

Indonesia's BITs Review

In the era of Soesilo Bambang Yudhoyono, the Government of Indonesia believes that Bilateral Investment Treaty (BIT) will give only a small advantage to Indonesia. Indonesia has experienced many claims by foreign corporation through ICSID. In addition to this, the investment protection agreement also proven not being able to guarantee increasing on the investment value in Indonesia.



In June 2014, Indonesia Government announced the termination of the BIT between Indonesia and the Netherlands.

Indonesian Investment Board (BKPM) will renew bilateral investment agreements with all countries.



Mahendra Siregar: "we are reviewing BIT with all countries, to renew all the agreement"

Hello

In 2012 Churchill Mining sued the Government of Indonesia of US \$ 1.2 billion, equivalent to IDR14.4 trillion on the basis of UK-Indonesia Bilateral Investment Treaty signed in 1976. Then, in June 2014 Newmont filed a lawsuit against the Government of Indonesia at ICSID on the basis of Indonesia-Netherlands BIT. Because of this, former Indonesia's President, Mr. Susilo Bambang Yudhoyono, stressed that the Government will not let multinational companies do as they please with their international back-up and put pressure on developing countries such as Indonesia.

The Indonesian government awareness followed by conducting a proper and deep review of BITs which is as the basis for termination to all Indonesia's BITs with all States. It was recorded that up to March 2015 Indonesia has terminated its 18 BITs of 64 BITs signed by Indonesia, namely the Netherlands, Bulgaria, Italy, South Korea, Malaysia, Egypt, Slovakia, Spain, China, Kyrgyzstan, Laos, France, Cambodia, India, Norway, Romania, Turkey, and Vietnam.

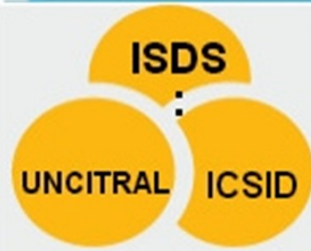
The rationales for the review conducted by Indonesia are essentially similar to the rationales for reviews undertaken

by other countries. **First**, the review has been undertaken to strike a balance between investor protection and national sovereignty; **Second**, most provisions of the existing IIA are outdated, as they grant extensively broad protections and rights for foreign investors, leaving the host state with little to no policy space to implement its own development goals. **Third**, one of Indonesia's greatest concerns regarding IIAs is the provision of the Investor-State Dispute Settlement (ISDS), which has increased Indonesia's exposure to investor claims in international arbitration. **Fourth**, the provisions in IIAs may potentially override national legislation.

Adverse effects of this dispute mechanism does not stop just there. It also has negative impact on the Country's finance if the government was sued trillion of dollars to replace the losses suffered by the corporation. For example, in Churchill Mining case, they sued the Government of Indonesia of US \$ 1.2 billion, equivalent to IDR14.4 trillion. The values of the lawsuit is almost equivalent to the allocation of

ISDS--> Indonesia Vs TNCs

75% of the ISDS is in Mining Sector



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ICSID:
Newmont (Netherland) Vs Indonesia
Churcill Mining Plc. (UK) Vs Indonesia
Planet Mining (UK) Vs Indonesia
Rafat Ali Rizvi (UK) Vs Indonesia
Cemex Asia Ltd (Mexico) Vs Indonesia
Amco Asia Corporation (USA) Vs Indonesia

UNCITRAL:
Karah Bodas Coompany (USA) Vs Indonesia

subsidies for food on 2015 State budget that is IDR 18.9 trillion and is higher than the value of IDR 0.9 trillion seed subsidies for farmers, IDR 2.5 trillion interest subsidies for small and medium enterprises and IDR 8.7 trillion public transportation subsidies.

The review process took almost 2 years expected to be able to release draft of templates of investment protection agreement in Indonesia which further be a standard model to be used by the Government of Indonesia in conducting various negotiation of the investment agreement on the bilateral level, regional level, as well as multilateral level. The new draft not only put on critics to the crucial matter such as definition of investment, fair and equitable treatment, expropriation, Dispute settlement mechanism, and survival clause, but also an effort to includes the fulfillment of public rights protection.

The review process undertaken by Indonesia has addressed almost all the common provisions included in BITs. Yet, the most outstanding issue in the review process is the ISDS. Therefore, Indonesia considers limiting the scope of application of the ISDS provision. The limitation would be substantive and procedural in nature.

The review has led Indonesia to reform its position into a more limitative definition. Furthermore, the current scope of the National Treatment (NT) clause also needs to be reduced. the review process suggests that the NT clause should only cover the post-establishment phase. the NT clause also considers excluding special treatment in favor of domestic small- and medium-sized enterprises, measures affecting certain sectors related to development needs, particularly natural resources and sectors that have close ties to national security. Likewise, restricting the scope of Most-Favored-Nation (MFN) clause is also necessary for limiting the possible application of ISDS.

Imposing procedural limitations is a useful way to minimize the legal risk of ISDS. Indonesia is considering introducing separate consent requirements before an investor can bring a matter to international arbitration. A special agreement to settle a dispute through international arbitration would be required on a case-by-case basis. This approach would be expected to cut down the number of ISDS claims in international arbitration. At the same time, it will also promote settlement of investor-state disputes through the domestic courts or alternative dispute resolutions.

In the future, with this new draft of agreement on investment protection, would become a challenge for the Government of Indonesia to consistently maintain Indonesia's interest in any investment treaty negotiations.***

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Indonesia for Global Justice (IGJ) formerly known as Institute for Global Justice) formed on August 7, 2001 in order to answer the issue of global trade liberalization. IGJ Mission is "change the world trading system to be more equitable through the development of critical awareness and empowering civil society strategic group". All this time, IGJ has done a lot of studies and research on the issue of globalization and market liberalization and its impact on Indonesia. These studies and research aims to produce policy recommendations an alternative that can be used for public education, policy advocacy and legal materials, as well as campaign.