BILATERAL INVESTMENT TREATIES (BITS) IN INDONESIA: A PARADIGM SHIFT, ISSUES AND CHALLENGES

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ABSTRACT

This paper examines the announcement by the Indonesian government to terminate its over 60 Bilateral Investment Treaties (BITs) signed with more than 50 countries including Australia, France, Russian Federation and UK among several other developed nations. The announcement echoes the Indonesian government's future strategies in foreign investments and creates a universally accepted investor-state dispute settlement (ISDS) mechanism in Indonesia. It also shows Indonesia's attempt to become a sovereign state and act more domestically in the interest of its own people. This study examines the pros and cons of this decision in order to determine the benefits that this decision would bring to the host state without affecting much the foreign investors. In order to study this paradigm shift in the Indonesian climate of foreign investment, this study adopted a qualitative approach to analyse the conditions that led to termination of BITs and the role played by international arbitration tribunals like ICSID. Evidence collected justifies Indonesia's decision to review its BITs. The implication of this study includes its usefulness in understanding issues and challenges that Indonesia has faced during this period.

Keywords: Foreign Investment, Termination, Tribunal, International Arbitration.

INTRODUCTION

Any government strongly believes that the best means to attract the foreign capital and to avoid the conflicts with foreign investors in international arbitration tribunals is to enter into bilateral Investment Treaties (BITs) with the investor countries. Indonesia also understands this fact and it had signed over sixty BITs with several nations. But recently Indonesia decided to terminate all its BITs in order to review their provisions before renewal. A few investments experts have criticized Indonesia's decision to end all the existing BITs and view this decision as not investor-friendly or perceive Indonesia as nationalistic and being unreasonable to recall or terminate all its BITs in one instance. On the other hand, a few countries have called Indonesian move as "a brave decision" since most of the "western BITs" were aggressive and only protected corporate interests. (Freehills, 2015; Oegroseno, 2014; Price, 2016; McKanzie, 2017) Indonesians, however, do not want this decision to be seen as a nationalistic or a jingoistic attitude but a desire to be fair and honest in dealing with matters (Budidjaja, 2013)

Indonesia had signed bilateral investment treaties (BITs) with 52 states including Australia, Belgium, China, Denmark, Egypt, France, India, Italy, Malaysia, the Netherlands, Syria, Thailand, South Korea, the United Kingdom, Germany, Turkey, Singapore, Russia and many others. Most of the BITs have been in force as of their respective date until the announcement came not to renew these BITs and terminate them to sign each BIT afresh.

Historically speaking, all BITs of Indonesia with developed countries were signed during a time when Indonesia was neither a stable democracy nor a member of G20; a few of them were actually signed during the Cold War; they were signed when China and Korea were not global economic players and Asia had not become a global economic hub and the Indonesian economy was not USD 1.2 trillion That was the time when Indonesia was under the spell of the Dutch-led Intergovernmental Group on Indonesia (IGGI). It was a time when "foreign investment" was same as Western investment (David, 2016). In such a state of affairs, many of the Indonesia's BITs were intended to protect foreign investors' investments in Indonesia and did not provide any protection to the Indonesian investment in the home countries of the investors. In other words, the BITs had no reciprocity; Indonesia was just a one-way street, a place to play, not a player.

In the 21st century, the world economy is changing which has affected the nature of Indonesian economy as well and so has come the Indonesian decision to "terminate" all the BITs and renegotiate most of them. ASEAN has a big promise to establish a regional economic partnership; therefore it was a wise decision to ask most European powers to re-negotiate their treaties and agreements with the developing nations like Indonesia in order to continue their partnership. It was therefore quite rational for Indonesia to end its BITs upon their conclusion. Indonesia was not terminating all BITs unilaterally or illegally; it intends to discontinue the BITs in accordance with their terms agreed upon. Indonesia is thus allowing its bilateral treaties lapse in order to negotiate better ones. After announcing the termination it's BIT with Netherlands (Freehills, 2017), Indonesia has also given notice to Hungary, France, Italy and Singapore among others that BITs with those countries shall not be renewed.

The question that Indonesia now faces is whether it needs a template for a standard BIT or it should negotiate each BIT individually without any consistent approach and without considering its domestic legal system. What Indonesia needs is a BIT template that is compatible to its national interests as well as the international law. It should identify and terminate all unfair investment practices by making strong laws against multinationals or laying provisions of international adjudications to the international tribunals like The International Centre for the Settlement of Investment Disputes (ICSID) or the Investor State Dispute Settlement (ISDS) platforms to report all kinds of unfair trade practices imposed on Indonesia by the developed nations. This study investigates such issues and attempts to understand how this situation evolved at the first place, what led Indonesia to terminate and renegotiate all its existing BITs and what steps Indonesia must take on its domestic grounds as well as internationally to protect its interests.

Bits and International Arbitration Laws

Bilateral Investment Treaty (BIT), as the name indicates, solely governs the investment relationship between two signatory states with the intent to manage investment between the parties (Ruttenberg, 1987). The primary aim of the BITs is to encourage overseas investments, by promising safety to foreign investors. This mitigates the profound worries faced by the developing countries. The worries were mainly due to the fear of confiscation that could possibly deter the investments. Till date, most BITs are formed between two developing countries or between one developed and one developing country (Zachary, 2006).

Actually, BITs initially aimed at defining and monitoring the conduct between states and a manifestation of their sovereign acts in dealing with one another. The general objective assigned to the BITs in the field of investment is for "promoting and protecting" the rights of two

states while one of them exports those investments (Tobin, 2005) and the other would be the host. This was done mainly to mitigate risks to host states. BITs also allow for an alternative dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated could seek recourse to international arbitration, at tribunals like ICSID rather than suing the host state in its own courts. A majority of such types of agreements take place between a developed nation and a state in the path of growth, with the observation that a large number of agreements aim at upgrading and protecting investments in these developing countries. But contrary to most treaties, BITs created direct benefits for individual investors rather than the state at large.

Moreover, the role of International Arbitration is to act as a transnational system and ensure justice to both parties of a BIT. It is often argued whether International arbitration is allowed to remain autonomous and free from the influence of national legal systems of the host country. The International Centre for the Settlement of Investment Disputes (ICSID) was founded in 1966 as an independent, depoliticized and effective dispute-settlement institution with the objective to settle cross-border investment disputes and to act as an international body to monitor the dispute resolution (James and Gump, 2000). It was also created to enhance international investments and create a healthy and harmonious environment between foreign investors and states to enter in their investment endeavours. Since its establishment, ICSID has consistently administered and negotiated several cases of bilateral, international investment disputes. It has also contributed in modelling investment laws and contracts and signing most BITs. Indonesia also signed the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) on 16 February 1968, followed by the issuance of Law No. 5 of 1968 on the Settlement of Investment Disputes between States and Nationals of Other States on 29 June 1968. The ICSID Convention entered into force for Indonesia on 28 October 1968.

ICSID also emphasizes upon states and investors to be governed by norms of International Investment Agreements (IIAs) to be used as norms for signing Bilateral Investment Treaties (BITs). The principal norms of IIAs and BITs are free transfer, nationalization and expropriation, compensation for damages due to war and similar events, settlement of dispute between the investor and the host state, subrogation and promotion and protection of investments which includes a few sub norms such as security, equitable treatment, Most Favoured Nation (MFN) provisions (Rivkin, 2013). The BIT norm of national treatment (NT) or most favoured nation (MFN), for instance, exercises an influence on investors and their "covered investments" (investments in the territory of the other Party) and mandates that each foreign investor or his investment will be treated as favourably as the host Party would treat its own investors and their investments. Thus, this BIT norm ensures national treatment (NT) or most favoured nation (MFN) treatment during the whole life cycle of investment, i.e., from its establishment or acquisition, through its management, operation and expansion, until its disposition. (Rivkin, 2013)

Another norm of the expropriation of investments provides for the payment of prompt, adequate and effective compensation in the event of expropriation. Similarly, the free transfer norm deals with the transferability of funds into and out of the host country without delay according to the market rate of exchange. This obligation is applicable on all transfers including the “covered investments.” There is another norm that puts a limit on the events or circumstances that amount to impose restrictions on performance requirements. Such restrictions are applicable

to such specific circumstances that would force covered investments to resort to inefficient and trade distorting practices by the parties.

There is also a norm that allows investors from both parties the right to opt for international arbitration in the event of any investment dispute with the host government. The norm also removes the requirement to use that country's domestic courts. Last, but not the least, there is a BIT norm which gives covered investments the privilege to hire and utilize the services of any top managerial official of their choice, regardless of nationality.

PROBLEM STATEMENT

Indonesia has commenced a policy of terminating and reviewing a number of its BITs. Till now, Indonesia has terminated its treaties with more than 25 states including France, Germany, Norway, India, Switzerland, Malaysia, Pakistan, Vietnam, Egypt, Argentina and three of her major investors such as the Netherlands, China and Singapore. Indonesia is in the process of terminating all others that are still in force it's not Indonesia alone that has taken this step of renegotiating a BIT. A number of countries with very advanced economies such as Brazil, Argentina, Ecuador, Venezuela, India and Australia have also indicated their choice to renegotiate a number of their BITs.

The Bilateral Investment Treaty (BIT) Model is considered as one of the forms of IIAs (Houde and Small, 2004) and there is a need for each country to examine the compatibility of its domestic laws with BIT norms and in order to address to any investment disputes. Perhaps, Indonesia's decision to terminate all its BITs was due to the growing international dissatisfaction over the way investor-state arbitrations are being executed under BITs. Besides, many nations found it difficult to maintain their sovereign power and authority to regulate their own economies due to the tribunals favouring the contractual agreements with investors and overlooking the domestic interests as well as the sovereignty of the host states.

Hence there is a need to examine the compatibility of Indonesian relevant Arbitration laws with the BIT norms and what role they play in Investor-Indonesia disputes that led to this decision of terminations of BITs.

RESEARCH METHODOLOGY

This study has adopted doctrinal, historical, analytical and comparative research methods to study the legal concepts, laws applied to investor-state disputes and arbitration so as to address to the issues raised in this study. Such a method declares, explains and highlights the active laws in a given field or in the jurisdiction of a country. A library based research is the popular research method of collecting data in legal studies. It is also referred to as arm-chair based research. In this respect, available libraries in Indonesia were optimally utilized. Hence all the tools of library research have been used as sources of data collection to carry out this study including published law reports; special volumes of journals; articles and books; legislations and any other relevant information from online databases.

LITERATURE REVIEW

Salacuse and Nicholas, (2005) opine that investor's care is a great concern of BIT protection. In accordance with their model, a developing country that enters into a BIT with a developed nation such as the US, for instance, can expect its FDI rising up to worth US dollar

one billion per annum. On the other hand, widely circulated studies of Dreimer, Tobin and Ackerman, report that BIT's do not have any positive impact on FDI (Egger and Michael, 2004). Zachary, (2006) too argue that the objective of giving protection to foreign investors hails from developed countries, but at the expense of the host state. Underneath BITs, the authors argue, foreign investors enjoy completely different rights, including the right to compensation in case the investment is taken to arbitration, the right to favourable provisions, the right to protection and security and also the foreign investor's right to transfer capital and profits from one country to another.

A trend was seen in commitments made by the host governments (Simmons, 2014) in Bilateral Investment Treaties (BITs) that allow more legal guarantees and privileges for foreign investors. This leads to an assumption that by granting such ample legal protection to foreign investors, the host government might narrow down the role of the state in regulating foreign enterprises in the country and thus take away the powers of the domestic courts to investigate any claims of encroachments that may be committed by foreign investors in Indonesia (Zayed and Heba, 2013). Likewise, Gantz (2003) did not assert that under the BITs, foreign financial specialists are guaranteed sundry rights, including those who are not compelled to pay one side of payment nor have the fear of confiscation of their assets. This is ideal for foreign investors to expect favourable procurements and to move capital from one nation to another.

Most BITs also promise to accommodate procedural rights which qualify foreign financial specialists to sue the host state without looking for earlier assent from their home administration (Gantz, 2003). Consequently, foreign speculators can procure locus stand to be subjects of worldwide law for purposes of venture mediation alone. This is verbalized to be the weightiest development brought by BITs, according to the author. Last but not the least, most of these BITs contains clauses that result in disputes that are submitted to the ICSID for proper settlement. It is true that all the BITs that had been signed by the Government of Indonesia contained terms imposing the settlement of disputes through International arbitration mechanism such as the ICSID. In the absence of non-involvement of the domestic courts or the Indonesian National Arbitration Law (BANI), the foreign investment entities enjoyed the liberty to skip the local courts and resort to Investor-State dispute settlement (ISDS) provided under the terms of BITs and approach tribunals such as ICSID. An instance can be cited of the Churchill Mining PLC case.

Churchill Mining PLC and Planet Mining Pty Ltd (Claimants) vs. the Republic of Indonesia

A major investment arbitration case involving Indonesia is *Churchill Mining PLC and Planet Mining Pty Ltd (Claimants) vs. the Republic of Indonesia* (ICSID Cases No's ARB/12/14 and 12/40). This dispute is related to the revocation of mining business licenses of PT Ridlatama Tambang Mineral, PT Ridlatama Trade Power, PT Investama Resource and PT Investama Nusa Persada by the Kutai Timur Regent. The ICSID tribunal rejected Churchill Mining's and Planet Mining's claims against the Republic of Indonesia because, under the International Law and based on the examination of evidence and experts, it was concluded that the disputed mining licenses were forged. Moreover, it was also proven that the Claimants had not conducted proper investigations before making a foreign investment in Indonesia. The verdict was against Indonesia as it had to pay damages of US $1.05 bn to the claimant. Indonesia challenged the ICSID's jurisdiction on the basis that the Investor State Dispute Settlement clause in the Indonesia-Australia BIT under question had not been triggered. The government submitted that

the tribunal had no jurisdiction as it should have first sought Indonesia's consent to arbitration. However, the Tribunal rejected Indonesia's jurisdictional challenges (Crockett, 2017).

The reason why Indonesian government challenged the tribunal's jurisdiction in the said case is because the dispute should have been resolved under Indonesia's Investment Law, implemented in 2007, which established the principle of equal treatment for foreign and domestic investors. The Law states that any dispute arising between foreign investors and the government can be settled through international arbitration, which was established under the Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution (the Indonesian Arbitration Law). Most of these BITs following the ICSID arbitration Law No. 25 of 2007 regarding Capital Investment (April 26, 2007) (the Investment Law") provides that if the government fails to reach an agreement for compensation or damages in the case of *a nationalisation* or an expropriation, the matter shall be settled by arbitration (Article 7(2) of the Investment Law). Yet, the Investment Law is silent on whether it refers to ICSID arbitration or some other arbitration or it might refer to the domestic arbitration system of Indonesia (Crockett, 2015).

So far Indonesia has been involved in only 12 investor-state arbitrations (seven of them before ICSID), two of which were settled or withdrawn before any hearings were held and two of which were eventually dismissed for lack of jurisdiction. Of the others two are still pending, while Indonesia was successful on the merits in three, one of which was actually brought by the state, as Claimant, against a recalcitrant investor in the mining sector who refused to comply with its contractual obligation to divest a portion of its shareholding (Crockett, 2015; Oegroseno, 2014). Thus Indonesia has suffered only three Awards against her. However at least two of these cases, both relating to private power projects postponed as a result of the Economic Crisis of 1997/1998 and were influenced with political interference (primarily US) and other serious defects and resulted in disproportionate losses for the state. But even the cases in which Indonesia was successful on the merits had serious jurisdictional overreaches, which are also one of the reasons why Indonesia is terminating its BITs.

Indonesia has also been subjected to arbitrations brought under the BIT with the United Kingdom and a multilateral treaty among 55 Islamic States, the Investment Agreement of the Organization of Islamic Conference (OIC). In fact, none of those cases should have been brought in the first place, but the respective tribunals interpreted the scope and jurisdictional provisions of these treaties beyond what had ever been intended or even contemplated when such treaties were executed (Crockett, 2015).

The message is clear, not only in Indonesia but in several economic zones of the world, the ambiguous language of BITs was resulting in too much misinterpretation by tribunals. The meaning derived of the clauses differs drastically from what was intended by states when they agreed to enter into these BITs. This is an enough rationale to review BITs in order to rephrase language for a proper understanding of the clauses. Indonesia has felt that BITs must be redesigned to address the problems that have arisen in their present form.

As a response to the need felt for arbitration in international commercial relations, the Indonesian government enacted and promulgated the first Indonesian national arbitration law (i.e., Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution) on 12 August 1999. The Arbitration Law replaced articles 615-651 of the Dutch Code of Civil Procedure. The Arbitration Law mainly provided provisions on international and national arbitration as well as the recognition and enforcement of these awards in Indonesia. The Arbitration Law was also designed to create a more pro-arbitration legal regime (i.e., to minimize the intervention of the

courts and to ensure the finality and enforceability of arbitral awards. For this reason it did not follow the UNCITRAL Model Law on International Commercial Arbitration. Hence, the Indonesian Arbitration Law does not expressly address *ex parte* procedures in the context of international arbitration, although it does permit them in the context of domestic arbitration. In practice, the Indonesian courts generally enforce international arbitral awards where the proceedings are conducted as ex parte procedures, provided that it can be shown that the parties were properly notified of the proceedings (Article 44(2) of the Indonesian Arbitration Law).

Since Indonesia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was ratified by Presidential Decree No. 34 of 1981 by inserting the clause of reciprocity and commercial reservations under which Indonesia will recognize the arbitral awards made only in the territory of the contracting states. In other words, in Indonesia, foreign arbitral awards can only be enforced if the country deciding on the award is also a contracting state to the New York Convention. Moreover, the Indonesian Arbitration Law also allows the enforcement of foreign awards in Indonesia, provided a foreign award is registered at the Central Jakarta District Court (CJDC). To enforce it, the Chief of the CJDC must recognize it and issue a writ of execution. Indonesia had also ratified the ICSID Convention by Law No. 5 of 1968 according to which the ICSID award was enforceable in Indonesia only after the receipt of a 'certificate of enforceability' (exequatur) from Indonesia's Supreme Court. In *Churchill Mining* case, the arbitration awarded by the ICSID tribunal was not registered with the CJDC nor was a certificate of enforceability obtained. In addition, the New York Convention allowed a party to challenge a foreign award by arguing that it did not meet the relevant criteria under the Arbitration Law.

The Indonesian Arbitration Law also makes a distinction between national (domestic) and international (foreign) arbitration. According to article 1.9 of the Arbitration Law, 'international arbitral awards' are 'awards rendered by an arbitration institution or by individual arbitrator(s) outside the jurisdiction of the Republic of Indonesia or awards by an arbitration institution or individual arbitrator(s) which, under the provisions of Indonesian law are deemed to be 'international arbitration awards' (Crockett, 2015). To date, there is no provision of law that would give the status of international arbitration to any arbitral award rendered within Indonesia. Hence, in practice, we can say that arbitral awards rendered outside of the jurisdiction of Indonesia are 'international' awards and awards rendered within Indonesia are 'national' awards. The key arbitral institutions in Indonesia are the Indonesian National Board of Arbitration (BANI), the Indonesian Capital Market Arbitration Board (BAPMI) and the Shariah National Arbitration Body (BASYARNAS). BANI handle arbitrations in sectors including corporations, insurance, financial institutions, manufacturing, intellectual property rights, construction, maritime and environment. BAPMI handles disputes relating to the capital market sector. The main objective of establishing BAPMI was to provide an alternative dispute resolution forum from the courts for all capital market players. In the market, the Indonesian Arbitration Law does not make any distinction between domestic and international arbitration.

The decision to terminate or renegotiate BITs and similar other international commercial contracts and agreements was therefore taken by the Indonesian government to introduce reforms in the BITs including the recognition to be given to the Indonesian Arbitration Law in the execution of the awards of international tribunals. Moreover, so far Indonesia had not signed any international treaty for the enforcement of verdicts of the international tribunals or for securing a favourable verdict. In Indonesia, the parties were enjoying a complete freedom to choose any institutional arbitration without any prohibition to make use of any national or international

arbitration institutions. Foreign parties though disliked bringing a foreign investment dispute before an Indonesian court because they feared that the judges may not be familiar with international business regulations and that the foreign party may not be allowed to be represented by lawyers of its own nationality, but instead will have to use the services of local lawyers. Furthermore, when cases were tried by an Indonesian court, all of the documents and evidence would have to be translated into Indonesian language by an official translator before their submission to the court.

DATA ANALYSIS

In March 2014, when Indonesia decided to 'terminate' its BIT with the Netherlands after its completion in July 2015 and adopt the same course of action with over 60 other existing BITs including those with Australia, China, Singapore and the United Kingdom., it was a sign of warning for the foreign investors to ensure that their investments in Indonesia were protected. However, the Indonesian government clarified that Indonesia was not 'terminating' its BITs; instead, Indonesia planned to allow its existing BITs to expire in order that new and better treaties could be negotiated. It is very important to find out what were the issues and constraints that led Indonesia to either withdraw, terminate or renegotiate all its BITs prior to their renewal.

A few of these are identified as follows

- Most BITs had been entitled: "Agreement for the Promotion and Protection of Investments" with hardly any clauses or provisions for promotion and only dealing with protection. The Indonesian government felt that there were no benefits to the host state from such a BIT, The Indonesian government wanted to ensure that the BIT must ensure that the business fraternity of the home state is able to invest in the country of its treaty partner.
- Secondly, many BITs were being misinterpreted and such parties were seeking treaty protection to which Indonesian government did not want to extend any protection. For example, Indonesia always discouraged giving treaty protection to foreign investors who wished to establish "PMA" or a foreign investment company in Indonesia. This clause has been misinterpreted in a few BITs which led Indonesia to terminate its treaties. In the new BITs, the government intends to adopt more precise drafting to avoid the possibility of such misinterpretation.
- Thirdly and most grievously, existing BITs were being interpreted to restrict states' sovereign right to regulate its own economy and society. The new BITs would use a language that would ensure that the state enjoys the freedom to regulate its economy without any breach or expropriation or violation of rights of the foreign investors.
- Fourthly, almost all BITs were being interpreted to give better treatment to foreign investors than its own domestic investors. The Indonesian government in the new BITs wanted to ensure that while foreign investors are given no worse treatment than the domestic investors, they should also not to receive better treatment either. Hence the BIT norm of Most Favoured Nation (MFN) needs to be reviewed drastically.
- Fifthly, provisions relating to "Fair and Equitable Treatment" and "Full" or "Adequate Protection and Security" too needs to be reviewed in the new BITs.
- Sixthly, under "Umbrella clauses", the dispute resolution provisions of a few BITS were misinterpreted as a foreign investor having allowed under the treaty to opt for an alternative arbitration or another dispute resolution method. The revised BIT will clearly state that no other arbitration clause shall apply if the parties have agreed for a bi-partite agreement and chosen a particular arbitration method or instrument.
- Seventhly, in the present state-state BITs, investors of the either state treat themselves free from any obligations as they assume not being parties to BITs signed by their states. Hence, in the event of any breach or violation of BIT norms they remain exempted from any prosecution although remain entitled to all rights and privileges. Upon the revision of the BIT, even the individual investors would comply with the laws and regulations of the host state in which they are operating and would be prosecuted indiscriminately

in the event of any breach of its provisions. The host state shall also be entitled to counterclaim against an errant investor if the latter brings arbitration against the state.

- Last but not the least, in the current BITs the duration and termination provisions locks the Indonesian government for too long a period with restrictions to opt out or to terminate. In order to resolve this more flexible termination provisions need to be added so that states should have the right to terminate or opt out at any time upon reasonable notice.

In short, the Indonesian government wishes to rectify the system for the benefit of contracting host states, hence until all treaties are reviewed, renegotiated and replaced by new treaties, no fresh investment treaties shall be signed. The announcement to review and renegotiate all treaties was probably made in response to expropriation claim cases brought against the Indonesian Government by foreign investors; including the Churchill Mining PLC v Indonesia and Planet Mining Pty Ltd vs. Indonesia cases, brought under the UK-Indonesia and Australia-Indonesia BITs respectively. Moreover, a month before this announcement, the ICSID Tribunal had issued its decision on jurisdiction, rejecting Indonesia's arguments that the Tribunal had no jurisdiction to hear the investors' claims for damages of over USD 1 billion (excluding interest).

However, it may be noted that this announcement to renegotiate BITs would not affect foreign investors immediately or bring an end to investors' protection in Indonesia. For instance, although Indonesia-Netherlands BIT has been terminated, its investment protections will continue for another 15 years due to the "sunset" provision. Similarly, other BITs too include sunset provisions for giving protection to foreign investors for a period of usually 10 or 15 years even after termination. Second, Indonesia has though announced to renegotiate a new BIT with Singapore, but it will have to wait until the current Indonesia-Singapore BIT becomes eligible for renewal. Third, foreign investors are still eligible to seek protection under several Indonesia's multilateral treaties and agreement including ASEAN treaties. Indonesia is a member of ASEAN and a signatory to the ASEAN Comprehensive Investment Agreement, which provides protection to foreign investors from ASEAN countries. ASEAN has free trade agreements with a number of countries including China, Korea, Japan, Australia and New Zealand, which include similar investment protections. Hence, protection to the rights of foreign investors will still remain in force even when the renegotiation process continues.

Here are a few examples of a few BITs wherein investors will still continue to enjoy benefits until review process is complete:

Indonesia-France BIT

Provides that its protections continue to be effective for investments covered by the BIT and admitted by each Contracting Party (that is, Indonesia or France) prior to notification of termination.

Indonesia-Italy BIT

Contains a ten-year sunset clause, meaning that investments made before the expiry of the BIT on 23 June 2015 will be protected for ten years (until 23 June 2025).

Indonesia-Hungary BIT

Also contains a ten-year sunset clause, meaning that investments made before the expiry of the BIT on 2 February 2015 will be protected for ten years until 2 February 2025.

Indonesia-Singapore BIT

Again, a ten-year sunset clause means that investments made before the expiry of the BIT on 20 June 2016 will be protected for ten years until 20 June 2026.

The following table (Table 1) further illustrates in detail BITs that have been terminated by consent, unilaterally denounced or replaced by new treaty:

Table 1
INDONESIA-INVESTORS BITS TERMINATED

No	Short title	Date of signature	Date of force	Date of termination	Type of termination
1	Argentina-Indonesia BIT (1995)	07/11/1995	01/03/2001	19/10/2016	Terminated by consent
2	Belgium-Indonesia BIT (1970)	15/01/1970	17/06/1972	16/06/2002	Expired
3	Bulgaria-Indonesia BIT (2003)	13/09/2003	23/01/2005	25/01/2015	Unilaterally denounced
4	Cambodia-Indonesia BIT (1999)	16/03/1999		07/01/2016	Unilaterally denounced
5	China-Indonesia BIT (1994)	18/11/1994	01/04/1995	31/03/2015	Unilaterally denounced
6	Denmark-Indonesia BIT (1968)	30/01/1968	02/07/1968	15/10/2009	Replaced by new treaty
7	Egypt-Indonesia BIT (1994)	19/01/1994	29/11/1994	30/11/2014	Unilaterally denounced
8	Finland-Indonesia BIT (1996)	13/03/1996	07/06/1997	02/08/2008	Replaced by new treaty
9	France-Indonesia BIT (1973)	14/06/1973	29/04/1975	28/04/2015	Unilaterally denounced
10	Germany-Indonesia BIT (1968)	08/11/1968	19/04/1971	02/06/2007	Replaced by new treaty
11	Germany-Indonesia BIT (2003)	14/05/2003	02/06/2007	01/06/2017	Unilaterally denounced
12	Hungary-Indonesia BIT (1992)	20/05/1992	13/02/1996	12/02/2016	Unilaterally denounced
13	India-Indonesia BIT (1999)	10/02/1999	22/01/2004	07/04/2016	Unilaterally denounced
14	Indonesia-Italy BIT (1991)	25/04/1991	25/06/1995	23/06/2015	Unilaterally denounced
15	Indonesia-Lao People's Democratic Republic BIT (1994)	18/10/1994	14/10/1995	13/10/2015	Unilaterally denounced
16	Indonesia-Malaysia BIT (1994)	22/01/1994	27/10/1999	20/06/2015	Unilaterally denounced
17	Indonesia-Netherlands BIT (1968)	07/07/1968	17/07/1971	01/07/1995	Replaced by new treaty
18	Indonesia-Netherlands BIT (1994)	06/04/1994	01/07/1995	30/06/2015	Unilaterally denounced
19	Indonesia-Norway BIT (1969)	26/11/1969		01/10/1994	Replaced by new treaty
20	Indonesia-Norway BIT (1991)	26/11/1991	01/10/1994	30/09/2004	Unilaterally denounced
21	Indonesia-Pakistan BIT (1996)	08/03/1996	03/12/1996	02/12/2016	Unilaterally denounced
22	Indonesia-Romania BIT (1997)	27/06/1997	21/08/1999	07/01/2016	Unilaterally denounced
22	Indonesia-Singapore BIT (1990)	28/08/1990	28/08/1990	20/06/2006	Replaced by new treaty
24	Indonesia-Singapore BIT (2005)	16/02/2005	21/06/2006	20/06/2016	Unilaterally denounced
25	Indonesia-Slovakia BIT (1994)	12/07/1994	01/03/1995	28/02/2015	Unilaterally denounced
26	Indonesia-Spain BIT (1995)	30/05/1995	18/12/1996	18/12/2016	Unilaterally denounced
27	Indonesia-Switzerland BIT (1974)	06/06/1974	09/04/1976	08/04/2016	Unilaterally denounced

28	Indonesia-Turkey BIT (1997)	25/02/1997	28/09/1998	07/01/2016	Unilaterally denounced
29	Indonesia-Viet Nam BIT (1991)	25/10/1991	03/04/1994	07/01/2016	Unilaterally denounced

Source: International Investment Agreements Navigator, 2017

The table illustrates that with the exception of Argentina-Indonesia BIT which was terminated by consent, all BITs were either unilaterally denounced or replaced by new BIT. This is an evidence of Indonesian autonomy in international arbitration.

Similarly Table 2 illustrates the BITs that are still in force but the parties are notified of termination after the sunset period is over or as until it is mutually agreed upon to replace it with a new BIT. With only a few exceptions of the BITs that were signed in 2008 or 2009, all other BITs will soon be either unilaterally renounced or replaced with new BITs.

Table 2
INDONESIA-BITS STILL IN FORCE

No	Short title of BITs	Parties	Date of signature	Date of entry into force
1	Australia-Indonesia BIT (1992)	Australia; Indonesia;	17/11/1992	29/07/1993
2	Bangladesh-Indonesia BIT (1998)	Bangladesh; Indonesia;	09/02/1998	22/04/1999
3	Cuba-Indonesia BIT (1997)	Cuba; Indonesia;	19/09/1997	29/09/1999
4	Czech Republic-Indonesia BIT (1998)	Czech Republic; Indonesia;	17/09/1998	21/06/1999
5	Denmark-Indonesia BIT (2007)	Denmark; Indonesia;	22/01/2007	15/10/2009
6	Finland-Indonesia BIT (2006)	Finland; Indonesia;	12/09/2006	02/08/2008
7	Indonesia-Iran BIT (2005)	Indonesia; Iran	22/06/2005	28/03/2009
8	Indonesia-Jordan BIT (1996)	Indonesia; Jordan;	12/11/1996	09/02/1999
9	Indonesia-Korea, BIT (1991)	Indonesia; Korea,	16/02/1991	10/03/1994
10	Indonesia-Kyrgyzstan BIT (1995)	Indonesia; Kyrgyzstan;	19/07/1995	23/04/1997
11	Indonesia-Mauritius BIT (1997)	Indonesia; Mauritius;	05/03/1997	28/03/2000
12	Indonesia-Mongolia BIT (1997)	Indonesia; Mongolia;	04/03/1997	13/04/1999
13	Indonesia-Morocco BIT (1997)	Indonesia; Morocco;	14/03/1997	21/03/2002
14	Indonesia-Mozambique BIT (1999)	Indonesia; Mozambique;	26/03/1999	25/07/2000
15	Indonesia-Poland BIT (1992)	Indonesia; Poland;	06/10/1992	01/07/1993
16	Indonesia-Russian Federation BIT (2007)	Indonesia; Russian Federation;	06/09/2007	15/10/2009
17	Indonesia-Saudi Arabia BIT (2003)	Indonesia; Saudi Arabia;	15/09/2003	05/07/2004
18	Indonesia-Sri Lanka BIT (1996)	Indonesia; Sri Lanka;	10/06/1996	21/07/1997
19	Indonesia-Sweden BIT (1992)	Indonesia; Sweden;	17/09/1992	18/02/1993
20	Indonesia-Syria BIT (1997)	Indonesia; Syria	27/06/1997	20/02/2000
21	Indonesia-Thailand BIT (1998)	Indonesia; Thailand;	17/02/1998	05/11/1998
22	Indonesia-Tunisia BIT (1992)	Indonesia; Tunisia;	13/05/1992	12/09/1992

23	Indonesia-Ukraine BIT (1996)	Indonesia; Ukraine;	11/04/1996	22/06/1997
24	Indonesia-United Kingdom BIT (1976)	Indonesia; United Kingdom;	27/04/1976	24/03/1977
25	Indonesia-Uzbekistan BIT (1996)	Indonesia; Uzbekistan;	27/08/1996	27/04/1997
26	Indonesia-Venezuela, BIT (2000)	Indonesia; Venezuela,	18/12/2000	23/03/2003

Source: International Investment Agreements Navigator, 2017

In addition to these BITs, Indonesia is also a party to several investment agreements with the regional powers of China, India, Korea and Japan as well as Australia and New Zealand. It is also a signatory to the multilateral ASEAN Comprehensive Investment Agreement, which provides protections to foreign investors from ASEAN nations such as Singapore. These agreements ensure the protection of the rights of foreign investors even in the absence of a regular BIT in force. A few of these agreements are:

- Agreement on Comprehensive Economic Cooperation between the People's Republic of China and ASEAN;
- Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of India;
- Association of Southeast Asian Nations-Republic of Korea Free Trade Agreement;
- Agreement between Japan and the Republic of Indonesia for an Economic Partnership;
- Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area
- ASEAN Comprehensive Investment Agreement with all member nations
- OIC (Organization of Islamic Conferences) Investment Agreement (in force since 1980).

In addition, Indonesia remains involved in negotiations over the China-backed Regional Comprehensive Economic Partnership (RCEP), which covers ten ASEAN member countries and their six major trading partners-China, Japan, India, South Korea, Australia and New Zealand. The RCEP is expected to create a targeted integrated market worth US $21.4 trillion by 2025. The RCEP encompasses trade in goods and services, economic and technical issues, intellectual property and investments and dispute settlement mechanisms (Olivet, 2017).

Negotiations are being carried out to bring RCEP in tandem with the US-led Trans-Pacific Partnership Agreement (TPPA), to strengthen dispute resolution mechanisms with other Europa nations. Indonesia though has not yet committed to the TPPA but is contemplating the possibility of doing so.

CONCLUSION

The termination of Indonesia's first investment treaty with Netherlands containing the ISDS mechanism was highly symbolic because it was the first step in adopting a strategy to review all its sixty-seven BITs. Indonesia thus joins a growing number of countries concerned about perceived excessive corporate rights enshrined in investment agreements as being incompatible with national development objectives. The intention may simply be for Indonesia to negotiate a more "modern" investment treaty and provide for more clearly defined protections and dispute resolution provisions, for individual party and for each contracting state. The conclusions drawn of this study shall have deep implications on the future course that Indonesia should adopt in managing its foreign investments disputes.

REFERENCES

Budidjaja, T. (2013). The legal framework for international arbitration. *The Asia-Pacific Arbitration Review*.

Crockett, A. (2015). *ICSID Review-Foreign Investment Law Journal*, *30*(2), 437-448.

Egger, P. & Michael, P. (2004). The impact of bilateral investment treaties on foreign direct investment. *Journal of Comparative Economics*, *32*(4), 789.

Freehills, H.S. (2015). Indonesia announces renegotiation of BITs. *Arbitration notes*.

Gantz, D. (2003). The evolution of FTA investment provisions: From NAFTA to the United States-Chile Free Trade Agreement. *American University International Law Review, 19*(4), 679.

Houde, M.F. & Katia, Y.S. (2004). Relationships between international investment agreements. *OECD*, *23*.

James, O. & Gump. (2000). The west and the third world: Trade, colonialism, dependence and development. *Journal of World History*, *11*(2), 396.

McKanzie, B. (2017). *Withdrawal from investment treaties: An omen for waning investor protection in AP?* Baker McKenzie.

Oegroseno, A.H. (2014). Indonesia's bilateral investment treaties: Modernizing for the 21st century. *RSIS Commentaries for Global, International, Southeast Asia and ASEAN, 14*.

Olivet, C. (2017). Why RCEP is more dangerous than Bilateral Investment Treaties. *The Jakarta Post.*

Price, D. (2016). Indonesia's bold strategy on bilateral investment treaties: Seeking an equitable climate for investment? *Asian Journal of International Law*, *7*(1).

Rivkin, D.W. (2013). The impact of international arbitration on the rule of law: The 2012 clayton Utz/University of Sydney international arbitration lecture. *Arbitration International*, *29*(3), 327.

Ruttenberg, V. (1987). States bilateral investment treaty program: Variations on the model. *University of Pennsylvania Journal of International Law, 9*(1), 121.

Salacuse, J. & Nicholas, S. (2005). Do bits really work? An evaluation of bilateral investment treaties and their grand bargain. *Harvard International Law Journal*, *1*(46), 90.

Simmons, B.A. (2014). Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. *World Politics*, *66*(1), 15.

Tobin, J. & Susan, R.A. (2005). Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. *Yale Law & Economics Research Paper*, 293.

Yusuf, A. (2001). *Introduction to legal research methodology*. Nigeria: Tamaza Publishing Company Ltd.

Zachary, E. (2006). Competing for capital: The diffusion of bilateral investment treaties. *International Organization*, *60*(4), 811.

Zayed, H. & Heba, K. (2013). Egypt & international arbitration protection of investor. *Cairo: ECESR.*