, as accessed on 3 December 2018.

30 Detik.com, “Bank Century Warisi Aset Busuk Bank CIC dan Bank Pikko,” <https://finance.detik.com/moneter/d-1213677/bank-century-warisi-aset-busuk-bank-cic-dan-bank-pikko>, as published on 2 October 2009, as accessed on 3 December 2018.

31 *Ibid.*

controller of Bank CIC, which later transformed into Bank Century, in spite the fact that his name was nowhere to be found on Bank Century's incorporation documents because he failed to pass the Board of Directors (BoD) fit-and-proper test by Bank Indonesia in 1999 for Bank CIC.³²

Behind the theater drapes however, he was renowned as skilled, but deceitful, banker who used its bank for personal dealings, including creating various AAA rate of fictive transactions which managed to be unnoticed by Indonesian banking authority. "As slick as an eel bathed in oil", a compliment from SusnoDudji, former Head of Criminal Investigation Agency of Indonesian National Police, was no joke and very relevant due to the fact that Mr. Tantular has never been criminally caught before Bank Century case considering his frauds which have piled up since the operation of Bank CIC.³³

Even up to the last minute of Bank Century's bailout, Robert Tantular still behind the wheel of Bank Century.³⁴ His control was undeniable by the fact that he was held liable for 20 years' imprisonment and billion rupiahs of his assets were seized in total from four cases relating to Bank Century's scandal.³⁵

Chinkara: The Shell Company

Moving on to the second key party which served as the investment vehicle of two foreigners who regretfully on board with the sinking ship of Bank Century, the

Chinkara Capital Limited which was subsequently rebranded First Gulf Asia Holdings Limited (Chinkara), a Bahamian corporation. Chinkara was allegedly co-owned by both Rafat Ali Rizvi and Hesham al-Warraq, while it was used as the Special Purpose Vehicle (SPV) as a shareholder at Bank Century through stock exchange.³⁶

Speaking about Bahamas, the country has been relentlessly quoted as tax-haven country and further, it enforces the Data Protection Act which essentially keep information of any Bahamas corporations to be protected under private and confidential.³⁷ Quite ironic, isn't it? When a publicly-listed bank has disclosed its shareholder, but the shareholder was a shell company which cannot be tracked at all. Such condition ultimately led Bank Indonesia officials to mistakenly, or ignorantly, determine the ultimate shareholders of Bank Century.

Specifically for Rafat Ali Rizvi and Hesham al-Warraq however, their stories will be profoundly discussed under the following sections.

RAFAT ALI RIZVI AND HESHAM AL-WARRAQ: DOUBLE TROUBLE

Who exactly are Rafat Ali Rizvi and Hesham al-Warraq? All we know is that those gentlemen were the co-owners of Bank Century through Chinkara with 9.55% ownership and further, Mr. al-Warraq was the Vice President Commissioner of Bank

31 *Ibid.*
 32 Dharmasaputra, *op. cit.*, page 38.
 33 Kontan.co.id, "Susno: Robert Tantular itu Belut yang Memakai Oli," <https://nasional.kontan.co.id/news/susno-robert-tantular-itu-belut-yang-memakai-oli>, published on 20 January 2010, as accessed on 6 December 2018.
 34 Dharmasaputra, *op. cit.*, pages 75-78.
 35 Indonesian Supreme Court Decision No. 631 K/Pid.Sus/2016, page 233.
 36 *Rafat Ali Rizvi v. The Republic of Indonesia*, ICSID Case No. ARB/11/13, Decision on Jurisdiction, paras. 37, 39 and 153.
 37 Offshore Company, "Bahamian Company Formation," <https://www.offshorecompany.com/company/bahamas/>, as accessed on 6 December 2018.

Century up to 2007, but in 2008, he was vanished from the management of Bank Century.³⁸ Side-by-side with Robert Tantular, the trio were claimed as controlling shareholders of Bank Century.³⁹

Takeover by LPS

On 21 November 2008, Sri Mulyani, the Minister of Finance and simultaneously as the Chairman of KSSK during that period, was faced with two life-and-death decision concerning Bank Century, whether it should be bailed out to live another hellish industry or just shut down and swept it under the rug.⁴⁰

At last, the bailout option was chosen and LPS officially took over the management of Bank Century with the ultimate goal of protecting both its consumers and the Indonesian financial stability as a whole.⁴¹ Although the decision was closely associated with corruption cases, the purpose of expropriation was nowhere to be found, and moreover, buying out a non-healthy bank to gain profit was certainly an ill-advised allegation.

The Fugitives

What are the odds? Since Bank Century was taken over by LPS, the Indonesian government had relentlessly summoned both Rafat Ali Rizvi and Hesham al-Warraq, but all of the efforts seemed futile. No surprises that the Indonesian government asked the Interpol to issue Red Notices for both Rafat Ali Rizvi and Hesham al-Warraq although it was eventually revoked.⁴²

The ISDS Lawsuits

Being uncooperative as fugitives, Mr. Rizvi and Mr. al-Warraq turned out construed the amicable takeover oppositely by using illogical legal arguments that the bailout of Bank Century was deemed as expropriation.

Under false premise, exactly on 5 April 2011, Mr. Rizvi filed a Request for Arbitration to the International Centre for Settlement of Investment Disputes (ICSID) and initiated the arbitral proceeding based on the BIT between United Kingdom and Indonesia (BIT UK-Indonesia) with USD 100 million claim in total.⁴³

Simultaneously, Mr. al-Warraq commenced arbitration based on the Organisation of the Islamic Conference Agreement (OIC Agreement) using the UNCITRAL Arbitration Rules (UNCITRAL Rules) on 1 August 2011 with the total claim of USD 19.8 million.⁴⁴

DOWNTURN OF INVESTMENT TREATIES

Is it true that investment treaties really induce foreign investors to invest in developing countries? Well, the Indonesian government was always clouded with such illusive goal while actually there is a greater risks of being sued by bad faith investors rather than gaining new foreign investments due to the signing of new BITs.

Questionable Legal Standing

First question in mind, were Mr. Rizvi and Mr. al-Warraq have legal standings against

³⁸ Indonesian Supreme Court Decision No. 631 K/Pid.Sus/2016, page 233.

³⁹ *Rafat Ali Rizvi v. The Republic of Indonesia*, ICSID Case No. ARB/11/13, Decision on Jurisdiction, paras. 37, 39 and 153. Offshore Company, "Bahamian Company Formation," <https://www.offshorecompany.com/company/bahamas/>, as accessed on 6 December 2018.

⁴⁰ PT Bank Century Tbk (a), *op. cit.*, page 55. PT Bank Century Tbk (b), *Annual Report 2007*, page 31.

⁴¹ Dharmasaputra, *op. cit.*, page 25.

⁴² *Ibid.*, pages 8-9.

⁴³ Kompas.com, "Akhirnya, Bank Century Diambil Alih LPS,"

<https://nasional.kompas.com/read/2008/11/21/09481797/akhirnya.bank.century.diambil.alih.lps>, as published on 21 November 2008, as accessed on 12 December 2018.

⁴⁴ Hesham Talaat M. al-Warraq v. The Republic of Indonesia, Final Award, paras. 261-266. Interpol, "INTERPOL cancels Red Notices in relation to Rafat Ali Rizvi and Hesham al-Warraq," <https://www.interpol.int/News-and-media/News/2015/N2015-115>, as published on 20 August 2015, as accessed on 12 December 2018.

the Republic of Indonesia? One can have legal standing to sue the state if it is indeed an investor. As depicted earlier, the valid shareholder listed in the Bank Century's 2008 financial statement was the Chinkara Capital Limited under the name of First Gulf Asia Holdings Limited, and not them.⁴⁵ Moreover, there was no way to know whether both gentlemen were actually controlling the Chinkara or not since the Bahamas was indeed tax-haven country and the Chinkara itself was a mere shell company.

Despite of this debate, actually since both BIT UK-Indonesia and OIC Agreement employ the non-exhaustive list of investments and broad scope of investors, at the end of the day, both of them may be broadly classified as investors with their questionable investments. Hence, the only way to fix this issue is by reforming the Indonesian BIT and changing the standard clause on the definition of investment and investor, so that unfaithful international investment claims arising from shell companies can easily be dismissed without any doubts.

Tangible and Intangible Losses

ISDS lawsuits naturally cannot be simply overlooked by the Indonesian government, in spite that both lawsuits filed by Rafat Ali Rizvi and Hesham al-Warraaq were unsuccessful. As mentioned beforehand, the total amounts of the lawsuits reached nearly USD 120 million, not to mention that the Indonesian government had to bear the incurred legal costs (e.g., lawyer's fees,

witness summons, etc.) since it was failed to be attributed to the losing parties.⁴⁶

Asides from that, both Rafat Ali Rizvi and Hesham al-Warraaq were also criminally convicted in absence (*in absentia*) based on Central Jakarta District Court Decision No. 339/PID.B/2010/PN.JKT.PST from being involved in the corruption and money-laundering scheme in connection with Bank Century, and an IDR 3.1 trillion state loss (*kerugian negara*) was claimed to be incurred.⁴⁷ Such figure does not include all the expenses made by the Indonesian government to request Red Notice from the Interpol in order to take captive of both convicts. However, up until the current moment, both Rafat Ali Rizvi and Hesham al-Warraaq have not been caught by the Indonesian authorities, hence, not a single penny can be recovered from them.

Moreover, the aforementioned figures do not encompass the uncalculated amount of loss which was sustained by the Indonesian government from the use of Bank Century's funds for their personal dealings and the potential tax losses from the use of shell companies in the Bahamas. All in all, although the losses are sounded intangible, but they can have the domino effect toward the overall Indonesian economy.

Investment Treaty Reform?

Now, the "ball" is actually in the Indonesian government's court, whether they wish to reform the investment

⁴⁵ PT Bank Century Tbk (a), *loc. cit.*

⁴⁶ Rafat Ali Rizvi, Decision on Jurisdiction, para. 4 of Tribunal's Decision. Hesham al-Warraaq, Final Award, para. 683.

⁴⁷ Arfin Deddy Candra, "Kendala Pengembalian Aset Hasil Tindak Pidana Korupsi Transnasional," BPPK Journal, Vol. 11, No. 1, Year 2018, page 30.

treaty regime and avoid any billion dollars frivolous international investment claims, or sitting idly for the Fortuna to bless Indonesia once again. If the Indonesian government chooses the former path, then they have to fundamentally change the international investment treaties by performing these measures: 1) Create a publicly available investment treaty model which contains provisions relating to avoidance on the use of shell companies for investments and prohibition on bad-faith treaty shopping; and 2) Renegotiate each and every first-generation international investment treaties by referring to the sustainable development goal in mind.



If the investment treaty reform fails to change the first generation of investment treaties, these conditions probably would continue to exist: 1) Frivolous million dollars international investment claims would still be filed by bad faith investors; and 2) Indonesia's economic development and climate would eventually be stagnant because of the illicit investment practices. However, would that be a problem for the middle-class Indonesians? It would be, because every penny lost to those million dollars claim would be borne by taxpayer money, while the riches will continue the practices of shell companies to protect their assets.

In conclusion, indeed that we must be grateful that Indonesia managed to dodge the investment claims brought in relation to Bank Century. However, the investment treaty reform must not await for losing disputes to occur. As the old Indonesian proverb goes, “it is better to prevent rather than cure the illness”.

CHURCILL MINING VS INDONESIA

Rp. 14,4 Trillion



Equal with Food subsidies (2015)

US\$ 1 Billion



Claim for Compensation

@IGJ2015 -
rh-

around US\$ 11 Million



Fee Lawyer payed by the state budget

Case 2

MINING PERMIT

REVOCAATION LEADS TO THE 1 BILLION DOLLAR LAWSUIT

By Rika Febriani & Rachmi Hertanti

in 2011, Churchill Mining and its partner in Indonesia, PT Ridlatama, submitted an appeal against the verdict from Samarinda District Court, East Kalimantan. The submitting of the lawsuit is based on the revocation of 4 mining licenses

The story began in 2005 when Kutai Regent, a district in East Kalimantan Province, approved a license for Nusantara Group to explore coal at a mining site which was estimated contains the second largest coal in Indonesia and the seventh largest in the world. However, Nusantara Group, owned by the presidential candidate who lost in the 2014 election, Prabowo Subianto, did not start any explorations. A few years later, Ridlatama, another Indonesian corporate group together with Planet, an Australian mining company, and Churchill Mining, a British mining company, were also interested to the mining site.

In 2010 the coal mining consortium got a license to start the operations, which later claimed by the Kutai Regent as fake license. The Kutai Regent revoked the license for Ridlatama in 2010 and decided to extend the Nusantara's license. What the happened afterwards is a complex issue filled with corruption alleged, fake documents and trials up to the highest court in Indonesia. Eventually Churchill and Planet filed an arbitration case at the International Center for Settlement of Investment Disputes (ICSID), with legal basis of the UK-Indonesian and Australian-Indonesian Bilateral Investment Treaty. If the consortium wins the case, the \$1 billion dollar claim should be paid by Indonesia.

In 2011, Churchill Mining and its partner in Indonesia, PT Ridlatama, submitted an appeal against the verdict from Samarinda District Court, East Kalimantan. The submitting of the

lawsuit is based on the revocation of 4 mining licenses included in the East Kutai Coal Project (EKCP). The revocation of this permit was later known been given to another party, namely Nusantara Group, which is obviously owned by Prabowo Subianto. The dispute between the two companies which was allegedly has political interests was then goes up to the international level and becoming a public concern up to the date.

Previously, this lawsuit was filed by Churchill because was felt aggrieved over the mining license revocation actions included in the East Kutai Coal Project (EKCP) by the Regional Government of East Kutai, East Kalimantan. In the same area, there is also a mining permit issued by the East Kutai Regional Government for PT. Nusantara Group. However, in this recent day was found a permit document of Kuasa Pertambangan (KP) signed by Regent Awang Faroek. After going through BPK audit, there were indications that the signature of Awang has been falsified. Nevertheless the falsifying was not brought up into the criminal level. Meanwhile, the Governor of East Kalimantan who is also a former regent of East Kutai, Awang Faroek Ishak, confirmed that his signature was indeed falsified by Ridlatama Group.

East Kutai Coal Project (EKCP) itself is a project that is estimated having a very big value reach up to 2.73 billion tons of coal. Another source said that the findings in 2008 showed that the East Kutai region could become the seventh

largest unexplored coal mining in the world, with a potency of \$ 700 million to \$ 1 billion per year and estimated will last up to 20 years.

INDICATIONS OF FALSIFYING AND CORRUPTION IN ISSUANCE OF MINING PERMITS

After a long process since June 22, 2012, ICSID finally issued a verdict on Churchill Mining and Planet Mining's lawsuit against the Indonesian Government on December 22, 2016, even though Churchill Mining submitted an Annulment of the Verdict. The Churchill Mining and Planet Mining lawsuit was filed based on the Bilateral Investment Treaty (BIT) Agreement signed between Indonesia and Britain in 1976. In its verdict, ICSID rejected Churchill's claim and insisted the Churchill Mining to pay the ICSID administration fee of US \$ 800,000 and bear 75% of the total costs incurred by the Government of Indonesia as much as US \$ 8,646,528.

The interesting part on Churchill's Verdict is that the Arbitral Tribunal rejected Churchill's claim because 34 mining permit documents that were used as the basis of the dispute by Churchill were deemed inauthentic and invalid. This is because of the 34 of the mining permit documents were as the product of the falsifying and deception by Ridlatama, as a business partner of Churchill, and Churchill was considered aware to this action, so there was no good faith from Churchill in process of claim filing.

In the process, the Arbitration Tribunal

focused on the verification of 34 documents allegedly falsified and the effect from fraudulent practices done by Ridlatama. The Indonesian government assumed that the mining permit issued by the East Kutai Regent of the time, Awang Faroek, had been falsified by Ridlatama, as a business partner of Churchill Mining. From the evidence presented, there are indications that the Garuda signatures and stamp contained in the mining permit documents owned by Churchill are the product of copy and paste processed in signature printer, autopen. Whereas the usual practices and official signatures issued by local government officials, in this case is the issuance of mining permits, was done by handwriting instead of digital signatures.

Mining Concessions & Threats to the Indigenous Peoples' Rights

There are about 7 villages in Busang, East Kutai that will be affected by the mining concession: Mekar Baru, Long Nyelong, Long Lees, Long Pejeng, Rantau Sentosa, Long Form, Long Seat. However, some of villages where the coal sediment was discovered and being disputed between the Churchill Mining and the Nusantara Group, there is a village forest protected by the local government. In 2011, the East Kutai Regent issued a letter of recommendation for the village forest with 11,648.90 hectares wide. In November 2012, The Ministry of Forestry issued a decree to define the village forest with 880 ha wide.

The establishment of the village forest

was demanded by the indigenous who make livelihood from the forest. Besides, the area is also hereditary region of Dayak tribe. Based on the explanation of Article 5 Law No. 41/1999 on Forestry, a village forest is defined as a state forest located in village area, utilized by the village, for the welfare of the community.

In the village forest, there is a graveyard of the indigenous Dayak Modang that existed since hundreds years ago. Moreover, there are also flora and fauna resources inside of the protected forest. Some of the flora resources is identified as source of food and natural medicine ingredients and currently still used by the indigenous people. These plants are: ginger, turmeric, galangal, noni, cats whisker, lemongrass, curcuma, pasak bumi Wood (Kejoe Paaq), ginseng, upper root (Long Dehoq), upas wood (Kejopeiq), garu (Kejoleah), Lawang oil (Jong Loeang), Kejo Paeq (Ketemang, Pelihiding), sun root (Wakahdea), turmeric root (Wekahsea), epiphyte (Seloeleang).

Other potentials of the village forest are: lime wood, ulin wood, banggeris wood, spring water, coal, natural gas, and faunas like orang utan (Helung Letean), uwaq-uwaq (Kenwaat), bear (Wahgoeng), teringgiling (Ham), deer (Pejiue), boar (E'woa), antelope (E'oh), skiving bird (Jeet), ketwaih, senjin (life hint bird), Pah'eat, hornbills (Teguen), peacock (Koong).

Dayak Modang community who are the indigenous people of Long Bentuq earn a living by working in the fields

and farming. The commodity planted is cocoa, coffee and rubber. The villagers also collect non-timber forest products, hunting and fishing around the Kelinjau river. To the villagers of Long Bentuq, the farming activities are not only to fill the daily needs, but there are also cultural values inside of it. They considered that farming is a kind of servitude for their Creator. Farming is also identified as the work done by women; it shows great respect to women.

The status of land owned by the Dayak community was customary land or communal land. Customary land is then used as a tool to bargain with the company. This customary land was usually compensated in a very cheap price, for around Rp. 100,000 / ha (USD 8/ha).

HORIZONTAL CONFLICT DUE TO MINING CONCESSIONS

Neither Churchill Mining nor Nusantara Group is not started the mining exploration yet. Both companies are still in the step of sampling from some points in the village of Long Bentuk and Long Lees. However, the presence of the companies has lead to the horizontal conflict among the community itself. There are increasing conflicts among ethnics in Kutai, either among Dayak ethnic or between the Dayak and newcomers (especially the Banjarese).

These conflicts occurred because of compensation provided by the company for the land expropriation. The land expropriation was

responded differently by the community. Some of are accept and some refuse. Suspicion between the members of the community increased because of prejudice one and another to the indigenous chief and his family, which are considered accepting money from the company and were not transparent to the villagers.

Long Bentuq village is one of the village which actively rejected the entry of

either mining companies or oil palm companies. The heads of the indigenous of Dayak Kenyah tribe were aware of the dangers of company expansion to their area. In 2011, this community has made a rejection letter to the investment coming into their village. The letter was addressed to the Minister of Forestry of the Republic of Indonesia. The resistance was also shown by planting a variety of trees such as cocoa, banana, rubber and fruits.

THE FACTS OF ISDS

*from the total
568 cases in
ICSID
dominated by
mining sectors*

70%

*Indonesia's
ISDS Cases are
in Mining*

50%

*Developing
Countries as
Respondent*

60%

Sumber: UNCTAD 2013
@IGJ2015

Case 3

NETHERLAND - INDONESIA BIT ROLLS BACK IMPLEMENTATION OF NEW INDONESIAN MINING LAW

By Riza Damanik, Hilde Van Der Pas

in July 2014, Newmont Mining Corporation brought a case against Indonesia using the Indonesia- Netherlands BIT at the International Centre for the Settlement of Investment Disputes (ICSID)

The case of Newmont Mining vs Indonesia is a powerful example of how investment agreements, particularly Bilateral Investment Treaties (BITs), are used by companies to get exemptions from government regulations and legislation, undermining democracy and development. It also illustrates the long-term dangers of governments signing investment agreements, which continue to be enforced even when subsequent governments try to re-establish sovereign control over investment in their countries.

In July 2014, Newmont Mining Corporation brought a case against Indonesia using the Indonesia-Netherlands BIT at the International Centre for the Settlement of Investment Disputes (ICSID).⁴⁹ In making the legal claim, the mining giant argued that the Indonesian Government's plans to implement a ban on unprocessed mineral exports would violate the investment agreement between Indonesia and the Netherlands. The case at ICSID was presented four months after Indonesia announced it would not renew its Bilateral Investment Treaty (BIT) with the Netherlands when it expires in July 2015. After one month, Newmont withdrew its case against Indonesia but only after it had reached an agreement with the Indonesian government, giving the mining company special exemptions from the new mining law.

NEWMONT MINING & LAW NO. 4/2009 ON MINERAL AND COAL

Newmont is one of the world's biggest mining companies, producing mainly gold. Headquartered in the United States, Newmont is active in Australia,

Peru, Indonesia, Ghana, New Zealand and Mexico. Its entity in Indonesia is Newmont Nusa Tenggara; its majority shareholder is based in the Netherlands under the name Nusa Tenggara Partnership BV. Newmont sued the Indonesian government together with the Dutch entity, under the Dutch BIT with Indonesia. PT Newmont Nusa Tenggara is a joint venture company that is owned by Nusa Tenggara Partnership B.V, PT Multi Daerah Bersaing (PTMDB), PT Pukuafu Indah and PT Indonesia Masbaga Investama.

In 2009 the Government of Indonesia issued Law No. 4/2009 on Mineral and Coal, which required mining companies to downstream production, in other words refine and process minerals (for example by establishing a smelter) in the country prior to export. Article 170 of the Mining Law stipulates that downstreaming must be done no later than 5 years after the Mining Law is enacted, which would mean in 2014. The law allows exports of semi-finished mineral products, such as copper concentrate, until 2017, but only with a progressive export tax ranging from 20% to 60%. This progressive tax rate was intended to force miners to develop mineral processing facilities in Indonesia and forms part of a broader strategy by Indonesian governments to get a larger share of its mineral resources.

The new mining law (Article 112) also aims to limit foreign ownership of mining companies: it obliges foreign-owned mining industries to progressively divest to become a shareholder minority within 10 years. In other words: companies have to sell off parts of their shares to the Indonesian government, municipalities or local industries – up to 51% within ten years.

Indonesia's new mining law should be seen in the context of a broader trend in countries in the Global South, wanting to

⁴⁸ Published on 12 November 2014

⁴⁹ ICSID CASE No. ARB/14/15 29 August 2014 <http://www.italaw.com/sites/www.tni.org/files/case-documents/italaw4005.pdf>

be less dependent on the export of raw materials, or seeking to control a larger part of its resources to benefit local and national development. Since 1998, Indonesia has witnessed the rapid growth of a sovereignty movement: a lot of young politicized people who felt very strongly about Indonesian economic independence, especially related to the extractive industries. The Yudhoyono government issued the mining law No. 4/2009, in January 2009 and was re-elected 3 months later.

The goal of this policy was to boost domestic employment and the local economy and help Indonesia be less dependent on the export of raw materials. But companies active in extractive industry strongly opposed the new policy. According to Newmont, the new law had led them to halt work at the Batu Hijau copper and gold mine on the island of Sumbawa (West Nusa Tenggara Province), leading to 'hardship' and 'economic loss'.⁵⁰ Newmont subsequently closed the mine, sending home 3,200 workers.

After intensive lobbying and pressure from large mining companies, the Indonesian government agreed to amend the regulations for Freeport and Newmont and postpone Obligation to build mineral refinery plants in Indonesia.⁵¹

The Indonesian government also came to an agreement with Freeport on other issues: they agreed on only selling 30% of the shares to the government and paying an export tax of 7.5% instead of 25%, which will be

zero once a smelter is completed.^{52 53} Freeport Said it would pay a significantly reduced" export duty until 2016, but higher royalties on copper and gold sales. In Freeport's Chief Executive Richard Adkerson words: "It is a compromise to create a bridge for us so that we can return to normal operations."^{54 55 56}

Unlike Freeport, however, Newmont adamantly refused to accept the conditions set by the Indonesian government and sued them at ICSID.

WHY INDONESIA CANCELLED ITS BIT WITH THE NETHERLANDS

In March 2014, the Indonesian government announced that it will not renew its Bilateral Investment Treaty with the Netherlands when it expires in July 2015. The country is facing a rising number of investment cases, with transnational companies claiming hundreds of millions of dollars-even up to a billion in one case- in damages. These cases are part of a worldwide trend of an increase of investor-state disputes, from 38 cases in 1996 to 514 known cases (registered at ICSID) in 2012. At least one in three cases at ICSID is related to oil, mining or gas.⁵⁷

Most BITs give foreign investors far-reaching protection through the so-called Investor-State Dispute Settlement mechanism (ISDS). This allows companies to sue governments over actions and policies that impact on their business -i.e might damage their future profits. The Netherlands is one

50 Arbitration Filed Over Export Restrictions in Indonesia, Press Release PT Newmont Nusa Tenggara, 1 July 2014 http://newmont.q4web.com/files/2014/Press%20Releases/Press%20Release%201%20Juli%202014%20-%20Arbitration%20Filed%20Over%20Export%20Restrictions%20i%20%20%20_v001_e210p1.pdf

51 Indonesian government continues to serve extractive companies, Bosman Batubara, Stiftung Asienhaus 13 March 2014 http://www.asienhaus.de/uploads/tx_news/asienhaus-hintergrundinformation4-2014.pdf and <http://www.koran-jakarta.com/?13377-pemerintah%20keluarkan%20dispensasi%20bk%20mineral>

52 Freeport Akhirnya Setuju Melepas 30 Persen Saham, motionFM <http://www.motionradiofm.com/News/Detail/280/freeport-akhirnya-setuju-melepas-30-persen-saham.html>

53 Newmont akhirnya sepakat revisi kontrak, Oleh Muhammad Yazid - Jumat, 3 October 2014 <http://industri.kontan.co.id/news/newmont-akhirnya-sepakat-revisi-kontrak/>

54 Indonesia offers tax cut to miners, Freeport to soon resume exports, Reuters, 24 July 2014 <http://www.reuters.com/article/2014/07/24/indonesia-mining-copper-idUSL4N0PZ18220140724>

55 Press Release, Freeport-McMoRan Announces Resumption of Exports from Indonesian Subsidiary, 25 July 2014 <http://www.fcx.com/news/2014/072514.pdf>

56 Freeport, Indonesia make peace: copper exports to resume in August, Mining.com, 25 July 2014 <http://www.mining.com/freeport-indonesia-make-peace-copper-exports-to-resume-in-august-11290/>

57 What is the 'investor-state dispute settlement'? FOeEurope <http://www.foeurope.org/isds>

of the world's leaders in investment protection, with 96 bilateral investment treaties signed at the time of writing,⁵⁸ which makes the country second in the world as the source of the claims by investors against states. The Netherlands-Indonesia BIT was signed in 1968 and renewed in 1995.

The Dutch BITs are known to be particularly expansive in the rights and protection given to foreign investors. In combination with a business-friendly fiscal environment, this has led to the phenomenon of 'treaty-shopping' where companies establish themselves in the Netherlands solely in order to qualify for the extensive protections offered by Dutch BITs which they use to sue states, including on occasion their own home states. Nusa Tenggara Partnership BV has its office in Amsterdam, has zero employees and more than a billion euros in assets. This usually indicates that the company is a so-called "mailbox company", existing in the Netherlands only in name in order to take advantage of its tax climate and investment agreements.⁵⁹

Indonesia's newly elected president Joko Widodo promised in his election campaign, as the first president without a political or military elite background, to give back Indonesia's wealth and natural resources to the Indonesian people. Although it was the former president Susilo Bambang Yudhoyono who issued the new mining law, Widodo plans to continue the export ban and seeks to boost export of processed minerals instead of the raw materials. According to former Energy and Mineral

Resources Ministry spokesman, Mr Saleh Abdurrahman: "Big mining companies have been operating in Indonesia since 1967, and we are basically exporting our country."⁶⁰ According to his party's policy document, Joko Widodo also plans to give more incentive to local miners, limit the expansion of plantations, and reduce food imports (aiming to become self-sufficient in rice and corn)⁶¹

ZOMBIE LAWSUITS: INVESTMENT CLAIMS THAT CONTINUE TO BITE

The Indonesian government has announced that it will cancel more than 60 other investment treaties that contain an ISDS clause. However, a cancellation of the BIT with the Netherlands doesn't safeguard the Indonesian government from future treaty-based investment claims coming from the Netherlands. The BIT contains a so-called survival clause: investments originating from before the treaty's official termination date of 1 July 2015 will continue to have full treaty protection for another 15 years.

Indonesia also faces a lawsuit from British owned Churchill Mining for one billion dollars over the revocation of coal mining permits on the island of Borneo. Churchill Mining had been active on the island of Borneo until 2010, when its permit was withdrawn by the local government. Indonesia claimed Churchill's investments were not covered by the Indonesia-UK BIT, but the arbitration court ruled otherwise.⁶²

Shortly after this news, the government announced the cancellation of the Dutch BIT. Indonesia's president at the time

58 Investment Policy Hub UNCTAD: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/148#iialInnerMenu>

59 Bedrijfsprofiel - Nusa Tenggara Partnership B.V. (34349749) Kamer van Koophandel, 30 september 2014- 13:29 & Nusa Tenggara Partnership B.V. (34349749) Financial Statement 2013 Kamer van Koophandel.

60 New Mining rules in Indonesia creating confusion and problems on the ground, Establishment Post, 19 February 2014 <http://www.establishmentpost.com/new-mining-rules-indonesia-creating-confusion-problems-ground/#ixzz3GsXHxOH>

61 Sebagai langkah awal ketika disumpah pada bulan Oktober 2014, Widodo mengumumkan bahwa pemerintah akan mengurangi subsidi bahan bakar sebesar 20 miliar USD, yang akan meningkatkan harga sebesar 50%. Subsidi ini sebagian besar menguntungkan orang Indonesia yang lebih kaya dan industri (seperti tambang) yang mengandalkan transportasi kendaraan. Pemerintah baru berencana untuk menggunakan subsidi tersebut bukan untuk mobil tetapi untuk meningkatkan infrastruktur, pendidikan dan layanan kesehatan yang lebih baik. Widodo juga berencana untuk menyusun program nasional untuk layanan kesehatan gratis dan bantuan finansial untuk pendidikan dasar. Program ini sangat populer saat menjabat sebagai gubernur Jakarta.

New at the Helm of Indonesia's Government: A Common Man, Joe Cochrane, NYT, 18 October 2014

<http://www.nytimes.com/2014/10/19/world/new-at-the-helm-of-indonesias-government-a-common-man.html>

62 Indonesia fails to knock out mining claim, Leo Szolnoki, 26 February 2014, Global Arbitration Review <http://globalarbitrationreview.com/news/article/32454/indonesia-fails-knock-mining-claim/>

Yudhoyono told his minister to 'prepare for worst' after Churchill filed its case: "I do not want those multinational companies to do anything they desire with their international back-up and put pressure on developing countries such as Indonesia." Gatta Rasaja, Indonesia's minister for Economic Affairs, stated that the Churchill case was a salutary lesson for Indonesia.⁶³

The government had been forced previously to weaken its environmental policy in the face of several lawsuit threats. For example, in 2002 it had to stop its new policy to ban mining in protected forests after a group of mining companies threatened to sue Indonesia for billions of dollars: "If shut down, investors demand and Indonesia cannot pay," said Environment State Minister Nabel Makarim.⁶⁴

NEWMONT WITHDRAWS CASE BUT SECURES ITS INTERESTS

In the end, Newmont withdrew its case from ICSID, but not before the government gave the mining company special exemption from national policies. The negotiation process has been far from transparent and the deal could not be monitored by local civil society organisations.

The eventual agreement, though, clearly undermined the implementation of the new mining law, which was put in place in the interest of Indonesia's citizens. Newmont is now, just like Freeport, only required to pay a 7.5% export duty. After Newmont withdrew its case from ICSID, a Memorandum of Understanding (MoU) was signed with the Indonesian government, very similar to the one with Freeport, allowing the company to resume exporting under the condition that it would build a processing plant to

strengthen the country's mineral industry. At the moment of Writing, this still has not happened.^{65 66}

It has long been argued that the impact of Bilateral Investment Treaties is not just shown in the cases brought to tribunals that rule against states' rights to regulate and protect citizens, but also in the many cases that do not make it to ICSID because states backtrack on regulation for fear of lawsuits. This is called the 'chilling' effect or regulatory chill of investment arbitration. However it is very difficult to show how the chilling effects works, because governments that backtrack in face of threats often do so without public knowledge and because agreements with corporations are made between closed doors. The case of Newmont against Indonesia however, shows the consequences that arise from a mere threat of a billion dollar claim in response to a (proposed) new Policy.

Indonesia's decision to cancel its BIT with the Netherlands is a move in the right direction, but the government also has its hands tied in its attempts to roll back unjust investment protection agreements. The survival clause makes it possible for companies to sue governments for up to ten to twenty years after the BIT runs out. The Netherlands has so far never been at the receiving end of such a claim, but with the EU-US TTIP negotiations underway and a growing consensus on the dangers posed by ISDS clauses in trade agreements, Indonesia's experience is a salutary lesson for any government considering signing investment agreements. It is time for countries in both the Global South and north to rethink their policies on trade and investment.

⁶³ SBY frets over int'l arbitration, Bagus BT Saragih, The Jakarta Post, 29 June 2012 <http://www.thejakartapost.com/news/2012/06/29/sby-frets-over-int-l-arbitration.html>

⁶⁴ Nabel Makarim Agrees with Mining in Protected Forests, MAC, 15 June 2002 <http://www.minesandcommunities.org/article.php?a=7737>

⁶⁵ Newmont Indonesia restarts copper exports; supply overhang looms, Reuters, 30 September 2014 <http://af.reuters.com/article/commoditiesNews/idAFL3N0RV1VI20140930?pageNumber=1&virtualBrandChannel=0>

⁶⁶ Newmont gets export permit despite pending smelter fund, Jakarta Post, 20 September 2014 <http://www.thejakartapost.com/news/2014/09/20/newmont-gets-export-permit-despite-pending-smelter-fund.html>



Press Conference on IMFA Lawsuit

Case 4

ISDS LAWSUIT INHIBITS THE ENFORCEMENT OF MINING POLICIES IN INDONESIA

By Aryanto Nugroho

In 2015, India Metals and Ferro Alloys Limited (IMFA) sued the Government of Indonesia through international arbitration and requested compensation of US \$ 581 million or around Rp7.7

The earth, water and natural resources contained in it are controlled by the nation and used for the greatest prosperity of the people, article 33 verse (3) Republic of Indonesia Constitution 1945 (UUD RI 1945). This article becomes guidelines for the government to provide licenses in the natural resources management including mining permits. In fact, granting permits, especially concerning to strategic sectors such as natural resources should go through due diligence process to ensure the management is transparent and accountable. The licensing in natural resources sector is not only to exploit natural wealth but also about concerning to environmental carrying capacity and sustainability of future generations. Other than that, the licensing function is also an instrument for controlling the management of natural resources in order not become over exploitation and become "the wet land" for some people.

Unfortunately, Indonesia has series of bad experiences related to granting permission to manage natural resources in the last 2 (two) decades. Corruption Eradication Commission (KPK) for example through Coordination and Supervision at the mineral and coal sector (Korsup Minerba) which began in the year 2010 found a number of acute problems in the mining sector.

In 2014, out of a total of 10,918 Mining Business Permits (IUPs) issued by the Central Government and the Regional Government (Pemda), 4,877 IUPs include Non Clean and Clear (CnC) status due to territorial and administrative problems;

There is an IUP that has already been expired as many as 5,986 IUPs (As of December 31, 2016).⁶⁷

6.3 million hectares of conservation forest and protected forest areas are burdened by mining concessions (in open pit) that clearly violate forest utilization provisions. Overlap between contract concessions and mining permits, the number reaches 121 overlapping IUPs with KK, and 50 IUPs with PKP2B. Millions hectares of ex-mining land are not reclaimed, and 90% of IUPs do not place reclamation guarantees and post-mining guarantees. The KPK found that PNBP arrears reached Rp.25.5 Trillion, due to dispute for generation-1 PKP2B amounting to Rp.21.8 Trillion, and the remaining IUP arrears that are difficult to trace its existence. From 10 thousand more IUPs, only 7,519 (70%) are registered with the Directorate General of Taxes, and of those 7,519 only 84% had NPWP, the rest is not identified.

Following up on the findings, Korsup Mienerba as part from the National Movement for the Rescue of Natural Resources (GN-PSDA) declared through the signing of the charter of the declaration "Rescue Natural Resources" by the Chairperson of the Corruption Eradication Commission, TNI Commander, National Police Chief, and Attorney General on June 9, 2014 in Ternate, North Maluku. The declaration contains statement of determination to support Indonesia's free SDA Governance from Corruption, Collusion and Nepotism (KKN) supporting the diversification of Indonesia's natural resources wealth and carry out law enforcement in the natural

⁶⁷ See link: https://www.minerba.esdm.go.id/show/show_halaman?halaman=4

resources sector. The declaration renewed with the signing of GNPSDA on March 19, 2015 at the State Palace involving 27 K / L in the marine sector, Plantation, Mining, and Fisheries; Local government (Pemda) and related Law Enforcement.

A number of positive achievements have been generated from the implementation of Korusup Minerba so far, among others, the reduction in the number of Non Clean And Clear IUPs(CNC) nationally, from 4,877 IUPs in 2014 to 2,155 as of February 2018, with a decrease of 2,722 IUPs or reaching 56.8%; The increase in the amount of state revenues from the Minerba sector, since the implementation of Korusup counts in total, there are increases of more than 30(thirty) trillion rupiahs; Increased compliance of IUP in placing a reclamation guarantee of only 10% in 2014, becoming 60% in June, 2018.

However, the implementation of Korusup Minerba still leaves various problems that demand immediate follow-up. For example, the settlement of 325 IUPs covering an area of 793,523.07 Ha which included to conservation forest and 1,349 IUPs covering an area of 3,711,881.07 Ha which included to protected forests; settlement of PNPB receivables amounting to Rp 4.9 trillion, of which Rp 19.8 billion from KK, Rp. 920 billion from PKP2B and Rp. 3.98 Trillion from IUP; a number of KK & PKP2B companies and thousands of IUPs that have not been indicated / not pay guarantees of reclamation and post-mining. (ESDM, February 22, 2017).

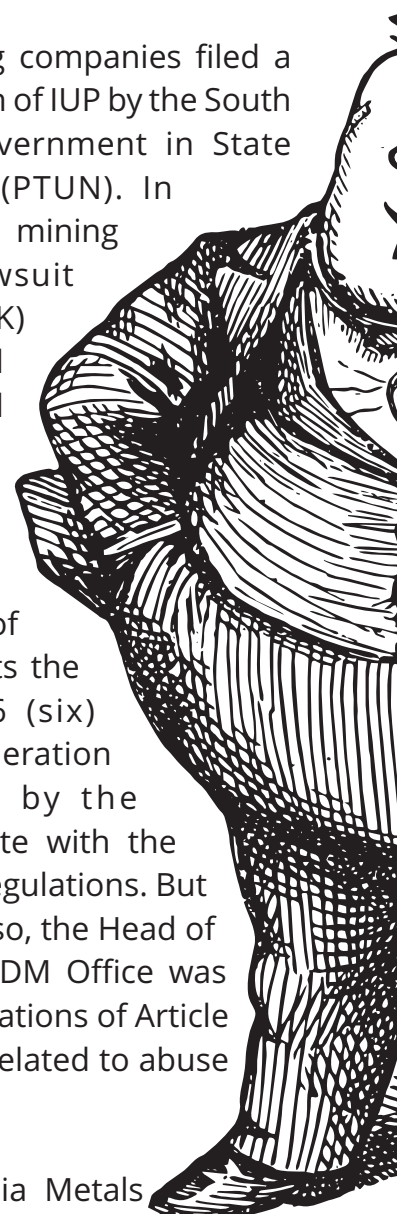
CORPORATE COUNTER-ACTION

On the other side, the efforts to improve mining governance are initiated by The KPK together with the relevant Ministry faced a number of obstacles and challenge. One of

them was a series of counter claims from the company whose IUP was terminated due to expiration or revoked because of Non CnC status.

In 2017, 10 (ten) mining companies filed a lawsuit for the revocation of IUP by the South Sumatra Provincial Government in State Administrative Court (PTUN). In Central Sulawesi, 6 (six) mining companies filed a lawsuit against the Decree (SK) Governor of Central Sulawesi (Central Sulawesi) related to Business Region D o w n s i z i n g Overlapping mining. In its decision, the Panel of Judges Palu PTUN rejects the claim of 2 (two) of 6 (six) companies with consideration that policies issued by the governor are appropriate with the mandate of applicable regulations. But for the issuance of SK also, the Head of the Central Sulawesi ESDM Office was named a suspect for violations of Article 165 of the Minerba Act related to abuse of authority.

Previously, in 2015, India Metals and Ferro Alloys Limited (IMFA) sued the Indonesian Government through international arbitration demanding compensation of US \$ 581 million or around Rp.7.7 trillion. The claim was made because the IUP owned by PT. Sumber Rahayu Indah, whose shares are owned by IMFA through its subsidiary, Indmet (Mauritius) Ltd, and Indmet Mining Pte Ltd, are declared status Non CnC, so it cannot carry out mining operations.





The lawsuit of PT. IMFA which was posted in 2015 was in the public spotlight and even Vice President Jusuf Kalla in March 2017 until the relevant ministers must gather to discuss this case specifically because of the adverse effects that will be generated greatly big if PT. IMFA to win.

This article will specifically highlight the "counter-claim" of the IMFA at the time The Indonesian government seeks to improve governance mining, and what are the negative impacts of the PT. IMFA's case.

MINING PERMIT CONFLICT IN IMFA CASE

In 2009, PT. Sumber Rahayu Indah received an IUP of Operation Production (OP) Decree (SK) of East Barito Regent No. 569, 2009 covering an area of 3,674 hectares, located in Raren Batuah and Dusun Districts Tengah, East Barito Regency, Central Kalimantan. In 2010, PT. IMFA through 2 (two) subsidiaries, namely: Indmet (Mauritius) Ltd, and Indmet Mining Pte Ltd bought ownership of PT. Sumber Rahayu Indah worth US \$ 8.7 Million.

However, the IUP owned by PT. Sumber Rahayu Indah declared to be Non CnC status so that it cannot carry out activities production operation. Non CnC status is caused by overlapping with 7 (seven) other companies, namely PT. Puspita Alam Kurnia and PT. Tanjung Bartim Kurnia in East Barito

Regency, PT. Bintang Awai Shine and PT. GEO Explo in South Barito Regency, and PT. SonBara Utama, PT. Marangkayu Bara Makarti and PT. Kodio Multicom at Tabalong Regency, South Kalimantan Province.

In addition, the IUP of PT. Sumber Rahayu Indah is known to be in the region of South Barito Regency, still in the same province Central Kalimantan. It is also known to be in the Province Central Kalimantan. It is suspected that PT. IMFA does not carry out the due diligence process completely before, at the same time it is also suspected of taking action speculative at high risk when purchased PT. Sumber Rahayu Indah.

At the same time, in 2014, the Law number 23 was issued concerning to Regional Government (Regional Government Law) which revokes authority issuance of IUP by the Regency and transfer of said authority to the Provincial Government and the Central Government, which also have consequences on the effort to resolve the overlapping problems of the IUP area.

Finally, IMFA in 2015 filed a lawsuit to the International Arbitration Court in the Netherlands, which is based on Article 3 and Article 9 Bilateral Investment Treaty (BIT) between the Government of Indonesia and Indian government in 1999.

At the time of writing, PT. IMFA towards Indonesia still not finished and or pending status. Claims in the lawsuit of PT. IMFA calculates potential losses (potential losses) starting in 2010 until 2015 so the IMFA demanded compensation for Indonesia worth US \$ 581 million or equivalent to Rp. 7.7 trillion.

WHO IS BEHIND IMFA

Indian Metals & Ferro Alloys is an Indian company was founded in 1961 in Odisha which is located on the eastern coast of India, this company is engaged in mining, chrome alloy and electricity. PT. IMFA has eight subsidiaries, including: Indian Metals & Carbide Ltd, Utkal Power Ltd, Utkal Coal Ltd., IMFA Alloys Finlease Ltd, Utkal Green Energy Ltd., Indmet (Mauritius) Ltd, Indmet Mining (Pte) Ltd, Singapore, and PT. Sumber Rahayu Indah, Indonesia.

The IMFA is led by Dr. This Bansidhar Panda has 33 partners with other companies, and among those 33 partner companies, more companies are indeed established directly by Dr. Bansidhar Panda or his family members such as B Panda & Company Pvt Ltd, B Panda Trust, B.P. Solar Pvt Ltd, BP Developers PvtLtd., and Panda Investment Pvt Ltd. In fact, within IMFA's organizational structure there was a lot of involvement of Dr. B. Panda's family in managing the company, including who holds the position of Vice Chairman named Baijayant Panda and Managing Director named Subhrakant Panda. And apparently, IMFA is a large family company of Dr. B. Panda included several the companies that is a partner of IMFA is managed directly by Dr.B. Panda and his family.

IMFA CLAIMS GUIDELINES: "CLEAN AND CLEAR POLICY"

The reason for the case of PT. IMFA is government policy to conduct an IUP arrangement through the CnC mechanism. Based on the lack of data

validity and some derivative problems due to a surge in licensing in the era of decentralization, making The Ministry of Energy and Mineral Resources, through the Directorate General of Mineral and Coal took the initiative to hold national reconciliation IUP data on 3-6 May 2011. The reconciliation aim is to obtain definite data in the IUP arrangement process issued by regional governments throughout Indonesia.

To filter the existence of mines, it needs some identification through status determination CnC and non-CnC are expected to obtain national IUP data, at the same time to accelerate the process of adjusting KP to become an IUP as mandated by PP No. 23/2010 about Mineral Implementation and Coal Mining Business Activities.²

Previously, the governance problematic of mineral and coal mining in Indonesia triggered by a mining licensing boom occurred after the implementation of decentralization in Indonesia in 2001, including giving the authority to the regional government to issue permits mining.

In 2001, mining permits were recorded by the central government is known only have 750 permits, but with the transition of authority to grant permits in the era of decentralization, permit numbers Minerba develops uncontrollably into more than 8,000 in 2008 (Tri Haryati, 2013). This number soared more significantly again to be more than 10,900 in the year from 2010 to 2014. From the figure is 40% which is coal IUP with a total area reaching 16.2 million

⁶⁸ See PP Nomor 23/2010 tentang Pelaksanaan Kegiatan Usaha Pertambangan Mineral dan Batubara.

hectares (DG Minerba, 2013). Whereas area for the PKP2B permit regime, it is around 1.95 million hectares (DG of Forest Planning, 2014).

In addition, the arrangement of IUP through the CnC mechanism is based on objective condition where the obligation to report mining business operations in region area by the Regional Government to the Center does not work. Overlapping IUPs issued by the Government Province / Regency / City. Non-compliance in PNBP is paid by Mining Business Actors (IUP Holders). And the presence of PETI and / or IUP is not compliant as a factor causing a decrease in environmental quality life (ESDM, 2017).

Reconciliation is done by inviting local government (Regent / Mayor / Governor) to equate data (reconciliation) with the Ministry of Energy and Mineral Resources by including administrative features include: Decree (SK) issuance of valid IUP along with map attachments and coordinates, documents stating that there is no overlapping between permits and commodities, documents related to obligations finance, and approval of Environmental Impact Analysis (AMDAL).

Based on the results of the verification, for the IUP that the issuance process has been in accordance with the provisions of legislation and not have administrative and overlapping issues commodity, declared CnC status, is able to continue its activities both exploration and production. Otherwise, for IUP holders who has Non-CnC status is automatically unable to carry out mining activities.

After the issuance of Law No. 23/2014 (Regional Government Law), as well as

following up the findings of Korusup Minerba KPK, the Government issued a Ministerial Regulation (Permen) ESDM Number 43 of 2015 concerning Procedures for Evaluation Issuance of IP that strengthens the mechanism for evaluating and controlling permits, and specifically through the CnC audit mechanism.

The CnC mechanism regulated in ESDM Regulation Number 43 of 2015 is fulfillment of IUP obligations in administrative, territorial, technical, environmental and financial aspect.

Administrative aspects:

- a) Submission of application for extension / increase of IUP / KP before the validity period expired.
- b) Reserves and requests for KPs are set before the Act 4/2009 published.
- c) KP exploitation is an increase KP exploration
- d) Do not have more than 1 KP / IUP for business entities that not opened.
- e) The period of validity of the exploration IUP / Production operation is not exceed the provisions of Law No.4 / 2009.
- f) Application for regional backup not submitted to the region KK / PKP2B, KP and existing IUP.
- g) KP that still valid after Law No. 4 of 2009.

Regional Aspects:

- a) WIUP does not overlap with other similar WIUP commodity.
- b) WIUP does not overlap with the WPN.
- c) Does not overlap with the administrative area another districts / cities or provinces.
- d) Coordinate of exploration IUP in accordance with reserve region coordinates.
- e) The coordinates of the IUP OP are in the

coordinates of the IUP Exploration.

- f) The coordinates of the IUP are parallel to latitude longitude.

Technical aspects, including:

- a) Exploration report for exploration IUP holders
- b) Exploration and feasibility study reports for IUP holders which include to the feasibility study and OP IUP

Environmental aspects, including:

- a) environmental documents that have been approved according to the provisions of the legislation.

Financial aspects, including:

- a) Proof of settlement of fixed contributions up to the last year at the time submission for the exploration IUPs.
- b) Proof of payment of fixed fees and production contributions up to the last year when submitting to operation and production IUP.

For Non CnC status IUP based on the results of the ESDM Permen evaluation 43/2015, the Central Government and the Regional Government are required to conduct area shrinkage (overlapping) and / or revocation the IUP. Even though in the implementation, not all Non CnC IUPs are reduced and / or revoked. One of The Regional Government reluctance to regulate the IUP is due to legal action through a lawsuit in the Administrative Court and arbitration lawsuit as was done by the IMFA.

SPECULATIVE INDICATIONS: IRRELEVANT IMFA CLAIMS

Based on the document "Statement of Defense" compiled by The Indonesian government in the arbitration proceedings

was obtained a number of facts, including: Granting permission to PT. Sri Rahayu Indah has had problems even during the exploration phase. Exploration Mining Contract (KP)

obtained from the East Barito Regent was truly outside the region of East Barito Regency; contradictory to the Central Kalimantan RT/RW's Perda; it is not accordance to the map issued by the Ministry ESDM and Ministry of Forestry in 2006; overlap with KP exploration of PT. Bintang Awal Bersinar (published first) and PT. Geo Explo (published later) published by the South Barito Regent; overlap with Exploration KP PT. Kodio Multicom, PT. Marangkayu Bara Makarti, and PT. Putra Bara Utama issued by the Regent of Tabalong.

Interestingly, on December 1, 2009, PT Sri Rahayu Indah submitted an amendment to the Exploration IUP which requires number of obligations that must be fulfilled. However, on December 5, 2009 or 4 days after submitting an amendment to the Exploration IUP, PT. Sri Rahayu Indah proposed an increase in the IUP of Production Operation (OP) without it first fulfill obligations determined based on legislation.

Other than that, with the IUP OP issued by the East Barito Regent through SK No. 569 of 2009 on December 8, 2009 after being reviewed more further, evidently it is located out of East Barito Regency area, it is contradictory to the Central Kalimantan RT/RW Regional Regulation; not in accordance with the maps issued by the Ministry of Energy and Mineral Resources and the Ministry of Forestry in 2006; and overlap with 7 (seven) companies other mines. During 2010-2012, PT IUP OP. Sri Rahayu Indah is also known does not carry out a number of obligations such as delivering RKAB,

investment plans, reclamation and post-mining plans, third quarter reports and annual report.

With these facts, based on legal regulations, both Law Number 4 of 2009 (Minerba Act) and its derivatives, it is appropriate if the existence of IUP OP (even IUP Exploration) from PT. Sri Rahayu Indah was declared as the IUP Non CnC, and should be revoked, regardless of existence problem in granting permission by the East Barito Regent. Allegations to PT. IMFA does not carry out *due diligence* process completely at the same time suspected of carrying out a high risk speculative actions when purchasing PT. Sumber Rahayu Indah, it is showed in the real facts that has been written before.

The purchase of PT. Sri Rahayu Indah by PT. IMFA with the *scheme indirect investment* through 2 (two) subsidiaries, named PT. Indmet based in Singapore and PT. Sri Indo Capital Ltd. based in United Arab Emirates is suspected of being inaccurate and speculative. Besides it is not a careful action of the IMFA subsidiaries in conducting *due diligence* specifically related to the mining business of PT. Sri Rahayu Indah, in Indonesia, registered as a PMA company is PT. Indmet and PT. Sri Indo Capital, not IMFA. BKPM as the issuer of PMA permits is also clear said there was no connection between IMFA and PMA status of PT. Sri Rahayu Indah, and also the status of the IUP OP of PT. Sri Rahayu Indah. Besides there is an alleged use of *nominees* in the context of the process of purchasing PT. Sri Rahayu Indah which is not legal in Indonesia, the use of *nominees* is prohibited.

Thus, even based on international law, the IMFA's efforts do an arbitration lawsuit becomes irrelevant. Even if there is a legal effort related to the problem of IUP overlapped, it should be completed in the Administrative Court of Indonesian jurisdiction. In fact, it is not PT. IMFA who filed the lawsuit. However, the Indonesian Government may not ignore it. If the international arbitration court approves the claim of PT. IMFA, certainly this will be a bad precedent as well as a backwards step in the efforts of the Government to improve good governance of mining in Indonesia. For this reason, the involvement of all relevant agencies, including the Attorney General as a lawyer for state law in this case is importantly needed.

Moreover, the international arbitration forum has many weaknesses that can weaken Indonesia's position as a sovereign law state. The process of proceeding through arbitration, according to the theory can be passed quickly and the results will satisfied both parties, in fact it can be different. Dispute case between Hotel Kartika Plaza Indonesia against PT. Amco International, which makes the ICSID must terminate up to three times, it takes about twelve years, that is, from the submission the claim for the first time on January 15, 1981 until the decision of the second cancellation on December 3, 1992.⁶⁹

In addition, the negative issues from international arbitration can also be seen from indication of the existence of "*inner mafia*" in international arbitrator profession. The top three law firms handle 130 investment cases in 2011, and only 15

⁶⁹ Sudargo Gautama, Arbitrase Bank Dunia Tentang Penanaman Modal Asing di Indonesia dan Jurisprudensi Indonesia Dalam Perkara Hukum Perdata (Bandung: Alumni, 1994) hlm. 1-15

arbitrators mostly from Europe, US, or Canada has accomplished 55% of the leading investment cases. Besides working as an arbitrator, he also works as a consultant, witness, even as a member of the board of major multinational corporations.⁷⁰

“WILD EFFECT” PT. IMFA CASE

As it has been mentioned in the beginning of this writing, the counterclaim from mining companies either through Administrative Court or International Arbitration have caused reluctance in some Regional Governments to revoke Non-CnC Mining Licences. As of February 2019, The Ministry of Energy and Mineral Resources recorded at least 542 Non CnC IUPs have not been revoked by the Regional Governments. Do not let the counterclaim of PT.IMFA to be a justification of the operation of Non CnC IUPs across Indonesia. This case can be an important lesson Central and Regional Governments for not easily to issuing permit to mining operation. The issuance of Exploration License or Operation Production (OP) License IUP to PT. Sri Rahayu Indah in East Barito Regency has attested that the *due diligence* process is not applied as it should be and as it is regulated in law. The 2016 OECD report titled Report on Corruption in Extractive Value Chain has emphasized that the risks of corruption can occur in any supply chain sports: starting from the decision making phase to conduct extraction until the use of receipt. The report revealed that most of the corruption case in extractives industries being surveyed

were in "Issuance of mining, oil and gas licenses ", and "operation and extraction regulations "phases (34 of 59 cases), while other cases are in the "income collection" phase". The types of violations that occur include bribery of government officials, embezzlement of money, misuse and transfer of public funds, abuse of office, exchange of influence, favoritism, extortion, bribery of domestic officials, and facilitation payments.

The Transparency International Indonesia study shows at least 35 types of corruption risk, with 86% of these risks are very likely to occur and / or will have a very severe impact. The biggest corruption risk comes from vulnerability in the licensing process (54%), then risks associated with practices in the licensing process (20%). The fact that OP Mining Licenses of PT. Sri Rahayu Indah did not submit its guarantees of reclamation and post-mining also confirmed that in practice, the operational of mining in Indonesia has neglected the responsibilities to the environment. It was recorded 60% or 1,569 out of 2,579 IDN PMDN)Domestic Investment License) bearers did not put the reclamation guarantee funds(Ditjen Minerba – Directorate General of Mineral and Coal, July 2018). It is known that the damaged because the reclamation is not done to the former excavation. For example, the mining activity has caused in the degradation and land used change as many as 100,000 hectares (Mongabay, June 2018). Moreover, there is lots of the former pit mine (either in the post-mining phase or in production phase) left without

⁷⁰ See More Pia Eberhard & Cecilia Olivet, Profiting From Injustice(Brussels/Amsterdam: Corporate Europe Observatory and The Transnational Institute, 2012) hlm. 7-9

reclamation. Even until this paper is written, the pit coal in East Kalimantan has generated victims of 32 people who live around the mining area.

Alleged use of *nominee* in business process of PT. Sri Rahayu Indah if it continues, it will impact impact to the existence of taxation crime efforts in Indonesia. The PWYP Indonesia Study (2014) mentions from around Rp. 1,387 trillion oil and gas sector (migas) and minerals and coal (minerba), thousands of entrepreneurs enjoy the income from extracting wealth in mining sector (BPS, 2014 & BI, 2014). However, it is only around Rp. 96.9 trillion can be withdrawn for the tax (DGT, 2014).

The Panama Papers document which reveals hidden wealth of world leaders and politicians, including 1,038 Indonesian taxpayers, increasingly strengthen this phenomenon. Illicit financial flow outflow in Indonesia for the period 2005-2014 reached USD 208 million USD 334 million. It placed Indonesia becomes the eighth countries with the largest flow of illicit money in the world (GFI, 2017). PWYP Indonesia recorded the flow of illicit money in mining sector in 2014 estimated at Rp23.89 trillion, and Rp21.33 trillion of them is from illegal trade transactions and IDR 2.56 trillion is from tax evasion.

On one side, the government paradigm regarding licensing is still struggling for some efforts to make business easy to run. So, mostly the efforts are made to deregulate and debureaucratize for facilitate permission. However, it must be remembered that there must be an exception in the context of licensing on natural resources sector, especially

related to sustainability and the future of next generation.

What should be remembered, permission is also an instrument to do supervision and control. Unfortunately the supervision and Law enforcement aspect in mining sector in Indonesia is still weak. This time, the ESDM Ministry has only 260 Mining Inspectors and 34 Official Civil Servant Investigator (PPNS). It is very ironic situation if it compare to a total of 5,717 Mining Business Permits (IUP) that must be monitored.

The Law enforcement in this case is also very weak. So far, the government only imposed administrative sanctions which in fact were ignored by the company. The government should apply criminal instruments, based on Law 4/2009 concerning to Minerba Mining and Law 32/2009 concerning to Environmental Protection and Management Life (PPPLH), as well as all companies that are proven not comply with environmental responsibilities that caused significant impact to environmental damage and caused the loss of life.

Procecution through multidoor approach is absolutely done in law enforcement for natural resources crime, including it should ensnare the corporations of SDA criminals with criminal acts corporation (corporate crime liability) and it is important to strengthen the integrity system in granting licenses and mining contracts. Development of anti-bribery systems and *whistle blower* protection, and also reform of the licensing / contracting system and supervision are several steps to improve integrity in the energy governance sector and natural resources.

4 INVESTMENT DISPUTES BANKRUPTING THE STATE

By : Rachmi Hertanti, SH., MH

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 Churchill 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, Krzysztof 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, Churchill, 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 Churchill 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 Churchill 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 Churchill 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 Churchill 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 Churchill 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 Churchill 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 Utama 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).

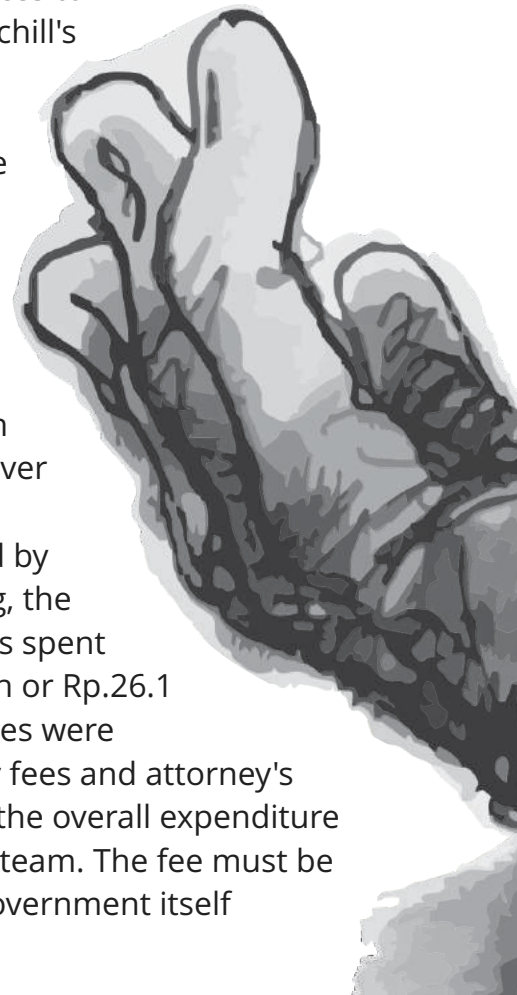
The Indonesian government tried to prove legally that PT TCUP has never acquired any form of land certificate for Port Land due to the absence of applications submitted to obtain location permits, as legal requirements determined by the National Land Agency (BPN). Moreover, the Government statement opened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

Another evil trick that Churchill 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 Churchill 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 Churchill'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.



ISDS

Between 2009 And 2010, Deep Down Beneath The Spotlight Of Bank Century's Corruption Case, Two Self-proclaimed Foreign Owners Of Bank Century, Namely Rafat Ali Rizvi And Hesham Al-warraq, Filed International Investment Lawsuits Through The Investor-state Dispute Settlement (ISDS) Forums With Hundred Million Dollars

Case Rafat Ali Rizvi

in 2011, Churchill Mining and its partner in Indonesia, PT Ridlatama, submitted an appeal against the verdict from Samarinda District Court, East Kalimantan. The submitting of the lawsuit is based on the revocation of 4 mining licenses

Case Churchill Mining - Planet Mining

in July 2014, Newmont Mining Corporation brought a case against Indonesia using the Indonesia - Netherlands BIT at the International Centre for the Settlement of Investment Disputes (ICSID)

Case Newmont Nusa Tenggara

In 2015, India Metals and Ferro Alloys Limited (IMFA) sued the Government of Indonesia through international arbitration and requested compensation of US \$ 581 million or around Rp7.7

Case India Metal Ferro Alloys

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