UNES LAW REVIEW
+62 813 6511 8590
+62 813 6511 8590
https://review-unes.com/
uneslawreview@gmail.com

DOI: https://doi.org/10.31933/unesrev.v5i4
Received: 28/05/2023, Corrected: 21/06/2023, Published: 22/06/2023

THE DISPUTE SETTLEMENT OVER FOREIGN INVESTMENT IN INDONESIA

Khusnul Khatimah[1]
[1] Southwest University Political Science And Law Baosheng Road, Yu Bei District, Chongqing
Email: khusnul.khatimah.bachtiar@gmail.com

***Corresponding Author*: Khusnul Khatimah**

ABSTRACT

Globalization has linked the world's nations with natural resources and their goods. Investment between countries is increasing, and the breadth of commercial commerce is expanding from micro to macro trading on a daily basis. To speed development, Indonesia has also liberalized its economy. Indonesia has started using a number of strategies to boost investment and improve commerce. Indonesia, as a developing country in the world, has a volume of large-scale foreign investment involving investment disputes with an environmental background, therefore Indonesia has a special arbitration institution, namely the Indonesian National Arbitration Board, which regulates issues related to arbitration and the enforcement of its decisions. Article 32 of Law No. 25 of 2007 regarding on Investment defines the method for resolving disputes in the field of investment i.e : Consensus-based deliberation, Arbitration , Courts, Alternative Dispute Resolution (Negotiation, Mediation and Conciliation), Disputes between the government and domestic investors settled by arbitration or the courts, and, Dispute between the government and foreign investors to be addressed by International Arbitration as agreed. To establish legal clarity and investment security,the Government of Indonesia also has ratified the International Convention on the Settlement of Disputes (ICSID) through Law Number 5 of 1968 concerning Settlement of disputes between countries and foreign nationals regarding investment and Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Both serve as the foundation of Indonesia's legal framework for the resolution of disputes involving foreign investments.

Keywords : Foreign Investment, Dispute Settlement, Alternative Dispute Resolution.

INTRODUCTION

Investment, as well as activities related to investment, is one of the primary contributors to the expansion of a country's economy. The partnership between investors and recipients of capital is regulated in investment. The link between investors and recipients of capital is extremely close, as investors as owners of money (capital) will invest in nations receiving

capital, and countries receiving capital must be able to give legal clarity, legal protection, and a sense of security for investors as they establish their businesses.

In Indonesia, investment activities are governed by Law Number 25 of 2007 pertaining to Investment, which defines investment as "all forms of investment activities, both by domestic investors and foreign investors for conducting business in the territory of the Republic of Indonesia." On the basis of this information, the status of investors can be divided into two distinct categories: domestic investors and foreign investors. This can also be considered from the perspective of investment finance itself, namely domestic investment and investment that originates from foreign capital .

In accordance with Article 32, Paragraph 4, of the Investment Law, the means for resolving investment disputes between the government and foreign investors is international arbitration, which both parties must agree upon. An international arbitration situated in Paris is most often selected to serve as the arbitral institution of choice. In addition, the rules in Law Number 5 of 1968 concerning Approval of the Convention on the Settlement of Disputes between the State and Foreign Nationals Regarding Investment set a pattern in the resolution of issues that occur between nations and foreign persons, specifically with the International Center for the Settlement of Investment Disputes. This center is responsible for resolving disputes between governments and foreign nationals regarding investments (hereinafter abbreviated as ICSID). The International Centre for the Settlement of Investment Disputes (ICSID) is an international organization whose primary mission and jurisdiction is to mediate and arbitrate conflicts that emerge in the context of investments made between one nation and another nation that is a party to the international investment convention. Therefore, the method of settling disputes that can be carried out in accordance with the rules established by the ICSID, other than through the means of arbitration, is through the process of conciliation.

Foreign investment and economic cooperation involving economic entities (businesses) that span national territorial limits are not usual economic activities. Foreign investment is a complex mechanism that involves not only transnational investors but also political actors in a country's government. In Indonesia, Foreign Direct Investment (FDI) is not new; the practice has existed since the era of President Soeharto, which was marked by the issuing of a law governing FDI operations, namely Law Number 1 of 1967 concerning Foreign Investment, which has since changed to Law Number 25 of 2007 concerning Investment and is effective until now. Foreign Investor is defined by law as "an investment activity to do business on the territory of the Republic of Indonesia that is conducted by foreign investors utilizing either wholly foreign capital or joint ventures with domestic investors."

Foreign investment has evolved into being acknowledged as an excellent economic instrument that plays an essential part in the economic growth and development of a country over the course of its history. This is the case due to the fact that foreign investment as a flow of cash is largely risk-free, more sustainable, and not susceptible to the possibility of global

economic disruptions.[1] Moreover, according to the United Nations Conference on Trade and Development (UNCTAD), Foreign Investment has become an integral aspect of industrial development policies and strategies in many countries around the world, particularly in developing nations.[2] According to UNCTAD's report, government interventions in trade or protectionist policies will be less successful than industrial development policies and strategies oriented at attracting foreign investment.

Typically, foreign investors engage in foreign investment activities by investing in domestic enterprises and forming a joint venture with domestic companies. Foreign investors who intend to form a joint venture are required to first draft a contract. The stage of contract law enforcement is one of the most crucial elements of a joint venture agreement to consider. This is vital when investment issues emerge in connection with and related to the implementation and realization of a joint venture agreement, in order to make clearly what law applies and what dispute resolution mechanism is used. Whenever law enforcement or dispute resolution is determined by the parties in accordance with the choice of law and choice of forum agreed by both parties.[3]

In terms of resolving disputes involving foreign investment in Indonesia, arbitral settlement forums are typically chosen. This is due to the perception that arbitration is more practical, swift, and affordable than other conflict settlement methods. Countries and the international legal community have established the International Centre for the Settlement of Investment Disputes (ICSID) as a special arbitral tribunal for the resolution of investment disputes (International Center for Settlement of Investment Dispute). It was initiated by the Executive Director of the World Bank (World Bank) through the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also commonly named " the Washington Convention. The Indonesian government ratified the Washington Convention by Law No. 5 of 1968 on the Approval of the Convention on the Settlement of Investment Disputes between States and Foreign Nationals.[4] According on the preceding context, the essential question is what forms of foreign investment disputes occur in Indonesia and how they can be settled.

[1] Yati Kurniati, Andry Prasmuko, and Yanfitri, "Determinan FDI (Faktor-Faktor Yang Menentukan Investasi Asing Langsung)," *Bank of Indonesia Working Paper* 6 (2007): 1–60. Working Paper No. 06, Agustus 2007, Bank Indonesia, Hal. 1. https://www.bi.go.id/id/publikasi/lain/kertas-kerja/Documents/2558724f98094f85b24594cf44da3b5aWP200706.pdf (3 November 2019).

[2] Chapter Iv, "CHAPTER IV: INVESTMENT AND NEW INDUSTRIAL POLICIES. (Essay)," *World Investment Report*, 2018, 125. United Nations Conference on Trade and Development (UNCTAD), 2018, Hal. 126, https://unctad.org/en/PublicationChapters/wir2018ch4_en.pdf (3 November 2019).

[3] Ahmad Shofin Nuzil, *Arbitrase sebagai penyelesaian sengketa dalam penanaman modal asing*, http://www.scribd.com/doc/25167579/Arbitrase- Sebagai-ian-Sengketa-Dalam-Penanaman-Modal- Asing, hal 4, diakses tanggal 12 Oktober 2012.

[4] Amirizal, 1996. *Hukum Bisnis*: *Deregulasi dan Joint Venture di Indonesia*, Djambatan: Jakarta, h.124

RESULTS AND DISCUSSION

Legal Dispute in Foreign Investment

Disputes are defined as any type of antagonistic or confrontational interaction between two or more parties.. Owens[5] indicated that the source of the conflict was the excessively rigid and severe rules and written and unwritten procedures that were in place. Schuyt[6] states that a dispute is a condition in which two or more parties are pursuing goals, one of which cannot be harmonized with the other, and they consciously attempt to oppose the interests of the other side.. Robbins and Judge[7] defines a dispute as a process that occurs when one party believes that another party has negatively effected anything that is of significance or importance to the first party.. According to Flippo, conflicts arise when two or more groups perceive they have rights over resources below : :[8]

1) Misaligned objectives;
2) Interdependent activities.

According to Stuart and Miller, disagreements arise when one party's statements regarding the facts, laws, and policies are rejected by the other.: “a dispute may be defined as a specific disagreement concerning a matter o fact, law or policy in which a claim or assertion of one

party is met with refusal, couter claim or denial by another”. Demikian pula dengan pendapat Bilder: “a dispute as a disagreement on a point of law or fact, a conflict of legal views or interest between two persons”.

According to Vilhem Ubert[9] , a dispute is a circumstance generated by two or more persons that is marked by various indicators of open confrontation. The two sorts of disputes are as follows:

1. Conflict of interest an claims of right;

When two persons share the same desire for a valued object, there is a conflict of interest. Conflicts of interest occur when two parties compete for the same object, such as two men competing for the same lady.

2. Claims of right;

Assume the opposing party is guilty while asserting the veracity of one's position. Truth-claim conflicts are framed in terms of right and wrong. This claim's argument will be founded on truth terms, not on considerations of interest, conventions, or the law. Conflicts of interest are more compromising in terms of settlement than disagreements based on truth claims.

[5] Owen, R.G., 1987. *Organization Behaviour in Education*, Englewood Clift: New Jersey
[6] *Ibid*
[7] *Ibid*
[8] *Ibid*
[9] Vilhelm Aubert, 1969. *Sociology o Law*, Penguin Books, Baltimuore: Maryland, *www.cehd.umn.edu/ssw/rjp,Umbreit,M.S., B. And Coates, R.B.,Opportunities and Pitfalls Facing the Restorative Justice Movement, Center for Restorative Justice & Peacemaking An International Resource Center in Support of Restorative Justice Dialogue, Research and Training In Collaboration with the Restorative Justice Initiative, Marquette University Law School*

According to Henry Campbel Black[10] there are many different kinds of disagreements that need to be settled, including the disagreement itself, claims regarding rights, acknowledgment of rights, or demands on the one side, and different claims on the other. Henry Campbel stated: "…. a conflict or controversy; a conflict of claims rights; an assertion of right, claim or demand one side, met by contrary claims or allegatios or the other. The subject of litigation".

Philip Selznick's theory of legal evolution, which states that rules must be respected not because of the threat of punishment, but because community would collapse in its absence, is one of the principles provided inside the resolution of civil disputes. This is underlined further by Responsive Legal Theory, which classifies the existence of three legal moralities in society, includingi:[11]

(1). Repressive law as a law that serves power and seeks to create social order;
(2). Autonomous law where this theory requires that the law is oriented towards monitoring repressive power with full attention aimed at the empirical social conditions of society based on law by seeking to legitimize procedural honesty and be free from political influence;
(3). Responsive law is intended as a law that can become a facilitator of response to the social needs and social aspirations of the community which is expected to be able to provide services to humans and legal entities in order to achieve procedural justice as well as substantive justice. The legal theory referred to tends to favor an autonomous type of law.

The scientific reason for placing the results of the elaboration of thought from Philippe Nonet and Philip Selznick to be used as a connects theory, because of their sharpness in distinguishing social and legal functions, as well as their ability to reveal the existence of law as a social, political and normative phenomenon, as well as providing a typology of legal ordering forms of repressive law, autonomous law and responsive law.

In a system of responsive law, according to Philippe Nonet and Philip Selznick, the law is a facilitator for reacting to social needs and ambitions. This requires the formation of standard legal institutions: if there is a paradigmatic responsive law function, then it is regulation, not adjudication, at least if performed by agencies devoted to investigating alternative techniques for fulfilling mandates and to reconstructing those mandates in light of what was learnt. By inviting and responding to legal advocacy requesting legal changes, legal institutions in a responsive law regime will disperse power, thereby blurring the border between law and politics (ie: the sharp line adopted by autonomous law)..[12]

Phillipe Nonet and Philip Selznick openly stated that responsive law is a high-risk form of government, citing the aforementioned justifications. This means that by making the law more adaptable and political, it runs the risk of becoming more permissive, reducing its power and

[10] Henry Campbell Black, 1990. *Black Law Dictionary Sixth Edition, Definition of The Terms and Phrases of American and English Jurisprudence, Ancien and Modern*: St. Paul Minn West Publishing Co.
[11] Phillipe Nonet & Phillipe Zelnick, 2008. *Hukum Responsif*, Terjemahan Nusamedia Ujung Berung: Bandung., h. 43-44
[12] *Ibid*

undermining the legitimacy of legal institutions. The effectiveness of employing responsive legislation is contingent upon the competency of legal officials, as well as their capacity to build new institutional procedures, to measure social needs, and to provide legal remedies that are sensitive, as well as politically possible and socially acceptable. social.

Thus, it is becoming increasingly apparent that responsive legislation requires a community of individuals who have the political competence to solve all of their problems, establish their objectives, and always strive to make the appropriate commitments.

The ability to develop responsive law depends on the will and resources present within a political community, keeping in mind that its existence does not produce miracles in the

domain of justice. In the meanwhile, its distinctive contribution is promoting public aims and fostering a spirit of self-correction inside the legal system.

Dispute Settlement Method

The theory of conflict resolution strategies developed by Dean G Pruitt and Jeffrey Z. Rubin..[13] The strategy-based conflict theory is a theory that examines society's conflicts and disputes through the lens of tactics to end or resolve them. The field of dispute/conflict resolution employs five main methods::[14]

1. Contending , i.e., attempting to execute a solution that one side favors over another;
2. Yielding In particular, reducing one's own expectations and being willing to settle for less than one desires. To establish a mutually beneficial agreement, both sides are prepared to compromise on some of their most desired terms. Yielding generates solutions, but not necessarily high-quality ones;
3. Problem Solving , i.e., discovering options that satisfy the desires of both sides.
4. With Drawing , notably decision to leave a conflict situation both physically and psychologically. Withdrawing entails ignoring dispute, whereas the other three tactics include distinct efforts to resolve conflicts.
5. Inaction , each party is waiting for the next step from the other, but nobody knows how long this will take. In the end, though, the attempt to break the impasse was successful since they both did nothing.

Dean G. Pruitt and Jeffrey Z. Rubin state that in the process of resolving a dispute or conflict, it is extremely uncommon for just one type of technique to be employed entirely. Rather, it is more common for a combination of several of the tactics described above to be used.[15]

This approach is consistent with the concept of ADR, commonly known as alternative dispute resolution (Alternative Dispute Resolution). The idea of alternative dispute resolution

[13] Dean G. Pruitt, Jeffrey Z. Rubin and Sung Hee Kim, "*Social Conflict Escalation, Stalemate, and Settlement"*, (McGraw Hill Inc, 1986), hal 7-8, Dean G. Pruitt dan Jeffrey Z. Rubin, *"Teori Penyelesaian Konflik"*, (Yogyakarta, Pustaka Pelajar, 2004), hal 4-5, dan dapat lihat juga dalam Salim HS, *"Perkembangan Teori Dalam Ilmu Hukum"*, (Jakarta, PT Raja Grafindo Persada, 2010), hal 95-96.

[14] *Ibid*

[15] *Ibid*, h. 6

(ADR) was initially developed in the United States as a reaction or response to their existing legal system. Dissatisfaction originates from long, expensive hours and questions about its abilities to manage complex cases. ADR, or alternative dispute resolution, has grown in

popularity in Indonesia in recent years, following similar trends seen in other industrialized nations like the United States. The necessity of institutionalizing ADR arises from the public need for a conflict settlement process that is able to satisfy a sense of justice that is becoming increasingly defined day by day and to balance the increasing demands and critical attitude of the community to participate in decision-making;

The presence of alternative dispute resolution or dispute resolution options in modern society fosters a climate of healthy competition and stimulates the motivation of parties to reach a resolution. ADR conflict resolution methods, including Arbitration, Negotiation, Conciliation, and Mediation. Ultimately, it's all about delivering justice in a rapid, efficient, and straightforward form.

The Development of Disputes Settlement On Foreign Investment In Indonesia

Aside from court systems, arbitration are frequently applied method of resolving disputes in Indonesia. Arbitration is a mechanism for settling civil law disputes in the commercial sector on a national and international scale. In Indonesia, there are two arbitration institutions: national arbitration, often known as domestic arbitration. BANI is the acronym for the Indonesian National Arbitration Board, which has jurisdiction over the settlement of civil disputes in the fields of trade, industry, and finance. Article 5 paragraph 1 of Law No. 30 of 1999 concerning Arbitration grants this jurisdiction.

Article 32 of Law No. 25 of 2007 regarding on Investment defines the method for resolving disputes in the field of investment:

1) Consensus-based deliberation;
2) Arbitration ;
3) Courts;
4) Alternative Dispute Resolution (Negotiation, Mediation and Conciliation)
5) Disputes between the government and domestic investors settled by arbitration or the courts, and
6) Dispute between the government and foreign investors to be addressed by International Arbitration as agreed.

There is a greater possibility of disputes or disagreements between foreign investors and national parties in foreign investment. According to Richard L. Abel, dispute resolution consists of "public declarations relating conflicting allegations (inconsistent claims) against

anything."[16] The Government of Indonesia has ratified the International Convention on the Settlement of Disputes (ICSID) through Law Number 5 of 1968 concerning Settlement of disputes between countries and foreign nationals regarding investment in order to anticipate the

[16] 16 William L.F. Felstiner, Richard L. Abel, and Austin Sarat. “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .” *Law & Society Review* 15, no. 3/4 (1980): 631–54. https://doi.org/10.2307/3053505.

occurrence of disputes between national parties and foreign parties in the field of investment. There must be a conflict or difficulty related investment between the State and Foreign Citizens; if a dispute arises, it will be resolved by an arbitration agency. In 2007, with the promulgation of Law Number 5 of 1968 respecting Agreement on the Convention on the Settlement of Disputes between States, arbitration proceedings in Indonesia commenced.

In practice, there are numerous foreign investment issues in Indonesia that are settled by arbitration, particularly international arbitration. Among these are the case of Indian Metal Ferro Alloys Ltd. (IMFA), a business from India, versus the Government of the Republic of Indonesia in the Permanent Court of Arbitration, and the Case of Churchill Mining Plc., which is settled via international arbitration or ICSID (International Center for Settlement of Investment Dispute). On March 19, 2019, the International Arbitration Forum (Permanent Court of Arbitrations/PCA) in The Hague, Netherlands, ruled in favor of the Government of Indonesia in the Indian Metal & Ferro Alloys Ltd. (IMFA) case. According to the Statement of Claim presented by IMFA as a Claimant on December 23, 2016, the value of the demand and the claim for damages requested from the government of the Republic of Indonesia is 469 million US dollars, or 6.8 trillion IDR. After nearly four years of examination by the Permanent Court of Arbitrations/PCA, the Tribunal bolstered the position of the Government of the Republic of Indonesia over the IMFA Lawsuit. The Additional Business Permits (IUP) awarded to PT. Sumber Rahayu Indah/PT. SRI (a subsidiary of IMFA) were accompanied by overlapping licenses and boundary difficulties. The existence of overlapping licenses in the issuance of mining licences to mining corporations by the Government of the Republic of Indonesia is at the root of the IMFA arbitration dispute.

On the other side, the most fundamental factor that causes foreign investors to hesitate to invest in Indonesia is the factor of confidence in the power of law. The problem most investors complain about is law enforcement. Investors desperately need legal certainty that is manifested through compliance with the work contract made and certainty about the settlement

mechanism in the event of a dispute. The role of law in encouraging foreign investment is needed to create legal certainty.[17]

There are at least 5 factors that influence the basis for the development of an arbitration institution as an alternative to resolve dispute in foreign investment in Indonesia, i.e:[18]

1. as an effort to increase competitiveness in inviting investment to Indonesia;
2. community demands for an efficient mechanism capable of fulfilling a sense of justice;
3. efforts to compensate for the increasing critical power of the community coupled with the demand for an active role in the development process;
4. fostering a climate of healthy competition for the judiciary;
5. the desires of business people in resolving disputes can be accommodated in alternative solutions to dispute resolution outside the court with a variety of models that can be chosen by themselves.

[17] Lilya Marischa Prihantini1 ; Mohammad Sood2 ; Lalu Muhammad Hayyanul Haq2 , Arbitration as Settlement of Disputes in Foreign Investments , http://dx.doi.org/10.18415/ijmmu.v7i8.1937

[18] *Ibid*

CONCLUSION

Investment activities in Indonesia are governed by Law Number 25 of 2007 regarding to Investment, which defines investment as "all forms of investment activities, both by domestic investors and foreign investors for conducting business in the territory of the Republic of Indonesia." On the basis of this information, the status of investors can be divided into two distinct categories: domestic investors and foreign investors. This can also be considered from the perspective of investment finance itself, namely domestic investment and investment that originates from foreign capital . To establish legal clarity and investment security,the Government of Indonesia has ratified the International Convention on the Settlement of Disputes (ICSID) through Law Number 5 of 1968 concerning Settlement of disputes between countries and foreign nationals regarding investment in order to anticipate the occurrence of disputes between national parties and foreign parties in the field of investment.

Article 32 of Law No. 25 of 2007 regarding on Investment defines the method for resolving disputes in the field of investment i.e : Consensus-based deliberation, Arbitration , Courts, Alternative Dispute Resolution (Negotiation, Mediation and Conciliation), Disputes between the government and domestic investors settled by arbitration or the courts, and, Dispute between the government and foreign investors to be addressed by International Arbitration as agreed.

To establish legal clarity and investment security,the Government of Indonesia has ratified the International Convention on the Settlement of Disputes (ICSID) through Law Number 5 of 1968 concerning Settlement of disputes between countries and foreign nationals regarding investment and Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Both serve as the foundation of Indonesia's legal framework for the resolution of disputes involving foreign investments.

BIBLIOGRAPHY

Ahmad Shofin Nuzil, Arbitrase sebagai penyelesaian sengketa dalam penanaman modal asing, http://www.scribd.com/doc/25167579/Arbitrase-Sebagai-ian-Sengketa-Dalam-Penanaman-Modal- Asing, hal 4, diakses tanggal 12 Oktober 2022

Amirizal, 1996. Hukum Bisnis: Deregulasi dan Joint Venture di Indonesia, Djambatan: Jakarta, h.124Owen, R.G., 1987. Organization Behaviour in Education, Englewood Clift: New Jersey

Chapter IV, 2018. “CHAPTER IV: INVESTMENT AND NEW INDUSTRIAL POLICIES. (Essay),” World Investment Report, 2018, 125. United Nations Conference on Trade and Development (UNCTAD), page. 126, https://unctad.org/en/PublicationChapters/wir2018ch4_en.pdf (3 November 2020).

Dean G. Pruitt, Jeffrey Z. Rubin and Sung Hee Kim, 1986. “Social Conflict Escalation, Stalemate, and Settlement”, McGraw Hill Inc page 7-8,

Henry Campbell Black, 1990. Black Law Dictionary Sixth Edition, Definition of The Terms and Phrases of American and English Jurisprudence, Ancien and Modern: St. Paul Minn West Publishing Co.

Lilya Marischa Prihantini1 ; Mohammad Sood2 ; Lalu Muhammad Hayyanul Haq2 , Arbitration as Settlement of Disputes in Foreign Investments , http://dx.doi.org/10.18415/ijmmu.v7i8.1937

Phillipe Nonet & Phillipe Zelnick, 2008. Responsive Law, Terjemahan Nusamedia Ujung Berung: Bandung., page 43-44

Vilhelm Aubert, 1969. Sociology o Law, Penguin Books, Baltimuore: Maryland, www.cehd.umn.edu/ssw/rjp,Umbreit,M.S., B. And Coates, R.B.,Opportunities and Pitfalls Facing the Restorative Justice Movement, Center for Restorative Justice & Peacemaking An International Resource Center in Support of Restorative Justice Dialogue, Research and Training In Collaboration with the Restorative Justice Initiative, Marquette University Law School

William L.F. Felstiner, Richard L. Abel, and Austin Sarat, 1980. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." Law & Society Review 15, no. 3/4: 631–54. https://doi.org/10.2307/3053505.

Yati Kurniati, Andry Prasmuko, and Yanfitri, 2007. "Determinant FDI (Faktor-Faktor Yang Menentukan Investasi Asing Langsung)," Bank of Indonesia Working Paper 6 (2007): 1–60. Working Paper No. 06, Agustus 2007, Bank Indonesia