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ARBITRATION DISPUTE RESOLUTION MECHANISM IN FOREIGN INVESTMENT BASED ON INTERNATIONAL TRADE LAW

Yunita Novia Sari

Universitas Labuan Batu Sumatera Utara

Corresponding Author: yunitanoviash@gmail.com

ABSTRACT

Settling foreign investment disputes in Indonesia, in the context of increasing economic globalization, requires mechanisms that comply with applicable regulations to avoid inequalities between regulations for the disputing parties. Using a normative juridical approach and contextual methods, this study aims to understand the forms of foreign investment dispute resolution, including deliberation, Alternative Dispute Resolution (APS), litigation, and arbitration. The results indicate that arbitration is the primary option for resolving foreign investment disputes in Indonesia, due to the existence of specialized arbitration institutions such as BANI, ICSID, and UNCITRAL, as well as the recognition and enforcement of international arbitral awards that can be executed in other countries. This study concludes that arbitration is an effective and efficient dispute resolution mechanism for resolving foreign investment disputes in Indonesia.

Keywords: Arbitration, Foreign Investment, International Trade Law.

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A. INTRODUCTION

Foreign investment plays a significant role in economic growth. Foreign investment provides a source of external funds and expertise that enrich, build, and strengthen domestic economic development capacity. Foreign investment creates long-term links with the global economy. With appropriate policies, foreign direct investment can provide economic benefits to both host countries and investors. In other words, foreign direct investment can encourage the transfer of technology and expertise between countries. Recipient countries also gain the opportunity to promote their products globally.[1]

Many countries believe in the importance of foreign investment in driving their economic development. Indonesia is no exception. Investment Law No. 25 of 2007 (hereinafter referred to as the Investment Law) emphasizes that investment must be part of the national economic system and positioned as a means to encourage national economic growth, create jobs, improve national technological capabilities and strengths, and must be able to encourage sustainable economic development that is people-oriented and achieves highly competitive socio-economic well-being.[2]

The need for many countries to advance their economies, coupled with globalization and liberalization, has united the interests of various parties into specific investment groups. Shared needs, mutual give and take, give rise to transactions between countries that involve cooperation. Typically, such cooperation is based on agreement. The same is true for investment. There are always risks involved, which can give rise to problems or even disputes, which require resolution through agreement.[3] In this context, harmonization of legal regulations, including legislation, with international legal principles, in addition to national law, is necessary. This harmonization is crucial because it will significantly impact the national legal system. By integrating international legal principles into national law, we can improve the effectiveness of resolving foreign investment cases and strengthen foreign investor confidence in Indonesia.

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[1] OECD, "OECD Benchmark Definition of Foreign Direct Investment."Fourth Edition,2008, hlm. 14, http://www. oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf (diakses 13 Februari 2018).

[2] See Undang-Undang Nomor 25 Tahun 2007 tentang Penanaman Modal. Indonesia, Undang-Undang Penanaman Modal, UU No. 25 Tahun 2007, LN No. 67, TLN No. 4724, Alinea Kedua Penjelasan Umum.

[3] Sornarajah, M.,The International Law on Foreign Investments, Third Edition (Cambridge: Cambridge University Press, 2010).

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Foreign investment plays a role in supplementing capital and technology to enhance economic strength. However, to achieve true economic independence, Indonesia needs to develop the capabilities and skills of its own people. This can be achieved through cooperation with foreign parties, as previously stipulated in Law No. 25 of 2007. This cooperation involves foreign entities and takes the form of an international agreement governed by Private International Law (IPL). This agreement is crucial because it guarantees legal certainty for both parties and facilitates foreign investment in Indonesia.

In foreign investment agreements, all parties strive to avoid losses. Therefore, vigilance and prevention of negative consequences are a shared responsibility between investors and national parties. Therefore, it is crucial to agree on clear and definitive dispute resolution procedures before signing the agreement, including a clear and agreed-upon legal framework for all parties.[4]

The Investment Law offers three dispute resolution methods: consensus resolution, arbitration or alternative dispute resolution, and litigation. In foreign investment disputes involving a state and a foreign investor, this law adopts a mutually agreed-upon international arbitration mechanism. However, dispute resolution through arbitration can also be achieved through a Bilateral Investment Treaty (PBI) between Indonesia and another country, which is an important instrument for resolving foreign investment disputes.[5]

Indonesia has signed 26 Bilateral Investment Treaties (BITs). All of these BITs include provisions for dispute resolution through arbitration, with the majority referring to the ICSID mechanism. Several other BITs also utilize International Chamber of Commerce (ICC) arbitration or ad hoc arbitration under UNCITRAL procedures.[6] Indonesia demonstrates its commitment to the international investment legal regime through provisions in the Foreign Investment Law and Bilateral Investment Treaties (BITs), and this also includes the settlement of investment disputes between countries and foreign investors. According to Law No. 25 of 2007, foreign investment is defined as any

[4] WIDANARTI, HERNI. "PENYELESAIAN SENGKETA DALAM PENANAMAN MODAL ASING MELALUI BADAN ARBRITASE INTERNASIONAL." (1996).
[5] Indonesia, Undang-Undang Penanaman Modal, Ps. 32.
[6] UNCTAD, "International Investment Agreements Navigator. Indonesia. Bilateral Investment Treaty," Investment Policy Hub,http://investmentpolicyhub.unctad.org/IIA/CountryBits/97, (diakses 9 Maret 2018).

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investment activity carried out by foreign investors in Indonesia, either individually or in collaboration with domestic or international investors.[7]

Foreign investment regulations in Indonesia are governed by a number of complex and layered regulations. Some relevant implementing regulations include:

1. Government Regulation No. 45 of 2008 concerning Guidelines for the Provision of Investment Incentives and Facilitation in Various Regions;
2. Presidential Regulation No. 27 of 2009 concerning One-Stop Integrated Services in the Investment Sector;
3. Regulation of the Chairman of the Investment Coordinating Board No. 12 of 2009 concerning Guidelines and Procedures for Investment; and other regulations.[8]

Based on Article 32 of Law Number 25 of 2007, investment disputes between the government and investors are resolved through deliberation to reach a consensus. If no agreement is reached, the dispute can be resolved through arbitration, other alternative dispute resolution methods, or litigation in accordance with applicable laws and regulations. Disputes between the government and domestic investors can be resolved through non-litigation arbitration based on mutual agreement. If no agreement is reached, the dispute will be resolved through the courts. Meanwhile, disputes between the government and foreign investors are resolved through international arbitration agreed to by both parties.

In investment contracts with a state or government, investors are considered legal subjects subject to international law. However, as private parties, investors do not have full status as subjects of international law and must comply with the choice of law agreed upon in the contract. Investment disputes between local governments and foreign investors often arise from violations of international investment contract clauses. Individual investors tend to choose resolution through local law, but some feel that local law does not provide adequate protection and prefer international law. In international dispute resolution, several options are available, such as negotiation, consolidation, or

[7] Prof. Erman Rajagukguk, S.H, LL.M., Ph.D, Hukum Investasi Penanaman Modal Asing (PMA) dan Penanaman Modal Dalam Negeri (PMDN), (Depok : Rajawali Pers, 2019), Hlm : 91

[8] David Kairupan, S.H., LL.M, Aspek Hukum Penanaman Modal Asing di Indonesia, (Jakarta : Kencana, 2013), hlm 14-15

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arbitration. Negotiation is the basic method, while consolidation or arbitration is more appropriate for complex cases.[9]

In this research, the author focuses on two main aspects, formulated in two problems. First, it is about the mechanism for resolving foreign investment arbitration disputes under international trade law. Secondly is which principles of international law underlying the arbitration process in protecting investors?

B. DISCUSSION

1. Foreign Investment Dispute Settlement Mechanisms Based on International Law

Arbitration dispute resolution is a dispute resolution process conducted by a single arbitrator or a panel of arbitrators, either through national, international, permanent, or temporary (ad hoc) arbitration institutions. The institution's task is to examine and make decisions to resolve the dispute.[10] Arbitration is often chosen as a dispute resolution method, especially for foreign parties involved in agreements, for several reasons. First, unfamiliarity with another country's legal system makes arbitration more attractive. Second, doubts about the objectivity of local courts in handling cases involving foreign elements are also a factor. Third, skepticism about the quality and capability of developing country courts in handling international cases also plays a role. Finally, the perception that dispute resolution through formal judicial channels is quite time-consuming is a reason why arbitration is preferred.[11] International arbitration, whether ACSID, ICC, or UNCITRAL, has rules that align with national law.

The dispute resolution process by ICSID, UNCITRAL, and ICC arbitral tribunals is similar to court procedures, but with several significant differences. Awards rendered by ICSID and UNCITRAL are final and binding, unlike court decisions, which can be appealed to a higher level.

Meanwhile, ICC arbitration offers an efficient and cost-effective dispute resolution method for commercial transactions. The ICC Arbitration Court is guided by

[9] Dr. Mas Rahmah, S.H., M.H., LL.M Hukum Investasi. (Jakarta Timur: Kencana, 2020), Hlm. 169

[10] Abdurrasyid, Priyatna, Arbitrase dan Alternatif Penyelesaian Sengketa (APS)(Jakarta: Fikahati Aneska, 2011).

[11] Erman Rajagukguk, "Keputusan Arbitrase Asing mulai dapat dilaksanakan di Indonesia", Suara Pembaharuan, 7 Juni 1990, hlm. 11, sebagaimana dikutip M. Yahya Harahap, Arbitrase, Edisi Kedua (Jakarta: Sinar Grafika, 2006) hlm. 4

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its 35-article Arbitration Rules, with the aim of resolving international business disputes in the best interests of the parties involved. The stages of the arbitration process are:

1. Filing an Application: The parties file an international trade dispute application with the court secretariat through the national commission. The application must include information about the parties, a statement of the dispute, relevant agreements, and the choice of arbitrator.
2. Notification: The Secretariat notifies the request to the national commission and sets the time for the arbitration hearing.
3. Document Delivery: The Secretariat sends a copy of the application and related documentation to the requested party to promptly provide a response.
4. Defendant's Response: The defendant has 30 days to provide comments or opinions on the proposed number and choice of arbitrators, and to submit reasons and defenses supported by relevant documents.
5. Prosecutor's Response: After receiving the defendant's response, the prosecutor is given 30 days to submit a response to the secretariat.
6. Arbitration Hearing Process:
   a. Arbitrator's Authority:
   b. The arbitrator may summon and hear from the parties involved, even if they are not present at the hearing.
   c. The arbitrator may appoint experts, determine the terms, and receive reports.
   d. The arbitrator has the power to decide the case and continue the arbitration process if one of the parties is not present.
   e. The arbitrator determines the language to be used in the hearing.
   f. Arrangement of the Hearing:
7. The arbitrator has full authority to organize the hearing and limit the attendance of unrelated persons.
8. Duration of the Award:
9. The arbitration award must be issued within 6 months after all requirements are met.
10. Nature of the Award:

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11. The arbitration award is final and binding on all parties. This award has permanent legal force and cannot be challenged through any legal procedure.[12]

Parties choose arbitration because the process is fast, confidential, and handled by a professional arbitrator or referee who can resolve disputes fairly and impartially. Priyatna Abdurrasyid provides several compelling reasons for choosing arbitration:

a. The advantage of arbitration is that the parties can choose an arbitrator they trust, who possesses the following qualities:
   - Integrity
   - Honesty
   - Expertise
   - Expertise in their field.

   These arbitrators are independent and do not represent either party, thus rendering a fair and impartial decision. They are also not legal advisors to the parties, so they can provide a neutral and objective perspective;

b. One of the advantages of arbitration is its confidential nature:
   - Maintaining the confidentiality of sensitive information
   - Avoiding unwanted publicity
   - Protecting the reputations of the parties involved

c. Arbitration can be an appropriate option for parties who wish to resolve disputes privately and do not want the dispute to become public, thus preserving their reputations and the confidentiality of sensitive information;

d. Arbitration decisions have several advantages, namely:
   - Final: The arbitration decision cannot be challenged.
   - Binding: The disputing parties must accept and implement the arbitration decision.

   This differs from court decisions, which can go through a lengthy appeal and review process. Therefore, arbitration decisions can provide legal certainty more quickly and effectively.

e. Because the decision is final and legally binding, this process takes less time and is much less expensive than litigation.

[12] Cicut Sutiarso, Pelaksanaan Putusan Arbritase dalam Sengketa Bisnis, (Jakarta: Yayasan Pustaka Obor Indonesia, 2011), Hlm : 129-134

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f. The arbitration process is more informal than the court process and is therefore more likely to seek and reach an amicable settlement, providing ample opportunity for the parties to continue their commercial relationship after the dispute resolution process is completed.[13]

2. Principles of International Law Underlying the Arbitration Process in Protecting Investors

There are three types of international investment treaties: bilateral, multilateral, and regional. A bilateral treaty, also known as a bilateral investment treaty, is an agreement between two countries to promote and protect each other's investments, with the aim of creating a conducive investment environment for companies operating in both countries.[14]

The general understanding and definition of a bilateral investment treaty (BIT) as an international agreement is basically in line with the rules and principles of international treaty law as stipulated in the Vienna Convention on the Law of Treaties. Article 2 paragraph 1 of the Convention defines an agreement as follows: "An international agreement concluded between States in written form and governed by international law, whether its contents are contained in a single instrument or in two or more related instruments, and regardless of its specific designation." [15]

Bilateral investment treaties (BITs) aim to build good international relations and provide benefits to the parties involved. Peter Muchlinski argues that a BIT is a binding international agreement between two countries in which each country commits to comply with the standards of treatment set out in the agreement in its relations with the other party's investors. The main elements of a BIT include: involving two countries, being mutually beneficial, and establishing standards of treatment for investors from the country concerned.

[13] Dalam hal ini Indonesia memiliki Badan Arbitrase Nasional Indonesia (BANI), dapat dikunjungi melalui laman www.bani-arb.org; Lembaga-lembaga arbitrase lainnya antara lain International Chamber of Commerce (ICC) dengan laman www.iccwbo.org; London Court of International Arbitration (LCIA), www.lcia-arbitration.com, Singapore International Arbitration Center (SIAC), www.siac.org.sg, serta International Center for the Settlement of Investment Dispute (ICSID) yang didirikan oleh Bank Dunia berdasarkan Konvensi ICSID (Convention on the Settlement of Investment Dispute between States and Nationals of Other States).

[14] Salviana,Fries Melia. (2018). Kepastian Hukum Penerapan Bilateral Investment Treaty dalam Pelaksanaan Investasi di Indonesia. Perspektif, 23(3), 184–191.

[15] Ian, Brownlie. (1998). Oxford: Clarendon Press.

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Bilateral Investment Treaties (BITs) have become an important instrument in regulating foreign investment relations, with the aim of enabling and protecting foreign investment. BITs define the scope and definition of foreign investment, including the investors and investments covered by the treaty, thereby providing legal certainty for foreign investors. Bilateral Investment Treaties (BITs) are based on six core principles, namely:

1. National treatment and most-favored-nation treatment, including the absence of restrictions on labor recruitment, imports and exports, and fair treatment.
2. Fair and equitable treatment, including non-arbitrary treatment by authorities and security forces.
3. Protection of investments from expropriation without compensation, war and civil unrest, as well as protection in currency transfers, and adherence to the principle of non-discrimination.
4. Absence of unfair or inequitable treatment, and adherence to the principle of transparency.
5. Establishment of a regulatory-based investment system, prevention of corruption, and due process of law.
6. The existence of a dispute resolution procedure between investors and states is a key feature of BITs.[16]

More detailed provisions regarding the six principles of the Bilateral Investment Treaty are as follows:

1. Principle of Non-Discrimination

   The Principle of Non-Discrimination is one of the important principles in International Trade Agreements, such as the WTO. This principle aims to avoid discriminatory treatment of foreign products or investors. According to Andrew D. Mitchell, the principle of non-discrimination consists of two main principles:

   - National Treatment (NT): no discrimination against foreign products compared to domestic products.

[16] Pratiwi, Dwi Resti. (2020). Analisis Faktor Determinasi Penanaman Modal Asing (Pma) Langsung Di Asean. Jurnal Budget: Isu Dan Masalah Keuangan Negara, 5(1), 47–66.

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- Most Favored Nation (MFN): no discrimination between products from WTO member countries, and no preferential treatment for products from any particular country.

2. Principle of National Treatment

   The principle of national treatment requires host countries to provide non-discriminatory treatment to foreign investors, ensuring there is no difference in treatment between:

   - national citizens and foreign nationals
   - domestic products and foreign products
   - domestic investors and foreign investors

   According to the United Nations Conference on Trade and Development (UNCTAD), the principle of national treatment aims to create equal conditions of competition between domestic and foreign investors by granting foreign investors at least the same preferential treatment as domestic investors in similar circumstances. UNCTAD defines the principle of national treatment as: "*The principle that a host country accords treatment to foreign investors that is at least as favorable as that accorded to domestic investors in similar circumstances. The national treatment standard is intended to ensure a certain degree of competitive equality between domestic and foreign investors…*"[17]

3. The Most Favored Nation Principle

   The Most Favored Nation (MFN) principle aims to guarantee protection for foreign investors from discriminatory treatment by the host country. This principle also provides equal opportunities for all foreign investors, regardless of their country of origin.

   By implementing the MFN principle, foreign investors from countries bound by a Bilateral Investment Treaty (BIT) will receive the same best treatment as investors from other countries. This helps create equality and fairness in the treatment of foreign investors.

[17] Kusnowibowo, RSAS. (2021). Buku Hukum Investasi Internasional. Pustaka Reka Cipta.

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4. Fair and Equitable Treatment

   The principle of fair and equitable treatment (FET) is an important principle in international law that requires host countries to provide fair and equitable treatment to foreign investors. This principle aims to:

   - Encourage foreign investment
   - Provide reciprocal investment protection
   - Protect investors based on the principles of fairness and equality.

5. Principle of Protection and Security

   The Principle of Protection and Security requires host countries to protect the assets and wealth of foreign investors from threats and interference, including:

   - Protecting the physical integrity of investments
   - Preventing intervention involving the use of force
   - Halting or inhibiting activities that could threaten the continuity and security of investments.

6. Transfer of Funds

   Transfer of funds is a crucial provision in investment agreements because it involves the repatriation of investment profits. This provision influences the host country's attractiveness to investors.

   Some important aspects of fund transfers include:

   - Currency type
   - Exchange rate
   - Transfer time

   In bilateral investment treaties (BITs), fund transfer provisions can vary, for example:

   - Transfers in any currency
   - Restricted transfers
   - Transfers only in currencies regulated by international monetary institutions

   Clear and transparent fund transfer provisions can increase investor confidence and encourage investment.[18]

[18] Darajati, Muhammad Rafi. (2020). Pengaturan Hukum di Indonesia Terkait ASEAN Comprehensive Investment Agreement Dalam Rangka Menghadapi ASEAN Economic Community. Riau Law Journal, 4(1), 1–22.

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7. Dispute Settlement

Dispute settlement clauses in Bilateral Investment Treaties (BITs) ensure effective and efficient dispute resolution. These clauses cover two types of disputes:

1. Disputes between investors and states (Investor-State Disputes)
2. Disputes between states (State-State Disputes)

The existence of dispute settlement clauses provides investors with the opportunity to defend their rights and enhance certainty in the business environment. These clauses also demonstrate the commitment of participating states to comply with their obligations under the BIT, thereby enhancing investor confidence.

a. *Investor –State Disputes Settlement* (ISDS)

International arbitration under bilateral investment treaties (BITs) is typically conducted through the International Centre for Settlement of Disputes (ICSID). ICSID is an international commercial arbitration institution established under the 1965 Washington Convention. Some BITs also provide for other institutional options, such as the International Chamber of Commerce (ICC) and the United Nations Commission on International Trade Law (UNCITRAL). Indonesia has ratified the 1965 Washington Convention through Law No. 5 of 1968 concerning the Settlement of Investment Disputes between States and Foreign Nationals.

b. *State –State Dispute Settlement* (SSDS)

The Inter-State Dispute Settlement Mechanism (SSDS) involves the home country and the host country, and foreign investors cannot file lawsuits directly against the host country but must instead proceed through the host country itself, acting as the legal subject.

c. In Indonesia, bilateral investment treaties (BITs) are called investment promotion and protection agreements (P4M) and are regulated by Investment Law No. 25 of 2007 (UUPM). Provisions governing foreign investment include:

1) Definition of foreign investment, investors, and capital (Article 1)
2) Principles and objectives of investment (Article 3)
3) Basic investment policies (Article 4)

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4) Forms of investment businesses (Article 5)
5) Investment treatment (Article 6)
6) Protection against nationalization and expropriation (Article 7)
7) Free transfer of assets (Article 8)
8) Legal responsibilities of investors (Article 9)
9) Employment of foreign labor (Article 10)
10) Settlement of labor-management disputes (Article 11)
11) Investment business fields (Article 12)
12) Rights, obligations, and responsibilities of investors (Articles 15 to 17)
13) Investment facilitation (Articles 18 to 24)
14) Settlement Disputes (Article 32)
15) Sanctions (Articles 33 to 34)

These provisions provide a clear legal framework for foreign investment in Indonesia.

C. CONCLUSION

International arbitration is a common dispute resolution mechanism used by parties. Therefore, it is important to improve understanding and mastery of arbitration by considering applicable international provisions. Domestic compliance with recognized international rules must be consistently demonstrated to build confidence in the domestic legal system.

Bilateral investment treaties (BITs) can boost a country's economy by incorporating protection clauses, including certainty in dispute resolution. In this context, courts should consider provisions on the recognition of international arbitral awards when reviewing challenges to foreign arbitral awards, while maintaining public interest. Therefore, BITs can be an effective tool for enhancing legal and economic certainty.

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