

Analysis of the Enforcement of the Survival Clause for Foreign Investors in Indonesia Due to the Termination of the Bilateral Investment Treaty (BIT)

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ABSTRACT

Keywords: termination of agreements, investment, bilateral investment treaty, foreign investors, survival clause.

This analysis examines the legal consequences of Indonesia's termination of the Bilateral Investment Agreement (BIT) on foreign investment entering or planning to enter Indonesia after the termination date. Bilateral Investment Agreements or BITs are known as a legal umbrella for foreign investors investing in host countries, including legal protection for foreign investors in Indonesia. The Indonesian government has signed BITs with several other countries to strengthen cooperation in the investment sector. However, because the contents of the agreement are no longer to the country's development and the current investment climate and limit Indonesia's policy space in regulating matters related to the protection of national interests, Indonesia has ended many BITs. The consequence of Indonesia's termination of the BIT for foreign investors is that there is the potential for investment disputes to arise. In this situation, the provisions of the survival clause will apply to foreign investments made before the termination date, because even though the BIT has ended, there is a certain period for the BIT to still be valid for investments made before the end of the agreement period so that in other words the agreement remains effective in protecting investors from both countries who previously existed or who had carried out restructuring before the termination date of the BIT. For foreign investments that enter or will enter Indonesia after the termination date, protection can be obtained by creating a new BIT or through a Multilateral Investment Treaty (MIT) and Free Trade Agreement (FTA) where Indonesia as the Host Country is a party to the agreement.



Introduction

Every country in the world certainly wants to establish cooperative relationships with each other that can benefit their country. Indonesia is classified as a country that is active in establishing international relations (Fonna, 2019). In addition to participation in international forums, international agreements are also the legal basis of activities

between countries, both bilaterally, regionally, and multilaterally. International agreements are the main tool that facilitates relations between countries around the world, including Indonesia (Fonna, 2019).

According to the explanation in UNCTAD (1995), there are 8 (eight) bilateral and multilateral agreements that usually apply to investment, such as:

1. Provisions on Capital Movement (PCM);
2. Provisions on Foreign Borrowing (PFB);
3. Double Taxation treaties (DTT);
4. Insurance Guarantees in MIGA;
5. Washington Convention on the Settlement of Investment Disputes (WCSID);
6. Preferential Trade Agreement (PTA); dan
7. Bilateral Investment Treaties (BIT)

An investment treaty in a bilateral context, namely the Bilateral Investment Treaty (BIT), can be defined as an agreement that "protects investment from one country in the territory of another country by providing clear substantive rules governing the treatment of the host state towards investment and by establishing a dispute settlement mechanism that can be used in cases of alleged violations of these rules". BIT first appeared in the 17th century, when major European countries became the pioneers in the formation of this BIT treaty (Oana & Schneider, 2018).

Generally, a BIT is an agreement between two countries to protect and promote investment by countries and investors from each country's jurisdiction. They set standards of treatment and protection for investors and for their investments of which the BIT is a party (Baek et al., 2021).

The Bilateral Investment Treaty (BIT) is one of the methods to attract investors from the two countries involved in the agreement to create and maintain favourable conditions for investment. The main objective of the BIT is to reduce non-economic risks and to open up investment opportunities, by setting standards for legal instruments for foreign investment (Fatimayin & Jacob, 2022). Indonesia has signed 74 (seventy) BITs with other countries in line with the ratification of the Convention on the Settlement of Investment Disputes between States which became the beginning of the establishment of the International Center for Settlement of Investment Disputes (ICSID). The convention came into force in October 1966 and Indonesia became a member of the convention on October 28, 1968 (Watts et al., 2018).

The signing of the ICSID Convention in 1965 became a new starting point for the investment regime, especially in the making of rules regarding international investment (IIA). The BIT and the ICSID Convention provide a sense of security to foreign investors, namely in the event of a dispute arising between the host country and foreign investors by resolving disputes through ICSID (Ndizera, 2018); (Penney et al., 2017); (Šerić & Mikulić, 2020).

BIT is an implementation of relations between countries that strive to advance economic activities in their respective countries, considering that investment is a form of economic activity that is commonly carried out by countries at this time. BITs have

become a commonly used instrument to conduct foreign investment relations and to facilitate and protect foreign investment. The agreement outlines the scope and definition of foreign investment, including investors and the types of investments covered by the agreement.

The involvement of countries in this agreement shows that the BIT is an international agreement according to the definition given by the 1969 Vienna Convention. This definition is contained in Article 2 paragraph 1, which states that an agreement is an international agreement made between countries in a written form and regulated by international law, whether it is in a single instrument or two or more interrelated instruments regardless of their designation.

The development of BIT as an international agreement has received great influence from global economic institutions, namely from the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD) in its implementation. Especially UNCTAD, which has played an important role in the signing of this BIT.

According to UNCTAD, countries that implement BITs to promote and protect foreign investment and enhance international economic cooperation by signing BITs are also a strong signal to the business community in the world, especially investors, that these countries are committed to providing stable and adequate legal protection against investment.

To be protected, an investor must be an investor who falls within the meaning of BIT. Generally, a BIT distinguishes between an individual and a corporation. For example, it can be seen from the BIT between South Korea and Indonesia which was signed on February 16, 1991, where the BIT defines an investor as in Article 1 (2) of the BIT of Indonesia and South Korea which stipulates that a person's citizenship must be from one of the partner countries to be protected by the BIT. As for the nationality of a corporation, it can be seen from which country the corporation is a legal entity and position. Thus, individuals who are not citizens of one of the partner countries and unincorporated corporations, do not fall into the category protected by the BIT, so the protection provided is highly dependent on the definition outlined in the BIT (Ndizera, 2018); (Penney et al., 2017); (Šerić & Mikulić, 2020).

Host states are legally entitled to screen and determine which foreign investors can invest in their country. Screening carried out by host states is carried out by the Administrative Agency, which is an agency that carries out the function of screening foreign investment inflows, with the main task of ensuring that foreign investors make a positive contribution to the host state by considering the impact of foreign investment effects on the local economy and ensuring that local business actors are not affected by the presence of foreign investors.

The provisions contained in the UUPM are not a way to implement the BIT as an international agreement but are the basis that will be included in the clauses in the BIT. As an international agreement, BIT is regulated by several Indonesian laws and regulations, especially Law Number 24 of 2000 concerning International Agreements

which regulates international agreements in Indonesia. The creation of the BIT is carried out to strengthen international relations, especially bilateral relations so that it can provide benefits for parties involved in international cooperation. In Indonesia, guarantees for foreign direct investment are regulated directly or indirectly through a series of laws and regulations. This starts from the highest legal foundation, namely the 1945 Constitution, then further regulated in Law Number 37 of 1999 concerning Foreign Relations which also emphasizes the importance of international cooperation through the signing of international agreements. The mechanism related to international agreements is then explained in Law Number 24 of 2000 concerning International Agreements. The ratification process of the agreement is then further regulated in Law Number 10 of 2004 concerning the Establishment of Laws and Regulations.

Law Number 7 of 2014 concerning Trade also refers to and regulates international agreements, especially international agreements related to the field of trade. This provision is contained in the Chapter XII section which discusses International Trade Cooperation, namely Articles 82 to 87. According to this law, international agreements are one of the ways that the Government can work with other countries and/or international institutions/organizations in increasing trade cooperation to expand market access and protect and guarantee national interests. When referring to BIT, which is an agreement related to investment protection where investment is also related to trading activities, the provisions contained in this Law can also be the basis for regulating BIT within the framework of Indonesia's national law.

Research Methods

The research methodology carried out in this study is normative legal research with a juridical approach. The form is by reviewing laws and regulations, international investment agreements, international journals and secondary materials taken in the form of literature studies. Then the literature will be used as a study in this writing.

Results and Discussion

Analysis of the Basis and Reasons for Termination of the Bilateral Investment Treaty (BIT)

From 2013 to 2014, several countries, including Indonesia, began to consider the problems arising from the existence of BIT. BIT as a legal instrument that should be able to provide mutual benefits to the two countries is considered not to provide benefits as expected. Countries such as Bolivia, Ecuador, South Africa, Pakistan, Venezuela, India, Brazil and including Indonesia intend to terminate or refuse to renew the BIT after the end of the treaty. The main consideration is the need to revise the BIT to protect the national interests of the country concerned. What is of concern is that a powerful agreement such as a BIT should be made carefully and openly, so that control by the host state is required.

Control by the host states in foreign investment, according to Prof. Erman Rajagukguk, refers to the measures and policies implemented by the host states to regulate

and supervise the presence of foreign investment in their territory. The main purpose of the control carried out by the recipient country is to protect the national interests of its country. One of the control measures taken by Indonesia against foreign investors was to end the BIT between Indonesia and the Netherlands in March 2014. Indonesia communicated its intention to terminate the agreement to the Netherlands Embassy in Jakarta, effective July 1, 2015. The communication was conveyed through Diplomatic Memorandum No. D/00405/02/2014/60 dated February 17, 2014 and the agreement ended on June 30, 2015. Indonesia also stated its intention to stop 67 (sixty-seven) BITs similar to 67 (sixty-seven) other countries. To date, Indonesia has violated as many as 31 (thirty-one) BIT agreements with 31 (thirty-one) countries, including the BIT Agreements with the Netherlands and India.

Indonesia's decision to terminate the Bilateral Investment Agreement (BIT) was triggered by an increasing number of legal disputes arising under the provisions of investment agreements filed by transnational companies seeking damages in the amount of hundreds of millions of dollars. In addition, the act of signing international investment and trade agreements is also considered to have reduced Indonesia's policy space to regulate matters related to the protection of national interests. One example of an international arbitration dispute case that uses the BIT as the basis of the lawsuit is the international arbitration case, namely the IMFA which sued the Government of the Republic of Indonesia in 2015 using the basis of the BIT lawsuit between Indonesia and India in 1999, one year after the BIT between Indonesia and India was terminated by Indonesia on April 7, 2016.

Analysis of the Survival Clause for Foreign Investors after the Termination of the Bilateral Investment Treaty (BIT)

In BITs that Indonesia has signed as a host state with partner countries, termination clauses are often combined with 'validity' and 'duration' provisions. The validity and duration clause regulates when the agreement becomes effective and how long the agreement is valid. Meanwhile, the termination provisions stipulated in the BIT affirm an appropriate time frame to be submitted to the partner country. This is done by giving official notice to the partner country regarding the intention to terminate the agreement before the expiration of the agreement.

In mutual termination, the consequences of termination for partner countries are usually limited whereas the BIT usually includes a survival clause in its provisions. This survival clause will ensure that investment protection will continue for investments that occur before the termination of the agreement for a certain period. The Survival Clause can be found in the BITs between Indonesia and its partner countries, including the following:

The BIT between Indonesia and India which was signed on February 10, 1999, and terminated on April 7, 2016, the survival clause is contained in Article 15 (3), quoted as follows:

Article 15 Entry into Force, Duration and Termination

Notwithstanding termination of this Agreement under paragraph (1) of this Article, the Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made or acquired before the date of termination of this Agreement.

In Article 15 (3) of the Indonesia-India BIT, there is a survival clause that protects foreign investors from India who have entered Indonesia before the termination date and is valid for up to 15 (fifteen) years from the date of termination of the BIT.

The BIT between Indonesia and the Netherlands which was signed on April 6, 1994 and terminated on June 30, 2015, the survival clause contained in Article 15 (2) is quoted as follows:

Article 15

In respect of investments made before the date of termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement.

In Article 15 (2) of the Indonesia-Netherlands BIT, there is a survival clause that protects foreign investors from the Netherlands who have entered Indonesia before the termination date and are valid for up to 15 (fifteen) years from the date of termination of the BIT.

The BIT between Indonesia and the Federation of Russia was signed on September 6, 2007, and terminated on October 15, 2009, the survival clause contained in Article 12 (2), is quoted as follows:

Article 12 Entry into Force, Duration, Amendment and Termination

This Agreement shall remain in force for ten years. Upon expiry of this period, it shall automatically be extended for subsequent five-year periods unless one of the Contracting Parties notifies the other Contracting Party in writing at least twelve months before the expiry of the corresponding period about its intention to terminate this Agreement.

In Article 12 (2) of the Indonesia-Russia Federation BIT, there is a survival clause that protects foreign investors from the Russian Federation who have entered Indonesia before the termination date and are valid for up to 10 (10) years from the date of termination of the BIT.

The survival clause is also still applied in the latest BITs between Indonesia and Partner Countries where the BIT has not ended and is still valid today, including the following:

The BIT between Indonesia and Saudi Arabia which was signed on July 24, 2019, and is still valid today, the survival clause is contained in Article 22, quoted as follows:

Article 22 Entry into Force, Duration and Termination

This Agreement shall remain in force for ten years and shall continue to be in force thereafter unless terminated by paragraph 3.

The BIT between Indonesia and Singapore which was signed on October 11, 2018, and is still in force today, the survival clause is contained in Article 44 (3), quoted as follows:

Article 44 Entry into Force, Duration and Termination

(3) This Agreement shall remain in force for ten years and shall continue in force thereafter, at any time after the expiry of the initial period of 10 years either party notifies in writing the other Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after it has been received by the other Party.

From the above quotes, it can be concluded that the survival clause does not apply to foreign investments made by foreign investors from the Partner Country after the expiration date of the agreement so the foreign investor loses protection from the BIT. This does not mean that investments made after that will not be protected. These investments can still be protected through the Multilateral Investment Treaty (MIT) and Free Trade Agreement (FTA), where Indonesia as the Host State is one of the parties involved in the agreement.

The applicability of the survival clause is reflected in the case of international arbitration disputes that use BIT as the basis of the lawsuit, namely the IMFA case that sued the Government of the Republic of Indonesia in 2015 using the basis of the BIT lawsuit between Indonesia and India in 1999. Although the BIT of Indonesia and India was terminated by Indonesia on April 7, 2016, the BIT remains valid throughout the case until the issuance of an international arbitration award on March 29, 2019.

The survival clause cannot always be enforced for a certain period, and parties who have agreed to terminate the BIT may also cancel the survival clause in some cases. One of them is what happened when Australia and Chile ended the BIT, while both were negotiating a new trade agreement. Australia and Chile agreed to change the survival clause from 15 (fifteen) years to only 3 (three) years.

Although the ISDS mechanism is an important issue that makes Indonesia want to review its BITs, the Government of Indonesia still has to pay attention to the balance between national interests and investor protection. This can be summarized in the change of clause as follows:

Specifying and narrowing the definition of "investment" rather than the flexibility of a broader definition. Indonesia should be able to process the word "investment" into a specific and narrow approach. This will clarify which assets are directly related to investment or not and encourage their use for national development;

The Most Favoured Nations Treatment (MFN) provisions are integrated into international investment and economic integration treaties, both existing and to be developed (e.g. FTA, ACIA, RCEP, and so on);

The Fair and Equitable Treatment provisions not only focus on the full rights of investors and quick access to legal proceedings but also pay attention to the national interest;

Provisions containing the ISDS mechanism must be enforced on a case-by-case basis. The new provisions also involve domestic arbitration institutions as an alternative to dispute resolution.

The BITs that exist today between Indonesia and other developing countries were mostly made about 50 (fifty) years ago with an automatic renewal clause, still the same

content as at the time of signing. There has been no substantial development with changes in the economic and political situation in Indonesia. Therefore, the need for a new BIT agreement model is important, not only to strengthen the fair and balanced treatment of investors but also to strengthen and protect national interests by maximizing the benefits of foreign investment in the country.

Conclusion

The reason behind Indonesia's decision to terminate the BIT Agreement with partner countries arises because Indonesia faces an increasing number of cases of legal disputes arising under the BIT filed by multinational companies claiming damages in the amount of hundreds of millions of dollars. In addition, the act of signing international investment and trade agreements is also considered to have shrunk Indonesia's policy space to regulate matters that protect national interests.

The result of the termination of the BIT by Indonesia for foreign investors is the enactment of the provisions in the survival clause, where even though the BIT has ended, there is a certain period for the BIT to still be valid for investment made before the expiration of the agreement period. Foreign investors who invest after the agreement period expires can seek protection from the Multilateral Investment Treaty (MIT) and the Free Trade Agreement (FTA) where Indonesia as the host country is one of the parties involved in the agreement. The new BIT model can take an example from the United States BIT model which has previously become a guideline for Indonesia's BIT, or it can take an example from the Brazilian BIT model which is more suitable for developing countries. In addition, Indonesia also needs to pay attention to the points of change in the BIT related to the definition of "investment", the provisions of the Most Favoured Nations Treatment (MFN), the provisions of Fair and Equitable Treatment, and most importantly the provisions of the Investor-State Dispute Settlement (ISDS) mechanism so that there is a balance between national interests and the protection of foreign investors.

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