INVESTMENT DISPUTE SETTLEMENT IN INDONESIA

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Abstract

Nowadays, investment contributes more for Indonesian's economic, especially foreign investment. Some policies and regulations have been enacted to support and promote foreign investment. One of it is by enacted Act No. 25 Year 2007 on Investment. Besides investment regulations, Indonesia has also been bound by some international investment agreements, whether bilateral investment treaty or regional investment agreement. These agreements have particular rules or mechanism to settle the dispute that arise between host state and investor. In investment, the possibility to breach investment regulations or investment agreement is a certainty. And it can be done by whether investor or host country. This paper will try to elaborate some rules or regulations of investment dispute settlement in Indonesia, how the mechanism to settle investment dispute, whether base on investment regulation or investment agreement and also the explanation about Indonesian's experience in some investment cases.

Keywords: investment, dispute settlement, investment regulation, international investment agreement

I. INTRODUCTION

Investment for a country has both positive and negative impacts. Among the positive impacts of investment is the flow of funds entris into a country. However, the funds can be used for development, in addition, investments especially foreign investment will open wide employment, which is expected to improve the welfare of the community, mainly in the area around the business . However, the negative impact may arise is that foreign investment, often causes disputes with local communities, especially in developing countries. Another negative impact that arises is allegations of environmental destruction by foreign investors, especially on investments related to natural resource exploration.

Foreign investments in a country, are began by an investment agreement made by the home country and the host country. Investment agreements are made to provide adequate and effective protection against investors who will invest their capital. This is one of the reasons for an investment agreement.

During the investment agreements between the home countries and the host countries which are usually made in the form of bilateral investment agreements, not yet as popular today, there is a tendency for host countries not to protect foreign investments.

So home countries, sometimes need to implement a "gunboat diplomacy" policy, which provide protection for investments, but often arise armed conflicts between countries (Nancy A. Welsh & Andrea Kupfer Schneider, 2013).

As developments, dispute resolution begins to move from initially putting the violent way into a peaceful settlement. Huala Adolf and An An Chandrawulan (2005) argue that the process is pursued initially by making an agreement prior to the dispute, in the form of an agreement between the home country and the host country. Another way is to make a deal after the dispute arised. And the next way that is now often chosen is to settle the disputes through a third party.

The mechanism of dispute resolution of investment in Indonesia based on Law no. 25 of 2007 concerning Investment, especially disputes that occur between the Government of Indonesia and the investors, the mechanism is as mentioned in Article 32.

In the event of an investment dispute between the Government of Indonesia and the foreign investors, the mechanisme of settlement is as set forth at Article 32 paragraph (1) of the Investment Law. Furthermore, if no agreement is reached from the negotiations made, then the mechanism of settlement that can be reached is through arbitration institution, both domestic arbitration institution and foreign arbitration institution. Alternatively, dispute settlement can be solved by dispute resolution through courts.

In general, several dispute resolution mechanisms of investment between foreign investors and the Government of Indonesia are as follows:

1. Settlement of disputes under the Investment Law No. 25 Year 2007 (Article 32)
2. Settlement of disputes under bilateral investment treaty (BIT) followed by Indonesia

Based on the description above, this article will discuss about the settlement of investment in Indonesia, especially disputes between foreign investors and the Government of Indonesia.

II. METHOD AND MATERIALS

The method of research which is used in this paper is the normative legal research method. The purpose of normative legal research is that legal research conducted by examining existing library materials. The research material used is secondary data. Data collection is done by conducting literature study. The data required in this study is included primary legal materials and secondary legal materials.

The data are obtained by qualitative analyze and comprehensively, ie by describing the data quality in the form of a regular sentence, sequential, logical, effective, making it easier in interpretation of the data and understanding of the results of the analysis. The data are also analyzed in depth as a whole, so that no part is forgotten. Thus, it is expected that the results of the research will be qualified and perfect. Technique of conclusion is done by deductive method, that is withdrawal of conclusion from things which is general to things that are special.

III.RESULT AND DISCUSSION

Regulations on investment, especially foreign investment has began by enactment of Law No. 1 Year 1967 on Foreign Investment. This law was then amended by Law No. 11 Year 1970 on Amendment and Supplement to Law No. 1 Year 1967 on Foreign Investment.

In 2007, Law No. 1 Year 1967 was replaced by the Law on Investment No. 25 Year 2007, where the regulation in the Investment Law covers the regulation of foreign investment and domestic investment, originally stipulated in different laws.

In Law no. 1 Year 1967, settlement of investment disputes is regulated in Article 22, namely through negotiations and through the arbitration body. However, this is only limited to the disputes that occur related to the nationalization of foreign investments by the Government of Indonesia. As for the dispute because of other matters not clearly regulated in the Foreign Investment Law 1967.

With the enactment of Law no. 25 of 2007, the Law no. 1 of 1967 becomes invalid. Therefore, investment disputes that occur between foreign investors and the Government of Indonesia, are settled in accordance with the provisions of Article 32 of Law no. 25 Year 2007.

The mechanism regulated at Article 32 is as follows:

1. Investment disputes between the Government and investors are to be first settled through deliberation and consensus.
2. If a settlement cannot be reached by deliberation and consensus, the dispute can be settled through arbitration, alternative dispute resolution or the courts, under prevailing laws.
3. Investment disputes between the Government and domestic investors are to be settled through arbitration, if the parties have agreed to do so, and if resolution is not achieved through arbitration, then the dispute is to be resolved in court.
4. Investment disputes between the Government and foreign investors are to be resolved through international arbitration upon which the parties must agree.

Stipulation in Article 32 paragraph 4 Investment Law 2007 is still not able to meet the legal interest of investors, especially if the parties, the Government of Indonesia and investors are disagree about applying for the international arbitration such as ICSID mechanism, and previously no investment agreement has been agreed (Simon Butt, 2011).

Besides the settlement of investment disputes under Article 32 of Law No. 25 Year 2007, the arrangement of settlement of investment disputes usually regulated in the investment treaty which is made between the host country and the home country. The investment agreement/treaty is a bilateral investment treaty (BIT), which is formulated bilaterally by Government of Indonesia together with other countries. This BIT is also known as the Agreement for Promotion and Protection of Investments (Perjanjian Peningkatan dan Perlindungan Penanaman Modal/P4M). Until 2015, at least Indonesia has signed 67 BITs with various countries.

BIT explicitly states the dispute resolution mechanism that occurs between the home country and host country, as well as the dispute between the host country and the investors. Sefriani (2013) notes that there is still appears criticism of BIT, one of the reason is that the settlement of investment disputes through investment arbitration is considered to be an industry for developed countries. This is evident from the legal system of developed countries that dominate the trial process, which tends to harm the interests of developing countries.

Nevertheless, several reasons put forward by experts on why BIT is still interesting in investment agreements, among others are (Huala Adolf, 2011):

1. Investors are not bound by the national courts of the host country;
2. There is an obligation for the state to ratify the ICSID Convention to implement the ICSID arbitral award;
3. Sense of security for investors, because there is a neutral authorized arbitration institution to resolve in case of dispute;
4. The host countries does not have to face any possible diplomatic protection measures by home countries.

An investment case that is discussed in this paper related to the dispute settlement in Indonesia, that is Churchill Mining Plc v. Republic of Indonesia. The case suggests dispute between Indonesian Government versus foreign investors. It has been awarded recently by the tribunal, and Indonesia won the case. However, in March 2017 Churchill applied for the annulment of the award.

Churchill Mining Plc (Churchill) is one of the British Company and an Australian company called Planet sued Government of Indonesia to ICSID (the International Center for the Settlement of Investment Dispute). These two companies through its subsidiary PT. Indonesian Coal Development (PT ICD), obtaining the right to explore the coal in Indonesia. It's project is mining exploration in Kutai Kartanegara Regency in East Kalimantan. The suit was based on BIT between Indonesia-United Kingdom dan BIT between Indonesia-Australia.

BIT Indonesia-UK signed in 1976. Article 8 BIT Indonesia-English states that in case of dispute concerning the interpretation or implementation of the agreement, if possible be settled through diplomatic negotiation. Furthermore, if the Contracting Parties are unable to reach an agreed, the dispute shall, upon request of either Contracting Party, be submitted to the arbitral tribunal.

In BIT Indonesia-UK 1976, Article 7 contains the dispute sttlemnet mechanism, namely "The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make investment. Company to submit, for conciliation or arbitration, to the Centre established by the Convention of the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment".

In BIT Indonesia-Australia, 1992, article xi governs the settlement of disputes between the government and the investor, which is first done through consultation and negotiation. If no

agree is reached, then the settlement shall be in accordance with the laws and regulations of the party, or to the ICSID for the application of the conciliation or arbitration procedures. On the basis of this BIT, Planet Pty Ltd also sued Indonesia in ICSID for revocation of exploration permit PT. ICD by Kutai Regency.

However, Kutai Regency the license revoked causing the loss for PT. ICD. Upon revocation of exploration permit, PT. ICD filed a lawsuit in the PTUN Samarinda to appeal to the Supreme Court. But the final decision was that the revocation of exploration permit by Kutai Regency is valid.

Further efforts made by Churchill and Planet as shareholders of PT. The ICD was filing a lawsuit to the ICSID arbitration body in 2014. After two years of trial, in December 2016, the ICSID arbitration judge handed down the verdict. ICSID's award is as follow (Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia, Award):

1. The Decisions on Jurisdiction of 24 February 2014 are incorporated by reference into this Award;
2. The 34 disputed documents listed in paragraph 108 of this Award are not authentic and unauthorized;
3. The claims brought in this arbitration are inadmissible;
4. The Claimants shall bear the fees and expenses of the Arbitral Tribunal as well as ICSID's administrative fees and thus pay to the Respondent USD 800,000 or any lower amount that may arise out of ICSID's final statement of account;
5. The Claimants shall bear 75% of the expenses incurred by the Respondent in connection with these proceedings and thus pay to the Respondent USD 8,646,528;
6. All other claims and requests are dismissed

This ICSID's award delivered an advantage for Indonesia, because the potential state losses that would occur if Indonesia had lost in ICSID had disappeared. However, this does not mean that no regulation of dispute resolution mechanisms in Investment Law 2007 and BIT have benefited Indonesia as a host country. Since there still unclear regulation in Investment Law 2007 about investment disputer settlement.

IV. CONCLUSION

Investment disputes are likely to occur when an investor invests in a host state, so that a clear provision of the settlement mechanism is necessary. In Indonesia, resolving investment disputes between government and foreign investors has been regulated in Investment Law 2007 and in BIT made by Indonesia and other countries.

Due to the lack of clarity of settlement mechanism in Investment Law 2007 and BIT, it is very important that the government pay attention to it, either through amendment of Investment Law 2007 or renegotiation of BITs for investment interest in Indonesia in the future.

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