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JURIDICAL REVIEW OF GLOBAL TRENDS RESTRUCTURING THE BILATERAL INVESTMENT TREATY MODEL IN THE POINT OF VIEW OF THE INDONESIAN LEGAL SYSTEM

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Abstract: The economic growth of a country is inseparable from the economic system adopted by the country, not only that tactical and targeted steps are also important in increasing economic growth in a country, therefore in international associations, collaboration between countries is needed, with various forms, along with the times, treaty models and collaboration models, one of which is bilateral investment agreements. The purpose of this study is to find out what is the qualification of the Bilateral Investment Treaty itself, and how is the application of the Bilateral Investment Treaty between countries carried out by Indonesia. The research method used in this study is a normative juridical method, which prioritizes secondary data, such as legal rules, books and legal journals, both online and offline. The restructuring of this bilateral investment treaty is the key to the success of collaborative relations between States, this creates a stigma that large countries can no longer depend on clauses that are not in accordance with the times, or are no longer relevant to the current situation. This is a good momentum because relations between countries are no longer biased when making a treaty, but as the name implies, international agreements between two countries at this time can be truly bilateral, fair and agreed to find solutions that benefit both parties.

Keywords: Agreement, Bilateral, State

I. INTRODUCTION

The development of the world economy makes many countries inevitably have to cooperate with other countries to meet their needs, one of which is cooperation in the field of investment. National interest is abstract and dynamic but is considered important in the implementation of investment activities. The basis underlying the argument is that the parameters and definitions are diverse or uncertain. Every country strives to protect and defend national interests in terms of foreign investment so as to spur national economic development, especially in bilateral investment treaties (BIT). BIT is an instrument of protection of national interests that ensures legal certainty and limits judges' interpretation of a dispute. National interest can be found in the main clauses of BIT, namely Most Favored Nation, National Treatment, Fair and Equitable Treatment. The three clauses are considered to have not provided balanced protection between foreign investors and domestic investors, adversely affect the national interests of the host country and limit a country's regulatory space or policy space to regulate its own investment activities. This is in accordance with dependency theory which views foreign investment as a threat to the host country. In line with this, BIT can be legally terminated based on fundamental changes of circumtances if it does not commit a breach of treaty and can be replaced by a new BIT model. This paper examines the form of protection of national interests in foreign investment and the choice of adjusting the main clauses of BITs so as to provide protection for national interests.

Philosophically, this BIT is a manifestation of the will of the parties, namely each State bound by a treaty, to jointly benefit. Philosophically BIT is also inseparable from the circumstances of each country, where if the country does not receive / invest, then the country's economy can be left behind by other countries, simply this BIT is one of the tools for a country to survive in world economic policy and not sink as a country that cannot keep up with developments. Then when looking at legal theory, legal theory itself is built on implicit theories of authority. Much attention and controversy surrounding contemporary legal science has caused a crisis of authority and shaken public institutions. The lack of public trust in the law is a criticism that shows the inadequacy of the law as a tool of change and as a tool to achieve substantive justice. In responsive law enforcement, law enforcement is not only based on formal law, where the law is enforced only based on rules and the law is only enforced as a guard from every violation or formatted to prevent every violation, but the law must be more progressive that is, the law must be seen from the side of community justice. So that when the law is enforced, the sense of justice will really be felt by the community. Based on the introduction, there are two identification that requires an answer, the first one is what is the qualification of the Bilateral Investment Treaty itself, and how is the application of the Bilateral Investment Treaty between countries carried out by Indonesia.

II. RESEARCH METHOD

The method used in this research is a normative approach, especially an approach implemented through legal regulations. The research stage is carried out by analyzing legal studies which include basic legal materials, especially laws and other regulations. In addition, legal materials are obtained through studying the opinions of experts in the legal field, and other legal materials obtained through dictionaries, encyclopedias and other sources. The data analysis method is carried out according to the qualitative normative method, namely analyzing the legal norms discussed without using statistical calculations and formulas.

III. DISCUSSION

According to Satjipto Rahardjo, progressive law enforcement is carrying out the law not just black-and-white words from regulations (according to the letter), but according to the spirit and deeper meaning (to very meaning) of the law or law. Law enforcement is not only

intellectual intelligence, but rather spiritual intelligence. In other words, law enforcement is carried out with determination, empathy, dedication, commitment to the suffering of the nation and accompanied by the courage to find another way than usual (Rahardjo, 2009).

Bilateral Investment Treaty is an agreement that is currently often used by the government of the Republic of Indonesia as a means to find investors and as legal protection for business actors who make investment agreements, however, it turns out that the Bilateral Investment Treaty is also widely used as the basis for lawsuits by business actors to the government of the Republic of Indonesia, including the case of Churchill Mining which filed a lawsuit with the provincial government East Kutai or a lawsuit by PT. Newmont Nusa Tenggara is related to the issuance of government policy regarding the imposition of tin seed export duties. So it is necessary to know about the Legal Characteristics of the Bilateral Investment Treaty and the application of the principle of legal certainty in the application of the Bilateral Investment Treaty in Indonesia., in this writing it is known that the BIT is an international agreement carried out by two countries and binds both. The content of the agreement in the BIT falls within the scope of investment that is legally binding to both parties through ratification or ratification. However, what is special about BIT is that there are legal consequences for business actors between the two countries who conduct BIT to express the contents of the BIT agreement in the agreement made between them, and can be used as the basis for a lawsuit when one party does not implement the contents of the BIT. BIT can also be used as a medium for promotion and choosing a means of dispute resolution.

The BIT is in fact very flexible, this can be seen from the several restructurings of the BIT by Indonesia against the Netherlands and vice versa, meaning that along with the development of the business world, the substance of the BIT is open to change as long as agreed by both parties. Even when a dispute occurs, dispute resolution is also provided by arbitration. Investor-State Dispute Settlement (ISDS) is a dispute settlement mechanism between investors and host states due to a violation of International Investment Law. Based on UNCTAD data, the reasons that are often raised in ISDS lawsuits generally include four problems, namely Most Favoured Nations, National Treatment, Non Exproriation, and Fair and Equitable Treatment. However, investment dispute resolution arrangements with ISDS mechanisms are considered more favorable to investors than to host states because most IIAs allow ISDS to be filed by investors, and in practice investors are the only claimants allowed. The imbalance of the position of the parties in the ISDS mechanism provides counter-claim thinking as an effort to balance the position of investors and host states in the ISDS mechanism. In addition, the importance of counter-claiim in the ISDS mechanism is partly because there are no uniform rules regarding counter-claims, counter-claims allow respondents to seek justice in the same forum so that it is more efficient. As well as for host states, counter-claims can be used to clean up the reputation of host states for lawsuits filed by investors. This study examines counterclaim clauses that can be adopted in BIT Indonesia so as to balance the position of parties in the ISDS mechanism, especially Indonesia as the host state. The legal research used is a conceptual approach (conceptual approach), a statutory approach (statute approach), and a case approach (case approach) in discussing counterclaims in the ISDS mechanism and in analyzing the formulation of counterclaim clauses that can be adopted in the Indonesian Bilateral Investment Treaty (BIT) (Nasution, 2019).

The signing of the ICSID Convention in 1965 became a new beginning for the investment regime, especially in making rules on world investment (IIA). This convention became a major part in the birth of ISDS. The BIT between Indonesia and the Netherlands signed in 1968 was the first BIT to include ISDS provisions in it. In the 1990s to 2007, the number of signed BITs spiked (particularly in Asia). At the same time, IIA rulemaking in the regional and multilateral scope is also numerous and increasing in this era. The birth of the

WTO with its various approvals including those relating to foreign investment (GATS, TRIMs, TRIPs) and the Energy Charter Treaty in 1994 became the first milestone of the birth of investment rules in the multilateral sphere. On a regional scale, the North American Free Trade Area (NAFTA, 1992) and the APEC Non-Binding Investment Principles (1994) were also signed and adopted by many countries at that time. Although in recent years there have been many initiatives, both from the WTO and OECD to make multilateral investment agreements, BIT is still popularized. The latest UNCTAD data states that at the end of February 2016, as many as 3,280 IIAs (International Investment Agreements) have been signed, almost 2,930 of which are BITs and more than 350 others are other IIAs. Despite the sheer number of BITS that have been created, the fact that many BITS have been discontinued or are being renegotiated cannot be ruled out. In the era of reorientation (2008 until now), the country's tendency towards making IIA, including BIT, actually began to decline. Countries began to sift through the content of such investment treaties.

Governments of many countries are beginning to enter into the phase of evaluating the costs and benefits of IIA. As a result, various countries began to think about reforming the IIA by revising and renegotiating the existing BIT. This is done with the aim of creating a new generation of IIA. Others have also announced a moratorium on future IIA negotiations, and some have even voted to terminate existing IIAs, including BITs. Some countries have also voted to withdraw from the ICSID. In general, it can be concluded that a BIT can provide investors with a certain minimum protection for their investments in the host state. If the host country violates the substantive provisions regarding protection that harm the investor, then the investor can sue the country where the investment is located. Usually, the objectives of the BIT are stated in the preamble or preface words, which refer to the desire to intensify economic cooperation between contracting countries and the recognition of the fact that encouraging and protecting investments will stimulate the protection of this economy (UNCTAD, 2016).

There are many controversies and debates whether BITs have been meeting their objectives, and to what extent they actually contribute to attracting foreign investment. BITs have not been generally entered between developed countries, since their established legal systems protect private initiative and do not discriminate against foreign investors. Typical examples of BITs are between developed and developing countries. Developing states may have various reasons to limit their exposure to BIT claims and should be cautious when negotiating BITs. However, a number of developing countries have failed to realize how risky BITs can be and entered into the texts as proposed by the developed countries (Cambridge University Press, 2015).

While almost all states are engaged in the international investment protection structure through their BITs, an increasing number of states are not satisfied with the current regime. In the last several years there has been a movement to revise and even terminate BITs in many parts of the world, due to a number of arbitration awards by the arbitration tribunals against the host states; in a number of cases arbitration tribunals treated sovereign regulatory measures of host states as breaches of BITs. Some of these awards imposed on the host states large amounts of damages (Yukos, 2014). One of the reasons for successful claims against host states has been the vague and broad language of BITs, such as a broad interpretation of FET standard in combination with the concept of legitimate expectation. BITs have been criticized for their alleged failure to allow countries to address their public policy concerns. A number of countries have made efforts to address these concerns by revising their BITs or renegotiating with their counterparts. As a result, there is a tendency towards drafting a new generation of BITs negotiated during the past several years. New treaties attempt to preserve sufficient policy power and regulatory flexibility for host states to pursue public welfare. New generation of BITs provides expressly for such authority of the host states, which

substantially reduces the risk of claims asserting indirect expropriation. This is a part of the trend that switches the basis of claims against host states from sole effects doctrine towards police power doctrine. A number of related issues have been given new contents, such as the issues related to protection of health and environment. Particular attention was given to the ISDS, in attempt to reduce the impact of BITs on sovereignty of the host states. There are various approaches that include termination of BITs, making decision not to enter into BITs in future, abandoning the ISDS mechanism, revision of BITs to incorporate public policy concerns, renegotiation, entering into new treaties without arbitration clauses; etc (Pejovic).

In the previous sub-discussion, it has been explained how Indonesia has implemented its BIT with the Netherlands in good faith, and it has also been explained how Indonesia in stopping the BIT has followed the provisions contained in the agreement in question, that Indonesia does not violate the principle of pacta sunt servanda as the most important and fundamental principle in the implementation of an international agreement where this principle is included in the Preamble to the 1969 Vienna Convention alenia 3 and Article 26. The fact that Indonesia terminated the agreement in accordance with the termination clause contained in the agreement shows how Indonesia respected the agreement and this is also shown by the absence of objections raised by the Dutch side regarding this termination, which means that Indonesia obtained Dutch approval to terminate this agreement. Regarding the reason for Indonesia to terminate the agreement in the name of national interests, this is certainly not justified in international treaty law. The Vienna Convention expressly prohibits the use of national law or reasons of national interest as an excuse for not implementing an agreement that has been mutually agreed upon by the parties, in this case Indonesia and the Netherlands (Suhaidi, dkk, 2017).

IV. CONCLUSION

The conclusion is that Indonesia's restructuring of countries that hold BIT with Indonesia is very likely, it is based on the common will of both parties, meaning that both Indonesia and other countries that sign BIT with Indonesia do not object that their BIT will be renewed. According to the author, this makes the impression of fairness in international legal relations through a BIT treaty between two States clear. Win – win solution is clearly visible in this process, that is, rather than forcing the BIT agreement that is not up to date, it is better for the country to reform the BIT agreement, by doing this it is not impossible that the benefits obtained by the two countries become many times over. And finally, actually this is not only done by Indonesia, as a country that has BIT agreements with other countries, other countries are also aware that without the renewal of the BIT agreement, and by looking at the reality and the fact that world economic development is very rapid, it is very appropriate if this BIT process adheres to an open principle, because it is connected with the dynamic development of business in the world.

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