



Umbrella clauses and autonomy regulation: assessing the impact on indonesia's regulatory capability for the public interest

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ABSTRACT

Foreign Direct Investment (FDI) plays a key role in the contemporary global economy. The Bilateral Investment Treaty (BITs) guarantees equitable treatment in Investment Arbitration and Contractual Commitments, despite the divergent goals of the home and host countries involved. The emergence of certain events gave rise to a conflict resolution issue, which subsequently led to the implementation of an umbrella clause aimed at safeguarding investments associated with contract violations. The "Umbrella Clause" is a contentious legal provision commonly included in bilateral investment treaties (BITs) and international investment agreements (IIAs), which significantly impacts the regulatory autonomy of a host state. The primary objective of this process is to convert the contractual obligations established between foreign investors and host countries into legally binding commitments within the framework of the treaty. However, many foreign investors utilize this clause to circumvent government regulations in the host country. The primary objectives of this research is the to establish a thorough comprehension of the effects that the Umbrella Clause has on regulatory sovereignty in Indonesia; to assess the viability of including scope reform clauses in future BITs and IIAs to reconcile investment protection with the state's right to regulate in the public interest; and to mitigate any potential negative consequences that may arise from the Umbrella Clause's application on regulatory autonomy.

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1. INTRODUCTION

Foreign Direct Investment (FDI) Foreign investment has become very important for a country's ability to run its economy and cannot be eliminated. The actors in foreign investment activities are the host state or the country where the investment is invested by investors or business actors who invest in the jurisdiction of the host state, and the investor's home state or the country where the capital comes from. The purpose and impact of these investment activities are also very diverse, the home state receives foreign investment with the aim of improving the economy, creating jobs, providing training education, and technology, while the host state invests in more profitable areas with the aim of increasing marketing, increasing production costs, and obtaining labor with lower salaries. (Lila Sitha Rambisa dan Ni Made Suksma Prijandhini Devi Salain, 2013)

As investment flows and globalization grow, the intersection between international investment law and a country's regulatory autonomy has become a focal point of debate and concern between home and host states, especially when the investment and regulatory objectives of the host state differ significantly. As of December 31, 2022, there were 1,257 investor-state dispute settlement (ISDS) cases documented by the United Nations Conference on Trade and Development (UNCTAD), 46 of which were public cases under international investment agreements (IIAs). (Investor-State Arbitration Awards: New Insights for Investment Treaty Reform, 2013).

ISDS is a process in a dispute settlement by choosing domestic courts or international arbitration institutions, when investors find that losses have occurred due to host state violations of their obligations contained in the agreement, ISDS also refers to the investment dispute resolution system adopted in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). BITs and FTAs are legal instruments commonly used to regulate the relationship between home and host countries in terms of foreign investment. The framework of these agreements, investment arbitration and contractual commitments become important mechanisms in handling disputes that may arise due to violations of the performance stated in an agreement, therefore BITs and FTAs introduce what is known as the "Umbrella Clause" as a form of effort to provide protection to investors, but it raises serious questions about conflict resolution, because this clause has a very significant impact on the regulatory sovereignty of the host state itself.

The Umbrella Clause is an increasingly common legal clause included in *BITs and international investment agreements (IIAs)*. As the name implies, the umbrella clause plays a role in overshadowing the agreement or agreement, so as to ensure the continuity of the agreement in the future after the agreement is signed by the contracting parties. In investment treaties, an umbrella clause is an explicitly or implicitly written provision or clause that guarantees that the host country will fulfill its obligations to the investor. These provisions are known for protecting the contractual and other commitments of the agreement. (Sinclair, 2004) The policies established by umbrella clauses in international investment treaties require the receiving state to comply with all commitments made by the foreign investor regarding the investment. Simply put, Umbrella Clauses give foreign investors the ability to directly activate the protection of IIAs when they consider their rights under a particular investment contract to have been violated by the host country. Unfortunately, there is no clear consensus on how umbrella clauses should be interpreted.

On the other hand, the host country also has autonomy regulation provisions that allow it to manage its own affairs in the public interest without interference from foreign investors. Autonomy regulations are often included in investment treaties to protect the host country's right to manage its own affairs without interference from foreign investors. However, these regulations can sometimes conflict with the umbrella clause, causing disputes between the investor and the host country. (Stephan W. Schill, 2010) The relationship between these two provisions is complex and has been the subject of much debate in international investment law. *The Umbrella Clause* raises questions about how it affects the host state's ability to regulate in the public interest and creates an imbalance in the relationship between foreign investors and host governments.

However, many foreign investors have violated government regulations by using umbrella clauses in BITs. To date, Indonesia has signed many bilateral agreements and therefore there are several obstacles that hinder the implementation of these agreements, causing conflicts between Indonesia and investors, foreign investors sued the Indonesian government in several cases because the policies made by the Indonesian government were considered detrimental to them. For example, Churchill Mining sued Indonesia before the International Center for Settlement of Investment Disputes (ICSID) arbitration for violating the umbrella clause in the BIT against a government regulation in 2012. Most of Churchill Mining's arguments regarding the umbrella clause itself centered on the idea that Indonesia had violated or invalidated licenses or exploration rights previously granted to Churchill Mining or its affiliates. (Rihwanto, 2016) This was done by the Indonesian government because the mining concession entered the national park forest area.

Although the final ICSID ruling rejected Churchill's ideas and even ordered the company to pay the costs of the proceedings and other costs to the Indonesian government in 2016, recipient countries such as Indonesia must find ways to harmonize regulation, protection of public interests,

and balance between the rights of foreign investors and national interests, so as to achieve better results in foreign investment arrangements that are beneficial to all parties. Starting from this explanation, the author is interested in conducting research with the focus of the problem on How the implications of the umbrella clause affect host state policies and regulations, especially Indonesia and What efforts can be made to balance legal protection for investors and host states in the umbrella clause and sovereignty over government regulations.

2. RESEARCH METHOD

The writing of this article uses normative juridical research (Legal Research). "This research with a normative juridical approach examines data derived or sourced from legal norms found in society and contained in laws and regulations.."(Dimas Almansyah dan Mohamad Fajri Mekka Putra, 2022) The research approach used in writing this article is the statutory approach (statue approach) and conceptual approach (conceptual approach). "Statue approach is a research approach based on the analysis of thoughts based on statutory rules, principles and legal norms."(Siti Thali'ah Atina; Eddy Purnama dan Efendi, 2022) While conceptual approach is a research approach whose dimensions of thought are based on logic and systematised legal concepts. In examining these problems, legal theory will be used as a building system of norms which includes legal principles, norms, rules of legislation, and doctrines (teachings).

3. RESULTS AND DISCUSSIONS

A Role and History of Foreign Direct Investment (FDI) in the Global Economy

The history of FDI can be traced to the development of international trade, which has been increasing since the 19th century. The 1970s was the era when many developing countries started intense confrontation with the investor countries.(Fitri, 2023) At that time, many European countries carried out colonial expansion into various regions in Asia, Africa and Latin America. This expansion aimed to obtain natural resources, markets and profits from the colonized territories. One form of expansion was foreign investment in strategic sectors, such as mining, plantations, railways and banking. This foreign investment was carried out by establishing companies controlled by the country of origin or foreign private companies (*Investasi Dan Sejarah Perkembangan Investasi Asing Di Indonesia*, 2014).

In the early 20th century, there was a change in the pattern of foreign investment. Foreign investment was no longer dominated by European countries, but also involved other countries, such as the United States and Japan. Foreign investment also no longer focused only on primary sectors, but also on secondary and tertiary sectors, such as industry, services, and technology. This foreign investment was done by establishing company branches or subsidiaries in the country of investment. However, in the middle of the century, important events occurred that affected the development of foreign investment, one of which was World War II, which resulted in economic and political damage in many countries. This movement resulted in the takeover or nationalization of assets owned by foreign investors by newly independent countries.

To overcome these challenges and risks, foreign investors need legal protection that can guarantee their rights and obligations in the country of investment. After the end of the Second World War, debates on the appropriate national legal instruments to regulate foreign investment began to emerge. Countries with abundant natural resources and the newly independent supported the principle of sovereignty that recognized their rights to natural resources as a manifestation of self-determination.(Sangwani Patrick Ng'ambi, 2015) Finally, these developments reached a positive outcome when *the United Nations General Assembly (UNGA)* adopted resolution 1803 on Declaration on Permanent Sovereignty over Natural Resources. This resolution emphasized the principle of state sovereignty in the equitable management of natural resources and tried to strike a balance between Calvo's doctrine of national standards and the minimum standards supported by the Bara states.

With the resolution, countries agreed on several things, namely: (i) nationalization or expropriation can only be carried out based on public interest, security, or national interest, (ii) there is a possibility to bring investment disputes to the international dispute settlement forum, (iii) foreign investment agreements must be complied with in good faith, and countries and international

organizations must respect the principle of permanent sovereignty over natural resources. In the end, the resolution became the initiative for the establishment of *The United Nations Conference on Trade and Development* (UNCTAD) (Paramita, 2020)

In its development, it plays a very important role in the global economy. The process of globalization, which strengthens the economic integration of countries around the world, drives global economic growth and generates new economic policies. This situation is considered an opportunity for all countries, including developed and developing countries. (Bagaskara Prawira; et.al, 2019) The definition of FDI indirectly includes investments that involve the transfer of capital and the establishment of new businesses abroad with the aim of capitalizing on long-term prospects. (Aisyah Thasa Khairunnisa dan Yetty Komalasari, 2023) However, in this context, there are various risks faced by both parties to the investment. These risks include political risks, environmental damage, labor exploitation, and potential foreign exchange leakage due to repatriation of profits by foreign investors.

In the face of these challenges, foreign investors require legal certainty to provide legal protection that can guarantee their rights and obligations in the investment destination country. This protection is often realized through international investment treaties and foreign investment mechanisms. Such international investment agreements can also be bilateral (between two countries), regional (between several countries in one region), or multilateral (between many countries from different regions). Elements of protection provided in investment treaties include the principle of nondiscrimination, minimum standards of treatment for foreign investment, the obligation not to nationalize, and mechanisms for resolving disputes between investors and the state through international arbitration. Indonesia itself has regulated investment in Law No. 25/2007 on investment (hereinafter referred to as "Law No. 25/2007") which contains all forms of investment, both domestic and foreign investment with the aim of doing business in the territory of Indonesia (Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal, n.d.)

The Development of Bilateral Investment Treaties (BITs), Investor-State Dispute Settlement (ISDS), and the Introduction of the Umbrella Clause in International Investment Agreement (IIAs)

Before 1868, each country was subject to the laws of its home country, and relations between countries were built on a strong basis of friendship, which was reflected in international legal norms. Foreign property was given protection, and states could not use their national laws to expropriate the assets of other states. Then Argentine jurist, z how a country should view foreign investment (M. Sornarajah, 2021). At the time, Calvo criticized how foreigners were entitled to more benefits than nationals in the countries where they lived. He then emphasized the absolute equality between foreigners and nationals and how local solutions in a country should be prioritized, implying a rejection of non-local solutions and laws, including diplomatic protection or military intervention or international law as the law of the land. (W. Shan, 2007)

In response to the development of Calvo's national treatment doctrine, in 1910, American lawyer Elihu Root argued that there are minimum standards of fairness in international law. While a state may treat foreigners with the same treatment as they give to their nationals, this does not mean neglecting their obligations under international law. (Paramita, 2020) Therefore, local laws must be made in line with international standards of justice, and if local laws do not apply, then local laws must be made in line with international standards of justice.

Violations of such minimum standards will bring liability to the host state and provide a legitimate basis for the investor state to offer protection to its nationals. This concept complements the national treatment of the country. The doctrine will in a sense provide additional protection for foreign investors under international law if national law does not provide sufficient security. Historically, it can be seen that BITs were initiated by developed countries that wanted to invest in the majority of developing and least developed countries (*LDCs countries*). Its birth was driven by the owners of capital, who wanted a guarantee of their investment in the host country. Hence, the responsibility to safeguard the investment flows generated in the capital-receiving country is the rationale behind the establishment of these BITs. It is not surprising that *a large part of BITs*

contain the obligations of the capital-receiving country rather than the responsibilities of the investor.

Bilateral Investment Treaties (BITs) are the most common type of *International Investment agreements (IIAs)*. They are currently the most dominant source of international law considered to protect foreign investment in developing countries and have gradually become the main instrument that countries rely on in inviting foreign investment into their countries. In contrast, very few BITs are signed between developed countries, possibly because these investors are confident that the developed country's host country has adequate domestic law and will not discriminate against them. (Ryan J. Bubb dan Susan Rose-Ackerman, 2007) BITs typically contain an ISDS clause, which is a system of dispute resolution mechanisms contained in international investment treaties, allowing investors to bring arbitration claims directly against a host state that has been alleged to have harmed or violated the rights guaranteed in the treaty. ISDS also entitles foreign investors to sue the host state in forums other than the country's domestic courts. This shows that BITs are a means for advanced countries not only to invest, but also to intervene in the domestic policies of developing and less developed countries. Because the Investor will sue the state if there is a state policy that prioritizes national interests and harms the investor. (Sidik, 2023)

ISDS comes from a background that suggests an attempt to depoliticize and practice diplomatic protection, whereby investors can establish rights diplomatically in host countries that are allegedly detrimental to investors in investment dispute resolution. Previously, investment dispute resolution was usually done through the State-State Dispute Settlement (SSDS) mechanism, which was regulated under instruments such as Friendship, Commerce, and Navigation (FCN), which was basically the forerunner to the BIT treaty. (Kabir, 2021) ISDS itself is usually carried out through the medium of international arbitration where the parties agree to submit the dispute to one or more neutral and independent arbitrators who will then issue a binding decision to both parties.

ISDS can be conducted under the rules of international arbitration institutions, such as ICSID (International Centre for Settlement of Investment Disputes), LCIA (London Court of International Arbitration), ICC (International Chamber of Commerce), HKIAC (Hong Kong International Arbitration Centre), and UNCITRAL (United Nation Commission on International Trade Law). However, the choice of institution is usually determined at the outset of the agreement or as agreed by the parties when the dispute arises.

The purpose of the international arbitration institution forum is to provide facilities for conciliation as well as arbitration of disputes between states parties to the convention and nationals of other states parties to the way under the terms of the convention. For this facility to be utilized, the parties must agree to submit the dispute to a designated arbitration board, and the dispute must take the form of an investment. (Felix O Soebagjo dan Erman Rajagukguk, 1995) In its journey, the Umbrella Clause comes from the use of treaties to provide legal protection for legal rights. An *umbrella* clause is an explicit or implied provision or clause in an investment treaty that guarantees that the host state will comply with its commitments and obligations vis-à-vis the investor. The term "umbrella" is used because these clauses provide comprehensive international legal protection to the contractual commitments made by the host state. (S.P. Subedi, 2008)

This clause provides additional protection beyond the guarantees contained in the treaty. When an *umbrella clause is applied*, a breach of an investment contract by a state can be elevated to a violation of international law. It is also often referred to as a blanket clause, parallel protection, *pacta sunt servanda*, or sanctity of contract. (M. Sornarajah, 2021) From its inception, the umbrella clause aimed to elevate private agreements made between investors and host countries to international obligations, and thus provide additional protection to foreign investors.

A prominent early example in the history of using treaties to protect legal rights is the 1921 treaty between the United Kingdom and Peru regarding mineral concessions in La Brea y Parinas. This agreement related to the ownership of British nationals and leasing to the London and Pacific Petroleum Company. (Perrone, 2022) What distinguishes La Brea y Parinas from umbrella clauses in modern treaties is its more explicit nature as an ex post facto device. That is, it is used after a default of an existing agreement to provide legal protection to the legal rights involved.

Foreign investor interest disputes and Umbrella Clause Implications for local government regulatory sovereignty (House Country)

Overall, despite the many positive aspects of ISDS, the goal of investment protection in this context may actually be potentially detrimental to the countries involved in BITs. This is because BITs substantially follow an almost identical template, with the main focus on providing comprehensive protections and facilities for the benefit of investors. This dynamic is emphasized by compensation and ISDS mechanisms that can be used by investors to initiate international arbitration against a state.

Calculated from 1966 to 2022, the number of claims filed by investors against states mainly through BITs is much higher than through the Energy Charter Treaty (ECT) and other investment treaties. Statistics from ICSID show that as many as 60 percent of claims utilize BITs, followed by investment contracts between investors and host-states. (*The ICSID Casesload Statistics-Issue 2022*, 2022) In addition, in cases of lawsuits filed at UNCTAD, 61 percent of the lawsuits were won by investors, while 39 percent were in favor of the host state. What has triggered *the rise of ISDS in international arbitration forums, especially at the International Center for Investment Dispute (ICSID)*, is that it is considered to erode state sovereignty.

While Foreign Direct Investment (FDI) remains an important pillar in efforts to boost national economies, the Investor-State Dispute Settlement System (ISDS) mechanism is causing concern among developing countries. For instance, Bolivia, Venezuela, and Ecuador have decided to exit their membership in the International Centre for Settlement of Investment Disputes (ICSID) organization as a precaution against possible claims in international arbitration forums. The rationale behind this action is that ISDS, in addition to being costly, can harm countries not only financially, but also in terms of regulation. This is due to the fact that ISDS covers issues related to domestic regulation and policy, losing an ISDS case may impact the state's ability to regulate certain sectors in accordance with policies deemed important to the public interest.

The Churchill Mining-Indonesia case is a complex example of an international investment dispute. Churchill Mining PLC is a British mining company that acquired a 75% stake in Indonesia through a local company called PT Ridlatama. In 2010, the Indonesian government, through the Ministry of Energy and Mineral Resources, revoked PT Ridlatama's Exploration License based on an audit by the Supreme Audit Agency (BPK) in September 2008 when it carried out an audit of KPs (Kuasa Pertambangan) made in 2006-2008. With the results of the audit, BPK found five fake Mining Authorizations issued in 2006-2008, moreover Churchill Mining Plc had also not received a license from the Minister of Forestry for mining in production forest areas in accordance with the provisions of Law Number 41 of 1999 concerning Forestry.

The Minerba Law stipulates that any disputes arising in the implementation of IUP, IPR or IUPK shall be resolved through domestic courts and arbitration in accordance with the provisions of laws and regulations. (Undang-Undang Nomor 4 Tahun 2009 Tentang Pertambangan Mineral Dan Batubara, n.d. Pasal 154) while all legal consequences arising from the temporary suspension and / or revocation of IUP, IPR or IUPK are resolved in accordance with statutory provisions. (Undang-Undang Nomor 4 Tahun 2009 Tentang Pertambangan Mineral Dan Batubara, n.d. Pasal 155) Based on Article 5 Paragraph 2 of Law No. 25 Year 2007, it is explained that foreign investment must be in the form of a limited liability company, subject to Indonesian law, and located in the territory of the Republic of Indonesia, unless otherwise stipulated by law. Furthermore, Article 77 of Law No. 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law No. 2 of 22 on Job Creation states that all businesses are open to foreign investment, unless there are closed business fields that have special requirements. In line with Article 7 Paragraph 1 of Presidential Regulation No. 10 of 2021, foreign investors are only allowed to operate in Large Enterprises with an investment value of more than IDR 10,000,000,000.00 (ten billion rupiah), excluding the value of land and buildings. However, Article 8 explains that these investment restrictions do not apply to activities in Special Economic Zones.

To invest in Indonesia, registration and acquisition of a business license from the competent authority is required, with procedures regulated in the Indonesian Investment Coordinating Board Regulation No. 4 of 2021 concerning Guidelines and Procedures for Risk-Based Licensing Services and Investment Facilities. In the mineral and coal mining sector, foreign

investors must also undergo a Coal Mining Concession Work Agreement (PKP2B), as explained in Article 1 of Government Regulation No 96 of 2021 concerning the Implementation of Mineral and Coal Mining Business Activities. This provision is necessary to ensure that the investment can run smoothly while anticipating events that may occur during the investment process.

In this case, Churchill Mining argued that Indonesia had breached the umbrella clause claims contained in the Bilateral Investment Treaty (BIT) between the UK and Indonesia which caused Churchill Mining to lose its exploration rights and resulted in the company filing an arbitration claim to challenge the Indonesian Government's actions and require the Indonesian Government to comply with all obligations or agreements it has made towards foreign investors. This lawsuit was filed as a result of violations that were deemed to have occurred, including indirect expropriation and violation of the principle of fair and equitable treatment through the revocation of the Mining Authorization/Exploitation Mining Business Permit (KP/IUP Exploitation) of four subsidiaries of PT Ridlatama covering approximately 35 thousand hectares of land in Busang District by the Regent of East Kutai on May 4, 2010. Churchill Mining further stated that the company suffered losses in its investment in Indonesia, so they filed a lawsuit with a compensation claim of USD1.3 billion or equivalent to approximately IDR18 trillion. (*Pemerintah Indonesia Menang Mutlak Di Forum Arbitrase ICSID*, n.d.)

Churchill Mining plc bases its claim against the Government of Indonesia to the ICSID tribunal based on the Bilateral Investment Treaty between the Government of Indonesia and the United Kingdom as the legal position of Churchill Mining plc.

Article 7 paragraph (1) of the Bilateral Investment Treaty UK - Indonesia stipulates:

"... The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment."

Furthermore, Article 2 paragraph (1) of the BIT states additional requirements for jurisdiction, namely that the investment in question must be:

"... have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it". It does so in the following terms: This Agreement shall only apply to investments of nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it."

Based on the aforementioned Bilateral Investment Treaty (BIT), Churchill filed a claim against Indonesia before ICSID arbitration. Although ICSID is a flexible arbitral institution, the first step is to determine whether or not the dispute falls within the jurisdiction of the ICSID arbitral body. Once it is determined that the dispute falls within ICSID's jurisdiction, the dispute is registered by the Secretary-General and an arbitration panel is established, which usually consists of three arbitrators (an odd number according to the agreement of the parties). ICSID's jurisdiction in this case refers to the limits set out in the Washington Convention, the convention that established ICSID to ensure that it could function. (Salam, 2007) However, it should be noted that, even though the Government of the Republic of Indonesia has ratified the ICSID convention, it does not mean that every dispute between foreign investors and the Government of Indonesia must be automatically resolved by the ICSID Arbitration Board. (Sentosa Sembiring, 2010) According to the provisions in Article 25 paragraph (3) of the ICSID Convention, in a dispute submitted to arbitration, the consent of the government of the country being sued, i.e. the government of the country receiving the capital, is still required. In order to fulfill this requirement, ICSID has developed a module called "arbitration clause" which is enforced by the parties, in this case the foreign investor and the Indonesian side, through the Investment Coordinating Board (BKPM) (Sutiyo, 2006)

Even though the host country and the foreign investor have agreed to resolve the dispute through an international arbitral tribunal, there are still some factors that may prevent them from using the international arbitral tribunal. One such factor is if the dispute resolution process falls within the jurisdiction of the courts of the host country. (Salam, 2007) This is also referred to by arbitration law experts as "exhaustion of local remedies" which refers to the obligation to try to resolve a dispute through the local judicial system before being able to submit a claim to international arbitration.

The problem arose when in Indonesia's response to Churchill's lawsuit, Indonesia rejected the claim that it had given written consent to submit the case to ICSID. This rejection became a key point to be considered by the ICSID Arbitration Council in determining its jurisdiction and the final outcome of the case. Factually, the Indonesian government does not recognize the meaning of the words "shall assent" which literally indicates an obligation to agree to the settlement of disputes through ICSID Arbitration. Meanwhile, Churchill maintains that the term constitutes an agreement on the part of Indonesia to refer the settlement of disputes arising from the investment to ICSID.

On February 24, 2014, *the International Center for Settlement of Investment Disputes* (ICSID) issued a decision on ICSID's jurisdiction to review Churchill Mining's arbitration claim against the Government of Indonesia. In the decision, ICSID determined that it had jurisdiction to review the claim based on its interpretation of the Bilateral Investment Treaty (BIT) between Indonesia and the UK's dispute settlement clause. However, ICSID rejected Indonesia's claim that the transfer of the dispute was not automatic, even though the BIT stipulated that the dispute settlement should be referred to the ICSID forum, and otherwise required the written consent of the Indonesian Government as a condition. Instead, ICSID favored Churchill Mining's view that the transfer was automatic. This decision came after a jurisdictional hearing that took place in Singapore on May 13-14, 2013.

On December 6, 2016, Gabrielle Kaufmann-Kohler, Michael Hwang SC, and Professor Albert Jan van den Berg (the "ICSID Tribunal") by Decision Nos. ARB/12/14 and 12/40, ICSID rejected all claims brought by *Churchill Mining and Planet Mining*. The reasons for the rejection were based on the claim that the licenses held by Churchill Mining were fraudulent, and ICSID considered that Churchill's due diligence procedures were inadequate. As a result, Indonesia won this lawsuit with a compensation award of US\$1.31 billion or equivalent to IDR17 trillion. In addition, Indonesia also received a compensation fund of US\$8.6 million. As a consequence of this ruling, the plaintiff Churchill Mining was obliged to reimburse Indonesia for administrative costs incurred by Indonesia, amounting to USD 800,000. The ICSID Tribunal further granted the Indonesian Government's claim for an award on costs of USD9.4 million.

In the course of the trial, which was later affirmed in its decision, ICSID accepted arguments and evidence, including forensic expert testimony submitted by the Government of Indonesia, that could prove the existence of forgery, most likely using an autopen machine. There were 34 forged documents submitted by the Plaintiffs during the trial (including mining permits for the general survey and exploration stages) that purported to be official/genuine documents issued by various government agencies in Indonesia, both central and regional. The ICSID Tribunal agreed with the Government of Indonesia's argument that "unlawful investments do not deserve protection under international law." ICSID also found that "the Plaintiff did not perform its obligations to vet its local partners and properly supervise its licensing process (*lack of diligence*)." Accordingly, based on, among other things, the facts and considerations set out above, the ICSID Tribunal dismissed the Claimants' claims. (*Pemerintah Indonesia Menang Mutlak Di Forum Arbitrase ICSID*, n.d.)

In evaluating the settlement of the dispute between Churchill Mining Plc and Planet Mining Pty Ltd through the International Centre for Settlement of Investment Disputes (ICSID), it is important to consider the potential impacts, both beneficial and potentially detrimental to Indonesia, including:

THE BENEFICIAL IMPACT OF INDONESIA	DETRIMENTAL IMPACT ON INDONESIA
<ul style="list-style-type: none"> Increasing Foreign Investor Confidence: The existence of ICSID increases the confidence of foreign investors to invest in Indonesia, as it provides clear legal certainty in the event of future 	<ul style="list-style-type: none"> Significant Legal Costs: The dispute resolution process involves considerable costs for Indonesia, including administrative, preparatory, legal, and accommodation costs.

investment-related disputes.

- The Confidentiality Principle: The confidentiality principle in ICSID proceedings benefits Indonesia by maintaining its integrity, safeguarding the government's prospects of attracting investors, and enabling investors to conduct business in Indonesia.
 - Simple and Fast Process: ICSID arbitration proceedings are designed to be simple and expeditious, saving time and reducing costs, which benefits all parties involved.
 - Freedom to Choose Arbitrators: Freedom to choose arbitrators is an advantage, allowing Indonesia to select highly competent arbitrators, which can have a positive impact on the objectivity and quality of the award.
 - ICSID Awards are Final and Binding: The final and binding nature of ICSID arbitral awards expedites and facilitates the enforcement of the award.
 - Recognition and Enforcement of ICSID Awards: Awards involving Indonesia as a party to the dispute can be enforced by execution from the Indonesian Supreme Court. Although ICSID awards are final, Indonesia still has the option to apply for annulment of the award if it feels aggrieved.
 - Impact on Investment Climate: This dispute may affect the investment climate in Indonesia due to its background involving mining license issues. Lack of care in granting mining licenses could potentially lead to overlapping licenses and international disputes.
 - Potential State Financial Losses: If Indonesia loses the dispute with Churchill Mining, the country will face potentially significant financial losses, including paying large amounts of compensation.
 - Risk of Loss of Natural Resources: The dispute also potentially poses the risk of losing natural resources, which are the livelihood of many people.
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4. CONCLUSION

Investment protection intended to benefit companies has a number of key objectives. These include ensuring legal certainty for investors, creating a legal framework that protects investors while they operate in the destination country, guaranteeing the principle of non-discrimination, providing compensation in cases of investment losses, and providing access to international arbitration mechanisms to resolve disputes. While these objectives are intended to protect foreign investment, some argue that they can also be used by corporations as a tool to challenge state policies and make significant compensation claims, which can ultimately impact the state's regulations and policies.

Considering that the impact of BITs is ultimately highly significant, especially in terms of dispute resolution between Indonesia and foreign investors and often leads to enormous compensation that must be paid by the government, Indonesia should firmly establish the Indonesian BIT Model and clear guidelines as an effort that must be realized by the Indonesian government. If the spirit of BIT reform, among others, is to reposition the position of the parties which has been considered asymmetrical, then the principles advocated by third world countries such as the *calvo* doctrine and appropriate compensation should be adopted in the Indonesian BIT.

Within the context of the Umbrella Clause in bilateral investment treaties (BIT) to mitigate the risk of third country losses, Indonesia in particular, must pursue measures that focus on protecting state interests and preserving national regulatory authority. Some steps that can be taken along with the underlying theoretical basis includes maintaining transparency in regulations and policies affecting foreign investment, ensuring compliance with the provisions of bilateral investment treaties, implementing transparent and fair dispute resolution mechanisms, and promoting consultation and negotiation before taking extreme legal action. In addition, it is important to promote the protection of public interests in policy formulation and enforcement, in line with the principles of international law that recognize the right of states to protect social, environmental and public health interests. The importance of striking a balance between the rights and obligations of states in investment treaties to achieve balanced protection between foreign investment and national interests should be underscored.

REFERENCES

Aisyah Thasa Khairunnisa dan Yetty Komalasari. (2023). Analisis Yuridis Mengenai Faktor dan Perlindungan

- Hukum Foreign Direct Investment di Indonesia. *Jurnal Anfa*, 3(2), 4.
- Bagaskara Prawira; et.all. (2019). Pengaruh Foreign Direct Investment (FDI), Ekspor dan Impor Terhadap Pertumbuhan Ekonomi Indonesia 1998-2007. *Directory Journal of Economic*, 1(1), 2.
- Dimas Almansyah dan Mohamad Fajri Mekka Putra. (2022). Tanggung Jawab Notaris dalam Pembuatan Akta Para Pihak Dibawah Tekanan dan Paksaan. *Jurnal Usm Law Review*, 5(2), 757. <https://doi.org/http://dx.doi.org/10.26623/julr.v5i2.5728>
- Felix O Soebagio dan Erman Rajagukguk. (1995). *Seri Dasar-Dasar Hukum Ekonomi 2; Arbitrase di Indonesia*. Ghalia.
- Fitri, A. (2023). Dialektika Perbedaan Interpretasi Umbrella Clause Dalam Bilateral Investment Treaties Sebagai Perlindungan Investor Dalam Putusan Arbitrase ICSID Sgs V. Pakistan Dan Sgs V. *Philippine. Unes Law Review*, 5(4), 7.
- Investasi dan Sejarah Perkembangan Investasi Asing di Indonesia*. (n.d.). Binus University. <https://business-law.binus.ac.id/2017/02/19/investasi-dan-sejarah-perkembangan-investasi-asing-di-indonesia/>
- Investor-State Arbitration Awards: New Insights for Investment Treaty Reform*. (n.d.). Investment Policy Hub. <https://investmentpolicy.unctad.org/news/hub/1723/20230804-investor-state-arbitration-awards-new-insights-for-investment-treaty-reform>
- Kabir, S. F. (2021). Krisis dan Reformasi: Penyelesaian Sengketa Dalam Perjanjian Investasi Bilateral di Negara Dunia Ketiga. *Mimbar Hukum Universitas Gajah Mada*, 33(2), 402.
- Lila Sitha Rambisa dan Ni Made Suksma Prijandhini Devi Salain. (2013). Kedudukan dan Tanggung Jawab Perusahaan Multi National (MNC) dalam Hukum Internasional. *Jurnal Kertha Negara*, 1(6), 3.
- M. Somarajah. (2021). The International Law on Foreign Investment. In *Edisi V* (p. 19). Cambridge University Press.
- Paramita, K. (2020). Much in Little: The Umbrella Cluse that Changes the International Investment Protection Standard. *Hasanuddin Law Review*, 6(1), 29.
- Pemerintah Indonesia Menang Mutlak di Forum Arbitrase ICSID*. (n.d.). Kementerian Komunikasi Dan Informatika Republik Indonesia. <https://www.kominfo.go.id/content/detail/17482/pemerintah-indonesia-menang-mutlak-di-forum-arbitrase-icsid/0/berita>
- Perrone, N. M. (2022). Bridging the Gap between Foreign Investor Rights and Obligations: Towards Reimagining the Internaitonal Law on Foreign Investment. *Business and Human Rights Journa*, 7, 380.
- Rihwanto, Y. (2016). Bilateral Investment Treaties dan Penyelesaian Arbitrase Internasional (Studi Kasus Pencabutan Izin Kuasa Pertambangan Churchill Mining). *Lex Renaissance*, 1(1), 119.
- Ryan J. Bubb dan Susan Rose-Ackerman. (2007). BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment. *27 Int'l Rev. L. & Econ*, 291, 3.
- S.P. Subedi. (2008). *International Investment Law Reconciling Policy Principle Oxford and Portland*. Hart Publishing.
- Salam, F. (2007). *Penyelesaian Sengketa Bisnis Secara Nasional dan Internasional*. Mandar Maju.
- Sangwani Patrick Ng'ambi. (2015). Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Agnle of Lucrum Cessans. *Loyola University Chicago International Law Review*, 12(2), 154.
- Sentosa Sembiring. (2010). *Hukum Investasi*. Nuansa Aulia.
- Sidik, R. M. (2023). Problematika Pemberian Perlindungan Investor dalam Perjanjian Investasi Bilateral Indonesia". *Buletin Konstitusi*, 4(1), 4.
- Sinclair, A. C. (2004). The Origins of the Umbrella Clause in the International Law of Investment Protection. *Arbitration International*, 20(4), 412.
- Siti Thali'ah Atina; Eddy Purnama dan Efendi. (2022). Dualisme Hukum Pendirian Perseroan Terbatas Pasca Berlakunya Undang-Undang Cipta Kerja. *Jurnal USM Law Review*, 5(2), 469. <https://doi.org/http://dx.doi.org/10.26623/julr.v5i2.4989>
- Stephan W. Schill. (2010). *International Investment Law and Comparative Public Law*. Oxford University Press.
- Sutiyoso, B. (2006). Penyelesaian Sengketa Bisnis: Solusi dan Antisipasi bagi Peminat Bisnis dalam Mengadapi Sengketa Kini dan Mendatang. In *Cetakan I* (p. 206). Citra Media.
- The ICSID Caseload Statistics-Issue 2022*. (2022). International Center for Settlement Investment Disputes. <https://icsid.worldbank.org/news-and-events/communiques/icsid-releases-2022-caseload-statistics#:~:text=Overall%2C women accounted for 23,women and 68%25 were men.>
- Undang-Undang Nomor 25 Tahun 2007 tentang Penanaman Modal.
- Undang-Undang Nomor 4 Tahun 2009 tentang Pertambangan Mineral dan Batubara.
- W. Shan. (2007). Is Calvo Dead? *The American Journal of Comparative Law*, 55(1), 126.