THE NEW MODEL OF BILATERAL INVESTMENT TREATY (BIT) FOR INDONESIA

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ABSTRACT

Recent years, there has been a surge in lawsuits at Investors State Dispute Settlement (ISDS) forum proposed by foreign investors to host state including Indonesia. Most of claims caused by policy of host state which is intended to protect basic rights of its society such as the right to health, right to healthy environment, tax, also the minimum standard of worker's wage. This policy gives damages to foreign investor and considered as violation of Bilateral Investment Treaty (BIT). Most of BIT is open ended language, open up wide interpretation. This has prompted many countries including Indonesia to review Its International Investment Agreements (IIA) especially Bilateral Investment Treaty (BIT). Indonesia have already reviewed and terminated many of its Bilateral Investment Treaty despite being aware of the continued importance of BIT to increase the entry of investment to Indonesia. This study provides a comprehensive understanding regarding international investment law and gives a picture of the new model of BIT for Indonesia to balance the interest of both host state and foreign investor.

Keywords: Bilateral Investment Treaty, Investment, New Model, Foreign Investor.

INTRODUCTION

Indonesia urgently requires foreign investment due to the limitedness of domestic capital. The existence of foreign investment is expected to accelerate national economic growth. Data shows that the implementation of investment in Indonesia in January to December 2016 comprised of Foreign Investment (PMA) 64.7% and Domestic Investment (PMDN) 35.3%. In 2017 of same period, Foreign Investment rate reached 62.1% and Domestic Investment rate reached 37.9% (BKPM, 2018). This fact means, foreign investment still is a pedestal for development in Indonesia.

There is some important factor for host state to increase the number of foreign investment such as provide ease of doing business and investment protection. The character of the host state's investment law should be conducive, promotive, equity, efficient and give legal certainty. World Bank Report 2018 for ease of doing business placed Indonesia in ranking 72 from 189 states. This level is under Singapore (2), Malaysia (24), Thailand (26), Brunei Darussalam (56) and Vietnam (68) (World Bank, 2018).

Investment protection is provided by investment legislation, investment contract between host state and investor and international investment treaty (Riyatno, 2017). Investment protection by national legislation can be found in Law No. 25 of 2007 on Investment. This law replaces Law No. 1 of 1967 on Foreign Investment and Law No. 6 of 1968 on Domestic Investment. This

replacement complies to the mandate of international investment law which prohibits state to discriminate foreign investors with domestic investors. Investment protection provides by Law on investment such as equal treatment; guarantee for non-nationalization without compensation, flexibility of transfer and repatriation of profit and dispute resolution mechanism.

Equal treatment to investors is provided in article 6 of Law on Investment which stipulated:

1. The government provides equal treatment to all investors who carry out investment in Indonesia regardless of which state they came from, in accordance with the provisions in regulation.
2. Treatment as stipulated in section (1) is not applicable for investor from a state which is granted such privileges based on treaty with Indonesia.

Provision of article 6 above is in accordance with the principle of Most Favoured Nations (MFN) which is adopted by Trade Related Investment Measures (TRIMs) GATT/WTO which Indonesia is a state party.

Not only non-discrimination, law on investment also guarantees that Indonesia as host state won't take any nationalization measures without compensation. The amounts of compensation are based on the market price. If there is no consensus regarding the amount of compensation, the settlement will be made through arbitration (Law No. 25 of 2007, Article 7). Article 32 of Law on investment prioritizes consensus as dispute resolution mechanism (Law No. 25 of 2007, Article 32 (1)). If consensus could not be reached, the dispute can be referred to alternative dispute resolution or court in accordance with legislation (Law No. 25 of 2007, Article 32 (3)). In case there is dispute between Indonesian government and foreign investor, disputing parties will deliver the dispute before international arbitration which must be agreed by the parties (Law No. 25 of 2007, Article 32 (4)). There is no explanation in this provision regarding international arbitration which must be agreed by the parties and how the appointment of that arbitration.

Investment Protection by International Investment Agreements (IIA) is conducted by Indonesia through the Treaties of Improvement and Protection for Investment (TIPI). Bilateral Investment Treaty (BIT) is one of them. The other forms are the Comprehensive Economic Partnership Agreement (CEPA), as well as the Regional Comprehensive Economic Partnership (RCEP) which both generally contain the Investor State Dispute Settlement (ISDS). Furthermore, to attract more investors, Indonesia also plans to join the Trans Pacific Partnership Agreement (TPPA) (Hasan, 2017). There are also other agreements such as Treaties with Investment Provisions (TIP), Trade Relations Agreement (TRA), Free Trade Agreement (FTA), Trade and Cooperation Agreement (TCA) and Cooperation Agreement (CA).

It can be conveyed that the current government priority scale is to continue or start negotiations and accelerate the settlement of various international economic cooperation which includes investment areas, such as: Indonesia-European Union Comprehensive Economic Partnership Agreement (IEU-CEPA); Indonesia-Australia Comprehensive Economic Partnership (IA-CEPA); Indonesia-European Free Trade Association (IEFTA-CEPA); and Trans-Pacific Partnership (TPP) Agreement; ASEAN-Japan Economic Partnership Agreement (AJEPA) and

Regional Comprehensive Economic Partnership (RCEP). The government believes that these agreements can provide a significant attraction for foreign investors to come to Indonesia.

BIT is one of the most frequently forms of IIA used by Indonesia. Theoretically, BIT should be able to benefit both parties, based on the principle of reciprocity, equality and non-intervention in international law. However, in practice the existence of BIT is much complained by developing countries including Indonesia. First, the substance of majority of BIT is imbalance. Almost all of the articles in BIT contain protection and enormous rights for foreign investors; on the contrary there are so many obligations for the host state. There is no protection and rights for the host. It is not such exaggeration to say that IIT has reduced the principle of equality in international law, because host states enjoy no actual benefits from the treaties, only obligations (Mills, 2018).

Second, BIT eliminates the sovereignty of the state to adopt policies that protect the public interest. The host state will be sued before Investor State Dispute Settlement (ISDS) forum when the policy to protect the interests of the public is deemed inconsistent with commitments in international investment treaties and detrimental to foreign investors (Hasan, 2017).

Third, BIT contain unclear parameter for such terms such as fair and equal treatment, full security, un clear definition for investment, foreign investor. This condition potentially interpreted extensively by ISDS in such a way as to (Mills, 2018):

> *"Afford treaty protection to parties to whom the state never intended it to extend; apply to contractual relationships even where contract calls for different dispute resolution mechanism; impose upon contracting states obligations, restrictions, and force them to give protections they never intended when entering into the treaties; restrict states' sovereign right to regulate their own economy and society; force states to pay crippling damages to foreigners at the expense of their local citizenry; punish governments for laws they pass for the benefit of their populace; overrule decisions of contracting state's highest courts; cause states virtually to guarantee high returns for foreign investors."*

Fourth, BIT is often used by foreign investors to conduct treaty shopping. For example, an Australian investor is granted an investment protection from BIT Indonesia-Australia and the ASEAN-Australia-New Zealand FTA. Furthermore, it will also be granted an investment protection through RCEP and Indonesia Australia-CEPA if later this agreement is agreed upon. If Indonesia also joins with TPPA, Australian investors are protected by five international agreements. With many instruments of agreement available to them, Australian investors can choose which agreement is most favourable to them, both in terms of substance and dispute resolution procedures. This certainly raises the risks for the government, in particular the risk of violating the treaty and being sued in international arbitration (Hasan, 2017). Fifth, BIT in practice is also often used by investors from other countries which don't have an agreement with the host state. The trick is to establish a business entity without a business activity or a shell company in a state that has an agreement with the host state and then take advantage of the agreement. For the record, there is some of Indonesia BIT with state partners that have no investment realization at all or it exists in a small amount (Hasan, 2017).

Base on the explanation above, it is not surprising that there are many parties who question the necessity of BIT and even recommend the government to terminate such

agreements. The doubt on the necessity of BIT is reinforced by the fact that in recent years the number of lawsuits using BIT as legal bases has increased significantly (Hertanti, 2017). There were five cases of lawsuit of foreign investors against Indonesia from 2011 to 2016, namely Ravat Ali Rizvi case (Century Bank Case) in 2011, Hesham Al Warraq (Century Bank Case) in 2011-2014 Churcill Mining and Planet Mining (2012), Newmont Nusantara BV (2014), Indian Metals and Ferro Alloys Ltd. (IMFA, 2015) and Oleovest Pvt. Ltd (2016). The highest lawsuit filed by Churchill Mining which reached amount of US $1 billion (Mills, 2018). This significant increase refers to the number of cases within 5 years (2011-2016) is almost equal to the number of lawsuits faced by Indonesia from 1980 to 2011 (Mills, 2018).

The increasing number and amount of lawsuit filed by foreign investors toward Indonesia encourages the government to terminate and review tens of BITS in Indonesia (Profesi, 2017). Based on record from Indonesia Investment Coordinating Board (BKPM), in period of 2013-2016 there were 67 BITs of which 20 BITs have not been ratified by either Indonesia or State Partner, 25 BITs have been suspended, not renewed, and the remaining 22 are still valid and now in the review process for its sustainability (BKPM, 2016). The first BIT terminated was BIT with the Netherlands which became effective since July 1st, 2015.

Indonesian government realizes that BIT is still important to attract foreign investors However, the review of existing BITs is necessary because both the substance and the structure are very diverse, inconsistent, containing such open clauses, which tend to be very harmful to Indonesia. According to BKPM, many BITs are no longer relevant, therefore need to be improved, adapted to the conditions and interests of the state. This is understandable considering most of BITs were made when Indonesia still in dire need investment to pursue economic growth (Hukum Online, 2016).

In fact, Indonesia is not the only state who terminate or review of its BIT due to other states are experiencing the same problem. Reformations in other countries can be used as a reference for Indonesia to develop a new model of its BIT that provides balance between the interests of foreign investors and the interests of Indonesia as the host state.

Problem Formulation

This study is conducted to address one important problem formulation: what kind of BIT model should be adopted by Indonesia that can provide a balance between the interests of investors and national interests?

The History of Bit

International Investment Agreement (IIA) has started to bloom after World War II when international economic activity began to wriggle. The purpose of IIA is to provide guarantee protection to foreign investment from nationalization or asset acquisition without compensation by the host state, especially the newly independent state (Mann, 2013).

The first international investment agreement was in the form of Bilateral Investment Treaty (BIT) that emerged in the 17th century. The first BIT was made by Germany and Pakistan in 1959, and then followed by other European and American countries which made BIT with the

developing countries where they invested (Bernasconi, 2012). BIT was meant also to protect investors from discrimination and nationalization. BIT was born as a new type of protection instrument for investment which was made between developed and developing countries. Although in this era, the protection provided is still relatively small and there is no regulation of Investor State Dispute Settlement (ISDS) yet (UNCTAD, 2015).

Although in recent years there have been many multilateral investment agreements, BIT is still popular. Most developing countries have signed many BIT's. When India shifts the investment policy into BIT, it resulted in huge regain of economic advantage after the economic crisis (Prabhash, 2018). India's first BIT with the United Kingdom in 1994 served as reference for another more than 80 BIT's to attract foreign direct investment (Banga, 2003). Modernization of China since 1978 has ranked this country to the most active and largest developing country for foreign direct investment (Wang, 2009). They have entered for more than a hundred of BIT (Wang, 2009) and it creates simultaneous inflow of foreign capital and technology.

The UNCTAD data states that by the end of February 2016, there were 3,280 investment agreements already signed, 2,930 of which were BIT (UNCTAD, 2015). There are at least 174 countries involved in BIT, at least in one BIT. In general, BIT contains minimum standards of investment protection that must be provided by the host state, namely (Hertanti & Febriani, 2014):

1. Equal and fair treatment or no discrimination for any kind of investment.
2. Full protection and security which contains the obligation of state to provide compensation for losses suffered by corporations due to war, armed conflict, revolution, state emergency, riot, or rebellion. This kind of protection is usually granted in the form of compensation or recovery.
3. Protection from expropriation or nationalization measures and it requires providing compensation.
4. Dispute settlement mechanism, which aligns the position of investor with the state or known as Investor State Dispute Settlement (ISDS).

Another author (Suhaidi et al., 2017) proposes six basic principles of investor protection in BIT as follows:

1. Regarding access: the implementation of National Treatment and Most Favoured Nations (MFN), the absence of prohibition related with restrictions on recruitment of labour, the absence of restrictions on import/export.
2. Fair and Equitable Treatment (FET) application: the absence of arbitrary treatment from the authority.
3. Regarding security: protection from uncompensated takeover, protection from war and civil unrest, protection on currency transfers (free transfer).
4. The principle of non-discrimination: there shall be no unreasonable or unlawful treatment or treatment which is unrelated with legitimate regulations.
5. The principle of transparency: to create regulation-based investment regime, prevent corruption, and in due process.
6. The existence of the dispute resolution procedure between the investor and the state (ISDS) as the main characteristic of BIT which is then adopted in various forms of regional Investment Agreement such as ASEAN Comprehensive Economic Agreement or Comprehensive Economic Partnership Agreement (CEPA), Regional Comprehensive Economic Partnership (RCEP), Trans Pacific Partnership (TPP), Free Trade Agreement (FTA), Transatlantic Trade and Investment Partnership (TTIP). As for global agreements such as the WTO and even into national regulations in states where investment takes place.

The Development of Bit Model

BIT has been the most dominant source of international law used by foreign investors to protect its investments in developing countries. BIT's initial background was due to the ill-treatment of developing countries that often nationalize the assets of foreign companies, also incompetent legal system and judicial process in developing countries. Therefore, it's understandable that BITs are rarely found between developed countries. It's possibly caused by these investors are convinced that the host state (developed countries) already has an adequate domestic law and will not discriminate (Vandevelde, 2000).

During the first 35 years of ICSID operating since 1966, there were only 35 registered cases. However, over the last 10 years there has been such significant spike which up to 300 cases. This happened along with increasing of direct investment (Foreign Direct Investment) worldwide. Most cases were carried by some major transnational corporations. Based on UNCTAD data, the main reason for filing a lawsuit is the cancellation or breach of contract and the revocation of the permit. The most recent developments occurred in 2014 among new cases, 61% covering services (such as supply of electricity and gas, telecommunications, construction and banking), 28% covering primary industry and 11% in manufacturing. The most frequently sued states in the ISDS period of 2014-2015 were Argentina (56), Venezuela (36), Egypt (24), Canada (23), Mexico and Ecuador (21), India and Ukraine (16), Poland and US (15) (Magaira, 2017). The number of lawsuit increases not only in the ICSID (International Centre for Settlement of Investment Disputes) forum, but also in UNCITRAL which is also a part of ISDS.

Increasing number of lawsuits filed by investors through ISDS mechanisms has prompted many countries to review their IIAs to enhance comprehensive protection for sovereignty of host state, reduce the risk of ISDS misuse and give more autonomy to the host state to objectify the welfare of its people (Patel, 2017).

Here are some new models of BIT put into actions by both developed and developing countries. First is the model exemplified by India? In this new BIT model, Host state gets more freedom to make rules to protect the public interest and protect the state's sovereignty.

This action was triggered by India's defeat in the case of White Industries Australia Limited v. Republic of India, in the UNCITRAL forum. BIT India-Australia contains terms that are multi-interpretive and detrimental to India (Patel, 2017). India's new model BIT redefines the notions of investments, investors, and enterprises under Indian investment law; require investors to use exhaustion of local remedies for at least 5 years before initiating notice of dispute to international arbitration (Indian Ministry of Finance, 2017). The new BIT model does not contain MFN provisions, prohibits treaty shopping and does not allow investors to import provisions that are useful to them in other BITs of India (Indian Ministry of Finance, 2017). Although the new Indian BIT model is more host state friendly, but it still provides protection for investors (Patel, 2017).

The second model is IIA that provided by Canada and Germany. As Canada and European Union (EU) adopted Canada Comprehensive Economic and Trade Agreement (CETA) and free trade area agreement such as NAFTA. Canada's action to review its IIA was triggered by a lawsuit filed by an energy company, Lone Pine Resources Inc. for US $250 million (Lone Pine Resources Inc. *vs.* Government of Canada, 2013). In this case, Canada was sued by Lone

Pine Resources because of *An Act to limit oil and gas activities* (the "*Act*") issued by Quebec revoked exploration permits in St. Louis. Lawrence River, including Lone Pine Resources' license. Responding to this, Canada declared that the Act was a legitimate act of sovereign state for the prevailing public interest without discrimination to all exploration permit holders, whose purpose was the protection of St. Lawrence. The law couldn't be regarded as arbitrary, unfair or inequitable measure. The Quebec Government's action wasn't a takeover (Lone Pine Resources Inc. v. Government of Canada, 2013).

The Canadian and the European Commission (CETA, 2016) negotiations brought many changes in 2015. CETA ensures the protection for investor, without neglecting the importance of protecting state sovereignty (Patel, 2017):

> *"For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations."*

CETA added also that (Patel, 2017):

> *"There is no indirect expropriation where a new regulation in the field of health, safety and environment makes it substantially costlier for companies to deploy their activities in the host state concerned."*

In addition, CETA also demands ISDS transparency. All submitted documents must be publicly available, all interested parties will be present and may ask questions, also open to the public (Patel, 2017).

The third model is exemplified by the China-Australia Free Trade Area (CHAFTA), enforced since December 20th, 2015 and was initiated from a lawsuit filed by Phillip Morris. In 2011, Phillip Morris' tobacco company filed a lawsuit against Australia, related to Australia's Tobacco Plain Packaging Act of 2011 (the "*Tobacco Act*") that governs plain packaging of tobacco products to protect and improve public health by awakening the dangers of smoking, encouraging people to stop smoking, reduce people's exposure to cigarette smoke. In this case, the company claimed that The Tobacco Act was an unreasonable and discriminatory policy that removed all the protection and security of Philip Morris' investment in Australia, which was a direct and indirect expropriation of investments without adequate compensation.

Learning from the case, CHAFTA was attempting to make some changes. CHAFTA recognizes the host state's right to make a national policy, giving the host state flexibility to protect the welfare of its people through non-discriminatory regulations for the purposes of community welfare, public health, safety, eco-friendly, public morals or public order. Article 9.17 CHAFTA contains changes to enhance the transparency of the ISDS arbitration process (CHAFTA, Article 9.17). Article 9.8 examines the autonomy of the host state which ensures that both states are entitled to take action if (CHAFTA, Article 9.8):

1. Necessary to protect human, animal or plant or health.
2. Necessary to ensure compliance with laws and regulations that are not inconsistent with CHAFTA agreement.

3. Imposed for the protection of national treasures of artistic, historic or archaeological value.
4. Relating to the conservation of living or non-living exhaustible natural resources.

The case of Philip Morris Asia Ltd. v. Australia inspired and influenced the preparation of the Trans-Pacific Partnership (TPP, 2015), which then made some changes regarding the definition of direct expropriation and indirect expropriation, especially regarding the right of state to protect the public interests as stated also that:

> *"Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances." (TPP, Annex. 9B (1)).*

TPP also made improvements to the ISDS process by including provisions for the prevention of an investor pursuing the same claim in parallel proceedings, *amicus curiae* submissions and dismissal of frivolous claims. TPP hands over the burden of proof of claim to investor; and created a code of conduct for all arbitrators related to conflicts of interest. TPP has implemented the transparency process where the state party guarantees that:

> *"Their laws, regulations, and administrative rulings related to any matters covered by the TPP Agreement are publicly available and that regulations are subject to notice and comment" (TPP, Annex 9B (1)).*

Next new BIT model is also exemplified by New Zealand which makes international agreements on investment either through BIT or multilateral agreements without the ISDS clause. Such an approach according to New Zealand will reduce the risk of a lawsuit to ISDS by investors. For New Zealand, the risk of litigation can be managed through the substantive provisions of the investment agreement (Kawharu and Nottage, 2017). However, this practice has drawn a lot of criticism for not giving investors the right to access international arbitration. This is tantamount to not providing legal protection from behaviour of host state that may be opportunistic.

A better alternative is to offer an arbitration choice agreed by the parties to its IIA. ICSID is focused on investment, but not necessarily favoured by all parties (Juwana, 2014). ICSID applies a decision annulment mechanism that may not be favoured by investors and tends to choose UNCITRAL or ICC which does not apply the decision annulment (Yackee, 2013).

The New Model of Bit for Indonesia

It was not much different from those made by other countries; Indonesia's BIT generally contains various protections for investors and obligations for the host. Some clauses that can be found in Indonesia's BIT including Fair and Equitable treatment (FET) and adequate protection and security; MFN, national treatment; non-expropriation; compensation for losses, free transfer of investment and returns, also settlement dispute. Theoretically, these agreements are reciprocity applicable to both parties, however due to Indonesia's role in general always acts as the host, the foreign investors appear to get more benefits from the BIT.

The renewal and termination of BITs has been a practice by some countries. The Netherlands, Belgium, and Luxembourg applied the treaty renewal to set the validity periods (Gordon and Pohl, 2015). In addition, India in 2016 sent announcement to 58 countries about its intention to terminate its various BITs (McKenzie, 2017). Bolivia, Venezuela, Ecuador, South Africa, Italy, and Russia also have eliminated redundant treaties that apply only to small groups of investors (Peinhardt and Wellhausen, 2016).

Learning from the renewal of BITs by many countries, there are some things that are recommended for the renewal of Indonesia's BIT. First, there is a necessity to firmly reformulate the definitions of investment and investors. This formulation is very important to limit who can deliver the dispute to the Investors State Dispute Settlement (ISDS) forum and what types of investments are covered by BIT. For investors, it needs to be formulated regarding several matters (Include Host-State subsidiary of other Party entity? Must an entity maintain a presence in the Host State? Is there some registration or approval required?). Related with the definition of investment, there has to be some explanations on some matters (Portfolio investments, bonds, securities, Sales of goods or services, Other contractual rights, Loans, Intellectual Property Rights) (Mills, 2018). In the case of Rafat Ali Rivzi *vs.* Indonesian Government (2011), Indonesia rejected the ICSID's jurisdiction, due to article 2.1 of Indonesia-UK's BIT stated that the investment protection is only granted for *"nationals or companies of the UK… which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it."*

According to Indonesia, only companies established under the Foreign Investment Law are allowed and supervised by BKPM which is regulated and protected on BIT. Because of the permission of Rafat Ali wasn't regulated under BKPM, hence it wasn't protected by BIT. But, ICSID had another opinion. According to ICSID, Rafat Ali was a banking investment, it remained entitled to be protected by Indonesia-UK's BIT justified by the words *"in accordance with"* and *"not contradictory to*". Although, ICSID ultimately rejected Rafat Ali's claim, but the interpretation of BIT-protected investors and investment requires such explicit definitions given the interpretation of ICSID in this case could be jurisprudence that other cases can follow (Mills, 2018).

Second, there is a necessity to reformulate the principles of Fair and Equitable Treatment (FET). The majority of the lawsuits filed by investors to ISDS use the argument that the host state has violated the Fair and Equitable Treatment (FET) standards (Dolzer, 2005). For example, in the case of Heslam (2012), the plaintiff claimed that Indonesia violated the FET standard under the OIC agreement. Furthermore, in the case of Rafat Ali (2011), Indonesia was sued for violating Article 4 and 2 (1) of Indonesia-UK's Bilateral Investment Treaty (BIT) on FET. Churchill mining also used FET violations in its lawsuit against Indonesia in 2015. In general, many IIAs, including Indonesia's BIT, do not provide a definition of what is meant by the FET Standard, even if the BIT provides definition, just open-ended language. This condition tends potentially widely interpreted before ISDS forum, so that almost all state actions that harm investors can be considered as violation of this standard.

The example of FET without definition can be found in Article 2 (2) of Indonesia-Australia's BIT which stated: a party shall ensure fair and equitable treatment in its own territory

to investment[1] (Agreement between the Government of the Republic of Indonesia and The Government of Australia Concerning The promotion and protection of Investment, Article 4). Likewise, the Article 3 (2) of Indonesia-United Kingdom's BIT[2] (Agreement between the Government of Republic of Indonesia and the Government of The United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investment) stipulates as follows:

> *"Investment of nationals or companies of either contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and securities in the territory of the other contracting party. Each contracting party shall ensure that the management, maintenance, use enjoyment or disposal of investment in its territory of nationals or companies of the other contracting party are not in any way impaired by unreasonable or discriminatory measures. Each contracting party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other contracting party."*

The standard elements of FET are still being debated up until now. Nevertheless, there are some elements that have always been shared by almost all scholars in international law, some tribunal arbitral verdict as well. These elements are legitimate expectation; due process; denial justice; rule of law; non-discrimination; transparency; consistency, good faith, reasonableness. The principle of reasonableness requires the host state to treat investors reasonably related to a legitimate public policy objective. Violation will occur when there is arbitrary conduct, especially related to motivation by animus to investors. The principle of non-discrimination prohibits discrimination except under the legitimate public policy objective and reasonableness. The principle of consistency permits changes to the policy as long as it does not conflict with the host state's commitment or guarantees afforded to the investor. The principle of consistency also prohibits simultaneous inconsistencies that make repeated changes in a short time (roller coaster change). Consistency also adds the principle of reasonableness. However, a reasonable change in policy will be prohibited if investors have made a reasonable guarantee that policy changes will not occur (Schreuer, 2005; Choudhury, 2005; Kalicki and Medeiros, 2017; Picherack, 2008).

Third, there is a necessity for a new model of Indonesia's BIT which prioritizes the doctrine of exhaustion of local remedies. The exhaustion of local remedies doctrine gives investor's access to ISDS when local remedies are inadequate (Porterfield, 2015). The doctrine of local remedies used to be found in BIT of 1970-1980s. After 1980, this doctrine was not required in BIT, and even many BITs strongly rejected this doctrine. Arbitration clauses such as ICSID are interpreted as repudiation of local remedies obligations by parties in BIT. A small amount of BIT still requires the obligation of local remedies exhaustion but with a time limit of about eighteen months (Porterfield, 2015). Today, the doctrine of exhaustion of local remedies is reappeared in the new BIT draft model released by India. A good example can be taken from the case of Loewen Group *vs.* United States. In this case a Canadian burial service operator (Raymond L. Loewen) claimed that his right to fair and equitable treatment had been violated in the Mississippi court, where he was ordered to pay hundreds of millions of dollars. A court held under the IIA of NAFTA rejected Loewen's claim because he had not filed a claim to the U.S. Supreme Court yet (Porterfield, 2015). The benefits of applying exhaustion of local remedies are

to protect the state's sovereignty, as well as to help strengthen and integrate domestic and international systems for investor protection. The other benefits are (Porterfield, 2015):

1. Encouraging national law to improve its legal system and its justice system to be more transparent and provide equity to investors, if do not want ISDS mechanism be applied.
2. Facilitating ISDS to deliver quality judgments because ISDS arbitrators can study national law, the host state's national legal standards of the decision.
3. Putting investors in the same position as other citizens, who are not granted more privileged rights.
4. Helping clarify and integrate the role of domestic courts and ISDS arbitration. The domestic justice system will reconsider their role as the main forum for disputes involving claims by foreign investors, and ISDS will soon provide an extra layer of protection against any shortcomings in domestic legal proceedings. Objection of the use of local remedies exhaustion is generally due to concerns of additional cost and time of dispute resolution process. Though there is no evidence that ISDS arbitration is cheaper and faster than domestic litigation. The average ISDS cost is more than eight million dollars per case and takes more than four years to complete. The reform of the domestic legal system that provides satisfaction to investors in domestic business will eliminate any costs for international arbitration. The 18 months' time limit for exhaustion local remedies in some IIAs is unfair given that in the ISDS alone the case resolution took an average of more than 4 years.

Fourth, BIT needs to require written consent of both parties before the ISDS mechanism is implemented. This is in line with the applicable principle in arbitration law that arbitration jurisdiction is based on mutual consent. In the case of Warraq (2011), the investor was a citizen of Saudi Arabia and Indonesia had no BIT with Saudi Arabia. Warraq brought the case to UNCITRAL based on Organization of Islamic Conference (OIC) agreement 1981. Indonesia objected to the UNCITRAL jurisdiction based on the same argument used in Rafat Ali case. Indonesia also argued that based on the OIC agreement, forum for investors is a local court. But the Tribunal ignored this argument and claimed to have jurisdiction. Learning from this case, it is important to set the terms for the written consent of both parties in BIT.

Fifth, BIT needs to provide the flexibility of the host state to protect the welfare of its people through non-discriminatory regulations for the purposes of community welfare, public health, safety, eco-friendly, public morals or public order. CETA ensures investor protection, without neglecting the importance of protecting state sovereignty.

Related to this flexibility the new BIT trend also incorporated the human rights clause into its clauses. Article 1114 (1) of the North American Free Trade Agreement (NAFTA) allows the host state to enact actions aimed at human rights as long as it is consistent with the terms of the investment agreement. Article 10 of CETA stipulates that investment arrangements do not restrict the state's authority to exercise the human rights of the people, as long as Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health (Cook, 2007).

Sixth, there has to be an effort to redefine expropriation. So far, expropriation is often interpreted in a very broad meaning that all host states' policies that harm investors are considered as non-direct expropriation. The case of Philip Morris Asia Ltd. *vs.* Australia has

inspired and influenced the preparation of the Trans-Pacific Partnership (TPP). TPP had made some changes regarding the definition of direct expropriation and indirect expropriation, especially regarding the right of state to protect the public interests as stated that (Cook, 2007):

> *"Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances".*

The necessity to protect investors from the host state is firmly rooted in the historical background of international investment law towards the end of the nineteenth century and throughout the 20th century, where investors face a takeover or discrimination without any compensation. Such helplessness comes from understanding the weakness of the individual in relation to state power. The balancing process takes place by means of internationalization of international investment dispute resolution mechanisms and applicable laws in international investment agreements (Radi, 2012). This is the reason why investment agreements usually only give the investors rights and give the host state obligations. However, the conditions are already much different, even in many situations bargaining position investor is stronger than host state. New BIT should able to balance between two different investment expectations (Radi, 2012).

CONCLUSION

As long as Indonesia still needs foreign investment, the existence of BIT is still important. Nevertheless, Indonesia needs to renew its BIT with a new model that provides a balance between the interests of investors and the interests of the host state. Some of the important changes that are recommendable in the new Indonesia's BIT model are as follows:

1. Redefinition of unclear terms which opens up opportunities for interpretation to the detriment of Indonesia. The term referred to include investment and foreign investors.
2. Re-formulation of Fair and Equitable Treatment (FET) with clear standards.
3. Obligation to exhaustion of local remedies.
4. Requiring the written consent of both parties for bringing the dispute to the international arbitration.
5. Providing flexibility to the state to protect public interests including human rights.
6. Redefinition on the term of expropriation.

ENDNOTE

1. Agreement between the Government of the Republic of Indonesia and The Government of Australia Concerning the Promotion and Protection of Investment.
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This article was originally published in a special issue, entitled: **"Legal aspects of Regionalism, Domesticity Agrarian, and Shariah principles",** Edited by Muhammad Haseeb.