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Bilateral Investment Treaty Effectiveness in Completion of Capital Investment Disposal

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Abstract—Investment is one of the important aspects of a country's economy. This is because the country will get many benefits, both directly and indirectly. Legal certainty is an important matter in attracting foreign investors, especially legal certainty related to dispute resolution. Article 32 of Law No. 25 of 2007 concerning Investment has stated that there are several ways to resolve disputes, including deliberation, arbitration and court. Bilateral Investment Treaty (BIT) is an agreement carried out between governments in investment. The Bilateral Investment Treaty (BIT) regulates various clauses related to the implementation of an investment. Bilateral Investment Treaty causes legal certainty and increases foreign investment in Indonesia. This research is aimed at finding dispute resolution in the field of investment that is fast and precise and beneficial for both the host country and investment. The research method will be conducted by finding data on the frequently used settlement procedures, speed, and accuracy in resolving investment disputes, analyzing the concept of the Bilateral Investment Treaty (BIT) and using it in resolving investment disputes. After doing the research, PERSPECTIVE will be carried out, the researcher will also create an ISBN textbook and make a presentation related to the publication.

Keywords—Bilateral Investment Treaty (BIT)

2 I. INTRODUCTION

Investment or investment is the first step in production activities. In this position, investment in essence is a the first step in production activities. Investment is also the first step in economic development activities. Investment dynamics affect the high and low economic growth and reflect the rampant or sluggish economy. In an effort to grow the economy, every country always creates a climate that can stimulate investment. The target is not only the public or the domestic private sector, but also foreign investors.

Investors have a motive to seek profit. Therefore, not a few investors invest abroad. These benefits can be obtained by cheap labor costs, close to raw material sources, new market size, selling technology (brands, patents, trade secrets, industrial designs), selling raw materials to be used as finished materials, incentives for investors and country-specific status certain in international trade. While for countries that provide investment, have an interest in national development. Unification of interests or equality of perception between investors and recipient countries is not easy. That is, if the

recipient country is too tight in determining the investment conditions for investors, it will be a negative sentiment that makes the country shunned by investors. On the other hand, the era of globalization makes capital owners free to determine where to invest which is not too limited in their space [1].

Disputes are certainly things that are avoided by investment, but disputes are things that can happen later on, therefore, legal certainty of dispute resolution is an important matter for investors before investing, especially if the investment is carried out by foreign investors.

Arrangements related to the settlement of disputes are contained in Chapter XV Article 32 of Law Number 25 of 2007 concerning Investment. Article 32 states that the settlement of disputes must first be settled by means of deliberation and consensus. However, in accordance with Article 32 paragraph (2), if no agreement is reached, it can be resolved through a court or arbitration (alternative dispute resolution) in accordance with the provisions of the legislation. In the event that a dispute occurs between the government and domestic investors, the settlement can be done through a court or arbitration and if the dispute between the government and foreign investors, the settlement can be done through international arbitration, but all of them must be based on an agreement by both parties this is contained in Article 32 paragraph (3) and paragraph (4) of the Law on Investment [2].

Certain types of dispute resolution certainly also create various problems, because each party will force to choose a dispute resolution option that will benefit itself and harm the other party, resulting in a sense of dissatisfaction from the losing party and this will break the cooperation between both sides. Therefore, the settlement of the dispute must have been made in an agreement, the agreement can be made bilaterally with the Bilateral Investment Treaty.

The Government through the Investment Coordinating Board (BKPM) is exploring cooperation in investment law handling bilaterally (Bilateral Investment Treaty) with other countries to provide legal certainty for foreign investors. With the bilateral agreement, it is expected that disputes on foreign investment in Indonesia can be resolved based on joint regulations. So that foreign investment and the government know how the settlement will be used and the sanctions that will be applied to those who violate the agreement [3].

Based on the description of the background described above in this study, the following problems will be formulated: 1) What are the legal characteristics of a Bilateral Investment Treaty? 2) What is the application of the Bilateral Investment Treaty in settling foreign investment disputes?

II. METHOD

A. Find the Legal Characteristics of a Bilateral Investment Treaty

This is to know the basic of this treaty, the parties, regulation or the function of this party, and the advantages;

B. The Application of the Bilateral Investment Treaty in Settling Foreign Investment Disputes

To know how the bilateral Investment Treaty's function to help the parties to settle their dispute with win solution, so the relationship between them can be still good.

III. DISPUTE SETTLEMENT IN DIRECT INVESTMENT

The International Monetary Fund (IMF) provides a definition of direct investment, namely an investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose being to have an effective voice in the management of the enterprise. In practice, this translates so an equity holding of 10 percent or more in the foreign firm an investment made by a company or entity based in one country into a company or entity based in another country. Direct investment differs substantially from indirect investment such as portfolio flows where in overseas institution investing equity listed on stock exchange [4].

Direct investment is often interpreted as an investment activity that involves: (i) transfer of funds (transfer of funds); (ii) projects that have long term projects; (iii) the purpose of obtaining regular income; (iv) the participation of those who transfer funds (the participation of the person transferring the fund); and a business risk.

The investment law regulates the conceptual framework of "investment" as an individual or business entity that invests both foreign investment and domestic investment. Article 1 point 5 and number 10 states that foreign investors are defined as the ownership of foreign citizens, foreign business entities, and / or foreign governments that invest in the territory of the Republic of Indonesia.

Article 1 point 8 of the Investment Law states that capital is owned by a foreign country, an individual is a foreign national, a foreign business entity, a foreign legal entity or an Indonesian legal entity, which is partly or wholly owned by a foreign party. Article 5 paragraph 2 stipulates that investment must be in the form of a limited liability company under Indonesian law and domiciled within the territory of the Republic of Indonesia, unless otherwise stipulated by law.

The Investment Law regulates the resolution of disputes. In Chapter XV, Article 32 of Law Number 25 Year 2007 concerning Investment is described in the manner of dispute

resolution used in the event of a dispute in the field of investment: 1). Deliberation and consensus is one of the solutions to disputes by conducting joint discussions with a view to achieving decisions and agreements on resolving disputes together; 2). Arbitration is a way of resolving a dispute by using the services of an arbitrator or an arbitral tribunal, so that the arbitrator or arbitrator assembly will resolve the dispute; 3). The court is an institution that must exist in every country that is useful for enforcing the law in a country. The court is an institution where legal subjects seek justice; 4). ADR or Alternative Dispute Resolution is defined as Alternative Dispute Resolution, according to Law No. 30 of 1999, is a dispute resolution or dissent institution through a procedure agreed upon by the parties, namely an off-court settlement through negotiation, mediation, conciliation. (a). Negotiation, Negotiation is two-way communication designed to reach agreement when both parties have the same or different interests; (b). Mediation, Mediation is a process of negotiation to solve problems through impartial and neutral outsiders who will work with the disputing parties to help find solutions to resolve the dispute satisfactorily for both parties; (c). Conciliation, Conciliation is an attempt to bring together the wishes of the disputing parties to reach agreement and resolve the dispute; 5). International Arbitration, namely through the International Center for the Settlement of Investment Dispute (ICSID), which is an institution for resolving disputes arising in the field of investment between a country and a foreign country among fellow convention participants [5].

Developed countries as providers of capital for legal treatment of their activities in Indonesia, the government makes rules regarding Settlement. Disputes outside the judiciary are international arbitrations, namely through the ICSID (International Center for Settlement of Investment Dispute). ICSID (International Center for Settlement of Investment Dispute) is an arbitration institution that functions to resolve foreign investment disputes that were born on World Bank initiatives in 1965 through the Convention on Settlement of Investment in Dispute Between States and National of Other States (Convention concerning Settlement of Investment Disputes between Countries and Foreign Citizens) or often known as the Washington Convention. The Government of Indonesia has ratified the Convention on the Settlement of Investment, Dispute Between States and National of Other States, with Law Number 5 of 1968 concerning Approval of the Convention on Settlement of Investment Disputes between Countries and Foreign Citizens.

IV. BILATERAL INVESTMENT TREATY AS DISPUTE SETTLEMENT IN DIRECT INVESTMENT

Definition of the Bilateral Investment Treaty (BIT) according to the United Conference on Trade and Development (UNCTAD) is stated: Bilateral Investment Treaty are agreements between two countries for the reciprocal encouragement, promotion, and protection of investment in each other's territories by companies based in either country. Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most favored nation treatment, fair, and equitable

treatment, compensation, in the event of expropriation or damage to the investment, guarantees of free transfers of fund, and dispute settlement mechanisms, both state-state and investor state [6].

Indonesia has entered into an Investment Treaty Bilateral Agreement with 67 countries starting in 1972 with Belgium, which is still valid today. The status of the agreement has 3 types, namely not ratified, terminated, and still valid. Indonesia's agreement with 20 countries is still not ratified, 22 terminated countries, while 24 countries are still valid [3].

Bilateral Investment Treaty (BIT), basically contains three things. The first is promotion, the second is protection and liberalization, so basically BIT is used in trade liberalization and promotion media. In the BIT there are usually exceptions given by the host country so that large investors feel it is profitable and invests in it, so that investors do not look at the settlement of the dispute, because what is seen is the things that benefit them.

The Bilateral Investment Treaty (BIT) offer, comes from a state proposal. Then negotiations by the negotiating team are carried out and if the proposal is deemed not harmful to the host country, BIT will be created. If not, BIT will be deadlocked, this happens in the proposal submitted by South Korea so that no signatures have yet been made. So that the host country also has the same bargaining position with investors, because the host country can refuse or accept, therefore the ability to negotiate is needed. However, given Indonesia's need for investors, if the proposal is not detrimental, it will usually be accepted, therefore many parties view Indonesia as having a low bargaining position in the BIT [5].

Two countries can be involved in many agreements, for example Indonesia and Australia enter into agreements with AUSNZ, AFTA, ASEAN JEPAN, if this happens then the most recent agreement is used. Whereas if BIT occurs between two ASEAN countries, then it must be approved in advance at the regional level.

Diplomatic settlement is of course preferred given that the settlement carried out through arbitration can incur substantial costs, for example in the case of Churchill Mining alone it can reach 1.5 billion to 20 trillion, but the cost of the case has not been the cost of the decision.

Disputes that occur usually between business people, or business actors with the state, are rarely found in countries that have disputes with the state, it does not mean that they are not allowed, only feared will make diplomatic relations bad. Even if there is, a dispute that occurs must only be a non-monetary dispute, not a compensation claim. An example is Singapore, which sues Indonesia regarding policies made by Indonesia, not to ask for compensation. The countries that often sue are the United States, which is 165 times followed by the Netherlands, Canada and Spain, while Japan and Singapore are countries that rarely sue.

The dispute resolution is a Bilateral Investment Treaty (BIT), usually using dispute resolution using EXIT, UNICITRAL, or ICSID. EXIT is only related to investment

policy, and will be rejected when the evidence used is fake, while UNICITRAL is Ad Hoc.

This research takes two kinds of dispute resolution media, namely Dispute Settlement Body in the WTO of them won against the party that has a Bilateral Investment Treaty with Indonesia. Whereas in the ICSID, of the six cases, one had no verdict, one was revoked, one of the two parties reached an agreement (i.e. in the cemex case), two wins (Rafat Ali and Churchill Mining, England), and one defeat (AMCO). Where the winnings obtained are from countries that have a Bilateral Investment Treaty (BIT).

The Bilateral Investment Treaty is basically a Bilateral agreement between the two countries to will be carried out by the investor who is the host. Aside from being a promotional media containing facility clauses, namely incentives and guarantees, signed by the Investment Treaty will also apply to business actors from both countries.

Bilateral Investment Treaty can also be used as a medium to resolve disputes that will occur. In addition to determining the media for settlement, the Bilateral Investment Treaty can actually also be used as a medium to state what sanctions will be received by the parties if they default in the future [5].

The Bilateral Investment Treaty is actually an agreement between two countries where the parties have an equal position in making clauses, so that it would be better if business actors entering Indonesia had previously entered into bilateral investment treaty agreements with Indonesia.

Training related to negotiation procedures and scientific enhancement on international law needs to be done considering that experts who negotiate in practice so far are only experts in the field of national law, thus impacting inequality in bargaining position.

V. CONCLUSION

First, Bilateral Investment treaty is an agreement between two countries based proposal which sent by a country to do investment in a country with promotion clause, liberalization, and law protection. So with this agreement, if there is a business actor in that agreement do investment, so the agreement will follow Bilateral Investment Treaty.

Second, although in Bilateral Investment Treaty, law protection not many from promotion and liberalisation, however, if there is be an agreement between two business actor, so based of make for choose in this is legal certainty.

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