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LOGICAL CONSEQUENCES IN INDONESIA'S POSITION IN INVESTMENT DISPUTES IN ARBITRATION FORUM ICSID

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ABSTRACT

This Research aims to: (i) explain the termination of BITs unilaterally by Indonesia which has implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum; (ii) Explaining the aspiration of ISDS review in the Regional Comprehensive Economic Partnership (RCEP) has implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum. And (iii) Explaining the counter-claim discourse in the BIT and/or ISDS has implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Methodologically, this type of research is normative legal research or doctrinal legal research, and the nature of this research is descriptive-analytic research. Data collection techniques through in-depth interviews and library research. The results show that the termination of BITs unilaterally by Indonesia is not legally a violation of investment law, and has no implications for Indonesia's position in investment disputes (ISDS) at the ICSID arbitration forum. The ISDS review in the regional comprehensive economic partnership (RCEP) does not directly implicate Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum, because the change to the ISDS mechanism is only in the form of a proposal or input to the RCEP forum. Meanwhile, the discourse on the counteclaim in the BIT and/or ISDS can have positive implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Because if a counterclaim is possible in the BIT until it is followed by the mechanism in the ISDS and international arbitration forums (ICSID, UNCITRAL, and others), then it is beneficial for Indonesia as the host country.

Keywords: BITs, ISDS, ICSID, RCEP

A. Introduction

In this study, the intended investment dispute is between foreign investors and the host country of investment. As the host country of investment, Indonesia has been sued several times by foreign investors through arbitration. Arbitration in the Indonesian legal system has been regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution; Arbitration is a way of

settling civil disputes outside the general courts based on an arbitration agreement made in writing by the disputing parties.

Regarding arbitration, Indonesia promulgated Law no.30 of 1999 concerning Arbitration and Alternative Dispute Resolution (Arbitration Law and APS). The Arbitration Law and APS are the main foundations for implementing arbitration and alternative dispute resolution. Other provisions governing dispute resolution in the investment sector in Indonesia are Chapter XV Article 32 of Law Number 25 of 2007 concerning Investment. There are three alternative ways of resolving investment disputes, namely: (i) based on consensus, (ii) through arbitration or alternative dispute resolution (APS), and (iii) through courts., (iv) through international arbitration based on the agreement of the parties.[1]. Suppose parties did not include an agreement regarding the choice of law and the choice of forum in case of a dispute. In that case, not every government investment dispute with a PMA must automatically be resolved by the ICSID Arbitration Board.[2]

Apart from being based on the Investment Law, dispute resolution through arbitration is also settled based on bilateral investment treaties (BITs) agreed between Indonesia and other countries. Indonesia is currently a party to more than 60 BITs in force. In all agreed-upon BITs, there are provisions for dispute resolution through arbitration, and almost all BITs refer to the settlement mechanism in ICSID arbitration.

Nowadays, due to the very rapid development of global investment, investment dispute resolution has been established with a settlement mechanism called the investor-state dispute or commonly called the Investor-State Dispute Settlement (ISDS) which was formed with the aim of protecting the interests of foreign investors investing in the recipient country. host country investment) so that it will attract investors to invest in other countries.[3] In general, it can be said that of the 10 lawsuits by investors against Indonesia as the host country investment, the Government of Indonesia has won more in ISDS. In general, it can be concluded that from the 10 lawsuits by investors against Indonesia as a host country investment, the Indonesian government has won more in ISDS. The meaning of RI winning more than losing in arbitration at ICSID proves that it is not entirely true to say that the ISDS mechanism and the ICSID tribunal are only in favor of investors. In general, it can be summarized that the Government of Indonesia has won more

1 Helmi Kasim, "Arbitrase sebagai mekanisme penyelesaian sengketa penanaman model (Arbitration as investment dispute settlement mechanism), *Jurnal Rechtsvinding*, Media Pembinaan Hukum Nasional, April 2018, 7(1), 81
2 Sentosa Sembiring, *Hukum Investasi*, Nuansa Aulia, Bandung, 2010, hlm.21.
3 Helmi Kasim,Op.Cit., hlm.82

in ISDS. The Indonesian government won four ISDS disputes, losing only two cases. Outside of the "win-lose" case, the plaintiff (investor) withdraws the lawsuit, or the parties resolve the dispute outside of arbitration.

Regarding Indonesia's actual position on the ISDS dispute, several developments have implications for Indonesia's position in the ICSID arbitration forum. The three developments are regarding Indonesia's policy to cancel the BIT, the plan to form RCEP, and the discourse on counterclaim from the defendant to the plaintiff in BIT content.

Regarding the policy of unilaterally terminating BITs, Indonesia has carried out more than 60 BITs signed with more than 50 countries, including some developed countries such as Australia, France, England, and the Russian Federation. On the one hand, the decision to terminate the BITs shows Indonesia's efforts to become a more sovereign country in terms of foreign investment and to create a dispute mechanism between investors and the state (ISDS), which is accepted not only internationally but also domestically.[4] Termination of the BITs will undoubtedly have implications for the dispute mechanism between investors and the state (ISDS) at the ICSD arbitration forum and similar forums such as UNCITRAL, Permanent Court of Arbitration (PCA) in The Hague, and others. The termination of the BITs will have implications for the ISDS and the ICSID arbitration forum because, in the BITs, there is an agreement on the ISDS and ICSID mechanism. The problem is, if the BITs have terminated, what agreement or legal basis governs the ISDS, and to what extent can the investor accept it.[5]

The next problem is the emergence of a counterclaim discourse from the defendant to the plaintiff in the ISDS. This is due to the assumption that the investment dispute settlement arrangement with the ISDS mechanism favors investors more than the investment recipient country. This imbalance in taking sides with the ISDS mechanism has given rise to the discourse of a counterclaim from the defendant to the plaintiff about what investment recipient countries can do under the ISDS mechanism. So far, counterclaims from the defendant to the plaintiff are very rare. For the 684 BITs that sued in ISDS, the counterclaim from the defendant to the plaintiff did not exceed 15 cases.[6]

Discourse counterclaim the defendant to the plaintiff has not been included in the ISDS clause, even though the counterclaim from the defendant to the plaintiff can provide a sense of justice for the investment recipient country. The

4 Hamzah, "Bilateral investment treaties (BITS) in Indonesia: A Paradigm Shift, Issues, and Challenges," *Journal of Legal, Ethical and Regulatory Issues*, 2018, 21(1), 1-13.
5 Hamzah, ibid.
6 Ibid, hlm.2223

counterclaim from the defendant to the plaintiff can streamline the arbitration mechanism because the investment recipient country carries it out in the same arbitration forum [7] (ICSID, UNCITRAL, London Court of International Arbitration, ICC, or other arbitration forum agreed by the parties).

The United Nations (UN) in January-February 2020 discussed the issue of counterclaim from the defendant to the plaintiff. It is not easy for a party to counterclaim on the other party because it must at least meet several requirements. One of the counterclaims from the defendant to the plaintiff can be used as part of the investment dispute resolution mechanism. If previously, namely in an investment agreement between the two countries, there has been a mutual agreement regarding the existence of a counterclaim mechanism to determine the court's jurisdiction in investment arbitration.[8] This means must be a prior agreement between the parties regarding the counterclaim from the defendant to the plaintiff. The investment agreement must be agreed upon between the parties regarding determining the jurisdiction of the arbitral tribunal regarding claims and counterclaims.[9]

The implications for the ISDS and the ICSID forum, namely the negotiations on a Regional Comprehensive Economic Partnership (RCEP), which has been ongoing since 2012. At the forum, India, Indonesia, and Australia wanted the ISDS to be reviewed, while China insisted that the ISDS be continued.[10] RCEP negotiations until 2019 showed that the ISDS mechanism had not been regulated in the RCEP. The failure to agree on ISDS in the RCEP is strong evidence of the RCEP member countries' rejection of ISDS. The executive director of Indonesia for Global Justice (IGJ), Rachmi Hertanti, stated that the ISDS mechanism is an exclusive right granted to foreign investors in international trade and investment agreements. The ISDS mechanism has been considered to hold the country hostage to the interests of investors because it has provided legal immunity for investors.[11]

Indonesia's attitude regarding ISDS in the RCEP, as stated by the Chairperson of Trade Negotiating Committee (TNC) RCEP, Iman Pambagyo, is Indonesia

7 Ibid.,hlm.2226
8 Ibid,hlm. 2227
9 Dafina Atanasova, Carlos Adr uiuan Martinez Benoit, and Josef Ostfansky, "*Counterclaims Investor-State Dispute Settlements* (ISDS) Under International Investment Agreement (IIAS)," Trade and Investment Law Clinic Paper 2012, The Graduate Institute, Center for Trade and Economuic Integration, Geneva.
10 I Gede Wahyu Wicaksana, Vinsensio Dugis, Baiq Wardhani, "ASEAN RCEP, Mega Regionalisme & Prospek Diplomasi Perdagangan di Asia Pasifik, " working paper, hal.5, can be downloaded on http://setnas-asean.id/site/uploads/document/journals/file/599d5d9f2e5ca-presentasi-4-paper-psa-psa-universitas-airlangga.pdf.
11 Zubi Mahrofi, " Mekanisme ISDS tidak diatur dalam RCEP dinilai langkah tepat," AntaraNews,com, Friday, 25 Oktober 2019, 18.51 WIB. can be dowloaded on https://www.antaranews.com/berita/1131891/mekanisme-isds-tidak diatur=dalam=rcep-dinilai -langkah-tepat.

proposing that the ISDS settlement must be complete in a local court. If the settlement of the investment dispute is to proceed to an international arbitration mechanism, Indonesia proposes that it obtain government approval first. Indonesia's attitude is contrary to the attitude of developed countries, which argue that if an investment dispute in local courts fails and then proceeds to a national arbitration mechanism, it is carried out automatically without having to obtain approval from the government of the host country at the end of the year.[12]

Based on this background, the author deems it necessary to conduct research titled "Implications of Termination of Bilateral Investment Treaty (BITs) and Counterclaim Discourse on Indonesia's Position in Investment Disputes at the ICSID Arbitration Forum".

B. Research Method

The legal research method used is normative legal research or doctrinal legal research, which focuses on legal principles, legal norms, legal principles, and legal doctrines in order to answer legal issues,[13] by examining secondary data by investigating the study, including a description of the research subject as shown in Fig this study between foreign investors and foreign countries recipient country or host country. The background that raised implications of investment dispute issues (BIT, RCEP, and counterclaim) on Indonesia's position in investment disputes at the ICSID arbitration forum implemented in books, scientific works, laws and regulations, and other regulations as well as conventions, and agreements between countries regarding investment disputes and other supporting data related to the theme of this research.

The nature of this research was descriptive-analytical research, which was to reveal or provide an accurate description of a problem or situation.[14] Descriptive-analytical research seeks to summarize qualitatively various situations or various phenomena of social reality that develop in society[15], in this case, related to positive law regarding investment disputes.

Data analysis in this study used the Miles, Huberman, & Saldana model,[16] which uses four stages of analysis, namely: (i) Data collection (data collection), in the form of data

12 "Indonesia Keberatan, ISDS tak Masuk dalam Poin RCEP", Gatra.com, 22 October 2019, 14.31. Can be downloaded on https://www.gatra.com/detail/news/452426/ekonomi/indonesia-keberatan-isds-tak-masuk-dalam-poin-rcep.

13 Soerjono Soekanto, *Penelitian Hukum Normatif*, Jakarta, Grafindo Persada,1983, hlm.62

14 Ishaq, *Metode Penelitian Hukum dan Penulisan Skripsi, Tesiis, serta Disertasi* (Bandung: Penerbit Alfabeta, 2017), hal 20.

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16 Miles, M.B., Huberman, A.M., & Saldana, J., "*Qualitative Data Analysis: A Methods Sourcebook.* Edutiin 3. Thousand Oaks:: SAGE Publications, Inc., 2014, hal 33.

collection through the primary-data (in-depth interview), even secondary data (via library-research), which is intended to be able to answer the formulation of the first, third, and fourth research; (ii) Data condensation was the process of selecting, focusing, simplifying, abstracting, and/or transforming data that appears in interview transcripts, documents, and other empirical materials. (iii) Data display is a collection of organized and summarized information so that conclusions can be drawn; and (iv) Verifying conclusions as the final process of data analysis.

C. Discussion

1. Implications of BIT Termination in the Context of ISDS at the ICSID Forum

Implications Settlement of investment disputes through an arbitration forum system, which underlies BITs as the basis for an investment dispute arbitration lawsuit, had a position as an early generation agreement containing less specific regulations (impress), and when it comes to setting up a dispute before international Arbitration, giving it a vast scope based on inconsistent and unpredictable decisions. Awareness of deficiencies in dispute resolution between investors and the host country also occurred because of the temporary nature of the arbitral tribunal (ad hoc) and lack of transparency and legitimacy.

The protection of foreign Investment so far is based on the national laws of the host country (host country) and international agreements. According to national law, the protection of foreign investors in Indonesia is covered by Law Number 25 of 2007 concerning Investment. This law underlies the Government in making policies related to the formation and participation in signing international agreements.

The legal basis for terminating BITs carried out by Indonesia on the grounds of national interest is most likely the provisions contained in Law Number 24 of 2000 concerning International Agreements, where one of the reasons, namely Article 18 point (h), stated that an international agreement could be terminated if there are things that are detrimental to the national interest.

Indonesia's reason for ending its BITs is to conduct a review of all BITs, and this also said closely related to the issuance of Law no. 7 of 2014 concerning Trade which was ratified and issued on March 1, 2014. Article 85[17] of this law gives authority to the Government or the Government and the DPR to unilaterally

17 Article 85 of the Trade Law: (1) The government with the approval of the DPR can review and cancel international trade agreements whose approval is carried out by law based on considerations of national interests; (2) The government may review and cancel international trade agreements whose ratification is carried out by a Presidential Regulation based on considerations of international interests.

annual international trade agreements[18] previously approved, whether ratified in the form of a presidential regulation or a law considering national interests.[19]

Concerning this research question, Indonesia unilaterally terminated many BITs almost simultaneously. Indonesia has terminated 26 BITs. The termination is carried out unilaterally according to the rules provided in the BITs. BITs that have been terminated are as follows: Egypt, Norway, Malaysia, France, Slovakia, China, Italy, Netherlands, Laos, Bulgaria, Spain, Kyrgyzstan, Turkey, Romania, Cambodia, Vietnam, India, Hungary, Singapore, Pakistan, Switzerland Argentina, Belgium, UK, Germany, and Australia.

The background of Indonesia ending BITs unilaterally, according to a source from BKPM, aimed to review whole existing Indonesian BITs in terms of substance and relevance. Furthermore, Indonesia would make BITs with a more modern approach and elements following national interests.

According to a BKPM source, the government has the option to create a new BIT that is more modern and in line with national interests. Previously several countries also canceled BITs unilaterally. Among these are Ecuador, Bolivia, South Africa, and India. According to Hamza,[20] several factors caused Indonesia to terminate and discontinue several BITs. These factors were:

a. As the host country or host-state, Indonesia does not feel that it has benefited from these BITs. Indonesia views that the last BIT could not accommodate good business relations between the host country with the investor's country of origin (home country or home state). Therefore, the previous BITs need to be evaluated, and for the first stage, the BITs need to be unilaterally terminated by Indonesia.
b. In the implementation of BIT, there is often a misinterpretation of the clauses Most Favorite Nation (MFN), National Treatment (NT), and Fair and Equitable Treatment (FET), and Expropriation. Indonesia wants the drafts related to MFN, NT, and FET to be compiled in more detail and clearly to avoid misinterpretation and claims for compensation from investors.
c. The previous BITs limited the sovereign rights of the state to regulate the economy and society, meanwhile, Indonesia wanted BITs to freely to regulate the country's economy without violating the rights of foreign investors.

18 Investment is also part of international trade under Indonesian law, namely according to Law no. 30 of 1999 concerning Arbitration which states that what is included in commercial law according to Indonesian law includes investment.

19 MichaelJ. Struett, *"The Transformation of State Responsibilities under the Rome Statute for the International Criminal Court"*, Chapman Law Review Volume 8:172, 2005, hal. 173-174.

20 Hamzah, "Bilateral Investment Treaties (BITS) in Indonesia: a Paradigm Shift, Issues and Challenges," (2018), 21 *Journal of Legal, Ethical and Regulatory Issues*, 8-9.

d. The Indonesian government wants to ensure that the new BITs can provide balanced protection between foreign investors and domestic investors.
e. So far, BITs have given the duration and termination of the agreement too long.
f. There has been an increase in the number of claims for compensation in international forums involving Indonesia, causing losses to the state.

According to BKPM sources, the legal implication is that the Indonesian government no longer has the treaty obligation in the form of various forms of protection to foreign investors of the partner country. However, protection has still been obtained through the survival clause for investors who already exist at the time of termination and through national law, especially the Investment Law. The implications of the termination of BITs can also cause investment disputes, especially between investors and Indonesia's position. The termination of BITs has indirectly made Indonesia a country that is considered an unfriendly country to investors.[21]

BITs usually specify that the agreement must be valid for a certain period, as Survival Clause regulated, which is said to prevent unilateral termination of the agreement with immediate effect. This clause extends the host country's international obligations by extending the agreement's validity for a longer period, usually 10 or 15 years.[22] Very few BITs do not regulate this clause.[23] BITs that regulate this period include a mechanism for extending the agreement. Two approaches were commonly used. Thus, investments made after that date do not receive protection from the terminated BITs but may seek protection from other agreements following the agreement of the two countries in the future, either by creating new BITs instead of the terminated BITs or through multilateral investment agreements in which each country was a signatory party.

Furthermore, based on the provisions of the survival clause, the state party to the agreement, that period found to have violated the substance of the BITs. The investor who feels aggrieved can be held accountable, either in the form of granting the rights that the investor should own or if there is an investment dispute. The dispute that can be resolved takes it to international arbitration following the agreement between the two countries regarding the dispute resolution mechanism regulated in the agreement, even if the agreement has been terminated. According to BKPM,

21 Arif Havas Oegroseno, *Indonesia's Bilateral Investment Treaties: Modernising for the 21st Century*, https://www.rsis.edu.sg/rsis-publication/rsis/indonesias-bilateral-investment-treaties-modernising-for-the-21st-century/ accessed on 10 Januari 2016.
22 Ibid.
23 UNCTAD, *"International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal"*, IIA Issues Note No. 4 (2013), www.unctad.org/diae

Indonesian attitude, after unilaterally terminating the BITs, it is necessary to analyze the cost and benefit of BITs with partner countries in detail. It will only make BITs if the cost and benefit analysis results show BITs are needed.

2. RCEP from a Legal Perspective

The forum that was used for review was not only the Regional Comprehensive Economic Partnership (RCEP) forum but also other relevant international forums. The RCEP Forum had relatively more limited participants, namely 10 ASEAN member countries and six partner countries (China, Japan, South Korea, New Zealand, Australia, and India. Although India was a partner country in 2019), and the interests of other countries are more prominent participants and did not reflect world powers. The most intensive forum to discuss the ISDS review was the UNCITRAL forum.

There were different aspirations between the ISDS mechanism review at the RCEP forum and the UNCITRAL forum. At the RCEP forum, a growing aspiration was to review the ISDS mechanism from developing countries (10 ASEAN countries) and six partner countries that are incidentally non-American and European and tended to be controversial, such as aspirations to replace the ISDS mechanism. Meanwhile, the aspiration to be reviewed the ISDS mechanism at UNCITRAL was more representative of world powers because almost all countries were involved in UNCITRAL. The aspiration for ISDS review at the UNCITRAL forum was more moderate because it was only to improve the ISDS mechanism, but not to the point of wanting to replace the ISDS itself.

According to a source from BKPM, not only ISDS but all elements and articles in international investment agreements must be reviewed for improvement. All of these elements and articles continued to develop according to the needs of the times, especially related to the economic activities of investors and the form of government treatment of investors. For example, the US Model BIT had been refined several times, namely in 1994, 1998, 2004, and 2012.

Based on the ISDS article of the IACEPA agreement, the clause in the investment dispute settlement mechanism through the ISDS needed to be reviewed because there were provisions regarding the exclusion of claims. This provision stipulated that investors could not file an ISDS lawsuit if:

- Investments made in violation of the law (e.g., bribery or corruption)
- The lawsuit has no apparent basis (frivolous)
- The Measures that were being sued were the measures intended for the protection of public health

Substantially, Indonesia's proposal in the ISDS review, referring to the UNCITRAL forum, Indonesia proposed a mechanism of mandatory mediation. This proposal aimed to extend the process toward ISDS. Before heading to ISDS,

the parties were required to mediate. Indonesia has conveyed this proposal through the UNCITRAL ISDS Reform forum.

Proposals for ISDS review from Indonesia and other countries, according to a resource person from BKPM. In progress, so it could not be concluded that it failed. Substantially, Indonesia's proposal in the RCEP forum showed that Indonesia's ISDS position in FTA/CEPA was the same in all negotiations. At the RCEP forum, no single country rejected the proposal to review the dispute resolution mechanism through ISDS.

According to BKPM sources, Indonesia had never been vocal in fighting for its aspirations. Indonesia proposed to improve the ISDS mechanism comprehensively and can be independently or with other countries. According to BKPM sources, there was no general difference in interests between developed and developing countries regarding ISDS. All the countries understand the importance and risks of ISDS. At this time, all countries were looking for a standard solution to the use and avoid misusing ISDS in international investment agreements.

The ISDS mechanism tended to be detrimental to the host country, so to review the ISDS, it must be a package with the general investment agreement. ISDS did present a risk for the host country. ISDS was one of the main features of investment agreements. Without ISDS, the investment agreement became less attractive.[24] At the same time, the purpose of making an investment agreement was to increase the inflow of investment into the host country. However, some countries were currently choosing to enter into investment agreements without an ISDS mechanism, for example, the Australia-Malaysia FTA. Indonesia also had an investment agreement that did not have an ISDS element, namely the Indonesia-EFTA CEPA.[25]

Based on the description above and related to the second research question, **"**How do the aspirations for ISDS review in the regional comprehensive economic partnership (Regional Comprehensive Economic Partnership, RCEP) have implications for Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum?" it can be concluded that the ISDS review in the regional comprehensive economic partnership (Regional Comprehensive Economic PartnershipRCEP) did not directly implicate Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum, because the change in the ISDS mechanism was only a proposal or input to the RCEP forum. The proposal to review the ISDS mechanism at the

24 Andi M. F. Adnan, Penyelesaian Sengketa Investor-State Dispute Settlement (ISDS) Melalui International Centre for Settlement of Investment Dispute (ICSID) Ditinjau dari Perspektif HAM Internasional, (Makassar: Universitas Hassanudin, 2017), hlm. 4

25 Susan D Franck, Investment Court System (ICS) sebagai Alternatif baru Investor State Dispute Settlement (ISDS)

RCEP forum was carried out by ASEAN countries, including Indonesia. Finally, the discussion regarding reviewing the ISDS mechanism at the RCEP forum was postponed at the suggestion of China. However, the proposal for a review of the ISDS mechanism is currently ongoing in various forums. The proposal to review the ISDS mechanism was not only made by Indonesia and ASEAN countries but by many countries. The ongoing review of the ISDS mechanism is in forums outside of RCEP, especially in the UNCITRAL forum. The extent to which the implications of the results of the ISDS review will depend on how the new ISDS mechanism will be, which is currently under review at UNCITRAL.

3. The counterclaim and Indonesia's Position in Investment Disputes at the Forum Arbitrage

The mechanism for suing back or in investment disputes is often referred to as counterclaim is the act of the host government (host state) suing the foreign investor back in the case of the foreign investor's lawsuit, which is currently ongoing in the international arbitration forum. The mechanism of the counterclaim is still rarely carried out on the ISDS mechanism, both in the ICSID arbitration forum and other international arbitration forums, especially UNCITRAL.

In investment disputes, can the defendant's counterclaim mechanisms be used (whether the defendant is an investor or a host country)? Both plaintiffs can counterclaim. There are also cases where countries sued investors, including Gabon (host state) vs. Societe Serene (investor), Tanzania Electric Supply (host state) vs. IPTL, and the Government of East Kalimantan (host state) versus KPC (investors). If we compare the lawsuits from investors against the host state and counterclaims from the host state to investors, the numbers are far adrift. When the lawsuit occurred in 684 BITs in 2017, the counterclaim until 2017 only 15 cases.[26] This means that the counterclaim is still rare in the international arbitration forums ICSID and UNCITRAL.

The problem is that the mechanism of the counterclaim is not explicitly regulated in the ISDS mechanism. The mechanism counterclaim is not specifically regulated but implicitly allowed if the ISDS Article is regulated broadly, which includes "any" or "all" disputes between a Contracting State and an investor of the other Contracting State" concerning a protected investment. Phrase any or all can be interpreted to include a lawsuit mechanism by the host country to the investors. In the absence of a counterclaim mechanism in the ISDS mechanism, the advantage for the state is not obtained from ISDS but from the entry of foreign investors due to the attractiveness of investment agreements in general.

26 Kamran Musayev, "Counterclaims in treaty-based investment arbitration," University of Oslo, Norwegia, hal 5; UNCTAD, "Investor-state dispute settlement: Review of Developments in 2017 (2018), hlm. 1

Formally Indonesia has never proposed a counterclaim mechanism. Indonesia tends to agree if the counterclaim mechanism is regulated in the ISDS mechanism. There have been many lawsuits from investors against Indonesia as a host state, both claims through the ICSID international arbitration forum and the UNCITRAL international arbitration forum. Indonesia has had arbitration cases and won or lost decisions in dealing with these lawsuits. Regardless of losing or winning the lawsuit, Indonesia still feels financially disadvantaged because of many costs must be incurred in the dispute resolution process and the imbalance in position between investors and the host state, and this is due to the arrangement of investment dispute resolution with the ISDS mechanism which can be a concern for many parties because the mechanism is considered more pro-investor than the state.[27] Most IIAs allowed ISDS to be filed by investors; in practice, investors are the only plaintiffs allowed.[28] The IIA allows investors to file lawsuits with ISDS on their own behalf or behalf of their companies.[29] The imbalance in the position underlies the idea of the emergence of a counterclaim as an effort to balance the position of investors and the host state in the ISDS mechanism. The counterclaim is a counterclaim from the defendant to the plaintiff.

The imbalance in the position of the parties in submitting claims to

the ISDS mechanism raised the importance of counterclaims because:[30]

1. There are no uniform rules regarding counterclaims because the counterclaim is a new.
2. The counterclaim was very rare, from 684[31] BITs sued on ISDS, counterclaim lawsuit did not exceed 15[32]cases.
3. The counterclaim allows respondents to seek justice in the same forum so that it is more efficient.
4. For the host state, a counterclaim can be used to clear a country's reputation in a lawsuit filed by an investor.

Whereas the ISDS mechanism through the ICSID and UNCITRAL arbitration forums does not stipulate a counterclaim mechanism, it can be seen from several BITs signed by Indonesia. The BITs mechanism so far does not allow the Government of the host country

27 Indonesia for Global Justice. *'Lembar Fakta Ancaman Perjanjian TPP : Masyarakat Indonesia #TolakTPP'*, (2016).hlm. 1.

28 UNCTAD, '*UNCTAD Series on Issues in International Investment Agreements II :Scope and Definition'*, (New York 2015).hlm. 180.

29 *ibid.*

30 Kamran Musayev, 'Counterclaims in treaty-based investment arbitration', (2017) , University of Oslo Norwegia. hlm. 5.

31 UNCTAD, '*Investor–State Dispute Settlement: Review Of Developments In 2017.*hlm. 1

32 Atanasova, Benoit and Ostřanský, 'The Legal Framework for Counterclaims in Investment Treaty Arbitration', (2014), Journal of International Arbitration.hlm.358.

(host state) to do counterclaims. The content of BITs that Indonesia terminated on average did not allow the Indonesian Government to do a counterclaim. This can be seen from several examples of BITs signed by Indonesia and the investors' countries of origin. The counterclaim mechanism is permitted in principle if it meets the following requirements: (i) Counterclaim must be under the consent of the disputing parties (host state and investors), and (ii) counterclaim must have a close relationship with the main claim.[33]

According to BKPM sources, Indonesia prioritized dispute resolution through negotiation, conciliation, and mediation. As much as possible, lawsuits through ISDS are avoided. In addition to compensation based on court decisions, settlement through ISDS will also require very high costs in dispute resolution.[34]

Based on the description above and linked to the third research question (third question: "How is the counterclaim discourse in the BIT and/or ISDS has implications for Indonesia's position in investment disputes at the ICSID arbitration forum?"), then the discourse counterclaim in the BIT and/or ISDS can have positive implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Suppose the counterclaim is possible in the BIT until the mechanism is followed in the ISDS and the international arbitration forum (ICSID, UNCITRAL, and others). In that case, it is beneficial for Indonesia as the host country. There are settings of counterclaim in agreements (BIT), investment dispute resolution mechanisms (ISDS), and international arbitration forums (ICSID, UNCITRAL); that will prevent investors from arbitrarily suing the host country, including Indonesia. The host country can also file a counterclaim at the same forum and opportunity to improve the country's reputation and allow the host country not to lose too much when facing lawsuits from investors.

D. Closing

1. That signs the BIT. Regarding unilateral timing termination, Indonesia does so for BITs at least 10 years old following ISDS provisions. Procedurally, Indonesia has terminated BITs following the provisions, which are carried out officially through a diplomatic note from the Ministry of Foreign Affairs notifying the partner countries of Indonesian BITs or host states.
2. The ISDS review in the Regional Comprehensive Economic Partnership, RCEP did not directly implicate Indonesia's position in the investment dispute (ISDS) at the ICSID arbitration forum because the change in the ISDS mechanism was

33 Nasution, op.cit.
34 Rachmi Hertanti, "Sengketa Investasi Bikin Negara Tekor", Opini IGJ, 2019, https//igj.or.id/sengketa-investasi-bikin-negara-tekor/

only a proposal or input to the RCEP forum. ASEAN countries, including Indonesia, carried out the proposal to review the ISDS mechanism at the RCEP forum. However, in the end, the discussion regarding the review of the ISDS mechanism at the RCEP forum was postponed at the suggestion of China. However, the proposal for a review of the ISDS mechanism is currently ongoing in various forums. The proposal to review the ISDS mechanism was not only carried out by Indonesia and ASEAN countries but by many countries. The ongoing review of the ISDS mechanism is in forums outside of RCEP, especially in the UNCITRAL forum. The extent to which the implications of the results of the ISDS review will depend on how the new ISDS mechanism will be, which is currently under review at UNCITRAL.

3. The discourse of counterclaim in the BIT and/or ISDS can have positive implications for Indonesia's position in investment disputes at the ICSID arbitration forum. Because if the counterclaim is possible in BIT until the mechanism is followed in ISDS and international arbitration forums (ICSID, UNCITRAL, and others), then it is beneficial for Indonesia as the host country. There presence of counterclaim in agreements (BIT), investment dispute resolution mechanisms (ISDS), and international arbitration forums (ICSID, UNCITRAL); will prevent investors from arbitrarily suing the host country including Indonesia. The host country itself can also file a counterclaim at the same forum and opportunity so that this will be able to balance the position between investors and the host country, in this case, Indonesia, and allow the host country not to lose too much financially when facing a lawsuit from investors.

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