

Backlash against Foreign Investment Regime: Indonesia's Experience

Herliana

A dissertation
submitted in partial fulfillment of the
requirements for the degree of

Doctor of Philosophy

University of Washington

2017

Reading Committee:

Dongsheng Zang, Chair

John O. Haley

Melissa Durkee

Program Authorized to Offer Degree:

School of Law

©Copyright 2017

Herliana

University of Washington

Abstract

Backlash against Foreign Investment Regime: Indonesia's Experience

Herliana

Chair of the Supervisory Committee: Professor Dongsheng Zang

School of Law

This study investigates Indonesia's changing attitude from embracing to repudiating foreign direct investments. Opened its door for foreign investment in the late of 1960s and enjoyed significant economic growth as the result, the country suddenly changed its foreign investment policy in 2012 to be more protectionist towards domestic investors and skeptical towards foreign investors. The essential issues to be discussed in this research are: what motivates Indonesia to move away from global investment regime; what actions the country has taken as manifestation of resentment against the regime; and who are the actors behind such a backlash. This is a qualitative study which aims at gaining a deep understanding of a legal development of Indonesia's foreign investment. It aims to provide explanation of the current phenomenon taking place in the country. Data were collected through interviews and documents.

This research reveals that liberalization of foreign investment law has become the major cause of resentment towards the foreign investment. Liberalization which requires privatization and openness toward foreign capital has failed to deliver welfare to the Indonesian people. Instead, foreign investors have pushed local business players, especially small and medium enterprises, out of the market. This is not only disadvantageous for local

industries but also in contrary to the economic principle stipulated in the Indonesian Constitution. Liberalization also carries the risk of regulatory chill due to the government's fear of being sued before an international arbitration if such regulations inflict financial loss for investors.

A key finding is the adverse impacts of 'openness' toward foreign investors were responded by civil society organizations and several individuals to file judicial review towards various Laws which give opportunity to foreign investors operating in strategic sectors such as electricity, oil and gas, and water resources. As a result, the Constitutional Court annulled the laws or provisions which give legal basis for foreign investor participation in the country. In addition, various measures are taken by the government to reduce the effects of liberalization including the enactment of protectionist policies, bilateral investment treaty moratorium, and drafting a model Bilateral Investment Treaty (BIT). Therefore, privileges and protections given to foreign investors are significantly reduced.

From the examination of judicial review cases and interview, this research discovers that various civil society organizations and some prominent figures actively engage on the backlash by seeking judicial review on laws that give way for foreign investors' operation in the country. By rendering decisions in favor of the plaintiffs and annulling the laws, the Constitutional Court itself can also be classified as an actor. On the other end of the spectrum, the Indonesian government also plays a crucial role in the shift through more subtle approaches. Its protectionist policy, BIT moratorium and the model BIT are powerful tools to cut down the privileges and protection enjoyed by foreign investors since the late of 1960s. A combination of factors between people's power and government legal actions emerge as the most important driver for the current backlash against foreign investment in Indonesia.

ACKNOWLEDGEMENTS

I would like to express sincere appreciation to DIKTI-Fulbright scholarship for funding the most part of my study. In addition, I also thank the Indonesian Directorate of Higher Education, Gadjah Mada University, the United States-Indonesia Society (USINDO) and the American-Indonesian Cultural and Education Foundation (AICEF) for providing additional funding.

My appreciation especially goes to Professor Dongsheng Zang who always believes in me and positions me as ‘the general’ of this long battle. Professor John Haley, Professor Melissa Durkee, and Professor Sarra Curran thank you for your knowledge, comments, and questions to sharpen this dissertation. I would also thank Dr. Hilary Soderland and Melissa Kane Ph.D. for their kind assistance during my study. My sincere gratitude goes to Professor Jonathan Eddy who opened the door for me to enter this outstanding Law School.

My PhD journey started with the kindness of my mentors at the University of Gadjah Mada Faculty of Law: Professor Marsudi Triatmodjo, Professor Sigit Riyanto, Professor M. Hawin, and Professor Tata Wijayanta who tirelessly wrote me the letter of recommendation for school and scholarship applications. In addition, this academic adventure is also made possible by my colleagues: Dr. Sutanto, Retno Supartinah, Kunthoro Basuki, Hasrul Halili, Sandradini, and Laras Susanti who allow me study abroad and took over my jobs for 4,5 years without expecting anything in return. To them, I am forever indebted.

I would also like to thank your help and friendship: Mbak Linda Yanti Sulistiawati Ph.D and Mas Ahmad Muswanto, Alfitri Ph.D and Rini, Yu Un Opposunggu Ph.D and Keya, Mbak Evi Sutrisno, Amira Paripurna, Wathcaracai, Luke, Mas Totok, Ninin, Putri, Iqbal, Dhila, and all friends in Seattle known as the residents of ‘Kelurahan Blakeley 2013-2017’ whose names are not mentioned here but very meaningful to me. My Ph.D journey might be unbearable without you around. Thank you also to Pusat Studi Hukum dan Kebijakan (PSHK) for giving me an opportunity to be a research fellow during my field research in Jakarta.

Finally, my deepest gratitude goes to my families in Jogja and Klaten, thank you for the endless prayers and support. My husband, my daughter and my son, you make this dream comes true. Thank you.

DEDICATION

To my father who passed away 46 days before my defense.

For every step that I make in life, you are always there with me.

TABLE OF CONTENTS

Title Page.....	i
Copyright Page.....	ii
Abstract.....	iii
Acknowledgements.....	v
Dedications.....	vi
Table of Contents.....	vii
List of Tables.....	xi
List of Abbreviations.....	xii
Chapter I Introduction.....	1
A. Background of the Indonesian Foreign Investment Regime.....	5
B. Significance of Research.....	12
C. Research Question.....	14
D. Literature Review.....	15
E. Methodology.....	26
F. Road Map.....	28
Chapter II Indonesian Foreign Investment Legal Landscape.....	31
A. Pre-Independence Era.....	32
1. The Vereenigde Oost-Indische Compagnie (VOC).....	32
2. The Dutch Colonialization.....	33
B. Post-Independent.....	38
1. The Old Order.....	38
a. <i>National Economy</i>	38
b. <i>Indonesianization</i>	42
c. <i>The FDI policy making: Ambivalence</i>	44
d. <i>Theory in Context</i>	48

2. The New Order.....	51
<i>a. The Group of Policy Experts.....</i>	51
<i>b. The New Investment Regime.....</i>	58
<i>c. The Economic Fall.....</i>	70
<i>d. The International Monetary Fund Assistance.....</i>	72
3. Reform and Post-Reform Era.....	74
<i>a. A Divided Economic Team.....</i>	75
<i>b. The Succeeding Government.....</i>	77
<i>c. Interface between Domestic Law and International Commitment.....</i>	82
C. Conclusion.....	94
Chapter III Liberalization of Foreign Investment and Arbitration.....	96
A. Liberalization of Foreign Investment in Indonesia.....	100
1. Privatization.....	105
2. Bilateral Investment Treaty.....	118
<i>a. Indonesia BIT Program.....</i>	120
<i>b. Features of Liberal Investment Regime.....</i>	128
1. Expropriation.....	130
2. Repatriation of Funds.....	132
3. Free movement of personnel.....	133
4. Investor-State Dispute Resolution.....	134
<i>c. Criticisms on Indonesia's Liberalization.....</i>	138
B. Arbitration.....	139
1. Theoretical Debate.....	141
2. Arbitration under the ICSID.....	143
3. Indonesia and the ICSID Arbitration.....	146
<i>a. Cases.....</i>	146

b. <i>Indonesia's Concerns on Investor-State Arbitration</i>	155
C. Conclusion.....	167

Chapter IV Forms of Backlash: Protectionist Policies, Constitutional Court Judicial Review, Bilateral Investment Treaty Review and Limited Arbitration.....169

A. Increase Protectionist Policies.....	173
1. Nationalism as the Driving Factor.....	173
2. Areas of Protectionist Policy.....	176
B. Constitutional Court Cases.....	179
1. Electricity Law Case.....	180
2. Investment Law Case.....	184
3. Oil and Gas Law Case.....	187
4. Plantation Law Case.....	192
5. Coastal Area and Isles Law Case.....	195
6. ASEAN Charter Case.....	199
7. Forestry Law Case.....	201
8. Water Resource Law Case.....	204
C. Bilateral Investment Treaty Review and Moratorium.....	207
1. Reasons for Review.....	208
2. Process of Review.....	209
3. Features of the Model BIT.....	215
D. New Limits to Arbitration.....	231
1. Criticisms toward Investment Arbitration	231
2. Procedural Limitations.....	235
3. Issues Uncovered by the Model BIT	237
E. Conclusion.....	241

Chapter V Actors behind Indonesia’s Changing Attitude against Foreign Investment.....	242
A. The Actors.....	246
1. Traditionalist Actors.....	248
<i>a. Islamic-based CSOs and Islamic Scholars.....</i>	<i>250</i>
<i>b. Trade and Investment-based CSOs.....</i>	<i>261</i>
<i>c. Land, Indigenous People, and Environmental-related Issues CSOs.....</i>	<i>266</i>
<i>d. Organized-worker CSO.....</i>	<i>274</i>
<i>e. Prominent Figures.....</i>	<i>276</i>
<i>f. The Constitutional Court.....</i>	<i>281</i>
2. Modernist Actors.....	297
<i>a. The Indonesian Government.....</i>	<i>298</i>
<i>b. Non-government Actors.....</i>	<i>303</i>
B. Interaction between the Actors.....	305
C. Conclusion.....	310
Chapter VI Conclusion and Recommendations.....	312
Bibliography.....	325

LIST OF TABLES

Table II.1	Number of FDI Projects
Table III.1	BITs Signed by Indonesia
Table III.2	Indonesia's Investment Arbitration Cases
Table IV.1	List of Discontinuation of BIT by Indonesia
Table IV.2	Amount of FDI in IDR Trillion in Quarterly Basis
Table IV.3	Comparison of the Existing BIT with the BIT Model
Table IV.4	Sums of Compensation Awarded to Multinational Company by Rules
Table V.1	Criteria to Determine the Group
Table V.2	Changes of Law No. 25 of 2007 as a Result of Judicial Review
Table V.3	Education and Professional Background of the Constitutional Court Justices

LIST OF ABBREVIATIONS

AANZFTA	ASEAN-Australia and New Zealand Free Trade Agreement
ASEAN	Association of Southeast Asian Nations
ACIA	ASEAN Comprehensive Investment Agreement
BIT	Bilateral Investment Treaty
BKPM	<i>Badan Koordinasi Penanaman Modal</i>
BP MIGAS	<i>Badan Pelaksana Minyak dan Gas</i>
CSO	Civil Society Organization
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HTI	<i>Hizbut Tahir Indonesia</i>
ICD	Indonesian Coal Development
ICSID	International Centre for Settlement of Investment Dispute
IIA	International Investment Arbitration
IMF	International Monetary Fund
KPC	<i>Kaltim Prima Coal</i>
MFN	Most-Favored Nation
MIT	Multilateral Investment Treaty
MNC	Multi-National Company
MoU	Memorandum of Understanding
NGO	Non-governmental Organizations
NT	National Treatment
NU	<i>Nahdlatul Ulama</i>

OECD	Organization for Economic Cooperation and Development
OPEC	Organization of the Petroleum Exporting Countries
PLN	<i>Perusahaan Listrik Negara</i>
SKK MIGAS	<i>Satuan Kerja Khusus Minyak dan Gas</i>
SME	Small and Medium Enterprise
SOE	State-owned Enterprises
TIFA	Trade and Investment Framework Agreement
UK	United Kingdom
UN	United Nation
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Commission on Transnational Corporations
US	United States
USTR	United State Trade Representatives
VCLT	Vienna Convention on the Law of Treaties
VOC	<i>Vereenigde Oost-Indische Compagnie</i>
WTO	World Trade Organization

Chapter I

INTRODUCTION

Foreign investment has two types: portfolio and direct investment. Portfolio investment is symbolized “by a movement of money for the purpose of buying shares in a company formed or operating in another country.”¹ Thus, there is no management and control of the enterprise. Foreign Direct Investment (FDI), on the other hand, is defined as an investment having distinct criteria such as commitment of assets into a project, involving a long-term relationship and reflecting a lasting interest and control of a private party in one country in a company in another country.² This implies that in FDI, the investors have a significant degree of influence on the management of the company in another country.

FDI uses Multi-National Company (MNC) as the vehicle for their operation.³ This type of company has facilities and other assets in at least one country aside from its country of origin. MNC has become a crucial way to bring goods and services to foreign markets through investment in all sectors throughout the world.⁴ While most FDIs are coming from developed countries, the current trend shows a considerable number of FDI from emerging markets.⁵

FDI has the characteristic of a long-term investment which involve tangible and intangible assets such as technology, management and marketing skills, as well as access to new markets to the host country of investment. Therefore, FDI also creates new employment and could improve economic growth and development of its host. Because of those reasons,

¹ M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed, (Cambridge: Cambridge University Press, 2010), 8.

² *Ibid.*, 9-10.

³ Eric M. Burt, “Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization,” *American Journal of International Law and Policy*, vol. 12 (1997): 1019.

⁴ Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford: Oxford University Press, 2010), 33.

⁵ Karl P. Sauvart, “The International Investment Law and Policy Regime: Challenges and Options.” E15 Task Force on Investment Policy, International Centre for Trade and Sustainable Development, May 2015, p 2, available at <http://ccsi.columbia.edu/files/2015/08/KPS-E15-Overview-Paper-May-15-published.pdf>, accessed on June 1, 2015.

in the 1960s many developing countries liberalized their foreign investment to attract many foreign investors as possible. Despite such benefits, there is a growing criticism towards FDI such as the inability of the government to exercise its full regulatory power; monopoly over the market by MNC, environmental degradation, and human rights abuse.⁶ Due to those conflicting needs and interests, the host government often faces a dilemma in making policy related foreign investment. On the one hand, the government seeks to attract FDI and benefit from it, while on the other hand, it has to advance the national interests or public policy objectives.⁷ Pressures from various groups such as labor unions, religious groups, as well as Non-governmental Organizations (NGOs) are not uncommon.

Unlike trade, no multilateral agreement governs foreign investment. This is despite several attempts made to establish such an agreement including one attempt in 1998 at the Organization for Economic Cooperation and Development (OECD) and another attempt in 2003 as part of the Doha Development Agenda of the World Trade Organization (WTO). Both developed and developing countries failed to reach an agreement.⁸

OECD's failure was due to considerable differences among the negotiating parties⁹ as well as from NGOs¹⁰ toward the draft of the agreement. Their disagreements were in respect to the right of entry, national and most-favored treatment, prohibition of performance requirement, and liberalization of investment.¹¹ The NGOs criticized the provision that required the host government to give a general right of entry to investors because this meant that FDI with a bad record on environmental and labor issues could not be banned. Likewise, national and most-favored nation treatment would disable host governments to punish foreign

⁶ Kenneth J. Vandavelde, *Bilateral Investment Treaties*, (Oxford: Oxford University Press, 2010) 103-104.

⁷ Salacuse, *The Law of Investment*, 38.

⁸ Vandavelde, *Bilateral Investment Treaty*, 69.

⁹ Including Canada, the United States, France, and Australia.

¹⁰ For example: Third World Network based in Malaysia, Polaris Institute based in Canada, Public Citizen Global Watch based in the US.

¹¹ Eric Neumayer, "Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD-Negotiations," *Wirtschaftspolitische Blätter*, vol. 46, no. 6 (2010) 618-628. Available at SSRN: <https://ssrn.com/abstract=203348>, accessed at 12/5/2016.

investors for their bad behavior to environment, labor standards, or human rights in other states. The negotiating states objected with the general prohibition of performance requirements since host state governments could no longer be able to favor local industries or require FDI to employ domestic workers or use local production inputs. In addition, they disagreed with liberalization of investment regimes since it would allow companies to move to countries which offered lowest production cost. This way, the home states of investors, especially the industrialized countries, would suffer job and income losses.¹²

The next effort to set up investment multilateral agreement was conducted at the WTO Ministerial in Cancun in 2003 demanded by industrialized nations.¹³ However, a group of developing countries, led by Brazil and India, blocked the effort due to the fear of reduction of their ability to exercise their sovereignty power including their ability to regulate the activities of foreign investors.¹⁴

Absence of a multilateral investment agreement brings a consequence that FDI is governed mostly by Bilateral Investment Treaties (BITs). BITs are agreements between two countries that set up the rules to protect foreign investors and their investments. Concluding BITs means both countries agree to provide protections for the other country's foreign investment that they would not otherwise have. A BIT provides benefits for the investors rather than the host state government since it offers various treatments for investors such as national treatment, fair and equitable treatment, and protection from expropriation. Moreover, BITs also provide procedural rights in the form of dispute settlement provision.¹⁵

Containing procedural and substantive rights given to investors, BITs are legally binding instruments in which signing one leads to some legal consequences for host countries

¹² Neumayer, *Multilateral Agreement on Investment*, 618-628.

¹³ Including the European Union, Japan and Korea.

¹⁴ Rafael Leal-Arcas, "The Multilateralization of International Investment Law," *North Carolina Journal of International Law and Commercial Regulation*, vol. 35 (2009): 51.

¹⁵ Vandeveld, *Bilateral Investment Treaties*, 69.

under international law.¹⁶ The procedural rights afford investors an adjudicatory mechanism to enforce substantive rights. It provides investors a remedy for unlawful actions by a host state that affect their investments through International Investment Arbitration (IIA). The justification for an IIA is the assumption that foreign investors do not perceive the domestic court of the host state of investment impartial to settle investment disputes. Also, the domestic court would be likely to apply the domestic law which might be incompatible with the nature of the investment.¹⁷

The International Centre for Settlement of Investment Dispute (ICSID) is frequently referred to the institution for settling a dispute in the BITs. It is an intergovernmental organization established to promote settlement of disputes between states and foreign private investors. The ICSID was created through the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention or also known as the Washington Convention) of 1965.¹⁸ Article 6 of the Convention requires the Administrative Council of ICSID to adopt rules of procedure for arbitration and conciliation. Thus, the ICSID does not conduct arbitration or conciliation proceedings itself but offers institutional and procedural support to conciliation commissions, tribunals, and other committees which do such matters. ICSID arbitration is one of the primary mechanisms for settlement of investment disputes under BITs.

Nonetheless, there is a growing criticism toward the existing foreign investment regime. Firstly, the benefit of FDI in increasing economic development is being questioned.¹⁹ Secondly, BITs are criticized as giving too many protections and treatments for foreign investors without imposing obligations on them. BITs increasingly set the parameters for domestic policy making on international investment. Consequently, host state governments

¹⁶ Vandevelde, *Bilateral Investment Treaties*, 6.

¹⁷ Salacuse, *The Law of Investment*, 358.

¹⁸ "ICSID: International Centre for Settlement of Investment Dispute" available at <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx>, accessed on 10/23/2014.

¹⁹ Vandevelde, *Bilateral Investment Treaties*, 89.

no longer have the freedom to make policies concerning investment related activities.

Thirdly, the arbitration system has some flaws, such as a perceived bias toward investors; interferences on domestic policy; high costs; and an expansiveness of tribunal reasoning.²⁰

The current judgment of the investment regime implies that it has some flaws which need to be repaired.

A. Background of the Indonesian Foreign Investment Regime

In 1967, Indonesia under President Suharto started to aggressively move to an international investment regime by enacting Foreign Investment Law, ratifying the ICSID Convention, concluding some BITs and formulating various policies to provide incentives for FDI. Indonesia's embracement towards this regime was driven by the need to generate income for economic development as the financial condition at that time was severe. The then government pinned its hopes on BIT to improve their chances to attract FDI in the competition among developing countries. Indonesia's openness to FDI has shown to have had a significant impact on economic development. It is fair to say that until the 1990s international investment regime has placed itself in Indonesia's investment law, politics and economy in a way so that no significant conflict or concerns arose.

The financial crisis in 1997-1998 ruined many of Suharto's achievement, encouraging the Indonesian people to keep pushing a new government. The financial crisis caused external debts to rise sharply. Indonesia's economic crisis was triggered by a sudden loss of investors and a lower creditor confidence in the Indonesian currency: rupiah. It was believed that political factors played a bigger role rather than economic factors.²¹ For many Indonesians,

²⁰ Salacuse, *The Law of Investment*, 119.

²¹ M Sadli, "The Indonesian Crisis," in *Southeast Asia's Economic Crisis: Origins, Lessons, and the Way Forward*, ed. H.W. Arndt & H.Hill (Singapore: Institute of Southeast Asian Studies, 1999), 16-27.

the crises also brought the question about the strategy of integration into the world economy.²²

Suharto finally stepped down in 1998. His resignation marked the beginning of the reform era (1998-2001), known in Indonesian as *Reformasi*. The most profound policy change was the shift from a highly centralized system of administration to a decentralized and democratic system. In the decentralized scheme, full autonomy is being placed at the regency/municipal level, with limited freedom at the provincial level.²³ Under decentralization, the power of central government has also been cut. For foreign investors especially in the natural resources sector, transfer of political and administrative powers from the national government to sub-national governments creates complexities.²⁴

After the reform, a new trend emerged in national legislation towards more restrictive provisions. Indonesia is now situated in a different level of development from it was in the 1960s. The era of attracting FDI to satisfy development need ended after Indonesia has reached stability. There is a growing need for an FDI policy that does more than create a favorable climate for economic purposes but also considers non-economic factors to protect national interests. Non-government actors such as NGOs, scholars, local communities demand greater benefits from foreign investors and are increasingly demanding them to be more transparent and promote better social performance. Regarding the mining industry, regional governments, and local people have been seeking to maximize benefits regarding both revenue and economic development. In other words, Indonesia demands that state-investor relationships take the form of mutual and equal partnerships.

²² Thee Kian Wie, "The Soeharto era and after: stability, development and crisis 1966-2000," in *The Emergence of a National Economy*, ed. H. Dick, V. Houben, J. Th. Lindblad & Thee Kian Wie (Sydney: Allen&Unwin, 2002), 241.

²³ Coen J G Holtzappel and Martin Ramstedt, "*Decentralization and Regional Autonomy in Indonesia Implementation and Challenges*," (Singapore: Institute of Southeast Asian Studies, 2009), 20.

²⁴ Bernadetta Devi and Dodi Prayogo, "Mining and Development in Indonesia: An Overview of the Regulatory Framework and Policies." IM4DC Action Research Report, available at m4dc.org/wp-content/uploads/2013/09/Mining-and-Development-in-Indonesia.pdf.

Indonesia experienced dramatic social and political changes after the reform era. One of them was called for the government to put Indonesia in a better position in its relation with foreign investors. The government responded by enacting four important laws related to foreign investment activities. In 1999, the government passed Law No. 22 of 1999 on Local Government which gave greater autonomy to local authorities including granting a license for a foreign investor. In 2007, Law No. 25 of 2007 on Capital Investment was promulgated. This investment law does not distinguish between domestic and foreign investment. It recognizes direct investment in the form of a joint venture; joint operation scheme; and technical and management assistance. Under this Law, a wholly owned foreign company is required to divest a particular portion of its share within 15 years after its operation. The Indonesian Investment Board has taken the view that at least 5% of the total shares should be divested. Next, Law No. 4 of 2009 concerning Mineral and Coal Mining was enacted. This new law limits foreign ownership and requires a divestment. It stipulates that foreign mining companies shall sell at least 51% of their shares to domestic investors after operating for ten years. Also, the new Mining Law bans raw material exports. As a further implementation of this Law, the Ministry of Energy and Mineral Resources passed Ministerial Regulation No. 7 of 2012 concerning the Increment Added Value of Mineral through the Activities of Processing and Refining/Smelting Mineral which requires mining companies to process minerals in the country before export. The government also passed Law No. 32 of 2009 concerning Environmental Protection and Management which put into effect new requirements for foreign companies to acquire an environmental permit, mandatory environmental audit, and provide security funds that will be used for environmental rehabilitation and recovery.

Since the 2000s a significant portion of the government's attention has been given to arbitration proceedings before the ICSID. Indonesia has been named as a respondent six

times. Amco Asia submitted the first case involving Indonesia in the 1980s. Later cases included those filed by Cemex Asia Holding in 2004; Rafat Ali Rizvi in 2010; Churchill Mining and Planet Mining in 2012; and Newmont in 2014. While it remains an anomaly for the host state to bring claims to the ICSID, Indonesia experienced such a case in 2007 when the government of East Kalimantan Province filed a lawsuit against Kaltim Prima Coal in a divestment case. The legal arguments presented before the ICSID are critical to the rise of resentment against FDI in Indonesia. It provides visible sign through which the shift takes place

The policy toward FDI changed dramatically in 2012 when the government took a bold action to what it calls BIT moratorium. The then President Yudhoyono's stated: "I do not want those multinational companies to do anything they desire with their international back-up and put pressure on developing countries such as Indonesia." This remark sends a bold notice to the future of international investment regime in the country.²⁵ Prior to this, the Indonesian government had been forced to halt its environmental and mining policies in the face of several lawsuit threats. For example, in 2002, it had to discontinue its new policy to ban mining in protected forests after the government was threatened with arbitrations. The then Minister of the Environment said, "There were investment activities before the Forestry Act was effective. If shut down, investors demand arbitration and Indonesia cannot pay."²⁶ Those monumental statements encapsulate the view that started in the early 2000s investment arbitration was seen as not merely a dispute resolution but also as a threat. As a result under the Yudhoyono administration, Indonesia issued a policy on BIT moratorium in which stipulated that the government will not extend expired BITs neither will they create new ones. Up to June 2016, the government just had confirmed to discontinue 25 among 65 BITs.

²⁵ The statement was made in cabinet member in a meeting prepared to respond to Churchill arbitration which was held on June 28, 2012, at SBY: Indonesia Harus Menang Hadapi Gugatan Churchill Mining, <http://nasional.kompas.com/read/2012/06/28/15325095/about.html>

²⁶ Tempo. *Nabil Makarim Setuju Dengan Penambangan di Hutan Lindung* (Nabil Makarim Agrees with Mining in Protected Forests), *Tempo*. June 15, 2002.

Indonesia's discontinuation of BIT is essential in signaling Indonesia's movement away from and seriousness in dealing with investment law regime.

The government did not expressly mention that arbitration was the reason behind the BIT moratorium policy. However, some analysts believe that, in part, the policy was motivated by *Churchill and Planet Mining's* claims.²⁷ Those who support the policy said that the decision to terminate BIT deserves appreciation since it is in line with the national interests. Furthermore, Hikmahanto Juwana, a distinguished Indonesian scholar, said that Indonesia should withdraw from the ICSID Convention due to the changing circumstances in economic and political condition.²⁸ On the other hand, Tevendale sees Indonesia's termination of treaties as a backward step as it removes the key protection of the investor.²⁹ Contrary to Juwana, Ewing-Chow and Losari, researchers from the Center for International Law at the National University of Singapore, state that Indonesia should not withdraw from the ICSID because there is no better alternative to investor-state dispute resolution.³⁰

Another extraordinary form of backlash against the current foreign investment regime is the series of judicial review cases brought by individuals and civil society organizations (CSOs) before the Indonesian Constitutional Court aiming to invalidate certain provisions or laws which deemed contrary to the 1945 Constitution, especially Article 33. Article 33 stipulates that the state retains control over its natural resources and that they shall be used for the greatest benefit for the Indonesian people. The claimants use this article to limit private

²⁷ This statement is given by Riza Damanik, the Executive Director of the Indonesian NGO Indonesia for Global Justice, on November 14, 2014, available at <http://www.tni.org/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law>. Similar statement also comes from Rick Beckmann et al in BIT by BIT in Indonesia, October 2004 available at <http://www.nortonrosefulbright.com/knowledge/publications/121386/bit-by-bit-in-indonesia>. Accessed at: May 15, 2015

²⁸ Hikmahanto Juwana. "Indonesia Should Withdraw from the ICSID." *The Jakarta Post*. April 2, 2014, available at <http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html>. Accessed at: May 15, 2015.

²⁹ Herbert Smith Freehills in London, Ben Blawn and Shawn Donnan. "Indonesia to terminate more than 60 Bilateral Investment treaty." May 26, 2014 article can be found in <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3SVIfHD6e>.

³⁰ Michael Ewing-Chow and Junianto James Losari. "Indonesia should not withdraw from the ICSID." *The Jakarta Post*, April 24, 2014. Available at <http://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html>. Accessed at: May 15, 2015

participation, including foreign investors in the economy as such participation is deemed reducing state's control. Moreover, they argued that private participation in natural resources exploitation means that the state has to share the profits with them and therefore, reduce the benefit for the people as the country's earning decreasing. From 2003 up to the end of 2015, the Constitutional Court has invalidated several provisions in seven foreign-investment related law. Rendering judgment in favor of the applicants means that the Constitutional Court agrees with the claimants that the role of foreign investor's participation in the Indonesian economy should be limited. At the moment, the Court is examining three other foreign investment-related laws: Foreign Exchange and Exchange Rate System; Investment; and Electricity Law petitioned by *Muhammadiyah*, Indonesia's second-largest Islamic organization.

The backlash against the current foreign investment regime is not limited to Indonesia.³¹ What makes Indonesian case interesting is the very organized movement by constitutionally limit or ban foreign investment involvement in certain sectors through the judicial reviews. Some Latin American countries withdrew from the ICSID Convention: Bolivia in 2007,³² Ecuador in 2009,³³ and Venezuela in 2012.³⁴ Venezuela terminated its BIT with the Netherlands in 2008 stating incompatibility of the BIT with Venezuela's national policy. South Africa is terminating its first generation of BIT.³⁵ Argentina is said to be in the

³¹ Similar actions also take place in Latin America and South Africa.

³² Diana Marie Wick, "The Counter-Productivity of ICSID Denunciation and Proposals for Change," *Journal of International Business and Law*, vol. 11, (2012): 245-247.

³³ Eric Gillman, "The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008," *American Review of International Arbitration*, vol. 19 (2008): 269.

³⁴ "Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve," *Investment Treaty News*, April 13, 2012, available at <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>, accessed at, February 3, 2015.

³⁵ Xavier Carim, Update on the Review of Bilateral Investment Treaties in South Africa: Prepared for the Parliamentary Portfolio Committee on Trade and Investment 8 (Feb. 15, 2013). Available at: https://www.thedti.gov.za/parliament/2013/bit's_in_sa.pdf, accessed at May 12, 2015.

process of leaving the ICSID Convention due to a large number of claims against the country.³⁶

Disappointment with the ICSID arbitration was the reason behind such a withdrawal since those Latin American Countries face a significant number of cases.³⁷ For example, Argentina has 25 concluded cases, and 25 pending cases; Venezuela has 11 concluded cases and 25 pending cases; Ecuador has ten concluded cases and three pending cases.³⁸ The number of Indonesian cases is lower under those of Latin American countries. However, the potential financial loss and the possible interference with domestic policy caused by arbitration are serious concerns for the country.

This research tries to locate the link between Indonesia's shift against foreign investment regime and the lawsuits brought by foreign investors before the ICSID with the rising of nationalist sentiment in the nation. The primary focus of this research is Indonesia's changing attitude toward international investment regime. In explaining that phenomena, this research entails to find out the manifestation of liberalization of investment law and policy; identify the form of backlash against foreign investment and investor; and pinpoint the actors directly involved in the backlash. This research leads to the proposition that the shift towards international investment regime is caused by liberalization. Liberalization has reduced the state's control over the economic activities and policy making; creates domestic problems such as the inability of small and medium enterprises to compete, and gives rise to arbitration cases. Together, those three factors bring about nationalist sentiment channeled through judicial review cases in the Constitutional Court.

³⁶ Luke Eric Peterson, In policy switch, Australia disavows need for investor-state arbitration provisions in trade and investment agreements, Apr 14, 2011, <http://www.iareporter.com/articles/20110414>, February 1, 2015 .

³⁷ Katia Fach Gómez, Latin America and the ICSID: David versus Goliath?, Social Science Research Network, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325. Accessed at April 4, 2015

³⁸ ICSID and Latin America: Criticisms, withdrawals and regional alternatives : <http://www.bilaterals.org/?icsid-and-latin-america-criticisms#sthash.56LrqZFR.dpuf>. Accessed at April 4, 2015.

This research aims to do three things. First, it shows how international investment law have evolved in line with economics development to move Indonesia from economically devastated country to an emerging economy. The discussion aims to show that economic condition and development needs have affected Indonesia's behavior toward international investment regime. Links are drawn between economic and political occurrence in each period and the changing legal landscape in the foreign investment area. Second, this study details how the liberalization of foreign investment and ICSID cases involving Indonesia are seen, domestically and internationally, from the law and legal process. Focus on cases is important, not only because they represent the law enforcement mechanism in investment dispute, but also because the process serves as a benchmark by which to assess the fairness of the regime in treating the investors and host state. Finally, this research analyzes the foreign investment-related law cases in constitutional court and the actors as a way to analyze the historical background on the shift and the agendas they try to bring up.

B. Significance of Research

Embracement to international investment law regime has been at the center of Indonesia's effort to attract foreign investor since 1967. This study focuses on Indonesia because the country's history of foreign investment law provides an excellent example of the social and economic impacts of foreign investment. That development process has been very dynamic and has occurred over a long period of time. Thus, it is able to show how changes in bargaining abilities and positions are translated into different perspectives among different groups of the society.

By explaining the puzzling situation why Indonesia moves away from international investment regime, despite its needs to attract more foreign investment, this research provides an interesting contrast between what the country needs and the policy that the government implements. For the government, this research provides an explanation for how it needs to

reformulate the law and policy concerning foreign investment to be more acceptable within the society.

In international level, this research is very significant since Indonesia has been inadequately addressed in the literature on foreign investment law, despite the fact that it is significantly important as an FDI destination in Asia. Indonesia is among the three most attractive destinations for multinational companies for 2014-2016, ahead of India and Brazil. In terms of FDI inflows Indonesia ranks 4th among East-Asian countries after China, Hong Kong, and Singapore.³⁹ In so far, there is no current study of the shift since it is a new phenomenon. This research aims to participate in the ongoing debates about the need for developing countries to balance between offering protection to FDI and meeting the state's interests. Scholars in foreign investment law field are now focusing their studies on Latin American countries.⁴⁰ Focus on Latin American countries is understandable in light of the harsh experiences of Argentina, Bolivia, Ecuador, and Venezuela. However, it is important that scholars also look at other countries that actively engaged in the debates surrounding investment law and investment arbitration.

Thus this research serves to fill the gap in English literature on foreign investment law in Indonesia. Hence, on the international level, it contributes to providing a comprehensive empirical literature addressing the struggle of developing countries in the realm of international investment law regime. Moreover, it situates the phenomenon occurring in Indonesia and its interplay with the trend that is also happening in other parts of the world. The results of this research have important implications regarding international governance of foreign investment in the globalizing world. The current regime which increasingly sets the

³⁹ UNCTAD 2014 World Investment Report, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf. Accessed at April, 4, 2015

⁴⁰ For example Gisela Bolivar, The Effect of Survival and Withdrawal Clauses in Investment Treaties: Protection of Investments in Latin America, in *Regionalism in International Investment Law*, ed. Leon E. Trakman and Nicola W. Ranieri, (Oxford: Oxford University Press, 2013) 162-181.

parameters for domestic policy-making on international investment through BIT needs to be enhanced to keep its effectiveness and legitimacy.

C. Research Question

The central research question sought to be answered is, after the significant economic development contributable to the FDI during the New Order:

1. What accounts for Indonesia's current shift away from global investment regime?
2. What are the forms of adverse reactions shown against foreign investment law and policy?
3. Who are the actors behind such a backlash?

In answering the questions, this research will look into the role of FDI in its relation to Indonesian economic development from the 1960s to now and the policy on openness toward FDI. This study will also scrutinize the moves that take place in the Constitutional Court as well as in the government, and the actors involved in such moves. The proposed answers to those research questions are as follows: the changing attitude towards foreign investment regime is caused by dissatisfaction of investment liberalization in the forms of privatization, BIT programs, and investment arbitration since the promised benefits of liberalization are not materialized. Consequently, various efforts are undertaken to minimize the effects of liberalization including the enactment of protectionist policies, Constitutional Court judicial review, BIT moratorium policy, and drafting model BIT which limits access to arbitration. NGOs and some prominent figures have been filing judicial review to annul several foreign investment-related provisions or laws to block foreign participations in several sectors of the economy. On the other hand, the Indonesian government determines to discontinue the existing BITs. Besides, with the support of legal scholars and lawyers, the government is now drafting a model BIT which offers a lower level of FDI protections compared to the existing BITs.

D. Literature Review

Many scholars have undertaken in-depth studies on the issue of natural resources and its correlation with foreign investment and development. National resources especially extractive materials play a key role for a country because they are the powerful drive of development.⁴¹ Extractive industries are often associated with the development of public utilities such as electricity and water supplies and with the building of the transportation infrastructure such as roads, railways, ports needed for extracting, transporting, and exporting the minerals and fuels.⁴² Moreover, the production of extractive industries may influence the overall economic performance of a host country in terms of its macroeconomic stability, growth and income distribution. Income generated can help savings and investment by using the oil revenues to finance diversified investments and to push industrial development.⁴³ However, countries that unable to manage their natural resources could suffer problems known as ‘resource curse’ in the form of poorly diversified economic structures, disruption of local economy and community, environmental hazards and risk of violent conflict.⁴⁴ Consequently, the expected benefits are not materialized.

Using 97 developing countries as samples, Jeffrey D. Sachs and Andrew M. Warner find that countries that are more dependent on natural resources namely agricultures, minerals, and fuels tend to grow more slowly than those which less dependent on natural resources.⁴⁵ Similarly, Scott Pegg also claims that many low-income countries heavily dependent on exporting natural resources have performed poorly on various measures of

⁴¹ UNCTAD World Investment Report Trans National Corporations, Extractive Industries and Development, United Nations 2007, p 93 available at http://unctad.org/en/Docs/wir2007_en.pdf, accessed at 12/7/2016.

⁴² Williamson and DeLong, Natural Resources and Convergence in the Nineteenth and Twentieth Centuries, Unpublished paper, Harvard University, 1994

⁴³ Jeffrey D. Sachs and Andrew M. Warner, Natural Resource Abundance and Economic Growth, National Bureau of Economic Research Working Paper 5398, December 1995, p 3. Available at <http://www.nber.org/papers/w5398.pdf>, accessed at 12/7/2016.

⁴⁴ Naazneen H. Barma, Kai Kaiser, Tuan Minh Le, Lorena Vinuela, Rents to Riches the Political Economy of Natural Resource-Led Development, (Washington DC: the World Bank , 2012), 5-6.

⁴⁵ Jeffrey D. Sachs and Andrew M. Warner, *Natural Resource Abundance*, 2.

economic, social and political development.⁴⁶ For upper-middle developing countries like Indonesia, Malaysia, South Africa, Saudi Arabia, Chile, Botswana, the experience slightly differs. They have managed to take advantage of their natural wealth in order to advance at least certain aspect of development such as increasing per capita income, reducing poverty, and in some case, achieving economic diversification.⁴⁷

During the oil boom period from 1974 to 1982, the Indonesian government used a significant proportion of earnings from oil on high technology projects, even though the projects were considered as unproductive and inefficient.⁴⁸ Moreover, it also used much of the earnings for developmental purposes such as spending on agricultural development and education.⁴⁹ While corruption was rampant during this time, Andrew MacIntyre stated that “Indonesia’s newfound oil wealth did not appear to have been completely wasted through corruption or poor economic management.”⁵⁰

In contrast, the experience of Sub-Saharan Africa shows that abundance of natural resources has so little effect on its people’s welfare. Angus Deaton explains that the problem in Africa has been “the low quality of investment and the absence of complementary factors, especially education.” Moreover, he stated that “the degree of processing in Africa’s exports is relatively low and also the ownership of minerals is often concentrated so that increases in commodity prices are only enjoyed by a certain group of the society.”⁵¹

⁴⁶ Scott Pegg, “Can policy intervention beat the resource curse? Evidence from the Chad-Cameroon pipeline project”, *Oxford Journal of African Affairs*, vol. 105. Issue 418 (2005)1.

⁴⁷ UNCTAD, *World Investment Report*, 93.

⁴⁸ Andrew Rosser, Why did Indonesia overcome the resource curse?, IDS Working Paper 222, Institute of Development Studies, March 2004, p 17. Available at: <http://www2.ids.ac.uk/futurestate/pdfs/wp222.pdf>, accessed at 7/12/2016.

⁴⁹The key figure such as Ali Moertopo saw expansion of the education system as an essential prerequisite for economic development. Economic development, they argued, would be impossible without improvements in the country’s human resources. Besides, expansion of the education system also provided a mechanism for the New Order to promote its political ideology and pursue nation-building objectives..

⁵⁰ Andrew MacIntyre, 2003, ‘Institutions and the political economy of corruption in developing countries’, Discussion Paper, workshop on Corruption, Stanford University, 31 January–1 February.

⁵¹ Angus Deaton, “Commodity Prices and Growth in Africa,” *Journal of Economic Perspectives*, vol.13, no. 3 (1999): 34.

Jean-Philippe C. Stijns's research shows a mixed result. He confirms that oil and gas sectors seem to have positive and negative impacts to economic growth. There is evidence that oil and gas reserves are associated with better education, more market-oriented economic policy and more favorable investment-saving characteristic. Stijns uses Norway and Australia as examples.⁵² Another finding in Stijns's research is that "oil and gas extraction draws resources away from the manufacturing sector and leads the ruling elite to expropriate oil and gas and repudiate the contracts."⁵³

Countries rich in natural resources often face challenges include "how to add value through extractive activities, how to capture that value locally, and how to make the best use of the revenues generated." The countries that possess sufficient financial resources, engineering expertise and technically competent state-owned enterprises have successfully developed their own capabilities to exploit their natural resources. According to a study by UNCTAD, West Asia is a typical example where much oil and gas extraction is undertaken with little participation by MNCs.⁵⁴ On the contrary, countries which lack capital and expertise would rely on FDI.

MNCs can be important to bring the needed capital, knowledge, and access to markets. For the home country, MNCs serve as vehicles for securing access to foreign supplies.⁵⁵ The benefit of MNCs involvement in extractive industries is that it does not generate foreign debt for host country government, and such financing comes with a package of other assets, such as marketing, technology and managerial expertise. However, the lack of educated and skilled human resources can limit the positive effects on low-income countries of such knowledge transfer.

⁵² Jean-Philippe C. Stijns, *Natural Resources Abundance and Economic Growth Revisited*, University of California at Berkeley Department of Economics, November 2000, p 28. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.321.8113&rep=rep1&type=pdf>, accessed at 12/6/2016.

⁵³ Ibid.

⁵⁴ UNCTAD, *World Investment Report*, 94.

⁵⁵ Barma, et all, *Rents to Riches*, xi.

In regard to the relationship between FDI and developing countries, experts had written many books for example, Karl P. Sauvant and Lisa E. Sachs, Theodore H. Moran, Jeswald W. Salacuse, M. Sornarajah, Surya P Subedi, Pritchard, R., and Waibel, Michael, et al.⁵⁶ Despite the high number of writings and research on foreign investment studies, very few are using Indonesia as the object of in-depth study. In fact, it is difficult to find books or articles on the issue which provide an objective opinion on the role of foreign investment and liberalization in the country. This dissertation, therefore, analyzes the current development of foreign investment law in Indonesia.

The effect of FDI inflow towards economic growth and development in developing countries remains unsettled. There are three conflicting theories on the relation between the role of FDI and economic development of its host state: dependency, neoliberalism and middle path, which according to Sornarajah has impacted the legal attitudes to foreign investment.⁵⁷ Those who favor complete protection for FDI rely on the theories which emphasize the positive effects of FDI on economic development. Latin American economists and political philosophers in 1960s created dependency theory which argues that the primary goal of Latin American countries is to improve the standard of living and social well-being of the people through industrialization.⁵⁸ These objectives can be achieved if they play role as

⁵⁶ See Karl P. Sauvant and Lisa E. Sachs, *The effect of treaties on foreign direct investment : bilateral investment treaties, double taxation treaties, and investment flows*, (Oxford: Oxford University press, 2009); Theodore H. Moran, *Foreign direct investment and development : the new policy agenda for developing countries and economies in transition*, (Washington DC: Institute for International Economics, 1998), Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford: Oxford University Press, 2010), Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, (Oxford: Oxford University press, 2013), M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed (Cambridge: Cambridge University Press, 2010), Surya, P Subedi, *International Investment Law: Reconciling Policy and Principle*, 2nd ed, (Oxford, Portland, Oregon: Hart Publishing, 2012), Robert Pitchard, *Economic Development, Foreign Investment and the Law: Issues of Private Sector Involvement, Foreign Investment and the Rule of Law in a New Era*, (London: Kluwer Law International, 1996). Waibel, Michael., et al, *Backlash to Investment Arbitration. Three Causes, in the Backlash Against Investment Arbitration*, (The Netherlands: Kluwer Law International, 2010).

⁵⁷ Sornarajah, *The International Law*, 47.

⁵⁸ Joseph J. Jova, Private Investment in Latin America: Renegotiating the Bargain, *Texas International Law Journal*, vol. 19. (1975), 470.

exporters. Otherwise, they would remain ‘dependent’ on foreign countries.⁵⁹ Dependency theory claims that MNCs from industrialized nations helped to raise the level of industrialization in Latin America. However, they do not contribute in the development and economic growth. The benefit from FDI is only enjoyed by “elite classes while other society groups suffer from environmental degradation, human rights abuses, and labor exploitation as consequences of MNCs operation.”⁶⁰ This way, industrialization and development of the host states becomes impossible to achieve. Instead, the home state of investments develops even more, while Latin America, as the host states, becomes a “subservient or peripheral economy serving the interest of the developed country.”⁶¹

Consequently, dependency theory requires for decreasing the economic connection between developed countries and emerging states. Such an action includes rejecting investors from developed countries, especially if they do not seem to contribute to the host nation’s development objectives. Also, dependency theory suggests expropriation of those foreign investments that are already in existence.⁶²

Dependency theory seems to lose its power in the early 1990s when Latin American countries moved to embrace neo-liberal policies by adopting BIT and FTA which contain investment provisions. As a result, inflows of FDI increase due to privatization processes and wider openness to foreign participation in the telecommunication and public utilities sectors.⁶³ However, such a liberalization approach was then blamed for the economic crises in some Latin American states in the 1998-2000s. For Argentina, the financial crisis had dramatic consequences for international investment law as it gave rise to a series of

⁵⁹ Ibid., 471.

⁶⁰ Sornarajah, M, *The International Law*, 53.

⁶¹ Ibid, 54.

⁶² Ibid.

⁶³ Regulating Foreign Direct Investment in Latin America, Indicators of investment regulations and options for investment climate reforms, A report of the FDI Regulations project Global Indicators and Analysis Department The World Bank Group with CAF - Development Bank of Latin America, October 2013, p 1, available at <http://iab.worldbank.org/~//media/FPDKM/IAB/Documents/Regulating-FDI-in-Latin-America.pdf>, accessed at June 21, 2015.

investment disputes submitted to arbitration by foreign investors. Argentina responded to these arbitrations by introducing policies which are increasingly hostile to FDI. Hostility towards FDI then extended to Venezuela, Bolivia and Ecuador.⁶⁴

The next theory is neoliberalism which explains the contribution of FDI to the economic development of host states of investments.⁶⁵ In contrast to dependency theory, neoliberalism suggests that foreign investment leads to employment, growth and development. There are several factors which this view relies upon. The first one is the capital brought to the host states complement domestic capital and, therefore, ensures the availability of financial resources for various uses. Besides, the technology brought by FDI may lead to the diffusion of technology within the state. Capital and technology open up business opportunities which will create employment. The labor employed in the project will acquire the technology and managerial skills introduced by investors. Infrastructure facilities will be developed either by investors or the state, and these services will be the benefit of the local people and its economy.⁶⁶

Neoliberalism occupied a dominant position in the 1990s. The policies implemented by the International Monetary Fund (IMF) and the World Bank and their influence on domestic legislation particularly, all acclaimed the beneficial role of foreign investments in economic development. The predominance of liberalism in the United States and Europe, the success of capitalism, and the confidence that foreign enterprises should operate without restrictions, support the dominance of this theory. The adherence to neoliberalism can be traced back to the policy implemented during this period by the IMF and the World Bank

⁶⁴ Sornarajah, M, *The International Law*, 54.

⁶⁵ Stephan W. Schill, *Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?*, 4th Global Admin. L. Seminar (June 13-14, 2008).

⁶⁶ Sornarajah, M, *The International Law*, 48.

which known as the Washington Consensus.⁶⁷ Financial aid provided by these institutions was often made conditional on the adoption of liberal policies informed by such consensus.⁶⁸ Consequently, capital importing states were obliged to adjust their laws and regulations with liberal views that foreign investment must be protected by international law through treaties. Such protection would facilitate the flow of FDI and lead to the economic development of developing countries. Inevitably, developing states took major steps towards liberalization. Unfortunately, neoliberalism does not explain such questions why after several decades of FDI operations transfer of technology has not taken place in most developing countries; why the level of unemployment in many developing countries are still high and why they remain unindustrialized.

Some studies show liberalization itself cannot guarantee the benefit of foreign investment in the host states. Hermes and Lensink⁶⁹ consider the presence of a well-organized and developed financial system a necessary pre-requisite for host state economy's ability to allocate capital inflows strategically. Borenstein, De Gregorio and Lee assert that technological distribution is an intended consequence of foreign investment, which is a critical component of economic growth. Hence, the entry of foreign investors is often taken as the primary source of technological advances in capital importing countries. In order for the host economy to receive and successfully adapt the technology, it must have "a minimum threshold stock of human capital, that is, some degree of education and training, which are pre-requisites for such transferal."⁷⁰

⁶⁷ Washington Consensus is a set of 10 economic policy prescriptions considered to constitute the "standard" reform package promoted for crisis-racked developing countries by the IMF, World Bank, and the US Treasury Department.

⁶⁸ Sornarajah M, *The International Law*, 48-53.

⁶⁹ Hermes, Niels and Lensink, Robert, 'Foreign Direct Investment, Financial Development and Economic Growth' *Journal of Development Studies*, vol. 40, no.1 (2003): 142.

⁷⁰ E Borenstein, J.De Gregorio, and J.W Lee, How Does Foreign Direct Investment Affect Economic Growth, *Journal of International Economics*, vol. 45 (1998) 133-134.

A study by the United Nations Commission on Transnational Corporations (UNCTC) showed that FDI through MNCs could have devastating results in certain circumstances, but if properly utilized it could be engines that fuel the growth of developing countries. This study points out that host countries should take regulatory measures to counter harmful practices and also propose to set codes of conduct for MNCs which prohibit them to avoid behavior that is considered detrimental to the economic development of the poorer states.⁷¹

Thus, those researches answer why some host countries still unindustrialized and have high unemployment rate despite the significant number of FDI in the country. The idea that FDI liberalization is always beneficial or harmful to development is no longer accepted in academic literature as there is evidence for both. Instead, there must be other conditions, such as appropriate policies or human capital present for foreign investment to have a positive impact on economic development. The uncertainty between benefits and drawbacks is the reason of legislation enacted by developing countries which give incentives to FDI and at the same time, apply restrictions. Nowadays, a mixed regulation and openness are seen as desirable.⁷²

The combined approach gives rise to another theory called middle path which accepts that foreign investment might have beneficial effects on the economy of the host state, but only if appropriate regulation is put in place to make sure the investment is subject to appropriate conditions.⁷³ This alternative has been considering the appeal of the Southern Consensus, the Beijing Consensus, and the Post-Washington Consensus. The Southern Consensus is identified by Charles Gore as a “convergence between East Asian *developmentalism* and Latin American neo-structuralism and portrayed as the primary

⁷¹ Theodore H. Moran, *The UN and Transnational Corporations from Code of Conduct to Global Compact*, *Transnational Corporations* Vo.1 18 No. 2 (2009): 105-108.

⁷² M. Sornarajah, *The International Law*, 58.

⁷³ M. Sornarajah, *The International Law*, 46-60.

challenge to neoliberal policy.”⁷⁴ Although this paradigm presents fascinating aspects, combining active state intervention with progressive liberalization, it has been seen as an evolution of the Washington Consensus rather than as the emergence of a new regime.

Indonesia’s path towards FDI from 1945 up to now shows departure from dependency theory to neoliberalism and move toward middle-path and now back to somewhat dependency theory again demonstrates that the trends are cyclical with the failure of one policy leading to the acceptance of the other. This assertion seems to correlate with studies by Trubek and Santos⁷⁵ who identified three moments as characteristic of the Law and Development discipline. They claimed that the first moment corresponded to the period between the 1950s and the 1960s when “the aftermath of World War II and the reconstruction of societies demanded an interventionist and active state.” In this era, dependency theory was quite dominant as a result of colonialization that forced new independent countries to structure their economy through government intervention. In the 1980s, with the emergence of liberalization, government intervention was replaced by deregulation and a free market.⁷⁶ The economic crises in the 1990s and 2000s again changed the perspective by combining between liberalism and a certain level of government intervention. This new approach does not make economic liberals in all cases favor foreign investment rather; it acknowledges government intervention.

International investment is an economic phenomenon which closely relates to law and legal system in which they influence the economy either positively or negatively. Law matters in foreign investment because each party in the investment project uses law and legal devices to advance its interest. Jeswald W. Salacuse offers propositions that:

⁷⁴ Charles Gore, The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries’ *World Development Journal*, Vol. 28, no. 5 (2000) 789.

⁷⁵ Trubek, David M and Santos, Alvaro, *The New Law and Economic Development; A Critical Appraisal*, (Cambridge: Cambridge University Press, 2006) 1-4.

⁷⁶ *Ibid.*, 8.

Law enhances or diminishes the predictability of investment transactions; increases or reduces transaction costs. Law is also an instrument to direct, control, and encourage international capital flows; law defines and regulates investment rights, responsibilities and relation; and law also as a mean to resolve investment dispute. On the host country's side, the investment law may influence the revenue, development level, and the level of openness. Thus the link between law and foreign investment is that the law may influence the distribution of the benefits and rewards, as well as costs and risks in investment activities for both the host government and the investors.⁷⁷

The consequence of that proposition is that the policymaking involves host and home governments, as well as foreign investors indirectly since they have the ability to shape the legal environment through negotiations and contracts they make with state and private parties.⁷⁸ Another factor that makes law matters is with respect to dispute settlement system. Whenever conflict arises, multinational companies often treat the contract or domestic law as a matter of international law so that the dispute can be arbitrated.⁷⁹ Investment arbitration is mostly used to enforce the investors' interests.

Opponents of investor-state arbitration argue that investment arbitration is biased in favor of multinationals, and this does not benefit the host state as it interferes with the ability of the host government to pursue policies in the public interests.⁸⁰ Critiques arise concerning fairness in IIA where they see that arbitral tribunals have extended protection to foreign investors under customary laws and BITs. Kathleen S. McArthur and Pablo A. Ormachea did an empirical study in 2009 and found that investors from the richest countries have experienced the greatest success in securing ICSID jurisdiction for the resolution of their claims.⁸¹ Thus, tribunals often neglect host states' interests and show pro-investors bias rather

⁷⁷ Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, (Oxford: Oxford University Press, 2013) 24.

⁷⁸ *Ibid.*, 24-25.

⁷⁹ Julian Arato, "Corporations as Lawmakers," *Harvard International Law Journal*, vol. 56 (2015) 231.

⁸⁰ United Nations Conference on Trade and Development (UNCTAD), IIA Issues Note No. 2: Reform of Investor

-State Dispute Settlement: In Search of a Roadmap,
http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf

⁸¹ McArthur, Kathleen S; Ormachea, Pablo A; "International Investor-State Arbitration: An Empirical Analysis of ICSID Decision on Jurisdiction," *The Review of Litigation*, Vol. 28, No. 3 (2009) 559.

than pro-investment and development.⁸² In his study, Park argues that arbitrator's bias is driven by systematic incentives. For example, arbitrators appointed by MNCs will tend to give decisions in favor for the companies to be regularly appointed due to the reasons of reputation and enhanced income.⁸³

Another criticism says that investment arbitration interferes with the freedom of action of the host governments and therefore restricts sovereignty.⁸⁴ Ministerial meetings by Latin American countries affected by investment arbitration stated that in IIA, there are some judgments which violate international law and the sovereignty of the States as well as its legal institutions, due to the economic power of individual companies and deficiencies of the global systems of dispute settlement on investment.⁸⁵

Another issue that makes states reconsider their confidence in investment arbitration is related to cost.⁸⁶ Susan D. Franck in her empirical study finds that there was no consistency in the decision and also no positive relationship between cost shifts and losing. Tribunals usually decided costs only in the final award; and as the amount investors claimed increased, tribunal costs also increased. "Such a combination of variability and convergence can disrupt the value of arbitration for investors and states."⁸⁷

Salacuse's proposition says that investors, host states of investment, and home states of investment are the primary participants in the international investment process.⁸⁸ Host and home countries' government formulate a national policy which then will be articulated and

⁸² Ibrionke T. Odumosu, "The Antinomies of the (Continued) Relevance of ICSID to the Third World," *San Diego International Law Journal*, vol. 8 (2007) 345.

⁸³ William W. Park, "Arbitrator Integrity: The Transitory and the Permanent," *San Diego Law Review*, vol. 46 (2009) 658.

⁸⁴ Hikmahanto Juwana and Minister Amir Syamsuddin, Indonesia Should Exit Bilateral Investment Treaties, <http://en.hukumonline.com/pages/lt539ed4bbd9f64/indonesia-should-exit-bilateral-investment-treaties>, June 16, 2014, accessed at February 1, 2015.

⁸⁵ This 1st Ministerial Meeting was attended by representatives of Bolivia, Cuba, Ecuador, Nicaragua, Dominican Republic, St. Vincent and Grenadine and Venezuela. It was held in Ecuador in April 22, 2013. The full text of this declaration can be found at: http://cancilleria.gob.ec/wpcontent/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf

⁸⁶ Susan D. Franck, "Rationalizing Costs in Investment Treaty Arbitration," *Washington University Law Review*, vol. 88 (2011) 774.

⁸⁷ *Ibid.*

⁸⁸ Jeswald W. Salacuse, *The Three Laws*, 24.

applied through law and legal system. Thus, an investment-related law is “authoritative means that a government communicates investment policy.”

There are three legal frameworks of foreign investment: national law, contractual law, and international law. The domestic legal framework consists of the legislation, regulation, administrative acts, and judicial decisions of the governmental authorities in the host states of investment. It expresses and concretizes the policies of states toward foreign investment by seeking to do two things: “to encourage, by granting freedom and incentives, as well as to control foreign investment, by imposing rules and restrictions.”⁸⁹ In addition to a national legal framework, international investment is also governed by a contractual framework. This contract governs “specific matters relating to the organization, structure, operation and functioning of the investment, and the respective rights and obligations of the investors.” A national law has a crucial role since the ability for the parties to make rules⁹⁰ in the contract as well as the enforceability depends on it. The international legal framework also plays an important role since it affects foreign investment by influencing domestic legislation affecting transactions. It also creates international organization and institutions, such as the ICSID.⁹¹

E. Methodology

This research uses a single country study: Indonesia. It is a state that represents a compelling case in explaining the legal development of international investment law in developing countries. Indonesia is a crucial country to discuss since it signed 65 BITs and 15 Free Trade Agreements (FTAs) with investment chapter from 1968 to 2011. In addition, the

⁸⁹ Ibid., 35.

⁹⁰ For the investors a fundamental question is the extent to which national law will permit them to make rules by contract and the extent to which the national law prohibits it. Investors must be cautious to ask to what extent will a particular facet of an investment be subject to public ordering and therefore be governed by the national law; and to what extent will aspects of the investment process be subject to private ordering and fall within the domain of the parties based on party autonomy.

⁹¹ Jeswald W. Salacuse, *The Three Laws*, 43.

country also experienced seven investment arbitration cases in ICSID (the largest in South East Asia); attracted substantial investment flows due to its embracement to international investment regime, and currently undergoing a shift in policy towards international investment commitment. Thus, Indonesia reflects the experience of many other developing countries and, therefore, it can offer valuable lessons.

This dissertation is a study that combines doctrinal and historical narrative. Within the doctrinal part, this research's aim is to determine the relevant rules of law applicable to the investment related issues covered in ICSID cases and judicial review cases before the Constitutional Court. In doing so, it uses BIT provisions, the Indonesian Constitution; and relevant domestic laws. Secondary sources will also be used to understand and elaborate the research question.

Studying the development of investment law in Indonesia is not thorough without understanding the context to which the law operates and how it relates and affects that context. Thus, it needs to begin by situating foreign investment law in its proper historical context. Therefore, the period, the events following them, and the government agendas (in term of social, political and economic) influence how international investment law evolved and the way they related to outside world. The changes in international investment law raise a social, political or economic issue.

Using the pertinent historical information, this research draws the connection between significant legal events and economic development agenda, and Indonesia's decision to ratify ICSID and conclude BITs. Similarly, those types of information will also be used to examine the current policy to terminate/modify BITs. The information will be used to determine the way the government acts: why ratification of ICSID was done in such a prompt manner; why 65 BITs were concluded; and also why there is a sudden shift against foreign investment regime.

This study is a qualitative research which employs interview to collect the required data from relevant actors involved in the discussion on Indonesia's shift to enable a broader picture not only on what happens but also the overall context of the change. The interviewees were given open-ended questions to encourage authentic responses. This way, respondents could answer in detail and can qualify and clarify responses. Open-ended questions allow an in-depth study of an individual or a particular group of actors to explain the current shift that cannot be found through studying cases. Moreover, this enables unanticipated findings and a richness of details. The respondents of the current discussion are distinguished into two groups namely: Government which includes Ministry of Foreign Affairs and Investment Board; and non-government such as CSOs, NGOs, foreign chamber of commerce, legal scholar, and practicing lawyers. The data gained from the interview is then organized and coded using a combination of pre-set codes and emergent codes.

F. Road Map

This dissertation evaluates the causes, forms, and actors of Indonesia's changing attitude against international investment regime. Chapter I: Introduction serves to establish the context of discussion by giving an overview of foreign direct investment regime and its interplay in Indonesia; background; the significance of the research; questions to be asked; literature review; research methodology; and road map.

Chapter II lays a historical groundwork of the Indonesian investment regime. It explains Indonesia's attitude towards foreign investment regime across time and describes what factors caused them. This approach uses a historical narrative which aims to explain what history reveals on particular issues. The historical narrative is to study how, why and who are the actors that shape Indonesian foreign investment law. Emphasizing on how global investment law regime influences the country, this part employs two observations namely: liberalization of FDI and economic development. The cornerstone is to establish whether

liberalization of FDI has been contributable to Indonesian economic development. In doing so, it relates the economic, social and political nature in four different time frames: Old Order, New Order, Reform and Post-Reform; and the foreign investment law and policy taken by the respective government.

Chapter III focuses on liberalization of Indonesian FDI. The section explains three forms of liberalization namely privatization, BIT program, and IIA. The main objective is to demonstrate the liberal character in the current Indonesian foreign investment law and policy, and at the same time analyze if this has led to the current backlash. This chapter discusses investment arbitration cases involving Indonesia and maintains that the arbitration cases were the significant cause. Moreover, the liberalization that prevents the implementation of a much-needed approach of ‘family principle’ was also contributable to the backlash.

Chapter IV analyzes the form of backlash against foreign investment regime. It suggests that protectionism policies, judicial review in the Constitutional Court, BIT review and the limitation of access to arbitration are the forms of backlash against the current foreign investment regime. This chapter discusses judicial review cases before the Constitutional Court, as well as arbitration before the ICSID. There are several reasons for using cases. Firstly, they enable for tracing the backlash movement across time. Secondly, the cases show variations in terms of the explanations from which backlash might have emerged. Each case brings different concern that leads to unsatisfactory which could explain why such backlash occurs. Third, the cases allow assessment of the role of FDI in policy changing or policy making process. In short, the aim of using cases is to trace and discuss the explanation of the shift in the current backlash.

Chapter V aims to identify the actors, as well as to confirm how state and non-state actors in Indonesia shape foreign investment law. This chapter sheds light on the ways in which state and non-state actors adopt, adapt, and see liberalization and global investment

law waves. This part discusses the manifold pressures from actors that generate demand for giving state more control over the economy and therefore limit foreign investors' involvement. This chapter highlights the debate between state-governed and free market; the global economy and local economy; family principle and liberalization.

Chapter VI: The conclusion states the findings of the dissertation. This finding establishes the relationship between past occurrences and the current shift in investment law, the actors who played the most roles and their agendas, and the link between cases and policy changes. This part confirms what accounts for the current shift that happening in Indonesia. It also summarizes the takeaway points of this phenomena occurring in Indonesia and their role in the bigger discussion in the field of international investment law, and how this will cultivate further debate in the field.

Chapter II

INDONESIAN FOREIGN INVESTMENT LEGAL LANDSCAPE

The formation of Indonesian Investment Law is impacted by historical aspects encompassing not only economic but also legal and political events. It is important to learn how and why foreign investment law in Indonesia develops as it is now and its larger significance to the economic development of the country. This chapter shows that Indonesia's attitude towards foreign investment has been characterized as ambiguous indicated by its long list of fields closed to FDI, as well as its protectionism policy. Moreover, this chapter demonstrates a pattern that economic downturn was usually followed by economic reforms in the form of openness towards FDI. However, as the economic growth over the past year has slowed down, the current government seems to take protectionist measures instead of following that pattern.

Due to its close connections with past events, Chapter II uses a historical narrative in examining the development of Indonesian foreign investment law. It uses a chronological order that attempts to provide a broad overview of Indonesian foreign investment history, beginning with the emergence of the Dutch East Indies Company (*Vereenigde Oost-Indische Compagnie*: VOC) in 1603 and ending at after reform period.

This section seeks to examine the record of Indonesian foreign investment law and policy since 1945 and to gain deeper insight into these global-national interactions from time to time. It starts the narratives with the involvement of the VOC as the foreign trader and then moving towards Pre-Independence era where the principles underlying Indonesia's economy was set by Mohammad Hatta, one of the country's founding fathers. This chapter focuses on the post-independence era and divides the time frame into Old Order, New Order, and Post-Reform. It compares and contrasts between each time frame to extract the key policies of foreign investment and their contents and characteristics.

The breakdown of Pre-Independence, Old Order, New Order, and Post-Reform is driven not only by the different administration but also by the general treatment that foreign investors received within the time frame. Reflecting on the theory that emerged as a result of various circumstances, this chapter stands that the Indonesian foreign investment law moved from nationalism in the Old Order to liberalism during the New Order, and the highly influenced by neo-liberalism in the post-economic crises. Finally, the foreign investment legal landscape is now a combination of nationalism and liberalism. The Old Order period was close to Dependency theory and robust nature of economic nationalism due to traumatic experience by the Dutch colonialization, while New Order was dominated by liberalism which supported free movement of capital due to the need to overcome economic collapse and pay foreign debt. During the reform period, the policy was highly influenced by the Washington consensus which requires privatization of state-owned enterprises and liberalization of capital movement. Lastly, in post-reform, the rising nationalism and liberalism are combined and played out in the legal sphere, so that it resembles what is characterized by middle-path theory.

A. Pre-Independence Era

1. The *Vereenigde Oost-Indische Compagnie* (VOC)

The old path of foreign involvement into Dutch Indies, what now is known as Indonesia, dated back in the 16th century when the VOC arrived for seeking spices, coffee, and sugar. The enterprise was a very successful by way of taking control of the local market and prohibiting local people from selling the commodities themselves. All transactions had to be done through the VOC.¹ In 1796 the company went bankrupt and was nationalized by the

¹ Vincent J.H. Houben, "The Pre-Modern Economies of the Archipelago," in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*, eds. Howard Dick et al (Honolulu: Allen & Unwin and University of Hawai'i Press: 2002) 46-46.

Dutch government. As a consequence, its assets in Dutch Indies were passed into the hands of the Dutch government in 1800.²

2. The Dutch Colonialization

The Dutch colonialization in Dutch Indies used the VOC's possessions as its initial capital.³ The Dutch applied Cultivation System which meant the Javanese people were forced to cultivate export crops such as coffee, sugar cane, tobacco or tea, in which the exports of the products were consigned to a Dutch state-owned trading firm. The Cultivation System gained tremendous success in increasing Dutch state income and counted around 19% of the state revenue from 1832 to 1852. This percentage rose to 33% between 1860- 1866.⁴ Thus the Cultivation System is considered to have altered the economic development of Java in the 19th century. Almost the whole Java Island was transformed into one estate run by the Dutch State. The Cultivation System brought commercialization as well as disrupting the indigenous farming at the same time. It caused famines and epidemics because rice, as the basic staple for Javanese, could not be grown.

A rejection of the Cultivation System emerged in the late 19th century in the Netherlands articulated by Dutch politicians based on humanity and economic considerations. Following the rejection, a demand for a liberal approach towards foreign enterprises in Dutch colonies arose. Liberalism was believed to bring economic growth in the Netherlands that would trickle down to the Javanese farmers.⁵ This liberal approach opened the door for the first wave of private capitalism in Indonesia. As Western enterprises entered, the colonial government played supervisory roles between the enterprises and the population.

² Vincent J.H. Houben, "Java in the 19th Century: Consolidation of a Territorial State" in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*, eds. Howard Dick et al (Honolulu: Allen & Unwin and University of Hawai'i Press: 2002) 56.

³ Sritua Arief, "Ekonomi Kerakyatan Indonesia Mengenang Bung Hatta Bapak Ekonomi Kerakyatan Indonesia," (*Indonesia's People's Economy Commemorating Mr. Hatta the Father of Indonesia's People Economy*) (Surakarta: Muhammadiyah University Press, 2002) 179.

⁴ Elson, R.E. "Village Java under the Cultivation System, 1830-1870," (Sydney: Allen and Unwin, 1994).

⁵ Ulbe Bosma, "The Cultivation System (1830-1870) and Its Private Entrepreneurs in Colonial Java," *Journal of Southeast Asian Studies*, vol. 28 (2007) 275-291, June 2007.

However, the expected trickle-down effect did not occur. Javanese farmers were still suffering from hunger, famine, and epidemics. Correspondingly, in 1901, the Dutch introduced the Ethical Policy⁶ aimed at improving the living standards of the native Dutch Indies. The Policy gave way to Dutch direct intervention in economic life of the Indonesians in the areas of ‘irrigation, education, and migration.’ The objective was to raise productivity levels in agriculture and to promote economic development while relieving Java from a rapidly growing population.⁷ Again, this policy failed. Irrigation and migration policy from Java to less densely populated areas were unable to improve the living standards of the Dutch Indies people. Nonetheless, the education program was quite successful and contributed to the awakening of Indonesian nationalism in the later period.⁸

Liberalization proposed by Dutch politicians changed the economy in Dutch Indies during 1905- 1930. The Dutch government switched from the State-run exploitation of the colony’s natural resources to economic expansion with private capital. The need was an export-driven in order to supply the demands of the world market. The expansion scheme included switching and broadening the range of exportable product, for example, sugar and tobacco were supplemented by new goods such as oil, rubber, tin, and copra.⁹

Private foreign investment during the Dutch colonialization began after the 1930s when the colonial government for the first time encouraged foreign investment as a consequence of the depression and the threat of Japanese competition. The investors were American, British and Belgian. The main sectors of investment were the plantation, primarily

⁶ In 1899 the parliamentarian C. Th. Van Deventer argued that the Netherlands, having reaped such large financial benefits from the Cultivation System in Java, should now pay something back. Through this Ethical Policy the Dutch acknowledged that it had a debt of honor towards the Indonesians as written by J Thomas Lindbald, *The Late Colonial State and Economic Expansion, 1900-1930s*, in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*, eds. Howard Dick et al (Honolulu: Allen & Unwin and University of Hawai’i Press: 2002) 117.

⁷ Von J. Thomas Lindbald, *Colonial Ryle and Economic Development: A Review of the Recent Historiography on Indonesia*, 15. http://www.digitalis.uni-koeln.de/JWG/jwg_139_9-22.pdf

⁸ J Thomas Lindbald, “The Late Colonial State and Economic Expansion, 1900-1930s,” eds. Howard Dick et al (Honolulu: Allen & Unwin and University of Hawai’i Press: 2002) 119-121.

⁹ Linbald, *Colonial Ryle and Economic Development* , 17.

rubber, and palm oil. In addition, oil and manufacturing sectors were also opened for private investment.¹⁰ As a result, Java and other outer islands were integrated into the world economy as rapid export expansion took place.¹¹

While the Ethical Policy failed to improve the standard of living, it successfully ignited nationalist spirit among the native Dutch Indies. The Ethical Policy education program led the development of a Dutch school system in the Indies which provided education for small numbers of Indies people. The demand that more Indonesians be allowed to enjoy education was initiated by the nationalists.¹² The programs also send some Indies people to study in the Netherlands. As a result, the Indies people were provided with knowledge including Western political ideas of freedom and democracy. The training program and the relatively liberal regime have successfully “given the ideas and tools to organize and articulate objections to the colonial rule. This marked the emergence of nationalism among the Indies community.”¹³

Indies Union (*Perhimpunan Hindia*), an Indies student organization in the Netherlands, was formed in 1908. However, it was not until 1913 when the organization started to think about the future of Indies and became “a revolutionary and nationalist political organization.”¹⁴ The group issued a magazine called the Son of Indies. One of the presidents of Indies Union was Mohammad Hatta who studied economics in Rotterdam from 1921 until 1932 and later served as the first Vice-President of Indonesia.

In Indies, three nationalist groups emerged in the early 1900s: Nationalist, Islamist, and Marxist. The first Indonesian nationalist political society, *Budi Utomo*, was born in 1908

¹⁰ William A. Redfern, “Sukarno’s Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s,” Dissertation Submitted for Doctor of Philosophy (History) in The University of Michigan, 2010, 23.

¹¹ Houben, *The Pre-Modern Economies*, 53.

¹² Lindbald, *The Late Colonial State*, 120.

¹³ Ibid.

¹⁴ Ibid

initiated by students in Batavia, the present-day Jakarta.¹⁵ Following *Budi Utomo*, the first Islamic mass-based political party named *Sarekat Islam* was founded in 1911. *Sarekat Islam* was initially aimed to support indigenous entrepreneurs against the dominating Chinese in the local economy. It then “expanded its scope and developed a modern political consciousness with subversive tendencies.”¹⁶ In 1912, *Muhammadiyah* was established as an Islamic reformist socio-religious movement. Since its birth, *Muhammadiyah* has avoided politics. Instead, it has devoted itself to educational and social activities. The last prominent organization born was the Indonesian Association of Social Democrats in 1914. This group spread Marxist ideas which later led to the formation of the Indonesian Communist Party (*Partai Komunis Indonesia*) in 1920.

In 1922, the magazine the Son of Indies was changed into Free Indonesia. This was to reflect the disappointment over the Dutch government’s rule in Indies. During this time, the Indies Association sought to unify all nationalist movements in Indies and used non-cooperation as the policy of the association. These changes marked the beginning of radicalization movements. As the radicalization took place, the Dutch authorities changed course. A relative tolerant regime was turned into a repressive approach. The repressive approach was even strengthened a nationalist movement as proven by the creation of Indonesian Nationalist Party (*Partai Nasional Indonesia*) in 1927 led by Sukarno, whom later became the first Indonesian president. The goal of this party was to create an independent state.

In 1926, Sukarno¹⁷ wrote an article ‘Nationalism, Islam, Marxism’ in which he called for closer cooperation among the three groups.¹⁸ He did not follow the concept of Western

¹⁵ Ibid., 121-122.

¹⁶ Sejarah Penjajahan Indonesia (Indonesian History of Colonialization) Indonesia –Investment, available at <http://www.indonesia-investments.com/culture/politics/colonial-history/item178>. Accessed at June 2, 2015.

¹⁷ Sukarno interested to Marxism due to the concept offered for freedom from capitalism.

¹⁸ Bernhard Dahm, “*Sukarno and the Struggle for Indonesian Independence*,” (New York: Cornell University Press, 1969) 62-63.

nationalism which according to him has” aggressive nature and self-centered since it was only concerned with own needs and commercial interests that lead to profit or loss.”¹⁹ Rather, according to Sukarno nationalism was broader than business interest, which was the welfare of the people. In his nationalism concept, Sukarno maintained non-cooperation without doing violence towards the Dutch.²⁰

Meanwhile, Mohammad Hatta returned to Indonesia in 1932 and continued his political activities. As a consequence, Hatta was arrested in 1934. While spending his time in prison, he wrote a book entitled “The Economic Crises and Capitalism.” In the same year, Hatta also wrote ‘People’s Economy is in Danger.’ This piece became the core concept of ‘people’s economy’ (*ekonomi kerakyatan*) in the Indonesian Constitution and often be contested with the Dutch economic system.²¹

Following the arrests of nationalist leaders, Indonesia sought help from outside to eliminate the Dutch power. In March 1942, the Japanese provided the support which later turned to create another hardship for Indonesians. The Japanese applied *romusha*, forced laborers where people were stationed to work on labor-intensive construction projects on Java. On the other hand, the Japanese actively promoted Indonesian nationalism. They educated and trained young Indonesians and gave the nationalist leaders a political voice. Hatta and Sukarno collaborated with them in establishing numerous mass organizations. The organizations enabled the nationalists to prepare for a future independent.

During the Japanese occupation, most of the foreign investments were seized by the Japanese and put under tight supervision. Some ceased to operate altogether. It was believed that the oil fields were the prime target of Japanese control and the primary reason for the occupation. Following Japan’s surrender to the Allied forces, Sukarno and Mohammad Hatta proclaimed Indonesian independence on August 17th, 1945. Sukarno was appointed as the

¹⁹ Ibid., 68.

²⁰ Ibid., 113.

²¹ Arief, *Ekonomi Kerakyatan Indonesia*, 179.

President, and Hatta was the Vice-President. However, Dutch recognition of Indonesian independence was only given on December 27th, 1949 through a transfer of sovereignty.

B. Post-Independent

1. The Old Order

Generally speaking, the Old Order is understood as the period where Indonesian first President Sukarno was in power from 1945-1966. This section explores the policies of the Indonesian foreign investment law during that time. The focuses will be on the feature of Indonesia's economy, foreign policy, and also takeover of foreign companies.

In the early Independent, the role of foreign investor was prominent since many sectors of the economy such as plantation, oil, and industry were foreign-owned. However, those companies later were nationalized by the Old Order government. The nationalization represented the fundamental issues faced by the government on how to deal with foreign domination of the modern sector of the economy and what role the state should play in it. The nationalization had successfully closed foreign economic domination as the Indonesian government gradually acquired stakes in the modern sector of the economy through its state-owned enterprises (SOE). This step was also considered as “to pave the way towards a more socialist approach to economic problems through direct governmental intervention.”²² The political life during Old Order period was emphasized on continued revolution and mass mobilization which resulted in the politicization of daily life and intrigue. Foreign investment was welcomed as proven by the enactment of Investment Law of 1958. However, takeover of foreign companies had scared away foreign investors.²³

a. National Economy

The general objective of the Old Order was to transform the colonial economy into a national one, even though there was no agreement on what the national economy should be.

²² Redfern, *Sukarno's Guided Democracy*, 96.

²³ *Ibid.*, 6.

Hatta believed that economic system should contain ethical norm and ideology that favor the people. Hatta was the mastermind behind the Article 33 of the Constitution and, therefore, was called as the architect of the Indonesian economy.

During the drafting of the 1945 Constitution, Hatta delivered his idea of social justice on nationalism and ‘people-ness’ (*kerakyatan*). The basic idea of the economic system was collectivism which meant a mutual entrepreneurship. Hatta’s ‘people’s economy’ was believed to be ideal for the majority of Indonesians to support their livelihood in various sectors such as plantation, farming, fishery, forestry, and small industries.²⁴ Hatta also introduced family principle which was aimed to consider the nation as a family unit while the state serves as the family leader.²⁵ Hatta’s thinking was quickly accepted by the nationalist, socialist and Islamic groups. The Islamic group saw Hatta’s economic view as promoted collectivism which was considered to resemble the Islamic values: togetherness and helping the vulnerable.²⁶

Hatta’s economic ideology thinking was accepted by the Investigating Committee for Preparatory Work for Indonesian Independence and manifested in Article 33 of the Constitution. Article 33 does not only contain Indonesia’s economic form but also describes the role of the state in the economy. Article 33 reads²⁷:

- 1) The economy shall be organized as a common endeavor based upon the principles of the family system.
- 2) Sectors of production which are important for the country and affect the life of the people shall be under powers of the state.
- 3) The land, the waters, and the natural riches contain therein shall be controlled by the State and exploited to the greatest benefit of the people.

The elucidation of Article 33 reads:

²⁴ Mubyarto, *Reformasi Sistem Ekonomi: Dari Kapitalisme menuju Ekonomi Kerakyatan (Economic Reform: From Capitalism towards People’s Economy)*, (Yogyakarta: Aditya Media, 1998) 46.

²⁵ Susanti, Bivitri, *Neoliberalism and its Resistance in Indonesia’s Constitutional Reform 1999–2002* (Masters Dissertation, University of Warwick, 2002, 4.

²⁶ Anwar Abbas, “*Bung Hatta & Ekonomi Islam, Pergulatan Menangkap Makna Keadilan dan Kesejahteraan, (Mr. Hatta and Islamic Economy, The Battle to Understand the Meaning of Welfare and Justice)*”, (Jakarta: Multi Pressindo, 2008) 160.

²⁷ English translation of the Constitution of 1945, issued by the Constitutional Court of the Republic of Indonesia, 2009, p 14.

Article 33 embodies the principle of economic democracy which states that production is carried out by all, and for all, under the leadership of supervision of members of the community. The primary goal is the prosperity of the community, not the prosperity of individuals.

Hence, the economy is organized as a common endeavor based on the principles of the family system. The business entity that meets those conditions is a cooperative. The economic sectors which are essential for the country and which affect the life of the people must be controlled by the state. Otherwise, the control of production might fall in the hands of powerful individuals who could exploit the people. Hence, only business which does not affect the life of the general population may be left to private individuals.

The land, the waters and the natural resources therein are basic assets for the people's prosperity and should, therefore, be controlled by the state and exploit to the greatest benefit of the people.

Apparently, the construction of Article 33 was inspired by socialist, nationalist and anti-colonialist ideas. Socialist view is evident in paragraph 2 and 3 because, during the independence movement, it was seen as an antithesis of colonialization. Hatta also saw this view as a way to reject Western individualism ideas and to replace it with collectivism. This way, the liberalism tenet should also be altered into socialism. On the other hand, the nationalist sense appears in paragraph 1 which contains economic democracy under which production is carried out by all, and for all, under the leadership or supervision of members of the community with the objective for the prosperity of the people.²⁸ Hatta believed that socialism could free Indonesian from colonial domination and would be able to materialize welfare.²⁹

Hatta's elaboration of Article 33 was as follows:

The ideas planted in Article 33 of the Constitution are the greatest possible production to be performed by the government with borrowed capital from overseas. If this strategy is unsuccessful, an opportunity must be given to foreign business to invest their capital in Indonesia based on requirements stipulated by the government. If national workforce and capital are insufficient, we borrow foreign workers and capital for smooth production. If a foreign country is not prepared to lend money, then opportunities are given to them to invest their capital in Indonesia with conditions determined by the government. These conditions are primarily to guarantee that our

²⁸ Mubyarto, *Amandemen Konstitusi & Pergulatan Pakar Ekonomi (Amendment of Constitution & Economic Expert Debate)*, (Yogyakarta: Aditya Media, 2001) 11.

²⁹ Abbas, *Bung Hatta & Ekonomi Islam*, 160.

natural resources, such as forests and land fertility are looked after. In developing the state and the community, workers and national capacity will improve over time, and foreign workers and capital will reduce over time.³⁰

Hence, Hatta acknowledged three economic organizations under people's economy: SOE; society-owned-enterprise (cooperative); and private-owned enterprise. SOE is the manifestation of state's role towards the prosperity of the people. Meanwhile, a cooperative was the realization of the principle of family system stipulated in Article 33(1). The relationship between cooperatives members represented the family relationship as to disregard their individualistic nature.³¹ The cooperative was seen as an enterprise as well as a principle for new social cooperation based on the values of democracy, voluntary, and individual responsibility.³² As an entity jointly owned and democratically controlled by its member, Hatta believed that cooperative would develop self-help, self-responsibility, equality, and solidarity as promoted in the people's economy. The primary objective of the cooperative was to contest individualism and capitalism.³³

The last economic organization was private-owned enterprises including foreign investment. However, under the people's economy, private companies have a limited role in respect to Article 27 paragraph 2,³⁴ Article 33, and Article 34³⁵ of the Constitution which was to help the government providing workforce and increasing the welfare of the Indonesian.

Regarding foreign investment participations, Hatta stated that foreign investors had to follow Indonesian economic policy and to contribute in the form of transfer of technology

³⁰ Zainul Yasni, *Bung Hatta Menjawab (Mr. Hatta Answers), an Interview between Muhammad Hatta and Dr. Z Yasni 1902-1980*, (Jakarta: Gunung Agung, 2002) 199.

³¹ *Ibid.*, 199-200.

³² Rasuanto, Bur. "Keadilan Sosial Pandangan Deontologis Rawls dan Habermas: Suatu Studi Filsafat Politik." (*Social Justice from Deontologist Rawls and Habermas: A study of Political Philosophy*), Summary of Ph.D Dissertation, University of Indonesia, 1999, p 30.

³³ Yasni, *Bung Hatta Menjawab*, 204.

³⁴ Article 27 paragraph 2 reads: "every citizen shall have the right to work and to earn a humane livelihood."

³⁵ Article 34 paragraph 1 reads: "Impoverished persons and abandoned children shall be taken care of by the State."

and experience for national interest.³⁶ Foreigners, as well as their capitals, shall work under government supervisory within sectors and requirements stipulated by the government.³⁷

Hatta emphasized that foreign investment should provide working opportunity for Indonesians.³⁸

Under people's economy, SOE, cooperative and private capitals play different positions. Small and medium enterprises dealt with daily life economic activities developed from the grassroots should take the form of cooperative. The government, on the other hand, dealt with important sectors such as electricity, water resources, irrigation, and infrastructure. Lastly, private capital including foreign investment was to be given opportunity when domestic human resources and national capital were insufficient.³⁹

b. Indonesianization

The stand to increase native Indonesia's role in the economy marked '*Indonesianization*' effort. According to Johnson, *Indonesianization* was understood as "efforts by the Indonesian government to transfer productive assets owned by foreigners or foreign businesses to indigenous Indonesians." This mainly applied to Dutchmen or residents viewed as foreigners, especially ethnic Chinese. Moreover, *Indonesianization* also implied "transferring economic functions performed by foreigners or citizens viewed as foreigners to indigenous Indonesia."⁴⁰

The process of *Indonesianization* was driven by economic nationalism which involved nationalization and takeover of foreign companies. The nationalization of Dutch enterprises was an initial step toward converting the colonial economy into a national economy. To achieve *Indonesianization*, the government wanted to ensure that foreign

³⁶ Sri Edi Swasono, *Modal Asing, Beban Hutang Luar Negeri dan Ekonomi Indonesia (Foreign Investment, Foreign Debt, and Indonesian Economy)*, (Jakarta: University of Indonesia, 1987) xiii-xiv.

³⁷ Yasni, *Bung Hatta Menjawab*, 202.

³⁸ *Ibid.*, 203.

³⁹ *Ibid.*, 211-212.

⁴⁰ Harry Johnson, 'The ideology of economic policy in new states', in: David Wall (ed), *Chicago essay in economic development*, (Chicago: University of Chicago Press, 1972).

investment was controlled and limited. Consequently, in the early independence, the Dutch strategic companies were nationalized into state-owned companies.

The first economic institution to be nationalized was the *De Javasche* Bank which was turned into Bank of Indonesia in late 1951 and became the nation's central bank.⁴¹ In addition, the Dutch air carrier KNILM was nationalized into Garuda Airlines. Garuda, a joint venture held 51% by the Dutch and 49% by the Indonesian government was fully bought by the Indonesian government in 1954.⁴² Dutch utilities such as railways, tramways, as well as the gas and electricity companies were also nationalized. Moreover, several Dutch estates and industrial companies were taken over and held under control of the Government Estates Center.⁴³ Both the Dutch government and the owners of the companies realized the importance of central bank and public utilities as well as vital modes to be controlled by the state.⁴⁴

Meanwhile, the *Indonesianization* of the oil companies was unique because it involved the military. In 1957, the Dutch assets' in oil enterprise was nationalized and Indonesian oil SOE, Permina, was founded. The Department of Industry which was responsible for the oil sector allowed exploitation of oil to be controlled by the army.⁴⁵ The Army Chief of Staff appointed General Ibnu Sutowo as the head of Permina. This permit marked the involvement of the army in the state's economy. Also, in 1957 Dutch-owned sugar and tobacco companies, once among the leading earners of foreign exchange, were

⁴¹ Thee Kian Wie, *Recollections: the Indonesian Economy, 1950s-1990s*, (Singapore: Institute of Southeast Asian Studies, 2003) 71.

⁴² Burger, DH, *Sociologisch-economische geschiedenis van Indonesia*, Amsterdam: Royal Tropical Institute, Leiden: KITLV Press, 1975 as cited by Thee Kian Wie, *Recollections: the Indonesian Economy, 1950s-1990s*, (Singapore: Institute of Southeast Asian Studies, 2003) 26.

⁴³ Howard Dick, "Formation of the Nation-State, 1930s-1966, in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*," eds. Howard Dick et al (Honolulu: Allen & Unwin and University of Hawai'i Press: 2002) 183.

⁴⁴ Thee Kian Wie, 'Indonesianization Economic aspects of decolonization in Indonesia in the 1950s,' in *Indonesian Economic Decolonization in Regional and International Perspective*, ed. J. Thomas Linblad and Peter Post (Leiden: KITLV Press, 2009) 26.

⁴⁵ Adrian Vickers, *A History of Modern Indonesia*, (Cambridge: University of Cambridge Press, 2005).

taken over by the military as the nationalization policies were executed.⁴⁶ Robison claimed that military involvement in Indonesian economic history began with the collapse of colonial capitalism and the failure of domestic private capitalism in the period of 1949-1957.⁴⁷ Nationalization was not always successful, however, as shown in the case of the Dutch shipping company that failed to be taken over. To compensate that failure, the Indonesian government established a state-owned shipping company called PELNI.⁴⁸

c. The FDI policy making: Ambivalence

In some occasions, President Sukarno recognized the need for foreign investment by indicating that security was necessary so that both citizens and foreigners would invest in Indonesia, and that the country still needed assistance from foreign capital. Also, in another speech in September 1951 he defended the cabinet's policy of encouraging foreign investment. In 1954, the Minister of Finance pointed the importance of FDI by stating that foreign investment was required to "enlarge national production, improve people's standard of living, and to develop sound economic conditions."⁴⁹ However, it was only in 1958 that the government introduced Law No. 78 of 1958 concerning Foreign Investment. The Law acknowledged three types of investment methods: FDI can invest on their own; in cooperation with Indonesian; or in collaboration with the government. The enterprises should be primary places for Indonesian citizens to work, and thus only foreigners whose skills were not available in Indonesia would be permitted to work in the country. Foreign enterprises were allowed to remit abroad after-tax profits, and they were also authorized to transfer part of their earnings.

⁴⁶ Bambang Purwanto, "Economic Decolonialization and the Rise of Indonesian Military Business," in *Indonesian Economic Decolonization in Regional and International Perspective*, ed. J. Thomas Linblad and Peter Post, (Leiden: KITLV Press, 2009).

⁴⁷ Richard Robison, *Indonesia; the Rise of Capital*, (Sydney: Allen and Unwin, 1986) 36.

⁴⁸ Wie, 'Indonesianization,' 26.

⁴⁹ Redfern, *Sukarno's Guided Democracy*, 126.

The Foreign Investment Law emphasized monitoring and control of FDI to protect the nation's interests. The Law contained negative investment list which included the areas of railways, telecommunications, shipping and aviation, power generation, water supply, arms and munitions, and the mining of important materials. Preference was expressed for businesses that featured cooperative arrangements between foreigners and Indonesian partners.⁵⁰ The Law also introduced limitations in which the enterprises operated wholly or primarily in Indonesia had to be incorporated under Indonesian Law and domiciled in Indonesia.⁵¹

Regarding the facilities, the Law avoided double taxation and further indicated that various types of tax relief may be granted on the Indonesian side.⁵² The law also declared that industrial enterprises would not be nationalized for at least a 20 year period, 30 years in the case of agricultural businesses.⁵³ All after-tax profits were transferable abroad in the case of wholly-owned foreign firms and repatriation of capital was allowed in cases where the enterprise had been in operation for an unspecified length of time.⁵⁴ Land use rights for industrial firms were to be for 20 years, which were extendable; for large agricultural companies, the period was 30 to 40 years, also extendable.⁵⁵ On the other side, the government imposed price control to goods and services produced by Dutch companies in Indonesia. In 1952, repatriation of profits was subject to taxes in which the government imposed a surcharge on the purchase of foreign exchange for that purpose. Moreover, permits for foreign workers were subject to complicated bureaucratic procedures, while trade unions

⁵⁰ Article 4 Law No 78 of 1958 concerning Foreign Investment.

⁵¹ Article 5 4 Law No 78 of 1958 concerning Foreign Investment.

⁵² Article 11 and 124 Law No 78 of 1958 concerning Foreign Investment.

⁵³ Article 13 4 Law No 78 of 1958 concerning Foreign Investment.

⁵⁴ Article 16 and 17 4 Law No 78 of 1958 concerning Foreign Investment.

⁵⁵ Article 6 and 7 4 Law No 78 of 1958 concerning Foreign Investment.

were encouraged to demand the Dutch companies to grant improved pay and working conditions.⁵⁶

Despite recognizing the importance of FDI, the government seized Dutch enterprises in 1957 due to the conflict between the Dutch government and Indonesian government over West Irian status. The first company to be taken over was the KPM shipping line and the George Wehry trading house. The official position of the seized Dutch companies was uncertain until late in 1959 when the Indonesian government finally decided to nationalize them.⁵⁷

In 1959, there was a change in the government into a Guided Democracy which was accompanied by a shift in economy called Guided Economy which also referred to as Indonesian Socialism. Guided economy was set up to materialize a just and prosperous society. To achieve this goal, President Sukarno was to formulate and control Indonesia's foreign policy with a strongly anti-colonialist and anti-imperialist element. Consequently, liberalism and capitalism were officially prohibited. The most significant role of Guided Economy was the heavy economic intervention of the government through its state-owned enterprises.⁵⁸

The Guided Democracy gave rise to an unfriendly attitude towards foreign investment. This was evident from the enactment of laws that had significant impacts on foreign investment. The laws were meant to replace the various colonial laws and were seen as the way to cut the link with colonialism. The first law was Law No. 5 of 1960 concerning the Basic Agrarian Law which regulated land ownership and land use with the purpose to guarantee land ownership for the Indonesian people. The Law did not recognize land ownership for foreign individuals or enterprises. It also only allowed shorter terms of land rights: the right of tenure can be given for 35 years and renewed for a further 25 years, the

⁵⁶ Dick, *Formation*, 182.

⁵⁷ Wie, *Indonesianization*, 30.

⁵⁸ Redfern, *Sukarno's Guided Democracy*, 38-40.

right to build can be given for 30 years and renewed for a further 20 years, and the right to use can be given for 25 years and renewed for a further 20 years.

The second law was Law No. 44 of 1960 concerning Oil and Natural Gas which stipulated that the state now owned oil and gas and that only state-owned enterprises may undertake the mining of oil and gas. Consequently, the Oil and Natural Gas Law changed the position of foreign oil companies such as Caltex, Stanvac, and Shell. Hence, foreign oil enterprises were no longer to be regarded as concession holders but as contractors which had to renegotiate their contracts with the government.⁵⁹ What happened in Indonesia this time was in line with what happen with other newly independent states that were very nationalistic and skeptical of the liberal economic order.⁶⁰

In addition to the takeover of Dutch companies, there was also bad treatment toward ethnic Chinese. Chinese descendent economic power grew due to the gap left by the Dutch and the inefficient state-owned enterprises. This sentiment led the government to issue a regulation banning foreign nationals, including Chinese, from engaging in retail trade in rural areas. Despite causing most Chinese to be relocated to cities, this regulation also caused many of them to leave Indonesia for China.⁶¹

In 1962, President Sukarno began pushing for new foreign capitals to enter the country in the form of production sharing arrangements as a preferred form of foreign capital to enter Indonesia. On August 3rd, 1962 President Sukarno made a statement saying that “foreign investment of the classical type is unacceptable to the government.” One of the reasons cited was that foreign investment recalls the bitter experiences of the newly independent countries and they extract the wealth from a colonial country.⁶² The ban was considered as the manifestation of economic nationalism. In September 1963, there was an

⁵⁹Dick, *Formation*, 189.

⁶⁰ Kenneth J. Vandavelde, “Sustainable Liberalism and International Investment Regime,” *Michigan Journal of International Law*, vol. 19 (1998) 383.

⁶¹ Dick, *Formation*, 185.

⁶² Redfern, *Sukarno's Guided Democracy*, 460.

outbreak of Confrontation with Malaysia⁶³ which resulted in takeovers of British companies. The outbreak of Confrontation with Malaysia deteriorated Indonesia-US relation due to the US support for Malaysia in Confrontation. This political turmoil led the government to confiscate British and Malaysian companies.

The last phase of the takeover was done to 13 companies which 11 of them were American-owned.⁶⁴ According to Redfern, this final wave of takeovers of foreign companies was very different from the previous waves. The last takeover was triggered by an “official change in Indonesian government policy which required all remaining foreign companies with any significant operations in the country were taken over.” An exception was made to two of the big three oil companies: Caltex and Stanvac (Shell oil was taken over).⁶⁵ The 1958 foreign investment law was repealed in 1965 and led to a closing off of future foreign investment. Nevertheless, it complemented the first step of seizing foreign companies already in the country by technically shutting the door to any new foreign investment coming in. By the end of 1965, foreign investment in Indonesia, except Caltex and Stanvac, had been eliminated.

d. Theory in Context

The Old Order regime apparently did not subscribe the liberalism which attributed that the reasons for the underdevelopment were due the lack of capital needed to initiate an industrialization process. Instead, the government was heavily influenced by Marxism through its dependency theory. The government refused to regard integration into the global economy as the key to economic development. Indonesia in the Old Order also firmly attached to economic nationalism. Both Marxism and economic nationalism supported extensive state regulation of economic activity and redistribution of wealth from developed to

⁶³ It was a violent conflict from 1963-1966 that arose from Indonesia’s opposition to the establishment of Malaysia. Indonesia under President Sukarno sought to prevent the creation of new Federation of Malaysia while the British Commonwealth sought to safeguard the security of the new state.

⁶⁴ Redfern, *Sukarno’s Guided Democracy*, 364.

⁶⁵ *Ibid.*, 464.

developing countries.⁶⁶ Indonesia in the Old Order era adopted policies that blended the two theories which were indistinguishable in practice.

Similar to Latin America where dependency theory was originated, Indonesia subscribed to dependency theory to justify government policies to acquire control of national development. While for Latin American countries this theory was the explanation of the historically unequal relation between Latin America and North America and Europe, for Indonesia it was the expression of protest for the subordinate relationship with the Dutch. As dependency theory considered FDI creating dependency for developing countries toward developed nations, the Old Order government cut all ties with foreign capital. The Old Order argued that foreign investors exploited the country's natural resources, cheap labor, and markets. The anti-FDI sentiment was translated into a policy called *Berdikari* (the Indonesian acronym for *berdiri di atas kaki sendiri*, or standing on one's own feet), meaning economic self-reliance. This was the effort of President Sukarno to link financial independence with political sovereignty, arguing that the latter could not exist without the former.⁶⁷

It was through President Decree No. 6 of 1965 *Berdikari* was enacted. It authorized the takeovers of remaining foreign business. Another manifestation of submission to dependency theory was the revocation of the 1958 Foreign Investment Law. Redfern claimed that this revocation was symbolic because practically the nationalization and takeover already meant a closed the door to new foreign investment. *Berdikari* was complementary to such takeover and nationalization. Without any laws or supporting regulations, new foreign investment had no legal means to enter the country.⁶⁸ On May 1965, Minister Saleh publicly announced that Indonesia would no longer permit investment of foreign capital.

⁶⁶ Vandeveld, *Sustainable Liberalism*, 384.

⁶⁷ Dick, *Formation*, 189.

⁶⁸ Redfern, *Sukarno's Guided Democracy*, 510.

Consequently, all foreign companies already in Indonesia had technically been placed under the government control, and no new foreign investments were allowed to enter.⁶⁹

What highlights the Old Order's FDI policy was its fear of capitalism and neo-imperialism as well as its powerful antagonism to liberalization. The experience with the Dutch colonialization led to a perception that foreign capital had the characteristic of taking as many profits as possible away from Indonesia and continually exploiting the country and its people. The nationalization and takeover of foreign enterprises during the Old Order era was the result of socialism and people's economy. These efforts reflected the endeavor of the government to create a national economic system. It was clear that national economy was understood to release the country's economic activities from foreign participation. One of the principal problems faced in the construction of national economy was "the degree to which the economy should be *Indonesianized*, an issue that directly questioned the role of foreign investment in the Indonesian economy."⁷⁰

Indonesian economy under Sukarno was somehow considered underachiever where far more economic progress could have made than what actually happened. There was a contradiction between potential and actual economic development. Evidently, this happened because Indonesia simply did not have capital, skills, and technology for industrialization. Excessive nationalism and ambition towards *Indonesianization* and *Berdikari* on behalf of financial independence had excluded the possibility to look assistance from foreign investment. Even though people's economy did not in entirety prohibit foreign investment, Sukarno's Guided democracy almost completely closed off the connection with FDI.⁷¹

⁶⁹ Ibid.

⁷⁰ Wie, '*Indonesianization*, .

⁷¹ Ibid.

Between 1960 and 1965 real Gross Domestic Product (GDP) per capita fell by roughly 10%, while the inflation was very high (229%).⁷² This economic collapse proved that President Sukarno's concentration on nation prestige and socialism tenet did not help the country's economy. Excessive nationalistic sentiments, opposing the idea of liberalism, and adherence to Socialism were believed to be the culprit. Without industrialization process and development, Indonesia during the Old Order was an emerging country. A clear lesson is that a close investment regime and cut off from outside world were ruining the economy.

2. The New Order

New Order is a term associated with the second Indonesian President Suharto. This term was used by Suharto to contrast his rule from President Sukarno. The New Order term is now widely used to describe Suharto years in power from 1966-1998. The New Order government was supportive to capitalism as a mean to economic development. But this did not mean free liberalism approach to development and the private sector because several limitations applied.⁷³

a. The Group of Policy Experts

There were two groups of policy experts during the New Order era, the technocrats and the technologists.⁷⁴ According to General Sumitro,⁷⁵ the technocrats were given more trust because almost all of them were American graduates who believed to apply the western economic concept. Hence, Western countries as the biggest source of capital would be more

⁷² Michael T. Rock, "The Politics of Development Policy and Development Policy Reform in New Order Indonesia," William Davidson Institute Working Paper Number 632 November 2003, available at <https://core.ac.uk/download/pdf/7051027.pdf>, accessed at May 20, 2015.

⁷³ Ibid. 12.

⁷⁴ Heru Cahyono, *Pangkopkamtib Jenderal Soemitro dan Peristiwa 15 Januari '74 : sebagaimana dituturkan kepada Heru Cahyono, (General Soemitro and Malari Incident January 15, 1974: as stated to Heru Cahyono)*, (Jakarta : Pustaka Sinar Harapan, 1998) 18.

⁷⁵ He was the Commander of Operational Command for the Restoration of Security and Order and Deputy Commander of Indonesian Army in 1973. He was accused of letting the students protests get out of hand and became Malari incidents in 1974.

confident to invest in Indonesia since the economic policy was formulated by western-educated economists.⁷⁶

The technocrats consisted of economists graduated from University of California-Berkeley and, therefore, known as ‘the Berkeley Mafia.’ They were originally students at the School of Economics of the University of Indonesia. Sumitro Djojohadikusumo,⁷⁷ the Dean of the school, was the only doctorate in Economics in that time. Therefore, he invited professors from the Netherlands to assist in educating the students. As tension grew between Indonesia and the Netherlands in the mid-1950s, the Dutch professors withdrew. Recognizing the importance of economists’ role in the country, Djojohadikusumo called for the Ford Foundation to help by sending a group of outstanding students to the Ph.D. in Economics at the University of California Berkeley from 1957 to early 1960s. The members include Widjojo Nitisastro, Mohammad Sadli, Emil Salim, Subroto and Ali Wardhana.

After graduating, Widjojo Nitisastro was appointed as the coordinator for economy and finance of the staff of personal assistants to President Suharto in 1966. He was later positioned as the Chairman of the National Development Planning Agency⁷⁸ from 1967 to 1983; Minister for Development Planning in 1971; and Coordinating Minister for Economy, Finance, and Industry from 1973-1983.

As for Mohammad Sadli, he returned to Indonesia in 1957 after graduating and became the Director of the Economics and Management Institute at the University of Indonesia.⁷⁹ In 1967, Sadli was appointed as the first chair of the Indonesian Investment Coordination Board. From 1971-1973 he served as the Minister for Manpower followed by

⁷⁶ Cahyono, *Pangkopkamtib Jenderal Soemitro*, 25-26

⁷⁷ The Minister of Trade and Industry in 1950-1951, Minister of Finance 1952-1953, and 1955-1956.

⁷⁸ This agency is called Bappenas which responsible primarily for national planning, drafting the development budget, coordinating with foreign governments and international organizations and monitoring implementation and, as such, held considerable sway over other ministries.

⁷⁹ In the New Order era, a number of research center rose in prominence as President Soeharto led a process of economic reform. These included the Indonesian Institute of Sciences, the Center for Policy and Implementation Studies (CPIS) and the Centre for Strategic and International Studies (CSIS).

becoming Minister for Mines in 1973-1978. The next member of the group was Ali Wardhana who was known as the longest serving Finance Minister of Indonesia from 1968-1983. President Suharto later also appointed Wardhana as the Coordinating Minister for Economics, Industry and Development Monitoring from 1983 to 1988.

The next member, Emil Salim served as a member of the team of economic advisers to President Suharto in 1966, member of the team of adviser to the Minister of Manpower from 1967 to 1968, Chairman of the technical team to the Council for Economic Stability from 1967-1969, Vice-Chairman of the National Development Planning Agency and also served as Ministers from 1971-1993. Like his Berkeley Mafia fellows, Subroto served as Minister of Energy and Natural Resources from 1978 to 1987, and Secretary General of Organization of the Petroleum Exporting Countries (OPEC) 1988-1994.

The technocrats were considered as the voice of economic liberalism. They supported for an open economy, export-led growth, privatization of public assets, deregulation, opened up oil and minerals sectors to private entrepreneurs, and facilitated FDI and freer trade.⁸⁰ To facilitate FDI, at the global level, the New Order government ratified the ICSID Convention, concluded several Foreign-Trade Agreements which contained Investment chapter, and signed Bilateral Investment Treaties (BIT). This development suggests that the future development of foreign investment law in Indonesia will be more liberal than ever before. Indonesian BIT during this time was meant to attract as many FDI as possible without considering room for policy making and obligations to be performed by investors. Most of the BITs also referred to the ICSID as the dispute resolution. These characteristics are in agreement with Level 1 BIT⁸¹ which has three main components: limiting the government to

⁸⁰ This is similar to a group of economists known as ‘the Chicago boys’ which was a group of Chilean economists trained at the Department of Economics of the University of Chicago who was summoned to help reconstruct the Chilean economy in 1975. The Chicago boys attached to the neoliberal theories, but the immediate revival of the Chilean economy in terms of growth rates, capital accumulation, and high rates of return on foreign investments was short-lived.

⁸¹ The author categorizes BIT into three level: 1,2, and 3 where each level has different focus and goal.

regulate FDI; did not impose investor's obligations, and provide quick dispute resolution namely: international arbitration. Level 1 BIT was designed to improve investor-friendliness as this would help the host government efforts to attract more FDI.⁸² As a result, new flows of foreign investment were flocking the country.

The other group, the technologists, consisted of a wide variety of professions and none of them was a US graduate. They were oriented professionals like BJ Habibie who graduated from a Doctorate program in School of Engineering in Germany with a thesis in aerospace engineering. In 1974, Habibie returned to Indonesia because President Suharto recruited him as part of Suharto's industrialization program. Four years later, Habibie was appointed as the Minister of Research and Technology. Habibie successfully developed Indonesian aircraft industries through a state-owned company IPTN which specializing in the manufacture of helicopters and small passenger planes. IPTN was later to be halted as part of the IMF conditional loan to Indonesia following the financial crises in 1998.⁸³ Later, Habibie succeeded Suharto as president after he stepped down in 1998.

Another prominent figure was General Ibnu Sutowo, the former head of oil SOE since 1957 (Permina) to 1978 (Pertamina). He devised the new concept "production-sharing contracts" with international major oil companies in lieu of the contracts of work.⁸⁴ During the oil boom, Sutowo used Pertamina's profit to embark on various major projects for industrial development.⁸⁵ In doing so, Sutowo established some joint ventures for engineering and consulting services for oil and gas explorations, tanker operations, and development and

⁸² Genevieve Fox, A Future for International Investment? Modifying BITs to Drive Economic Development, *Georgetown Journal of International Law*, vol.46(2014) 239.

⁸³ John Bresnan, The United States, the International Monetary Fund and the Indonesian Financial Crisis, Discussion Paper No.8 , Discussion Paper Series APEC Study Center Columbia University 30 June 1998 available at <https://www8.gsb.columbia.edu/apec/sites/apec/files/files/discussion/bresnan2.pdf> , accessed at June 21, 2015.

⁸⁴ Shinji Asanuma, "Natural Resource Abundance and Economic Development: A Curse? Or A Blessing? – Lessons from Indonesia's Experience," available at http://policydialogue.org/files/events/Asanuma_nat_resource_abundance_and_economic_dev.pdf, accessed at June 23, 2015.

⁸⁵ Hill and Wee, *Indonesia's Technological Challenges* , 48.

production of manufacturing input materials for oil and gas sectors, such as steel structures. Outside oil and gas sectors, Sutowo used Pertamina's money to the production of chemical products, the packaging of fertilizer and other chemicals, frozen food, and dry foodstuff either in the form of Pertamina's subsidiary or joint ventures. Sutowo tried to build up the necessary infrastructure for oil and gas sectors.⁸⁶

The next leading figure in technologist groups was a politician name Sudharmono. He was the Chairman of the then ruling party: Golkar in 1983, and the Vice President from 1988 to 1993. The next persons in the group were Ali Murtopo, a prominent general and political figure, and Ginandjar Kartasasmita who graduated from Chemical Engineering at Tokyo University. Kartasasmita was the Minister for Domestic Production Improvement from 1983 to 1988, the Minister of Mining and Energy from 1988 to 1993, and the State Minister for National Development Planning from 1993-1998. Sudharmono, Murtopo, and Kartasasmita's strategic positions in the government enabled them to convince Suharto to adopt high technology projects.

The technologists' nationalism was manifested in their ambition to make Indonesia as a leading industrialized country. They seemed to have thought that "the establishment of the high-tech project could jump-start Indonesia's industrialization and elevate the country's status of a low-income nation for a long time."⁸⁷ The technologists were more nationalists than the technocrats in the sense that they adhere to the people-based economy in the form of used more state-centered approach to economic development and favored promotional privileges for indigenous entrepreneurs. The state-centered approach was evident in the way the national economy was controlled by the state through SOEs. The technologist argued that this step made Indonesia heading in a different direction from people's economy and family

⁸⁶ Asanuma, *Natural Resource Abundance*.

⁸⁷ Asanuma, *Natural Resource Abundance*.

principle. They also asserted that the intended reform was especially difficult without constitutional changes in the whole structure of social-economic institutions.⁸⁸

The technologists were the proponent of self-reliance and industry-led development which opposed mass production to support small and medium enterprises.⁸⁹ Their influence appeared at the protectionism nature in some inward-looking policies. Restrictions on FDI were among their influence. Even though nationalist approach used by the technologists contributed to the rise of indigenous entrepreneurship and improved their role in the economy, it was also largely coincided with growing corruption. Following the economic crises in 1998, most of the high-technology projects were halted under the IMF recommendation due to alleged corruption and inefficiency.

An infamous group that played the secondary role in the economic policy was rent-seekers that consisted of firms owned by Suharto's families and close acquaintances. This rent-seeking group took advantage of their closeness with political power. Crouch indicated "patrimonial feature in Suharto administration." He saw the use of "patronage to maintain the loyalty of president's subordinate by keeping their official salaries too low so that their dependency toward the government could be assured." Such a condition was believed to create a favorable environment for the rent-seekers group through corruption practices.⁹⁰ The rent seekers' practices disturbed liberalization measures initiated by the technocrats. They resisted deregulation in some sectors of the economy such as in wheat flour, soybean, plywood, high-technology, clove, and automobile.⁹¹

⁸⁸ James Buchanan, "Reform in the Rent Seeking Society" in *Toward a Theory of the Rent-Seeking Society*, ed. J. Buchanan, R. Tollison and G. Tullock (Texas: Texas A & M University Press, 1980) 359-367.

⁸⁹ These are the principles of economic democracy as stated by Adi Sasono in Menuju Rakyat Berdaulat, Wawancara Adi Sasono Ketua Umum Dekopin Oleh Liem Siok Law, (Toward Sovereignty of the People, Interview with Adi Sasono the Chairman of National Cooperative Council), by Liem Siok Law, Republika, 2008, p 18.

⁹⁰ Harold Crouch, *Patrimonialism and Military Rule in Indonesia* (Cambridge: Cambridge University Press, 1979).

⁹¹ Andrew Rosser, *The Politics of Economic Liberalisation in Indonesia: State, Market and Power*, (New York: Routledge Curzon, 2002) 134-142.

There was a noticeable tension between the technologist and the technocrat which was mediated by President Suharto who channeled their ideas in separate areas. Hill and Narjoko stated that:

the technocrats dominated and influenced in the financial and fiscal policy. In the period of crisis, the technocrats were in the important position to formulate government policies, and they delivered significant economic reforms that led to the recovery and faster growth. By cutting subsidies and changing the exchange rate mechanism, inflation dropped from 660 percent in 1966 to 19 percent in 1969. However, during the periods of steady economic growth the technocrats were less influential.⁹²

The technocrats successfully implemented macroeconomic stabilization program, and the results were: inflation slowed, investment rose, and growth exploded. The World Bank reported that the real GDP per capita grew at 5.03% per year from 1966 to 1997. Besides, the manufacturers had risen to more than 25% of GDP as real manufactured value added increased more than 12 times from \$4.4 billion to \$57.33 billion by 1996. By 1993, manufactured exports reached \$21 billion accounting for 53% of total exports.⁹³

The success of technocrats in implementing macroeconomic stabilization program was considered as the success of liberal approach and had saved Indonesian economy. Some economists thought Berkeley mafia's approach as evidence that liberalization may lead to economic development which was in agreement with Vandelde who claims that the goal of economic development may be best served if the commitment to liberalism is genuine.⁹⁴ However, Indonesian liberal approach was not fully accomplished due to resistance from certain groups of business players. Another economic reform introduced by technocrats was

⁹² Hal Hill and Dionisius Narjoko, "Managing Industrialization in Globalizing Economy: Lesson from the Suharto Era," in *Soeharto's New Order and Its Legacy: Essays in Honor of Harold Crouch*, ed. Edward Aspinall, Greg Fealy (Canberra: Australia National University ePress, 2010) 64.
<https://digitalcollections.anu.edu.au/handle/1885/52953>

⁹³ World Bank, World Development Indicators, 2000, available at <http://documents.worldbank.org/curated/en/462341468766204683/pdf/multi0page.pdf> accessed August 20, 2015.

⁹⁴ Kenneth J. Vandelde, "The Political Economy of a Bilateral Investment Treaty," *The American Society of International Law Journal*, vol. 92 (1998) 635.

to encourage awareness of the political leaders about the adverse effect of rent-seeking interventions in the economy.⁹⁵

b. The New Investment Regime

Liberalization of FDI appeared from the enactment of Law No. 1 of 1967 concerning Foreign Investment. The Law defined a legal framework for foreign investment including applied restrictions as to what sectors open to the investors. The Law introduced a positive list of sectors open to foreign investment which means that all sectors were closed for FDI except those stated in the list. The next step was the ratification of the ICSID Convention in 1968 and numerous investment treaties which offered various protections to FDI. The government also enacted Law No. 6 of 1968 concerning Domestic Investment which indicated a different treatment between domestic and foreign investors.

Thee Kian Wie divides the New Order's economic policy into three different phases: 1966-1973 (stabilization, rehabilitation, partial liberalization and economic recovery); 1974-1982 (oil booms, rapid economic growth, increasing government intervention); and 1983-1996 (post oil boom, deregulation, renewed liberalization, and rapid export-led growth).⁹⁶ Below is the explanation of each time frame:

1. 1966-1973: The period of stabilization, rehabilitation, partial liberalization and economic recovery

The focus of the New Order was economic development. The first step to being done was the reintegration into the world economy by rejoining the IMF, the United Nation (UN), the World Bank and also ended the Confrontation with Malaysia. President Suharto changed the economic policy from the East (Communist-socialist bloc) towards the Western alliance. The economic policies in the domestic, regional and international level were geared towards the new system. As a result, New Order government had successfully led to economic

⁹⁵ Srinivasan T, "Neoclassical Political Economy, the State and Economic Development" *Asian Development Review*, vol. 3 (1985) 38-58.

⁹⁶ Wie. *The Soeharto Era*, 194-243.

recovery through its openness and liberalization policy. This policy “reopened the flow of foreign aids in the form of loans as well as investments.”⁹⁷ Apparently, the New Order regime turned from stricter to loosen government control. The tight control period started in the 1960s and early 1970s. This policy enabled the country to channel its very limited resources to areas that were considered as vital for economic development.

As Indonesia’s wealth grew, and the economy increased, it was not practical for the government to control anymore. With the advice from economic technocrats, President Suharto came up with economic recovery plan through free market mechanism followed by the implementation of the Law No. 1 of 1967 concerning Foreign Investment. The Law provided numerous incentives such as varying exemptions from corporate taxes and dividend taxes,⁹⁸ full authority of foreign owners to appoint management, including foreign managers and technical personnel,⁹⁹ exemption from stamp taxes and import duties, as well as favorable terms on grants of land.¹⁰⁰ Foreign companies were granted the right to repatriate profits and various expenses at prevailing exchange rates, rights that were denied prior to then.¹⁰¹ The law also contained a provision that protects the foreign investor from nationalization.¹⁰²

Restrictions regarding the sectors closed to foreign investment applied for example utilities, shipping, aviation, mass media, and defense-related areas.¹⁰³ Foreign companies were obliged to use and train Indonesian human resources,¹⁰⁴ and also required that foreign investors divest a portion of ownership to domestic shareholders.¹⁰⁵

⁹⁷ Ibid.

⁹⁸ Article 15 and 16 Law no 1 of 1967 concerning Foreign Investment.

⁹⁹ Article 9 Law No 1 of 1967 concerning Foreign Investment.

¹⁰⁰ Article 14 Law No 1 of 1967 concerning Foreign Investment.

¹⁰¹ Article 19 Law No 1 of 1967 concerning Foreign Investment.

¹⁰² Article 21 Law No 1 of 1967 concerning Foreign Investment.

¹⁰³ Article 6 Law No 1 of 1967 concerning Foreign Investment.

¹⁰⁴ Article 10 and 12 Law No 1 of 1967 concerning Foreign Investment.

¹⁰⁵ Article 27 Law No 1 of 1967 concerning Foreign Investment.

To promote foreign investment in the country, Suharto traveled to Western Europe and Japan starting in the natural resources sectors. From 1967 to 1968, a significant number of the companies seized in 1963-1965 were returned to their original owners. Meanwhile, foreign investment returned to the country in response to the newly liberal policy regime and generous fiscal incentives. Freeport Sulphur Company and International Nickel Company were among the first foreign investors that re-enter Indonesia.¹⁰⁶

The government also enacted Law No. 6 of 1968 concerning Domestic Investment to allow development of a domestic capitalist class to contribute to economic growth to supplement existing state-owned companies. As a result, the late 1960s and early 1970s were noticeable for the emergence of domestic entrepreneurs in the import-substitution light-manufacturing sector.¹⁰⁷ During this period, Indonesia was considered as an inward-looking country. Much of the revenues were used to finance physical developments, while the focus on diversifying and expanding trade and investment was minimal.

2. 1974-1982: The period of oil booms, rapid economic growth, and increasing government intervention.

This era was considered as “state-led industrialization” with funding from the oil boom. Indonesia’s economic growth increased significantly when the OPEC cut its exports drastically, causing the oil prices to hike. Another oil boom occurred during 1978-1979 at the same period with the Iranian revolution which caused oil price to ascent due to disrupted oil production. The positive impact of the price increase was not only rising in the Indonesia’s export earnings rose but also government’s revenues. Correspondingly, the government could “allocate budget to the public sector by investing in regional development, social development, infrastructure, and through the establishment of large-scale industries among which were the import-substitution industries.” Also, “the increased foreign exchange

¹⁰⁶ Redfern, *Sukarno’s Guided Democracy*..

¹⁰⁷ Most of them were Chinese Indonesians

enabled the government to import capital goods and raw materials which giving rise to the manufacturing sector.”¹⁰⁸

Consequently, “by 1981 oil and natural gas earned 80% of the nation’s foreign earnings and contributed 61.7% of tax revenue.”¹⁰⁹ The government devised a strategy to optimize the benefit from oil to support state-owned company, and infrastructure projects. Selected industries were subsidized. “The state invested heavily in steel, cement, petrochemicals, and infrastructure and fostered manufacturing of motorcycles, television sets and processed foods to supply the domestic market.”¹¹⁰

On the other hand, disappointment arose due to the perceived over the existence of foreign investment projects in the country which in turn seemed to exclude indigenous Indonesian from the economy. The emergence of Conglomerate Corporation headed almost entirely by ethnic Chinese who had good connections with Suharto also played a role. Consequently, small and medium enterprises were marginalized.¹¹¹ Criticisms toward the expanding of economic control on non-indigenous Indonesia and conspiracy between them and certain government officials resulted in a riot in January 1974 in Jakarta known as *Malari* incidence which was considered as the biggest riot during New Order period and marked the rising of economic nationalism.

The *Malari* incidence took place during Japan’s Prime Minister Kaukei Tanaka’s visit to Jakarta.¹¹² It started with the burning of Japanese automobile within reach of the crowd.¹¹³ This riot brought a new understanding on the government side and resulted in several changes in law and legal policies. The government imposed controls on the economy primarily for three reasons: to direct industrial development specifically to assist indigenous Indonesians,

¹⁰⁸ Wie, *The Soeharto Era*, 207-208.

¹⁰⁹ Richard Robison, “Power and Economy in Suharto’s Indonesia,” *Journal of Contemporary Asia* (1990) 99.

¹¹⁰ *Ibid.*

¹¹¹ Dawam Rahardjo, *Pembangunan Pascamodernis (Post-modern Development), Esai esai ekonomi politik (Essays in Political Economy)*, (Jakarta: Insist Press INFID, 2012) 45.

¹¹² Cahyono, *Pangkokamtib Jenderal Soemitro*, 215.

¹¹³ *Ibid.*, 221-222.

to protect domestic industries from more efficient offshore competition and to conserve foreign exchange. The new policies included:

- a. Foreign investment shall include business partners from among the natives, and within ten years the natives shall control 51 percent shareholding.
- b. Ownership of the entire share of new investment in the framework of domestic capital investment has to be managed by natives within a period of 10 years.
- c. Elimination of credit allocation by state-owned banks to non-native Indonesians.
- d. The closure or restriction to non-indigenous and foreign investors to invest in certain sectors.
- e. The distribution of credits to native entrepreneurs by state-owned banks to strengthen indigenous people's economy.¹¹⁴

However, the New Order government did not fully adhere to those policies. Report from the Center for Business Data showed unexpected reality. Economic concentration was still on the conglomerates. Rent seekers society was among the culprits. Around 200 conglomerates and foreign investors control more than 50% gross domestic product while around 200 million Indonesians owned the rest. As a result, most people were fall under the poverty threshold.¹¹⁵

Thus, during 1974-1982 the New Order government failed to materialize what presumed to be the trickle-down effect. Instead, a trickle-up effect marked by the economically strong party became even stronger, and the weak getting worse. It was indicated by a different and exploitative relationship between large and small business units, and also between formal and informal. This kind of relationship also occurred between capital owners and their labors. All these processes resulted in economic rent.¹¹⁶

¹¹⁴ Arief, *Ekonomi Kerakyatan Indonesia*, 136.

¹¹⁵ Ibid.

¹¹⁶ Ibid., 208-209.

Hatta criticized the economic policy in this period. In 1976, the term of “Pancasila Economy”¹¹⁷ (*ekonomi Pancasila*) emerged as Hatta’s reaction which condemned the political economy promoted by the technocrats. Hatta perceived the technocrat’s liberalization program had departed from Pancasila and the 1945 Constitution.¹¹⁸ Hatta urged the nation to refer to Pancasila economy instead of liberalism. Pancasila economy was understood as moral economic system that concerned with equity and intended to narrow the gap between the rich and the poor, the powerful and the powerless; and small business and big corporation.¹¹⁹

3. 1983-1996: The period of post-oil boom, deregulation, renewed liberalization, and rapid export-led growth.

The oil price fell in the early 1980s. Not only it led to currency conversion, but also disturbed foreign debt. The government had to make new measures to restore macroeconomic stability. The economic orientation needed to be changed into an economy focusing on competitive private sectors oriented towards export, rather than economy dependent on oil. This implied new deregulation measures to improve the investment climate for private investors.¹²⁰

Following the global drop in oil prices in 1986, the Indonesian government adopted new approaches which considered as ‘outward looking’ consisted of deregulation, export-led growth, the creation of a regulatory climate conducive to foreign investment, and transfer of economic power from the government to the private sector. Deregulation was aimed to avoid

¹¹⁷ Pancasila is the philosophical basis of the Indonesian state. Pancasila consists of two Sanskrit words, "*panca*" meaning five, and "*sila*" meaning principle. It comprises of five inseparable and interrelated principles: 1) Belief in the one and only God; 2) Just and Civilized Humanity; 3) The unity of Indonesia; 4) Democracy Guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives; 5) Social justice for the whole of the people of Indonesia.

¹¹⁸ Tempo Magazine No 22/Th.XI, August 1, 1981 as cited in Mubyarto, *Amandemen Konstitusi & Pergulatan Pakar Ekonomi* (Amendment of Constitution & Economic Expert Debate), Aditya Media, 2001, p 138.

¹¹⁹ Mubyarto, *Reformasi Sistem Ekonomi*, 32.

¹²⁰ Radius Prawiro, *Indonesia's Struggle for Economic Development: Pragmatism in Action*, (Oxford University press, 1998) 257.

high-cost economy and considered as the key step to moving forward with the other three approaches.¹²¹

The deregulation was done in financial, trade and investment sectors. The reason for investment deregulation was that it brought foreign exchange into the country and injected capital into the economy that can accelerate growth beyond levels obtainable through domestic investment. Therefore, export-oriented investments were prioritized to generate foreign exchange as well as to expand non-oil foreign exchange earnings. Export activities were mainly from the primary sector such as mining and forestry. Foreign exchange earned from export was used for paying foreigners through import, service and insurance, repatriation, and foreign loan interests.¹²²

Foreign investor at this time concerned with the stability of the economy in the midst of the collapsing oil market.¹²³ In March 1985, foreign investment level still below that of 1975 level. The government started its regulatory reform to attract FDI by simplifying the investment process. The number of licenses required was reduced from 26 to 13 and levies associated with the investment application process were removed. Following this change, the government launched the May 6th package which included several measures. Firstly, increased foreign equity was permitted up to 95 percent foreign ownership for export-oriented firms. Businesses that were valued at US\$ 10 million or more or were located in selected provinces were permitted 95 percent foreign ownership. Secondly, expanded access to finance for foreign joint ventures was created. Joint ventures would be treated the same as domestic firms and would be permitted to borrow from state banks and participate in government credits schemes. To receive such a treatment, the foreign partner had to divest of at least 75 percent of the company or had listed at least 51 percent of the shares through the stock exchange. Thirdly, duration of permits for investment was awarded for 30 years from

¹²¹ Ibid.

¹²² Arief, *Ekonomi Kerakyatan Indonesia*, 206.

¹²³ Prawiro, *Indonesia's Struggle*, 272.

the time the firm was established or expanded. Lastly, all FDI were exempted from the value-added tax on imported capital goods.¹²⁴

The following years, the government implemented a series of measures designed to improve the nations' investment conditions. The positive list was changed into a negative list in 1986. The number of sectors closed to FDI was reduced.¹²⁵ Investors were allowed to diversify their product without seeking new licenses. The government also lowered the minimum capital investment from US\$1 million to US\$ 250.000. With the 1993 regulations, only six business sectors were closed to FDI for national security, environmental, and other narrowly defined reasons. A wholly-owned foreign company was given 20 years to divest their ownership to 51 percent.¹²⁶

Deregulation of Indonesia's foreign investment sector also promoted innovation such as permission for FDI to enter areas which used to be the exclusive domain of government such as telecommunications, roads, potable water, and power generation. Therefore, deregulation policy was contributable to the improvement of infrastructure. Moreover, this investment deregulation brought Indonesia to integrate with the international economy more tightly and extensively than ever before. And more importantly, this deregulation has saved the country from oil dependency and successfully compensate for the 1986 oil collapsed. Prawiro stated that the May 6th Package represented not only the launch of deregulation as a movement, but also the conclusion of Indonesia's oil-driven economy and the start of trade-led growth.¹²⁷ It could be seen that measure to deregulate the economy was taken as part of the broader effort toward structural economic reform.¹²⁸

Deregulation in trade and investment sectors was complicated due to some resistances. Opposition to deregulation came from both the private sectors having close

¹²⁴ Prawiro, *Indonesia's Struggle*, 272.

¹²⁵ Wie, *The Soeharto Era*, 212.

¹²⁶ Prawiro, *Indonesia's Struggle*, 272.

¹²⁷ *Ibid.*, 278-279.

¹²⁸ *Ibid.*

connections with Suharto, the technologist, and particular government institutions. The technologists opposed deregulation in high-technology projects including airplane-building firm, ship-building firm, steel firm and arms manufacturer. Those sectors were designated into strategic industry under the Minister for Research and Technology. The technologist refused deregulation because they wanted to “avoid privatization and ensure access to government subsidies and protection.”¹²⁹ As a result, President Suharto affirmed that these high-tech projects to be excluded from the deregulation.

For many private companies affiliated with Suharto, deregulation meant a loss of monopoly rights or a decrease in tariff protection. Despite their oppositions, the technocrats were successfully able to have wheat flour industry removed from the negative list and therefore there was no more monopoly held by *PT Bogasari* Flour Mills owned by Liem Sioe Liong,¹³⁰ one of the most influential Chinese conglomerates. *Bogasari* was benefited from special arrangements with *Bulog*,¹³¹ Indonesian Bureau of Logistic, which held the sole right to import wheat. Under this arrangement, the wheat imported by *Bulog* would be transferred to *Bogasari* in exchange for a modest processing fee and once it had been milled into flour, it would then be sold back to *Bulog* at a high price. Not only this arrangement made the price of wheat flour very high, but also the quality was poor. While the government had officially opened the industry to new investment, it still wanted to ensure that *Bogasari* retained control over it. In addition, the government also introduced a requirement that all new mills export at least 65 percent of their product. As a result, three prospective investors canceled their investment plans in that industry.¹³²

¹²⁹ See Far Eastern Economic Review, 23 November 1989, Tempo magazine 30 September 1989.

¹³⁰ Liem Sioe Liong owns the Salim Group which is Indonesia's biggest conglomerate with assets including, plantation, Indofood Sukses Makmur, the world's largest instant noodle producer, and Bogasari. He was considered as a pivotal business backer for New Order government.

¹³¹ Bulog stands for Badan Urusan Logistik is a national agency which deals with food distribution and price control.

¹³² See Media Indonesia, 2 July 1995, Gatra 15 July 1995.

A similar resistance toward deregulation took place in soybean industry in which *PT Sarpindo*, a company majority owned by one of Suharto's sons, Liem Sioe Liong and Bob Hasan, had the monopoly over soybean crushing plant. *Sarpindo* was to benefit from an arrangement with *Bulog* which had the sole right to import soybeans. The arrangement was very similar as that of wheat flour. This monopoly severely disadvantaged downstream users of soy meal. Minister of Agriculture tried to convince Suharto to abolish soybean monopolies as part of a new trade bill, but the President refused.¹³³

The third area of resistance was in the plywood industry in which the Indonesian Wood Panel Association (*Apkindo*) controlled around 80 percent of the world market for plywood. *Apkindo* was headed by Bob Hasan, one of Suharto's closest acquaintances. This control caused significant resentment domestically and internationally. The Japanese plywood manufacturer's association warned to file a complaint under the General Agreement on Tariffs and Trade (GATT) due to *Apkindo*'s attempt to sell its plywood to Japan at below cost. South Korean importers were to call a boycott of Indonesian plywood after *Apkindo* tried to force them to buy solely through an *Apkindo* agent. Despite the widespread criticism of *Apkindo*, however, the technocrats including Ministry of Forestry failed to deregulate it since Suharto rejected the idea.¹³⁴

The fourth deregulation resistance came from clove industry. It was the Clove Marketing Board known as BPPC, a consortium headed by Suharto's son named Tommy Suharto. In 1990 this organization had been given exclusive rights to purchase and sell cloves. This monopoly caused job and government's revenue losses. The World Bank also criticized this monopoly saying it would result in the reduction in farmer's welfare. The technocrats were to warn that "if the government supported the monopoly financially by providing it with central bank credit, it could fuel growth in the money supply and worsen

¹³³ Adam Schwartz, *A Nation in Waiting: Indonesia in the 1990s*, (Westview Press, 1994) .

¹³⁴ See Far Eastern Economic Review, 23 November 1989, Tempo magazine, 30 September 1989.

inflation.”¹³⁵ Eventually, the central bank was forced to lend BPPC Rp 359 billion and another Rp 300 billion. In 1992, the monopoly had caused a massive oversupply of cloves in the country. Unfortunately, its sales had failed to grow because of the cigarette companies’ boycott on purchase from BPPC. It was only after Suharto’s fall that BPPC was finally dissolved.

The next case was also involved Suharto’s son: Bambang Triatmodjo with his company PT Chandra Asri regarding olefins project. The project required a 35- 40 percent tariff on imported propylene and ethylene in order to remain viable. Initially, the Minister of Finance, Mar’ie Muhammad refused to give protection saying that the June 1994 trade deregulation package was expressly prohibited any increase in tariffs for new industrial projects. However, “the President favored protection of the project saying that some industries require initial protection to develop successfully.”¹³⁶

The last industry to be high resistance to deregulation was the automobile industry owned by Tommy Suharto: PT Timor Putra Nusantara. Presidential Instruction No. 2 of 1996 granted import duty and luxury tax exemptions to auto industry policy that used Indonesian brand names, were 100 percent owned by Indonesian, employed domestic technology, engineering, and designs, and met certain local content requirements. These facilities were to promote private involvement in the country’s automobile industry and thereby reduce the domination of foreign car companies.¹³⁷ PT Timor and its 30 percent foreign partner were granted exclusive three-year rights to build a national car using the facilities under the regulation. Later, PT Timor received additional assistance through Presidential decree which making it possible to import the vehicle instead of producing it in Indonesia.¹³⁸ Consequently, the price was almost half of the price of other cars of the same type and quality. Following

¹³⁵ See Media Indonesia Newspaper, 18 September 1991.

¹³⁶ See Tempo magazine, September 11, 1997.

¹³⁷ See Gatra Magazine, 9 March 1996, also see Asian Wall Street Journal, 20 February 1996.

¹³⁸ See Kompas Newspaper, 5 June 1996, Far Eastern Economic Review 20 June 1996.

this, Japan, the European Union (EU), and the United States (US) filed a complaint to the WTO stating that the national car project breached WTO rules on fair trade. Despite this pressure, the Indonesian government refused to abandon the project, even it extended new facilities to ensure its continuation.¹³⁹

Resistant on deregulation and privatization from government agencies also occurred in the media industry. The Ministry of Information refused to let foreigners invest in media industries because of fear that foreign-owned media would disperse information that might harm the nation's interests. Also, opening media industry to foreign investors could reduce Ministry's ability to control media. The Minister of Information approached President Suharto to cancel privatization of media sector to FDI. After the meeting, the Minister announced that opening the media industry to foreign investment was inconsistent with the Law No. 21 of 1982 concerning Press and that foreign investment would, therefore, continue to be excluded from that industry.¹⁴⁰ However, domestic investors were allowed in the area. This led the transfer of public monopoly of TVRI, the state-owned television company, to private hands. In the mid-1980s, the first two private companies to receive a commercial television license were owned by Suharto's son and daughter. In the 1990s, the other private television channels were owned by Sudwikatmono, Suharto's foster brother, and Liem Sioe Liong.¹⁴¹

The fall of SOE into Suharto ally also took place in the power sector. The electricity generation industry was initially controlled by state-owned electricity company PT *Perusahaan Listrik Negara* (PLN). In the early 1990s, the government deregulated it by allowing private investors to establish new power generation facilities. One of the main beneficiaries was PT Cikarang Listrindo, a company partly owned by Sudwikatmono. In 1992, the company was granted exclusive rights to provide electricity to five large industrial

¹³⁹ See *Bisnis Indonesia*, 4 June 1997; *Jakarta Post* 7 July 1997.

¹⁴⁰ See *Asian Wall Street Journal*, 7 June 1994; *Tempo* 18 June 1994.

¹⁴¹ See *Tempo*, magazine, 25 August 1990.

estates despite the fact that PLN could already supply power to these estates at lower prices.¹⁴² Over the years, more Suharto's families and cronies were awarded contract with PLN for example Paiton Energy, Himpurna, and Patuha. These three power companies were awarded contracts with PLN without a competitive procurement process.¹⁴³

Suharto's cronies were also awarded 159 contracts by the state-owned oil company, Pertamina. In July 1999 edition, the Oil and Gas Journal stated that "Pricewaterhouse Coopers on July 9 revealed that graft and efficiency cost Pertamina about \$ 6.1 billion in lost revenue during 1997 and 1998. The funds were lost due to embezzlement, illegal commissions, markups on procurement contracts, and sheer inefficiency."¹⁴⁴

Despite the ability to liberalize Indonesia's foreign investment regulation, the technocrats were not successfully able to deregulate industries controlled by Suharto's family and friends due to corruption and nepotism in the SOEs. The TVRI, PLN and Pertamina cases provided examples how liberalization measures failed to achieve its benefits. When state monopolies were opened up to private investment, the Suharto's allies were best actors to move into these industries because of their abilities to secure necessary licenses and finance. The result was, in some cases, the public monopoly was transformed into a private oligopoly instead of a competitive market.¹⁴⁵

c. The Economic Fall

There was a disagreement on the cause of the 1997-1998 financial crises between fundamental causes and triggers, and between domestic and international factors. For sure, "the sudden change in risk assessments which prompted the capital flight, initially from Thailand and subsequently some of its neighbors, underlines the importance of managing

¹⁴² See Media Indonesia 11 October 1998, *Prospek* 27 June 1992)

¹⁴³ Among Paiton Energy's local shareholders was Mr. Hashim, whose brother is married to Titik Suharto, the daughter of President Suharto. Another Indonesian shareholder is Agus Kartasasmita, whose brother, Ginandjar Kartasasmita, served as mines and energy minister at the time the Paiton project was being negotiated.

¹⁴⁴ Pertamina Facts, information, pictures | Encyclopedia.com .., <http://www.encyclopedia.com/topic/Pertamina.aspx> (accessed November 16, 2015).

¹⁴⁵ Rosser, *The Politics of Economic Liberalization*, 143.

integration into the global economy.”¹⁴⁶ Attempts by the Indonesian government to prevent the further impact of the crises from spreading to Indonesia failed. By December 1998, the Indonesian currency, Rupiah, had lost more than 50 percent of its value. As a result, big companies unable to pay their foreign debt, panic domestic and foreign investors relocated massive amount of capital abroad, inflation and unemployment soared, and political stability began to collapse. By April 1998, many of Indonesian conglomerates were technically bankrupt, rising inflation and unemployment had driven millions of Indonesians into poverty, and political unrest had grown sharply. The crisis revealed Indonesia’s weak economic foundation and created political and social instability.¹⁴⁷

The interests of Suharto’s family and acquaintances were significant concerns and became part of the explanation of the Indonesian economic collapse in 1998. Rosser mentioned that this corruption, collusion, and nepotism during Suharto regime might explain the collapse of the Indonesian economy in 1997-1998.¹⁴⁸ Mackie argued that “the financial collapse could have been prevented had Suharto not shown favoritism towards his children and their economic interests.”¹⁴⁹ Prawiro acclaimed that Indonesian economic collapse was because “the cost of ignoring how corruption, nepotism, and rent-seeking practices.” It also comes at the expense of “complication between macroeconomic and microeconomic policy as macroeconomic area was falling under technocrat’s authority while microeconomic was under the technologists.”¹⁵⁰

Another explanation for the fall of Indonesian economy can be based on the empirical study by Agarwal which showed that incentives given to FDI have a limited effect on the

¹⁴⁶ David Harvey, *A Brief History of Neoliberalism*, (New York: Oxford University Press, 2005) 96.

¹⁴⁷ Executive Summary: The Macroeconomics of Poverty Reduction in Indonesia an Independent Study Supported by the United Nations Development Program available at <http://www.ipcundp.org/publications/reports/Indonesia.pdf>.

¹⁴⁸ Rosser, *The Politics of Economic Liberalization*, 146.

¹⁴⁹ Jamie Mackie, 6 Patrimonialism: the New Order and Beyond, in *Suharto’s New Order and Its Legacy: Essays in Honor of Harold Crouch*, Australia National University, <http://press.anu.edu.au/apps/bookworm/view/Soeharto%E2%80%99s+New+Order+and+its+Legacy%3A+Essay+in+honour+of+Harold+Crouch/5331/part2.xhtml>. accessed at August 20, 2015.

¹⁵⁰ Prawiro, *Indonesia’s Struggle*, 300.

level of FDI, as investors base their decisions on risk and return considerations. On the other hand, disincentives seem to have a more definite impact than incentives on FDI.¹⁵¹ According to Reuber et al “the incentives may be of some help, particularly for small firms with limited experience, but their overall impact on FDI is marginal at best.” The variety of incentives granted by developing countries to attract FDI adds to the costs of investments for these countries without increasing the investment flows efficiently. The main reasons behind the incentives are frequently accompanied by disincentives such as various restrictions on ownership and size. Since the objective of the incentives is to correct an existing comparative disadvantage of the host state, it is common to find that their effectiveness is limited.¹⁵²

d. The International Monetary Fund Assistance

With capital leaving the country, the Indonesian government had to send the signal to foreign investors that it was still responsive to their needs and that the country remained an attractive location for investment. Aid from international financial institutions was becoming increasingly important because the economy was getting worse. The Indonesian government was forced to negotiate its agreement with the IMF on a rescue package worth more than \$ US 40 billion. The IMF responded by prescribing further liberalization.¹⁵³ It required market-oriented reform and restructuring various state-owned enterprises to make them more efficient including through privatization. This was seen as an effort to restore commercial viability, improve efficiency, and attract private investment.¹⁵⁴ The IMF clearly accelerated the process of liberalization in Indonesia. The government was forced to agree to a whole range of new reforms measures. As a result, a range of trade monopolies and restrictions on

¹⁵¹ Jamuna P Agarwal., 'Determinants of Foreign Direct Investment: A Survey', *Weltwirtschaftliches Archiv*, vol. 116 (1980) 739-773, available at https://www.jstor.org/stable/40438670?seq=1#page_scan_tab_contents.

¹⁵² Reuber, G., Crokell, H., Emerson, M. and Gallais-Hamonno, G. *Private Foreign Investment in Development*, (Oxford Clarendon Press and OECD, 1973).

¹⁵³ Harvey, *A Brief History*, 97.

¹⁵⁴ The IMF letter of intent

foreign investment were eliminated, a new commercial court and bankruptcy law was introduced, and several state-owned enterprises were prepared for privatization.¹⁵⁵

The Indonesian government proposed the idea of a currency board¹⁵⁶ to manage the value of the rupiah. This proposal was rejected by the IMF saying that Indonesia did not meet preconditions required. However, Suharto refused to abandon the plan. The IMF responded by announcing that it would delay the second US \$ 3 billion tranches of its bailout package until a full review of the package was completed during April. On March 1998, Suharto declared that the IMF package could not be implemented because it was unconstitutional. The package would impose liberal economy which is not in line with Article 33 of the Indonesian Constitution. In addition, Suharto also reaffirmed the government's plan to the introduction of a currency board.

At the same time, social unrest emerged in various cities across the nation. In many cities, the targets were ethnic Chinese because of widespread resentment among indigenous Indonesians of their dominant economic position and suspicions that they were hoarding food and deliberately inflating prices. Also, student and opposition groups stepped up their campaign for political reform. Within this context, the government argued that the implementation of further IMF reforms and in particular the cut off government subsidies on essential produce could pose a severe threat to the country's political and social stability.

On May 21, 1998, Suharto stepped down. B.J. Habibie as his predecessor had little choice but to continue with liberalization prescribed by the IMF. President Habibie confirmed that the government's primary objective would be to eradicate corruption, collusion, and nepotism and establish a more efficient and cleaner administration.

¹⁵⁵ Harvey, *A Brief History*, 72.

¹⁵⁶ A currency board is an arrangement whereby a country fixes the value of its currency against another currency. To operate properly, the country concerned must have adequate foreign reserves to cover all foreign exchange transactions.

The main positive message learned from the New Order experience is that the liberalization of foreign investment offered a boost to Indonesia's economy, but in the long term without accompanied by adequate measures, liberalization proven to be catastrophic. The benefits of liberalization could be seen from Indonesia's three decades of rapid growth and the rapid improvement in living standards. It was evident that Indonesia's economy has grown rapidly when it has opened up its trade and investment policies as illustrated in the two major liberalization episodes in 1966-1968 and 1982-1986. In both cases, the economy responded swiftly and growth accelerated to 7-8 %. Indonesia during New Order was much richer country compared to it was in Old Order.¹⁵⁷

However, with the presence of inappropriate deregulation, corruption, nepotism and improper practices, the economic development promoted by liberalization could not be materialized. Resisting investment policy reform implied that the government was not fully responsive to investor's need. It also sends a signal that Indonesia might not a profitable place to invest.¹⁵⁸ Resistance towards liberalization and adherence to corruption as well as collusion practices seemed to have hindered the benefit of the free market. As a result, the distribution of wealth and power in the society was not equal and disadvantaged most of the society. The benefits were only to be enjoyed by politically dominant groups such as the Chinese conglomerates and Suharto's cronies which led to reinforce the existing gaps between the wealthy and the have-nots.

3. Reform and Post-Reform Era

Following the fall of President Suharto, in 1999 the People's Consultative Assembly (MPR) enacted the first Amendment to the Constitution. To date, the Indonesian Constitution

¹⁵⁷ Wie, *The Soeharto Era*, 231.

¹⁵⁸ Deregulation is defined as the process by which governments remove, reduce, or simplify restrictions on business and individuals with the intent of encouraging the efficient operation of markets. The stated rationale for deregulation is often that fewer and simpler regulations will lead to a raised level of competitiveness, therefore higher productivity, more efficiency and lower prices overall.

has been amended four times. The fourth amendment, in 2002, added two sub-articles to the Article 33.

a. A Divided Economic Team

The economist team in the fourth amendment was divided into two groups: neoliberalism and economic democracy. Advocates of economic liberalism worked toward limiting state intervention to removing Article 33. The neo-liberals group argued that too much government intervention was one of the reasons for the financial crises in 1997/1998. Thus, they proposed the key features of neoliberalism namely free market, efficiency, and competition to be inserted in the Article 33.¹⁵⁹ Among the members of this group are Sri Adiningsih,¹⁶⁰ Bambang Sudibyo,¹⁶¹ and Sri Mulyani Indrawati.¹⁶² Bambang Sudibyo graduated from North Carolina University, while both Sri Adiningsih and Sri Mulyani earned their doctorate from the University of Illinois.

On the other hand, the opponents of neoliberalism believed that during New Order regime market system failed, therefore, they demanded economic democracy that protects the people. Professor Mubyarto,¹⁶³ graduated from Iowa State University, argued that Indonesia's ideology in the Preamble of the Constitution is anti-imperialist which means anti-capitalist liberalism. Thus Mubyarto rejected the idea to insert neoliberalist features in the national

¹⁵⁹ Tim Lindsey and Simon Butt, *The Constitution of Indonesia: A Contextual Analysis*, (Oxford: Hart Publishing, 2012) 252.

¹⁶⁰ She is a Professor of Economics at Gadjah Mada University. She earned bachelor degree in economics from Gadjah Mada University, Master of Science (MSc) from University of Illinois, and Doctorate in economics also from University of Illinois.

¹⁶¹ He is a Professor of Economics at Gadjah Mada University, former Ministry of Finance and also Ministry of Education. He earned bachelor of economics from Gadjah Mada University, MBA from North Carolina University, and Doctorate in Business Administration from University of Kentucky.

¹⁶² At that time Sri Mulyani was the Head of the Institute for Economic and Social Faculty of Economics, University of Indonesia. She was the Minister of Finance from 2005 to 2010. In June 2010 she was appointed as Managing Director of the World Bank Group and resigned as Minister of Finance. On July 27, 2016, Sri Mulyani was reappointed as Minister of Finance in a cabinet reshuffle by President Joko Widodo.

¹⁶³ He is a Professor of Economics at Gadjah Mada University. Mubyarto earned his bachelor degree from Gadjah Mada University, Master of Arts from Vanderbilt University, Tennessee and Doctor of Philosophy from Iowa State University. He is also the initiator of Pancasila Economy.

economic system. Another opponent of neoliberalism was Dawam Rahardjo,¹⁶⁴ who argued that it was important to maintain state-owned enterprises and focus on the economic development of people's economy through cooperatives.¹⁶⁵

The open debate between those two groups led Mubyarto and Rahardjo resigned from the economic team.¹⁶⁶ Despite the resignation, the proponents of neoliberalism were unable to insert the key features of neoliberalism due to insufficient support from the People's Consultative Assembly who preferred state protectionism to prevent the negative effect of the free market. AM Luthfi submitted:

In a family principle, we have children. We want them all to advance; they must compete to advance. But they cannot kill each other. The disabled and disadvantaged must be looked after. If the father allows the strong to win, the strong will eat more. The weak will die because they cannot take back their food.¹⁶⁷

Luthfi was making an analogy that resembled Hatta's idea of family principle. Luthfi stated that in an economic democracy the state serves as the head of the family, with the people as the children. As the head of the family, therefore, the state must protect all the people especially the weak, in this regard: small and medium enterprises so that they have the opportunity to participate in the economy.

The contestation of economic principles show that in Indonesia, the prevailing view is that economic justice means that all the people must benefit from the country's natural resources; and the government shall help smaller enterprise. Thus, despite many attempts to change or remove Article 33 from the Constitution, Article 33 remained and even expanded in the fourth amendment added two subsections, as follows:

(4) The national economy is to be organized based upon economic democracy and the principle of togetherness, just efficiency, sustainability, environmental awareness, independence, and with protecting the balance, progress, and national economic unity.

¹⁶⁴ Professor of Economics at Muhammadiyah University in Malang, he earned bachelor degree in economics from Gadjah Mada University.

¹⁶⁵ M. Dawam Rahardjo, "Masalah Amandemen UUD, Khususnya Pasal Ekonomi," (Issues on Constitutional Amendment, Especially Economic Articles), Kompas Daily, 13 June 2001.

¹⁶⁶ Susanti, *Neoliberalism and its Resistance*, 79.

¹⁶⁷ Submission by AM Luthfi, Risalah PAH I the 20th Meeting, March 27, 2002 p 35, available at: www.mpr.go.id

(5) Further provision to implement this article will be provided in the legislation.

Paragraph 4 and 5 of Article 33 are considered as the accommodation of neoliberalism since it gives legitimation to private participation through ‘economic democracy’ and principle of just efficiency (*efisiensi berkeadilan*) as the basis for good corporate governance emphasizing transparency in privatization. Economic democracy is understood as limiting the state’s power in the economy and transferring it to private entities. Paragraph 5 requires implemented legislation for the operation of the economic democracy. Law No. 19 of 2003 concerning State-Owned Enterprise was enacted to facilitate a transfer of economic authority from the state to private capital. Therefore, the Law is known as the legal basis for privatization. The Law defines privatization as the selling of state-owned enterprises share either fully or partially to a third party. The aim is to increase company’s performance and value, to enhance its benefit for the State and society, increase competitiveness, to grow business climate, macroeconomic and market capacity, as well as to enlarge public distribution of shares.¹⁶⁸

b. The Succeeding Government

From the reform era up to now, Indonesia’s administration was led by President BJ Habibie, Abdurrahman Wahid, Megawati Sukarnoputri, Susilo Bambang Yudhoyono and Joko Widodo. President Habibie had a commitment to liberalization, and it was materialized through several economic liberalization measures. The government announced that it would deregulate its investment regulations to facilitate the entry of new foreign and domestic investment. Under the new system, all investment projects up to the value of US \$ 100 million would only be required to gain approval from the Minister for Investment. Under the old regime, it must obtain presidential approval. The new system also permitted investors in

¹⁶⁸ The definition is formulated in Article 1 (12), and the purposes are in Article 74 (1) Law No 19 of 2003 concerning State-Owned Enterprises.

the industrial sector to choose where they would locate their plants.¹⁶⁹ Habibie administration passed two laws: Law No. 22 of 1999 concerning Regional Autonomy and Law No. 25 of 1999 concerning Fiscal Arrangements for Local Autonomy. The laws are considered poorly worded, contradictory and inadequate. Regarding foreign investment, this law creates uncertainty regarding the authority that issues license and permit.

Habibie administration was marked by adopting policies which both encouraging and discouraging incoming FDI by providing incentives and disincentives in the form of restrictions on the activities of MNCs. The government offer fiscal incentives (tax reductions, reinvestment allowances, and exemption from customs duties), and financial incentives (subsidies, loan guarantees). Disincentives include some impediments that may range from the slow processing of the required authorization, specific requirements to employ a number of local workers, transfer of ownership within a certain amount of time in operation, to the prohibition of FDI in particular sectors as listed in the negative list (DNI).

After Habibie, Abdurrahman Wahid took the presidency from October 20, 1999 to July 23, 2001. The first task for President Wahid was “to get IMF approval to initiate efforts to get financial assistance and attract investors’ confidence both domestic and foreign.” He confirmed his commitment to market-oriented reform and policies facilitating an increase the income of Indonesians.¹⁷⁰ The IMF instructed the government to initiate banking reform as part of administrative and legal reforms to create a transparent and non-discriminatory environment. However, “Wahid commitment to market-oriented was not materialized due to the politically hostile environment.”¹⁷¹

¹⁶⁹ See Suara Pembaruan , Daily Newspaper, 30 May 1998, and Jakarta Post Daily, 30 May 1998.

¹⁷⁰ Stephen Sherlock, Indonesia's New President: Continuity, Change and the Problems Ahead, 11 November 1999, Parliament of Australia, available at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib9900/2000CIB10, accessed at 2/20/2015.

¹⁷¹ Marcus Mietzner, “Personal Triumph and Political Turmoil: Abdurrahman Wahid and Indonesia’s Struggle for Reform,” in *The Presidency of Abdurrahman Wahid: an Assessment after the First Year*, ed. Damien Kingsbury, (Monash Asia Institute, Monash University, 2001) 17.

The successor of Wahid was President Megawati who assumed the presidency when Wahid was impeached in 2001. Megawati administration responded the international donor's request by enacting Law No. 22 of 2002 concerning Oil and Gas Law. This Law established *BP Migas* as the state Implementing Agency to manage and supervise the upstream activities of exploration and exploitation and to take over Pertamina's regulatory and administrative functions. *BP Migas* did not directly participate in the oil and gas sector itself, but the Law permitted other state-owned enterprises and the private sector, both domestic and foreign, to enter the downstream market, thereby forcing Pertamina to compete as an operator. This Law required Pertamina monopoly over the country's energy resources to come to an end in order to foster a competitive environment. Pertamina's legal status was expected to change into a limited liability company in preparation for its eventual privatization. The firm would also be driven to concentrate on its basic operations and divest nonrelated assets and subsidiaries.¹⁷²

Megawati administration also enacted Law No. 20 of 2002 on Electricity. This Law aimed to liberalize power sector by introducing competition into the business which had formerly been monopolized by state-owned enterprises called PLN (Perusahaan Listrik Negara). This law was part of necessary reforms that Indonesian government was committed after the Asian financial crises. As required under the IMF conditional loan, this legislation included measures to facilitate the privatization of the sector, and also restructuring PLN.¹⁷³ In addition, the Law also introduced an independent market regulator through the establishment of the Electricity Market Supervisory Agency. Energy market liberalization was aimed to introduce specific legislation on unbundling, applying to vertically integrated energy companies. In addition, allowing for greater private participation, the Law divided the

¹⁷² Pertamina Facts, information, pictures | Encyclopedia.com .., <http://www.encyclopedia.com/topic/Pertamina.aspx> (accessed November 16, 2015).

¹⁷³ PLN (Perusahaan Listrik Negara, or State Electricity Company) is an Indonesian government-owned corporation which has a monopoly on electricity distribution in Indonesia before the enactment of Law No 20 of 2002.

electricity market into various activities including generation, distribution, and sale, and permitted the private sector to run them.

From the financial crises in 1998 up to end of President Megawati administration the number of FDI in Indonesia was continuing to decrease significantly as shown in the table below:

Table II.1: Number of FDI projects

No.	Year	Approved FDI	Number of projects
1	1998	US\$ 13.585 billion	1.034
2	1999	US\$ 10.892 billion	1.174
3	2000	US\$ 15.420 billion	1.524
4	2001	US\$ 9.027 billion	1.317
5	2002	US\$ 9.790 billion	1.151
6	2003	US\$ 13.20 billion	1.024
7	2004	US\$ 8.85 billion	969
8	2005	US\$ 4.60 billion	909
9	2006	US\$ 4.69 billion	801

Source: Indonesia Investment Coordinating Board

After Megawati, President Yudhoyono took the presidency in 2004. From 2004 to 2014 Indonesian policy on foreign investment was known as consolidation era. This is characterized by the enactment of new laws and regulations; decentralized administration; liberalization adjusted to domestic conditions; regular review of investment negative list; equal treatment of foreign and domestic investors by enacting one Investment Law for both foreign and domestic investment; and providing better investment services. However, analysts see, despite promoting liberalization, some laws take interventionist and protectionist approach since some of the laws had a severe impact on openness to trade and investment.

In 2007, President Yudhoyono administration enacted Law No. 25 of 2007 concerning Investment to replace Law No. 1 of 1967 regarding Foreign Investment, and Law No. 6 of 1968 regarding Domestic Capital. The Law No. 25 of 2007 accommodates both foreign and domestic investment. One important feature of the New Investment Law is the equal treatment¹⁷⁴ of foreign and domestic investors.¹⁷⁵ Foreign investment should be in the form of a limited liability company which established under Indonesian Law.¹⁷⁶ The Law puts several obligations toward MNCs such as good corporate governance; social responsibility; and for mining and resources investors to rehabilitate their areas.¹⁷⁷

The facilities given by the new law includes tax facilities;¹⁷⁸ new land title renewal procedures;¹⁷⁹ work permits; and multiple re-entry periods.¹⁸⁰ The New law ensures that foreign investors have the right to repatriate assets, capital, interest, and dividends. In respect to licensing, the New Investment Law is intended to provide a one-stop service in the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal*: BKPM) in an attempt to speed up and simplify the procedure.¹⁸¹ According to the Investment Law, investment in mining, oil and gas are considered as specific sectors. Foreign companies can participate in the oil and gas industry by entering a production sharing contract with the Indonesian government.¹⁸² At the same time, however, the Investment Law significantly increased the number of sectors in which foreign investment is restricted and increased foreign equity limitations in several areas. However, the United State Trade Representatives

¹⁷⁴ The equal treatment is given after initial entry and subject to bilateral investment treaty.

¹⁷⁵ Article 4 (2) Law No 25 of 2007 concerning Foreign Investment.

¹⁷⁶ Article 5 (2) Law No 25 of 2007 concerning Foreign Investment.

¹⁷⁷ Article 15 Law No 25 of 2007 concerning Foreign Investment.

¹⁷⁸ Article 18 (4) Law No 25 of 2007 concerning Foreign Investment.

¹⁷⁹ Article 22 Law No 25 of 2007 concerning Foreign Investment.

¹⁸⁰ Article 23 (3) Law No 25 of 2007 concerning Foreign Investment.

¹⁸¹ Article 26 Law No 25 of 2007 concerning Foreign Investment.

¹⁸² Interview with BKPM

(USTR) identifies telecommunications, pharmaceuticals, film and creative industries, and constructions are among the sectors that interest US investors, yet close for FDI.¹⁸³

c. Interface between Domestic Law and International Commitment

Indonesia's international obligations on FDI do not only those stipulated in the ICSID Convention, BIT or other investment-related agreements. The Indonesian government also has the commitment with foreign governments,¹⁸⁴ the IMF through conditionality upon loans, and the World Bank, for example, to introduce investment law, competition law, trade practices law, or some other piece of legislation designed to open Indonesian market. These legislations were to 'maintain and encourage competition and thereby promote economic efficiency and maximize consumer welfare.'¹⁸⁵

International Investment Agreement (IIA) is an agreement between countries that concerns the issues of cross-border investment activities, for the purpose of protection, promotion, and liberalization of investment. Global investment rules take form in bilateral (BIT), regional, or multilateral levels govern legal relationship between foreign investors; home states of investment and host state of investment. In addition to international investment regime, Indonesia also enacts domestic regime which consists of various laws and regulation to govern investment activities within its region.

The following part discussing the interface between Indonesia's foreign investment commitment and national legislations in four regimes: principles, norms, rules, and decision-making. IIAs have interaction with various bodies of national law such as the Constitution; investment laws;¹⁸⁶ investment-related laws;¹⁸⁷ and investment-specific laws.¹⁸⁸ The national

¹⁸³ The United State Trade Representative, Indonesia, available at <https://ustr.gov/sites/default/files/2013%20NTE%20Indonesia%20Final.pdf>, accessed at August 16, 2015

¹⁸⁴ For example with the US: The US government through the Economic Law and Improved Procurement Systems (ELIPS) project within the Coordinating Ministry for Economics, Finance and Development Supervision aimed to draft new commercial laws in areas such as company law, capital markets, secured transactions and arbitration.

¹⁸⁵ The World Bank 1995 country report p 64

¹⁸⁶ Law No 25 of 2007 concerning Investment.

law consists of different bodies of law which concern with the non-investment issue, but has the potential to affect some aspects of investments. Investment related laws are enacted for a broader purpose than merely investment matters since they have the ability to affect investments and have provisions dealing with investments. Investment-specific regulations are adopted specifically for the purpose of governing investment issues such as licenses and permits.

The influence of international law over Indonesian investment law appears in several provisions in the Investment Law and can be seen as Indonesia's effort to adopt international commitments into national law. The objective of the Investment Law is mainly to encourage the creation of a favorable business climate for investment; strengthening the competitiveness of national economy; and accelerating the increase of investment.¹⁸⁹ To achieve those goals, the Law refers to international law standards in regards to treatment and protections of aliens. While the Law does not specifically mention about fair and equitable treatment,¹⁹⁰ it contains investment basic principles. The principles include national treatment for foreign investors¹⁹¹ (as an impact of merging domestic investment law and foreign investment law in one single law), Most-Favored Nation (MFN);¹⁹² guarantee of compensation in case of nationalization;¹⁹³ free transfer of assets;¹⁹⁴ the right to use foreign employees;¹⁹⁵ and

¹⁸⁷ For example: Law No 40 of 2007 regarding Limited Liability Companies; Law No.4 of 2009 on Minerals and Coal Mining (the Mining Law); Law No.5 of 1960 concerning the Basic Provisions concerning the Fundamentals of Agrarian Affairs (the Basic Agrarian Law); Law No.13 of 2003 on Manpower (the Labor Law); Law No.32 of 2009 on Environmental Protection and Management; Law No 30 of 2009 concerning Electricity; Law No 7 of 2004 concerning Water Resources.

¹⁸⁸ Regulation of Chairman of Indonesia Investment Coordinating Board Number 15 Year 2015 Regarding Guidelines and Procedures for Licensing and Non Licensing Investment; Regulation of Chairman of Indonesia Investment Coordinating Board Number 14 Year 2015 Regarding Guidelines and Procedures for Investment Principal License;

¹⁸⁹ Consideration Part Law No 25 of 2007 concerning Investment.

¹⁹⁰ This is probably due to due to the FET comprehensive nature so that it is difficult to translate into provision in the Law.

¹⁹¹ Article 4 (2) Law No 25 of 2007

¹⁹² Article 6 Law No 25 of 2007

¹⁹³ Article 7 Law No 25 of 2007

¹⁹⁴ Article 8 Law No 25 of 2007

¹⁹⁵ Article 10 Law No 25 of 2007

recourse to international arbitration to settle investment disputes.¹⁹⁶ Thus, in principle, Indonesia's national law already provides at least the level of legal protection for foreign investors required in the international legal standard.

Jan Knorich and Axel Berger stated that Indonesia has an interlocking law which was the Investment Law. The interlocking law is where the national and international commitments meet in one body of law. They further acclaim that an "interlocking law is beneficial to face the complexity of international investment regime since the law is to help achieve consistency between international commitments and domestic investment law." Thus, it reflects compromises that have been reached and is indicative of areas where policy space has been negotiated.¹⁹⁷ Further, Jan Knorich and Axel Berger found that interaction between Indonesia's international commitments and its national laws is "bi-directional even though international law is likely to have more influence in Indonesian national policy rather than the other way around."¹⁹⁸ That claim is true during the New Order era where the country often adopted investment treaty or convention without sufficiently considering the national interests. However, the claim is not accurate for the Post-Reform Period where Indonesia is more active in finding a balance between attracting FDI and pursuing national interests.

Investment law making policy in Indonesia is quite complicated due to decentralization since authority is granted to two levels of regional government namely provinces and district/city to make their policies and local laws. The authority given to local governments added great bulk and complexity to the Indonesian legal system. Generally speaking provinces, regencies and cities have the power to organize investment in their respective regions. Nevertheless, foreign investment approval must be given by the central government through the BKPM. BKPM is an agency responsible for approving all foreign

¹⁹⁶ Article 32 Law No 25 of 2007

¹⁹⁷ Jan Knorich and Axel Berger, *Friends of Foes? Interactions Between Indonesia's International Investment Agreement and National Law*, German Development Institute, 2014, p 3, http://www.die-gdi.de/uploads/media/Studies_82.pdf accessed at 8/20/2015.

¹⁹⁸ *Ibid.*, 4.

investment except in the area of banking and financial sectors (approval is granted by Indonesia's Financial Service Authority); the upstream oil and gas industry (regulated by the oil and gas contracting agency); and portfolio investment. After approval is given, a foreign investor needs to obtain a principal license through submission of the Deed of Establishment of the company to the Ministry of Laws and Human Rights for approval of the articles of association of the company. This is in order to commence the operation of a multinational company legally. All foreign direct investment in Indonesia shall be in the form of a limited liability company as regulated by Law No. 40 of 2007 concerning Limited Liability Companies.

After the company is established, the next step would be applying regional license which issued by the local government where the project or business is located. This is related to land acquisition, manpower related problems and other licenses for any other matter that falls under the authority of the regional governments such as nuisance permit. The investor also needs to obtain operation permit which is issued by the ministry relevant to the field of business and required for the technical aspects of the business field. For companies that produce goods or services, a business license from BKPM is required to commence production and operational activities.¹⁹⁹

FDI operates in Indonesia must conform to applicable legislations. Reference to these laws is meant to limit the liability of the host state to claim that possibly filed by foreign investors. Ideally, international investment agreement in the form of BIT, Multilateral Investment Treaty (MIT), and Convention should be coherent with the national law concerning investment, so that national law on foreign investment reflects the country's international commitment. However, given the existence of 65 BITs; 16 multilateral investment-related agreements; and hundreds of national laws and regulations, the Indonesian

¹⁹⁹ BKPM, <http://www2.bkpm.go.id/en/investment-procedures>, accessed May 15, 2015 .

international investment legal landscape is described as complex and characterized by overlaps and incoherence.²⁰⁰ The national laws on foreign investment and international commitments on foreign investment have different structure and content. BITs, for example, tend to be short, very general and differ from one BIT to another. On the contrary, national investment laws consist of complex investment laws and regulations that govern the issues of trade, industry, monetary, energy, environment, human rights, and many others.²⁰¹ Moreover, they involve many different government agencies which have authority to issue regulations on their own. In a decentralized state like Indonesia the unclear division of central and local government regulatory power makes the matter even worse. Therefore, it is very challenging to keep in conformity with international commitments and national law.

There is a debate on whether international investment regime exists. Sylvia Ostry and K Von Molke assert that until now such system is not available. They argue that regime must contain uniformity, while the provisions of the current BITs and FTAs are different and some treaties restrict host government action more than others. On the contrary, Howard Mann²⁰² and Roberto Echandi consider the existing international investment agreement in the form of BITs and regional agreements as the international investment regimes since those agreements address the same issues and employ similar concepts and terminology.²⁰³ Furthermore, Jeswald W. Salacuse also argues that the body of investment treaties which scattered into various BIT and regional agreement are considered as the regime. He refers to regime theory which stipulates four elements for the existence of a regime: principles, norms, rules, and decision-making processes.²⁰⁴ This research takes the stand that international

²⁰⁰ Interview with Staff of the Ministry of Foreign Affairs.

²⁰¹ Knorich and Berger, *Friends of Foes?* 9.

²⁰² Howard Mann, "Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?" in *the Evolving International Investment Regime*, eds. Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino(Oxford University Press, 2011) 25.

²⁰³ Roberto Echandi, "What Do developing Countries Expect from the International Investment Regime? " in *the Evolving International Investment Regime*, eds. Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino(Oxford University Press, 2011) 4.

²⁰⁴ Salacuse, *The Law*, 5.

investment regimes do exist through BITs and MITs. Moreover, this study confirms that Indonesia's BITs and Investment Law conform to the international investment regime.

The first principle in international investment regime is the belief that increased investment between and among contracting states in treaties lead to economic development which increases the prosperity as the result of business activities. Indonesia adheres to this principle for example, in the preamble to 1976 BIT with the United Kingdom states:

“.....recognizing that the encouragement and reciprocal protection under the international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both states.”

In addition, the Law No. 25 of 2007 concerning Investment also acknowledges the importance of foreign investment for economic development in point c of Consideration part which states:

“...that to accelerate national economic development and to realize Indonesian political and economic sovereignty it is necessary to step up investments in order to turn economic potentials into real economic strength by use of funds derived from home and abroad.”

The second principle is that favorable conditions in host states will lead to increased investment. Favorable conditions refer in particular to conditions that can be affected by host government actions and recognizes that such measures can either encourage or discourage investment. This is a kind of investment promotion that can be achieved by the creation of a stable legal environment that favors foreign investment. This is translated into clear rules that protect FDI, reduce their risks, and fair treatment. Another principle that closely connected with a favorable condition is protection. Favorable conditions and protection are highlighted in the title or preamble of BITs which states that the agreement is to promote and protect investment with the targets investors of the other contracting party. The Law No. 25 of 2007 recognizes the importance of favorable conditions in point d Consideration saying:

“...that to deal with global economic changes and Indonesia's participation in diverse international cooperation it is necessary to create investment climate to be conducive, promoting, giving legal certainty, justice and efficiency with due regard to the interest of national economy.”

The third principle of the investment regime is that predictability of laws and policies under which investors make their investments and conduct their activities can increase the number of investments. A legal system is most likely to be predictable where there is a legal certainty. While BIT does not normally contain provision on legal predictability, Law No. 25 of 2007 Chapter III Article 4 Section (2) confirms the importance of legal certainty by ensuring it:

“In the adoption of major policies as intended by section (1) the Government shall: (a) accord equitable treatment to domestic investors and foreign investors with due regard to the national interest; (b) ensure the legal certainty, business certainty, and business safety for investors starting from the licensing process to termination of investment activities in accordance with provisions of laws and regulations.”

The last principle of the investment regime is that international rules with effective enforcement mechanism will deal with the problem of the obsolescing bargain by restraining the actions of the host government towards foreign investment in its territory.

The second element is regime norms. Norms in regime theory are identified as ‘standard of behavior defined in terms of rights and obligations’ that host states are obligated to accord to investors and investments from their partners. The common norms in investment regime are fair and equitable treatment, full protection and security, most-favored-nation treatment, national treatment, and non-discriminatory treatment. Indonesia’s Investment Law and BITs contain those norms that translated into promises about the actions and behaviors to be given to investments and investors of its treaty partners. The treaty provisions on norms are intended to restrain host country government behavior and to impose a discipline on governmental actions. State actions that fail to meet standards defined in the BIT constitute treaty violations that engage the offending state’s international responsibility and render it potentially liable to pay compensation to the suffering party.

Foreign entities might be subject to less favorable treatment due to their status as outsiders. The national treatment norm attempts to neutralize the protectionist tendency of

governments to protect domestic investors and producers from foreign competition. National treatment is a dependent, or contingent, obligation. It requires that a host state treats foreign investments or investors as well as similarly situated national investors. Therefore, it requires a comparator against which to measure the allegedly less favorable treatment. The scope of national treatment in Indonesian BITs varies. Some treaties accord protection only post-establishment while others extend rights to pre-establishment as well. Some treaties extend protection only to investments others protect both investment and investors. Some BITs offer an open-ended list of the activities to which the standard applies, while others have closed lists.

Law No. 25 of 2007 states that the government is “to provide the same treatment to any domestic and foreign investors, by continuously considering the national interest.” Such inclusion of national treatment could be considered as a real “watershed” in Indonesian investment policy.²⁰⁵ The phrase “continuously considering the national interest” is there to retain some regulatory flexibility for Indonesia. In its elucidation, the law clarifies that equal treatment “shall mean that the Government shall refrain from giving different treatment to any investors that have made investments in Indonesia unless otherwise specified by rules of law.”²⁰⁶ The formulation applies to the post-establishment phase of the investment, subordinating national treatment to Indonesia’s domestic laws and regulations. It also applies to possible discrimination among domestic investors. National treatment is an area where Indonesia maintains significant amounts of policy space. At the same time, national treatment is a core standard in IIAs, and its omission may substantially reduce the attraction of Indonesia as an investment location, which is probably why national treatment has increasingly found its way into Indonesia’s IIAs.²⁰⁷

²⁰⁵ Knorich and Berger, *Friends or Foes?* 10.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

The next norm is MFN treatment. It is a particular form of non-discrimination and often combined with the national treatment as they both are relative standard as both seek to promote non-discrimination and a level playing field between foreign and domestic investors. An example of this combination can be found in the Indonesia-Singapore 2005 BIT article III “Most-Favored Nation and National Treatment which reads:

“Each Contracting Party shall in its territory subject investment admitted or approved under Article X or returns from such investments of investors of the other Contracting Party to treatment:

- a. Which it accords to investments or return from investments of investors of any other State; or
 - b. Subject to its laws and regulations, that which it accords to investments or return from investments of its own investors,
- whichever is more favorable.”

The wording of MFN treatment provided in national law is strongly in line with that typically found in IIAs. Article 6 of Law No 25 of 2007 stipulates that:

- (1). The government shall provide the same treatment to any investors originating from any countries making an investment in Indonesia pursuant to the rules of law.
- (2). Treatment set forth in paragraph (1) shall not apply to an investor of certain countries that have received privilege by virtue of an agreement with Indonesia.

The formulation is akin to a post-establishment clause clarifying that investment must be undertaken in accordance with the law to enjoy MFN treatment. It is broadly in line with Indonesia’s post-establishment IIAs.

Both National Treatment (NT) and MFN have consequences of inclusion of liberalization commitments for the contracting parties as those norms enable foreign investors to be able to invest on same terms as domestic investors. MFN treatment clause entails international obligations and rights not only among the Contracting states of the international treaty incorporating it (the basic treaty) but also among these Contracting States and other States by virtue of different international treaties. Therefore, it is not only a normal treaty clause but also a source of international obligations other than those explicitly included in the

basic treaty. It allows borrowing treaty provisions from other treaties regarding third States. The material scope of the MFN is thus open, as the contents of future treaties and State practice cannot be totally foreseen and identified when the basic treaty is concluded. One way to limit the effects of the MFN principle is to make it not automatic but conditional which means that the application of new more favorable rules or preferences is only granted to existing treaty partners if they agree to apply the same rules.

The third element of the international investment regime is regime rules. In respect to regime theory, Salacuse defines rules as ‘specific prescriptions or prescriptions for actions’ which include treaties express rules and rules that used in the decision of arbitral tribunals.²⁰⁸ Treaties express rules usually contain expropriation, monetary transfer, and compensation of injured investors because of war, revolution, and civil strife. Arbitral tribunals create rules when they interpret vague or unclear norms stated in a treaty. Law No. 25 of 2007 guarantees that the government shall take no measures of nationalization or expropriation of the property of investors unless provided by law,²⁰⁹ as well as ensure the repatriation of assets in foreign currency.²¹⁰ Similar provisions are also found in most Indonesian BITs.

The last element of international investment regime is decision-making process. The international regime for investment does not have a council to administer and apply its rule. Decision-making process and authority are varied among treaties. Investment treaty provides for decision making in four ways: by discussion between the state parties to the treaty, by arbitration between state parties in cases where they are unable to resolve conflicts through consultation and negotiation, by consultation and negotiations between the investor and the state, and by investor-state arbitration. The investor-state arbitration is considered as the most important and is a unique feature since it gives private persons and companies the right to sue

²⁰⁸ Jeswald W. Salacuse, “The Emerging Global Regime for Investment,” *Harvard International Law Journal*, vol. 51, No 2. (2010).

²⁰⁹ Article 7 Law No 25 of 2007.

²¹⁰ Article 8 Law No 25 of 2007.

states. The reason for choosing arbitration is because capital-exporting countries need assurance that any violation of rules would be fairly adjudicated. For home countries of investment, arbitration is seen as a way to reduce transaction costs arising out of the investments made by their nationals. Without arbitration, governments had to deal with their citizens seeking diplomatic protection and the forms of interventions with host country governments.

The Indonesian Investment Law stipulates that any dispute should first resolve through consensus. If it fails, the dispute can be brought to arbitration, alternative dispute resolution, or court.²¹¹ Similarly, Indonesian BITs also recognize multi-layers of dispute settlement mechanism, even more specifically many BITs explicitly refer to the ICSID as designated arbitration.

In Indonesia, dispute in term of coordination problems regarding the ability of governments to adopt national legislation that is in agreement with its international commitments is prevalent. Coordinating the Constitution, the Investment Law, investment-related laws and keeping them in line with international investment agreements is a challenge. Competing interest among relevant ministries responsible for drafting the different laws is among the reasons. Below are examples of inconsistency that exist between BITs and Law No. 25 of 2007:

- The definition of investment covers both domestic and foreign investors, reflecting principles of national treatment. But, it is unclear whether the definition of investment in Law No. 25 of 2007 covers the same types of investments as in IIAs. The definitions in Indonesia's IIAs are quite far-reaching, including investments and

²¹¹ Article 32 Law No 25 of 2007.

investors beyond activities for running a business. Thus the apparent development intention in national law is not replicated in IIAs.²¹²

- Article 33 paragraph number 3 of the Indonesian Constitution states that “the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.” There are some differences in regard to land ownership between the Basic Agrarian Law and Investment Law. Law No. 5 of 1960 concerning Basic Agrarian Law regulates that the right of tenure can be given for 35 years and renewed for a further 25 years, the right to build can be given for 30 years and renewed for a further 20 years, and the right to use can be given for 25 years and renewed for a further 20 years. The Basic Agrarian Law does not recognize the up-front extension, while the Investment Law does. Regarding the length of time, the Investment Law gives relatively longer period: the right of tenure for 95 years, the right to build for 80 years, and the right of use for 70 years.
- The coordination and organization of investments among government agencies and between the central government and the regions are specified in Articles 27, 28, 29 and 30 of Law No. 25 of 2007. The BKPM is given a core role in the coordination and organization of investments, even though certain areas are outsourced to regional governments. However, in practice, the implementation of these provisions is often overlaps and confusing.²¹³

The above explanation shows that Indonesian Investment Law and BITs are consistent with all elements in international investment regime. While, the adoption of IIAs is meant to provide a more stable and favorable legal framework than national laws, both of them are often in conflict. The arbitration cases that Indonesia encountered showed how the

²¹² Knorich and Berger, *Friends or Foes?*, 10.

²¹³ *Ibid.*

implementation of national policy could lead to a breach of BIT.²¹⁴ The investment cases brought by foreign investors against Indonesia are mainly concerning the conformity with its international commitments and national laws.²¹⁵ Such an anomaly takes place because domestic law making regarding FDI and international commitments take place in the context of tensions for the government to attract FDI on the one hand and protect national interests on the other.²¹⁶

C. Conclusion

This chapter shows a pattern that difficult economic circumstances have historically led Indonesian governments to enact economic reforms leading to more openness towards foreign involvement. In a number of occasions, it was evident that if the government strays too far from what foreign investors consider to be an appropriate investment climate, they can pull their investment back or hold them back. The Old Order showed that socialism and excessive nationalism which led to the cut off the international link considerably resulted in economic collapse. Hence, Indonesia was one of the poorest countries in the developing world. The government had little work to overcome poverty and underdevelopment amid its closeness and cut off with the Western world.

On the contrary, liberalization of trade and FDI during the New Order contributed to the increase of FDI flows and economic development. Indonesia was widely seen as one of East Asia's high-performing economies. Openness to the world economy provided a good signal to foreign investment. Whereas FDI had helped the New Order government to transform Indonesian economy from devastated to thrive; appropriate measures did not accompany it. Whilst three decades of steady growth in New Order illustrate the benefits of

²¹⁴ Poulsen, L. (2014): Bounded rationality and the diffusion of modern investment treaties, in: *International Studies Quarterly*, 58 (1), 1–14.

²¹⁵ Example: Amco and Ravat case dealt with expropriation; Newmont and India Metals & Ferro Alloys cases were concerning Mining Law and commitment on indirect expropriation; Planet and Mining cases were about indirect expropriation and Decentralization.

²¹⁶ Karl P. Sauvant, "The International Investment Law and Policy Regime: Challenges and Options," Overview Paper, E15 Task Force on Investment Policy, p July 2015.

liberalization, the Asian economic crisis in 1997-1998 was the testimony to the pitfalls. Since then, the successive governments have been struggling to replace highly centralized and interventionist economic policy with more decentralized and more market-oriented.

Nevertheless, post-reform showed a different trend. Even though deregulation was massively performed, FDI flow continued to decrease. The problem of ambivalence policy toward FDI has existed since Old Order in various degrees. President Suharto was extremely successful in building and sustaining a pro-capitalist, pro-integration with the world economy, and pro-growth. Currently, the government is making an effort to create more conducive investment climate since foreign investment is still undoubtedly a major force in Indonesia's economy.

To connect these lessons from legal the development of Indonesian foreign investment, these narratives show that when properly managed, FDIs have contributed to rapid economic growth. Moreover, to be beneficial, liberalization must be accompanied by certain conditions such as minimum threshold stock of human capital, that is, some degree of education and training, which are pre-requisites for such transferal as stipulated by Borenstein, De Gregorio and Lee. The New Order Indonesia simply did not provide those conditions.

What important is what effort should be done to strengthen the country's capacity to absorb, and benefit from greater openness to foreign capital. Indonesia should have done better in tapping into global opportunities. Liberalism remains politically and socially unpalatable in Indonesia. It is, therefore, likely that the direction of foreign investment policy will continue to be uncertain, as it has periodically since the 1960s with consequences for Indonesia's long-term development dynamics.

Chapter III

LIBERALIZATION OF FOREIGN INVESTMENT AND ARBITRATION

In the eighteenth and nineteenth centuries, foreign investment in Asia, Latin America, and Africa was mostly made in the context of colonialization. Hence, investment did not need protection from the host states as the colonial legal system was integrated to give protection for their investment into the colonies.¹ A separate legal system for the protection of foreign investment was not recognized since the imperial system directly protected the flows of capital using its country legal system. In this framework, investment disputes were settled by power or force.²

The ending of colonialization in the 1960s changed the condition of foreign investment and its regulation. After struggling for freedom from former colonial power, newly independent states struggled to develop their economy. Many of them did so by nationalized foreign properties including foreign companies to retain domination over vital sectors of the economies from foreigners. Known as a form of anti-colonialist movement, this era was a period of hostility and antagonism toward foreign investment generated by nationalistic sentiment. Many developing nations applied heavy regulation of the private sectors, provided almost unlimited roles to state-owned enterprises (SOE), and restricted economic relation with foreign countries.³

There was a shift from hostility to friendly attitude toward FDI after developing countries recognized that foreign investment was essential to the achievement of sustainable development. Developing countries actively made various efforts to attract foreign investment for the sake of economic development and they had been willing to affirm liberalism policy to get it. These countries have liberalized their investment regime at

¹ M. Sornarajah, *The International Law on Foreign Investment*, (Cambridge: Cambridge University Press, 2012) 19.

² *Ibid.*, 20.

³ *Ibid.*, 22.

different points in time, for example, Southeast Asian nations in the 1960s (Indonesia, Malaysia, Singapore);⁴ Korea in 1980s, India in 1990s, and Latin America in 1990s.⁵ As a result, FDI inflow to emerging nations surged and in the 1980s, FDI concentrated amongst developing countries and regions. China, Hong Kong, Mexico, Brazil, Singapore, Russian Federation, Chile, and India were among the top in the group.⁶

The peak of liberalization of FDI took place in the 1990s due to the Washington Consensus which brought even more dramatic development for the openness to foreign capital. Supported by the IMF and the World Bank, this consensus advocates openness to trade and investment; and the expansion of market forces within the domestic economy. Also known as the neoliberal model, Washington Consensus emphasizes on markets than to state in resource allocation focuses on private sectors rather than on state enterprises as the main players of economic activities.⁷ It also stresses deregulation of economies and openness to international economic activities, including FDI. The need for a foreign loan made developing countries had no choice other than adhering to neoliberal model as the condition of the loan.

The shifts in the international economic scene also contributed to the peak of neoliberalism. The receding of communism and dissolution of the Soviet Union in December 1991 also contributed to the trend of liberalization.⁸ The dissolution had created many new states to emerge which also needed new capital. Thus, they committed to a free market as

⁴ Dirk Willem te Velde, "Foreign Direct Investment and Development A historical perspective," Background paper for

'World Economic and Social Survey for 2006', Overseas Development Institute, available at: <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/850.pdf>, accessed at: 7/10/2016.

⁵ Francisco L. Rivera-Batiz, "Foreign Direct Investment in Latin America: Current Trends and Future Prospects, United Nations, Interregional Cooperation in Trade and Investment: Asia-Latin America," United Nations Economic and Social Commission for Asia and the Pacific, Studies in Trade and Investment No. 43, New York, 2000, 161-191, available at: <http://www.columbia.edu/~flr9/documents/fdi.pdf>, accessed at: 7/10/2016.

⁶ Velde, *Foreign Direct Investment*.

⁷ Sornarajah, *The International Law*, 25.

⁸ Kenneth J. Vandelde, "International Law on Foreign Investment, in Alternative Visions of the International Law on Foreign Investment," in *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah*, ed. C.L.Lim, (Cambridge: Cambridge University press, 2016) 60.

other existing developing countries.⁹ The free market made competition among developing countries to gain foreign capital even tighter.¹⁰

International investment, as an economic phenomenon, has a close relationship with law and legal system in a way that law and legal institutions influence investment whether positively or negatively.¹¹ Liberalization of foreign investment needs legal tool in international level such as multilateral, regional, and bilateral investment agreements.¹² Also, in domestic level, the government needs to create positive investment climate through FDI-friendly investment law and policy.

A domestic legal tool is set by a state through laws and policies to advance its interests in foreign investment activities. Law and the legal system are therefore the means by which foreign investment policy is articulated and applied. Together, legislation, regulations, administrative acts, and judicial decisions of the governmental authorities of countries and their subdivisions make a national legal framework.¹³ Foreign investors respond to the national legal framework through their investment decisions: to invest or not to invest

Since the New Order era, Indonesia has opened its door for foreign investment liberalization through various regional and bilateral investment agreements as well as domestic laws and policies. Indonesian national legal framework has liberal features in which it seeks to encourage foreign investment by granting freedom of action and providing them with various incentives, protection, and facilities. In theory, liberalization of FDI should benefit both the investors and the host countries through sharing the wealth derived from the

⁹ This was in the form of embracing BITs as one means of encouraging inward foreign investment. The result is that the rate at which BITs were concluded increased from fewer than 400 BITs worldwide from 1959-1989 to some 2,000 BITs from 1990 to 2008. See UNCTAD, recent Developments in International Investment Agreements (2007-June2008), IIA Monitor No 2 (2008).

¹⁰ Sornarajah, *The International Law*, 24.

¹¹ Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, (Oxford: Oxford, 2013) 24.

¹² Konrad von Moltke, "An International Investment Regime? Issues of Sustainability, International Institute for Sustainable Development, available at An International Investment Regime? Issues of Sustainability," available at: <https://www.iisd.org/pdf/investment.pdf>, accessed June 13, 2016.

¹³ Salacuse, *The Three Laws*, 34.

investment which then utilized to the economic development of the host state.¹⁴ However, in practice that is not always the case. A number of scholars¹⁵ have similar opinions that benefit accrued from FDI contingent upon various factors. The factors include “the economic policies pursued by the host state, the sectors in which investment is made, the political risks present, availability of effective institutions and the presence of developed financial markets, to the stock of human capital availability.” These factors are called the "absorptive capacity" of a host country.¹⁶

The enthusiasm toward economic neoliberalism slowed down by economic crises in Russia, Mexico, Asia and Argentina in the late 1990s. The doubt over neoliberalism comes into being. In Indonesia, analysts asked: despite a large amount of FDI inflow, why the productivity level in Indonesia remains low compared to its neighboring countries. Why there was no equitable distribution of wealth as indicated by the high level of poverty and unemployment.¹⁷ The ability of capital to move in and out of a state without restriction has been seen as the cause of the crises. The free movement of capital was made possible by repatriation provision in investment agreement as well as domestic law as requested by liberalism. The economic crises showed that the promise of liberalization did not materialize. Rather, globalization which proved favorable to foreign investment has released forces of nationalism which compete against liberalization of the economy. Consequently, the state had to rein toward further liberalization.

Focusing on legal aspects, Chapter III explains Indonesia’s commitment to liberalization of foreign investment. This chapter provides legal explanations on what

¹⁴ Leon E. Trakman, “Foreign Direct Investment: Hazard or Opportunity?,” *George Washington International Law Review*, vol. 41(2009) 12.

¹⁵ Among them Li and Liu 2005; Le 2004; Nunnenkamp 2004; Alfaro 2003; Seid 2002; Borensztein.

¹⁶ NEPAD: drawing lessons from theories of foreign direct ..., <http://www.thefreelibrary.com/NEPAD%3a+drawing+lessons+from+theories+of+foreign+>, accessed November 20, 2015.

¹⁷ The World Bank’s Poverty Global Practice Team in the Jakarta Office, “Indonesia’s Rising Divide,” March 2016, available at: <http://pubdocs.worldbank.org/en/16261460705088179/Indonesias-Rising-Divide-English.pdf> accessed July 21, 2016. Using Gini coefficient data this article shows how income inequality is increasing from the time of economic recovery (post crises) from 2000 to 2014.

accounts to backlash against foreign investment regime in Indonesia. It is organized as follows. Section A following this short introduction presents a discussion on liberalization in Indonesian foreign investment and explains what forms of liberalization have taken place that ignited nationalist sentiment. This section affirms that privatization and BIT program are two main policies made to remove barriers to foreign investment in Indonesia. Privatization has created more barriers to local participation due to limited capital. For FDIs, however, privatization opens broader participation since they have almost unlimited human and financial resources. BIT provides extended protection for foreign investors without giving obligation, yet limiting state's regulatory roles. Section B is presenting arguments on why arbitration matters in liberalization and how it plays a role in the current backlash. Indonesia is increasingly sued before investment arbitration within the last ten years. Investment arbitration, be it before the ICSID or any other institution, has raised financial burden as well as sovereignty issues. This section discusses arbitration cases Indonesia has encountered. The concluding section sums up that while the government had implemented privatization and BIT program, the promised benefits of implementing them did not all materialized. The unmet expectations led to negative sentiment in domestic level.

A. Liberalization of Foreign Investment in Indonesia

Rahnama et al claim that beginning in 1993; there was a sudden increase in FDI in East Asian region which caused by substantial deregulation of capital investment, promotion of privatization and liberalization of trade policies.¹⁸ In Indonesia, the shift toward liberalization of FDI was driven by two factors. The first was the perception that FDI would bring along various benefits such as capital, technology, knowledge, new market; and second,

¹⁸ Mashaallah Rahnama, Hedayeh Samavati, David A. Dilts, "An Analysis of Capital Flight from East Asian Emerging Economies," available at <https://www.usi.edu/media/3655130/Analysis-of-Capital-Flight.pdf>, accessed October 5, 2016.

was the external force from foreign lenders such as the International Monetary Fund (IMF),¹⁹ the World Bank, and foreign governments. Regardless the fact that Indonesia remained skeptical of the free market and the absence of high domestic demand for the norms, the international financial institutions left the country with no alternative but to liberalize its foreign investment regime. Hence, national FDI policies have increasingly become more liberal to provide a better investment climate, despite the prevailing view that considers liberalism as contradictory with economic principle laid down in the Article 33 of the Constitution.

As shown in Chapter II, historically Article 33 was inspired by socialist and nationalist ideas. While elucidation does not bind in the interpretation of the Constitution, ones often refer to it in interpreting Article 33. Lindsey and Butt contend that economic nationalism and anti-liberalism are often associated with Article 33. A literal and conservative interpretation of Article 33 apparently always likely ends up with an understanding that the state has to retain direct control over natural resources and important production. Therefore, such an interpretation “impedes legal reforms aimed at improving the efficiency of the economy, and hinders effort to provide positive investment climate.”²⁰ The advocates of such interpretation offer various explanations for their claim. On the practical level, liberalism implicates state’s regulatory freedom; and influence the capability of domestic investors to thrive. On the philosophical level, liberalism is not compatible with economic wisdom articulated in Article 33 of the Indonesian Constitution which aims at achieving people’s welfare through economic democracy. Economic democracy in the Constitution requires the fulfillment of human basic rights while liberalism, based on capitalist’s ideas, limits the fulfillment of the

¹⁹ See Fischer, Stanley, April 8, 1998 “The Asian Crisis, the IMF, and the Japanese Economy,” Tokyo: IMF Website, <http://www.imf.org/external/np/speeches/1998/040898.htm>, accessed October 5, 2016.

²⁰ Tim Lindsey and Simon Butt, *The Constitution of Indonesia: A Contextual Analysis*, (Oxford: Hart Publishing 201) 266-267.

basic rights since capitalists would only enjoy the benefits of investment. Liberalism has caught “the emergence of large scale enterprises which are monopolistic and oligopolistic, multinational and conglomerate in nature.”²¹

The next reason is the notion of individualism in a liberalized economy which contradictory to the ‘people-ness’ or family concept in the economic democracy. The essential element in the economy based on democracy is neither individualism nor collectivism. Rather, it is a family based concept which put the government as the family leader²²emphasizing on togetherness, emancipation, and participation which prioritize public welfare over individual prosperity.²³ Thus, liberalization that encourages free market is deemed to be exploitative and individualistic which at the end only benefited the capitalist, is considered unsuitable. The last reason is directed to the business entity. The economic system in Article 33 has a collectivistic nature. According to Hatta, the most suitable business form for economic based on family principle is cooperatives. Cooperative is deemed as a symbol of grassroots economic institutions which aim to improve the capacity of economically weak members by means of their working together. Thus the term itself symbolized an anti-liberal economic approach.²⁴

The thesis of this chapter is that liberalization of investment has resulted in the significant increase of FDI’s roles in the Indonesian economy. At the same time, the FDI negatively impacted small and medium business as the basis of people’s economy; as well as people’s welfare. Liberalization also reduces the role of state-owned enterprises due to

²¹ Dawam Rahardjo, *Small Scale Business in the Indonesian Economy*, (Jakarta: The Ministry of Cooperatives and Small Enterprises, 1994) x.

²² Bivitri Susanti, *Neoliberalism and its Resistance in Indonesia's Constitutional Reform 1999–2002* Master’s Thesis., University of Warwick, 2002.

²³ Cornelis Rintuh and Miar, *Kelembagaan dan Ekonomi Rakyat (Institution and People’s Economy)* (Yogyakarta: BPFE, 2005) 76.

²⁴ The idea of cooperatives being an integral part of economy would become a pet project for Hatta and he would become an enthusiastic promoter of the idea. In July 1951, on the occasion of Cooperatives Day, Hatta went on the radio to deliver a speech on cooperatives. In 1953, Hatta's contribution towards promoting cooperatives was recognized and he was given the title "Father of Indonesian Cooperatives" at the Indonesian Cooperative Congress.

privatization. Those unfavorable impacts lead to the rise of nationalism which later resulted in a backlash against foreign investment regime. This section shows that privatization has been blamed for influencing the capability of small and medium enterprises to thrive and eventually forced them to cut down their business. Using conservative interpretation of Article 33 of the Constitution, privatization is seen to negatively impact welfare of the people. The reason is because private participation in the important sector of production reducing the profit made by the state and limits the fulfillment of the basic rights since the benefits of investment have to be shared between SOE and private parties. Using the same perspective, BIT and arbitration would also be seen as a culprit that limits state regulatory freedom due to the risk of being sued before an arbitral tribunal.

On the theoretical point of view, a backlash against foreign investment regime can take place because of the absence of willingness to be bound by it or the inability of the regime to withstand challenges. Hasenclever states that the endurance of a regime depends on two factors: regime effectiveness and regime robustness. Regime effectiveness requires “the continued willingness and ability of its members to abide by its rules and to pursue its objectives and purposes.” Regime robustness refers to the ability of the regime to withstand threats and challenges. Hasenclever further stated that “the effectiveness and robustness of the international investment regime is by no means assured.” It faces four salient challenges: two internal and two external.²⁵

The external challenges are directed toward the Washington Consensus which promotes open economies, privatization, and economic deregulation. Some developing countries have lost faith in the ability of Washington Consensus to bring prosperity; therefore, they look for alternative ways of economic development.²⁶ The next external challenges come from financial crises where countries under great stress were often forced to

²⁵ A Hasenclever et al, *Theories of International Regimes*, as quoted by Jeswald W. Salacuse, in *The Law of Investment Treaties*, Oxford University press, 2015, p 19.

²⁶ Salacuse, *The Law*, 21.

adopt certain measures prescribed by international donors without taking the local condition into account.²⁷ In the Indonesian case, this was evident during the time of economic crisis when Indonesia was obliged by the IMF to conduct legal reforms by invalidating some laws and enact the new ones which were more open to foreign investors. It was later proven that the IMF's prescription in Indonesia's recovery program would inevitably plunge the country into a worse condition.

The internal challenges are aimed to the principles stating that investment treaty is an important tool to attract foreign investors and that international investment will lead to increased prosperity and economic development. However, many researchers have found little evidence of that claim. If the regime is judged not to have achieved its fundamental objective of promoting investment, then the justification for its continued existence becomes problematic.

The next internal challenges are directed to the norms and rules. The investment security principle comprises of five norms: reasonableness, non-discrimination, security, transparency, and due process.²⁸ Reasonableness and non-discrimination include the prohibition of unreasonable or discriminatory measures. Requirements of national treatment and most-favored-nations principle reflect the norm of non-discrimination. Guarantee of full protection and security, observance of obligations provisions, compensation, conditions of expropriations, and right to free transfer reflect the norm of security. Provision requiring publication of law related to FDI reflects transparency. Investment arbitration and provision

²⁷ Ibid.

²⁸ According to Kenneth J. Vandelde, economic liberalism in investment policy include three principles: investment neutrality, investment security, and market facilitation. Investment security is also known as legality principle. See Kenneth J. Vandelde, *International Law on Foreign Investment*, in *Alternative Visions of the International Law on Foreign Investment*, Essays in Honour of Muthucumaraswamy Sornarajah, C.L.LIM (ed), Cambridge University press, 2016, p 52-53.

on judicial access reflect the norm of due process. Lastly, fair and equitable treatment reflects all the five norms.²⁹

While public opinion seems to accept the norms and rules of the regime, its decision-making process has been called into question. Host governments and elements of civil society have challenged the decision-making process on many grounds. For example, that the process is not transparent and does not account for the disparity in the economic situations; that arbitrators are not truly independent as they have investor bias; and that their decisions infringe on the legitimate exercise of sovereignty by host states.³⁰ Jeswald W. Salacuse, questions this kind of move whether it is an initial action to change the course of foreign investment regime or to dismantle in its entirety.³¹

Three forms of liberalization of foreign investment in Indonesia appear to be the cause of backlash against foreign investment: privatization, BIT program, and arbitration.

1. Privatization

There are two approaches of privatization in Indonesia: relaxation of ownership to give greater involvement to the private sector and sale of State-owned enterprise (SOE).³² The former form of privatization is done by encouraging the participation of, and competition from, private businesses in sectors where state-owned enterprises have already played a major role.³³ Private investors prefer acquiring shares in SOE rather than establishing new enterprises. Thus, many foreign investors have chosen to purchase or assume control of existing SOEs or their assets, reorganize and improve them, and then attempt to operate them on a profitable basis. Privatization is seen as a crucial step to economic liberalization and reform since it gives new opportunities for foreign investors to participate in a country's

²⁹ Vandelde, *International Law on Foreign Investment*, 61.

³⁰ Salacuse, *The Law*, 21.

³¹ *Ibid.*

³² Ross H McLeod, "Privatization Failures in Indonesia," Indonesia Project, Economic Division, the Australian National University, 6 available at <https://cnnd.crawford.anu.edu.au/acde/publications/publish/papers/wp2003/wp-econ-2003-05.pdf>. Accessed January 12, 2016.

³³ *Ibid.*, 7.

economy, as well as increase economic efficiency.³⁴ Privatization is necessary for Indonesia's circumstance for providing cash flows needed to maintain government's spending.³⁵

- Relaxation of Foreign Ownership

Led by the technocrats,³⁶ the first phase in the relaxation of foreign ownership was set in May 1986 and highly motivated by the drop in oil prices which suffered Indonesian economy. The objective of this policy was to promote export-oriented investment in non-resource-based, and investment in eastern Indonesia.³⁷ The 20 percent minimum Indonesia shareholding requirements were relaxed to five percent for FDI that were high risk, located in remote areas, involved high technology, and export oriented. Additionally, FDI could obtain national treatment if it was at least 75 percent Indonesia-owned or if 51 percent of its share were traded in capital market or if it was 51 percent Indonesia-owned and if at least 20 percent of its share were traded in the capital market. Lastly, the export-oriented was changed from 100 percent to 85 percent of product exported.³⁸

The next phase took place in December 1987 where ownership requirement was further loosened to 51 percent Indonesia owned, and 45 percent Indonesia owned, provided that 20 percent of its share were sold in the capital market. Minimum Indonesia ownership at the time of formation of the company was lowered to five percent for FDI that exported 100 percent of their production with no further obligation to divest in Indonesia. The minimum

³⁴ Salacuse, *The Three Laws*, 111.

³⁵ McLeod, *Privatization Failures*, 5.

³⁶ These economic technocrats, known as Berkeley Mafia, were identified as the initiator of deregulation in Suharto era. They were mostly academic economists affiliated with universities and academic research centers. The group of technocrats was to be contrasted from technologists that was a mixed group of technically oriented professionals, politicians, former military officers, nationalists, and economists with a "structuralism" philosophy. The technocrats argued for an open economy and export-led growth while the technologists argued for self-reliance and indigenous industry-led development.

³⁷ M. Hadi Soesastro, "Asian Survey," *University of California Press*, vol. 29, no. 9 (1989), 856.

³⁸ Mari Pagestu, "Foreign Investment Policy: Evolution and Characteristic," in *Deregulation and Development in Indonesia*, eds. Farrukh Iqbal and William E. James (Prageer, 2002) 48-49.

capital invested for FDI was lowered to \$ 250.000 based on employment creation, export, production, support to the big industry, and non-competition with existing industry.³⁹

In 1989, liberalization of foreign ownership restriction in certain areas was introduced. Full ownership of foreign companies is allowed in Batam Special Economic Zone,⁴⁰ with five percent divestment to Indonesian shareholding in five years and no further divestment is required if the company export 100 percent of its product. In direct response to the reforms, economic growth surged after 1987 and averaged 6.4 percent from 1986 to 1990. Average real Gross Domestic Product (GDP) growth remained above 6 percent from 1990 to 1993.

The success of privatization appeared as non-oil and gas exports grew on average by over 25 percent from 1986 to 1992. Manufactured exports grew by more than 30 percent per annum during this period. Investors also responded well to the reforms. The investment share of GDP averaged 25 percent from 1973-1985, while the average for 1986-1992 was 33 percent. In manufacturing, investment increased most sharply in textiles and apparel, paper products and chemicals. The rise was due to the Indonesia's competitive advantage to provide low-cost labor as those industries were considered as labor-intensive.⁴¹ Consequently, employment induced by manufactured exports was also rising sharply from 3 percent of the total labor employed in 1983 to 8 percent of the total employment in 1989. These growths made the group of technocrats won their argument against technologists who favored continued restrictions on trade and investment.⁴²

³⁹ Ibid., 49.

⁴⁰ Batam is the first Special Economic Zone opened in Indonesia. It lies on one of the world's busiest shipping lanes between Sumatra island and Singapore (only 13 miles away from Singapore). This makes Batam an attractive location for Singaporean manufacturing firms, who enjoy the benefits of cheaper land and competitive labor costs.

⁴¹ William E. James and Sherry M. Stephenson, "The Evolution of Economic Policy Reform: Determinants, Sequencing and Reasons for Success," in *Deregulation and Development in Indonesia*, eds. Farrukh Iqbal and William E. James (Prageer, 2002) 35.

⁴² Ibid., 37.

The next phase of relaxing foreign ownership was in 1994 which was considered as very dramatic. The relaxation was pushed by the increased competition for trade and investment globally. Firstly, new FDI could choose two alternatives in structuring their foreign investment: a joint venture with a maximum of 95 percent foreign ownership or full foreign ownership. Secondly, there was a substantial relaxation of the phase down requirement. For joint ventures set up with at least five percent Indonesia shareholding, divestment of foreign shares was no longer mandatory. For companies set up with complete foreign ownership, divestment of some of the foreign shares was required after 15 years. Thirdly, the license for FDI could be automatically renewed as long as it is perceived that the benefit to the economy and national development continue to persist. Fourthly, the government opened up nine sectors previously closed for FDI: ports, production, and generation of electricity, telecommunications, shipping, air transport, drinking waters, railways, atomic energy generator plants, and mass media.⁴³ Correspondingly, the period from 1994 to 1997 was marked by dramatically increased in FDI as well as domestic investment. In 1994 the FDI approvals almost tripled to \$27.5 billion. The projects were in the chemical, paper and pulp and infrastructure sectors.⁴⁴ Mari Pangestu claimed that domestic firms became increasingly domestic-oriented whilst foreign corporations became increasingly export oriented.⁴⁵

On the contrary, the negative effect of the rise of FDI mostly affected small and medium enterprises (SMEs).⁴⁶ Mubyarto accused that the ease given to FDI gave way to the birth of big companies and conglomerates which detriment to SMEs as the backbones of

⁴³ Pagestu, *Foreign Investment Policy*, 50-52.

⁴⁴ *Ibid.*, 54.

⁴⁵ *Ibid.*, 8.

⁴⁶ Dawam Rahardjo, "*Pembangunan Pascamodernis (Post-modern Development), Esai esai ekonomi politik (Essays in Political Economy)*," (Jakarta: Insist Press INFID, 2012) 31.

people's economy.⁴⁷ The presence of big business and conglomerates were successfully improved economic efficiency because their internal capital markets allocate among member more efficiently than the external capital market does.⁴⁸ However, economic efficiency was only enjoyed by a small group of people while left most SMEs unable to compete with those large companies. In Indonesia, SMEs are not just as enterprises which are a small scale based on the amount of capital or labor use. The definition of SME implies social aspects such as traditional enterprises as part of the traditional society.⁴⁹ The liberalization forces this traditional industry and company to compete with foreign investors who are more modern and has more capital. For example, *batik*⁵⁰ and hand weaving products compete with industrial garment products, shoe factory replaces traditional shoe makers; ceramics products compete with plastics ones.⁵¹ Consequently, people's welfare in general decreased. Mubyarto asserted that in 1969, 40 percent Indonesians with the lowest income received 19 percent of national income. In 1973, the number dropped only to receive 15 percent, while in 1976 they received only 11 percent, and in 1980 decreased again to 10 percent of national income. This condition, according to Mubyarto, represented the wider gap between the have and the poor.⁵²

The Indonesian experience shows that labor absorption of small-scale industries was decreasing in line with privatization. In 1984 small scale industry absorbed 78,2 percent of the workforce, then increased to 86,6 percent in 1985. Yet, after the first privatization was set in May 1986, the number dropped significantly to only 46 percent and continued to drop to 34,3 percent in 1987. This trend continued in 1988 to 28,2 percent, in 1989 to 16,1 percent,

⁴⁷ Mubyarto, *Ekonomi Rakyat Program IDT & Demokrasi Ekonomi Indonesia (People's Economy IDT Program & Economic Democracy Indonesia)*, (Yogyakarta: Aditya Media, 1997) 11.

⁴⁸ *Ibid.*, 13.

⁴⁹ Dawam Rahardjo, *Small Business*, xiii.

⁵⁰ Batik is a technique of wax-resist dyeing applied to cloth. To make a batik, selected areas of the cloth are blocked out by brushing or drawing hot wax over them, and the cloth is then dyed. The parts covered in wax resist the dye and remain the original color.

⁵¹ Data from the Indonesian Ministry of Industry as cited by Dawam Rahardjo, *Small Business in the Indonesian Economy*, the Ministry of Cooperatives and Small Enterprises, 1994, p xv.

⁵² *Tempo Magazine* No 22/Th.XI, August 1, 1981 as cited in Mubyarto, *Amandemen Konstitusi & Pergulatan Pakar Ekonomi (Amendment of Constitution & Economic Expert Debate)*, Aditya Media, 2001, p 141.

and decreased again in 1990 to 14,2 percent.⁵³ The continued decline of labor absorption since the first privatization is a shred of evidence that the size and production volume of SME is decreasing. Consequently, their income is also declining.

The increasing income gap contradicts with the mission of economic policy stipulated by Article 33 of the Constitution which was to materialize welfare of the Indonesians.

Professor Mubyarto mentioned that the basis of economic democracy laid down in Article 33 paragraph 1 was that production was done by ‘all Indonesians’ and for ‘all Indonesians’ under the leadership of Indonesian. Otherwise, an important branch of production could fall under certain individual or group and left nothing for the people. In this type of economy, people’s welfare was the main priority rather than individual or group welfare.⁵⁴

Due to the devastating impacts of privatization for SMEs, economic nationalist like Mubyarto strongly suggested that the government supported SMEs, even though at the expense of capital flight from foreign investors.⁵⁵ Mubyarto did not support liberalization arguing that it denied Article 33 of the Constitution which required the state to control the earth, water, and natural resources for the greatest benefit of the people.⁵⁶

Privatization was also accused of the financial crises in 1997/1998. Radius Prawiro⁵⁷blamed the excessive liberalization of FDI to the crisis.⁵⁸ The crisis did not only lead to a backlash against the Suharto government and his cronies, but also to the technocrats and their liberalization ideas. The sudden increase of FDI into Indonesia in the late 1980s and early 1990s may have been stimulated in part by the open capital account. At that time, foreign investor confidence in the Indonesian economy was bolstered by the fact that there was very relax ownership and divestment requirements. However, the fact that the 1998

⁵³ Rahardjo, *Small Business*, xxii.

⁵⁴ Mubyarto, *Ekonomi Rakyat*, p 83.

⁵⁵ *Ibid.*, 103.

⁵⁶ *Ibid.*, 152.

⁵⁷ The Financial Minister from 1983-1988 as well as the Governor of Bank of Indonesia 1966-1973.

⁵⁸ Radius Prawiro, *Pergulatan Indonesia Membangun Ekonomi: Pragmatisme dalam Aksi, (Indonesia's Effort to Develop Economy: Pragmatism in Action)*, (Jakarta: Elex MK., 1998) 354.

crises in Indonesia were triggered by a sudden capital flight from the country which led Rupiah, Indonesian currency, to depreciate significantly against the US dollar⁵⁹ clearly exposed the deficiencies of the Indonesian FDI regime. A report estimated that around US \$ 80 billion of foreign capital had been taken out from Indonesia. Indonesia Investment Minister Hamzah Haz in April 14, 1998, Media Indonesia article estimated that 25,000 Indonesian businessmen of Chinese descent had already fled the country brought an estimated US \$ 500 million. This statement was also confirmed by the head of the Jakarta branch of the Indonesian Chamber of Commerce, Pungky Bambang Purwadi. ⁶⁰

The crisis significantly impacted the FDI flow into Indonesia. The foreign investment approval continue to decrease due to the crisis: in 1997 was \$ 33,833 billion, in 1998 fell to \$ 13,563 billion, in 1999 to \$ 10,891, and in 2000 to \$ 6,087 billion. In order to mitigate the situation, President Habibie and his predecessor President Wahid adopted reforms aimed at the reducing barriers to investment. In May 1998, the government announced a policy of simplifying investment licensing procedures. For example, foreign investment of up to \$ 100 million did not require President's approval; instead it could be approved by the Minister of Investment. The next simplification appeared in a 'single-stop' office which was created to assist investor in gaining the necessary approvals to go ahead with new projects or expansion of existing ones. Also, President Habibie reduced the negative list from 35 to nine in January 1999 and was further reduced by President Wahid in July 2000.⁶¹

⁵⁹ The depreciation was soon followed by national banking crises and ended up as national crises. The crisis hit first middle and high income groups such as current employees in the financial/ banking sector and large scale industries which strongly dependent on credits from bank or other financial institutions and imports. After several months, domestic inflation started to increase, and this accompanied with the increase in unemployment due to many laid off employees in crisis-affected firms than resulted in a significant increase in the poverty rate in 1998.

⁶⁰ Indonesian Capital Flight Potentially Compounded by Habibie's Communist Remarks, May 6, 1999 <https://www.stratfor.com/analysis/indonesian-capital-flight-potentially-compounded-habibies-communist-remarks>.

⁶¹ William E. James and Anwar Nasution, "Economic Reforms During the Crisis and Beyond," in *Deregulation and Development in Indonesia*, eds. Farrukh Iqbal and William E. James (Praeger, 2002) 200.

However, even though ownership restrictions on FDI have mostly been lifted, FDI flow continued to decline because of political uncertainty, poor law enforcement, instability of Rupiah, and increased minimum wages.⁶² Besides, ethnic and religious violence in Indonesia such as in Jakarta,⁶³ Medan (in Sumatra island), Kalimantan, Poso (in Sulawesi island), and the Moluccas from 1997 to 2002 were also cited to hold back the FDI from investing.

While the pre-Asian economic crisis was marked by relaxation of ownership, post-crisis's liberalization mainly focused on reducing the number of closed sectors. In 2016, President Joko Widodo administration opened 35 areas to up to 100 percent share ownership. These sectors include toll roads, cinemas and film distribution, rubber production, restaurants and bars, and raw materials for medicine. In addition, the government also decided to open industries to a certain degree of foreign involvement for the first time such as healthcare facilities, land transport services, and installation of high voltage utilization.⁶⁴

- **Sale of State-Owned Enterprises**

Article 33 (2) of the Indonesian Constitution reads “branches of production which important to the state and affect the public’s necessities of life, are to be controlled by the state.” It carries understanding that the state, represented by the government, takes part in the economy through SOEs. As one of the economic players, SOEs are expected to provide a financial contribution to the development. Moreover, it is also projected to create job opportunities, new technology, and skills. However, instead of gaining profits, many Indonesian SOEs create liability to the state due to widespread corruption, lack of

⁶² Hadi Soesatro and Thee Kian Wie , “Comprehensive Investment Policies in a Competitive Environment,” Paper presented at a Conference on the Indonesian Economic Recovery in a Changing Environment, Jakarta 4-5 October 2000.

⁶³ There was a bombing of the Jakarta Stock Exchange in September 14th, 2000.

⁶⁴ As stated by Pramono Anung, the Cabinet Secretary in Jakarta on February 11, 2016, available at: <https://www.ft.com/content/52390634-d087-11e5-92a1-c5e23ef99c77> accessed at April 10, 2016.

management, and hinder Indonesia's economic performance.⁶⁵ To make things worse, there were strong allegations that Suharto's children and his cronies used SOEs for their personal and group benefits.⁶⁶

Privatization of state asset and enterprises began in the mid-1980s. It is a complicated process by which governments transfer state asset or functions from the public or governmental sector to the private sector.⁶⁷ The technologist seemed to be hesitant toward privatization despite the needs due to financial difficulties and inefficiencies of the SOEs operations. Similarly, politicians cannot afford to lose control over SOEs since they used it as a financial source that can be used for enrichment individuals and also for financing the political parties.⁶⁸ Economic nationalist insisted the government approach privatization with extra caution saying that economic efficiency shall also consider family principle where the state was the leading player in managing the economy for people's welfare.⁶⁹ Thus, they did not recommend the government to sell state-owned companies in sectors critical for the basic needs of the people.

Up to 1987 seven small-scale SOEs were privatized: Gaya Motor company from 100 percent to only 24,8 percent state owned; Sari Husada from 55 percent to 43,54 percent state-owned. The government also sold its shares in the following companies: Dainippon Indonesia to Tumbak Mas; Indonesia Engineering to Bumi Akar Rezeki; and Golden Martapura.⁷⁰ In 1989 the then Finance Minister JB Sumarlin announced that Indonesia would privatize 52

⁶⁵ Government of Indonesia Letter of Intent, December 13, 2001, point 29, available at: www.imf.org.

⁶⁶ For example Suharto forced state banks, and other SOEs to contribute money to his Supersemar Foundation, ostensibly to finance social welfare projects, including education scholarships. However, large sums were transferred to companies owned by members of the Suharto family and their cronies.

⁶⁷ Salacuse, *The Three Laws*, 110.

⁶⁸ E. Yonnedi, "Why has Indonesia's privatization policy failed?" *The Jakarta Post Daily*, available at <http://www.thejakartapost.com/news/2003/01/06/why-has-indonesia039s-privatization-policy-failed.html>. See also Ross H. McLeod, *Privatisation Failures in Indonesia*, Indonesia Project, Economics Division, The Australian National University, available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.522.1609&rep=rep1&type=pdf>, accessed at 11/1/2015.

⁶⁹ Mubyarto, *Ekonomi Rakyat*, 154.

⁷⁰ Effendy Choirie, *Privatisasi Versus Neo-Sosialisme Indonesia (Privatization versus Neo-Socialism Indonesia)*, (Jakarta: LP3ES, 2003) 76.

SOEs between 1990 and 1992, yet only one was privatized: Semen Gresik.⁷¹ Similarly, in 1993 the then Minister for Research and Technology BJ Habibie stated that around 50 SOEs could be sold, but it was not successful either.⁷²

By mid-1990s, almost every significant privatization featured the involvement of the President Suharto family or cronies.⁷³ For example, privatization took place in aviation and electricity which resulting in huge losses to the government. After decades of monopolizing civil aviation through *Garuda* airlines, the government opened a market share for a private company: Sempati Air which was owned by one of Suharto's sons. Sempati Air was on the market before gone bankrupt due to the economic crises in 1998/1999. Sempati left massive debts to SOEs in the forms of unpaid bills for the supply of fuel by Pertamina, and the rental of airport facilities.⁷⁴

As with civil aviation, the experiment with privatization in the electricity industry in 1997 has also been resulting in a big loss to the government. The losses are the direct consequence of the nature of the contracts that govern the supply of power by private generators to the state-owned electricity company PLN (*Perusahaan Listrik Negara*).⁷⁵ The contracts had two crucial features: the supply price for electricity was denominated in US dollars and it obliged PLN to purchase all of the power produced by those private generators. Due to Rupiah-US Dollar exchange rate fluctuating from approximately 2,400 rupiah to the US Dollar in 1996, to rates as high as 16,000 Rupiah to the US Dollar in 1998, PLN considered its obligation to purchase power from the private generators incapable of being performed. As requested by the IMF as a condition for the loan, the government suspended the contract between PLN and private generators company including *Himpurna* and *Patuha*.

⁷¹Ibid., 77.

⁷² Ross H Mc Leod, "Survey of Recent Developments," *Bulletin of Indonesian Economic Studies*, vol. 29 (1993)2.

⁷³ James and Nasution, *Economic Reforms*, 190.

⁷⁴ McLeod, *Privatisation Failures*, 13-14.

⁷⁵ Ibid., 15-17.

Consequently, *Himpurna* and *Patuha* filed the case to an international commercial arbitration. The tribunal gave decisions in favor of the claimants, as a result, demanded the Indonesian government to pay US\$391,711,652 to *Himpurna* and US\$180,570,322 to *Patuha*.⁷⁶

Privatization in 1998/1999 only contributed 11 percent from targeted revenue of IDR 15 trillion, while during 1999/2000 it contributed to only IDR 3,7 trillion or 29 percent of the target.⁷⁷ Privatization in the early 2000s is the most remarkable development and attracts widespread public criticisms.⁷⁸ Following the Asian economic crises, privatization was a central feature of the economic reform agenda promoted by the IMF as part of their prescriptions for economic recovery. In many countries lacking sufficient local capital, technology, and management skills practice are the reasons of privatization. In Indonesia, the inefficiencies of SOEs are cited as the most prominent reason for privatization which is caused by mismanagement. President Megawati administration was considered as pro-privatization. She was supported by American graduates such as Dorodjatun Kuntjoro-Jakti (a University of California-Berkeley graduate, served as Coordinating Ministry for Economic Affairs); and Boediono (a University of Pennsylvania graduate, as Ministry of Finance). Megawati set to privatize several state-owned companies include PT Semen Gresik (a cement company), PT Telkom (telecommunication), PT Indosat (telecommunication), PT Batubara Bukit Asam (coal mining), PT Kimia Farma (pharmaceutical).

Privatization under President Megawati attracted many criticisms because it is the policy imposed from capitalists and therefore induced resentment. Privatization of telecommunications through PT Telkom and PT Indosat was imposed by the IMF and the

⁷⁶ Mark Kantor, "International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?", *Fordham International Law Journal*, vol. 24, no 4, (2000) 1133.

⁷⁷ Effendy Choirie, *Privatisasi Versus Neo-Sosialisme*, 79.

⁷⁸ <http://www.thejakartapost.com/news/2001/11/15/local-lawmakers-reject-privatization.html> , see also <http://atimes.com/se-asia/DB23Ae01.html>

World Bank.⁷⁹ The lack of investment was a major problem in achieving the telecommunications target. Privatization was one of the solutions.

Privatization in telecommunication sector involved both encouraging private participation and the transfer of ownership from SOEs: PT Telkom and PT Indosat.⁸⁰ The government sold 41.94% of PT Indosat's shares to Singapore Technologies Telemedia in 2002 which raised about US\$ 631 million to be used to reduce the budget deficit. This privatization left the government as the minority owner due to the previous privatization (in 1994 the Indonesian government sold 35% of its share in PT Indosat), while Singapore Technologies Telemedia as the majority owner.⁸¹ This privatization sparked opposition from various groups ranging from university intellectuals to politicians. They argued that this divestment contravened Article 33 (2) of the Constitution governing state control over important sectors such as telecommunications. They claimed that this transaction had left the government with the insufficient power to control PT Indosat.

Privatization fails to meet the expected results. Theoretically, privatization would give greater benefits when it is transparent and conducted fairly. However, it is not always the case in Indonesia as shown in the aviation and electricity sectors. Among those who resisted privatization were employees of the SOEs, politician, and parliament. They concerned that privatization would lead to a dependence on foreign capital and expertise that gradually proved difficult to bear.⁸² In local level, resistance came from governments, parliament, and

⁷⁹ Can be found in Letter of Intent of the Indonesian Government with the IMF, January 20, 2000.

⁸⁰ Atip Latipulhayat, "State Control and the Privatisation of the Indonesian Telecommunications Industry: From Ownership to Regulation," *Journal of International Commercial Law and Technology*, vol. 5, no. 2 (2010) 64.

⁸¹ *Ibid.*, 66.

⁸² For example Amien Rais from National Mandate Party who was also speaker of Indonesia's highest legislative body, the MPR who said that privatization of government assets was not in the best interests of the nation as quoted from Bill Guerin in *Decentralization: Indonesia's privatization nightmare*, available at <http://atimes.com/se-asia/DB23Ae01.html>

community.⁸³ Another criticism is due to the lack of transparency, preferential treatment of politically well-connected buyers and the low prices which gave the buyers high profits. The plan to sell 51 percent stake of PT Semen Gresik to Cemex of Mexico became the first privatization after the crisis. It was unsuccessful due to the resistance of the local government, parliament, and the people.⁸⁴ Analysts believed that this was a reflection of local sentiment against foreign control of local assets. Since nationalist sentiment was high, the government was reluctant to privatization if this would result in foreign ownership, especially for critical economic resources. Consequently, the government negotiated with Cemex and reached a conclusion which was not made into the public.

The implication of the meaning of ‘state control’ in Article 33 of the Constitution has devastated the government effort to privatization. The term has been used several times as a legal weapon to condemn privatization as contravening to the Constitution. The Indonesian Constitutional Court has been dealing with privatization cases since its establishment in 2003. From its decisions, it is apparent that the Court has attempted to hinder government’s efforts at offering wider scope for the private investors to participate in the branches of production and exploitation of natural resources referred to in Article 33 of the Constitution. In their decision, the Court disagrees with privatization because of various reasons. In the Water Resources Law, water management shall be given to the state to maintain access to clean water for the whole population.⁸⁵ In Electricity Law case the Court argued that competition and unbundling in electricity sector relinquished state control. Since electricity was deemed as a crucial branch of production, the private sector involvement could not be accepted. In the

⁸³ For example attempt to sell off the cement maker's local subsidiary, PT Semen Padang was refused. Similarly, in South Sulawesi, local interests were able to stymie the planned sell-off of Semen Gresik subsidiary PT Semen Tonasa

⁸⁴ Yonnedi, *Why has Indonesia's*.

⁸⁵ The Constitutional Court Decision No 85/PUU-XI/2013 p 140 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_2131_85_PUU_2013-UU_SumberDayaAir-Dikabulkan-telahucap-18Feb2015-FINAL-%20wmActionWiz.pdf, accessed at, 2/21/2016.

view of the Court, privatization causes the price to go up and public prosperity down since they are less able to afford the price.⁸⁶ At the same time, government earning decreases as it has to share the revenue with the private entity.

2. Bilateral Investment Treaty

In addition to national policy in the form of privatization, there are also international FDI policies which become more liberal or more protective to FDI over time in the form of BIT and Multilateral Investment Treaty (MIT).⁸⁷ Globally, there has been an increase in the number of BITs from around 500 in the 1990s to 2,962 in October 2016.⁸⁸ A BIT, as opposed from a MIT, is an international investment agreement between two states that stipulate standards of conduct towards private investment by nationals and companies from the other contracting party. The treatment is given in the forms of providing fair and equitable treatment, national treatment, and most-favored-nation principles. Moreover, BIT also usually provides protection against expropriation, a guarantee of free transfer of profits, and full protection and security. BIT also provides dispute resolution venue, mostly in the form of international arbitration.

Initially, BITs were set by developed countries during the decolonization in the 1950s and 1960s. The objective was to protect their investors and the investment of their investors in emerging nations.⁸⁹ Thus, BITs were used to advance goals: promote and protect investment; facilitate investment entry and operation; and liberalize the economies of developing countries.⁹⁰ In the absence of a single global multilateral investment treaty, BITs, and other international investment agreements are considered as primary sources of

⁸⁶ Constitutional Court decision No 001-021-022/PUU-I/2003, p 330 available at: <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/Putusan022PUUI2003.pdf>, accessed at 2/19/2015

⁸⁷ Velde, *Foreign Direct Investment*, 21.

⁸⁸ International Investment Navigator, <http://investmentpolicyhub.unctad.org/IIA>, accessed October 14, 2016.

⁸⁹ Kenneth J. Vandelde, "A Brief History of International Investment Agreements," in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flow*, eds. Karl P. Sauvant and Lisa E. Sachs (2009) 13-35.

⁹⁰ Jewald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain," *Harvard International Law Journal*, vol. 46 (2006) 75-79.

international investment law.⁹¹ They establish a legal regime known as international investment law. Besides the increasing number, the scope of BIT is also widening to include new issues such as environment, human rights, and labor rights.⁹²

BIT provisions permit the home states to dictate the circumstances under which its investors will be authorized to invest abroad. BIT is part of the effort for a country to liberalize its economy⁹³; in which it creates a set of legal rules for the protection of foreign investment that is essential to the development of a liberal investment regime.⁹⁴ It prohibits much post establishment discrimination among investors, thus liberalizing the regime in which foreign investment operates.

Furthermore, the guarantee of repatriation, free movement of foreign employees, and expropriation are considered as liberalism commitments since those protections are principally against state interference with investment. Moreover, the investor-state arbitration provisions are a critically important step in transferring protection of private investment from political to the legal realm, a fundamental tenet of liberalism.⁹⁵ The history of BIT also indicates the liberalism since it became “one of the means through which developing countries, amidst financial needs, could signal their commitment to what was perceived to be standard of appropriate behavior defined in the Washington consensus.”⁹⁶

BIT is the representation of the neoliberalism which sees FDI has positive economic gains for a host government through a number of channels includes the transfer of capital, advanced technological skills, the creation of employment, infrastructure development and the integration of the host economy to global market. This doctrine has been propagated by

⁹¹ Ibid.

⁹² U.N. Conference on Trade and Development., Investor-State Dispute Settlement and Impact on Investment Rulemaking, at 4, U.N. Doc. UNCTAD/ITE/IIA/2007/3, U.N. Sales No. E.07.II.D.10 (2005).

⁹³ Vandevelde, *The Political Economy*, 627, see also Salacuse, *The Emerging Global Regime*, 442.

⁹⁴ Kenneth J. Vandevelde, “Sustainable Liberalism and the International Investment Regime,” *Michigan Journal of International Law*, vol. 19 (1998) 395.

⁹⁵ Vandevelde, *The Political Economy*, 627.

⁹⁶ Ibid.

the IMF, the World Bank, and also the United Nations (UN). The UN endorsed FDI at its 2002 Monterrey Conference held in Mexico, stating that FDI is an important and vital complement to national and international development efforts.⁹⁷

a. Indonesia BIT Program

Under the influence of the World Bank and the IMF, neoliberalism occupied a dominant position in Indonesia during the 1990s. Liberalism was done through those financial institutions' influence through domestic legislation and also using BIT conclusions. The classical view adopted by Indonesian BIT program appears from the characteristic that BIT imposed no obligations to FDI. If it is aimed to increase economic development, BIT must impose FDI to some responsibilities that support economic development. In fact, Indonesian BITs do not contain such obligations. Rather, they are not details, vague, and consisting of wide ranges of protections.⁹⁸

Table III.1: BITs signed by Indonesia

No.	1960s	1970s	1980s	1990s	2000s
1.	Denmark 1968 (Replaced by 2007 BIT)	Belgium 1970 In force		Singapore 1990 (Replaced by 2005 BIT)	Algeria 2000 (signed but not in force)
2.	Germany 1968 (Replaced by 2003 BIT)	France 1973 (terminated)		Italy 1991 (terminated)	North Korea 2000 (signed but not in force)
3.	Norway 1969 (Replaced by 1991 then terminated)	Switzerland 1974 In force		South Korea 1991 (In force)	Qatar 2000 (signed but not in force)
4.		UK 1976 In force		Vietnam 1991 (terminated)	Philippines 2001 (signed but not in force)

⁹⁷ NEPAD: *Drawing lessons*.

⁹⁸ BITs concluded with developing countries with the same level of technology and skills.

5.				Australia 1992 (In force)	Croatia 2002 (Signed but not enforced)
6.				Hungary 1992 (terminated)	Saudi Arabia 2003 (in force)
7.				Poland 1992 (in force)	Bulgaria 2003 (terminated)
8.				Sweden 1992 (in force)	Germany 2003 (in force)
9.				Tunisia 1992 (in force)	Tajikistan 2003 (Signed but not in force)
10.				Netherland 1994 (terminated)	Iran 2005 (in force)
11.				China 1994 (terminated)	Finland 2006 In force)
12.				Laos 1994 (terminated)	Russia 2007 (in force)
13.				Malaysia 1994 (terminated)	Guyana 2008 (Signed but not ratified)
14.				Egypt 1994 (terminated)	Libya 2009 (Signed but not ratified)
15.				Slovakia 1994 (terminated)	Serbia 2011 (signed but not ratified)
16.				Turkmenistan 1994 (signed but not in force)	
17.				Argentina 1995	

				(in force)	
18.				Kyrgyzstan 1995 (in force)	
19.				Spain 1995 (in force)	
20.				Suriname 1995 (signed but not in force)	
21.				Uzbekistan 1996 (in force)	
22.				Jordan 1996 (in force)	
23.				Pakistan 1996 (in force)	
24.				Sri Lanka 1996 (in force)	
25.				Ukraine 1996 (in force)	
26.				Cuba 1997 (in force)	
27.				Morocco 1997 (in force)	
28.				Mauritius 1997 (in force)	
29.				Mongolia 1997 (in force)	
30.				Romania 1997 (terminated)	
31.				The Syrian Arab Republic 1997 (in force)	
32.				Turkey 1997	

				(terminated)	
33.				Yemen 1998 (signed but not in force)	
34.				Thailand 1998 (in force, note of receipt unavailable)	
35.				Bangladesh 1998 (in force)	
36.				Czech Republic 1998 (in force)	
37.				Sudan 1998 (signed but not in force)	
38.				Zimbabwe 1999 (signed but not in force)	
39.				Chile 1999 (signed but not in force)	
40.				India 1999 (in force)	
41.				Jamaica 1999 (Signed but not in force)	
42.				Cambodia 1999 (terminated)	
43.				Mozambique 1999 (in force)	

*Data collected from the Ministry of Foreign Affairs Republic of Indonesia as of October 27, 2015.

In addition to 65 BITs concluded by the Indonesian government, the country also binds to several multilateral investment-related treaties. By 2009, the member countries of Association of Southeast Asian Nations (ASEAN), including Indonesia, succeeded in concluding the ASEAN Comprehensive Investment Agreement (ACIA) which entered into force on March 29, 2012. Meanwhile, ASEAN also concluded FTAs with investment provisions with various countries. The agreements signed under the umbrella of ASEAN offer pre-establishment rights and include far-reaching commitments:

1. ASEAN-India Investment Agreement 2014
2. ASEAN –China Investment Agreement 2009
3. ASEAN-Korea Investment Agreement 2009
4. ASEAN-Australia, New Zealand Foreign Trade Agreement 2009
5. ASEAN Investment Agreement 2009
6. ASEAN-Japan Free Trade Agreement 2008
7. Indonesia-Japan EPA 2007
8. ASEAN-US Trade and Investment Framework Agreement (TIFA) 2006
9. ASEAN-Korea Framework Agreement 2005
10. ASEAN-India Framework Agreement 2004
11. ASEAN –Japan Framework Agreement 2003
12. ASEAN-China Framework Agreement 2002
13. ASEAN Services OIC Investment 1995
14. ASEAN –EU Cooperation Agreement 1981
15. RCEP (Australia, China, India, Japan, Korea Republic, New Zealand) 1980

World history of BIT started in 1959 when Germany concluded the first BIT with Pakistan. In the 1960s, 1970s, and 1980s BITs were concluded between a developed country as a capital exporter, and a developing country as a capital importer. From the first BIT in 1959 to the late 1980s, the number of BITs increased steadily but slowly. The primary reason was numerous expropriations of foreign-owned assets that took place in developing

countries.⁹⁹ This trend also occurred in Indonesia through the conclusion of its seven BITs with Denmark, Germany, Norway, Belgium, France, Switzerland, and the UK from 1968 to 1976. These BITs followed the typical of most BITs concluded at that time which was in line with the protection approach and included provisions on Fair and Equitable Treatment (FET), MFN, expropriation, transfer of funds and national treatment. This is because, as a developing country, Indonesia concluded BIT to create a more favorable investment climate to attract FDI. Scholars contend that Indonesia's motivations were straightforward: BIT was negotiated to build positive investment climate to attract FDI to contribute to economic development.¹⁰⁰

The Indonesian BITs table shows that the most active period of Indonesia BIT conclusion took place in the 1990s with 43 treaties. The treaty partners did not only come from developed countries. Instead, most of them came from developing countries. This trend is consistent with the trend identified by UNCTAD which saw the 1990s as a rapid increase in the number of BITs.¹⁰¹ The pace of negotiations quickened in the early 1990s, with the collapse of the Soviet Union. Indonesia concluded four BITs with former Soviet Union: Turkmenistan (1994), Kyrgyzstan (1995), Uzbekistan (1996), and Ukraine (1996). Besides, the trend was also influenced by the transformation of the Central and East European economies from socialism to free markets. This trend shows a way for these states to demonstrate their renunciation of Marxist economics and their commitment to a liberal economic regime. Indonesia concluded BITs with several Central and East European economies such as Hungary (1992), Poland (1992), Slovakia (1994), Romania (1997) and Czech Republic (1998).

⁹⁹ Jandhyala, Srividya, Witold Henisz, and Edward Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy,' *Journal of Conflict Resolution* vol. 55 (2011) 1047–1073.

¹⁰⁰ Interview with legal scholar.

¹⁰¹ UNCTAD, "Bilateral Investment Treaty 1959-1999," United Nations 2000, 1-2. Available at <http://unctad.org/en/docs/poitejiad2.en.pdf>, accessed at March 10, 2016.

The next explanation for the rapid increase of BITs in the 1990s is due to the South-South cooperation.¹⁰² The needs for regional integration through the exchange of resources, technology, and knowledge between developing countries and also to increase flows of FDI were materialized by the conclusion of BITs between countries of the global South. Even though the UN established the South-South cooperation in 1978, the idea of South-South cooperation only started in the 1990s. In Indonesia, the South-South cooperation in FDI appears through the conclusion of BITs with various countries from Asia, Africa, and Latin America. Among those BITs are with South Korea (1991), Vietnam (1991), Laos (1994), Malaysia (1994), Argentina (1995), Suriname (1995), Pakistan (1996), Sri Lanka (1996), Thailand (1998), Sudan (1998), Bangladesh (1998), Cambodia (1999), Chile (1999), Jamaica (1999), and Mozambique (1999). As a result of the collapse of Soviet Union; the transformation of the Central and East European countries; and Global South cooperation, the dividing line for BIT partners between developed countries as capital exporters and developing countries as capital importers are no longer holds true.

According to Lauge Polsen, the rapid increase of BITs in the 1990s was “the result of less-than-careful calculation of developing countries of the costs and benefits involved, and resulted in an outcome that was exceeding investor friendly.”¹⁰³ Globally, by the end of 1999, out of the total 1,857 BITs, 40 percent were concluded between developed and developing countries, 26 percent between developing countries, 14 percent between developing and Central and Eastern European countries, 15 percent between developed and Central and Eastern European countries, 6 percent between Central and Eastern European countries, and only 11 percent between developed countries.¹⁰⁴

¹⁰² South –South cooperation in this regard is referring to BITs involving two developing countries. By the end of 2005, the number of 'South-South' BITs had grown to 644, representing 26% of BITs overall.

¹⁰³ Lauge N. Skovgaard Poulsen. "Bounded Rationality and the Diffusion of Modern Investment Treaties" *International Studies Quarterly* (2013) Available at: http://works.bepress.com/lauge_poulsen/10/. Accessed April 21, 2016.

¹⁰⁴ UNCTAD, *Bilateral Investment Treaty*, 4.

The trend of BITs between developing countries continued in the 2000s. This phenomenon is happening as developing countries are increasingly becoming capital-exporting countries. The countries with the largest and fastest growing FDI outflows are those with the highest number of BITs for example China, Malaysia, India and the Republic of Korea.¹⁰⁵ From the 15 BITs that Indonesia concluded during the 2000s, most of them were with developing countries.

Despite the growing number of BITs and countries that sign them, it was only in early 2000s scholars began to study the effect of such treaties on FDI flows. Most of the early scholarship on BIT focused on tracing the history of such treaties in a descriptive way, lack of empirical studies of their effect on FDI. These are for example study by Alenfeld 1971; Bergman 1983; Mann 1982; Sornarajah 1986; UN 1988 and Voss 1981 which mostly describe specific provisions in the BITs. They concerned with normative questions such as whether BITs were cumulatively creating a new body of customary international law.

Scholarship that evaluating the success of BITs has focused mainly on whether BITs have been successful methods of attracting capital, promoting economic development and therefore reduce unemployment and encourage technology transfer as conducted by Salacuse and Sullivan in 2005. Peinhardt and Allee¹⁰⁶ affirm that BITs have not had an effect on investment flows between the US and the countries that it has negotiated these treaties. When looking at BITs overall, and not just the US BIT program, the evidence that BITs directly increase the flow of FDI between the two countries that have negotiated them is mixed.¹⁰⁷ Yackee's study finds no direct positive effect on BIT towards increasing FDI.¹⁰⁸

¹⁰⁵ UNCTAD, "South-South Investment Agreements Proliferating." *IIA Monitor* no. 1 (2006) 1. Available at http://unctad.org/en/docs/webiteit20061_en.pdf, accessed March 10, 2016.

¹⁰⁶ Clint Peinhardt and Todd Allee, "Failure to Deliver: The Investment Effects of United States Preferential; Economic Agreements," *The World Economy* (2012), 771, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9701.2012.01440.x/epdf>. Accessed March 10, 2016.

¹⁰⁷ Tom Ginsburg & Gregory Shaffer, "The Empirical Turn in International Legal Scholarship," 106 *American Journal of International Law* vol. 106. No.1 (2012). See also Jason W. Yackee, "Do Bilateral Investment Treaties Promote

In Indonesia, the question of FDI benefits is particularly emerged during the Asian financial crises in 1997 which somehow showed a connection between capital inflows and financial crises. Furthermore, there has been growing doubt if BIT influence investment decision.¹⁰⁹ This is evident in the case of Indonesia-Japan. The inexistence of BIT between the two countries does not prevent Japanese firms from being the third largest investor in Indonesia. Similarly, Indonesia and the US do not conclude BIT, but the US investment is the 6th largest in Indonesia.¹¹⁰ This rank suggests that American investors are not eager to take advantage of the protections of a BIT for their benefits. This fact confirms Yackee's finding saying that a survey of general counsels to US-based multinational corporations and found that these individuals did not believe that the presence of a BIT impacted their business.¹¹¹

b. Features of Liberal Investment Regime

The liberal nature of Indonesian foreign investment legal framework appears in the Law No. 25 of 2007 concerning Capital Investment (the Investment Law) as well as in BITs. Law No. 25 of 2007 replaced Law No. 1 of 1967 concerning Foreign Investment and Law No. 6 of 1968 concerning Domestic Investment. By merging foreign and domestic investment laws into a single Investment Law, the Indonesian government ends the differentiation treatment given for foreign and domestic investors. The Investment Law serves as *lex generalis* while BIT serves as *lex specialis*. Generally speaking, the key features of Indonesia's BITs are a broad definition of investments; absolute standards of treatment clauses; protection against expropriation; investor-state dispute settlement; and repatriation of funds. Noticeably absent from Indonesia's BITs are protection against wars, riots, or related

Foreign Direct Investment? Some Hints from Alternative Evidence," 2010, University of Wisconsin Legal Studies Research Paper No. 1114, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887.

¹⁰⁸ Yackee, *Do Bilateral Investment Treaties*.

¹⁰⁹ Interview with informant No 2 of American Chamber Jakarta Office.

¹¹⁰ Indonesia Investment Coordinating Board.

¹¹¹ Yackee, *Do Bilateral Investment Treaties*.

civil disturbance; state-state dispute settlement; provisions pertaining to human rights, labor rights, environmental protection and sustainable development.

Liberalization may concern both the pre-establishment and post-establishment phase of foreign investment. In both phases, investment liberalization has various segments. However, Indonesian BITs only adopts the admission clause or controlled entry model, meaning that investors do not enjoy market access rights but only post-establishment protection. This reveals Indonesia's willingness to retain its regulatory powers over the admission. Under the admission clause model, admission and establishment of investment are subject to the domestic laws of the host country and investors do not enjoy any right of establishment.¹¹² The implication is there is no obligation to the host country to eliminate discriminatory legislation affecting the establishment of foreign investment. Almost all the BITs apply to investments after they are established in the host country.

This part addresses post-establishment segment in the Indonesian Investment Law as well as BIT to prove the liberalization in Indonesian investment law regime.¹¹³ The point to be made here is that liberal related provisions seem to benefit the investors yet detrimental to the host states, complicated, unclear and open to broad interpretation.

All the BITs have a general obligation clause under which both parties undertake to protect the investments of an investor. Some of them are general obligations since they refer to all aspects of the investment in a host country, and many of them also absolute due to their independence from treatment given by domestic investors or investors from other countries.¹¹⁴ Four different standards are typically addressed under the general obligation clause: a guarantee of FET; guarantee of full protection and security; non-discrimination obligation; and guarantee of protection against unreasonable measures. Those standards are

¹¹² Interview with informant No 1 of the Indonesian Investment Coordinating Board.

¹¹³ Interview with informant No 2 of Indonesian Investment Coordinating Board.

¹¹⁴ Interview with informant No 1 Indonesian Investment Coordinating Board. Also interview with informant No 1 Ministry of Foreign Affairs.

part of protection commitment toward foreign investors and their investment. In addition to protection commitment, BIT also contains liberalization commitments such as matter related to expropriation, repatriation of funds, free movement of personnel, and investment arbitration.¹¹⁵

1. Expropriation

Chapter V Article 7 of the Investment Law stipulates that the government will not undertake any nationalization or take the ownership of the investors, unless by law. Article 8 further mentions that shall nationalization take place the government will provide compensation according to market value. Arbitration can be used only if the parties cannot reach agreement on the amount of compensation.

Similarly, all Indonesian BITs recognize the right of host countries to expropriate the property of investors, but there were variations regarding their content and scope. By and large, all BITs require that expropriation meet one or more of the following conditions: public interest purpose; non-discriminatory basis; due process of law; and compensation. Other than expropriation, Indonesian BITs use the words taking, nationalization, deprivation, and dispossession. The vagueness of expropriation provision can be seen in the Indonesia-UK BIT which reads:

“Investor of nationals or companies of either Contracting Party shall not be nationalized, expropriated, or subjected to measures having an effect on equivalent to nationalization or expropriation in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party and against compensation.”¹¹⁶

The challenge with interpreting such a provision is determining whether and to what extent covered assets are protected against administrative and regulatory actions that

¹¹⁵ Interview with informant No 1 Indonesian Investment Coordinating Board. Also interview with informant No 1 Ministry of Foreign Affairs.

¹¹⁶ Similar wordings can also be found in Indonesia BIT with Germany, India, China.

negatively affect them.¹¹⁷ Most of the expropriation clauses also silent on what assets are protected whether it also includes intangible forms of property, such as contractual rights, intellectual property rights, and government business concessions.

Arbitral tribunals in some cases recognized that both tangible and intangible assets might be the subject of expropriation.¹¹⁸ Without an explicit provision in the treaty, such expansive interpretation is considered as detrimental to the host state. It is challenging to determine legal issue of whether certain governmental measures such as changing policy that affect intangible rights of foreign investors can be considered as expropriation.¹¹⁹ In the Newmont case, the investors sued the Indonesian government for its policy to ban raw ores export. The government also requires the investors to build smelters within the country for processing raw minerals so that it can increase the value of the product as well as provide more employment for Indonesians. Newmont and Freeport protested this policy arguing that such requirements are not in line with the contracts with the Indonesian government. The proponents of economic nationalists see this case as an encroachment of foreign investors towards the government sovereignty. They argue that the role of the Indonesian government's for regulating foreign investment which affects the property rights of foreign investors cannot be regarded as expropriation.¹²⁰

Indonesia-Germany BIT:

“Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry interest at the average prevailing local short-term interbank market lending rate until the time of payment. Such amount shall be calculated according to internationally accepted evaluation methods. It shall be effectively realizable, freely transferable and in convertible currency. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or a comparable measure for the determination and payment of such compensation. The legality of any such appropriation, nationalization or comparable

¹¹⁷ Salacuse, *The Three Laws*, 394.

¹¹⁸ See *Fireman's fund Insurance Company v. United Mexican States*, ICSID Case No ARB (AF)/02/1

¹¹⁹ As indicated in Newmont case

¹²⁰ Interview informant No 2 of legal scholars.

measure and the amount of compensation shall be subject to review by due process of law.¹²¹

There was a debate about the standard of compensation for expropriation that was required by customary international law. Developed states proposed for prompt, adequate and efficient compensation as a contrary to the nationalist economic claim that expropriated investors were entitled to no more than national treatment. Indonesia-Malaysia BIT applies Hull formula which follows international minimum standard stating that the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation.¹²² Differs from Calvo doctrine which stipulates that compensation for aliens falls under the jurisdiction of a domestic host country court and national law instead of international law, Hull formula acknowledges that international law prevails over national law.

The compensation from expropriation in the Indonesian Investment Law is clearly much closer to Calvo doctrine, while BITs apply Hull formula. Even though the Investment Law uses domestic law approach in determining the amount of settlement, it gives access to international arbitration if there is no consensus on the amount. Hull formula strengthens the liberal character of the BITs. The problem is that arbitral tribunals have freedom to determine compensation. So, there is no guarantee that the tribunal will use Calvo doctrine approach unless explicitly stated in the BIT. The burden for Indonesia as a host country is that there is potential that the compensation awarded to foreign investors would be massive as happened in the case of Karaha Bodas Company. This reason might have motivated the Indonesian government to settle the case with Cemex and Newmont.

2. Repatriation of Funds

Repatriation of funds is regulated in Chapter V Article 8 of the Investment Law. It provides investors with the right relating to:

¹²¹ Similar provision can be found in other Indonesian BITs with Australia, United Kingdom, India, Finland

¹²² Indonesia-Malaysia BIT Article IV Expropriation.

the transfer and repatriation of funds, in foreign currency, on capital, profit, interest, dividends and other income, funds required for (i) purchasing raw material, intermediate goods or final goods, and (ii) replacing capital goods for continuation of business operations, additional funds required for investment, funds for debt payment, royalties, income of foreign individuals working on the investment, earnings from selling or liquidation of the invested company, compensation for losses, and compensation for expropriation.

Some BITs are very detailed on specifying the type of investments and returns on investment that can be repatriated. For example Indonesia-Australia BIT:

“Each Party shall permit the transfer freely and without unreasonable delay of such funds including:

- a. Capital and additional capital amounts used to establish, maintain or expand investments;
- b. Returns;
- c. Repayments on any loan and interest thereon;
- d. Proceeds from sales of shares of investors;
- e. Compensation for losses referred to in Article V;
- f. Proceeds received by an investor in case of sale of an asset or liquidation; and
- g. The earnings and other remuneration of personnel engaged from abroad who are allowed to work in connection with an investment in the territory of the other Party.”

Eliminating restrictions on the transfer of funds from the host states encourages free movement of capitals across borders. Indonesian BITs allow for almost unlimited freedoms for its investors to undertake these monetary transfers. That freedom is an important segment of liberalization. The impediment with relaxes repatriation requirements is that when Indonesia is facing chronic balance-of-payments difficulties which need to conserve foreign exchange to pay for essential goods, services or debt, the repatriation clause would hinder the country’s ability for payments.¹²³

The unfavorable effect of repatriation has been demonstrated during the 1997-1998 Asian crises. In Indonesia, the crisis was triggered by a sudden capital flight from the country which led the national currency, Rupiah, to depreciate significantly against the US dollar. A national banking crisis then followed the depreciation.

¹²³ Interview with informant legal scholar no1.

3. Free movement of personnel

While the BITs do not typically provide treatment standard for the investor's right to enter the country and employ foreign nationals, Indonesian Investment Law guarantees the free movement of foreign workers in Indonesia in Chapter VI Article 10 which stipulates that "investor may utilize foreign experts for particular positions and skills." Indonesia acknowledges the importance of the ability of investor's employees to freely enter the country and manage and operate the investment to create a favorable investment climate for foreign investors.

Free movement of foreign employees might create benefits when they fill vacancies which could not be filled with Indonesia due to insufficient skills. However, with the huge labor market in Indonesia, it is highly likely that those vacancies could be filled with Indonesian. Hence, in this situation free movement of foreign employees is considered to hinder the ability of Indonesian workers to get jobs amidst the increasing number of unemployment.

4. Investor-State Dispute Resolution

Chapter XV Article 32 of the Investment Law stipulates that every dispute shall first be settled amicably. If amicable settlement fails, the dispute shall be carried out through arbitration, or alternative dispute resolution, or in court. Settlement through international arbitration must be based upon an agreement between the parties. This article is silent on which arbitration is chosen, however by saying "based upon agreement" it is clear that consent must be given. In other words, the consent is not automatic.

All Indonesian BITs provide investor-state dispute resolution procedures. Most of the BITs offer the investors the selection of submitting a dispute to a domestic court in a host country or to international arbitration, mostly to arbitration administered by the ICSID.¹²⁴

¹²⁴ BITs require amicable settlement before arbitration, 5 BITs (Canada, Denmark, France, Netherland, Norway).

Such a choice is not in agreement with Calvo doctrines which stipulate that foreign investment in the host country is an internal affair, to be governed by domestic law, and under the jurisdiction of domestic court. Accordingly, investment disputes should be resolved through national court. On the contrary, foreign investors prefer international arbitration as a neutral side.

Indonesia's endorsement of investment arbitration acknowledges that it has gone in line with the international trend. The Indonesian government refusal to reserve domestic court as investment dispute resolution is considered the most distinctive character of liberalism in the BIT. The liberal economic theory assumes the protection of property through an autonomous legal system. Thus, a liberal international investment regime necessarily would require a body of international investment law. Some consider this as a risky choice since in many cases arbitral tribunals have rendered substantial awards against host countries of investment, and it appears that host countries have paid them.¹²⁵ Should the case settled, the settlement cost is also involved a significant amount of money or other arrangements which usually not make available for public as happened in Cemex and Newmont cases.

In lights of expropriation and investment arbitration, Indonesian BITs do not follow the Calvo doctrine which is believed as an expression of the nationalist economic theory. The doctrine holds that "special protection for foreign nationals under international law was inconsistent with the prerogative of the host state to subordinate economic activity to the national interests."¹²⁶ It is safe to conclude that Indonesian BITs consistent with liberal investment policy. Indonesia's strong desire to promote FDI has spurred it to go farther than national laws.

¹²⁵ Salacuse, *The Three Laws*, 398.

¹²⁶ *Ibid.*

c. Criticisms on Indonesia's liberalization

Even though liberalism is prominent in Indonesian BIT, foreign analysts often criticized saying that Indonesian foreign investment is not fully liberalized.¹²⁷ Instead, the country is ambivalence towards FDI liberalization. There are many indications to suggest that the government is not fully motivated to liberalize its foreign investment regime.¹²⁸ From the Indonesian government point of view, certain measures are needed in order to maintain a balance between promoting investment and promoting national interests. For example, acknowledging the negative impact of the free movement of foreign workers in Indonesia, Law No. 13 of 2003 concerning Manpower was enacted to set up restrictions for foreign workers. Chapter VIII Article 42 of the Law stipulates that foreign workers must obtain written permission from the Minister of Man Power. Furthermore, an employer who is an individual person, not a corporate, is prohibited from employing workers of foreign citizenship. Also, foreign workers can only be employed for a certain period of time and they are prohibited from holding a certain position such as personnel director, industrial relation manager, human resource manager, and personal development supervisor.

In addition to the Manpower Law, the government issued various regulations to limit the movement of foreign workers. For example, the Ministry of Manpower Regulation No. 12 of 2013 demanded that foreign workers shall be able to speak the Indonesian language. This Regulation was later revoked in June 2015 by Ministry of Manpower Regulation No. 16 of 2015 concerning Procedures for the Utilization of Foreign Employees. This Regulation requires a company to hire ten Indonesians for every foreign worker they hired, and non-resident directors and commissioners to hold a work permit.¹²⁹ These requirements are

¹²⁷ Interview with informant No 1 American Chamber of Commerce Jakarta.

¹²⁸ Interview informant No 2 American Chamber of Commerce Jakarta

¹²⁹ This regulation is later revoked by the government.

considered as a nationalist policy which intends to limit foreign workers involvement in Indonesian workforce and give more opportunity to domestic workers instead.

The next example of what so-called ambivalence is performance requirements to FDI to achieve certain economic objectives. Performance requirements are stipulated in the Investment Law as follows:

- Chapter VI Article 10 (2) requires investors to give priority to Indonesian human resources.
- Chapter VI Article 10 (3) requires investors to increase the competency of Indonesian workforce through training
- Chapter VI Article 10 (4) requires investor that employs foreign human resources to conduct training and transfer of technology to Indonesian employees.
- Chapter IX Article 17 stipulates investors that manage “renewable natural resources shall allocate funds progressively for the preservation of the area to attain the environmental standards as required by laws.”

Further, to avoid intrusion on domestic economy and policy making as well as threaten local investors, Indonesia applies various means to minimize those possibilities by restricting FDI in certain sectors through investment negative list and ‘interventionist and protectionist’ policy.¹³⁰

Indonesia adopts negative approach saying that it opens all industries to admission except those specified for exclusion. The negative approach reflects Indonesia’s willingness to retain regulatory control over investment activities in its territory according to national laws and policies. Reference to the national policy is vital to boost the public benefits of the investment activities for economic and social development goals, environment or other public ends.¹³¹ For the Indonesian government, the negative investment list is seen as a mean to stabilize FDI’s impact in the longer term.¹³² Leon E Trakman states that in dealing with FDI, states inevitably make strategic choices in regulating FDI which include choosing among

¹³⁰ Interview with informant No1 American Chamber of Commerce Jakarta.

¹³¹ Interview with informant X No 1 of Indonesian Investment Coordinating Board.

¹³² Interview with informant X No 1 of Indonesian Investment Coordinating Board.

competing measures of reform. Further, states prioritize among national interests that are not necessarily compatible in selectively seeking to attract FDI.¹³³ Negative investment list is the strategic choice chosen by the government.

There have been debates about the implications of the investment treaty regime for regulatory autonomy.¹³⁴ In making it responsive to the needs of both investors and home countries, often the investment treaty system limits sovereign powers of the host country government.¹³⁵ Consequently, questions arise on the needs for policy space and regulatory autonomy to protect public interests. It is well settled that “investment treaties and investment arbitration constraint to limit the policy choices of the host government.”¹³⁶

In short, the objections of BIT concern with two reasons: substantive and procedural. Substantively, generous protection and facilities given to FDI are considered as unfair towards domestic investor and the state as the host investor. Same treatment given to foreign and domestic investors is unjust and illogical for local investors. If the goal of investment activity is to create jobs, employment, improve national economic growth with the support of foreign investment, it becomes irrational and illogical if the BIT gives very relax provision on repatriation of profit and free flow of foreign employees.

Procedurally, investment arbitration is considered as endanger to state sovereignty since it gives chances to MNC to sue the government for its public policy making. To some extent, the fear of being sued has led to the cancellation or delay of the enactment of state regulations. Hence, MNCs have acquired the power to create primary rules of international law through arbitral decisions, at the cost of the host state’s regulatory autonomy.

¹³³ Trakman, *Foreign Direct Investment*, 12

¹³⁴ "Policy space" and "regulatory autonomy" are used here to refer to the freedom of action and administrative, policy or regulatory flexibility and discretion that states need to be able to initiate and make policies and laws, and to implement them and regulate the way individuals and businesses should conduct themselves in society.

¹³⁵ Dominic N Dagbanja, “The Limitation of Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective,” *Journal of African Law*, vol. 60, no. 1 (2016), 3.

¹³⁶ Ibid.

B. Arbitration

In the investment relation between the host government and investors, there are different interests involve. Host government expects taxes, revenues, technology transfers, and employment from investment activities, while at the same time apply law and regulations. On the other side, investors need assurances that the government will not unreasonably expropriate properties and that investment contract will be obeyed.

Arbitration is provided by the majority of investment agreement in the event of a dispute. It allows foreign individuals and foreign companies to sue host-state governments through arbitration proceedings and avoid domestic courts. Hence, there have been some suggestions that arbitration is the strongest assurance given to foreign investors. Consequently, the host state's national laws often become the object of scrutiny by arbitral tribunals. This investigation covers a wide variety of local measures including environmental protection, revocation of permits, measures adopted in response to economic crises, and termination of concession contracts and tax.¹³⁷ In their decisions, the tribunal often decides that government action, even though following the domestic law, breaches the treaty rules. This impact of investment arbitration has “generated controversies manifested in rising backlash against foreign investment regime globally.”¹³⁸

Interestingly, investment arbitration carries unique characteristic which significantly differs from commercial arbitration or State-to-State arbitration. The disputing parties in investment arbitration are always foreign investor (most of the time as a claimant) and host government (mostly as a respondent). Subsequently, the disputes often involve public law in addition to private law issues.¹³⁹ Unlike dispute settlement in the WTO where decision-making remains in the hands of member states through their representatives, investment

¹³⁷ GV Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007).

¹³⁸ Dagbanja, *The Limitation*, 3.

¹³⁹ Loukas A Mistelis, “Confidentiality and Third Party Participation *UPS v. Canada and Methanex Corp v. United States*,” in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Todd Weiler (London: Cameron May, 2005) 169.

arbitration decision making is given to arbitrators and lawyers hired by the parties. Therefore, the investment regime operation and application are delegated to private parties who are not accountable to states that created the regime.¹⁴⁰

Investment arbitration is seen in various perspectives. Firstly, it is an international legal dispute resolution mechanism. As a mechanism to solve disputes, arbitral tribunals do not only apply laws to particular facts but also focus on the process of interpretation of the laws. Arbitral tribunals deal with three different laws: national law, contract law underlying the investment agreement; and international law. In the context of FDI in Indonesia, the domestic legislation is Indonesian law as the place of investment; contract law directly related to the investors and the parties in the transaction; and international law especially in regard to the BIT, the ICSID Convention, and standard of treatment of FDI in customary international law.

Secondly, arbitration is seen as a business instrument which means that it serves the interests of business or that individual arbitrations should be conducted in some form of business-like fashion.¹⁴¹ This way, arbitration is deemed to be in favor of investor interest. Thirdly, arbitration is a mechanism to force host government to respect the contract. When proposing an investment, an investor has a certain amount of bargaining power to secure favorable treatment and condition for its investment because of the host government's desire to acquire the investment. However, once the investment is made, its bargaining power diminishes.¹⁴² Arbitration is a tool to ensure that commitments made by host state's government would be honored during the contract.

¹⁴⁰ Salacuse, *The Law of Investment Treaties*, 14.

¹⁴¹ Cedric Dupont, "Towards a New Heuristic Model: Investment Arbitration as a political System," *Journal of International Dispute Settlement*, vol. 7., no. 1 (2016), 24.

¹⁴² Sornarajah, *The International Law*.

1. Theoretical Debate

It is common for BITs and investment-related agreement to provide for recourse to international investor-state arbitration in the event of disputes due to a stigma that local courts may be slow, corrupt, bias or ill-equipped to resolve complex disputes.¹⁴³ Even though there is no definitive answer whether referral of investment disputes to international investment arbitration has the positive impact on investment decision, almost all Indonesian BITs and the Investment Law do recognize it.

Opponents of investment arbitration argue that it may endanger the development of domestic courts. Professor Tom Ginsburg suggest that the “decision to bypass domestic courts may reduce court’s incentives to improve performance by depriving key actors of a need to invest in institutional improvement.”¹⁴⁴ Mark Halle and Luke Eric Peterson also suggest that existence of international dispute resolution for foreign investment may inhibit the development of the rule of law in national courts by creating a regime that provides a privilege to FDI and removes investment disputes from local courts.¹⁴⁵ Moreover, International Institute for Sustainable Development suggests that investment treaties provide foreign investors with an “escape clause” which might reduce the push for broader improvement of domestic institutions and instead insulate domestic legal institutions.¹⁴⁶ Professor Ron Daniels suggests that investment treaties have overturned the development of rule of law institutions in the emerging countries because foreign investors resist from using the institutions and initiating rule of law reforms in the developing state. They prefer to

¹⁴³ Mark Halle and Luke Eric Peterson, “Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries,” Discussion Paper at Asia-Pacific Trade and Investment Initiative UNDP Regional Centre in Colombo December 2005 Dec 2005, at 23 available at <http://www.snap-undp.org/elibrary/Publications/InvestmentProvisions.pdf>. accessed at April 21, 2016.

¹⁴⁴ Tom Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,” *International Law Review of Law and Economic*, vol. 25 (2005) 107.

¹⁴⁵ Halle and Peterson, *Investment Provisions*, 23.

¹⁴⁶ Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy Making*, International Institute for Sustainable Development, November 2014, available at https://www.iisd.org/pdf/2004/trade_bits.pdf.

protect their interests by relying on the BIT.¹⁴⁷ Leon Trakman and David Musayelyan states that criticisms to investment arbitration fall into three categories: the potential to promote regulatory chill, the inherent bias in favor of developed states, and the quality of arbitral decisions.¹⁴⁸

On the contrary, the proponents of investment arbitration propose that investment arbitration serves as a complement to domestic courts. Hallward-Dreimer, a researcher from the World Bank, suggests that when BITs are used to show the intention to involve in institutional reform and adhere to the rule of law, offering opportunity to arbitrate investment claims could create a “race to the top” to adjudicate disputes impartially and fairly, instead of a “race to the bottom.”¹⁴⁹ Furthermore, Susan D. Franck asserts that investment arbitration and local courts have a harmonious connection. Promoting the rule of law in local courts not only establishes domestic judicial institutions, but it also supports confidence in the process of investment disputes resolution.¹⁵⁰ Susan D. Franck believes that investment arbitration complements domestic courts.¹⁵¹ First, if allowed in the BIT, investors may bring their claims in national court under appropriate circumstances. The benefit of this model is “it gives national court incentive to provide independent and impartial adjudication of the cases on their dockets.” Second, local courts offer vital support to the investment arbitration by its role in enforcing the awards.¹⁵²

¹⁴⁷ Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World 2*, University of Toronto, Faculty Workshop, Faculty of Law, 2004.

¹⁴⁸ Leon Trakman and David Musayelyan, “Caveat Investors-Where do Things stand Now”?, in *Alternative Visions of the International Law on Foreign Investment, Essays in Honour of Muthucumaraswamy Sornarajah*, ed. C.L.Lim (Cambridge: Cambridge University press, 2016) 78.

¹⁴⁹ Mary Hallward-Driemeier, “Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit-and They Could Bite,” Policy Research Working Papers. August 2003.

¹⁵⁰ Susan D. Franck, “Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development: Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law,” *Pacific McGeorge Global Business & Development Law Journal*, vol. 19 (2007) 368.

¹⁵¹ *Ibid.*, 368-370.

¹⁵² *Ibid.*

2. Arbitration Under the ICSID

ICSID Convention is designed to promote the settlement of disputes between a state and foreign private investors which intend to assist in the promotion of economic development.¹⁵³ Investment dispute arbitration administered by the ICSID is accounted for the largest number of investment disputes.¹⁵⁴ Article 25 of the ICSID Convention stipulates the jurisdiction of the ICSID tribunal as for legal disagreements resulted directly out of investments between a contracting State and the national of another contracting State. The parties to the dispute shall consent in writing to submit the dispute to the ICSID. The ICSID has several unique aspects, for example, its proceedings are free from the interference of local courts where the proceeding is conducted. Unlike other international arbitration which requires other instruments in recognition and enforcement, ICSID provides for automatic recognition of its awards in member countries upon the presentation of a copy of the award certified by the Secretary General.¹⁵⁵

Criticism towards ICSID is directed to the way the tribunal address interpretation of the legal texts.¹⁵⁶ Standard of treatments in BIT is mostly expressed in general and vague terms. As a result, they are very flexible and allow the application to a wide variety of situations.¹⁵⁷ In addition, a factual and legal complexity of investment transaction to which investment treaty are applied also complicates the matter.¹⁵⁸ Such a complexity explains why investment disputes administered by ICSID deal with interpretation issue such as the

¹⁵³ http://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf, down loaded at January 15, 2014.

¹⁵⁴ Ucheora Onwuamaegbu, "International Dispute Settlement Mechanisms-Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions," in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small,(Oxford: Oxford University press, 2010) 63.

¹⁵⁵ The ICSID Convention, Article 54.

¹⁵⁶ Given that the tribunals in ICSID consist of commercially trained international arbitrators who, arguably, lack adequate appreciation of domestic conditions, ICSID arbitration has the potential to produce over-extensive awards in favor of foreign investors at the expense of host states.

¹⁵⁷ This is for example umbrella clause, and Fair and Equitable Treatment (FET). Umbrella clause provides that the state parties undertake to observe any contractual obligation they may have entered into with an investor of the other state party. FET protects the investors from a significantly wider range of action. All these clauses have been subject to interpretation and scrutiny before ICISD where investors approach for arbitration in case a injury or loss accrues due to administrative action of a host state. Umbrella clause and FET if interpreted extensively could result in almost every case to be *arbitrable* before the ICSID.

¹⁵⁸ Salacuse, *The Law of Investment Treaty*, 139.

definition of investment; determination of national treatment, most-favored-nation principle; as well as fair and equitable treatment principle.¹⁵⁹

The applicable law for the interpretation of the treaty is international law. In investment interpreting agreements, tribunals apply the 1969 Vienna Convention on the Law of Treaties (VCLT), either because both state parties are signatories to the VCLT or because the rules of interpretation in VCLT represent customary international law.¹⁶⁰ Article 31 (1) of VCLT stipulates that “a treaty shall be interpreted in a good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” This article is often understood that in giving meaning to treaty provisions, one shall give more weight to the text of the agreement, not into the intention of the parties. The text comes first because giving more weight to intention may open up a possibility of an interpreter changing the text to suit what the interpreter consider to be the treaty’s purpose.¹⁶¹

Further, Article 31 (1) also carries a message that if the text alone cannot provide a precise meaning, it can be interpreted in its context which includes other provisions of the treaty and other materials outside the treaty.¹⁶² “Other provisions” or “other materials” include “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision.” Another example is “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” and also “any relevant rules of international law applicable in the relations

¹⁵⁹ Ian A. Laird, “A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*”, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Todd Weiler (London: Cameron May, 2005) 201.

¹⁶⁰ *Tokios Tokelés v Ukraine (Jurisdiction)* (2005) 20 ICSID Rev-FILJ 205, 216 (ICSID, 2004, Weil P, Proce & Bernardini).

¹⁶¹ J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, (Oxford: Oxford International Arbitration Series, 2012) 43.

¹⁶² *Ibid.* 58.

between the parties.”¹⁶³ While one of the objectives of BITs is to protect investment, the idea that using ‘object and purpose’ approach means exaggerating protection to FDI should never prevail. While the general aim of investment treaty is to extend and intensify parties’ mutual economic relations, a balanced approach between protecting investment and protecting host countries should be held.

In practice, the VCLT is only of limited use in giving guidance to a tribunal in its interpretive task. Problems arise because the VCLT’s rules of construction are capable of supporting a broad range of potential interpretations. The principles contained in the VCLT are not wholly useful in resolving difficult questions of BIT interpretation.¹⁶⁴ Although the VCLT Rules are applied and can provide helpful and clarifying guidance to the interpretation, the weight is given to the ordinary meaning of the text or the object and purpose of the treaty is fundamental and can be determinative of the outcome of the interpretation.¹⁶⁵

Critiques arise concerning the practice of arbitral tribunal in applying VCLT to interpret ICSID Convention or BIT.¹⁶⁶ Opponents of investment arbitration contend that ICSID tribunals increasingly extend protection to foreign investors by expanding their interpretation of BIT provisions.¹⁶⁷ This way, investment arbitration is judged to serve as the advocates of foreign investors from developed countries. Thus, tribunals often neglect host states’ interests and show pro-investors bias rather than pro-investment and development.¹⁶⁸

¹⁶³ Ibid.

¹⁶⁴ Campbell McLachlan QC, Laurence Shore, Matthew Weiniger, *International Investment Arbitration Substantive Principles*, (Oxford: Oxford International Arbitration Series, 2007) 68.

¹⁶⁵ Weemantry, *Treaty Interpretation*, 181.

¹⁶⁶ The misapplication of the general rule of treaty interpretation was also heavily criticized by Jan Paulsson in his dissenting opinion given in the case of *Hrvatska Elektroprivreda d.d. v. Slovenia*, in which Paulsson accused the tribunal of relying on a “commercial logic” in disregard of the general rule of treaty interpretation. See also: Robert Walde in *Interpreting Investment Treaties: Experiences and Examples*, in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, at 730 and 746).

¹⁶⁷ Surya, P Subedi, *International Investment Law: Reconciling Policy and Principle*, (Oxford: Hart Publishing, 2012) 115.

¹⁶⁸ Odumosu, *The Antinomies*, 345.

Using publicly available arbitral award as of January 1st, 2012,¹⁶⁹ Susan D. Franck proves that the respondent state's development status was not reliably associated with the outcome of investment treaty arbitration. Examining 144 awards that resolve disputes, Franck found that 57 cases (39.6%) were investor wins. By contrast, there were 87 cases (60.4%) where respondents won with no state liability. This fact suggests that claim of a pro-investor bias is inaccurate in the context of the final outcome. In addition, this fact also proves that investment arbitration does not disfavor host states. Thus, the fear that developing countries as hosts state of investment would be disadvantaged in investment arbitration proceeding is baseless.¹⁷⁰

3. Indonesia and the ICSID Arbitration

The following part discusses investment arbitration cases involving Indonesia. It seeks to demonstrate Indonesia's perspectives on investment arbitration and how the cases are seen not as just the culmination of Indonesia's struggle but also the main cause of Indonesia's shift against international foreign investment regime. This shall show how the issues concerned in each case related to the explanation of liberalization which gives rise to nationalist sentiment.

a. Cases

The legal cases before the ICSID are critical to the rise of backlash in Indonesia. It provides visible sign through which the shift takes place. The first case involving Indonesia was in 1980's filed by Amco Asia¹⁷¹; followed by Cemex Asia Holdings¹⁷² in 2004; Rafat Ali

¹⁶⁹ The research addressed two issues: whether there is a reliable statistical relationship between a respondent state's development status and which party won the treaty claim, and whether there is a reliable statistical relationship between a respondent state's development status and the amount awarded.

¹⁷⁰ Susan D. Franck, "Considering Recalibration of International Investment Agreements: Empirical Insights," in *the Evolving International Investment Regime*, eds. Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino (Oxford: Oxford University Press, 2011) p 80-89.

¹⁷¹ ICSID Case No. ARB/81/1.

Rizvi¹⁷³ in 2010; Churchill Mining¹⁷⁴ and Planet Mining¹⁷⁵ in 2012; and Newmont in 2014.

Whilst it remains an anomaly for host State to bring claims in ICSID, Indonesia experienced once in 2007 the Government of East Kalimantan Province launched a lawsuit against Kaltim Prima Coal¹⁷⁶ in a divestment case.

Amco Asia v. Indonesia 1981

This case is not related to BIT breach; rather it concerns concession agreement between a foreign investor and Indonesia, as a host state of investment. Amco, a US-owned company, and PT Wisma, an Indonesian company, entered into a Lease and Management Agreement in 1986. The agreement stipulates that Amco was to invest in, and managed a hotel named Kartika Chandra for the duration of thirty years. However, in April 1980 due to a management conflict particularly concerning the amounts due for Amco to PT Wisma under the profit-sharing contract, the hotel was seized by Indonesian army and police during the period March 31 to April 1, 1980. In July 1980, the Indonesian government revoked Amco's license to engage in investment activities in Indonesia. Consequently, on January 15, 1981, Amco filed a lawsuit before the ICSID arbitration base on the concession agreement claiming that the Indonesian government has unlawfully expropriated the company which created damages of not less than US\$ 15 million.

The (first) tribunal held that the takeover and revocation of the license violated the international law obligation to protect foreigners against illegal actions of host state's citizens. Moreover, the repeal of Amco business license was in violation of the principle of due process and therefore unjustified. Consequently, the tribunal ordered the Indonesian government to pay damages amounting US\$ 3,2 million. The award was calculated according

¹⁷² ICSID Case No. ARB/04/3.

¹⁷³ ICSID Case No. ARB/11/13.

¹⁷⁴ ICSID Case No. ARB/12/14

¹⁷⁵ ICSID Case No. ARB/12/40.

¹⁷⁶ ICSID Case No. ARB/07/3.

to the principle applicable in cases of failure to comply with contractual obligations.¹⁷⁷ In addition, the tribunal also applied a 6% rate of interest, prescribed by Indonesian law, which runs from the date of the request for arbitration until the time of payment.

Dissatisfied with the decision, Indonesia exercised its right to seek annulment of the award. The annulment committee annulled the award as a whole on the grounds that the first tribunal did not apply Indonesian law and to state the reasons about the episode on revocation of Amco's license. In 1987, the dispute was resubmitted to a different tribunal which held the first tribunal findings that the act of the army and police was in breach of international law, that it was the responsibility of Indonesia to compensate. The second tribunal in 1990 rendered monetary award amounting US\$ 2,696,330 to Amco.

Cemex Asia Holdings v. Republic of Indonesia

Cemex Asia Holdings is a Singaporean subsidiary of the Mexican cement company. The dispute was under the 1987 ASEAN Treaty.¹⁷⁸ Cemex claimed that the Indonesian government had breached the 1998 sale-purchase agreement. In 1998 the Indonesian government sold 14 percent of Semen Gresik to Cemex. The conditional sale and purchase agreement included a 'put option' that gave the government the option of selling its remaining 51 percent stake in the company to Cemex by October 2001. During 1998-1999 Cemex acquired an additional 11.5 percent stake by buying shares on the Jakarta Stock Exchange. Thus, the government held 51 percent of Semen Gresik shares, while Cemex owns 25.5 percent and private investors held 23.5 percent.

However, strong opposition from the Padang community,¹⁷⁹ parliament (local and national), local government, the management, and workers has prevented the central

¹⁷⁷ Amco award 1984 Award, para.265.

¹⁷⁸ The official name is the 1987 ASEAN Agreement for the Promotion and Protection of Investments. The 1987 ASEAN Treaty and the 1998 Framework Agreement on the ASEAN Investment Area then consolidated and revised by the 2009 ASEAN Comprehensive Investment Agreement (ACIA).

¹⁷⁹ Padang is the capital city of West Sumatra province.

government from concluding the arrangement.¹⁸⁰ One of the reasons for the opposition was that Cemex only paid \$1.38 per share for its stake in Semen Gresik which was considered as below the fair value. Consequently, those opponents began to demand the spin-off of Semen Padang from holding company Semen Gresik.¹⁸¹ After a long negotiation, the government finally accepted the request and called an extraordinary general meeting of shareholders to establish a new management team at Semen Padang in May 2003. The new management team executed the spin-off which was opposed by Cemex which later sought to pressure the government to realize its commitment or to purchase back its minority share in Semen Gresik.

The sale-purchase agreement stated that Cemex could only sell its shares if the Indonesian government agreed. Boediono, the then Coordinating Minister for the Economy and Sri Mulyani Indrawati, the then Minister of Finance indicated that the government had no money in the 2006 budget to exercise the right to buy Cemex's stake. On the contrary, the State Enterprises Minister: Sugiharto,¹⁸² insisted for the government to acquire the shares which could be done by a consortium of state-owned enterprises. Parliament later pressed the government to maintain its majority ownership in Semen Gresik, ensuring that Minister Sugiharto's plan to purchase Cemex's stake would be materialized.

Negotiation between the government and Cemex did not reach an agreement. As a result, Cemex initiated an arbitration proceeding before the ICSID in 2004 for breach of contract due to the inability of the Indonesian government to buy the majority shareholding and 'de-facto expropriation' under the 1987 ASEAN Treaty.¹⁸³ The proceeding did not

¹⁸⁰ Tony Prasentiantono, "Political Economy of Privatization of State-Owned Enterprises in Indonesia," in *Business In Indonesia*, eds. M Chatib Basri and Pierre Van Der Eng, (Singapore: ISEAS, Yushof Ishak Institute, 2004) 142.

¹⁸¹ PT Semen Padang is a key subsidiary of Semen Gresik located in Sumatra. In 1995, the government merged Semen Gresik, Semen Padang and Semen Tonasa under a new holding company (also called Semen Gresik) to enable them to compete more effectively with private firms, especially Indocement.

¹⁸² He had demonstrated a general disdain for privatization.

¹⁸³ ICSID Case No. ARB/04/3.

continue because both of the parties agreed to settle the dispute. The settlement was recorded in the form of an award dated February 23, 2007, as requested by the parties. Part of the agreement was that Cemex agreed to sell its 25,6 percent shares to a local company, the rest of the detail of settlement has not made public.

*Rafat Ali Rizvi v. Republic of Indonesia*¹⁸⁴

Rafat case is the first award related to Indonesia BIT in ICSID. The claimant invested in Indonesia through a Bahamas-incorporated company through an indirect shareholding in three Indonesian banks. The claim arising out of the Government's bailout of Bank Century in which the claimant allegedly held shares. The basis for this claim is Indonesia-United Kingdom BIT. In 2012, Rafat contended that the Indonesian government has indirectly expropriated his investment, breached fair and equitable treatment, and committed denial of justice. The key issue is whether the claimant's investment was properly 'granted admission' under the Indonesia-UK bilateral investment. The arbitral proceeding was limited to address the meaning of Article 2(1) of the BIT which required the investments to have been granted admission in accordance with Foreign Capital Investment Law to be protected under the BIT.

Indonesia objected by stating that on the BIT's requirement that investment is granted admission under the Law No. 1 of 1967 or any law amending or replacing it. It further said this meant that the treaty only covered investments approved by the Indonesia Investment Coordinating Board (BKPM). The BKPM was set up in 1973 to regulate foreign investment in certain sectors which do not include insurance, upstream oil and gas, and banking. Indonesia, therefore, argued that the BIT did not protect foreign investment in areas not administered by BKPM. Besides, Indonesia also claimed that both the BIT and the 1967 law

¹⁸⁴ ICSID Case No. ARB/11/13

were limited to direct investment. Rafat's shares in the bank could not be categorized into a direct investment.¹⁸⁵

The claimant asserted that the investment treaty did not specifically appoint the BKPM or a specific admission procedure. It further argued that actions by Indonesia's banking regulator, prosecutors, and courts that recognized and treated him as a shareholder in the bank considered to a de facto grant of admission as a foreign investor. In addition, the claimant cited ICSID case suggesting that tribunals should refrain from analyzing bureaucratic requirements and instead focus on substantive approval under the relevant domestic law.¹⁸⁶

The tribunal found that the claimant had failed to prove that his investment in the bank received regulatory approval in accordance with Law No. 1 of 1967 concerning Foreign Investment required under the Indonesia-UK BIT. Thus, the tribunal rejected Claimant's claim of protection under the most-favored-nation article of the BIT.¹⁸⁷

*Churchill Mining v. the Republic of Indonesia; and Planet Mining Pty Ltd v. the Republic of Indonesia*¹⁸⁸

Churchill and Planet Mining collectively invested in an Indonesian company called PT Indonesian Coal Development (PT ICD) in exploration and exploitation of coal in East Kutai Regency. Since PT ICD only had licenses for general mining and supporting services, it entered into various cooperation agreements, investor's agreements and pledge of shares contracts with a company called Ridlatama Group which had the exploration and exploitation licenses of the East Kutai Coal project. Churchill Company started its business in 2008 by acquiring a 75 percent shares in its Indonesian partner, Ridlatama Group. Ridlatama held

¹⁸⁵ ICSID Case No. ARB/11/13

¹⁸⁶ ICSID Case No. ARB/11/13.

¹⁸⁷ ICSID Case No. ARB/11/13, paras. 196-198

¹⁸⁸ ICSID Case No. ARB/12/14 and 12/40.

permits for about 35.000 hectares of land previously owned by another local company:

Nusantara Group.¹⁸⁹

The government of East Kutai accused Ridlatama falsified documents of its mining operation and therefore its license was revoked. Consequently, Nusantara Group then was said to have the legal permits. As the majority share owner Churchill filed a request for arbitration against the Indonesian government, alleging that Indonesia unfairly expropriated their interest in the East Kutai Coal Project, and therefore breached its obligations under the UK-Indonesia BIT. Churchill's Australian subsidiary Planet Mining Pty. Ltd. also has a shareholding in PT IDC through 5 percent shares in the company.¹⁹⁰ Since Planet Mining also had an interest in the Coal Project, it also filed for arbitration at ICSID under the Australia-Indonesia BIT. The Churchill and Planet arbitrations had been consolidated into a single proceeding.¹⁹¹

The Indonesian government claimed that it did not give consent the ICSID arbitration of the dispute; therefore, the tribunal had no jurisdiction. It further claimed that the arbitration clause "shall assent" and "shall consent" in both BITs did not contain the consent to submit the dispute to ICSID. Indonesia also argued that in case the arbitral tribunal found that Indonesia had consented, the tribunal would lack jurisdiction. The investment made by Churchill was not covered by the BIT because of various violations of Indonesian law.¹⁹²

In Churchill, the tribunal held that Indonesia had given its advance consent in the BIT after observing the preparatory materials of the Indonesia-United Kingdom (UK) BIT. It further decided to have jurisdiction over the case. On the other hand, in Planet Mining case

¹⁸⁹ COMPANY PROFILE - Churchill Mining PLC, <http://www.churchillmining.com/corporate/company-profile> accessed November 16, 2015.

¹⁹⁰ Ibid.

¹⁹¹ Churchill pre-tax losses narrow | Interactive Investor, <http://www.iii.co.uk/stockmarketwire/82344/churchill-pre-tax-losses-narrow>, accessed November 16, 2015.

¹⁹² ICSID Case No. ARB/12/14 and 12/40.

the tribunal found that the Indonesia-Australia BIT did not contain any advance consent since consent shall be given by virtue of BKPM's approval.

On December 6, 2016 the ICSID tribunal rendered a decision that rejected Churchill's claim for compensation against Indonesia. Instead, the tribunal stated that the permit's revocation was in compliance with the necessary procedures. Consequently, the tribunal ordered the claimant to pay a total of \$ 9.45 million in costs to the country.

*Newmont Nusa Tenggara v. the Republic of Indonesia*¹⁹³

The Indonesian Law No. 4 of 2009 concerning Mineral and Coal (the Mining Law) requires every mining company to build a smelter.¹⁹⁴ Article 170 of the Law stipulates that down streaming shall be completed no later than five years after the Law is enacted, which would mean in 2014. After this specified time, the export of raw minerals would be banned. The objective was to enable the country to grow into an industrial economy, create more added-value and open up more employment opportunity. On January 11, 2014, series of regulatory changes took place. Copper mining companies will receive an export license for copper concentrate if they show progress with the building of smelters. The government also introduced export tariffs on copper concentrate from 25 percent in 2014 to 60 percent in 2017. Consequently, the two biggest copper miners in Indonesia, Freeport, and Newmont, protested. Freeport negotiated the matter with the government and reached a compromise. The company pledged over US \$ 100 million for the construction of a smelter and soon received its export license.

On the contrary, negotiation with Newmont was more difficult. It argued that building a smelter would be 'uneconomic' and that the mining contract with Indonesia from 1986 safeguarded it from such activities. In July 2014, Newmont claimed that Indonesian

¹⁹³ ICSID Case No. ARB/14/15

¹⁹⁴ The economic slowdown and uncertain global environment have obstructed Indonesia's policy to push the country's mining sector to invest in metal smelters and downstream industries. Falling exports and the depreciation of the Indonesian rupiah motivated the government to ban shipments of unprocessed metal minerals.

government's plan to implement a ban on unprocessed mineral exports would violate the Indonesia-Netherlands BIT. This case was presented four months after Indonesia announced it would terminate its BIT with the Netherlands. Newmont strongly opposed the new policy saying that the new law had led the company to stop its operation at the *Batu Hijau* copper and gold mine, leading to hardship and economic loss. Newmont finally discontinued and withdrawn the arbitration after concluding a Memorandum of Understanding (MoU) with the Indonesian government whereby the company was given numerous concessions concerning export duties. It then received its export license and can export for significantly lower tariffs. The negotiation process has been done in private¹⁹⁵ and again, as happened in Cemex case the agreement is not made public.

*The Government of the East Kalimantan Province vs. Kaltim Prima Coal.*¹⁹⁶

Even though in most cases investors serve as claimants, the ICSID also deal with few cases where host state filed a claim against foreign investors. The Government of the East Kalimantan Province is one of the examples. This dispute was about a shareholding issue in a mining contract for coal in East Kalimantan Province. The contract was entered into between the Indonesian government and Kaltim Prima Coal (KPC), a joint venture owned by BP and Rio Tinto. As the New Mining Law stipulates that the joint venture shareholders are required to offer 51 percent of the shares either to the government or Indonesian parties, the provincial government of East Kalimantan expressed its interest in buying all the 51 percent shares. However, the joint venture shareholders offered a percentage to the Central Government, which provided 31 percent of it to the provincial government and another party.

In July 2002, the Central Government decided that it would purchase 51 percent of the PT KPC shares and allocate 31 percent of the PT KPC shares to the claimant and the

¹⁹⁵ The case of Newmont Mining vs. Indonesia: Netherlands-Indonesia BIT rolls back implementation of new Indonesian Mining Law, 12 November 2014, available at: <https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law>, accessed November 16, 2015.

¹⁹⁶ ICSID Case No. ARB/07/3

Regency, retaining the remaining 20 percent shares. The provincial government rejected this decision and demanded 51 percent of the shares for itself and the Regency. The East Kalimantan government brought a claim in ICSID alleging that the allocation was a breach of the terms of the mining contract and the Investment Law. In the jurisdictional stage, the tribunal cited that Article 25(3) of the ICSID Convention requires that in order to arbitrate, subdivision or agency of contracting states must obtain the approval of the state unless that state notifies the ICSID center that approval is not required. The East Kalimantan government failed to show that it has received such an approval from the Indonesian government, as a consequence the tribunal held that it lacked jurisdiction.

This case is resulting in conflicting rights to mine coal in the same territory¹⁹⁷ and adds up the list of the impact of the 2001 decentralization policy on the investment activities. Decentralization creates uncertainties in investment regulations resulted from the power given to provincial and district administrations to issue mining rights and mining business permits. Since the implementation of decentralization, land disputes and overlapping permits for plantations and mining operations are a common problem as various government agencies use different maps and data.¹⁹⁸

b. Indonesia's Concerns on Investor-State Arbitration

Table III.2: Indonesia's Investment Arbitration Cases

Case Name	Legal Basis	Merit of the Dispute	Claim	Rules & Institutions	Outcome	Award
<i>Amco Asia v. Indonesia</i> Year	Lease and Management Contract	The seizure of the hotel by Indonesian	US \$ 15 million financial damages	ICSID Rules ICSID Center	First award: Investor won Second	US \$ 3,200,000 The first

¹⁹⁷ <http://investmentpolicyhub.unctad.org/ISDS/Details/682>

¹⁹⁸ Heriyanto, the head of legal section Directorate General of Minerals and Coal, Ministry of Energy and Mineral Resources, as told to the Jakarta Post, available at: <http://www.thejakartapost.com/news/2015/11/18/indian-mining-co-sues-indonesia-581-million.html>, accessed at 7/11/2016.

registered: 1981		army and police. Revocation of License			award: Investor won	award was annulled as a whole US \$ 2,696,330
<i>Cemex Asia v. Indonesia</i> Year registered: 2004	The 1987 ASEAN Treaty Sale-purchase Agreement	Shares and option to purchase shares in a state-owned company	US \$ 400 million	ICSID Rules ICSID Center	Settled (no record can be found on the details of the settlement)	Settlement: the government bought Cemex's shares
<i>Rafat Ali Rizvi v. Indonesia</i> Year registered: 2010	Indonesia-United Kingdom BIT	Shares	US 75 million	ICSID Rules ICSID Center	The tribunal declined jurisdiction	
<i>Churchill Mining v. Indonesia Planet Mining v. Indonesia</i> Year registered: 2012	Indonesia-UK BIT Indonesia-Australia BIT	Revocation of licenses	US\$1.05 billion	ICSID Rules ICSID Center	The tribunal held jurisdiction The claim was rejected.	The tribunal awarded \$ 9.45 million in costs to Indonesia.
<i>Newmont v. Indonesia</i> Year: 2014	Indonesia-Netherland BIT 1994	Objection to regulation concerning export ban unprocessed minerals		ICSID Rules ICSID Center	The arbitration was discontinued and withdrawn	Settlement: reduced applicable tax, postponed smelter building obligation
<i>East Kalimantan v. PT Kaltim Prima Coal</i> Year registered: 2007	divestment requirement imposed by the concession contract	Divestment requirements in the concession contract		ICSID Rules ICSID Center	The tribunal declined jurisdiction	

The cases involving Indonesia before the ICSID cannot adequately prove the criticism on investment arbitration regarding extending protection to foreign investors by expanding their interpretation on BIT, and should not be used as the reason for denunciation from the

ICSID Convention. From the cases described above, it can be argued that Indonesia's performances in ICSID arbitration are not particularly poor. From the six cases, Indonesia was only lost one in *Amco* with relatively small financial compensation to be paid about 1/3 of the claim. The ICSID tribunal even proves its fairness when dealing with *Rafat* case by decline jurisdiction due to the frivolous claim brought by the claimant. Similarly, in the case of *Government of the East Kalimantan Province* the tribunal was right in declining jurisdiction since the central government had not designated the provincial government to arbitrate which means consent was not given. Because the parties reached settlements in *Cemex* and *Newmont*, it is not possible to evaluate the tribunal's reasoning in those two cases. In *Planet Mining* case, the tribunal refused jurisdiction over the case. The point to be made here is that Indonesia can defend its interest before the ICSID investment arbitration in proper manners as proven by its victory in *Churchill* case.

The Indonesian experience before the ICSID seems to affirm the empirical study conducted by Susan D. Franck through a rigorous analysis of 52 investment arbitration awards. She found out that of the 21 cases that investors won on the merits, damages were not high; while 13 resulted in damages being awarded between \$ 1 and \$ 5 million; in 4 cases investors have been granted between \$ 5 and \$ 10 million, and in only four others were investors awarded more than \$ 10 million. Furthermore, awards typically are below the amount claimed; more than 80% of awards granted less than 40% of the damages sought.¹⁹⁹ Furthermore, in 2012 Franck examined 159 final awards from prior to January 2012. The research did not see any reliable links between investment arbitration outcomes and development status.²⁰⁰ This refutes the claim that investor arbitration favors developed country over developing ones.

¹⁹⁹ Susan D. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration," *North Carolina Law Review*, vol. 86 (2007) 59-61.

²⁰⁰ Susan D. Franck, Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes, *Virginia Journal of International Law*, vol. 55 (2014) 60.

Even though lost in *Amco*, bias towards investors does not seem to exist. In *Amco*, the tribunal found Indonesia unlawfully expropriated the hotel and license. It should be noted that losing in one case does not establish a pattern of bias. The case was quite evident with the seizure of the hotel by the army and police. In theory and practice, avoiding an unlawful direct expropriation is quite easy. Expropriation shall be conducted after the requirements for lawful expropriation are fulfilled, including providing compensation to the investors.²⁰¹ The Indonesian government did not do what it is required. For the investor, *Amco* arbitration was frustrating since the proceeding took about ten years to complete, yet culminating a relatively small of financial award. The tribunal's reasoning over the damage was entirely fair. It included compensation for the 'general disturbance' suffered by *Amco* due to the takeover, as well as for the profits lost as a result of license revocation. The profit lost was calculated in two time periods, the first one immediately following the repeal of the license until 1989, and the second period starting with the year of the award (1990) until the end of the Lease and Management Agreement in 1999.

Even though ICSID arbitral tribunals have been fair in dealing with Indonesian cases, the raising concerns about investment arbitration in respect to state's sovereignty particularly the regulatory chill effect is plausible. Fear of arbitration might cause reluctance to enact regulations and design policies to advance legitimate public interests. This concern is pointed out by Kaushal who argues that developing countries traded part of their regulatory sovereignty for the enhanced protection of FDI.²⁰² Brower and Blanchard respond to sovereignty issues by saying that voluntary acceptance of binding international obligations that constrain domestic actors is a fundamental principle of international law. The commitment to arbitrate implies that a state binding itself by agreement in relation to a

²⁰¹ Junianto James Losari and Michael Ewing-Chow, "Reflective or Reactionary? Indonesia's Approaches to International Investment Agreements and Recommendations for the Future," *Transnational Dispute Management*, vol. 12, no. 1 (2015).

²⁰² Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime," *Harvard International Law Journal*, vol. 50 (2009) 491.

question of domestic policy. In international investment regime, states agree to limit their discretion in the treatment of foreign investors in exchange for benefits that include increased attractiveness to foreign capital.²⁰³

A Similar argument is articulated by the informant from the Ministry of Foreign Affairs who argues that using sovereignty to reject investment arbitration is useless. Indonesia exercises its full sovereignty in the treaty negotiating process. It has full freedoms to agree or disagree on the provisions. However, by ratifying the treaty, the country binds itself and lost part of its sovereignty. In fact, the international law that rules the state cannot invoke even the most important domestic interest to override their international obligation is not unique to international investment law. Thus, Brower and Blanchard contend that the use of sovereignty constraint is a challenge not only for investment arbitration but also to foundational principles of international law in general.²⁰⁴

Investment dispute is heavily a 'regulatory' conflict, as opposed from a purely commercial dispute that arises from a sovereign act of the State. Through consent to arbitrate, the state gives arbitrators authority to interpret and apply investment treaties to resolve disputes in the regulatory sphere. Investment dispute is also different from arbitration under customary law in between states since investment arbitration is individualistic and not reciprocal in nature. Hence, in investment arbitration, it is a legitimate governmental activity that is being examined, and most of the time it involves matters of public interest as appears in *Cemex* and *Newmont*.

In *Newmont* case, the investor brought a claim against the government's law banning any export of raw minerals. Even though there is a possibility to export, it subjects to the current progressive taxes if the company commits to build smelters to process the minerals before export. This new obligation, according to *Newmont*, can be classified as indirect

²⁰³ Brower and Blanchard, *What's in a Meme?*, 721-722.

²⁰⁴ *Ibid.*, 722.

expropriation. What is clear in this case is Indonesia's effort to shift its policy from getting investment in an export of raw materials changes into the investment that contains added value. Government officials and NGO activists see this as how investment arbitration limits the policy space and hinder the sovereignty of Indonesia. From the investor's point of view, the Indonesian government action to pass legislation to ban export raw minerals is considered as the unpredictability of government conduct that creates perceived risk for Newmont's investment. The requirement to build a smelter and the increased tax could increase associated transaction costs.

Both in *Newmont* and *Cemex*, Indonesia has to answer to the claims from the investors to protect legitimate public interests. The procedure is very costly and drawn-out the state risk being bound an arbitrary negative award. The adverse consequences might be the reason for the government to finally choose to settle the cases instead of continuing the arbitral proceedings. In investment arbitration, the state faced with adverse decisions often pay costly damage awards and may encounter lawsuits from similarly situated investors,²⁰⁵ signal a potential economic cost of investment arbitration may cause 'regulatory chill' on national regulation.²⁰⁶ The example of regulatory chill is evident from Indonesia's withdrawal of its law on the ban on open-pit mining in protected forests in 1999 in response to a threat by foreign-owned mining companies to sue the country before the ICSID.²⁰⁷

Regulatory chill raises considerable legitimacy concerns.²⁰⁸ The arbitration awards have a direct impact on the state economy and the lives of their citizens. The current FDI governance model arguably frustrates the capacity of States to provide for the quality of regulation that its citizen demand for the regulatory choice that was initially available.

²⁰⁵ Barnali Choudhury, "Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights," *Alberta Law Review*, vol. 46 (2009) 983-1002.

²⁰⁶ Jeffrey Waincymer, "Balancing Property Rights and Human Rights in Expropriation", in *Human Rights in International Investment Law and Arbitration* eds. Pierre Marie-Dupuy et al. (Oxford: Oxford University press, 2009) 275.

²⁰⁷ See *Newmont* case.

²⁰⁸ Trakman and Musayelyan, *Caveat Investor*, 78.

Therefore, the democratic legitimacy of state law and policies are challenged.²⁰⁹ The ability of a state to regulate activities in its territory is not only an essential element of sovereignty but also a vital tool to pursue its development goals.

Newmont case garnered particular attention because the claimant challenged the Indonesian government enactment of a mining regulation implemented for public policy objectives. There was a fear that arbitral tribunals might use the doctrine of indirect expropriation to require states to compensate investors for generally applicable regulation that cause a loss.²¹⁰

From Newmont point of view, the regulation which requires the establishment of smelter adversely affects its investment project by raising costs. The regulatory taking doctrine requires host state to compensate foreign investors for regulatory measures that negatively affect ongoing investment projects. In *Newmont*, even though there was no direct expropriation, state regulation has nonetheless deprived the investment of its economic values, or of a substantial portion of it. Hence, it is the obligation for the state to compensate the investors.²¹¹ The regulatory taking is an important safeguard for investors but constrains the ability of the host state to exercise its sovereignty to implement regulation necessary for economic development.²¹²

Generally speaking, Indonesian BITs only spell out basic requirements of expropriation without specifying what considered as expropriation. Instead, they only mention the condition under which expropriation is allowed; how to calculate and pay the compensation. Indonesia-Netherland BIT as the legal basis for Newmont claim regulates expropriation in Article 5 as follow:

²⁰⁹ Abdulkadir Jaelani in Kedaulatan dalam Perjanjian Investasi Internasional (Sovereignty in Investment Treaty), *KOMPAS* Newspaper, May 27, 2015.

²¹⁰ Interview BKPM.

²¹¹ Lorenzo Cotula, "The Regulatory Taking Doctrine, International Institute for Environment and Development," available at: <http://pubs.iied.org/pdfs/17014IIED.pdf>, accessed May 6, 2016.

²¹² *Ibid*.

Nationals of either Contracting Party shall not be deprived, directly or indirectly, of their investments, nor shall their investments be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation in the territory of the other Contracting Party except by measures taken for a public purpose related to the internal needs of the expropriating Contracting Party, which shall be taken under due process of law and shall not be discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given. The measures shall be taken against full, prompt and effective compensation. Such compensation shall amount to the market value of the investment expropriated prior to the moment when the decision to expropriate is announced or becomes known and shall include interest at a normal commercial rate until the date of payment. Such amount shall be calculated according to internationally acknowledged evaluation methods. Compensation shall be made without delay, be effectively realizable and freely transferable in any freely convertible currency.

The issue of what constitutes as expropriation has been one of constant debate. States have recognized the importance of attracting foreign investment and thus do not want to be perceived as threatening those investors using expropriation. Hence, the typical form in which they occur in *Newmont*, *Cemex*, *Churchill* and *Planet Mining* cases is an ‘indirect expropriation.’ Indirect expropriation can be in the forms of state interferences, the issue whether legal liability can arise because of omissions is of particular importance. In principle, the doctrine of State responsibility acknowledges that a failure to act can lead to a state’s liability as much as can certain actions.²¹³ Typically arbitral tribunals rely on a combination of actions and omissions: the state does not issue a necessary license in the first place or whether it grants the license to withdraw it shortly after. The doctrine of indirect expropriation came into the spotlight with the increase of cases involving states taking measures in connection with their rights to regulate and exercise their sovereign powers. The lack of guidelines as to what exactly constitutes an indirect expropriation in combination with an evolving case law which is not always coherent has caused concerns as to both the predictability and fairness of investment arbitration towards host states.²¹⁴

International law defines expropriation very broadly. First, the investor’s property rights that can form the object of confiscation are defined very broadly cover any rights and

²¹³ Sornarajah, *The International Law*, 365.

²¹⁴ *Ibid.*, 368.

interests that have monetary values. As a result, host state action that breaches investors' contractual rights (arising from concession agreements) has been treated as taking of property.²¹⁵ Second, to determine whether a taking has taken place, international law considers the impact of government action rather than its intention. Consequently, where regulation affects an investment project in a very significant way, it is treated as a case of expropriation, even if asset ownership remains vested with the investor. This is what considered as regulatory taking or indirect expropriation.²¹⁶

Using regulatory taking doctrine, the case of *Cemex* (breach of the sale-purchase agreement and establishment a new management team), *Newmont* (imposition of taxes in violation of agreed commitments), and *Planet and Churchill Mining* (revocation of licenses) would fall under the category of expropriation. This broad interpretation of expropriation is apparently confirmed by Indonesian BITs which refer to both direct and indirect expropriation. It is, therefore, reasonable why the Indonesian government agreed to the settlement in *Cemex* and *Newmont* since there was a legal basis for the tribunals to qualify Indonesia's action as a regulatory taking which could lead significant loss for the government. Development consideration has no bearing on the amount of compensation awarded. Compensation is usually to be calculated according to the same rules of international law.²¹⁷

What has happened with *Newmont* and *Freeport* can be seen as the new phenomenon of investors' regulatory interference. What appear from those two cases are the assumptions about the state contract with *Newmont* and *Freeport*: first, that the agreement created international legal obligations; and second that the obligations hinder the state's attempts to regulate in the public interest. Such an assumption seems to fit Julian Arato's contention that

²¹⁵ See case *British Petroleum Exploration Company (Libya) Ltd v. Government of the Libyan Arab Republic*, 10 October 1973, 53 ILR 329; *Texaco Overseas Petroleum Company and California Aisatic Oil Company v. The Government of the Kibyan Arab Republic*, 19 January 1977, 53 ILR 389.

²¹⁶ Sornarajah, *The International Law*, 367-368.

²¹⁷ As happened in *Compania del Desarrollo de Santa Elena*.

“multinationals corporations are able to make primary rules of international law which negatively impact state’s ability to make regulation as a result of their rights to enforce their legal rights to international arbitration.” Should the proceeding continue, the tribunal might consider the contracts to have been internationalized due to the existence of BITs,²¹⁸ regardless the fact that Indonesian law governs the contracts. As a result, the contracts can be categorized as a priority over the state’s domestic regulatory efforts to govern public interest. It can be said that the contract between the Indonesian government and Newmont as well as Freeport appears as a source of international law establishing legal norms that the state could not unilaterally undermine without escaping from the consequences.

Concerning contract versus treaty distinction, BIT provisions can elevate investor-state contracts (state contract) to the international level because of ‘umbrella clause.’ Umbrella clause provides the protections of the treaty also apply to any “investment agreement” including the contract that establishes the investment such as concession agreements or licenses. Consequently, any breach of the contract is constituted as a violation of the state’s international responsibility. Such a view implies that domestic law cannot excuse a state’s violation of its international obligations nor its duty to compensate.²¹⁹ This way, it is safe to assume that BIT provides MNC privileged position in the international legal order as a lawmaker. Generally speaking, the sources of international law consist of treaties, custom, and general principles. Elevation of state-investor contract, using BIT, into international level means that the contract becomes the source of international obligation. Hence, the contract becomes a secondary legal source.²²⁰

²¹⁸ In *Azurix v. Argentina*; *CMS Gas v. Argentina*; and *Aguas del Tunari v. Bolivia* the ICSID Tribunals held that under the auspices of BIT the contract between state and foreign investors generated legal rights that superior over the state’s regulatory power. Therefore, the investors shall be compensated for state’s action to exercise their regulatory power.

²¹⁹ Arato, *Corporations as Lawmakers*, 241.

²²⁰ *Ibid.* 242.

Extending protection to contracts is beneficial for the investors but detrimental to the host states. *Amco*, *East Kalimantan*, and *Cemex* deal with issues about investment contract. Indonesian BITs typically contain umbrella clause which obliging the parties to observe any obligations it has entered into. As a result, the contracts between the government and Amco, KPC, and Cemex are considered *arbitrable* before the ICSID. Apparently, the tribunal approached the umbrella clause extensively to consider a contract breach as an international law infringement.

Another reason why ICSID assume jurisdiction over contractual breach is the assumption that property and contracts are considered as investments. The consideration has resulted from the extension of FET and guarantees against expropriation to a broad spectrum of assets including state contracts. Such an extension is unfair for the host state and considered as bias towards investors.²²¹ Once tribunals find state contracts entitled to protection under the treaty, they tend to adjudicate the investor's contract claims on the basis of FET or expropriation claims regarding any other kind of assets. This fusion of property and contracts protect the contract from regulatory changes to the same extent as property.²²² The fusion brings a consequence that regulatory changes that affect a contract could be classified as expropriation as occurred in *Newmont*. A contract should not be treated as property as it is a collection of rights and obligations resulted from a negotiation. Therefore, they have different values.

FET is an absolute, non-contingent standard of treatment, flexible, whose normative content is being continuously expanded to include new elements. Due to its flexibility, it is the most often invoked treaty standard in investor-state arbitration and appears in many claims.²²³ FET is used to protect state contracts from governmental measures that depreciate the state contracts from discrimination to failure to live up the investor's legitimate

²²¹ Sornarajah, *The International Law*, 204.

²²² Julian Arato, *Corporations as Lawmakers*, 272.

²²³ *Ibid.*, 259.

expectations. In short, it can be used as an alternative and more flexible way to provide protection to investors in cases where the test for indirect expropriation is too difficult to achieve.²²⁴

FET standard is included in almost all Indonesian BITs which are expressed in very general and vague terms, such as in Indonesia-Jordan 1992 BIT Article 3:

“Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use enjoyment or disposal thereof by those investors.”

State contract should not be considered as property or as a source of international legal obligation. Rather, it should be understood as merely a private source of law which binds the contracting parties. This way, the host state government would still retain its regulatory power without fear that its regulatory changes would be inflicting international responsibilities. Internationalizing state contract brings implication that any regulatory changes which revoke, breach, or depreciate the value of the contract could inflict state’s liability under international law.²²⁵ This is unfair for domestic investors since they do not receive the same protection. For them, the contract they made with the government remains an ordinary private contract, with no BIT protection given. In such a way, any regulatory changes negatively impact the contract with the government will not inflict state’s liability since state law prevails over a private contract.

As interpreters of law to facts, there is always a possibility for arbitral tribunals to overly broad in interpreting provisions and standard of treatment in BITs so that the investor’s interest is superior to host state’s interests. The implication of this imbalance is not merely an inconvenience for the state. They may cause a state to prove unwilling to undertake legitimate regulation for fear of lawsuits from investors. The *Newmont* case is the example. The Indonesian Mining Law, if seen in a broader context, represents the willingness “to be

²²⁴ Ibid.

²²⁵ Ibid. 243.

less dependent on the export of raw materials, or seeking to control a larger part of its resources to benefit local and national development.”²²⁶ This is in accordance with the trend in countries in the Global South.

To sum up, investment arbitration may potentially lead to a regulatory chill in the host states due to fear of lawsuits. The possibility of a tribunal to extensively interpret BIT provision and standard of treatment must be taken into consideration since it creates more room for foreign investors to sue the government before the investment arbitration. Nevertheless, the arbitration cases that Indonesia encountered do not provide strong reasons for the government to eliminate arbitration clause in BIT or withdraw from the ICSID Convention.

C. Conclusion

Liberalization of foreign investment in Indonesia can be distilled into two causes: substantively and procedurally. Substantive liberalization is accomplished by providing treaty provisions for the protection of FDI, providing incentives, and facilitating their operations. On the other hand, procedural liberalization is carried out by providing access to international arbitration as dispute settlement.

Even though internationally investment arbitration is criticized as bias against developing countries, this research argues that negative perception toward investment arbitration is not entirely, true. Using the six Indonesian cases, this part proves that indeed arbitration has created hindrances over sovereignty issues especially state regulatory power, yet ICSID tribunals’ reasoning and interpretation are not necessarily in favor of foreign investors. The challenge, for now, is how to construct an international investment law and arbitration system that can guarantee investment protection and at the same time give the

²²⁶ The case of Newmont Mining vs Indonesia | Transnational, <https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation> (accessed November 20, 2015).

government with the policy flexibility and regulatory autonomy to protect broader public interests.

Chapter IV

FORMS OF BACKLASH: PROTECTIONIST POLICIES, CONSTITUTIONAL COURT JUDICIAL REVIEW, BILATERAL INVESTMENT TREATY REVIEW AND LIMITED ARBITRATION

In the early 2000s, several capital-importing countries Latin America did not feel a similar compulsion as it was in the 1960s to attract foreign investment. Instead, they questioned the benefits of protection and preferences given to foreign investors through Bilateral Investment Treaty (BIT). Due to their perception that BIT is biased towards foreign investors, there was a need to achieve a proper balance between investor rights and duties, and between private needs and public goods.¹

Similar concern also arose in Indonesia which was expressed by civil society organizations (CSOs) as well as various individuals.² The CSOs express their disagreement with privileges, protection, and preferences given to foreign investors through application for judicial review to several Foreign Direct Investment (FDI)-related laws to the Constitutional Court. Moreover, they also write newspaper articles, as well as hold dialogues with relevant government institutions. *Muhammadiyah*, the second largest Islamic organization, is on the lead to challenge FDI-related laws. *Muhammadiyah* uses the term ‘Constitutional *Jihad*’ or ‘*Jihad Muhammadiyah*’ to describe their effort to what they call ‘aligning’ legislation with its view of the Constitution using Article 33 of the Constitution as the legal basis for judicial review. In Islam, the word *jihad* has a very strong sense which means “striving to live a moral and virtuous life, spreading and defending Islam as well as fighting injustice and

¹ David Ma, “A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America,” *Journal of Dispute Resolution*, vol. 2012, no. 2 (2012) 585.

² Globally, the involvement of NGOs was started in the late 1990s following submission of several investor-state arbitrations under NAFTA. A number of NGOs most notably environmental groups feared that the substantive provisions of the BIT would provide a basis for arbitral tribunal to award compensation to investors that suffered a loss as the result of environmental regulations.

oppression.”³ Syaiful Bakri, the Chairman of Legal Department of *Muhammadiyah* as well as the team leader of judicial review, stated that his team had found 115 laws which deemed to be inconsistent with the Constitution.⁴ These strong public reactions are considered as a manifestation of increasing nationalism.⁵

The history of nationalism that spread throughout Indonesia in the 1950s and early 1960s seems to find its way nowadays as a protest against the government’s policy during the New Order up to Post-Reform Era to provide greater FDI involvement in the economy. The apparent nationalism in the 2000s is quite different from nationalism in the 1960s when nationalization of foreign firms took place. In 1960s nationalism was an anti-colonial sentiment and aims to be a ‘self-sufficient’ state and retain financial and political stability. Therefore, the takeover and nationalization of the foreign company took place in various fields and was considered as economic nationalism. Furthermore, it was also directed to the Chinese-Indonesia due to their leading role in the Indonesian economy compare to the indigenous people.

Meanwhile, in the 2000s, nationalism is taken the form of ‘indirect expropriation’ and merely directed to FDI. Commentators portray increased FDI and financing by international financial institutions as signs that Indonesia: is bowing to the demands of foreigners rather than its people; lacks of self-confidence; and is a weak nation.⁶ An economist considers that

³ Indonesian Dictionary (Kamus Besar Bahasa Indonesia) <http://kbbi.web.id/jihad>.

⁴ Muhammadiyah Duga 115 UU Bertentangan Dengan Konstitusi (Muhammadiyah Suspects 115 Contradict with the Constitution): <http://news.detik.com/berita/2888451/muhammadiyah-duga-115-uu-bertentangan-dengan-konstitusi>; Jihad Konstituti Jihad Baru Muhammadiyah (Constitutional Jihad, a New Jihad for Muhammadiyah) available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11501#.WAPIO-ArKM8>. Accessed August 14, 2016.

⁵ Ahmad D. Habir, “Resource Nationalism and Constitutional Jihad,” *Southeast Asian Affairs*, vol. 2013, 121-134.

⁶ For example, an opinion by Ichsanudin Noorsy available at: <http://m.inilah.com/news/detail/93879/investor-asing-harus-diminimalisir> (Foreign Investmen shall be minimized), accessed at: 8/12/2016. Ichsanudin Noorsy is an economist, he hold a doctorate degree from Airlangga University Indoensia.

foreign investment is a new type colonialization.⁷ Liberalization of FDI is also seen as “selling Indonesia” to foreigners⁸ and a threat to the national economy as it could create a dependency toward the home country of investment.⁹

In international level, the Indonesian government followed-up through review of BIT including revise the investor-state dispute settlement provision which purpose is to redo the investment arbitration at a minimum and to give Indonesians more opportunities to manage their natural resources.¹⁰ Ahmad Kurniadi, a deputy chairman of the Indonesian Investment Coordinating Board (BKPM) stated another reason for that policy indicating that many of BITs are no longer relevant, therefore, needs to be fixed, adjusted with the conditions and state’s interests.¹¹ This policy garnered support from various circles for example Hikmahanto Juwana saying previous BITs concluded when the country was in desperate need for capital, skills, and technology are no longer compatible with current condition and thus need to be reviewed.¹² The judicial review and BIT review policy are considered as backlash following decades of liberalization of FDI which lead significant regulatory changes on FDI operations in the country.

The regulatory changes attract significant attention worldwide. The World Bank and the IMF consider the state legislation which required all foreign investors to have local

⁷ Stated by Dwi Condro Triono, Sharia’ Economic expert, available at: <http://mediaumat.com/wawancara/5141-116-investasi-asing-penjajahan-gaya-baru.html>, accessed at 8/1/2016.

⁸ Sri Edi Swasono, Professor of Economics of University of Indonesia, available at: <http://www.hukumonline.com/berita/baca/lt5534c3f1708ef/sukses-uji-uu-sda--muhammadiyah-sasar-tiga-uu-lain>

⁹ Adi Sasono in Dekopin Prihatinkan Pertambahan Porsi Investasi Asing (Dekopin Concerns Foreign Investment Growth) February 19, 2008, available at: <http://www.kabarindonesia.com/beritaprint.php?id=20080219041530>.

¹⁰ Abdulkadir Jailani of Ministry of Foreign Affairs, “Indonesia’s Perspective on Investment Agreement Review,” *Investment Policy Brief*, no. 1, Juli 2015, available at: <https://kadirjailani.wordpress.com/2015/07/16/indonesias-perspective-on-investment-agreement-review/>, accessed July 12, 2015.

¹¹ Statement cited by American Chamber of Commerce in Indonesia, May 6th, 2014, available at: <http://www.amcham.or.id/fe/4568-what-gives-with-indonesia-s-bilateral-investment-treaties>, accessed at: 7/14/2015.

¹² He wrote article in the Jakarta Post titled: Indonesia should withdraw from the ICSID!, April 2, 2014, available at: <http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html>, accessed: 7/12/2015.

partners and that local partner had to be an Indigenous Indonesian was hard to be satisfied.¹³ The United States (US) government expresses its disappointment saying that changes on “local content requirements, requirements to divest equity shares to Indonesia stakeholders, and requirements to set up manufacturing or processing facilities” in the country are the manifestation of the rising economic nationalism.¹⁴ Organization for Economic Cooperation and Development (OECD) responds that what happened in Indonesia appears to “have caused a sharp drop in business expectations and such policies risk damaging Indonesia’s international reputation as a safe place to invest.” Further, it says that protectionist policies in Indonesia have hindered the openness of foreign trade and investment which create uncertainty for development.¹⁵ Another respond comes from Jakob Sorensen, head of the European Chamber of Commerce in Jakarta, said that the protectionist policy and the Constitutional Court decision make investors lack clarity and therefore need a clear strategic direction.¹⁶

This chapter seeks to explain the forms of backlash against international investment regime in Indonesia. It argues that backlash against FDI takes the form of increased protectionist policies; judicial review cases; BIT review; and limiting access to arbitration. Protectionist policies are enacted to give more opportunity to domestic investors to grow and to pursue national interests. The judicial reviews sought by CSOs and individuals are mainly aimed to challenge the legality of various natural resources-related laws giving rights for FDI to participate in the Indonesian economy. By granting the plaintiffs’ claims, the Constitutional Court gives way for the rising of resource nationalism which is defined as an

¹³ RADIUS Prawiro, *Indonesia’s Struggle for Economic Development: Pragmatism in Action*, (Oxford: Oxford University press, 1998) 257.

¹⁴ United States of America Department of State, Indonesia Investment Climate Statement 2015, 8, available at: <http://www.state.gov/documents/organization/241809.pdf>, accessed 8/1/2016.

¹⁵ OECD Economic Surveys Indonesia, March 2015, p 3, available at: <https://www.oecd.org/eco/surveys/Overview-Indonesia-2015.pdf>, accessed at 8/1/2016.

¹⁶ Reuters: Legal 'jihad' against private sector gathers pace in Indonesia, April 24, 2015 available at: <http://www.reuters.com/article/indonesia-investment-idUSL4N0XL2Z920150424>, accessed at 8/1/2016.

effort to maximize revenues from exercising greater state control over the exploitation of natural resources.¹⁷ Policy in respect to BIT is to nullify the extensive protection given to FDI through the existing BITs, as well as to impose certain obligations on foreign investors. Lastly, limitation to arbitration is aimed to reduce Indonesia's exposure to investment arbitration which could endanger the government regulatory power.

Chapter IV proceeds as follows: part A describes the growing nationalism which is responded by the government through enacting protectionist policies. It is followed by part B which scrutinizes eight judicial review cases filed in the Constitutional Court. Part C examines the BIT moratorium and review policy. It also discusses the draft of Indonesian model BIT. Lastly, Part D analyzes the current debate on recourse to ICSID arbitration and new limit to arbitration proposed in the BIT model.

A. Increase Protectionist Policies

Economic nationalism holds that “a state's economic policy should serve its political policy.” It seeks to enhance or preserve state's position within international community by protecting or increasing the financial resources available to the state.¹⁸ In doing so, economic nationalism regulates business activity to the extent necessary to further national political policy.¹⁹ Because of the need to further national policy, economic nationalist may see FDI as beneficial in one case and detrimental in another. Thus, there is no single perspective on favoring or opposing foreign investment.²⁰ The stand is that foreign investment should be regulated to ensure that it promotes national policy.

1. Nationalism as the Driving Factor

The Indonesian nationalism is mostly directed to its natural resources. Engaged by developed and developing countries alike, resource nationalism and its causes are complex,

¹⁷ Summarized from various Constitutional Court decisions on foreign investment related laws.

¹⁸ Halina Ward, “Resource Nationalism and Sustainable Development: a primer and key issues,” IIED Working Paper, March 2009, available at: <http://pubs.iied.org/pdfs/G02507.pdf>, accessed August 15, 2016.

¹⁹ Kenneth J. Vandavelde, “The Political Economy of a Bilateral Investment Treaty,” *The American Society of International Law Journal*, vol. 92 (1998) 622.

²⁰ *Ibid.*

encompassing nationalistic and economic reasons. The drivers of resource nationalism can arise from either national circumstances (increasing domestic demand for natural resources) or international ones such as increasing commodity prices.²¹ In Indonesia, in addition to increasing demand, some economic nationalists see liberalism that advocates free movement of capital across borders is not compatible with the spirit of Pancasila and the Indonesian Constitution. Hence, interpretation of Article 33, specifically paragraph 3, of the Constitution becomes a huge debate. The word control within the provision “the land, the waters, and the natural resources within shall be controlled by the State and shall be used to the greatest benefit of the people,” contains ambiguity as does it require the state to directly manage the land, the waters and the natural resources through state-owned company? Or instead, control can be exercised through regulatory power? The economic nationalists prefer the former interpretation and therefore, they make any endeavor to protect domestic investors in the Indonesian economy significantly.

The Indonesian economic principle advocates an equal distribution of wealth within the state. The principle supports an intervention in the economy when necessary to ensure that foreign investment conforms to their political goals of promoting the national independence and economic development in the country. The philosophy is that inward looking favors greater reliance on domestic resources by using local producers to supply goods and local markets to consume them. This way, the implementation of economic liberalization, including liberalization in foreign investment, would likely to be seen as creating adverse impacts on the country’s economy.

Economic nationalism has been marking Indonesia’s history from time to time in different forms. In the 1950s, economic nationalism was manifested by taking over various foreign companies and mostly directed to Dutch companies and Chinese ethnic group. In the

²¹ Habir, *Resource Nationalism*, 123.

1970s, nationalism was showed by students and often turned into riots. Their protests were directed not only towards inequality of treatment between domestic and foreign investors; but also President Suharto's policy to give preferential treatment to his families and cronies, many of them were Chinese descendants. This differential treatment made a significant number of domestic investors unable to compete.²² Adrian Vickers sees President Suharto's openness to foreign investment especially in oil and mineral sectors in the 1980s as a mean to serve Western interests.²³ Vickers claims that economic liberalism had allowed the large conglomerates controlled by President Suharto's children and key ethnic Chinese conglomerates to increase their wealth and power. Consequently, despite the fact that the new economic liberalism has boosted Indonesian economy, it failed to distribute the wealth acquired proportionally.²⁴ After the financial crises in 1998, economic nationalism came to be directed primarily at the perceived interference by international organizations, in particular, the IMF in the formulation of Indonesia's economic policies.

Within the government's action, the nature of economic nationalism in Indonesia recently does not occur in the form of nationalization of assets. Rather, measures which could be characterized as resource nationalism are imposed by through protectionisms policy such as control of inward and outward investment flows; and stricter requirements for divestment. In addition, the government employs interventionist measures such as protective tariffs, tax, investment screening, and performance requirements to attract foreign investors that would further its development policy, to prevent the establishment of those investments that would not, and to ensure that investment would continue to operate in accord with national policy.

Economic nationalism is shown in a more structured way. For example, Presidential Decree No. 44 of 2016 concerning List of Business Closed and Open with Certain Requirements (Investment Negative Lists) stipulates the latest version of the negative list.

²² The riots in January 14, 1970 also known as the Malari incidents

²³ Adrian Vickers, *A History of Modern Indonesia*, (Cambridge: Cambridge University Press, 2005).

²⁴ Ibid.

Despite characterized by an increased level of permissible foreign ownership levels for some areas, the lists show an increase in the lines of business which require partnerships between foreign investors with local Micro, Small and Medium Scale enterprises; and also cooperatives.

2. Areas of Protectionist Policy

Protectionism policy is evident from the investment negative list. Nineteen industrial sectors were closed for FDI since they are reserved Small and Medium Enterprises (SMEs) such as pre-design and consulting services, architectural design services. In addition, no SMEs are open to foreigners, along with business with an investment value of less than IDR 10 billion. Darmin Nasution, the Coordinating Economic Minister, said the policy was meant to boost investment, both domestic and FDI while providing protection to SMEs.²⁵

Furthermore, the Cabinet Secretary, Pramono Anung, added that the amendment of the negative list is an effort to modernize the country's economy by encouraging SMEs and national companies to improve creativity, innovation, and technology.²⁶ In addition, the government imposes restrictions on outward investment to prevent a loss of capital despite the fact that this policy seems to contradict with the current trend where many developing countries have started to encourage outward investments to gain access to foreign markets or needed assets such as natural resources, less expensive labor, and technology. Negative investment list and restrictions on outward investments are seen as the manifestation of economic nationalism in Indonesian governmental economic policies.

In extractive industry, particularly in the oil and gas sectors, the Indonesian government seeks changes in what is considered by foreign investors as outdated and unfair law. Law No. 4 of 2009 concerning Mineral and Coal Mining (the Mining Law) seeks to

²⁵ Indonesia Opens 35 sectors to foreigners, closes 20 others, Ayomi Amindoni and Anton Hermansyah, the Jakarta Post, February 11 2016, available at: <http://www.thejakartapost.com/news/2016/02/11/indonesia-opens-35-sectors-foreigners-closes-20-others.html>, accessed July 1, 2016.

²⁶ Ibid.

provide a greater level of environmental protection and recognize the needs and rights of local communities. Through the Mining Law, the government employs less direct methods to increase revenue from mining such as through taxes and higher royalties.

To generate more revenue, contractual-based concessions are no longer available for new mining projects and replaced by a licensing system where both the government and the mining companies have equal benefit. The existing contract of work will still be honored until they are expired, and the state is required to renegotiate the key term of the contract. The points of negotiation include a higher contribution paid, an adjustment to the size of the mining area, operation continuity under a license after contract expiry, an obligation for local processing and refining as well as requirement to use domestic goods and service.²⁷ These new changes are seen with negative sentiment from foreign investors and their home states alike by saying that these new rules make investing in Indonesia's mining sector considerably less lucrative.²⁸

Protectionism in mining industry appears in several provisions in the Mining Law. Article 112 of the Law stipulates that foreign companies shall divest their shares to the central government, regional government, a state-owned company, a local government-owned company or a national private company. On February 21st, 2012 the then President Yudhoyono signed a regulation that requires foreign investors to divest their shares to the state or domestic investors.²⁹ This requirement seeks to reduce foreign investors' shares to no more than 49 percent in order to achieve majority Indonesian ownership in the company. The divestment requirement was hiked up from 20 percent in 2010 to 51 percent in 2012. The

²⁷ Investment and Taxation Guide, Mining in Indonesia, May 2015, 7th edition, available at: <https://www.pwc.com/id/en/publications/assets/eumpublications/mining/mining-in-indonesia-2015.pdf>, accessed June 15, 2015.

²⁸ Interview Informant no 1, American Chamber of Commerce Jakarta .

²⁹ Government Regulation Number 24 of 2012 concerning Amendment of Government Regulation No 23 of 2010 concerning Implementation of Mineral and Coal Mining Business Activities.

regulation implies a requirement that foreign investor give the controlling interest to the Indonesian partner.

Furthermore, Article 103 of the Mining Law requires a mining company to build a smelter to process and purify output of the mining activities. The Minister of Energy and Mineral Resources Regulation No. 1 of 2014 stipulate that miners have to build their own smelters and refineries so as to increase domestic value added of mining products. The Minister of Trade Regulation No. 4 of 2014 rules that only mining products that have reached a certain threshold of internal processing are allowed for exports. The Minister of Finance Regulation No. 153 of 2014 is the least interventionist among these regulations, as it offers some ‘price mechanisms’ to ‘incentivize’ miners to build refineries and smelters in Indonesia.³⁰ According to this regulation, the government will impose a 7.5 percent export tariff if construction (of smelters) reaches 7.5 percent completion, a 5 percent export tariff if progress is between 7.5 percent and 30 percent, and 0 percent when construction is 30 percent complete or above by January 2017.

The rationale of those regulations is to develop Indonesia’s downstream mining industry, raise national revenues and guarantee the availability of refined products for domestic use. However, until January 2014, there were many obstacles to fulfill this new regulation. As a consequence, the government decided that the period from January 12, 2014, to January 11, 2017, export of concentrates are still permitted, subject to the fulfillment of certain requirements including a commitment to build a smelter and the payment of a progressively increasing export duty.

Protectionism also affects the government policy in the oil and gas sector. For example, the regulation that rules FDI to transfer expiring production sharing contracts to

³⁰ Patunru, Arianto A. and Rahardja, Sjamsu.” Trade protectionism in Indonesia: Bad Times and Bad Policy,” Lowy Institute for International Policy, July 2015, <http://www.lowyinstitute.org/publications/trade-protectionism-indonesia-bad-times-and-bad-policy>, accessed November 16, 2015.

Indonesian investor rather than extended it.³¹ Inevitably, the new regulations significantly impact the benefits that foreign investors expected of their investment. It also creates uncertainty over the planned profitability of foreign investment in the mining sector, which now depends on renegotiations.³²

B. Constitutional Court Cases

The establishment of Indonesian Constitutional Court in 2003 was the result of the third amendment of the 1945 Constitution. There was an attempt to incorporate neo-liberalism into the Constitution through the Constitution reform 1999-2002.³³ In the amendment process, proponents of neo-liberalism recommended the amendment of Article 33 to limit state intervention, whereas the opponent wanted to maintain the Article to guard Hatta's idea of "economic democracy."³⁴ However, neo-liberalist failed with their attempt, consequently Article 33 remain unchanged.

This part focuses on judicial review cases on laws influential to FDI. Some of the decisions focused on give meaning to the state's obligation to control important branches of production under the Article 33 (2) of the Constitution. The meaning of Article 33 (2) is not self-evident. There is no definitive interpretation of the term 'controlled by state' and its scope; the definition of 'important branch' and its types. Hence, the government and the Constitutional Court have debated to determine the legal interpretations. The debate is particularly for the continuing of the opening vital sectors to private capital and privatization of SOEs which made a significant part of economic reform. The discussion of each judicial review case is intended to highlight features of the operation of the concept of "state control," "greatest benefit for the people," and "welfare of the people" in foreign investment related activities. The Court decisions indicate resource nationalism has two components: limiting

³¹ United States of America Department of State, Indonesia Investment Climate Statement 2015, 8, available at: <http://www.state.gov/documents/organization/241809.pdf>.

³² Interview AmCham, Jakarta office.

³³ Bivitri Susanti, *Neoliberalism and its Resistance in Indonesia's Constitutional Reform 1999–2002* Masters Thesis, University of Warwick, 2002, 65.

³⁴ Ibid.

the operations of foreign companies and asserting a greater national control over natural resources.

1. *Electricity Law Case (2003)*

The letter of intent with the IMF dated November 13, 1998, mentioned that state-owned electricity company needed to be restructured for privatization.³⁵ Following this recommendation, the then President Megawati signed Law No. 20 of 2002 concerning Electricity which seeks to establish a more competitive environment for power business so that consumers have the choices to which electricity to buy. In addition, the Law intended to increase the power and reach of Indonesia's electricity network. Thus, the Electricity Law sought to break down the state monopoly which was held by State Electricity Company (PLN).

The applicants consisted of 21 individuals; PLN worker union; and the Association of PLN retired employees.³⁶ They requested the Constitutional Court to annul the Electricity Law on the basis that the Law intends to liberalize electricity sector. According to the claimants, liberalizing power sector violated Article 33 paragraph 2 of the Constitution which stipulates that sector of production important to the state and affect the life of the Indonesians shall be controlled by the State.³⁷ The Claimants considered electricity played a crucial role in the life of Indonesians. Hence, it should be controlled by the government through PLN as a state-owned company,³⁸ therefore, an involvement of foreign investors cannot be accepted.³⁹ FDI would likely to be profit oriented which could lead to the increase of electricity tariffs that burdened the people.⁴⁰

³⁵ The letter can be found here: <https://www.imf.org/external/np/loi/1113a98.htm>.

³⁶ Constitutional Court decision No 001-021-022/PUU-I/2003, 1-2, available at: <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/Putusan022PUUI2003.pdf>, accessed at 2/19/2015.

³⁷ *Ibid*, 27.

³⁸ *Ibid*, 30-31.

³⁹ *Ibid*., 31.

⁴⁰ *Ibid*., 33.

Article 9 paragraph 2 of Law No. 20 of 2002 provides a broad category of business in electricity include: generating, transmitting, and distributing electricity; sales; sales agents; market organizers; and system organizers. Article 12 paragraph 1 of the Law set up a Supervisory Agency for the Electricity Market known as BPPTL which is responsible for regulating and monitoring the power market, to determine the competitive and non-competitive market for the distribution, transmission, and sale of electricity, and to determine the market prices in a competitive market. The legal issue presented by the plaintiff was that electricity is very critical for achieving national goals; thus it should be controlled by the state and cannot be liberalized. They argued that unbundling hand over too much state control over the electricity sector, thereby breaching Article 33 (2) of the Constitution.⁴¹

In this case, the Constitutional Court considered the meaning and requirements of ‘State control’ in Article 33 of the Constitution. The court established several principles. The state’s power to regulate natural resources did not of itself constitute state control because the state already had inherent authority to regulate irrespective of Article 33. Also, mere civil ownership by the state was not ‘control by the state’ because natural resources were public assets collectively owned by all Indonesians and the state was required to control those assets for the greatest possible collective prosperity. Rather, ‘state control’ comprised five activities: making policies, administering, regulating, managing, and supervising. And at least for natural resources, these five activities needed to be performed for one purpose: the greatest prosperity of the people.⁴²

In interpreting “state control,” the Court cited Mohammad Hatta’s thinking:

The ideas planted in Article 33 of the Constitution are the greatest possible production to be performed by the government with borrowed capital from overseas. If this strategy is unsuccessful, an opportunity must be given to foreign business to invest their capital in Indonesia based on requirements stipulated by the government. If

⁴¹ Ibid., 32.

⁴² Constitutional Court decision 3/PUU-VIII/2010 at (3.15.4.) available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_putusan149-puu-vii-2009%20_Edy%20Edy_%20telah%20baca_LWE.pdf

national workforce and capital are insufficient, we borrow foreign workers and capital for smooth production. If a foreign country is not prepared to lend capital, then opportunities are given to them to invest their capital in Indonesia with conditions determined by the government. These conditions are primarily to guarantee that our natural resources, such as forests and land fertility are looked after. In developing the state and the community, workers and national capacity will improve over time, and foreign workers and capital will reduce over time.⁴³

The Court understood Hatta's thinking on 'state control' that the production branch that has been owned by the state shall be strengthened by empowering the state-owned company. The objective is to the state-owned companies' ability to fulfill the needs of Indonesian people so that at the end of the day they do not need private participation either domestic or foreign investors.⁴⁴ The Constitutional Court disagreement with private sector involvement in important economic sectors is because profits are shared between the government and the private company which leaving less for the people. Thus, the Court argued that the prosperity of the people could not be achieved through privatization.⁴⁵

The Court further held that free competition promoted by Article 17 paragraph 1 and Article 21 paragraph 3 would lead to more electricity crises in Indonesia which already happening outside Java island when the privatization was started. Moreover, the unbundling system could potentially create a market control by individual enterprises and unhealthy competition among them. The Court asserted that this breached Article 33 paragraph 2 of the Constitution.⁴⁶ Also, letting the market to decide electricity price also contradicts with Article 33 of the Constitution which oriented to people's welfare.⁴⁷

Annulment of the Law No. 20 of 2002 meant that Indonesia had reverted to Electricity Law No. 15 of 1985 in which electricity supply activities were organized by the government and carried out by the state-owned enterprise. A private business entity would

⁴³ Mohammad Hatta, *Kumpulan Pidato II Hal. 231*. Disusun oleh I. Wangsa Widjaja, Mutia F. Swasono, PT. Toko Gunung Agung Tbk. Jakarta 2002, cited in Constitutional Court decision No 001-021-022/PUU-I/2003, p 32 p 331-332.

⁴⁴ Constitutional Court decision No 001-021-022/PUU-I/2003, 348.

⁴⁵ Constitutional Court decision No 001-021-022/PUU-I/2003, 330 .

⁴⁶ Constitutional Court decision No 001-021-022/PUU-I/2003, 349.

⁴⁷ Constitutional Court decision No 001-021-022/PUU-I/2003, 343-343.

only play a role in electricity support activities in cooperation with the government. In 2005, the government issued a regulation No. 3 of 2005 which was not framed as a formal and direct replacement of Electricity Law. Rather, it was apparently intended to provide certainty to private investors after the Court decision since the content was not much different from the Electricity Law.⁴⁸

Electricity Law No. 30 of 2009 was finally enacted in response to the Court decision. According to this new Law, the State electricity company, PLN, would remain vertically integrated and control the national transmission network which means that PLN is the primary provider of transmission and distribution. The independent market regulator was rescinded in this new law. Furthermore, this law clarified that PLN would no longer have a monopoly on supply and distribution to end customers. In this regard, a license to provide electricity for public use may be granted to privately owned business. However, in practice, PLN has the right of priority to supply electricity to customers.

Another effort to block the Electricity Law took place by the end of 2009 when representatives of PLN labor union filed a case to the Constitutional Court. The applicants petitioned that Articles 10(2)(3)(4); 11(3)(4); 20; 33 (1)(2); 56 (1)(2)(3) of Law No 30. of 2009 breached the Constitution. However, the Court rejected the case arguing that compared to Law No. 20 of 2002, the 2009 Law had a clear position on the role of the PLN. The Law No. 30 of 2009 authorizes the government to design policy, regulation, administrative, management, and monitoring aspects of the electricity sector.⁴⁹ Even so, Law No. 30 of 2009 is not anti-private investors, for example, Article 11 paragraph 3 allows government over areas without electric power to give the opportunity to locally-owned enterprises, private enterprises, or cooperatives to organize an electricity supply business.

⁴⁸ Statement by J. Purnowo, the Electricity Management Administration Director as quoted from an article "Pemerintah Segera Keluarkan PP Kemitraan Swasta Sektor Ketenagalistrikan, Hukumonline, 14 January 2005.

⁴⁹Constitutional Court decision No 148/PUU-VII/2009, 97, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_putusan149-puu-vii-2009%20_Edy%20Edy_%20telah%20baca_LWE.pdf, accessed January 24, 2015.

2. *Investment Law Case (2007)*

The case was filed by a coalition of civil society organization SPI (*Serikat Petani Indonesia* or the Indonesian Peasant Union), Indonesian Forum for the Environment (WALHI), Federation of the Indonesian Trade Union and several other organizations.⁵⁰ The motivation behind this case was because the claimant objected with the elucidation of Article 3 paragraph 1 Law No. 25 of 2007 concerning Investment which does not distinguish a foreign investor from a domestic investor. They argued that both investors should be treated differently, and that same treatment can be given to foreign investors from different countries.⁵¹

The claimants requested judicial review of various provisions in Law No. 25 of 2007 including Article 12(4), 22(1) a,b, and c; for contradicting with Article 33 of the Constitution. Article 12(4) reads “qualifications and requirements for each of the closed and open business sectors shall be regulated under a President Regulation.” This article was considered as contradicting with Article 33 paragraph 2 and 3 of the Constitution since it gave broad power to the president to determine which business sectors to be opened or closed to investment activities. The claimant contended that president could misuse this power for his/her benefits as well as the interests of foreign investors which could damage the vulnerable groups in the society such as peasant and labor.⁵²

In addition, the claimants also requested a judicial review of Article 22 which reads:

- (1) The facilitated services and/or licensing of the rights over land as stipulated in Article 21 letter can be granted and extended in advance all at once and can be renewed upon the request of the investor, in the form of:
 - a. Right to cultivate can be granted for 95 years by means of grant and extension in advance all at once for 60 years, and can be renewed for 35 years;
 - b. Right to build can be granted for 80 years by means of grant and extension in advance all at once for 50 years, and can be renewed for 30 years;

⁵⁰ Constitutional Court decision No 21-22/PUU-V/2007, 1-5, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_Putusan%2021-22%20PUU%20V%202007%20Baca%2025%20Maret%202008_ASLI2.pdf, accessed January 24, 2015.

⁵¹ Constitutional Court decision No 21-22/PUU-V/2007, 29.

⁵² *Ibid.*, 33-34.

- c. Right to use can be granted for 70 years by means of grant and extension in advance all at once for 45 years and can be renewed for 25 years.

The claimants saw these rights given to investors as a threat to the rights of peasants. They considered that this law could undermine the rights of rural citizen over their access to land and natural resources. Thus, this article breached Article 33 (2)(3) of the Constitution. Moreover, Article 22(1) also conflicts with the Basic Agrarian Law which does not recognize the upfront extension. It also only allow shorter time of rights: where the right of tenure can be given for 35 years and renewed for a further 25 years, the right to build can be given for 30 years and renewed for a further 20 years, and the right to use can be given for 25 years and renewed for a further 20 years.⁵³

The claimant also sought review of Article 8(1) Investment Law for contradicting with Article 27(2) Constitution) which stipulates that every citizen shall have the right to work and to earn a considerate livelihood. Article 8 (1) guarantees free transfer of investors' assets to parties appointed by them, as long as this is not contradictory to prevailing laws and regulations. According to the claimants, this provision gives an uncertainty for workers due to the high possibility of layoff in case the investors transfer their assets and close the business.⁵⁴

While refusing to invalidate other articles, the Court invalidated Article 22 (1) a, b and c of the Investment Law that allowed foreign investors to obtain 'upfront' extension to various rights over land upon which they could run commercial enterprises. The primary concern of the Court is the granting of land rights which can be renewed in advance. The Court argued that advance renewal could eliminate the sovereignty of the state including its capacity to regulate, maintain, manage, and oversee the use of the land, water, and natural

⁵³ Ibid., 36-37.

⁵⁴ Ibid., 38

resources. Even though the state could revoke these land rights, such thing could only take place in particular circumstances listed in Article 22(4) of the Law which says:

Granting and extension of land rights can be given and may be updated as described in paragraph (1) and (2) but can also be suspended or cancelled by the government if the investment company abandons the land, harms the public interests, fails to use the land in accordance with the intent and purpose of the land rights granting, or is in violation of laws and regulations.⁵⁵

Although Article 22 (4) allows suspension by the state, it still reduces the control of the state authorities. The Court confirmed that since land fell within Article 33(3) and that the state was required to ‘control’ it, the Court held that upfront extensions were unconstitutional since it makes the state lose power to revoke or refuse to extend these rights.⁵⁶ Consequently, the Court ordered that Article 22(1), (2) and (4) of the Investment Law should be removed, as well as references to the number of years the rights (right of tenure, right to build, a right to use) could be granted for. The Court ordered that reference to those rights should instead defer to the Basic Agrarian Law.⁵⁷

Justice Maruar Siahaan dissented saying that same treatment given to foreign and local investors is unfair and illogical as domestic investors have more responsibility toward the state. If the goal of investment activity is to create jobs, employment, improve national economic growth with the support of foreign investment, it becomes irrational and illogical if the Indonesian investors as the owner of Indonesian resources receive the same treatment as foreign investors.⁵⁸ He further asserted that the Investment Law is not consistent as it applies different dispute settlement mechanism for both types of investors. While foreign investors are given access to international arbitration, domestic investors cannot access it.⁵⁹

⁵⁵ Ibid.,257-258.

⁵⁶ Ibid.

⁵⁷ Ibid., 263.

⁵⁸ Ibid., 276.

⁵⁹ Ibid., 272-275.

3. *Oil and Gas Law Case (2012)*

Law No. 22 of 2001 concerning Oil and Gas (Oil and Gas Law) gave birth to *Badan Pelaksana Minyak dan Gas* (BP Migas), the state upstream oil and gas regulator, as part of Indonesia's restructuring of the upstream oil and gas business.⁶⁰ BP Migas took over the role of upstream oil and gas regulator from Pertamina, the state oil and gas company. The case was brought by ten Islamic organizations including Muhamamdiyah,⁶¹ Hizbut Tahir Indonesia, *Persatuan Ummat Islam* (the Unity of Muslim), *Syarikat Islam Indonesia* (Indonesian Islamic Association), and *Pemuda Muslimin Indonesia* (Indonesian Muslim Youth). In addition, 32 individuals also join as applicants including Hasyim Muzadi, Fahmi Idris, Marwan Batubara, Salahuddin Wahid, and Ali Mochtar Ngabalin.⁶²

Article 4 paragraph 3 Law No. 22 of 2001 established BP Migas: “the government as the holder of Mining Authority shall establish the implementing body as referred to in Article 1 number 23.” The applicants claimed that BP Migas reduced state control over natural resources since this entity represent the state to sign contracts, control, and handle oil and gas production. The applicants argued that the contracts BP Migas had entered into with foreign investors bound the state, thus restricting its ability to regulate and control oil and gas resources freely.⁶³ The applicants also objected to the arbitration clauses in many of these

⁶⁰ Under Article 44 of the Oil and Gas Law, BPMIGAS was responsible for
a) providing advice to the Minister of Energy and Mineral Resources (the MEMR) in respect of the preparation and offering of work areas and joint co-operation contracts (Co-operation Contracts);
b) entering into Co-operation Contracts;
c) assessing field development plans for work areas that are to produce for the first time and submitting that evaluation to the MEMR for its approval;
d) approving other plans of development;
e) approving work plans and budgets;
f) monitoring and reporting to MEMR with respect to the implementation of Co-operation Contracts; and
g) appointing sellers of the state portion of petroleum and/or natural gas to obtain the maximum profit for the state

⁶¹ Muhammadiyah is the second largest Islamic organization in Indonesia with member approximately 40 million all over Indonesia.

⁶² Constitutional Court decision No 36/PUU-X/2012, 1-4 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_36%20PUU%202012%20migas%20-%20telah%20baca%2013%20Nov%202012.pdf, accessed February 2, 2015.

⁶³ *Ibid.*, 21

contracts, which exposed the state to binding international arbitration. Not only did this impose a financial burden on the state, but it also undermined both the national parliament's authority as the people's representative and participation by the people as the owners of natural resources.⁶⁴

Private enterprises are allowed to operate in the oil and gas sector as reflected in Article 10 (1) (2) and Article 13 (1)(2) of the Oil and Gas Law which means that they will compete with SOE. The applicant contended that by allowing private commercial enterprises to operate in the oil and gas sector, the law undermined state control stipulated in Article 33(3) of the Constitution. The claimants' interpretation of Article 33 (3) was that the article did not allow private operators to compete with SOE in the areas of oil and gas. Moreover, they claimed that private companies' involvement in oil and gas degrading the country's sovereignty and economic independence.⁶⁵

The Court declared that oil and gas sectors are considered as an important area of production which shall be controlled by the state as stipulated by Article 33(2) of the Constitution. The majority⁶⁶ declared that Articles 1(23), Article 4(3), Article 41(2), Article 44, 45 48, 59 and 61 of the Oil and Gas Law were in violation with Article 33 of the Constitution.⁶⁷ The revocation of such articles means that BP Migas has to be dissolved.

⁶⁴ Ibid., 20.

⁶⁵ Ibid., 25- 26.

⁶⁶ Justice Harjono dissented saying that oil and gas sector is high risk, requiring significant capital and capacity. Opening up competition and allowing private-sector involvement in upstream activities might therefore allow more exploration and exploitation to take place than the state could achieve. This could result in profits that might be significantly more than if the state had directly managed the activities itself. This view appears to be consistent with the writings of Hatta, who seemed to endorse private sector involvement provided that Indonesian workers were employed: "What is important is that foreign capital operating in Indonesia provides opportunity to work for Indonesian workers. It is better for them to work with a sufficient livelihood than them being unemployed.

⁶⁷ Constitutional Court decision No 36/PUU-X/2012

The Oil and Gas Law gave the BP Migas regulatory control through the regulations it enacted and also through contracts it entered into with oil and gas companies on behalf of the government. The Court decided that the role owned by BP Migas infringed Article 33:

1.) Regulatory control

The Law gave power to BP Migas to advise the Energy and Mineral Resources Minister on cooperation contracts, production plans, budgets and the appointment of oil and gas sellers. According to the majority, these functions did not constitute ‘control’ within the meaning of Article 33 of the Constitution and therefore they were violating that article. The Court suggested that the state should directly involve in oil and gas operations because “maximum benefit” could only be achieved if the State exercises entire domination by being directly involved in their exploration and extraction through SOEs. In addition, the state also makes related policy decisions. The Court argued that BP Migas as a legal entity was not part of the government. Therefore, its legal standing hampered the government’s ability to manage upstream oil and gas activities directly. Consequently, the government could not use its authority to improve public prosperity through the management of oil and gas sectors.⁶⁸

2). Contract with Oil and Gas Companies

Another function of BP Migas was to enter into cooperation agreements with industry participants and then to monitor the implementation of those contracts to ensure that oil and gas sector generates the maximum benefit for the greatest prosperity of the people. The Court noted that the authority given to BP Migas to enter into arrangements with private business entities had degraded the state’s control over natural resources.⁶⁹ The Court stated:

⁶⁸ Ibid., 99-100.

⁶⁹ Ibid., 108.

‘Once the contract is signed, the government is bound by the contract. The government loses sovereignty and control over natural resources so that exercising that control might breach the contract. However, as representatives of the people and the controller of natural resources, the state needs freedom to make regulations that bring the greatest possible prosperity of the people. According to the Court, the relationship between the state and the private sector in the management of natural resources cannot be established through civil law. It is a public relationship providing concession or licenses that are under the complete control and power of the state. Civil contracts degrade the sovereignty of the nation over natural resources. To avoid this problem, the government can establish or appoint a state-owned enterprise and give it the concession to manage oil and gas.’⁷⁰

Consequently, the Court prescribed to give the contracting authority to state-owned enterprises. Giving direct management of natural resources through state-owned enterprises ensured that all profits would flow to the state, thereby indirectly bringing greater benefits to the people. By contrast, giving it to the private sector meant sharing profits between the state and private entities which would reduce the welfare of the Indonesians. The majority decided that the state needed to manage natural resources entirely unless it was unable to do so, in which case opportunity could be given to foreigners. If the state had sufficient capital, technology and capacity to manage natural resources, then according to the Court, the state was required to manage the natural resources directly.⁷¹ The direct management implied the return of Pertamina to its previous role as both regulator and operator.

According to the Court, the role of BP Migas as state representation degraded the meaning of ‘state control’ due to three things. Firstly, the government was unable to directly manage or appoint state-owned enterprises to carry out upstream oil and gas activities. Secondly, after BP Migas signed a contract with a business entity, at the same time the state would be bound to the agreement. Hence, the state lost its freedom to enact regulation or policy which would consider contradictory to the contract. Thirdly, the profit earned by the state would not be maximal since private entities would also take their part of the profit. Thus

⁷⁰Ibid., 109.

⁷¹ Ibid.,

the Court held that BP Migas was in breach of Article 33 (3) of the Constitution.⁷²

Consequently, BP Migas was disbanded. However, the decision did not mean that the contracts that BP Migas had entered into before its disbandment were invalid. The Court declared that, in the interest of legal certainty, all working contracts made between BP Migas and commercial enterprises would continue in force until their expiry or a date on which the parties agreed.

After BP Migas has been disbanded, the Indonesian government established Special Task Force for Upstream Oil and Gas Business Activities (SKK Migas)⁷³ under Presidential Regulation No. 9 of 2013 concerning Management of Upstream Oil and Gas Business Activities. Commentators said that SKK Migas' roles are similar to that of BP Migas. The similarity between BP Migas and SKK Migas has inspired a CSO named Indonesia for Global Justice to take the Presidential Decree for judicial review.⁷⁴

The Court's interpretation of Article 33 has been criticized for significantly obstructing or even halting government efforts to increase competition in important sectors and to attract a more foreign investor. Butt and Lindsey asserted that the court seemed to disregard "relevant passages in the same chapter of Hatta's book from which the court cited. One such passage emphasizes the importance of regulation to state control and downplays the need for the state to manage." State control (within the meaning of Article 33 paragraphs 2 and 3) does not mean that the state functions as an entrepreneur. It is more

⁷² Constitutional Court decision 36/PUU-X/2012, 105.

⁷³ SKK Migas performs the following functions:

to proffer inputs for consideration to the Minister of Energy and Mineral Resources at its discretion in preparing and offering the bidding round of Working Areas and Cooperation Contract;

to sign Cooperation Contracts;

to review and submit the plan of field development to be the first production in a Working Area to Minister of Energy and Mineral Resources for obtaining approval;

to grant an approval for the development plan other than as referred to in previous point;

to grant an approval for the work programs and budget;

to conduct monitoring and to make report to Minister of Energy and Mineral Resources on the performance of the Cooperation Contracts; and

to appoint sellers of oil and/or gas of the state entitlement that may generate maximum profits to the state

⁷⁴ This statement was given by Salamuddin Daeng, the then Director of Indonesia for Global Justice, in <http://www.amcham.or.id/fe/3821-what-does-the-future-hold-for-skkmigas>, accessed at 4/2/2015.

accurate to say that “state control is exercised in making regulations that prohibit people with capital sucking dry the weak.”⁷⁵

Given the notorious corruption and mismanagement of state-owned companies like Pertamina and PLN, there is little to suggest that the state is capable of managing the sector directly, at least in a way that achieves the greatest prosperity of the people.⁷⁶ Moreover, how Pertamina would assume the functions is uncertain. Pertamina is widely considered to have neither the expertise nor financial resources for the exploration and development needed to maintain or increase production.⁷⁷

4. *Plantation Law Case (2011)*

The period of 2011 to 2013 was marked by the rising of traditional rights-related cases. Four traditional farmers submitted the plantation law case: Japin, Vitalis Andi, Sakri, and Ngatimin.⁷⁸ The applicants lived and maintained land that had been designated for plantations under the Law No. 18 of 2004 concerning Plantation. The judicial review was carried out as a reaction towards criminalization of those farmers⁷⁹ who were convicted while fighting for their land rights from takeover by palm oil companies.

Article 9(1) of the Plantations Law allows the state to provide various rights over land for plantations. Article 9(2) rules that, if *hak ulayat* (land customary rights) existed on land needed for a plantation, before the rights could be granted, the prospective owner needed to first negotiate with the *hak ulayat* holders to seek an agreement about the transfer of the land as well as the compensation.

⁷⁵ Mohammad Hatta, Bung Hatta Menjawab, 2002, cited in the Oil and Natural Gas Law case 2012, at page 210.

⁷⁶ Simon Butt, Fritz E Siregar, “State Control over Natural Resources” in Indonesia: Implications of the Oil and Natural Gas law Case of 2012, *Journal of Energy and Natural Resources Law*, (2015) 7.

⁷⁷ Indonesian Oil and Gas Regulator Held to Be Unconstitutional, <http://www.gibsondunn.com/publications/Pages/Indonesian-Oil-and-Gas-Regulator-He> accessed November 16, 2015.

⁷⁸ Constitutional Court decision No 55/PUU-VIII/2012 p 1, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/risalah/risalah_sidang_Putusan%20No.93.PH.PU.D-IX.2011,%20tgl.%2019%20Sept%202011.pdf, accessed at: February 20, 2015.

⁷⁹ They come from various regions across Indonesia: Japin from Silat Hulu village, Vitalis Andi from West Kalimantan, Sakri from East Java, and Ngatimin from North Sumatra.

Article 21 of the Plantation Law prohibits anyone from doing any activities that may create harm to plantation area or other actions that resulted in disruption of the estate business. Article 47 stated that breaching Article 21 of the Law resulted in criminal punishment for a maximum of five years in prison and IDR 5 billion penalties. According to the Claimants, these articles contradict to Article 1(3), Article 28D (1), and Article 28 G of the Constitution.

The claimants argued that Article 21 could result in any action to preserve and defend one's right over a land could be categorized as breaching the Plantation Law. According to Sawit Watch,⁸⁰ up to 2011, there have been 660 conflicts arising out involving farmer and indigenous community against palm oil plantation, mostly involving criminalization upon members of the society's action in the farm areas. Further argument was Article 21 and 47 of the Plantation Law did not provide protection for the indigenous community. Instead, it safeguards big investors' interests over their activities conducted on indigenous people's land. Furthermore, Article 9(1) of the Plantation Law enabled investors in the farm to exploit indigenous people's land, and as a result, indigenous people and traditional farmers would not be able to get access to their land.⁸¹ Hence, the claimants argued that Article 21 and 47 of Law No 18 of 2004 breached the Indonesian Constitution, including:

Article 28D paragraph 1 which reads "every person shall have the duty to respect the human rights of others in the orderly life of the community, nation, and state."

Article 28 G paragraph 1 which reads "every person shall have the right to protection of his/herself, family, honor, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right."⁸²

⁸⁰ Sawit Watch is an NGO established in 1998. It envisages social changes for smallholder farmers, laborers and indigenous peoples towards ecological justices. Among its main activities are carrying out studies on policies and regulations related to oil palm plantation development and its impacts on smallholder farmers, laborers and indigenous peoples; and monitoring the development practices and activities of oil palm plantation companies and their credit-backer financial institutions; website: <http://www.forestpeoples.org/partners/sawit-watch>.

⁸¹ Constitutional Court decision No 55/PUU-VIII/2012, 11-12.

⁸² Ibid., 17-19.

The court gave a decision in favor of the claimants declaring that Article 21 and Article 47(1) and (2) of Law No. 18 of 2004 are in conflict with the Constitution, and therefore inapplicable. According to the Court, the word “anyone” and “prohibited” in Article 21 could be misleading since traditional farmer who has the customary right over a parcel of land could be criminalized over entering his/her land that has been used for plantation.⁸³ Such a criminalization is clearly an infringement of citizen constitutional right. The Court further stated that indigenous community should be given their customary rights including land rights.⁸⁴

In addition, the Court maintained that the phrase “any activities that may create harm to estate area or other actions that resulted in disruption of the plantation business” in Article 21 of Law No. 18 of 2004 contains very broad understanding which leads to legal uncertainty. For example, the Court questioned if someone could be criminalized due to his/her failure to provide credits for the operation of the plantation which resulted in the damage of the plantation. This type of action, according to the Court could not be categorized as a crime, yet could be penalized due to the phrase “any activities.”⁸⁵ Furthermore, the Court rejected the penalty for violating Article 21 since the conflict arising out from the Plantation Law is a private conflict which shall be resolved through civil trial, and therefore could not be settled in a criminal trial.⁸⁶

As a result, the Court maintained that Article 21 and 47 contradicted to Indonesian Constitution Article 28D (1) of the Constitution which reads: “Every person shall have the right to recognition, guarantees, protection and certainty before a just law and of equal treatment before the law.” Further, the Court stated that Article 47(1) was in breach of Article

⁸³ Ibid., 101-103.

⁸⁴ Ibid., 103.

⁸⁵ Ibid., 104.

⁸⁶ Ibid., 105.

1(3) Constitution which says: “the State of Indonesia shall be a state based on the rule of law.”

In 2014, the government enacted a new Plantation law: Law No. 39 of 2014. The government stated that this new law shows state’s alignment to the indigenous community, plantation society, and domestic investors. The government confirmed that this Law is intended to give legal protection to investors to optimally use estate resources.

In 2015, a judicial review was sought against Law No. 39 of 2014 by NGOs consist of Sawit Watch, Palm Oil Plantation Farmer Association, and Indonesian Farmer Alliance. The applicants sought to challenge Article 12(2), Article 13, Article 27(3), Article 29, Article 30(1), Article 42, Article 55, Article 57(2), Article 58(1) (2), Article 107 and Article 114 (3). They argued that the new Plantation Law was passed with a few substantial changes compare to the old law. For example, Article 55 is very similar to Article 21 of the old Law. This case is now still ongoing in the Constitutional Court.

5. *Coastal Area and Isles Law Case (2011)*

This case was brought by several individuals and CSOs include: Indonesian Peasant Union (SPI), Indonesian Forum for the Environment (WALHI), *Koalisi Rakyat untuk Keadilan Perikanan* (People’s Coalition for Fishery Justice), Indonesian Human Right Committee for Social Justice, *Pusat Kajian Pembangunan Kelautan dan Peradaban Maritim* (Center of Coastal Development and Maritime Civilization).⁸⁷ They argued that Article 1 paragraph 18 Law No. 27 of 2007 on Coastal Area and Isles infringes Article 33 (2)(3) of the Indonesian Constitution.⁸⁸ Article 1 paragraph 18 defines Coastal Water Concessions as the right of certain parts of coastal waters for marine and fisheries business, as well as other activities associated with the utilization of coastal resources and small islands which include the top of sea surface and the water column up to the sea floor.

⁸⁷ Constitutional Court decision No 3/PUU-VIII/2010, 1-8.

⁸⁸ *Ibid.*, 38-39.

The claimants acclaimed that Article 1 section 18 undermined the ability fishermen and indigenous communities' ability to make a living in coastal waters and small islands area. Isles and coastal areas area considered as a strategical economic sector which according to Article 33 (2) of the Constitution shall be controlled by the state and therefore cannot be granted to private entities.⁸⁹ They further referred to Mohammad Hatta's writing indicated that the state shall manage strategic economic sector including public utilities.⁹⁰

The claimants also sought the judicial review on Article 18 of Law No. 27 of 2007 concerning Management of Coastal Areas and Small Island which enables private enterprises to exploit coastal resources. Section 18 reads:

Coastal water concessions shall be given to:

- a. Indonesian citizen as an individual;
- b. Legal entity established based on Indonesian law, or;
- c. Indigenous community.

Hence, the government has the authority to grant private sector, including foreign investors, a concession over coastal waters for aquaculture and tourism. Concessions could extend over resources contained from the water surface to the ocean floor and could last up to 60 years with an initial period of 20 years being twice extendable.⁹¹ Furthermore, the Coastal Water Concession can also be transferred to other investors.⁹² The claimants interpreted these articles as giving preferences to private entities rather than local communities in utilizing the coastal areas and small islands. The concession given to indigenous community was seen merely as a complementary.⁹³

According to the claimants, Article 18 Law No. 27 of 2007 posed a threat to local communities. Their concerns were for the community who depended on coastal resources for their daily life and who concerned that the concessions granted would restrict their traditional

⁸⁹ Ibid.

⁹⁰ A writing by Mohammad Hatta in Gema Angkatan 45 published in 1977 titled: Pelaksanaan UUD 1945 Pasal 33 (the Implementation of 1945 Constitution Article 33), cited by the claimants in p 39-40, Constitutional Court decision No 3/PUU-VIII/2010.

⁹¹ Article 19 of Law No 27 of 2007 concerning Management of Coastal Area.

⁹² Article 20 of Law No 27 of 2007 concerning Management of Coastal Area

⁹³ Constitutional Court decision No 3/PUU-VIII/2010, 56.

rights to access and use resources, or close them altogether. In their point of view, this Law is a mean for the government to privatize Indonesia's natural resources.⁹⁴

In giving meaning to Article 33 (3) "the land, the waters and the natural resources within shall be controlled by the state and shall be used to the greatest benefit of the people," the court held that the words "controlled by the state" shall be understood more than as a private ownership. A mere 'private ownership' would not likely to be able to reach "greatest benefit of the people." Instead, the words "controlled by the state" shall be understood broadly as domination or authorization derived from the concept of sovereignty over natural resources including public ownership. The Constitution implied that collectively the Indonesian people gave a mandate to the state to formulate policy, to regulate, to manage, and to supervise natural resources for the greatest benefit of the people.⁹⁵ Therefore, the coastal water concessions given to private entities by Law No. 17 of 2007 have the potential to give the 'control' to individuals or private entities having substantial capital and technology. Consequently, traditional fishers and indigenous communities would lose their access to make a living.⁹⁶

Moreover, the Court gave meaning to Article 33(4) of the Constitution which reads:

The organization of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, the efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.

The Court argued that based on Article 33(4), the management of coastal and small islands shall be done on behalf of Indonesian people. Coastal water concessions breached economic democracy which conform togetherness principle and efficiency to justice. 'Togetherness' principle shall be seen as involving Indonesian people in conducting economic activities including those related to natural resources. Hence, the exploitation of

⁹⁴ Ibid.,

⁹⁵ Ibid., 157.

⁹⁶ Ibid., 161.

natural resources cannot merely be based on efficiency to earn maximum profit for the benefit of small groups of investors. Instead, it shall be able to improve people's welfare. The Court further argued that giving private investors a role in managing coastal and small island areas represents state's failure to maintain its economic responsibility to protect its people's welfare.⁹⁷

The Court decided that provisions of the Law No. 27 of 2007 that allowed the government to issue these concessions were considered a form of privatization of natural resources and thus unconstitutional as it breaches Article 33(3). The Court confirmed that coastal areas and natural resources within them clearly fell within Article 33(3) of the Constitution. Therefore, it requires the state to exercise control over coastal resources by formulating policies, and issuing regulations, administering, managing and supervising them. It indicated that state could give a right to use for private investors through licensing arrangement. Through licensing, entitlement towards the management of coastal areas and small island to private investors do not constitute as a transfer of ownership of the resources because the state still holds the ownership of the areas.⁹⁸

In January 2014, the government enacted Law No. 1 of 2014 concerning Management of Coastal Areas and Small Island as an amendment of Law No. 27 of 2007. The new Law amends Article 16 which reads: "Every person conducting the space utilization of a portion Coastal Water and partial use of small islands are permanently required to have a permit location. Article 18 is also amended as follows: "In case the license holder location referred to in Article 16 paragraph (1) does not initiate its activities within a maximum period of two years after the permit is granted, the holder is subject to administrative sanctions in the form of license revocation." Article 20 stipulates the central and local government to facilitate the provision of Location Permit and License Management to Local Communities and

⁹⁷ Ibid., 163.

⁹⁸ Ibid., 164-165.

Traditional Society. The amended law is apparently trying to accommodate the need of local community as required by the Constitutional Court.

6. *ASEAN Charter Case (2011)*

In 2011, the Alliance for Global Justice which consists of representatives from civil society organizations and NGOs including INFID, Indonesian Farmers Alliance, and Indonesian Association of Migrant Workers sought a review of law No. 38 of 2008 concerning the Ratification of the Charter of the Association of Southeast Asian Nations (ASEAN Charter).⁹⁹ The applicant acclaimed that ASEAN regionalism is a new imperialism initiated by the United States (US), Japan and the European Union (EU) to form a single market and base of single production through ASEAN Free Trade Area. The claimants were suspicious that ASEAN economic policy would be used as developed countries' agenda to exploit natural resources and to expand their products in Southeast Asian countries. Hence, developed countries could preserve their economic and political domination in the region as this is the favorite location for multi-national companies from the EU, the US, and Japan.¹⁰⁰ The applicant further asserted that the EU provided funding amounting € 8.4 million from 2006-2009 to support ASEAN integration; the US provided US\$ 7 million in 2007 for technical assistance, single windows program and regional market integration; and Japan contributed US\$ 90 million in 2009 to establish cooperation with ASEAN.¹⁰¹

Law No. 38 of 2008 consists of two articles. The first article stipulates the House of Representatives' endorsement of the ASEAN Charter, while the second article pertains to enforcement of the law. The applicant argued that Law No. 38 of 2008 would enable ASEAN Charter to establish ASEAN free trade area as Article 1(6) of the ASEAN Charter stipulates that "all member states take all necessary measures including the enactment of appropriate

⁹⁹ The Constitutional Court decision No 33/PUU-IX/2011, 1-2, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_33%20PUU%202011_ASEANcharter_telah_baca_26Feb2013%20final.pdf, accessed at January 22, 2016.

¹⁰⁰ *Ibid.*, 7.

¹⁰¹ *Ibid.*, 10-11.

domestic legislation to implement the provisions of the Charter.” FTA between ASEAN countries and developed countries was believed to create an unequal relationship. Developed countries with strong financial, advanced technology and human resources would likely to win the competition at the expense of ASEAN countries. They take ASEAN-China FTA as an example where Indonesia suffered a significant loss due to its inability to compete with a relatively cheap product from China. Hundreds of textile and steel manufacturers went bankrupt. Consequently, approximately three thousand workers lost their job. ¹⁰²

The applicant challenged Article 1 (5) and 2(2)(n) of the ASEAN Charter. Article 1(5) rules that one goal of the ASEAN is to establish a “single market and production base” with “free flow of goods, services, and investment” and “freer flow of capital.” Article 2(2)(n) binds ASEAN members to multilateral trade rules and to move towards eliminating market barriers to regional economic integration in a “market-driven economy.”¹⁰³ Those articles were considered in breach of Article 33 paragraphs (1) (2) and (3) and also Article 27(2) of the Constitution: “Every citizen shall have the right to work and to earn a humane livelihood.”¹⁰⁴

The claimant asserted that Articles 1(5) and 2(2)(n) have been used as a basis in several other FTAs such as the ASEAN-Australia, the ASEAN-China, and the ASEAN-Korea. Such provisions, according to the claimant, were unfair to Indonesians as they did not have an equal level of playing field, especially for the small scale business. Unequal competition would likely to result in damaging domestic industries. Therefore, such provisions were against Article 33 and Article 27(2) of the Indonesian.¹⁰⁵

Fajruul Falaakh, a legal expert from the Indonesian government, explained that the substance of ASEAN Charter ratification which was documented under Law No. 38 of 2008

¹⁰² Ibid., 13.

¹⁰³ Ibid., 11-12.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid., 64-65.

was not a formal legal document. Instead, the disputed object was ASEAN Charter which was an international agreement. Reviewing ASEAN Charter meant considering public international entity, ASEAN, which is definitely beyond the Constitutional Court jurisdiction. Besides, given the Constitutional Court an authority to review the ratifications would possibly make the Court annul many international agreements.¹⁰⁶

The majority of the Court held that Articles 1(5) and 2(2)(n) of the Charter did not breach the Constitution. Those articles did not bound Indonesia to do anything more than enact national laws to give effect to the Charter. Hence, the government would still have the latitude to choose how to comply with it. In any event, the Charter had not come into force when Law No. 38 of 2008 was enacted because other ASEAN countries had not yet ratified it, as required by the Charter.¹⁰⁷ In addition, the Court hold that the implementation of ASEAN Charter depended on each member state as stipulated in Article 5 (2). Hence, the Indonesian government shall make the implementation of the Charter in accordance with the national interest and the Constitution.¹⁰⁸ Justice Hamdan Zoleva and Justice Maria F Indrati dissented arguing that the Constitutional Court cannot review Law No. 30 of 2008 as the ratification from the House Representative towards ASEAN Charter. Hence, the application should have been rejected in the first place.¹⁰⁹ These two justices apparently agreed with Fajruul Falaakh legal opinion

7. *Forestry Law Case (2013)*

On March 20th, 2013 the Indonesian Constitutional Court invalidated provisions of the Law No. 41 of 1999 concerning Forestry. The Law allowed the Indonesian government to assume ownership of forest that indigenous communities had occupied and used for generations. This Law enables state agencies like the Ministry of Forestry to grant large

¹⁰⁶ Ibid., 121-122.

¹⁰⁷ Ibid., 189.

¹⁰⁸ Ibid., 195.

¹⁰⁹ Ibid., 201-206.

concessions to companies for mining, logging, and plantations even if the areas have been managed for generations by traditional community. Consequently, there have been many conflicts between indigenous communities and private investors that received permits.¹¹⁰

The petitioners were AMAN (*Aliansi Masyarakat Nusantara*), traditional communities such as *Kesatuan Masyarakat Hukum Adat Kenegerian Kuntu*, *Kesatuan Masyarakat Hukum Adat Kasepuhan Cisitu*.¹¹¹ The claimants requested the Court to invalidate Article 1(6), Article 4(3), Article 5 (1) (2) (3) (4), Article 50(2), Article 67, and Article 68 (3) (4). Article 5 reads:

- (1) According to their status, forests shall be categorized as: (a) state forest and (b) titled forest.
- (2) State forest as intended in paragraph (1) point a can be in the form of customary forests.
- (3) Government shall determine the status of forests as intended in paragraph (1) and (2); and customary forests shall be determined insofar as they exist in reality and their existence is recognized.
- (4) If during the development thereof, the customary communities concerned are no longer existing, the management right of the aforementioned customary forests shall be returned to the government.

They claimed that those articles enabled the state to use its control over their land to issue concessions to commercial enterprises to exploit it, including for mining, industrial logging, pulp and paper, and also palm oil.¹¹² For more than ten years of enactment, the Forestry Law has been used as a tool to take over the rights of indigenous people over their customary forests areas to become state forest. Hence, the government, on behalf of the state, could give the areas to investors through several licensing arrangements to be used regardless the rights and local wisdom of indigenous people. Consequently, many conflicts arose

¹¹⁰ Rhett A. Butler, "In landmark ruling, Indonesia's indigenous people win right to millions of hectares of forest," May 17, 2003, <https://news.mongabay.com/2013/05/in-landmark-ruling-indonesias-indigenous-people-win-right-to-millions-of-hectares-of-forest/> accessed at July 21, 2016.

¹¹¹ Constitutional Court decision No 35/PUU-X/2012, 1 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_35%20PUU%202012-Kehutanan-telah%20ucap%2016%20Mei%202013.pdf, accessed at January 22, 2016.

¹¹² *Ibid.*, 3.

between indigenous people and investors exploiting their forests, as well as conflicts between indigenous people and the government.¹¹³

The claimants argued that these are contradictory with Article 33 (3). In addition, the government practices also contradicted with Article 18 B(2) of the Constitution which reads:

The state recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic Indonesia, and shall be regulated by law.

The Court acknowledged the indigenous people constitutional rights and respected them as the legal owner of customary forests. Further, it stated that as a legal subject, the people should receive concerns as another legal subject especially in allocating the source of life. In fact, they often received different treatment so that they lost their rights for the forest as natural resources for their lives including their traditional rights.¹¹⁴

The Court decided in favor of the claimants stated the provisions were unconstitutional because the state was constitutionally required to recognize and respect the customary rights of the traditional forest community. The state could not, therefore, award the concessions without approval from those communities because such an act violated Article 33 (3) of the Constitution. The Court is increasingly siding with the indigenous community. Justice Muhammad Alim stated that “native Indonesians have the right to log their forests and cultivate the land for their personal needs, and the needs of their families.”¹¹⁵

Prior to this ruling, land-related cases were brought under which the state has permitted itself to grant concessions to commercial entities including foreign investor to exploit the land, water, and natural resources. Unfortunately, it was not accompanied by proper compensation to the people affected. Such practices led to strong criticisms from the society.

¹¹³ Ibid., 4.

¹¹⁴ Ibid., 169-170.

¹¹⁵ Ibid.

8. *Water Resource Law* (2015)

In February 2015 the Constitutional Court annulled Law No. 7 of 2004 concerning Water Resources¹¹⁶ and reinstated Law No 11 of 1974 concerning Waterworks. The applicants, Muhammadiyah, some NGOs and several individuals, argued that Water Resources Law negatively impacted their constitutional rights.¹¹⁷ The petitioners requested a review of Article 6, 7, 8, 9, 10, 26, 29(2)(5), 45, 46, 48, 80. Citing Islamic teachings which emphasize the importance of water,¹¹⁸ they argued that utilization of water shall benefit to all creatures.¹¹⁹ Thus, the applicants reject commercialization and privatization of water in Law No. 7 of 2004 as it contradicts to Islamic teachings and Article 33 of the Constitution.

Commercialization of water was regulated in Article 9 paragraph 1 which stipulates that water exploitation right could be given to individuals or enterprises pursuant to permit given by the regional or central government. Meanwhile, privatization was made possible by Article 45 enabled private participation:

(2) Surface water resources operation covering a river area may only be conducted by state-owned business entities or regional-owned business entities in water resource processing or by co-operation between state-owned business entities and regional-owned business entities;

(3) Water resources operation other than those intended under paragraph (2) may be conducted by individuals, business entities, or co-operations between state-owned business entities and regional-owned business entities in accordance with their respective authorities.

The applicants argued that private participation in water resource management was considered as giving more opportunities to private entities to control water resources at Indonesian people' expenses. Such control shall belong to the government¹²⁰ Private

¹¹⁶ The Constitutional Court decision No. 85/PUUXI/2013 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_2131_85_PUU_2013-UU_SumberDayaAir-Dikabulkan-telahucap-18Feb2015-FINAL-%20wmActionWiz.pdf accessed February 21, 2016.

¹¹⁷ Ibid., 9.

¹¹⁸ They cited Koran Surah Al-Baqarah 164, Al-Ankabut 63, and Ar-Ruum 24.

¹¹⁹ The Constitutional Court Decision No 85/PUU-XI/2013, 15.

¹²⁰ Ibid., 21-23.

participation in water resources could lead to monopoly which detrimental to people as the private entities would commercialize it.¹²¹

The Court takes the stand that the Water Resources Law contradicts Article 33 (3) of Indonesian Constitution. According to the Court, Article 33 contains economic democracy which is “democracy conceptualized based on facts about the outlook of the Indonesian nation, which is collective, not individualistic, and not liberal, so that the national economy is structured as a joint venture on the basis of kinship.”¹²² The ruling emphasizes the state’s control over water through its roles as policymaker, supervisor, regulator, manager and controller. The supervisory function is conducted by granting and depriving permits, licenses, and concessions. As the regulator, the government together with the House of Representatives create legislations. At the same time, the government is required to directly involve in SOE as a shareholder. These are to ensure that water is used for the greatest prosperity of the people.¹²³

The Court also holds that the right to water is a human right and it should be interpreted as a tool for the government to manage water use. A private investor cannot claim ownership of water resources but only use water allocated by the government. The ultimate priority for water utilization shall be given to state-owned enterprise or local government-owned enterprise. Private parties will be given the opportunity only when the restrictions have been fulfilled, and the water supplies are still available. The Court also instructed the government issues permit to investors to conduct water utilization with a certain and restricted condition.¹²⁴

Following the verdict, the government reenacted the old water law which was the Law No. 11 of 1974. It is a setback since the old water law does not acknowledge utilization of

¹²¹ Ibid., 27.

¹²² Ibid., 135.

¹²³ Ibid., 140.

¹²⁴ Ibid., 138-139.

water resources for commercial purposes. Also, the old water law was enacted when the government was centralized. The Court decision did not only puts the use of Spring water bottled water companies into question but also raises concerns about the legality of the district and provincial permits issued for any type of ground water usage.¹²⁵ Foreign investors impacted by this decision includes those operate in bottled water companies, hydropower project, and commercial agricultural sectors. The Ministry of Public Works and Housing and the Ministry of Energy and Mineral Resources have issued a circular letter stating that any existing permit will still be valid until its expiry date.

Following the Constitutional Court ruling, on March 24th, 2015 the Central Jakarta District Court annulled a water privatization contract signed by two foreign-owned water companies Suez and Aetra. Both companies have had cooperation with PAM Jaya (Regional-owned enterprise) since 1997, and their contracts are set to expire in 2023.

Further Judicial Review Cases

At the time being, three ongoing cases are being reviewed by the Constitutional Court submitted by *Muhammadiyah* and several prominent figures¹²⁶: Law No. 24 of 1999 on Foreign Exchange and Exchange Rate System (Foreign Exchange Law); Law No. 25 of 2007 regarding Investment; and Law No. 30 of 2009 concerning Electric Power. Submitted separately, those three cases are formulated on the same basis namely breach Article 33 of the Constitution. According to Professor Edi Swasono¹²⁷ the substances of those laws threaten Indonesia's political and economic sovereignty. Ichsanuddin Noorsy¹²⁸ stated that Foreign Exchange Law had caused an unstable Indonesian currency, rupiah, because of its free

¹²⁵ Water Law Crisis Opens Floodgates - amcham.or.id, <http://www.amcham.or.id/fe/4919-water-law-crisis-opens-floodgates> accessed November 1, 2016.

¹²⁶ They are including: Professor Sri Edi Swasono, Marwan Batubara, Fahmi Idris, Ichsanuddin Noorsy.

¹²⁷ A professor of economics at the University of Indonesia, son in law of Mohammad Hatta. His books are: Cultural Breakthrough (Terobosan Kultural; 1986), Economic Democracy: Participation Business Linkages VS Economic Concentration (Demokrasi Ekonomi: Keterkaitan Usaha Partisipasi VS Konsentrasi Ekonomi; 1988), Economic Systems and Economic Democracy (Sistem Ekonomi dan Demokrasi Ekonomi; 1991), Towards Economic Development and the People (Menuju Pembangunan Perekonomian Rakyat; 1998).

¹²⁸ Politics and economics observer, Doctor in Economics from Airlangga University Indonesia, former member of the House of Representatives.

floating rate system. “Under this system, the rupiah’s exchange rate is no longer determined by the government, but by market forces.” Noorsy also argued that Foreign Exchange Law enables the free use of foreign exchange. The negative impact would be worsened as the Article 8 of the Law No. 25 of 2007 allows foreign investors to transfer and repatriate their assets in foreign currency.¹²⁹ In addition to those cases, Muhammadiyah has listed 115 laws and implementing regulations that are considered to contradict the Constitution.¹³⁰

C. Bilateral Investment Treaty Review and Moratorium

The *Churchill and Planet Mining* cases in 2012 can be seen as a turning point in Indonesian foreign investment agendas. The foreign investment legal landscape changed dramatically and the government started to act to prevent further damage caused by BIT. After Churchill and Planet Mining had sued the Indonesian government to ICSID arbitration, the then President Yudhoyono declared not to renew the already due treaties, nor will it make the new one. Consequently, all 65 BITs and five Investment-Chapters in various free trade agreements are under scrutiny. This review reflects a critical evaluation of the impact of the existing International Investment Agreements (IIAs) and the formulation of a new approach towards IIAs which favor the interest in pursuing national development goals.¹³¹ This policy is continuing under the current President Widodo administration.

Since the first BIT was concluded between Germany and Pakistan in 1959, the early BITs adhered to model formulated by European capital exporters. It was not until the 1990s when a modern wave of BIT negotiations took place.¹³² The modern BITs often signed

¹²⁹ Christina Desy and Agus Sahbani, “Muhammadiyah to Continue Its Constitutional Jihad,” *Hukum Online*, April 22, 2015 available at <http://en.hukumonline.com/pages/lt553765365e6f3/muhammadiyah-to-continue-its-constitutional-jihad-accessed-at-August-2,-2016>.

¹³⁰ As stated by Syaiful Bakhri, the Chairman of Legal Division of Muhammadiyah in *Tempo*, July 23, 2015, “Constitutional Jihad, Muhammadiyah New Jihad.” Available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11501#.V6q1Q5grKM8> accessed January 20, 2016.

¹³¹ Abdulkadir Jailani, “Indonesia’s Perspective on Review of International Investment Agreements,” *Investment Policy Brief*, No 1, July 2011.

¹³² Karl P. Sauvant and Jose E. Alvarez, *Introduction: International Investment Law in Transition*, (Oxford: Oxford University Press, 2011).

between developing countries. Several nations are in the process of reviewing BIT. India has proposed Model BIT which was released to the public for feedback. The draft model provides that home state as well as host state of investment is required to consent to arbitration. South Africa is also in the process of terminating its BITs. Up to January 2016, South Africa has sought to review its BIT that gives access to investment arbitration. It already terminated six of its BITs and still has 17 other remaining.¹³³

1. Reasons for BIT Review

Interview conducted with the government officials revealed that there are two main reasons for the current review of IIAs. The first reason is regarding the substantive matter in which the most BITs grant very broad protections and rights for FDI and left the government with little policy space to implement its development goals. That fact led the government to seek a balance between investor protection and national sovereignty. Secondly, it is the issue of dispute settlement in BIT which stipulates international investment arbitration. The government intends to reduce the possibility of being sued before any investment arbitration.¹³⁴

BIT review policy is motivated and considerably influenced by not only Indonesia's experiences in responding claims from various multinational companies before the ICSID arbitration but also other landmark cases before the ICSID. The drafters of the Indonesian model BIT takes the lessons from arbitration very seriously aiming to expressly manifest Indonesia's intentions to promote sustainable economic development.

¹³³ Mohammad Mossalam, "Process Matters: South Africa Experience Exiting Its BITs," The Global Economic Governance Programme, University of Oxford, Working Paper January 2015, available at http://www.globaleconomicgovernance.org/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossallam.pdf, accessed May 12, 2016.

¹³⁴ Interview with Informant no 1 Indonesian Investment Coordinating Board.

Table IV.1: List of Discontinuation of BIT by the Republic of Indonesia

No.	Country	Date of Notification	Effective Date of Termination
1.	Bulgaria	January 22, 2014	January 25, 2015
2.	Netherland	February 17, 2014	June 30, 2015
3.	Italy	February 17, 2014	June 23, 2015
4.	Slovakia	February 17, 2014	February 28, 2015
5.	France	February 17, 2014	April 28, 2015
6.	Kyrgyzstan	February 24, 2014	February 18, 2018
7.	Spain	March 19, 2014	November 11, 2016
8.	China	March 19, 2014	March 31, 2015
9.	Laos	March 28, 2014	October 13, 2015
10.	Egypt	April 7, 2014	November 30, 2014
11.	Malaysia	June 20, 2014	June 20, 2015
12.	Cambodia	January 7, 2015	January 7, 2016
13.	India	January 7, 2015	April 7, 2016
14.	Romania	January 7, 2015	January 7, 2016
15.	Turkey	January 7, 2015	January 7, 2016
16.	Vietnam	January 7, 2015	January 7, 2016
17.	Hungary	February 2, 2015	February 12, 2016
18.	Singapore	May 6, 2015	June 20, 2016
19.	Pakistan	August 4, 2015	December 2, 2016
20.	Switzerland	August 4, 2015	April 8, 2016

Source: The Ministry of Foreign Affairs Republic of Indonesia

In addition, in October 19, 2015, Indonesia and Argentina agreed to discontinue the BIT twelve months after the date of reception and not to impose the survival clause. The effective date of termination was October 19, 2016.

2. Process of Review

The process of reassessing the existing provisions are mainly focused on the most problematic provisions such as the ‘scope’ and ‘definition of investment,’ Fair and Equitable

Treatment (FET); the ‘Most-Favored-Nation’ principle, National Treatment principle, expropriation and dispute settlement provision. The reassessment is aimed at identifying problems and finding the most reasonable solutions. The assessment sees into the extent to which those clauses provide protection to the investors and its impact on the policy space of the Government.¹³⁵ The result will be in the form of a Model BIT which will serve as the Government’s new position on BIT negotiation.

The model BIT contains various improvements. If previous BITs are only to promote a liberal investment regime to attract as many FDI as possible, the current model has a nationalistic framework.¹³⁶ This can be seen from the definition of investment which has been narrowed down in which exclude portfolio investment from the definition. By doing so, not all investment may enjoy benefits under BITs unless such investment contributes to national development. The current scope of the National Treatment clause is also reduced to apply only for investment that already operating (post-establishing treatment). This differs from the previous regime where National Treatment principle extends to pre-establishment rights. Likewise, the scope of Most-Favored-Nation clause is also narrowed to limit the possible application of investment arbitration.¹³⁷ The current practice allows a foreign investor to invoke provisions of any treaty other than the one concluded between the home state and Indonesia. Some of the important exclusions incorporated in the new MFN clause are pre-establishment measures; any existing or future regional FTAs and EPAs; existing and future IIAs; ISDS provisions; and any preferential system for any least-developed countries.

Generally speaking, the inclusion of FET has brought about a high degree of unpredictability, especially in respect to investment arbitration.¹³⁸ In that regard, the FET

¹³⁵ Jailani, *Indonesia’s Perspective*. 1.

¹³⁶ Ginsburg, *International Substitutes*, 119-122.

¹³⁷ Article 4(1)(2)(3) Model BIT.

¹³⁸ Matthew C. Porterfield, “A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals,” *Investment Treaty News*, March 22,

clause has been numerous and successfully used by investors as a basis of their claims against host state of investment.¹³⁹ A broad interpretation of FET by arbitral tribunals may lead to the decision in favor to foreign investors. As a result, Indonesia is crafting a new provision to replace FET, namely Standard Treatment, which simply shifts the focus from investor rights to protection from denial of justice.¹⁴⁰ In this newly formulated provision, assurances were made regarding the fact that investors shall not be subjected to denial of justice in criminal, civil or administrative proceedings.¹⁴¹ As far as expropriation is concerned, Indonesia still maintains the clause of expropriation. However, a distinction is made between direct and indirect expropriation, which is entirely excluded. Direct expropriation shall only be made for the purpose of public interest and carried out with due process of law and followed by prompt and adequate compensation.¹⁴²

The procedural limitation is aimed to minimize the legal risk of ISDS. In most BITs, Indonesia is considered as giving advance consent for arbitration. This approach poses a high risk as a foreign investor may directly sue the country before arbitration. To anticipate the legal risk, Indonesia is about to introduce separate consent requirement before an investor could bring a matter to international arbitration.¹⁴³ Therefore, an investor may bring a case to international arbitration if investor and the Indonesian government have expressed their consent to settle the case through international arbitration. A special agreement to resolve a dispute through international arbitration would be required on a case per case basis. This approach would be expected to reduce the number of arbitration claims against the

2013, available at: <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/>, accessed at August 15, 2016.

¹³⁹ Ibid.

¹⁴⁰ Article 5(1)(2) Model BIT

¹⁴¹ Jailani, *Indonesia's Perspective*, 3.

¹⁴² Ibid., 5.

¹⁴³ Article 24 (5) Model BIT

Indonesian government and also to promote settlement of investment dispute through domestic court.¹⁴⁴

While there is concern that inexistence of BIT might reduce the number of inward investment,¹⁴⁵ the government responds that the review process does not affect the foreign investment inflows to Indonesia as suggested by the table below. The table reveals that in the fourth quarter of 2015 FDI inflow amounted to IDR 99.2 trillion which is the highest since 2011 before BIT review was initiated.

Table IV.2: Amount of FDI in IDR (Indonesian Rupiah) trillion in Quarterly bases

2011				2012				2013			
1 st Q	2 nd Q	3 rd Q	4 th Q	1 st Q	2 nd Q	3 rd Q	4 th Q	1 st Q	2 nd Q	3 rd Q	4 th Q
39.5	43.1	46.5	46.2	51.5	56.1	56.6	65.5	65.5	66.7	67.0	71.2

2014				2015				2016	
1 st Q	2 nd Q	3 rd Q	4 th Q	1 st Q	2 nd Q	3 rd Q	4 th Q	1 st Q	
72.0	78.0	78.3	78.7	82.1	92.2	92.5	99.2	96.1	

Source: The Indonesian Investment Coordinating Board

A further concern is regarding whether the review and reassessment will be able to meet the appropriate balance between investment protection and the advancement of public interest.¹⁴⁶ Another opinion stating that this review process is worthless since investors from the United States mostly do not question about BIT between Indonesia and the U.S. as indicated by data that U.S. investors are the fourth biggest FDI in Indonesia amid the absence of BIT between those two countries.¹⁴⁷

¹⁴⁴ Interview with Informant no 2 of Indonesia Investment Coordinating Board and Informant No 1 of Ministry of Foreign Affairs.

¹⁴⁵ Interview with Informant no 1 of Indonesia Investment Coordinating Board and Informant No 1 of Ministry of Foreign Affairs.

¹⁴⁶ Interview Informant no 2 of Ministry of Foreign Affairs.

¹⁴⁷ Interview Informant no 1 American Chamber of Commerce Jakarta.

Recognizing the flaws of the current BITs, the drafters of model BIT have come up with new features and more accurate, clear and precise provisions for new investment treaties that Indonesia negotiate. The model BIT confirms economic development purpose;¹⁴⁸ protect state's right to regulate,¹⁴⁹ and limit the definition of investment;¹⁵⁰ stricter the nationality requirements.¹⁵¹ These aim to minimize the possibility of the government being sued and to set the limit of arbitral tribunal power so that the provisions cannot be interpreted in a way that is detrimental to the national interests.¹⁵²

Table IV.3: Comparison of the existing BIT with the BIT Model:

Features	Existing BIT	Model BIT
Preamble	Emphasize on favorable conditions for investors. Do not contain regulatory measure.	Emphasize on sustainable development. Regulatory measure is recognized.
Covered Investment	Do not explicitly mention "direct investment" and written permit from BKPM.	Explicit direct investment requirement, must have been admitted into Indonesia only through the grant of written Investment License by the BKPM under the Investment Law
Definition of Investment	Very broad: "Any kind of assets": movable and immovable properties, shares, bonds, claims of money, industrial and intellectual property rights, business concessions.	Narrowly defined: Land and rights on immovable properties. Shares in limited liability company and dividend.

¹⁴⁸ Preamble of Model BIT

¹⁴⁹ Article 19(1)(2)(3) Model BIT

¹⁵⁰ Article 1 Definitions paragraph I Model BIT

¹⁵¹ Article 1 Definitions paragraph II Model BIT

¹⁵² Interview with informant No 2 of Indonesia Investment Coordinating Board.

Investment License	Do not mention the authority that issues the license. No provision on 'principle license'	Emphasize that investment license shall be the principal license and other business license given by the BKPM.
Definition of Investor	Legal entity or individual	Legal entity or individual (natural person)
Definition of Measures	No provision	Law or Government Regulation in lieu of Law; Government Regulation; Presidential Regulation; Provincial Regulation; District Regulations; others.
Scope of Application	General: to investor and their covered investment within Indonesian territory, comply with Indonesian law.	Specific: the BIT shall not apply to Measures, policies, acts, facts and disputes arisen before the conclusion of the treaty.
Treaty Claim and Contract Claim	There is no provision	Breach of contract cannot be categorized as breach of treaty.
Treatment of Investment	National Treatment Most Favored Nation Standard of Treatment Fair and Equitable Treatment	National Treatment Most Favored Nation Standard of Treatment
Compliance with International Obligations	No provision	Measures taken by the government to fulfill its international obligations is not a breach of treaty
The Cause of Action under the Agreement	National Treatment, Most Favored Nation, Standard of Treatment, Expropriation (including indirect), Contract breach	Only breach on national treatment; most favored nation treatment; standard of treatment; expropriation.

Investor-State Dispute Settlement	No provision on written consent	Consent in writing
Governing Law in Dispute Settlement Period in Force and Termination	Do not specifically mention hierarchy	Hierarchy: BIT, National laws General principle of law International Law
Period in Force and Termination	Between 10-15 years can be extended automatically	10 years, automatic extension is not possible unless stated otherwise in writing Unilateral termination is possible through a diplomatic note.
Cooperation in Promotion of Investment	No provision	Promotion event, information exchange, technical assistance.

3. Features of the Model BIT:

a. Preamble

The preamble of ICSID Convention specifically mentions the Convention was made partly due to the need for international cooperation for economic development. While the existing BITs mostly emphasize on friendly and cooperative relations; protection and promoting investment in their preamble,¹⁵³ the Indonesia model BIT set a wider set of ultimate policy goals of BIT to promote economic development through the flows of sustainable investment as pointed in the ICSID Convention. The preamble also states each party of the BIT may take regulatory measures in order to promote development and the public interest according to policies it adopts including the promotion of labor rights and the protection of the environment. The intention is to emphasize that investors' accountability is as important as their rights.

¹⁵³ For example Indonesian BIT with Algeria, Australia, Bangladesh, Cambodia, Cuba, Czech, Germany, Lao, Mongolia, Netherlands, Pakistan, Philippines, Singapore, Slovak, Sri Lanka, Sudan, the United Kingdom.

The consideration for putting economic and sustainable development seems to be influenced by many opportunities Indonesia has for ‘green’ development including in the infrastructure such as toll roads, railway, airports, and ports. The Investment Coordinating Board estimates that the potential for ‘green’ infrastructure for foreign and domestic investors will increase by about 20 percent by 2019.¹⁵⁴ That is why emphasize on sustainable development is essential to ensure that foreign investors will take part to materialize it.

Besides, Article 31(1) the Vienna Convention on the Law of Treaties stipulates that “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” That article is very relevant for the purpose of interpreting the word ‘investment’ since when an arbitral tribunal is examining the text of a treaty, they pay particular attention to the preamble in which the treaty purposes are declared. Accordingly, ICSID arbitral tribunals repeatedly refer to ‘economic development’ when interpreting treaty provisions.¹⁵⁵ Putting ‘economic development’ as the purpose is in conformity with the ICSID Convention. More importantly, it should direct arbitral tribunal to consider the host state’s interests, rather than merely paying attention to the ‘protection of investment’ which often detrimental to the host state. An expressed purpose that neglects to indicate that foreign investments are protected because they are an avenue to economic development will merely make arbitrators see BIT as a way to protect foreign investors and their investment.

b. Covered Investment

BIT only protects direct investments obtaining necessary permits from the Indonesian Investment Coordinating Board. The Older generation of BITs such as those with the UK,

¹⁵⁴ The World Bank Press Release, “Indonesia: Businesses To Work Together with Government towards Sustainable Development Goals,” June 9, 2015, available at: <http://www.worldbank.org/en/news/press-release/2015/06/09/businesses-to-work-together-with-government-towards-sustainable-development-goals>, accessed August 3, 2016.

¹⁵⁵ For example: *Salini Costruttori SpA and Italstrade SpA v. Morocco* (ICSID Case No ARB/00/4); *Malaysian Historical Salvors Sdn Bhd v Malaysia* (ICSID Case No. ARB/05/10); *Ceskoslovenska obchodni banka, a.s. v Slovak Republic* (ICSID Case No. ARB/97/4).

Australia, and Singapore do not mention ‘direct investment’ requirement. Consequently, it created a doubt if portfolio investment is included as covered investment as happened in *Rafat Ali* case. Rafat, the Claimant, owned shares traded on the Indonesia Stock Exchange. The ICSID tribunal held that the claimant’s investment was not protected within the meaning of Indonesia-UK BIT and Indonesian Investment Law. Article 2(1) Indonesia-UK BIT reads:

The agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.

While the BIT did not specifically require direct investment, the tribunal held that claimant’s portfolio investment was not a protected investment. The tribunal referred article 2 of the Law No. 25 of 2007 which excludes indirect investment from the definition of investment.

The Indonesian government asserted that the claimant had no legal permit for his investment based on Law No. 25 of 2007. While the Law was silent on which government institution had the authority to grant the license, the government stated that the Indonesian Investment Coordinating Board was the one. Thus, any license produced by an agency other than the Board was not in compliance with the Law. The claimant asserted that his investment had gained a license from Bank of Indonesia since his investment was in the banking sectors. The ICSID tribunal ruled for Indonesia stating that the Claimant cannot claim protection under the Indonesia-UK BIT. However, the tribunal agreed with the Claimant that the permit issued by Bank of Indonesia is valid since this institution is responsible for banking regulation. Also, the Law did not specifically indicate the Investment Board as the sole agency to issue the permit. The Indonesian government is apparently learning from *Rafat* case, thus in the Model BIT the designation of the Investment Board is made expressed.

c. Definition of Investment

The older generation and existing BITs define investment extensively, starting with “any kind of assets” and then followed by “including but not exclusively.”¹⁵⁶ Example

Indonesia-Singapore BIT Article 1:

The term “investment” shall mean any kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, in conformity with the laws and regulations of the latter, including, though not exclusively:

- a. Movable and immovable property as well as other property rights such as mortgages, liens or pledges;
- b. Shares, stock, debentures and similar interests in companies;
- c. Claims to money or to any performance under contract having an economic value;
- d. Intellectual property rights (including but not limited to, copyrights and neighboring rights, trademarks, patents, industrial design, layout-design of integrated circuit and right in plants varieties) know how, trade secrets, trade names, and goodwill;
- e. Business concessions conferred by law or under contract including concessions to search for or exploit natural resources.

This broad definition would likely to qualify almost every transaction as an investment which is definitely not what was intended by Indonesia.

The model BIT, therefore, defines investment more specifically covering land and other immovable property rights acquired after the investment; shares in other limited liability companies; and dividend payment.¹⁵⁷ To anticipate any further dispute, the Indonesia model BIT explicitly limits protected investment. The following do not fall under the definition of investment: any legal rights arising out of contract; portfolio investment; goodwill; market shares; the extension of credit in connection with a commercial transaction such as trade financing; loan to state party or state-owned company; money raised through government bonds; representative or branch office; public debt instruments or debt security issued by a government; letter of credit; and intellectual property rights including but not

¹⁵⁶ For example Indonesian BIT with Algeria, Argentina, Australia, Croatia, Finland, Germany, Libya, Singapore, the United Kingdom.

¹⁵⁷ Article 1 (II) (I) (i)(ii) Model BIT.

limited to trade secret information.¹⁵⁸ Clearly, this is intentionally aimed to reverse the wide ranges investment types recognized in the older BITs such as the Indonesia-Singapore above.

Further, the model explicitly requires that assets shall fulfill the characteristic of investment such as certain duration; the substantial commitment of capital or other resources; the expectation of gain or profit; the assumption of risks; and contribution to the development of the host state.¹⁵⁹ Those criteria are clearly echoing the ‘Salini test.’ In *Salini*,¹⁶⁰ the ICSID tribunal considered the criteria of investment to be: contributions, certain duration of performance of the contract, and participation in the risks of the transaction. After examining the preamble that has economic development purpose, the Tribunal in *Salini* went on to identify two criteria for an investment to contribute to the economic development of the host state namely: the investment should be beneficial to the public interest and there should be any transfer of know-how.

In respect to the ICSID arbitration, a dispute will only fall within the jurisdiction if it directly arises out of an ‘investment’, as stipulated in Article 25(1) of the ICSID Convention. Since the ICSID Convention does not provide the definition of ‘investment,’ the drafters of Indonesian model BIT make precise ‘investment’ definition. The model clearly has an objective definition of investment to set the limit of arbitral tribunal’s authority. Without such definition, foreign investors could use BIT to submit any dispute they chose to arbitration regardless of the subject matter.

It seems that the drafters are also aware that the Salini tests have been followed by subsequent tribunals, either in whole or in part. In *Joy Mining Machinery v. The Arab Republic of Egypt (Joy Mining)*,¹⁶¹ Egypt asserted that the dispute over a contract provide mining equipment for a phosphate mining project did not fall under ICSID arbitration.

¹⁵⁸ Article 1(II) (I)(iii) Model BIT.

¹⁵⁹ Article 1(I)(iii) of the Indonesian Model BIT.

¹⁶⁰ ICSID Case No ARB/00/4, Decision on Jurisdiction of 23 July 2001.

¹⁶¹ ICSID Case No. ARB/03/11.

Conversely, the Claimant contended that the transaction met the requirements under Salini test meaning that the transaction was an investment. The tribunal confirmed the Claimant's argument. Another case that followed is *Jan de Nul N.V. v. Arab Republic of Egypt*.¹⁶² The Claimant was hired by the Egyptian government to widen and deepen part of Suez Canal. Later the claimant alleged the Egyptian government withheld certain material facts related to the project. While the Egyptian government denied the arbitral tribunal's jurisdiction saying there were no investment activities involved, the tribunal held that it was an investment based on Salini test.¹⁶³

d. Investment License

The existing BITs do not designate a single institution to administer investment license. Consequently, licensing are scattered around various government agencies depending on the investment sector. In order to simplify licensing, the Model BIT Article 1(II) states that:

Investment license means any government authorization, license, or similar legal instrument that entitles an investor to establish, expand, acquire, own or operate an investment. For investment made in Indonesia, such investment license shall be the principal license and other business license given by the BKPM pursuant to prevailing law of the Republic of Indonesia.

This provision is in line with the current administration policy. In January 2015 President Joko Widodo launched the integrated one-stop service center at the BKPM. This service enables investors to simply go to BKPM without pay visits to various ministries or government agencies to obtain principal license.¹⁶⁴ The principal license is one of the most important licenses a multinational company needs to get before its operation in Indonesia.

¹⁶² ICSID Case No. ARB/04/13.

¹⁶³ ICSID Case No. ARB/04/13.

¹⁶⁴Indonesia's One-Stop Investment Licensing Service at BKPM Launched, Indonesia-Investment, January 27, 2015, available at: <http://www.indonesia-investments.com/news/todays-headlines/indonesia-s-one-stop-investment-licensing-service-at-bkpm-launched/item5256>, accessed on 8/12/2016.

e. Definition of Investor

Both Old generation of BITs and the Model BIT recognize that investor means either a natural person or a juridical person. The Model BIT is more accurate in the requirement for both. For a natural person, the investor must have the nationality of the home state, and the nationality must be submitted and admitted to the investment authority as stated in the investment license issued by the host state. Juridical person means a corporation legally incorporated in the home state which has been established and actively operating for five years and has its seat of control and management exclusively in the home state.¹⁶⁵ The objective of such a strict requirement is to avoid treaty shopping.¹⁶⁶

The Indonesian government is likely to learn from *Newmont* case. Newmont is a subsidiary of the US-based Newmont Mining Corporation which is registered in the Netherland, presumably, because there is no BIT between Indonesia and the US. Newmont sued the Indonesian government under the Indonesia-Netherland BIT. The Netherland BITs are known to be expansive in the rights and protection given to foreign investors. The characteristic of Netherland BITs is the use of overly broad legal phrasing and definitions.¹⁶⁷ The Netherland government facilitate easy establishment of *mailbox company*, which allows entities with no substantial ties to the Netherlands to avail themselves of the treaty protections.¹⁶⁸ Newmont is clearly doing ‘treaty shopping’ to acquire the extended protection offered by Indonesia-Netherland BIT to sue the Indonesian government. Besides, the Netherland has favorable tax regime aims at removing international double taxation.

¹⁶⁵ Article 1 (II)(i and ii) the Indonesian BIT Model.

¹⁶⁶ Treaty shopping is the practice of various investors appropriating a treaty by incorporating a company in a country having a favorable treaty with the host country.

¹⁶⁷ Roeline Knottnerus & Roos van Os, “The Netherlands: A Gateway to ‘Treaty Shopping’ for Investment Protection”, January 12, 2012, *Investment treaty News, International Institute for Sustainable Development* available at: <https://www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/>, accessed at August 11, 2016.

¹⁶⁸ *Ibid.*

f. Definition of Measure

Regulatory measure is another crucial element in the BIT which seeks to prevent a lawsuit when host state regulation negatively affects ongoing investment by raising the costs or reducing the value of the investment. The ability of states to regulate activities within their territory is a key attribute of sovereignty. It is also a valuable tool to seek economic development goals.¹⁶⁹ The lawsuit filed by Newmont¹⁷⁰ was based on the banned of raw material export and the imposition of an obligation to build a smelter to refine raw materials. Another case related to regulatory measure is measure taken by the Indonesian government that deeply interfere with the management of Cemex¹⁷¹ company in which the Indonesian government placed the investor's local subsidiary within the supervision of a government-appointed temporary manager. While the government's goal for such regulatory measures is to enact and implement regulation pursuing economic development goals,¹⁷² those companies sued the state by indirect expropriation, and consequently they demanded an enormous amount of financial compensation from the government. The impact not only discourages Indonesia from adopting the regulation in pursuit of economic development, but also it makes difficult for the host country to raise human rights, environmental and other standards applicable to an investment project.¹⁷³

While there is progress to clarify the line between expropriation and regulation, their difference is still not a clear cut. Explicit recognition of allowing regulatory measures to promote development should suggest that “a public-interest based, proportionate and non-discriminatory measure, which did not render the foreign investor's projects useless, nor was

¹⁶⁹ Cotula, Lorenzo. “The Regulatory Taking Doctrine, International Institute for Environment and Development,” Briefing, 3 August 2007,1, available at: <http://pubs.iied.org/pdfs/17014IIED.pdf>, accessed May 6, 2016.

¹⁷⁰ ICSID Case No. ARB/14/15.

¹⁷¹ ICSID Case No. ARB/04/3.

¹⁷² The goal of this policy was to boost domestic employment and the local economy and help Indonesia be less dependent on the export of raw materials. But companies active in extractive industry strongly opposed the new policy.

¹⁷³ Cotula, *The Regulatory Taking Doctrine*, 2.

imposed in clear violation of a prior commitment, should not amount to expropriation.”¹⁷⁴

This way, the possibility of legal claim arising from regulatory taking can be minimized.

Indonesian old and existing BITs do not include measures. Consequently, the BITs allow multinational companies to challenge public policy measures which range from regulations to provide affordable public services; regulate the extraction and exploitation of natural resources; put in place tax measure; or government interventions to deal with economic crisis.¹⁷⁵ The claim is usually indirect expropriation or infraction of investors ‘legitimate expectation to a stable investment climate’ or entitlement to ‘fair and equitable treatment.’ This expanding reach of BIT has raised concerns about the ability of states to regulate public which might be uneasy due to fear of lawsuits. This is called the ‘chilling effect’ or ‘regulatory chill’ of investment arbitration.

The Indonesian government effort to regulate the mining sectors had been challenged. Newmont mining sued Indonesia to ICSID for an obligation imposed under Law No. 4 of 2009 that mining companies are required to build a smelter and banned to export raw ores. Newmont and Freeport which account 97 percent of Indonesia’s copper output also argued they should be exempted from the tax rise. Faced with a threat of a lawsuit before arbitration, Indonesia and Freeport negotiated and came to an agreement to reduce export tax rate of 7.5 percent, which will fall further depending on its progress in the construction of a smelter. Newmont also claims it has reached a ‘constructive solution’ over new mining rules with the Indonesian government.

Acknowledging the tension between BIT protection and sovereign right of a state to regulate public interest, as well as unwilling to be sued for the similar causes, the Model BIT covers measure. The measure means any form of legally binding government act directly

¹⁷⁴ Waelde, T. and Kolo, A., 2001, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law, *International Comparative Law Quarterly*, vol. 50 (2008) 814.

¹⁷⁵ <https://www.opendemocracy.net/ournh/corporate-europe-observatory-transnational-institute/transatlantic-corporate-bill-of-rights>, accessed 8/12/2016.

affecting an investor or the covered investment. For investment made in Indonesia, a measure has to be in a form of a law or regulation as regulated under the Law No. 12 of 2011 concerning Legislative Drafting. These include Law or Government Regulation in lieu of Law; Government Regulation; Presidential Regulation; Provincial Regulation; District Regulations; and other regulations. The aim is to preserve a greater degree of regulatory space for Indonesia to pursue its development goals without facing a legal risk of being complained through ISDS.

g. Scope of Application

The scope of application of Indonesian BITs is formulated very general which is for investor and their covered investment within Indonesian territory and comply with Indonesian Law. The Model BIT changes it to be more specific with limitations. In addition to the formulation in the current BITs, the model BIT also includes exceptions. It indicates that the BIT shall not apply to: “government procurement, indirect expropriation, service supplied in the exercise of governmental authority, subsidies or grants provided by authorities of the state party, including government loans, guarantees and insurance, competition laws, and taxation measures except for repatriation.”¹⁷⁶ Hence, all state actions mentioned in the exception do not give rise to remedies under the BIT, notwithstanding investment agreement. The exceptions seek to reduce the jurisdiction of arbitral tribunals.

h. Treaty Claim and Contract Claim

Another notable feature in the Model BIT is the express provision that distinguishes contract claim from treaty claim.¹⁷⁷ As a result, breach of an investment contract is not *arbitrable* through investment arbitration. Hence, any arbitral tribunal shall declare not having jurisdiction over the dispute. This jurisdictional issue is high of importance for both investors as interference with rights arising out from contract often engages the global

¹⁷⁶ Article 2 of Model BIT.

¹⁷⁷ Article 2(5) Model BIT.

responsibility of the host state. A foreign investor might decline to qualify a breach as a contract violation to avoid domestic courts. When examining jurisdiction, an arbitral tribunal might interpret that the particular contract breach means that the host state infringed its BIT obligations which can occur if the BIT contains FET standard. If breaches of contract and BIT exist concurrently, each breach is to be resolved in its own forum: domestic court or commercial arbitration for the contract breach; and investment arbitration for BIT breach.

i. Treatment of Investment

Model BIT removes FET standard from the list of treatment given to foreign investors. FET is known as a ‘catch all’ provision which interpretation becomes a source of controversy.¹⁷⁸ It requires that investors should be treated fairly and equitably which includes a prohibition of unreasonable, arbitrary or discriminatory measures. Including FET in BIT may give rise treaty responsibilities for any breach of contract, government actions, or any other conducts which negatively impact investors and their investment. In *Rafat* case, the claimant asserted that Indonesia failed to ensure FET of his investment when Indonesia nationalized its bank, PT Bank Century Tbk in 2008.

The Model BIT accords various treatment of investment including national treatment, MFN; and standard of treatment. National treatment ensures that after the entry, Indonesia as the host state give treatment no less favorable than the treatment it accords in like circumstances to the Host state’s local investors. However, Indonesia shall not oblige to extend the foreign investor the benefit of treatment by virtue of laws and regulations for facilitating small and medium scale enterprises; any measures affecting natural resources; and any sectors related to national security or the needs of development of the particular industry.

MFN treatment is not be construed so as to oblige Indonesia to extent the protection to investors under regional economic integration organization and the like; any existing and

¹⁷⁸ UNCTAD, World Investment Report 2012: Towards a New Generation of Investment Policies, available at <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>, 139, accessed August 10, 2016.

or future bilateral or multilateral treaty and other trade agreements; and any preferential system granted by the government to any least-developed countries.¹⁷⁹ For greater certainty, the model BIT also stated that MFN does not include investor-state dispute settlement procedure.¹⁸⁰ Standard of treatment is simply the rights given to investors to protection from denial of justice. It is defined as assurance that investors and their investment will not be subjected to any denial of justice in criminal, civil or administrative proceedings. Moreover, it guarantees that adequate protection is given.¹⁸¹ Standard of treatment is a new treatment which is aimed to replace FET due to its vague and broad meaning that often carries a risk of overreach in its application.

A precise formulation of treatment does not mean that there would be any means that there would be no dispute concerning the implementation of them. Treaty partners may agree to those fixed formulas of those standards, but nevertheless, disagree on what those words would mean in particular cases.¹⁸² When arbitral tribunal determines the meanings, a further possible meaning may be generated. Hence, it is important that in the negotiation process both countries may agree to define the standard of treatment in a loose way to allow it to be dynamic which may change according to context or conditions.¹⁸³

j. Compliance with International Obligations

While consideration of compliance with international obligations provision is not found in the existing treaty, the Model BIT makes it clear that foreign investors shall not entitle to seek compensation under the BIT when Indonesia takes measures to comply with its international obligations.¹⁸⁴ Many obligations in international laws both in bilateral treaties,

¹⁷⁹ Article 4(2)(i)(ii)(iii) Indonesia Model BIT.

¹⁸⁰ Article 4(3) Indonesia Model BIT.

¹⁸¹ Article 5 (1)(2) Indonesia Model BIT.

¹⁸² Alex Mills, "The Balancing of Interests in International Investment Law and Arbitration," in *The Foundations of International Investment Law*, eds. Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales, (Oxford: Oxford University Press, 2014) 455.

¹⁸³ Ibid.

¹⁸⁴ Article 6 Indonesia Model BIT.

multilateral treaties and in customary international law bind Indonesia in its mutual relations. These create parallel obligations to the country's treaty partners and international community.

International legal frameworks relevant in this regards are the law of foreign investment evolving from BITs and the international law relating to sustainable development which offers frameworks for the pursuit of an integrated approach to environmental protection, economic development, and social development through poverty reduction.¹⁸⁵

International law-related sustainable development usually requires constraining for the exercise of the right of state sovereignty over natural resources, environmental as well as labor rights. The Preamble of Indonesia Model BIT recognizes that:

Sustainable development allows each party to take regulatory measures in order to promote development and the public interest according to policies it adopts, including the promotion of labor rights and the protection of the environment of the host state.

The provision on compliance with the international obligation to be excluded from treaty breach is clearly to support this sustainable development effort. This way, any measures to protect the environment shall not raise state liability.

k. The Cause of Action under the Agreement

Proceedings relating to a cause of action must be initiated in a domestic court of the host state. Recourse to arbitration can only be initiated for measures that are resulting from discriminatory actions breaching the following: violation of national treatment; MFN; standard of treatment, and expropriation.¹⁸⁶ The BIT Model also makes it explicit that measures or policies taken in good faith to protect public morals; to maintain public order; to protect human, animal, plant, and health; to conserve natural resources; to secure compliance with laws or regulations; and to protect national treasures of artistic, historic, cultural or archaeological value are not *arbitrable*.¹⁸⁷

¹⁸⁵ Ward, *Resource Nationalism*, 25.

¹⁸⁶ Article 22(1)(2) Indonesia Model BIT.

¹⁸⁷ Article 19A(1) Indonesian Model BIT.

1. Investor-State Dispute Settlement

The most distinct characteristic of dispute resolution mechanism is the requirement that a claim submitted to arbitration is subject to a prior written agreement signed by and between the disputing parties. The model BIT expressly indicates that the signing of BIT, other agreement prior to dispute, or the granting of investment license do not automatically constitute a written agreement to the arbitration.¹⁸⁸ The explicit written requirement is inspired by the hurdles Indonesia faced in the case of *Churchill Mining and Planet Mining* arbitration cases.

The ICSID tribunal observed that under the ICSID Convention consent shall be expressed in writing. The tribunal, then, examines whether the BIT between Indonesia-the UK and Indonesia-Australia expressly contain ‘consent’ required by the Convention. In doing so, the tribunal makes use of the Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT).

In Planet Mining case, the tribunal found there was no standing offer to arbitrate between Australia and Indonesia. Article XI (4) Australia-Indonesia BIT reads:

Where a dispute is referred to the Centre pursuant to sub-paragraph 2(b):

- (a) Where that action is taken by an investor of one Party, the other Party shall **consent in writing** to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor.

The tribunal held that using plain meaning interpretation, the word “consent in writing” suggested that consent is not given in the treaty, instead of separated act is required. The tribunal further asserted that the relevant context led to the conclusion that Article XI does not contain Indonesia’s advance consent to ICSID arbitration.

In Churchill Mining, the tribunal held that there was a standing offer to arbitrate between Indonesia and the UK based on its interpretation of Article 7(1) Indonesia-the UK BIT which reads:

¹⁸⁸ Article 24(5) Indonesia Model BIT.

Reference to International Centre for Settlement of Investment Dispute

- (1) The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment **shall assent** to any request on the part of such national or company to submit for conciliation or arbitration, to the Centre established by the ICSID Convention.

The tribunal found two possible meaning of the words “shall assent.” Because using plain meaning approach did not give a conclusive definition, the tribunal used context, object, and purpose of the BIT. The tribunal noted that according to Article 32 of the VCLT the following materials can be used to shed light on the interpretation: doctrinal writing; case law; treaty practice between Indonesia and the UK with third States; and the preparatory materials. While Indonesia relied heavily on doctrinal writing, the claimant used UK practice which is to secure advance consent to international arbitration. The tribunal also reviews *travaux preparatoire*¹⁸⁹ for the UK BIT which had been found by the claimant. Finally, the tribunal reached the conclusion that the treaty drafters considered “shall assent” as functionally equivalent to wording such as “hereby consent.” As a result, it found that Indonesia had given its consent to arbitrate at the time the BIT was ratified. These cases have clearly motivated the drafters of Model BIT to explicitly require written consent before a dispute can be submitted to arbitration.

m. Cooperation in Promotion of Investment

The drafter understands that to materialize economic development goal; Indonesia needs cooperation with its treaty partners as well as foreign investors. The Model BIT facilitates this needs and emphasizing that each state party should cooperate in the promotion of investment which includes promotion event, technology development, exchange information, capacity building, direct financial assistance, technical and financial support, technology transfer, and periodic investment missions.¹⁹⁰

¹⁸⁹ In English means preparatory works. It is the official record of a negotiation, sometimes published, the "travaux" are often useful in clarifying the intentions of a treaty or other instrument. This is reflected in Article 32 of the Vienna Convention on the Law of Treaties (VCLT).

¹⁹⁰ Article 18 Model BIT.

The drafters of BIT Model have successfully addressed the fundamental issues for reforming international investment regime. The model BIT leaves Indonesia as a host state of investment to pursue a variety of economic nationalist policies through more direct means including measures such as technical assistance, encouragement of technology transfer, and joint investment promotion activities. The model BIT also maintains broad regulatory flexibility for development purposes. It also sets a limit for the arbitral tribunal in interpreting the treaty by ensuring the clarity and precision of provisions and allows the government to use measures for public interests. This way, it is hoped that the interpretation of Indonesian treaty based on this model would be straightforward.

However, when the matter goes to arbitral tribunal ascertaining the meaning of the terms of a treaty could be complicated. Not only does it include what the parties mean or intend to mean by the words to which they agreed or the subjective meaning, but also what the words which the parties have agreed to mean or the objective meaning. It is the task of the arbitral tribunal to balance the subjective and objective meaning as indicated by the VCLT rules on treaty interpretation.

The interpretation of a treaty provides a critical form in which the contest of interest between host state and foreign investors played out since emphasize on subjective or objective would determine which party's interest the tribunal will choose to preserved. The criticisms toward ICSID arbitral tribunal are mostly directed to their choice of interpretation method which leads to preserving investors' interests while neglecting host state interest of economic development.

D. New Limits to Arbitration

1. Criticisms Toward Investment Arbitration

Criticism toward the legality principle and procedural aspect of foreign investment regime is basically questioning the arbitration system.¹⁹¹ The lack of stare decisis makes arbitral tribunal free to depart from the awards of prior investment tribunals. The implication is a high number of inconsistencies in arbitral decisions. Consistency matters because it increases predictability which allows both host government and foreign investors to orient their behavior in greater confidence with more certainty about the consequences of their actions.¹⁹² The need of “coherence, consistency, and predictability are at the central of the rule of law.”¹⁹³ The absence of those features in ICSID arbitration make the proceeding is put under scrutiny.

Globally, the criticism in international investment arbitration is primarily directed to the ICSID arbitration. It was marked by Bolivia’s withdrawal from the ICSID in 2007, and Ecuador in 2010 followed it. The trend of retreat continued in 2012 when Venezuela finalized its withdrawal from the ICSID. Without withdrawing from the ICSID, Australia in 2011 stated that it would no longer adopt international investment arbitration in its BIT as well as regional trade agreements.¹⁹⁴ Consistent with that policy, in 2011 the Australia-New Zealand Investment Protocol and in 2012 Australia-Malaysia Free Trade Agreement (FTA) were signed without providing investment arbitration. Instead, the agreement requires both parties to resolve investment dispute in domestic courts.¹⁹⁵

¹⁹¹ Vandelde, *International Law*, 65.

¹⁹² Thomas Schultz, “Against Consistency in Investment Arbitration,” in *The Foundations of International Investment Law*, eds. Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales (Oxford: Oxford University Press, 2014) 297.

¹⁹³ *Ibid.*, 309.

¹⁹⁴ Australian Government, Department of Foreign Affairs and Trade, ‘Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity’ (April 2011), available at: http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf accessed May 14, 2016.

¹⁹⁵ *Ibid.*

Since Australia is a large developed country, the policy to abandon investment arbitration raised a question on whether the state would set a new trend in the regulation of FDI and whether other developed countries would follow this policy. Exclusion of arbitration provision was reviewed by Tony Abbot government saying that the government would consider negotiating investment arbitration selectively.¹⁹⁶ As a result, China-Australia FTA signed in 2015 and Korea-Australia FTA signed in 2014 provided investment arbitration. On the contrary, Japan-Australia FTA signed in 2014 does not include investment arbitration. Trakman and Musayelyan asserted Australia has failed to articulate detailed policy direction on investment arbitration.¹⁹⁷

Due to the large number of claims Argentina faces before the ICSID, in 2012 the country began to work toward leaving the ICSID as well. However, up until now, Argentina is yet to announce its formal withdrawal. Australia's approach is followed by South Africa stating that it would not provide investment arbitration in its future agreements.¹⁹⁸ A more lenient approach toward investment arbitration is shown by India which indicates that it intends to require investors to exhaust domestic remedies before submitting disputes to international arbitration.¹⁹⁹ Argentina, Cuba, and Pakistan have not yet identified any particular policy direction regarding investment arbitration.

In Indonesia, the debate on whether Indonesia should withdraw from the ICSID is sparking. Professor Hikmahanto Juwana, an international law expert at the University of Indonesia, acclaims that Indonesia should withdraw from the ICSID and give the jurisdiction

¹⁹⁶ Australian Government, Department of Foreign Affairs and Trade, 'Trade and Investment Topics-State Dispute Settlement' <http://dfat.gov.au/trade/topics/pages/isds.aspx> accessed May 14, 2016.

¹⁹⁷ Leon E. Trakman and David Musayelyan, "The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration," *ICSID Review*, Vol. 31, No 1 (2016) 200.

¹⁹⁸ South Africa Pushes Phase-Out Early Bilateral Investment Treaties at Least Two Separate Brushes with Investor-State Arbitration', *Investment Arbitration Reporter* (23 September 2012) http://www.iareporter.com/articles/20120924_1 accessed June 23, 2016.

¹⁹⁹ Deepshikha Sikarwar, 'Government to Draft Model Treaty on MNCs' Mediation Rush,' *The Economic Times* (9 August 2013) available at http://articles.economictimes.indiatimes.com/2013-08-9/news/41240891_1_bipa-international-arbitration-white-industries-australia/. Accessed June 23, 2016.

of investment dispute to Indonesia's administrative court since investment dispute is administrative disputes. Juwana cites four reasons for the withdrawal. Firstly, withdrawal from ICSID Convention is allowed by the Convention itself. Secondly, due to decentralization, it is very challenging for the central government to control local governments. When dispute arising with local governments, foreign investors file a claim against the central government, and this is unfair for the central government.²⁰⁰ Thirdly, the Indonesian government is unable to guarantee equal treatment between domestic and foreign investors. The obligation to ensure equal treatment is considered as contradicts to sovereignty since sovereignty also means freedom to discriminate against foreign companies. Lastly, there is changing in social and economic condition. Indonesia is no longer in need of FDI, instead, the investors need Indonesia due to its competitive advantages.²⁰¹

The article by Juwana was responded by Michael Ewing-Cho and Junianto James Losari in the same newspaper saying that Indonesia should not withdraw from the ICSID. Cho and Losari citing Mexico as an example suggest that investment arbitration contributes to better governance since the central government often cited the awards with local governments about the need to comply with domestic and international legal obligations.²⁰² The next disagreement of withdrawal comes from Abdulkadir Jaelani, the Director for Treaties on Economic, Social, and Cultural Affairs of Foreign Ministry, saying that the main concern with the Indonesian cases before the ICSID is the provisions in the BIT.

Therefore, instead of withdrawing from the ICSID, Indonesian efforts should be dedicated to formulating BIT provisions precisely to avoid arbitrary interpretation by arbitral

²⁰⁰ Juwana certainly refer to Churchill Case, ICSID Case No. ARB/12/14 and Planet Mining Case ICSID Case No. ARB/12/40.

²⁰¹ Article in The Jakarta Post daily newspaper, April 2 2014 available at: <http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html>.

²⁰² Michael Ewing-Chow and Junianto James Losari, "Indonesia should not Withdraw from the ICSID," *the Jakarta Post*, available at: <http://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html>. May 15, 2015

tribunals.²⁰³ Nono A. Makarim, an Indonesian senior lawyer, is also a proponent of the ICSID. Citing a report from the World Competitiveness Yearbook 2014 which situates Indonesia in rank 37, lower than its neighboring countries, Makarim stated that Indonesia still needs to attract FDI. In addition, the fact that FDI is often discriminated against is also widely acknowledged among investors and becoming one reason that is holding them back from investing in the country.²⁰⁴

While most of the Indonesian BITs refer to ICSID arbitration, the Model BIT gives no reference to it. The only reference is regarding the procedural law in the United Nations Commission on International Trade Law (UNCITRAL) Rules on Arbitration to the extent that it does not conflict with the provision of the BIT.²⁰⁵ The Model BIT also requires that the award shall be enforceable under the New York Convention on the Enforcement of Arbitral Awards, subject to any rules on sovereign immunity.²⁰⁶ A number of challenges directed toward ICSID seem to motivate the drafters not to designate the ICSID. Many developing countries concern about the operation of ICSID arbitration such as costs and complexity of ICSID proceedings,²⁰⁷ and the perception that in interpreting treaties many ICSID arbitrators serve developed state interests.²⁰⁸ Even though no reference is made to the ICSID, there is still an open possibility for Indonesia to be sued before the ICSID since it becomes contracting parties to the ASEAN Comprehensive Investment Agreement (ACIA). ACIA provides investor-state arbitration with access to ICSID, UNCITRAL, arbitration centers across ASEAN, as well as various forums desired by the parties.

²⁰³ This opinion was given in the 6th CILS Conference in Surabaya, Indonesia.

²⁰⁴ Interview Teguh prakoso and Nono A. Makarim, at Law Enforcement and Justice Magazine *Requisitoire*, available at: <http://requisitoire-magazine.com/2014/07/08/harus-berani-berunding-kembali-bagian-1/>.

²⁰⁵ Article 25(5) Model BIT.

²⁰⁶ Article 25(6) Model BIT.

²⁰⁷ Leon E Trakman, "The ICSID Under Siege," *Cornell International Law Journal*, vol. 45 (2012) 616.

²⁰⁸ Stephen Schwebel, The Influence of Bilateral Investment Treaties on Customary *International Law*, 98 PROC. ANN. MEETING (AM. SOC. INT'L L.) 27, 28 (2004)

2. Procedural Limitations

A procedural limitation is believed to be the best way to minimize the legal risk of investment arbitration.²⁰⁹ The drafters of the Model BIT use consent to limit arbitral tribunal's jurisdiction procedurally. Investor-state arbitration is subject to consent, which traditionally emanates from a preexisting agreement like BIT between states, meaning that host states are deemed to have given their consent to investment arbitration at the time the treaty was ratified. Consequently, the host states can be sued to arbitration at any time. To avoid this, the Indonesian Model BIT requires separate written consent requirement for the investor to file a lawsuit before an international arbitral tribunal. It is accepted that arbitrating investment disputes are the privilege of multinational companies, even though in extremely rare circumstance state can also become the claimant in investment disputes. The approach on written consent, therefore, would be expected to cut down the number of investment arbitration claim against the Indonesian government. At the same time, it would also promote settlement of the dispute through an amicable solution or domestic courts.

Indonesia's decentralization in 1999 has motivated the drafters to significantly limit the *arbitrability* of disputes to reduce claims by FDI. Decentralization brought a very complex set of laws and policies including investment which is delegated to 34 provinces and 497 districts.²¹⁰ Decentralization's adverse effect is the existence of conflicting policies and regulations between the central government and the local governments,²¹¹ due to lack of coordination between them as well as a lack of human resources in the regional governments.²¹²

²⁰⁹ Jailani, *Indonesia's Perspective* 5.

²¹⁰ Simon Butt, Luke Nottage and Brett Williams, "Indonesian investments and international treaty law," 14 May 2012, available at: <http://www.eastasiaforum.org/2012/05/14/indonesian-investments-and-international-treaty-law/>, accessed at August 13, 2016.

²¹¹ Direktorat Otonomi Daerah (Bappenas), *Analysis in Formulating Mid-term Policies for Revitalizing Decentralization and Regional Autonomy Processes 2010–2014* (Kajian Perumusan Arah Kebijakan Jangka Menengah Bidang Revitalisasi Proses Desentralisasi dan Otonomi Daerah Tahun 2010–2014) (Badan Perencanaan dan Pembangunan Nasional 2009) IV-74.

²¹² Rabby Pramudatama, 'SBY Warns of Time Bomb in RI Mining' Jakarta Post (Jakarta, 8

The case of *Churchill* and *Planet Mining* are the result of lack of coordination between the central and district government. After the issuance of the licenses for those companies, the regional government claimed that some of the licenses overlapped with those of other license holders and were allegedly forged.²¹³ The Regent asserted that the revocation of the licenses was under the recommendations letter from the Ministry of Energy and Mineral Resources.²¹⁴ The ICSID arbitral tribunal established jurisdiction over *Churchill*, but rejected *Planet*. *Churchill* and *Planet Mining* reflect the lack of coordination in license management. It is reported that regional governments often give overlapping licenses especially related to land use. In 2011, as many as 1,052 license holders reported overlapping claims.²¹⁵

Cemex and *East Kalimantan* cases demonstrated how local control, when dealing with foreign investment project, could severely impact the central government. Both cases concern with local governments' attempt to prevent foreign investors from securing majority shareholders in regional companies. *Cemex* could not exercise its right given in the sale purchase agreement due to opposition from the legislature of the West Sumatra province and the management of PT Semen Padang. The challenges were due to fear of potential profits and job losses since Cement Padang was among the biggest company in the province. That strong opposition prevented the central government from enforcing its commitment with *Cemex*. Decentralization has limited the ability of the central government to issue orders to the government of West Sumatra province. The governor of West Sumatra and top management in Semen Padang insisted they owned authority to take over the locally run

August 2012) <<http://www.thejakartapost.com/news/2012/08/08/sby-warns-time-bomb-ri-mining.html>> accessed 8/13/2016.

²¹³ *Planet Mining v Indonesia* (n 37) paras 22–28; *Churchill Mining v Indonesia* (n 36) para 35.

²¹⁴ *Churchill Mining v Indonesia* (n 36) para 37

²¹⁵ Commission of Corruption Eradication of Indonesia, 'Memorandum of Understanding and Collective Action Plan: Annex 1 on Harmonization of Policies and Regulations (Nota Kesepakatan dan Rencana Aksi Bersama: Lampiran 1 Harmonisasi Kebijakan dan Peraturan Perundangan)' <<http://acch.kpk.go.id/documents/10157/34337/Lampiran+1+-+Nota+Kesepakatan+Bersama.pdf>> accessed August 13, 2016.

subsidiary of Semen Gresik. After series of negotiations failed to achieve a solution, Cemex sued the Indonesian government to the ICSID arbitration for breach of contract and expropriation.

The next case related to decentralization is unique since it was filed by the Government of East Kalimantan Province against PT Kalimantan Prima Coal (KPC). The East Kalimantan government intended to acquire the shares of KPC based on the obligation of a foreign investor to divest a certain amount of shares to a local investor as stipulated in the concession contract. Divestment was conducted, yet the shares were not sold to the East Kalimantan government, but to the central government. Dissatisfied with KPC's decision, the East Kalimantan government filed a lawsuit against KPC to the ICSID arbitration.

Hikmahanto Juwana stated that decentralization could expose Indonesia with too many lawsuits before the ICSID due to the actions of regional governments. The increasing power of local authority due to decentralization causes the central government unable to exercise full control of the regional administration.

3. Issues Uncovered by the Model BIT

Even though the model BIT has anticipated a significant number of problems that Indonesia may encounter, there are several issues that receive no attention. Firstly, the concern on financial impact has yet adequately tackled. Article 25(2) of Model BIT requires that the seat of the arbitration shall be in the capital city of the host state. That requirement could potentially reduce the travel expenses, yet does not really address the issue of cost since travel cost is not very significant in arbitration. Further Article 25(5) contains the requirement of hearing costs: "The total costs of hearings shall not exceed (% please fill in the percentage agreed by the State Parties) of the sum of compensation in the proceedings." Even though hearing costs are expensive, it is still far below the potential financial damage that the tribunal may award to multinational companies. And also, even though the amount granted to

multinational enterprises are remarkably lower than the amount claimed,²¹⁶ the average of the award is still extremely high.

Table IV.4: Sums of compensation awarded to multinational companies by Rules (in US\$ without interest):²¹⁷

	Total	Average	Median	Highest	Lowest
ICSID Rules (52 awards)	4,562,286,428	87,736,277	13,203,371	1,769,625,000	155,404
UNCITRAL Rules (21 awards)	1,241,835,801	59,135,038	16,300,000	269,814,000	461,566
SCC Rules (9 awards)	20,927,285	2,325,254	2,026,480	8,890,000	24,642
Other rule (1 award)	935,000,000	-	-	-	-
Total (83 awards)	6,760,049,514	81,446,380	10,694,005	1,769,625,000 (ICSID)	24,642 (SCC)

Rosert used IISD table based on UNCTAD data, Investment Treaty Arbitration (italaw.com), and Investment Arbitration Reporter (iareporter.com). The data sample consists of 83 awards in favor of investor rendered between 1990 and 2013, which were publicly available as of September 1, 2013.

It is important to limit the monetary compensation that a claimant may ask, for example by limiting only to actual or direct damage without considering future profit as well as costs which are not foreseeable or are too remote.

Another important thing that does not get attention from the drafter of the Model BIT is the fact that for the time being the number of Indonesian companies investing abroad is rising. As of the end of December 2011, Indonesian companies had invested US\$7.7 billion in a variety of business sectors in Asia, America, and Africa. The investment value grew by 185 percent compared to \$2.7 billion in 2010. It is predicted that it will continue

²¹⁶ Franck, S.D. Review: The Public International Law Regime Governing International Investment by José E. Alvarez. *The American Journal of International Law*, vol. 106((2012) 894.

²¹⁷ Table is taken from: Diana Rosert, *The Stakes Are High: A review of the financial costs of investment treaty arbitration*, International Institute for Sustainable Development, July 2014, available at: <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf>, accessed August 14, 2016.

increasing.²¹⁸ The increasing number of Indonesian investors abroad would likely to increase the potential of disputes between Indonesian investors and their host state. While the Model BIT provides generous defenses for the host country of investment, it fails to consider Indonesia's position if it serves as a home state of investment. In its position as emerging outward investors, developing countries like Indonesia, have to reconcile their traditional objective of maintaining broad regulatory flexibility for development purposes with their goal of securing much protection for their investors abroad.²¹⁹

Criticism on Indonesia's arbitration reform from outside came from Trakman and Musayelyan. They acclaimed that "Indonesia is inconsistent as it conducted BIT review by limiting the scope of investment arbitration, but at the same time, it appears to be committed to investment arbitration." This is, for example, by becoming one of the parties in the India-ASEAN Investment Agreement which provides arbitration under the ICSID and other forums.²²⁰ Another inconsistency can be found in ASEAN-Australia and New Zealand Free Trade Agreement (AANZFTA) in which the host state commits to extend 'fair and equitable treatment' to Australian investors. Trakman and Musayelyan assert that repudiation of the ICSID Convention, or requiring consent before the submission to the arbitration alone could not block or limit future investment arbitration claims shortly. Foreign investors can still file a claim against Indonesia under the ICSID Additional Facility Rules. They can also bring a claim if the pre-existing BIT provides sunset clause which makes treaty protection is extended for several years even after its termination.²²¹ Besides, investors can also file a

²¹⁸ Hans David Tampubolon , "RI firms invest heavily abroad," *the Jakarta Post*, February 13, 2012, <http://www.thejakartapost.com/news/2012/02/13/ri-firms-invest-heavily-abroad.html>, accessed at August 15, 2016.

²¹⁹ James Zhan, Jorg Weber, and Joachim Karl, "International Investment Rulemaking at the Beginning of the Twenty-First Century: Stocktaking and Options for the Way Forward," in *The Evolving International Investment Regime*, eds. Jose E. Alvarez et al (Oxford: Oxford University Press, 2011) 203.

²²⁰Trakman and Musayelyan, "The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration," *ICSID Review*, Vol. 31, No 1 (2016), 202.

²²¹ Trakman and Musayelyan, *The Repudiation*, 203.

claim under the UNCITRAL or other international arbitration either investment or commercial.

While The Model BIT has set up substantive and procedural limitation to arbitration, the question to be answered now is how to persuade potential treaty partners to agree with the provisions contained in the Model BIT. The most potential hindrance for negotiation is the substantial provision such as the requirement of written consent in arbitration and measures. BIT can be seen as equilibrium established between two states which reflects their counterbalancing interests and negotiation strengths.²²² Base on the features discussed above, the Indonesian model BIT can be considered as having weak standards of investor's protection. Thus, negotiating it with states seeking to invest in Indonesia, which favors a BIT with strong standards of investors protection,²²³ would be a great challenge. They may try to influence through various forms of pressure or to advocate for less restriction on state regulatory, excluding or limiting other regulatory objectives such as human rights protection, environmental protection or maintain labor standards.²²⁴

If the potential treaty partner anticipates as being a capital importer, the level of difficulty would be greatly reduced since as the host state, this treaty partner would prefer the limitations on investor protection to maintain its regulatory capacities.²²⁵ Therefore, it would be much easier to negotiate the Model BIT with other developing countries which likely to be capital importer and experience capital scarcity. Indonesian outward investors mostly go to Africa, and other Asian countries. In term of economic development, however, the impact of technology transfer would not as great as partnering with developed countries as Indonesia and other South countries have relatively equal level of development.

²²² Alex Mills, "The Balancing of Interests in International Investment Law and Arbitration," in *The Foundations of International Investment Law*, eds. Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales, (Oxford: Oxford University Press, 2014) 439.

²²³ These standards are usually applied by developed countries as capital exporting states.

²²⁴ Mills, *The Balancing*, 441-442.

²²⁵ *Ibid.*, 441.

How flexible the Indonesian government will be in BIT negotiation depends on the country's interests with that particular partner whether Indonesia mostly aim to be capital exporter or importer. In some extent, it also depends on the government of the treaty partners and their companies that already operate in Indonesia through various forms of pressures which might in the form of political pressure, to threats to relocate away from their existing investments. Some scholars contend that BIT review conducted could be inconsistent with the broader interest of states to attract FDI,²²⁶ yet informant from the Indonesian government agencies confidently believe that the flow of FDI to Indonesia would not be affected.²²⁷

E. Conclusion

Economic nationalism is behind the backlash that is happening in Indonesia. Nationalism has led the government to increased protectionist policy to control or limit the involvement of foreign investor in the country's economy, while at the same time give more opportunity to domestic investors. The fear of foreign domination is channeled through judicial review before the Constitutional Court which the objective that the Court could annul laws which enable foreign investment participation in Indonesia's economy. These efforts have successfully invalidated several provisions or laws deemed unconstitutional.

Another move to prevent foreign domination is by reducing the protection and preferential treatment given to FDI by drafting model BIT which gives significantly less protection to FDI and limiting its legal recourse to arbitration. The model BIT introduces legal obligations to FDI and provides ample rooms for the Indonesian government to exercise its sovereignty, features that did not exist in the previous and existing BIT. Those efforts and actions have significantly reduced foreign investor's protection and opportunity to do business in Indonesia, and therefore can be seen as the forms of backlash against them.

²²⁶ See Trakman and Musayelyan, *The Repudiation*, 207.

²²⁷ Interview with informant no 1 Indonesia Investment Coordinating Board.

Chapter V

ACTORS BEHIND INDONESIA'S CHANGING ATTITUDE AGAINST FOREIGN INVESTMENT

The movement away from foreign investment regime is common in many capital-importing states. However, the process in which it is expressed, the way it is conducted, and how it is responded varies from state to state. What makes Indonesian case worth examining is the fact that there is a very structured movement by civil society organization (CSO)¹ to legally 'limit' foreign investment involvement in the economy through the Constitutional Court. This legal action has been attracting public attention within and beyond Indonesia. The call for reconstruction of the economic system to protect people's economy which is mandated by Article 33 of the Constitution is cited as the main reason behind this movement. Arguing that the Indonesian economic system is based on family principle with the state's role to control the economy, CSOs as well as individuals involved in the movement decline to accept the consequence of liberalism that gives more roles to private investments.

In many other developing countries, the shift against foreign investment is brought due to "unfulfilled rising expectations, desires for economic self-determination and achievement of development goals with minimal outside help."² For countries where natural resources are the primary source of wealth due to its export earnings like Indonesia, the extractive industries are the principle target of such a changing attitude. A group of CSOs and several prominent figures asserted that the extraction by foreign investors is not in the best interest of Indonesian people. Resource nationalism is cited as the reason behind the landmark *BP Migas* case. It is defined as the dominance of the state in controlling natural resources, which results in the ability to use its power for political and economic purposes,

¹ In Indonesia, the term of Civil Society Organization (CSO) is used interchangeably with Non-Governmental Organization (NGO).

² Henry Landau, "Economic and Political Nationalism and Private Foreign Investments," *Journal of International Law and Policy*, Vol. 2. No.2 (1972) 169-170.

including the relationship with foreign investors. The main point of resource nationalism is “the government’s intervention in the state’s natural resource sectors to protect its property and sovereignty.”³

Moreover, with the looming desire for economic self-determination, the group of CSOs and several prominent individuals expand their criticisms to non-extractive sectors such as electricity, plantation, water resources and rights relating to the indigenous people. Consequently, there is a pressure for the executive, legislative, and judiciary branch to secure stricter control over those industries with the aim of increasing larger share and profits; and protecting domestic interests. Hence, the investment law and policies issued are carried out by reducing foreign investor’s roles from new and existing industries deemed vital to the national economy.

This chapter aims to identify and describe the actors involved in the ongoing backlash in the form of judicial review towards foreign-investment laws, as well as BIT review policy. The actors in the backlash share the same concern, but in different degree, regarding the two expressions of sovereignty in the context of foreign investment law: sovereignty over the earth, water, and natural resources; and sovereignty in the form of non-intervention in public policy space. The differences root from different interpretation of ‘state control’ within the Article 33 of the Constitution.

This chapter is important to shed light on who participate in the transformation of attitude against FDI; and the way the actors adopt, adapt, or resist liberalization. The thesis of this chapter is that the backlash against FDI is carried out by two nationalist groups: modernist and traditionalist. The differences between modernist and traditionalist lay on the perspectives and reactions towards foreign involvement in the economy. To be considered in

³ Reid W Click and Robert J Weiner, “Resource nationalism meets the market: Political risk and the value of petroleum reserves,” *Journal of International Business Studies*, vol. 41., no. 5 (2010) 784.

a particular group, actors must fulfill at least two criteria in the ‘perspectives’ category below and do either legal or non-legal actions to promote their views.

Table V.1: Criteria to determine the group

Criteria	Traditionalist	Modernist
Interpretation of ‘state control’		
Method	Literal interpretation, conservative	Purposive approach
Perspectives		
State’s owned company (SOE)	<p>Believing that monopoly by SOE is the fair and righteous way for the national interests;</p> <p>Efficiency is not the top priority, but the “involvement of all people” in the production is.</p> <p>Private enterprises are not to compete with SOE in natural resources and important branch of production.</p> <p>Competition increases price, breach of family principle because the government cannot protect the vulnerable groups.</p>	<p>Many SOE is inefficient, Monopoly given to SOE creates more harm than good.</p> <p>Efficiency, good governance in managing SOE</p> <p>Open competition increases productivity and efficiency.</p> <p>Government uses its regulatory roles to protect the people from unfair competition.</p>
FDI	<p>Poses a threat and to be seen as a modern type of imperialism.</p> <p>FDI creates injustices and insecurities,</p> <p>FDI should be treated differently from domestic investors.</p>	<p>Important in the pursuit of national interest through economic means.</p> <p>Encouraging FDI in a sector with the aim to promote local industries.</p> <p>Non-discriminatory treatment is required to promote FDI.</p>
State sovereignty/state control	Requires the acquisition of a full statehood with complete control over natural resources and other important branches of production; merely civil ownership of natural resources is not a ‘control.’	Regulatory control is state control, prioritizing national interests and making economic decisions with the intention of public welfare.

	Civil ownership of natural resources is not sufficient Concession eliminates sovereignty Arbitration breaches sovereignty, shall be removed from BIT or state contract. All disputes go to domestic courts.	Civil ownership of natural resources is sufficient Access to arbitration shall be limited.
Actions		
Non-legal	Through discussion, publication, protest, or channeling aspiration to government promote their views as mentioned in the first part of this table.	Appeal to circumstances that would make nationalist policies reasonable or permissible.
Legal	Appeal to remove any laws and policies that give roles for foreign investors.	Creating or insisting to create nationalist or protectionist policies.

Considering those criteria, this chapter infers that traditionalist group consists of applicants of judicial review before the Constitutional Court; non-applicants which constantly expressing their concern over FDI; and the Constitutional Court itself. On the other hand, the modernist group consists of the Indonesian government, lawyers, and legal scholar. The interaction between those actors is that pressures from the traditionalist including the decisions of the Constitutional Court have led the government to execute protectionism policies, BIT moratorium, and to draft model BIT.

Chapter V proceeds as follows: part A describes the actors in the backlash and their background of activities. It starts with traditionalist actors such as NGOs, prominent individuals, and the Constitutional Court, and then followed by the modern group. Part B explains the interaction and relationship between those actors. It also describes how the government responds to the global investment law waves that generate demand for a more open foreign investment regime while at the same time keeping the national economic

principles and national interest in the place. This chapter concludes that while each actor has its goal and interest, they all have a common concern about the negative impacts that liberalization has on the Indonesian people and the government.

A. The Actors

The system of international investment laid out in the New Order Regime has evolved with the participation of the government as the principal actor. After the reform era, which brought the country to democracy, private initiatives like those of civil societies and individuals are engaged in evaluating the system.⁴ Their involvement is currently a growing feature in the landscape of international investment rulemaking. CSOs are trying “to fill a gap in the regulatory order by placing certain ideas and issues on the political agenda,” and by contesting the future of environment, human rights, and nationalism. They are seeking for just public policies.⁵

Dissatisfaction towards the current international investment regime is due to the perception that the regime is biased toward the imposition of obligations on Indonesia and is at the same time biased against the national interests.⁶ The apprehension about foreign control ranges from” fears of intervention in the regulatory making to concerns and sovereignty; to suspicion on a new model of imperialism.”⁷

The tension between modernist and traditionalist arises in responding to the Constitutional Court’s rulings. An example of disagreement between them is on the view regarding the dissolution of BP Migas. While the traditionalist urged that the role of BP Migas to be handed back to the state-owned company *Pertamina*, the modernist refused by

⁴ Hans Antlov, Rustam Ibrahim and Peter van Tuijl, “NGO Governance and Accountability in Indonesia: Challenges in a Newly Democratizing Country,” 2005, 2. Available at: http://www.icnl.org/research/library/files/Indonesia/Peter_NGO%20accountability%20in%20Indonesia%20July%2005%20version.pdf accessed July 7, 2016.

⁵ Ibid.

⁶ Interview with informant legal scholar no 1; Informant no 2 of Indonesia Investment Coordinating Board, Informant no 2 the Ministry of Foreign Affairs no 2.

⁷ Interview informant no 1 of civil society organization.

arguing that the company is ineffective to run the oil and gas sectors.⁸ The modernists include Pertamina CEO 2009-2014, Karen Agustiawan and two cabinet ministers, Energy and Mineral Resources Minister Jero Wacik, State Enterprises Minister Dahlan Iskan, and Umar Said, a retired Pertamina commissioner. They said that Pertamina is on the right track to be a world-class company and is managed by professional people. Such a hard work should not be distracted by being a regulator.⁹

The modernist argued that competition would gradually lower prices for refined products and helping the government to peel away subsidies. They added that it is an irony to try to bring the management of oil and gas sector in line with the Constitution while ignoring the increase in Indonesia oil and fuel imports that come from foreign sources.¹⁰ However, some of the modernists believe the regulatory powers should be in the hands of state-owned companies, just not *Pertamina*. Consequently, in 2015, the government sought to establish a new SOE to oversee the regulatory tasks of oil and gas industry. The government uses this idea in the new draft oil and gas law which now is being discussed before the House of Representatives in which the government intends to create a new separate SOE to handle contract in oil and gas sectors.¹¹

⁸ Pertamina was formed in 1969 by a merger between two SOEs in the Old Order era: Pertamina and Permina. It has operated almost as a sovereignty unto itself, ignoring transparent business practices, often acting independently of any ministry, and increasingly taking on the role of a cash cow for then-President Suharto and his cronies. But even as it came increasingly to symbolize Indonesia's pervasive cronyism, there was the realization that something had to be done about Pertamina's inefficiency. In 1993, the company began a restructuring program that reduced production costs to \$5.10/bbl from \$11.70/bbl and reduced the company's work force to 30,000 from 45,540. In 1999, legislators called for further change which was resulted in Law No 22 of 2001 which gave a significant of Pertamina's monopoly on the downstream sectors of refining, distribution, and marketing, to a new agency called BP Migas.

⁹ American Chamber , More Politics, Less Oil and Gas?, available at http://www.gbgingonesia.com/en/main/partners_updates/amcham/more_politics_less_oil_and_gas.php , accessed August 17, 2016.

¹⁰Ibid.

¹¹ Government to overhaul oil and gas business, *the Jakarta Post*, April 9, 2015, Available at <http://www.thejakartapost.com/news/2015/04/09/govt-overhaul-oil-and-gas-business.html> accessed July 6, 2016.

1. Traditionalist Actors

The first group of traditionalist actor is Civil Society Organization (CSO). There is no single consensus on what the term Civil Society should be understood as, and translated in the Indonesian language. There are three terms refer to civil society: “*masyarakat madani*”¹², “*masyarakat sipil*”,¹³ and “*warga sipil*.”¹⁴ Generally, civil society means organizations in which people associate to push for greater democracy in the country.¹⁵

The New Order era under President Suharto undermined the development of civil society since they believed that “open and participatory decision-making process involving citizen could endanger national stability.”¹⁶ Freedom of association and speech were almost unrecognized, thus organized civil society did not play a significant role in public life.¹⁷ The government closed their doors to CSO input due to suspicion and caution. The New Order sought to control CSOs activism through laws requiring them to register and restricting them from engaging in politics. On the other hand, the government attempted to assist certain CSOs by providing financial support.¹⁸ These CSOs were only instrumental and not backed up by “the language of democracy building that regular donors were using to support them.”¹⁹ The suppression during the New Order consequently silenced CSOs’ interest.

The fall of President Suharto in 1998 brought an opportunity for democratic reform. It led to the emergence of a discourse on good governance, accountability, and transparency of public institutions. Indonesians are welcoming the opportunity brought by the newly

¹² This term was first introduced by Anwar Ibrahim, the former leader of Malaysia Islamic Youth Movement. The word *madani* implies Islamic genealogy.

¹³ This is a more secular term compared to *masyarakat madani*.

¹⁴ Verena Beittinger-Lee, (*Un*) *Civil Society and Political Change in Indonesia: A Contested Arena*, (London & New York: Routledge, 2009) 115-116.

¹⁵ International IDEA, “Democratization in Indonesia: An Assessment, International Institute for Democracy and Electoral Assistance” 2000, 111, available at: <http://www.idea.int/publications/country/indonesia.cfm>, accessed September 22, 2016.

¹⁶ *Ibid.*,

¹⁷ Robert W. Hefner, *Islam in an Era of Nation State: Politics and Religious Renewal in Muslim Southeast Asia*, (Honolulu: University of Hawaii Press, 1996) 23.

¹⁸ For examples MUI, ICMI see Elizabeth Fuller Collins, *Indonesia Betrayed*, (Honolulu: University of Hawaii Press, 2007) 182.

¹⁹ Antlov, Ibrahim and Tuijl, *NGO Governance*, 2.

democratic life which created space for Indonesian civil society activist to participate in establishing rights and mechanism of accountability in a society where it had previously been discouraged. Consequently, the number of CSO throughout Indonesia has grown dramatically. Among them are student activist groups, *Adat* (customary) organizations, independent trade unions, as well as the resurgence of CSOs which had previously been under constant pressure from the government. In addition to democracy, regional autonomy and decentralization have created new opportunities for Indonesians to participate in public affairs to counterbalance the power of the state and the local government in policy making.

There are two types of CSO in Indonesia which are recognized by law, and that operate in very different ways: associations and foundations. Associations (*perkumpulan*) are formed democratically by citizens who want to get together to pursue their personal or group interests. They have members who could hold the leaders accountable. These groups can operate at the local level, regional level, or national level. Foundations (*yayasan*) are groups of people who get together for philanthropic purposes. They are self-defined and accountable only to their founders.²⁰ For formal and administrative reasons, some NGOs adopt a foundational structure as a legal basis for their organization. In Indonesia, the term of non-governmental organization (NGO) is translated as *Lembaga Swadaya Masyarakat* which usually refers to NGOs which work to empower people.²¹ NGOs that are active in monitoring the activities of state and other political institutions become a “watchdog” organization. Nowadays almost all aspects of public institutions such as parliament, government, police, and judiciary are being watched by NGOs.²²

However, the problems with the New Order government still stick around. Hesitancy among state institutions to work with NGOs is visible. CSOs born out of the years of political

²⁰ Antlov, Ibrahim and Tuijl, *NGO Governance*, 5-6.

²¹ International IDEA, *Democratization in Indonesia*, 112-113.

²² Beittinger-Lee, (*Un*) *Civil Society*, 116.

turmoil often position themselves as opponents of the government and look with suspicion at cooperation with public institutions.²³

Civil society in the context of this research includes labor associations, social activist groups, religious organizations, and environmental NGO. For this particular part, CSOs to be examined are limited to those who have filed cases in the Constitutional Court or have actively engaged in expressing their concerns about limiting FDI roles. This chapter contends that after the reform era when freedoms of expression and association became guaranteed, CSOs found their way to raise their voice after the New Order regime had given limited room.²⁴ The democratization has opened up new opportunities for CSO to participate in ensuring government accountability by expressing their concerns regarding laws related to foreign investment. Some of CSOs activists felt that the time has come to have a dialogue with the government. On the other hand, the attitude of the government has changed and allowed involvement inside the state system. Even so, some NGO activists keep negative impression to the government's effort to encourage private capital participation to increase productivity and efficiency. Those NGOs empowering the economic capacity of village people are apathetic towards free-market saying that:

Democracy is a project of capitalism to secure free-market competition. Democracy does not solve the unjust economic exploitation of the poor by the economically rich. We do not need democracy, we need socialism. In essence, democracy is only needed by a small number of elites and political scientists in Jakarta, but not by the majority of the poor people.²⁵

a. Islamic-based CSOs and Islamic Scholars

Within the traditionalist, Islamic organization plays crucial roles. Indonesia has a strong Islamic culture and tradition since more than 80 percent of Indonesian population, or

²³ Beittinger-Lee, (*Un*) *Civil Society*, 121.

²⁴ Antlov, Ibrahim and Tuijl, *NGO Governance*, 5.

²⁵Conference, 'Transition Towards Democracy in Indonesia', Hotel Santika, Jakarta, 18 October 2002 as cited by Ikrar Nusa Bakti, *The Transition to Democracy in Indonesia: Some Outstanding Problems*, available at: <http://apcss.org/Publications/Edited%20Volumes/RegionalFinal%20chapters/Chapter12Bhakti.pdf>, accessed at 9/21/2016.

more than 200 million people are Muslim. Robert W. Hefner suggests that from the start of the nationalist movement in Indonesia, Islamic organizations had played a significant role in anticolonial resistance. However, they had had no major role in the government.²⁶ During the New Order, Islamic groups were given some space because the government wanted to benefit from the “significant number of their membership, strong community roots, and skillful leadership.”²⁷ Despite any attempt to eliminate Islam as a political force, “Islamic organizations remained the most resilient and independent elements of civil society.”²⁸

In the early independence, there were debates whether Indonesia shall become an Islamic country.²⁹ Due to opposition from Christians and secular nationalists, the leadership chose for a compromise formulation where there shall be no single establishment of religion. Instead, the Indonesian Constitution requires all citizens to have one religion among a number which is officially recognized by the state.³⁰

As suggested by Nakamuro Mitsuo, Islamization and Democratization have been going well from the twentieth century in Southeast Asia and these “trends are converging to promote and strengthen Islamic civil society in the public life of most of the Southeast Asian countries,”³¹ including Indonesia. As Muslim is the majority population, Indonesian Islamic organization is very influential.

There are two prominent Islamic civil societies in Indonesia: *Muhammadiyah* and *Nahdlatul Ulama* (NU) which literally means the awakening of Islamic scholar (*ulama*). NU is the largest Islamic organization with members around 50 million.³² It was established in

²⁶ Hefner, *Islam in an Era of Nation State*, 21.

²⁷ Antlov, Ibrahim and Tuijl, *NGO Governance*, 149.

²⁸ Collins, *Indonesia Betrayed*, 153.

²⁹ After the independence in 1945, Muslim Indonesians wanted the Constitution to guarantee an Islamic state. They endorsed a draft of the preamble which read: “Belief in one Supreme God with the obligation for adherents of Islam to perform shari’a (Islamic law).” The draft was rejected.

³⁰ Hefner, *Islam in an Era of Nation State*, 22.

³¹ Nakamuro Mitsuo, “Introduction in Islam and Civil Society” in *South East Asia*, eds. Nakamuro Mitsuo, Sharon Siddique, Omar Farouk, (Singapore: ISEAS Yusof Ishak Institute, 2001) 21.

³² Robin Bush, *Nahdlatul Ulama and the Struggle for Power within Islam and Politics in Indonesia*, (Singapore: ISEAS Yusof Ishak Institute, 2009) 2.

1926 as a response to the rise of *Wahabism*³³ in Saudi Arabia and Islamic modernism in Indonesia. Its roles include the development of education, social welfare, and economic activities. NU was also involved in the struggle for Indonesia's independence in 1945.³⁴ In the same year, the leader of NU was involved directly in the establishment of Masyumi Party which then dissolved by President Sukarno in 1960. While NU is not directly involved in judicial review cases before the Constitutional Court, its two former chairmen were among the applicants in *BP Migas* case: Hasyim Muzadi, chairman of NU 1999-2010, and Salahuddin Wahid.³⁵

Muzadi stated that the judicial review was motivated by the spirit to give back the state sovereignty in managing oil and gas. He further mentioned that at least there are 20 laws concerning the vital needs of the people which very pro-foreign investors. According to him, this resembles economic colonialization. Meanwhile, Salahuddin Wahid, who actively promotes the minority rights concerned about poverty and lack of education for some Indonesians. He stated that inequality was created because of a certain group of society benefited from development while other groups do not.³⁶ Muslim scholars possess some credentials which allow them to become an authority on several issues, including state's economy. The recognition of Muslim scholars' authorities can be observed "from the number of people who are attracted to attend their religious gatherings (*pengajian*), and from the personages who regularly invite them to deliver a talk on their forum."³⁷

³³ Wahabism is a tenet in Islam that insists on literal interpretation of the Koran. This tenet has been Saudi Arabia's dominant faith since 1970s. Critics say that Wahabism has led do misinterpretation and distortion in Islam, for example their understanding of Jihad has been blamed for the rise of extremism, radicalism, and terrorism.

³⁴ Muhammad Fajrul Falaakh, "Nahdlatul Ulama and Civil Society in Indonesia," in *Islam and Civil Society in South East Asia*, eds. Nakamuro Mitsuo, Sharon Siddique, Omar Farouk (Singapore: ISEAS Yusof Ishak Institute, 2001) 33.

³⁵ Salahuddin Wahid is the grandson of NU founder and currently the head of Tebu Ireng Islamic Boarding School. He was nominated to be the chairman of NU in 2010 but lost from Said Agil Siraj.

³⁶ Asfa Widiyanto, "Salahuddin Wahid and the Defense of Minority Rights in Contemporary Indonesia," *Al-Jamiah: Journal of Islamic Studies* Vol. 52, no. 2 (2014), 276.

³⁷ *Ibid.*

The next Islamic organization is *Muhammadiyah*, literally mean the followers of Prophet Muhammad. It was established in 1912 by a scholar educated from Saudi Arabia by the name of Ahmad Dahlan. He considered modernization and purification of religion from syncretic practices very vital in reforming Islam. *Muhammadiyah* is recognized as an Islamic NGO whose primary concern has been community development which activities cover modern Islamic schools; health care; and orphan care.³⁸ With about 40 million members, it is the second largest Islamic organization in Indonesia. *Muhammadiyah* is considered to “represent Indonesia’s urban middle and upper-class Muslim who are typically educated in modern schools and are reformist-modernist in the matter of organization.”³⁹ The strength of *Muhammadiyah* is its community-based movement. This can be seen in the process of socialization of programs which flow from its headquarter to the branches throughout Indonesia which are carried out rapidly because “the organization works by structural mechanism.”⁴⁰

Muhammadiyah’s chairman from 1995-1999: Amien Rais was the central figure during the reform era which led to the downfall of the then President Suharto.⁴¹ This role had elevated him to become the Chairman of People’s Consultative Assembly from 1999 to 2004. It was during his chairmanship that the Constitutional Court was established.⁴² Because of his role, *Muhammadiyah* has become known to be successful in promoting the agenda of civil society.

³⁸ M. Amin Abdullah, “Muhammadiyah’s Experience in Promoting Civil Society on the Eve of the 21st Century,” in *Islam and Civil Society in South East Asia*, eds. Nakamuro Mitsuo, Sharon Siddique, Omar Farouk (Singapore: ISEAS Yusof Ishak Institute, 2001) 45.

³⁹ Robert W. “Hefner, Islam in Indonesia’s Political Future,” *Project Asia*, 2002. Available at: www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA594233, accessed September 22, 2016.

⁴⁰ Abdullah, *Muhammadiyah’s Experience*, 47.

⁴¹ Indonesia: Inquiry Into Recent Riots in Jakarta. Available at YouTube, <http://www.youtube.com/watch?v=w9cG81ZXqXw>, accessed July 20, 2016.

⁴² During his chairmanship, the People’s Consultative Assembly passed a series of amendments to the Constitution of Indonesia. The amendments, among other things, established direct presidential elections, a presidential term limit (two terms), and the Constitutional Court.

During 2000-2005, Syafii Maarif chaired *Muhammadiyah*. The Maarif era was marked by various progressive thought and revived critical thought in the organization. Dialogue with other religious groups received more emphasis, as did the use of hermeneutics to interpret Qur'an.⁴³ Unfortunately, there was a contest between the liberal and conservative groups in *Muhammadiyah* where the conservatives disagreed with pluralism, liberalism and the use of hermeneutic. The conservative group often "refer the liberalists as being Jewish or American agents" as a way to convince people of the potential danger posed by liberal thought as being dangerous to Islam and *Muhammadiyah*.⁴⁴ Hefner states that there was "a small but vocal minority in the organization that opposes cooperation with any western agencies. This group would be all too willing to take advantage of American missteps toward Maarif to discredit the moderate leader."⁴⁵

In its 2005 Congress, the liberalists were voted out of the leadership and replaced by the Puritan group. The 2005 Congress elected Dr. Din Syamsuddin⁴⁶ who at the time was the secretary general of the Indonesian Ulema Council for the 2005-2010 periods. There was a widespread opinion that under Syamsuddin *Muhammadiyah* would be more conservative.⁴⁷ Hefner stated that according to a number of observers and civil society activists, Syamsuddin had previously been notorious for masterminding anti-Semitic, anti-Christian, anti-secular Moslem and anti- democratic discourse.⁴⁸ Syamsuddin was regarded as a "fundamentalist Moslem and apostle of conservative Islam as well as the brain behind militant Islam." While Maarif believed that maintaining connection with the United States was important in order to save the source of international aid, Syamsuddin suggested that Muslim should commence on

⁴³ Ahmad Najib Burhani, "Liberal and Conservative Discourses in the Muhammadiyah: The Struggle for the Face of Reformist Islam in Indonesia," in *Contemporary Development in Indonesian Islam*, ed. Martin van Bruinisse, (Singapore: ISEAS Yusof Ishak Institute, 2013) 116.

⁴⁴ Ibid.

⁴⁵ Hefner, *Islam*, 40.

⁴⁶ He holds PhD degree from University of California Los Angeles (UCLA)

⁴⁷ Hefner mentioned in his report Din Syamsuddin had helped coordinate the Indonesian Council of Scholars call for jihad against the U.S

⁴⁸ Hefner, *Islam*, 41.

a jihad against the United States if the US government was to attack Afghanistan.⁴⁹

Syamsuddin had a good reputation from within *Muhammadiyah* and considered as having a strong view. Among the members, he was believed to be able to mediate the rift between the liberal and the conservative groups.⁵⁰

Under Din Syamsuddin, *Muhammadiyah* vigorously challenges various laws before the Constitutional Court, arguing that it was mandated by the 2010 Congress. Before the Congress, the leadership boards of *Muhammadiyah* in 2009 in a national meeting had decided to set up a team to investigate laws contradicting to the Constitution particularly in the field of energy. Those laws would potentially be the object of judicial review. *Muhammadiyah*'s members name this effort as "jihad *Muhammadiyah*" or "constitutional *jihad*." The team then invited other persons and organizations to join the petition.

Oil and Gas Law was the first to be chosen because in the applicants' opinion the law had brought the most loss to Indonesia. The judicial review of the Oil and Gas law was led by *Muhammadiyah* with several Muslim scholars and some Islamic organizations. The organizations include Lajnah Siyasiyah Hizbut Tahir Indonesia, *Persatuan Ummat Islam* (the Unity of Muslim), *Syarikat Islam Indonesia* (Indonesian Islamic Association), and *Pemuda Muslimin Indonesia* (Indonesian Muslim Youth), *Lajnah Tanfidziyah Syarikat Islam*, *Persaudaraan Muslimin Indonesia* (Indonesian Muslim Brotherhood), *Al-Irsyad Al-Islamiah*, and *Al Jami'yatul Washliyah*.⁵¹ Those Islamic groups describe their vision as being the establishment of social justice and democratic order, based on the Islamic doctrine. Other than Lajnah Siyasiyah Hizbut Tahir Indonesia (HTI), the other organizations are not quite well known for their non-religious activities.

⁴⁹ Delphine Allès, *Transnational Islamic Actors and Indonesia's Foreign Policy: Transcending the State*, (London, New York, Routledge Taylor & Francis Group: 2016).

⁵⁰ Burhani, *Liberal and Conservative Discourses*, 11.7

⁵¹ Constitutional Court decision No 36/PUU-X/2012, p 1-4 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_36%20PUU%202012%20migas%20-%20telah%20baca%2013%20Nov%202012.pdf, accessed February 2, 2015.

HTI criticized the Indonesian government for giving too many roles to foreign investors in oil and gas sectors. Four days prior the verdict rendered by the Constitutional Court in *BP Migas* case, HTI insisted the Indonesian government ended all contracts with foreign companies in Oil and Gas industries and give the control of oil and gas to the state oil and gas company: Pertamina. It further suggested that the foreign involvement in oil and gas sectors resembled colonization over Indonesian resources.⁵² Recently, HTI contended that liberalization has caused foreign companies controlled 90 percent of oil production in the country.⁵³

Several explanations are given behind the involvement of Islamic organizations in politics or economy. Robin Bush claims that as a result of the repression of Islamic political activity during the New Order, the energy and effort of Islamic organizations were being channeled to “more intellectual areas which later led to the emergence of a cadre of scholars in both the liberal and conservative camps.”⁵⁴ The intellectual groups are regarded as the motor for the jihadist movement before the Constitutional Court.⁵⁵ As a Muslim-majority nation, there is a perception that Islam is considered the standard for conducting one’s life. Democratization plays an apparent role in the advocacy of Islamic organizations since the new democracy during the reform era provided new space for Muslims to discuss Islam and its laws through state mechanisms. An example of this was the decision of the government to situate the Religious Court under a single authority of the Supreme Court rather than under

⁵² An article in Hizbut Tahir Indoensia’s website: HTI Ajak Umat Tolak Perpanjangan Kontrak Migas RI dengan Asing (HTI Encourages Indonesian Muslims to Refuse Oil and Gas Contract Extension between Indonesia and Foreign Parties , <http://hizbut-tahrir.or.id/2012/11/01/hti-ajak-umat-tolak-perpanjangan-kontrak-migas-ri-dengan-asing/>, accessed June 23, 2016.

⁵³ Umar Syarifudin , “Ironi Negeri Seribu Blok Migas (the Irony of a State with Thousands Blocks Oil and Gas),” article published in Hizbut Tahi Indoensia website, Available at: <http://hizbut-tahrir.or.id/2016/06/13/ironi-negeri-seribu-blok-migas/>, accessed June 23, 2016.

⁵⁴ Bush, *Nahdlatul Ulama*, 9.

⁵⁵ They have been doing researches on what laws are possibly breaching Article 33 of the Constitution. This report is to be used to file judicial review in the Constitutional Court.

the Supreme Court and the Ministry of Religious Affairs as had previously been in the New Order era.⁵⁶

While the intellectual groups make a choice and decision to use the judicial channel as part of their effort to exercise democratic rights, they could, in fact, be motivated by their religious values.⁵⁷ Neo-liberal economic policies that give wider access for foreign investors to operate in a country are deemed not suitable for Islamic teaching. The Quran concerns about “the danger for capitalism since it may elevate materialism over spirituality.” That is why in Islam, the practice of imposing interest is forbidden,⁵⁸ and the importance of maintaining solidarity among Muslims is highly encouraged.⁵⁹ In the *Water Resources Management* case, the Islamic group used the verses from Koran: Surah Al-Baqarah 164,⁶⁰ Al-Ankabut 63,⁶¹ and Ar-Ruum 24⁶² to argue that water resources shall not be privatized because it is God’s creation for all creatures. Privatizing water, therefore, could endanger life.

Thus, there is clearly “a contradiction between Islamic solidarity and the exploitative nature of FDI activities,” especially in the natural resources. Islamic solidarity requires a genuine sense of compassion for others, while FDI’s major concern is material self-benefit. Their disagreement with elements of liberal policy is well articulated in their petition before the Constitutional Court. These Islamic groups also disagree with arbitration as dispute

⁵⁶ Nadirsyah Hosen, “The Constitutional Court and ‘Islamic’ Judges in Indonesia,” *Australian Journal of Asian Law*, vol. 16., no. 2 (2016) 8.

⁵⁷ This statement was made by Syaiful Bakhri, the Rector of Muhammadiyah University, Jakarta, in a newspaper article titled: *Genealogi Jihad Konstitusi*, October 27, 2015, available at: <http://www.republika.co.id/berita/koran/opini-koran/15/10/27/nwva472-genealogi-jihad-konstitusia> accessed June 23, 2016.

⁵⁸ Quran Surah ar-Ruum: 39; an-Nisa: 160-161; Ali-Imran: 130.

⁵⁹ Quran Surah al-Qasas:28-77 and al Baqarah:2-201.

⁶⁰ The verse says: Indeed, in the creation of the heavens and earth, and the alternation of the night and the day, and the [great] ships which sail through the sea with that which benefits people, and what Allah has sent down from the heavens of rain, giving life thereby to the earth after its lifelessness and dispersing therein every [kind of] moving creature, and [His] directing of the winds and the clouds controlled between the heaven and the earth are signs for a people who use reason.

⁶¹ And if you asked them, "Who sends down rain from the sky and gives life thereby to the earth after its lifelessness?" they would surely say " Allah ." Say, "Praise to Allah "; but most of them do not reason.

⁶² And of His signs is [that] He shows you the lightening [causing] fear and aspiration, and He sends down rain from the sky by which He brings to life the earth after its lifelessness. Indeed in that are signs for a people who use reason.

settlement in production sharing contract and other cooperation agreement related to oil and gas. In their point of view, international arbitration encroaches upon state's dignity, because it has to bow on a private tribunal. Moreover, if Indonesia loss arbitration cases, this means a loss for all Indonesian people.⁶³

In respect to the role of SOE, the applicants said that the oil and gas contract must be delivered by SOE rather than by BP Migas. SOE is seen as the representation of state and manifestation of 'state control' as stipulated in Article 33 (2) (3) of the Constitution. The concept of sovereignty shall be manifested in the public ownership of natural resources where all the Indonesian people collectively own it. Public ownership is best represented by SOEs which have all the tools such as oil wells, refineries, tanker, transportation and gas station.⁶⁴ Moreover, this group considers that Article 10 of Oil and Gas Law reduce state's sovereignty.

Article 10 which reads:

(1) A Business Entity or Permanent Establishment engaging in Upstream Business Activities shall be prohibited from engaging in Downstream Business Activities.

(2) A Business Entity engaging in Downstream Business Activities may not engage in Upstream Business Activities.

They argue that this article reduces state sovereignty upon control over natural resources due to the requirement for SOE to unbundle so to create new enterprises. The concept of unbundling, according to them, would create open competition. This group opposes the idea of free competition in oil and gas claiming that it only benefits MNCs but detrimental to Indonesians. They argue that market pricing for oil and gas contravenes with article 33 of the Constitution since oil and gas are an important branch of production which must be controlled by the state.⁶⁵

⁶³ The Constitutional Court decision No 36/PUU-X/2012, 15 and 20.

⁶⁴ Ibid., 20.

⁶⁵ Ibid., 25.

In *Water Resources* case, *Muhammadiyah* also disagreed with privatization claiming that involving private capital in water resources violates Article 33(3) which requires “the land, the waters and the natural resources” to be controlled by the state. *Muhammadiyah* indicated that regional-owned water company should be the one to hold concession right and be situated as the state agent to provide water services for basic needs including household needs and traditional farming.⁶⁶ Cooperative and private entities involvement in water resources sectors should only be allowed if the government has yet had the capacity to manage water resources.⁶⁷ *Muhammadiyah* also condemned that privatization in water resources management was promoted by international donors which supported capitalism and commercialization to water resources which were considered as unjust and breach human rights.⁶⁸

Citing what Din Syamsuddin stated in an interview with Reuters, “We will not stop as long as there are laws that are contradictory to the Constitution. This is our constitutional jihad, it is our social struggle.”⁶⁹ Thus, *jihad Muhammadiyah* should be seen more than merely the way Muslim intellectuals in Indonesia embrace their belief. It also reflects ideals of how they perceive sovereignty and citizen participation. It is clear that *Muhammadiyah* is the front-runner in fighting the capitalist economic system.

Hanieh Adam draws a link between democratization and Islam. Learning from other Muslim-majority societies like Egypt and Turkey, it is evident that they also experienced struggles during democratization which rooted from the conflict over the distribution of wealth. The relationship between democratization and the growth of capitalism including its neoliberal manifestation is complicated; “Islam and capitalism are deemed as incompatible

⁶⁶ Constitutional Court Decision Number 85/PUU-XI/2013, 21

⁶⁷ *Ibid.*, 19.

⁶⁸ *Ibid.*, 24.

⁶⁹ Charlotte Greenfield and Eveline Danubrata, “RPT-Legal 'jihad' against private sector gathers pace in Indonesia,” Reuters Sun Apr 26, 2015, <http://www.reuters.com/article/indonesia-investment-idUSL4N0XL4R120150426> accessed June 21, 2016.

due to cultural practices deriving from Islamic precepts that tend to create obstacles to private capital accumulation.”⁷⁰ According to Adam, “the promotion of democracy is mainly suited to the interest of global capitalist interests and their allies in international development organizations and Western government.”⁷¹ Thus the refusal of liberalism is also influenced by “the broader constellation of power through which the Islamic CSOs has navigated to attain more favorable positions to compete for access to state institutions⁷² and to economic resources.”⁷³

This connection is contended by Hadiz, saying that “it is too simplistic without taking into consideration of free domestic social forces.” Hadiz further stated that “democratization as a means of advancing their interests hindered by state authoritarianism closely intertwined with nontransparent links between big business and the government.”⁷⁴ What is certain according to Hadiz, policy taken by the government in response to liberalism that includes privatization has influenced social and political landscape of Muslim. He claimed that the Indonesians government has failed to promote native-Muslim business people because the government was prioritizing the Chinese-Indonesian business.⁷⁵ This has been evident where big Chinese conglomerates enjoyed many privileges under the New Order era, and also Western-dominated capitalism through FDI liberalization. Market competition has destroyed

⁷⁰ Vedi R. Hadiz, *Islamic Populism in Indonesia and the Middle East*, (Cambridge: Cambridge University Press, 2016) 159.

⁷¹ Hanieh, Adam, “Democracy Promotion and Neoliberalism in the Middle East,” *International Journal of Socialist Renewal*, Issue 29, (2006). Available: <http://links.org.au/node/224>, accessed July 17, 2016.

⁷² In July 27, 2016 President Joko Widodo reshuffled his cabinet among other things he replaced the Minister of Education, Anie Baswedan to Prof. Muhajir Effendy, head of Universitas Muhammadiyah Malang. Muhadjir has also been active in the management of several institutions such as serving as the chairman of Muhammadiyah, chairman of the Central Agency for Private Islamic Universities Cooperation (BKS-PTIS), chairman of the Association of Families of Indonesian Islamic Students (KB PII) in East Java, and vice chairman of the Indonesian Association for the Development of Social Sciences (HIPIIS). Muhadjir was also a member of the expert council of the Indonesian Association of Muslim Intellectuals (ICMI) Although it is not proven, I think it is a political act for Jokowi to embrace Muhammadiyah as the second biggest religious organization in Indonesia. Jokowi already appointed few ministers from Nadhlatul Ulama and by appointing another minister from Muhammadiyah, he wants to gain supports from them.

⁷³ Adam, *Democracy Promotion*.

⁷⁴ Hadiz, *Islamic Populism*, 160.

⁷⁵ *Ibid.*, 161.

the ability of native-Muslim to becoming significant business players in the country. In Indonesia, it is still considerably hard for the Muslim community to embrace liberalism since they are not equipped to benefit from liberalism since Muslim society is not a culturally business people like those of Chinese Indonesian.⁷⁶ Muslim society admitted they have no capacity to enter free market.⁷⁷ Thus, Islamic CSOs' decision to join *Muhammadiyah* in the judicial review was presumably aimed to give their members a fair chance of being involved in the economy.

The constitutional jihad is meant to be an action to legally limit or restrict private participation in the energy and water sectors and other FDI-related laws.⁷⁸ Syamsuddin believes that the mission is to protect Indonesian economy from globalization and capitalistic policies that favor foreign investors over domestic investors. Thus, the emergence of constitutional jihad could be explained by the religious explanation rooted from the Koran which rejects capitalism, as well as economic explanation to give opportunity for Muslim business people to enter free-market economy.⁷⁹

b. Trade and Investment-based CSOs

On May 5, 2011, just two days before the ASEAN Summit, the Alliance for Global Justice filed for a judicial review before the Constitutional Court towards Law No. 38 of 2008 concerning the Ratification of the Charter of the Association of Southeast Asian Nations

⁷⁶ Hadiz, *Islamic Populism*, 166.

⁷⁷ Interview Hadiz with Muslim businessmen in Hadiz, *Islamic Populism*, 170.

⁷⁸ In April 2015, Muhammadiyah filed requests for judicial reviews in the Constitutional Court saying that the 1999 foreign exchange law is invalid. If the court accepted these claims, the legal basis for convertibility of the rupiah currency would be thrown out. The argument is that the Foreign Exchange Law has caused an unstable rupiah rate due to its free floating rate system. Under this system, the rupiah's exchange rate is no longer determined by the government, but by market forces.

⁷⁹ According to Collins EF, this phenomenon also happens in other countries. In the Philippines, the Liberation Theology movement within the Catholic Church began organizing basic Christian communities among the rural poor, where the colonial legacy of deeply rooted poverty provided fertile ground for rebellion and recruitment by the Communist Party of the Philippines. In Thailand, development-oriented monks were inspired by a Buddhist reform movement led by Buddhadasa Bhikku. They began independent development projects. One of the earliest Buddhist NGOs, founded in 1974, was the Foundation for Education and Development of Rural Areas. In the 1980s, as forests were logged and watersheds destroyed, environmental monks began to ordain trees in an attempt to save the remaining forests. This movement came to be known as Engaged Buddhism.

(ASEAN Charter). The Alliance for Global Justices consists of representatives from CSOs and NGOs namely: the Institute for Global Justice (now it becomes Indonesia for Global Justice), People's Farmer United, INFID Association, Indonesian Farmer Alliance, FNPBI, People's Coalition for Fisheries Justice, Migrant Care, Petition 28 activists, Small Enterprise Women Defenders Association, and Anti-debt Coalition. Individuals who join this group consist of Salamuddin Daeng, Dani Setiawan, and Haris Rusli. The most spoken up NGO within this Alliance is International NGO Forum on Indonesian Development (INFID) and Indonesia for Global Justice (IGJ).

INFID was established in June 1985 based on the initiative of several Indonesian NGOs and civil society figures including Abdurrahman Wahid. INFID has a pivotal role in shaping Indonesia's democratization process in the field of human rights, freedom of the press, rule of law, labor rights, protection of marginalized groups, as well as gender equality.⁸⁰ Its mission is to monitor the development activities related to issues such as foreign debt and foreign direct investment. Since 1985 INFID has given critical input and recommendations concerning development issues in Indonesia. In its annual report, INFID indicated that as the source of development is now moved to private sectors namely private investors, strengthening the role of the private sector is crucial. Strengthening the private sector must be accompanied by a commitment to human rights both civil and political rights as well as economic, social and cultural rights. It further states that state needs to strengthen its role related to the financing of development and also to meet its obligations for the fulfillment of human rights and encourage the private sector's commitment to the realization of human rights.⁸¹

The next CSO in trade and investment group is IGJ. Formed on August 7th, 2001, IGJ claims as the only NGO in Indonesia focusing on world trade liberalization. IGJ's ambitions

⁸⁰ International NGO Forum on Indonesian Development, "Tentang INFID (CETAK) revisi," <http://infid.org/wp-content/uploads/2015/09/Profile-tentang-INFID.pdf>, accessed July 17, 2016.

⁸¹ Ibid. .

are to promote: the strategy of sovereign and just economic development; laws and policies on trade and investment which benefit the people; and international agreement that protect the national and people's interests. The works done including monitoring and responding to trade-related issues such as the World Trade Organization (WTO), national trade policy including investment, trade facility, and competition policy; Free Trade Agreement (FTA), ASEAN, and the G 20.⁸²

Rachmi Hertanti,⁸³ the IGJ director, stated the program that IGJ undertaking includes providing analytical information on different trade globalization issues, research, generating recommendations for alternative policies for the government. The way to do it is by participating in different conferences, government summits, and monitoring negotiations of trade and investment agreements between Indonesia and other countries. The outcomes of the research are used for various purposes, for example, public education, lobbying materials, campaign, and advocacy. Campaign activities are among IGJ's primary activities with objectives to increase critical awareness about global trade liberalization issues and their impacts on Indonesian economy and development. As a mean to public education, IGJ regularly conducts workshops, public dialog, discussions and hearings with the related commission at the parliament and government institutions.⁸⁴ Since 2009, IGJ has been joining with other NGOs to use the Constitutional Court to review questionable trade and investment-related laws.⁸⁵

IGJ and INFID as petitioners in the *ASEAN Charter* case oppose free market. They claim that the enactment of ASEAN Charter as the legal basis for the agreement between ASEAN countries to create a single market is a breach of the Article 33(1) which requires that "the economy shall be organized as a collective endeavor based upon family system."

⁸² Website of Indonesia for Global Justice, <http://igj.or.id/tentang-kami/>, accessed September 27, 2016.

⁸³ Interview.

⁸⁴ Website of Indonesia for Global Justice, <http://igj.or.id/profile/>, accessed September 27, 2016.

⁸⁵ Interview informant no 1 civil society organization.

IGJ and INFID argue that “family system” requires the economy to be conducted for all the people under a leadership of the state. In the family principle, the common good and shared-wealth prevail over individual needs. Hence, free market promoted by ASEAN Charter breach Article 33(1) of the Constitution.⁸⁶

Moreover, a free market is inapplicable to govern natural resources as well as a branch of production necessary to the people as this must be controlled directly by the state. Applying free market would be detrimental to small and medium enterprises and other national industries due to incapability to compete. As a result, it closes the opportunity for Indonesian to the right to work and to earn a humane livelihood as has been guaranteed in Article 27(2) of the Constitution.⁸⁷

In its publication, IGJ stated that ASEAN Charter’s philosophy, ideology, and goals are contradictory to the Indonesian Constitution. It claimed that binds itself to ASEAN Charter means that Indonesia loses its sovereignty over its economy because the country would not be able to and avoid of being an arena for foreign investors to invest through ASEAN.⁸⁸

Alexander C. Chandra cited couple reasons why CSOs are engaging with ASEAN. Firstly, ASEAN’s intention to establish ASEAN Community is considered as ambitious to include ASEAN Security Community, ASEAN Economic Community, and ASEAN Socio-Cultural Community. Secondly, CSOs view ASEAN as a platform to influence policy at the regional level. Although the prevailing view is that domestic politics determine regional policy, in fact, the reality tells differently in which “regional organizations control policies at the national level.” Further Chandra stated that “Southeast Asian CSOs have concerned on

⁸⁶ The Constitutional Court decision No 33/PUU-IX/2011, 29-30.

⁸⁷ *Ibid.*, 31.

⁸⁸ Indonesia for Global Justice, Desak MK Uji Materi “ASEAN Charter” (Demand Constitutional Court Review “ASEAN Charter”), 11/19/2012, <http://www.neraca.co.id/article/21725/desak-mk-uji-materi-asean-charter-indonesia-for-global-justice-igj>, accessed September 27, 2016.

the potential impacts of faster and more comprehensive trade liberalization under the bilateral FTA such as the agreement between ASEAN and China in 2004.”⁸⁹

In respect to BIT review policy, Rahmi Hertanti stated that BIT program benefits foreign investors the most and neglects host country’s interests. The provisions in the BITs focused on obligations and responsibilities of host states rather than home states or the investors. In addition, BIT does not have control over the corporations and their business activities. Those corporations are given rights to sue the host government before the arbitration despite the fact that BIT is an agreement between states instead of between state and MNCs. IGJ cites those as the main reasons why they support BIT moratorium policy and Model BIT.⁹⁰

IGJ is actively involved in the BIT review program by participating in discussions, conferences and audiences with the government. On February 18, 2015, IGJ researchers met with the Director of Bilateral Cooperation of the Indonesian Investment Coordinating Board (BKPM) to discuss the BIT review process.⁹¹ In response to the rising of agrarian conflict, environmental degradation, and human right abuse as consequences to investment activities, IGJ proposes provision to control multinational company’s activities. Therefore, right and obligation between states party as well investors and host states become balance. BKPM promises to accommodate that proposal.⁹² IGJ also held a meeting with the Director for Economic Agreement, Social, and Cultural Ministry of Foreign Affairs to monitor the BIT

⁸⁹ Alexander C. Chandra, “The Role of Non-State Actors in ASEAN,” in *Revisiting Southeast ASEAN Regionalism*, p 74, available at: http://www.alternative-regionalisms.org/wp-content/uploads/2009/09/chandra_non-stateactorsinasean.pdf, accessed September 27, 2016.

⁹⁰ Update on Indonesia BIT Reviews, February 24, 2015, available at: <http://igj.or.id/update-on-indonesia-bits-review/>, accessed at September 27, 2016.

⁹¹ Ibid.

⁹² Update on Indonesia BIT Reviews, February 24, 2015, available at: <http://igj.or.id/update-on-indonesia-bits-review/>, accessed at 9/27/2016.

review process.⁹³ It provides views on dispute resolution saying that it is worth the effort to try reform international investment agreement along with limiting the role of arbitration.

Rahmi Hertanti asserted that investment state dispute settlement favor investors' interests over host state's interests. She refers to arbitration brought by Churchill and Planet Mining claiming around \$ 2 billion compensation. According to her, the amount of compensation requested is considerably high and worth more than a year food subsidies in Indonesia.⁹⁴ This kind of pressure impose limitations to the government on the formulation of regulation and entering into international investment agreement primarily BIT and free trade agreement containing an investment chapter.

c. Land, Indigenous People, and Environment-related Issues CSOs

The next group of CSO comes from indigenous rights, mining, forests and water related issues. Indonesia is a country that enjoys the abundant land, mineral, forest, and aquatic resources. These resources often become the cause of conflict between governments and its citizens. Property rights of native communities are ignored, and multi-national corporations undertake business on mining, oil, and plantation on native lands without the consent of those communities. Freeport mining projects in West Papua⁹⁵ province is cited as among the most controversial mining operation in the world. Freeport is considered as disregarding the rights of the indigenous people by removing them from their traditional lands with the help of the Indonesian government in 1991. In the same year, Freeport acknowledged its responsibility in dumping over 110.000 tons of untreated mine waste into

⁹³ Indonesia Terminated 18 BITs, Asia-Pacific Network on Food Sovereignty, May 25, 2015, at <http://www.apnfs.info/indonesia-terminated-18-bits.html>, accessed September 25, 2016.

⁹⁴ Anton Hermansyah, "TPP may bankrupt Indonesia, activists say" *the Jakarta Post*, available <http://www.thejakartapost.com/news/2016/02/15/tpp-may-bankrupt-indonesia-activists-say.html>, accessed August 12, 2016.

⁹⁵ Freeport project in West Papua is the largest gold mine and the third largest copper mine in the world. It is located in the province of Papua in Indonesia near Puncak Jaya, the highest mountain in Papua. It has 19,500 employees. It is mostly owned by Freeport-McMoRan (FCX), which owns 90.64% of PT Freeport Indonesia, the principal operating subsidiary in Indonesia, including 9.36% owned through its wholly owned subsidiary, PT Indocopper Investama. The government of Indonesia owns the remaining 9.36% of PT Freeport Indonesia.

the rivers of West Papua every day.⁹⁶ In May 2000, there was a landslide in Freeport Lake Wanagon waste site which caused flooding in Banti village several kilometers downstream from the lake and cause four workers died. The government then asked the company to clean up the pollution that has been caused by toxic materials dumped by the landslide and to compensate the losses suffered by local people.

The first CSO in this group is WALHI (Indonesian Forum for the Environment). Founded in 1980, WALHI is considered as the largest and oldest environmental advocacy NGO in Indonesia. Following the May 2000 landslide from Freeport waste site, WALHI launched a national campaign for an environmental audit of the Freeport mining and a renegotiation of the terms of environmental management and income distribution. On July 27, 2000, WALHI filed a lawsuit against Freeport in South Jakarta District Court claiming that Freeport had breached Law No. 23 of 1997 concerning Environmental Management by deliberately concealed information and had given false and inaccurate explanations on their environmental management which caused the landslide in Lake Wanagon. Freeport denied claiming that the landslide was caused by high rainfall and that the waste site did not pose any risk to human health. The South Jakarta District Court declared Freeport breached the Law and ordered the company to reform its waste management system. The Court decision on this matter is considered as a landmark victory of WALHI.⁹⁷

WALHI was one of the claimants in *Coastal Water and Small Island and Investment Law* cases. It asserted that in Indonesia as an archipelagic state, coastal water, and small islands are considered as “important branch of production” and “affect the life of many people”⁹⁸ and therefore shall be controlled by the state.⁹⁹ “Control by state,” according to

⁹⁶ Al Gedicks, *Resource Rebels: Native Challenges to Mining and Oil Corporations*, (Cambridge Massachusetts: South End Press, 2001) 95.

⁹⁷ “Freeport Faces Investigation Due to Recent Disaster and Past Mismanagement,” vol. 5, no 9, (2000) *Business Week On-Line*, July 31, 2000, <http://www.clarku.edu/~jsarkis/freeport2.doc>. Accessed August 13, 2016.

⁹⁸ Article 33(2) of the Indonesian Constitution.

WALHI, means that the government shall be a supervisor, regulator, and player in the economy through SOE. The bigger the SOE, the more shares the government has and therefore, the more people get benefit from it.¹⁰⁰ Furthermore, WALHI acclaimed that “control by state” has higher concept than merely private ownership toward important branches of production as well as natural resources. While recognizing the role of private capital in the important sector, WALHI limited the role of private capital only when the central or regional government did not have the capacity to manage the resources.¹⁰¹

WALHI also argued that the concept of concession diminishes “state control” because it has the features of individual rights since it can be transferred. The option to transfer concession right could lead to the loss of national sovereignty to manage coastal water and small island to the greatest benefit of the people.¹⁰² This way, it promotes privatization of the coastal water and small islands.¹⁰³ WALHI opposed privatization since it breached the family principle. Privatization encourages commercialization, allows non-government entities to own coastal water and small islands, consequently diminish state’s responsibility towards the coastal community. Privatization also closes the access of fisherman, traditional community and local people to use the coastal water and therefore endanger their economic activities in the areas.¹⁰⁴ This way, coastal water and small islands would only benefit individuals or small group of companies.

Another CSO in this group is People’s Movement against Neocolonialism and Imperialism (GERAK LAWAN) and the Indonesian Peasant Union (SPI).¹⁰⁵ SPI was established in December 2007 by a number of peasants struggling to gain the right to speak and to organize during the New Order Regime, while GERAK LAWAN was established at

⁹⁹ Constitutional Court decision No 3/PUU-VIII/2010, p 39

¹⁰⁰Ibid., 40

¹⁰¹Ibid., 41.

¹⁰² Ibid., 54.

¹⁰³Ibid., 41.

¹⁰⁴ Ibid., 53.

¹⁰⁵ Basically SPI steers the national coalition GERAK LAWAN and it also hosts the secretariat of the coalition.

the first place to oppose Law No. 25 of 2007 concerning Investment. Their missions include empowerment throughout education and economic, political, social and cultural for farmers; work for an equitable system of the land owner. This Union challenged the constitutionality of the Investment Law. The initiating judicial review is seen by the Union as one strategy of its legal unit to advance the rights of peasants through legal avenues on behalf of its members.¹⁰⁶

Before the enactment of Law No. 25 of 2007, SPI involved in a series of rally and consultations in several provinces to raise peasant voices regarding the Article 22 of the Bill,¹⁰⁷ while GERAK LAWAN concerned about the provisions allowing 100 percent foreign ownership. In May 2007, GERAK LAWAN held a meeting in Jakarta involving agrarian experts, sociologists, economist, legal expert, and human right activists. The meeting was to examine the preferential treatment given to foreign investors under the Investment Law such as the 100 percent foreign ownership; national treatment; capital flight and asset repatriation; use of foreign labor; and land rights with rights of renewal. They concluded that those provisions infringed Article 33 of the Constitution. Based on this conclusion, GERAK LAWAN, SPI, WALHI and other eight civil society organizations filed a judicial review of those provisions.¹⁰⁸

In the *Investment case*, WALHI, GERAK LAWAN and SPI asserted that Law No. 25 of 2007 concerning Investment provides too many privileges for private investors from giving longer land rights which make harder for Indonesian people to get access to land, to the right for repatriation which would make Indonesians lost jobs.¹⁰⁹ The applicants further

¹⁰⁶ Yudha Fathoni, Challenging the constitutionality of Indonesia's Investment Law, *International Institute for Environment and Development*, 2014, 12, available at: <http://pubs.iied.org/pdfs/G03721.pdf>, accessed September 27, 2016.

¹⁰⁷ Article 22 provided investors the right of tenure for 95 years with rights of renewal in advance. This was perceived as a signal to civil society that the government did not trust that peasant farmers would be able to contribute to agricultural development, but believed in giving land to investors so that they could hire peasant farmers as cheap labor.

¹⁰⁸ Fathoni, *Challenging the Constitutionality*, 4..

¹⁰⁹ The Constitutional Court Decision Number 21-22/PUU-V/2007, 8.

mentioned that the spirit of economic nationalism in Article 33 of the Constitution is not manifested by the Investment Law which is too liberal.¹¹⁰

Specifically, WALHI and other claimants objected the economic liberalization in the form of equitable and nondiscriminatory treatment¹¹¹ saying that it breaches Article 33 (2) and (3) of the Constitution. Equitable and nondiscriminatory treatments disable the state to exercise control over an important branch of production including the earth, water, and natural resources. Consequently, the state is unable to provide welfare for the people.¹¹² They submit that ‘control by state’ means the state shall hold a minimum of 51 percent share in a company. The minimum requirement is for the state to be able to govern the company to reach the goal of people’s welfare.¹¹³

The next CSO in native people-related laws is AMAN (Nusantara Customary Society Alliance). It is a civil society organization established on March 17, 1999, in a conference as well as its first Congress which demanded the return to the control of indigenous society of sovereignty over natural resources.

The then Minister for Agrarian Affairs, Hasan Basri Durin, attended the Congress. The Minister became the object of anger from indigenous community representatives who demanded state’s recognition of their customary land which was being used by private investors. Taking AMAN’s demand into account, the Minister issued Ministerial Decree No. 5 of 1999 which recognize customary lands through a new category of land right called ownership right. However, the legal implications of the Ministerial Decree are questioned because it did not clarify the method to claim the ownership of customary land. On the other hand, the Decree received a negative response from timber industry since they would lose the privilege they had enjoyed should the indigenous people claim their land.

¹¹⁰ Ibid., 10.

¹¹¹ Article 3(d) Law No 25 of 2007 concerning Investment.

¹¹² The Constitutional Court Decision Number 21-22/PUU-V/2007, 29.

¹¹³ Ibid., 32-33.

AMAN's concern is based on the close connection between native people and their land which made them vulnerable to changes in their ecosystems. Gedicks acclaims that native people's dependence on the earth makes them suffer more acutely than others when toxic materials pollute their lands. "As the international mining, oil and gas, and timber industries explore the new regions for more supplies, they inevitably come into contact with native people who occupy that area."¹¹⁴

In September 1999, the government enacted Law No. 41 of 1999 concerning Forestry. This Law includes sustainability agendas and the multiple functions of forests which are seen as a departure from the view prevailing until then that forests were there to be exploited for economic gain. However, the Law did not address the need to give greater formal recognition to customary rights. Instead, the Law maintained the same divisions set out in the 1967 Forestry Law that is as between two categories of forest tenure: state forest and proprietary forest. A new type of forest which is a customary forest was defined as 'state forests where communities with customary laws are.'¹¹⁵ The 1999 Forestry Law therefore still confuse between customary rights and ownership rights.

AMAN and three indigenous groups filed judicial review case over the Forestry Law. Article 1 paragraph 6 give the consequence that the state owns all land and natural resources of the forest area in Indonesia. This policy allows the state to provide concession of rights over customary land rights that are not/not yet processed without consent from indigenous peoples concerned and without triggering a legal obligation to pay "adequate" compensation to the indigenous community holding customary rights over the land.¹¹⁶ This practice breaches Article 28C paragraph (1) of the 1945 Constitution which gives the constitutional

¹¹⁴ Gedicks, *Resource Rebels*, 41.

¹¹⁵ Article 1(6) of Law No 41 of 1999 concerning Forestry.

¹¹⁶ The Constitutional Court decision Number 35/PUU-X/2012, 28.

guarantee for every citizen to develop himself, to improve the quality of life and human welfare.¹¹⁷

According to AMAN, state control gives the state the authority and freedom to rule, to make policies, to manage and to monitor the use of land, waters and the natural riches within with constitutional measure. If private investors are given concession over forest areas, the government cannot exercise its control and the local community would be unable to get benefit from it as they could not participate in the activities to use the forest.¹¹⁸ Thus, this practice breaches Article 33 (3) of the Constitution.¹¹⁹

In the water sector, Amrta Institute for Water Literacy is the prominent NGO which conducts research-based advocacy on water resources issues. Its areas of concern include water governance, clean water supply, groundwater and surface water management, and water-related regulations. Amrta has been advocating for the fulfillment of the people's right to water especially in areas where water services are commercialized by contracts with other parties which sacrifice people's right to water.¹²⁰

In March 2013, Amrta joined the Coalition of Jakarta Residents Opposing Water Privatization¹²¹ and filed a case in the Central Jakarta District Court against the Government and two foreign companies: Palyja and Aetra demanding the court to annul a water concession agreement between city-owned water operator and those companies. The claimant argued that the city administration had breached the law by handing over water operations to private companies. Also, the cooperation between city-owned water company and Palyja and Aetra had failed to guarantee an adequate supply of clean water. A couple years later, the Court ruled in favor of the claimants stating that provision of water in Jakarta could not be privatized and ordered the water supply system to be given to the city administration. However,

¹¹⁷ Ibid., 29.

¹¹⁸ Ibid., 34.

¹¹⁹ Ibid., 35.

¹²⁰ Amrta Website at: <http://www.amrta-institute.org/profile/about-amrta-institute>, accessed September 28, 2016.

¹²¹ The Coalition comprised city residents, trade unions, and water justice activists.

responding to the District Court verdict, the defendants filed an appeal to the High Court of Jakarta in which the court annulled the district court decision in January 2016. The District Court verdict, however, was consistent with the Constitutional Court ruling on February 18, 2012, which declared that Law on Water Resources is unconstitutional since it gave private companies to have control over water resources.

Amrta's criticisms against water privatization were stated on many occasions. Amrta confirms that foreign domination is prevalent in water sector be it in bottled water or water supply system. The institute further mentions that in bottled water industry, foreign brands like Aqua-Danone, Nestle Pure Life and Ades dominated the market.¹²² In the water supply system, foreign investors from France, Singapore, South Korea, the Netherland, the UK, and Malaysia in cooperation with the local government-owned company usually collaborate under a concession contract. These foreign companies hold control over the water price. Amrta contends that this scheme does not benefit the people.¹²³ Nila Ardhianie, Amrta Director, stated that "commercialization of water is considered negate the state's role in meeting people's right to water."¹²⁴ In a discussion, she further reveals "the problems of water privatization in Jakarta include increasing water tariff, financial losses to the public water utility and substantial services delivered by the private water operators."¹²⁵

For CSOs like WALHI, AMAN, GERAK LAWAN, SPI, and Amrta the backlash against foreign investment is rooted in the problems those investors created in the community. It is the way to confront the power wielded by multinational companies. They took a pragmatic approach to the issues. They look into the real problems and use a legal

¹²² Amrta, "Dominasi Asing dalam Sektor Sumber Daya Air Indonesia (foreign Domination over Water Resources in Indonesia)," March 10, 2016, <http://www.amrta-institute.org/updates/144-the-reliable-performance-of-public-water-services>, accessed September 28, 2016.

¹²³ Ibid.

¹²⁴ Statement of in a National Seminar titled: Water Commercialization and People's Right on Water, in Jogjakarta Indonesia, February 10, 2016 available at: <http://www.amrta-institute.org/latest-news/156-keaulatan-rakyat-komersialisasi-air-rugikan-rakyat>, accessed at September 26, 2016.

¹²⁵ Public discussion in Legal Aid Foundation, Jakarta, June 2, 2016, available at: <http://www.amrta-institute.org/updates/167-public-discussion-19-years-of-water-privatization>, accessed September 26, 2016.

recourse to address it. The brave move against FDI does not go without risks. In exercising their democratic rights, CSOs also face risks such as losing funding.

d. Organized-worker CSO

In Indonesia, freedom of association in the form of a labor union is guaranteed in Law No. 21 of 2001. The Law guarantees among other things the union's rights to function to protect, defend and improve the welfare of workers and their families. The first organized worker to be discussed is the PLN Union which initiated a judicial review on Electricity Law. PLN union is a union for workers working for Indonesian electricity company PLN. It was established in 1999 and has the membership of 48.000 people spread all around Indonesia. The PLN union faced various workplace issues when the government introduced new Law to liberalize electricity market.

The union filed a judicial review against several articles on Law No. 30 of 2009 concerning Electricity. They opposed privatization arguing that it would lead to losing jobs as a consequence of unbundling.¹²⁶ Besides, the union said privatization during the New Order had caused the Electricity sector worsening, among other things due to bad implementation of the contract with foreign investors.¹²⁷ The Union cited Indonesia's loss in arbitration involving PLN and Patuha Company as one of the reasons for objecting privatization.¹²⁸ Furthermore, it argued that privatization could erode democracy, rise prices, increase insecurity and reduce access to electricity.¹²⁹ Opposition to protest privatization was set in the form of a campaign on the negative impact of the free market in the power sector. The PLN Union disagreed that market price is applied for electricity because it only benefited the investors. Market price and competition could make private companies to control electricity, as one of the important branches of production. Because electricity is vital for the

¹²⁶ Constitutional Court decision Number 01-021-022/PUU-I/2003, 21.

¹²⁷ They referred to PLN contracts with private entities owned by Suharto's relative: Paiton, Himpurna, and Patuha.

¹²⁸ Constitutional Court decision Number 01-021-022/PUU-I/2003, 21.

¹²⁹ *Ibid.*, 22.

Indonesian people, the purchasing power of the people shall be taken into account in determining the price.¹³⁰ Thus, state control in their perspective includes the direct ownership through SOE and determining the power's price.

Looking at the works of some CSOs in so many fields, it is evident that civil societies play a significant role in shaping the perspective towards foreign investors. Such participation is as the result of the reform era which opening up 'political space' for civil society that was closed by the New Order regime. As Stefano Harney and Rota Olivia put it, in addition to democratization in Indonesia, civil society is also entrusted with "the burden of ameliorating capitalist relations" where civil society provides help for people exploited as a result of capitalization.¹³¹

The participation of NGOs and other CSOs is due to their works at the grassroots and reflects a response to public need. CSOs that actively seek judicial review before the Constitutional Court or criticize the foreign investment activities are generally "issue-oriented" and entering public sphere discourse. These CSOs perceive the need to act after witnessing many incidents related to FDI operations including the impact of liberalization towards indigenous community and small and medium enterprises, as well as negative environmental, human rights and social consequences.

The CSOs scrutinize the distribution of wealth by FDI which has two patterns: internally and externally. Foreign investors redistribute wealth internally that not all members of the society benefits equally or can take advantage of it. Many civil societies believe that the benefits from FDI may be most likely to be felt by urban population or certain political groups. This situation widens the existing gap between the wealthy and the poor. Externally, foreign investors transfer the control over Indonesian assets to their parent company and

¹³⁰ Ibid., 24.

¹³¹ Stefano Harney and Rota Olivia, Civil Society and Civil Society Organizations in Indonesia, Paper presented at conference at International Labor Organization Geneva, August 2003, 1. available at: <http://www.ilo.org/public/english/protection/ses/download/docs/civil.pdf>, accessed September 1, 2016.

home state in the form of repatriation of profit, tax, royalty, fees, or the purchase of certain production components. MNCs operate for the benefit of their parent company and home states since they transfer profits and resources they gained from Indonesia. This way, reinvestment in the host country becomes low.

The unique characteristic of those CSOs is their involvement beyond campaign and advocacy but expand into judicial review through the Constitutional Court. Apparently, those CSOs have brought *judicialization* of backlash against foreign investment which shows a sign that they want a change that would lead to a better economic development than advocacy approach can offer. This new way to protest the FDI's involvement herds CSO into more political. Even though each group of CSO has its reason to support the backlash, they share common belief that the Indonesian people should be protected from the free market, by demanding state's intervention in the economy. This view is profoundly influenced by the societal value of development in Indonesia which was rooted in the anti-colonial struggle.

e. Prominent Figures

In addition to CSOs, there are some prominent individuals directly participating in the backlash against FDI. These persons are considered include in the backlash if they act as applicants or expert witness of the applicants in the judicial review cases in which his testimony is used as a basis to render decisions. They will also be considered involve in the backlash if they promote ideas to limit the role or protection of FDI through various means, and the ideas are used either by court or government.

The first figure is Edi Swasono, a Professor of Economy at the University of Indonesia who has participated in the cooperative and study for the development of cooperatives in Indonesia. Swasono's thesis is that a market-controlled economy has caused an economic downturn for Indonesia. The market has pushed aside the public's sovereignty. Therefore, the government is supposed to control the national market and protect its citizens

in the economic field. Swasono also asserted that the Article 33 of the Constitution requires the government to prioritize the public, not the market.¹³² Further, he criticized several international treaties that have been ratified by Indonesia. Swasono wrote several books related to Article 33 of the Constitution include: *Economic Democracy: Participation Business Linkages versus Economic Concentration*; *Economic Systems and Economic Democracy*; and *Towards Economic Development and the People*. These books are the crystallization of his disagreement with economic liberalization. Swasono served as an expert witness for the applicant in *Electricity Law* and *ASEAN Charter* cases.

In *Electricity Law* case, Swasono stated that only PLN could provide affordable electricity price. Private enterprises' participation on behalf of efficiency would 'kill' economic democracy.¹³³ Meanwhile, in *ASEAN Charter* case he said that Article 1 paragraph 5 and Article 2 paragraph 2 n ASEAN Charter breach the Indonesian Constitution because it created a single market and promoted liberalization. Article 33 paragraph 1 of the Constitution which reads "the economy shall be organized as a common endeavor based upon the principles of the family system," according to him, does not mandate that state economy to be based on market force.¹³⁴ Instead, the article demands that economy to be governed by the government. Otherwise, private investors would control the market and left Indonesians exploited.¹³⁵ Apparently, his testimony was used by the Court to render judgments hat opposing privatization of power sector.

The next person contributing to the shift against FDI is Dr. Ichsanuddin Noorsy, an economist.¹³⁶ Dr. Noorsy served as the expert witness from the applicants in *BP Migas Case*,

¹³² Sri Edi Swasono, *Anak bangsa menggugat : nasionalisme, kemandirian, dan kewirausahaan*, (Jakarta: LP3S, 2003) .

¹³³ The Constitutional Court decision No 001-021-022/PUU-I/2003, 28.

¹³⁴ The Constitutional Court decision No 33/PUU-IX/2011, 64-65.

¹³⁵ *Ibid.*, 65.

¹³⁶ He graduated from bachelor degree from University of Indonesia School of Law, Master from University of Indonesia School of Political Science, and doctorate from Airlangga University Indonesia School of Economics. He was former member of the House of Representative 1997-1999, expert in Centre for People Economy Study 2005-2010.

Electricity Case, Investment Law Case, and ASEAN Charter. Except in *ASEAN Charter* case, Noorsy's arguments were influential in the decisions rendered by the Constitutional Court. In electricity case, he argued that free market is not applicable in electricity sectors because it is an important branch which needs to be controlled by the state as required by Article 33(2) of the Constitution.¹³⁷ Free market and privatization in electricity only benefits big corporations but cause harm to people's welfare.¹³⁸ In *BP Migas* case, Dr. Noorsy stated that foreign domination in Indonesian economy has little impact on the country. Instead, FDI weakens domestic industry since the market is dominated by importing goods.¹³⁹ In regard to oil and gas industry, privatization caused the state's inability to supply gas to meet the domestic demands.¹⁴⁰ In *Investment Law* case, Noorsy opposed the free market and privatization arguing that 'institutionalized economy' is better. The liberal character of Indonesian Investment Law contributed to the current condition where the country is 'trapped' by FDI.¹⁴¹

Another prominent individual is Fahmi Idris an entrepreneur and a politician from the Golkar party.¹⁴² Idris was one of the plaintiffs in the Water Resources and *BP Migas* case. He said that foreign investors' motive is mere to gain profits which then being transferred to their home countries. Thus, he urged the government to change the law or treaty enabling foreign investors to repatriate their profit. Instead, according to him, investors shall be required to re-invest the profits they made in Indonesia. He further argued that repatriation hinder the ability of the government to materialize welfare of the people.¹⁴³

¹³⁷ The Constitutional Court decision No 33/PUU-IX/2011, 196.

¹³⁸ *Ibid.*

¹³⁹ The Constitutional Court decision No 36/PUU-X/2012, 35.

¹⁴⁰ *Ibid.*, 37.

¹⁴¹ The Constitutional Court decision No 21-22/PUU-V/2007, 107.

¹⁴² Golkar Party was the ruling party in the New Order Era. Fahmi Idris was the Minister of Manpower during Habibie presidency and Minister of Industry during the first term of Yudhoyono presidency. He gained a bachelor degree at the School of Economics University of Indonesia. Contacted by Din Syamsuddin to support the judicial review of Law No 22 of 2001 on Oil and Gas, he then united with other claimants.

¹⁴³ 'Investor cuma cari untung di RI terus dibawa kabur ke negaranya' (Investor merely Want to Gain Profit from Indonesia to be Repatriated to Their Hoem Countries), available at: <https://www.merdeka.com/peristiwa/investor-cuma-cari-untung-di-ri-terus-dibawa-kabur-ke-negaranya.html>, accessed September 13, 2016.

In April 2015 together with *Muhammadiyah*, Sri Edi Swasono, Ichsanuddin Noorsy and Fahmi Idris filed separate judicial review on Law No. 24 of 1999 on Foreign Exchange and Exchange Rate System, Article 12 of Law No. 25 of 2007 on Investment, and Law No. 30 of 2009 on Electricity. All the three different applications have the same basis which is an infringement against Article 33 of the Constitution. Swasono further contended that the substances of those three laws endanger the state's sovereignty and economy. Meanwhile, Noorsy explained that the Foreign Exchange Law has caused unstable Rupiah rate due to its floating rate system. Under this system, the rupiah's exchange rate is no longer determined by the government, but by market forces. In respect to the Investment Law, Saiful Bahri, the head of *Muhammadiyah* legal division, is demanding the Court limiting business field where foreigners may enter. The judicial review is now still ongoing.¹⁴⁴

The last figure is Adi Sasono,¹⁴⁵ even though did not directly participate in the judicial review process, his ideas and perspectives on people's economy have inspired other actors in their argument to oppose liberalization. He strongly voiced his refusal toward the increasing role of FDI in the newspaper, books or seminars. Criticizing that the market mechanism during New Order era did not work, he opposed liberalism and capitalism saying that economic liberalism is greedy.¹⁴⁶ He further stated that Indonesia is in the "*economic decolonization*" due to foreign investors' invasion across the country in the mining sectors, manufacture, plantation, tourism, while the Indonesian people only work for them as cheap laborers. Consequently, the earnings from Indonesian resources are drowned out to the home country of investors through repatriation. This situation resembles that of colonialization

¹⁴⁴ <http://www.mahkamahkonstitusi.go.id/>

¹⁴⁵ The Minister of Cooperatives, Small and Medium Businesses from 1998 to 1999 within the Development Reform Cabinet of President Habibie.

¹⁴⁶ Liem Siok Lan, "Menuju Rakyat Berdaulat, Wawancara Adi Sasono Ketua Umum Dekopin Oleh Liem Siok Lan, (Toward Sovereignty of the People)," an interview with Adi Sasono the Chairman of National Cooperative Council), (Jakarta: Republika , 2008) 84.

period.¹⁴⁷ Sasono further stated that the rise of foreign investment resulted from cooperation between domestic investors and the ruling elite which produce policies to protect foreign interests has resulted from the collaboration between domestic investors and the ruling elite which produce policies to protect foreign interests. This type of cooperation led to dependency.¹⁴⁸ Sasono was called “the Indonesian most dangerous man” by the Washington Post due to his aggressive advocacy on “people’s economy.”¹⁴⁹

In 2001 Adi Sasono, in his capacity as the chairman of ICMI,¹⁵⁰ was also stated the organization’s disagreement on privatization.¹⁵¹ Besides the low prices offered, privatization could be used as economic *de-colonialization* which detriment to the Indonesian economy.¹⁵² In an event commemorating the Youth Pledge Day in Bali on October 28, 2007, Adi Sasono gave speech emphasizing that the youth must work hard so that *de-colonialization* could be prevented.¹⁵³ Sasono wrote several books on various issues including people’s economy. Among his books are: *Foreign Capital, Foreign Loan, and Indonesian Economy* (1987); *People’s Economy Development in Liberalized Economy: Problems and Policy Choices* (1995); *State Challenge in Globalization: Examining ICMI’s Roles* (2000); *People Rose to Develop Dignity* (2008); and *Become Masters in Our Own Country: struggle for democracy, dignity, and independence* (2013).

¹⁴⁷ Ibid., 42-43.

¹⁴⁸ Ibid., 79-80.

¹⁴⁹ Richburg, Keith B., “Indonesia’s Most Dangerous Man,” *The Washington Post*, March 2, 1999, available at https://www.washingtonpost.com/archive/politics/1999/03/02/indonesias-most-dangerous-man/407061e7-495d-4620-91ca-9b0817810b45/?utm_term=.5b7ce31a7aa5, accessed at August 26, 2016. See also: Adi Sasono, *Lelaki Paling Berbahaya Itu Akhirnya Berpulang*, (Adi Sasono, the Most dangerous man finally passed away, CNN Indonesia, available at: <http://www.cnnindonesia.com/nasional/20160813191351-20-151166/adi-sasono-lelaki-paling-berbahaya-itu-akhirnya-berpulang/> accessed at 10/5/2016. .

¹⁵⁰ ICMI is a Muslim organization founded in 1990 by Indonesian Secretary of Research and Technology B. J. Habibie, under full support of the New Order regime. The organization is committed to fight against poverty and improve education in Indonesia. Many believe that ICMI was used by Suharto gain support from Islamic community and to show his Islamic identity.

¹⁵¹ ICMI Menolak Aset Negara dijual ke Asing (ICMI refuses State’s Asset being Sold to Foreigners), *Liputan 6*, December 29, 2001. <http://news.liputan6.com/read/26220/icmi-menolak-aset-negara-dijual-ke-asing>, accessed at October 17, 2016.

¹⁵² Ibid.

¹⁵³ Malam Persaudaraan Sumpah Pemuda Gema Inti Bali Hadirkan Tokoh Nasional (Youth Pledge Day Commemoration: Gema Inti Bali Invites National Figures) <http://gemainti.org/bali/malam-persaudaraan-sumpah-pemuda-gema-inti-bali-hadirkan-tokoh-nasional/> accessed at October 17, 2016.

f. The Constitutional Court

Bjorn Dressel claims that “Indonesia’s constitutional court plays a vital role in the diffusing political crisis and consolidating democratic practice through reliance on the court to address public policy questions.”¹⁵⁴ Dressel cites “political and economic liberalization are the cause many states in Asia, including Indonesia, have become more concerned about the rule of law, accountability, and rights issues.”¹⁵⁵ It is clear that Indonesia has undergone *judicialization* of policy which contributes to the backlash against foreign investment that driven from ‘below’ via social demand for rights protection voiced by CSOs and individuals. *Judicialization* of policy refers to “a judge-made law in which the way judges in exercising judicial review contribute to or at least influence public policy which had previously been the prerogative of legislatures and executives.”¹⁵⁶ This *judicialization* also encompasses the role of courts in political and social life when civil society is increasingly using courts and the law to advance their interests. *Judicialization* allows the court to make major policy decisions; consequently, they have “more influence on aspects of governance than their traditional role.”¹⁵⁷

The Constitutional Court is considered as an important player in the current shift against FDI in Indonesia. Its rulings have legally limited foreign investment roles in several sectors: oil and gas; water resources; coastal areas and small islands; and customary forests. The judgment of the Court is based on the principles and values contained in the Constitution as the highest guiding norms. Using decisions from various cases including in natural resources-related law cases, Simon Butt contends that Indonesian Constitutional Court can be

¹⁵⁴ Bjorn Dressel, *The Judicialization of Politics in Asia: Towards a Framework of Analysis*, (Routledge, Taylor & Francis Group, 2012) 1.

¹⁵⁵ Ibid.

¹⁵⁶ Sieder, R., Schjolden, L., and Angell, A. *The Judicialization of Politics in Latin America*, (New York: Palgrave Macmillan, 2005) 3.

¹⁵⁷ Ibid.

considered as an activist court.¹⁵⁸ In the decisions, even though the court does not annul provisions of a statute, it often requires that the statute or the provisions are interpreted in a particular way to give certain meanings intended by the court. In doing so, “it often functions as a kind of parliament amending legislation to ensure that it complies with the Constitution.”¹⁵⁹

Constitutional Court activism can be seen from its decision in *Electricity* case where the Court established five activities that constitute state: making policies, administering, regulating, managing, and supervising.¹⁶⁰ Another example is from *Coastal Water and Small Island* case where the Court set up four benchmarks to determine the term “greatest benefit of the people.” They are the benefit of natural resources for the people; the level of distribution of benefit of natural resources for the people; the level of public participation in determining the benefit of natural resources; and the respect for people’s rights from time to time in utilizing natural resources. The last example is from *Investment Law* case¹⁶¹ where the Court made ‘new provisions’ to Article 22 of Law No. 25 of 2007 concerning Investment.

Table V.2: Changes of Law No. 25 of 2007 as a result of judicial review

Article 22	Law No. 25 of 2007	Constitutional Court meaning after the amendment
sec (1)	The facilitated services and/or licensing of the rights over land as stipulated in Article 21 paragraph a can be granted and extended in advance all at once and can be renewed upon the request of the investor, in the form of:	The facilitated service and/or licensing of the rights over land as stipulated in Article 21 paragraph a can be granted and extended and can be renewed upon the request of the investors.

¹⁵⁸ Simon Butt, “Indonesia’s Constitutional Court: Conservative activist or strategic operator?” in *The Judicialization of Politics in Asia*, ed. Bjorn Dressel (New York: Routledge, 2012) 111.

¹⁵⁹ Ibid.

¹⁶⁰ Constitutional Court decision 3/PUU-VIII/2010, 15.

¹⁶¹ The Constitutional Court decision No 21-22/PUU-V/2007, 266.

	<p>a. Right to Cultivate can be granted for 95 years by means of grant and extension in advance all at once for 60 years, and can be renewed for 35 years;</p> <p>b. Right to Build can be granted for 80 years by means of grant and extension in advance all at once for 50 years, and can be renewed for 30 years;</p> <p>c. Right to Use can be granted for 70 years by means of grant and extension in advance all at once for 45 years and can be renewed for 25 years;</p>	
sec(2)	<p>(2) Rights over land as stipulated in paragraph (1) can be granted and extended in advance all at once for capital investment with the following requirements:</p> <p>a. capital investment that is long term and associated with a more competitive restructuring of the Indonesian economy;</p> <p>b. capital investment with high risk associated with the return of capital over a long period based on the type of capital investment business;</p> <p>c. capital investment that does not require a large area;</p> <p>d. capital investment conducted using the right over state land; and</p> <p>e. capital investment that does not disturb the people's sense of justice and does not damage the public interest.</p>	<p>(2) Right over land as stipulated in paragraph (1) can be granted and extended to investment activities, with following requirements: (the wording of paragraphs a, b, c, d, e remain the same)</p>
sec(4)	The advance grant and extension of	Granting and extension of land rights

	<p>the rights over land which can be renewed as stipulated in paragraph (1) and (2) may be terminated or annulled by the Government if the capital investment business abandons the land, disturbs the public interest, uses or cultivates the land other than in accordance with the aims and purposes of the grant of such rights over land, and otherwise, violates the provisions of laws and regulations regarding land.</p>	<p>given and those can be updated as referred to in paragraph (1) and Paragraph (2) may be terminated or annulled by the Government if capital investment business abandons the land, disturbs the public interest, uses or Cultivates the land other than in accordance with the aims and purposes of the grant of such rights over land, and otherwise violates the provisions of laws and regulations regarding land.</p>
--	---	--

In the cases discussed in Chapter IV of this dissertation, the Court was asked to consider whether Article 33 provide scope for privatization of important industries and natural resources namely electricity, oil and natural gas, forestry resources, coastal water and small islands, and water resources. In the *Electricity* case, the court decided that the Electricity Law, which sought to loosen state control of the sector and allow for significant private ownership and involvement, breaches Article 33. The court invalidated the entire statute.¹⁶²”

By contrast, in the *Water Resources Law* case, the majority upheld the constitutionality of the statute, finding that it did not, in fact, relinquish government control over water resources. According to the Justices, the Law had merely made it possible for the state to grant to the private sector a right to exploit water. The government retained the power to make policy and regulations, manage water resources, and issue permits for water exploitation.¹⁶³ In *Coastal Water and Small Island* case, the Court expressed its disagreement with privatization. Giving coastal water concession would mean allowing private entities to

¹⁶² Butt, *Indonesia's Constitutional Court*, 103.

¹⁶³ Ibid.

control the largest part of coastal water and small islands.¹⁶⁴ In the *Electricity* case, the Court stance seems to have been that privatization cannot guarantee the prosperity of the people, as required by Article 33 (2).¹⁶⁵ These cases raise questions about the extent to which the court should engage in public policy debate.

There is an assumption that judges of a particular background will decide cases in a certain way since their experience can assist them in making verdict. Nadirsyah Hosen¹⁶⁶ examines the Constitutional Courts judges' Islamic affiliations from 2003 to 2015. Hosen's research queries to what extent Justice's 'Islamic' background and connections influenced their decisions. The study finds that the judge's personal Islamic beliefs and their expertise in Islamic law can make him or her better advocate for maintaining the Constitution.¹⁶⁷ Hosen discovered that 59 percent of justices have a close association with Islam. Moreover, from five of the chairmen of the Constitutional Court, four of them have a strong Islamic background. Using various cases, Hosen claims that the justices do not use their knowledge and Islamic ties to decide cases based on Islamic laws. Hosen cites the refusal of Justices Alim and Justice Mahfud to reject an application to insert Islamic Criminal Law into the Religious Court's jurisdiction as their efforts to maintain the Constitution. The justices understanding of Islamic Law is used to reject the application of the Law. Furthermore, Hosen takes the case of the court's rejection of the Islamic teaching that says a

¹⁶⁴ Constitutional Court decision No 3/PUU-VIII/2010, 164.

¹⁶⁵ Butt, *Indonesia's Constitutional Court*, 103.

¹⁶⁶ Senior Lecturer at School of Law Monash University, Australia. His research asks to what extent have such Islamic backgrounds and connections influenced their decisions; and is it true that judges who have strong connections with Islam may act as defender of Islamic law, and not a guardians of the Constitution? The criteria for determining Islamic judges is that the judge must be or have been: former members of Islamic political parties in the legislature; former judges of the Religious Court; graduates of Islamic schools and or universities; and member of Islamic organizations. The research finds that 13 out of 23 judges or 59 percent have Islamic connections: Jimly Asshiddiqie, Abdul Mukhtie Fadjar; Achmad ROestandi; Ahmad Syarifuddin Natabaya; Mohammad Mahfud MD; Achmad Sodiki; Akil Mochtar; Hamdan ZOelva; Muhammad Alim; Ahmad Fadlil Sumadi; Anwar Usman; Patrialis Akbar and Wahidudin Adams.

¹⁶⁷ Hosen, *The Constitutional Court*, 1.

child born out of wedlock does not have a legal relationship with his or her father, as a proof of his claim.¹⁶⁸

The table below shows the connection of the Constitutional Court justices with Islam include: as former students or lecturers in *Muhammadiyah* University; member of *Nahdlatul Ulama* or lecture at NU University; member of Islamic parties; connection with other Islamic schools as former students or as a lecturer. From 24 Justices, 13 of them have links with Islamic organizations or academic institutions. Among those 13, four of them are linked with *Muhammadiyah* and two are connected with NU.

Table V.3: Education and Professional Background of the Constitutional Court Justices

No	Name and period	Nominator	Educational Background	Professional Background
1.	Prof. DR. Jimly Asshiddiqie, S.H. I. August 16, 2003-August 16, 2008. II. August 16, 2008-December 1, 2008 (Resigned)	House of Representative	Bachelor degree: University of Indonesia Master degree: University of Indonesia Doctorate degree: sandwich University of Indonesia, Van Vollenhoven Institute and Leiden University.	Professor of Law at University of Indonesia (public university). Advisory board of The Indonesian Association of Muslim Intellectuals (2005-2010)
2.	Letjen. TNI (Purn.) H. Achmad Roestandi, S.H. August 16, 2003 – March 1, 2008 (Retired)	House of Representative	Bachelor degree: University of Padjajaran Indonesia	Legislature from military faction Lecturer at various private law schools such as: University of Islam Nusantara; University of Nahdlatul Ulama and University of Ibnu Khaldun.

¹⁶⁸ This provision is stipulated in the Law No 1 of 1974 concerning Marriage. The Court decision gained strong criticisms from many Islamic organizations. The Indonesian Council of Ulama (MUI) issued a fatwa against the court decisions.

3.	Dr. Harjono, SH., MCL I. August 16, 2003-August 16, 2008. II. March 28, 2009-March 24, 2014 (Retired)	House of Representative	Bachelor degree from Airlangga University, Indonesia. Master degree from School of Law Southern Methodist University, Dallas. Doctorate degree from Airlangga University Indonesia.	Lecturer at Airlangga University School of Law (public university). Part time lecturer at Malang Islamic University, and Indonesia Islamic University, Yogyakarta, Indonesia.
4.	Prof. Dr. Moh. Laica Marzuki.,SH August 16, 2003-May 9, 2008 (retired)	Supreme Court	Bachelor degree from Hasanuddin University Indonesia. Master degree from Padjajaran University, Indonesia. Doctorate degree from Padjajaran University, Indonesia.	Judge in Supreme Court
5.	Soedarsono, SH August 16, 2003 – June 5, 2008 (retired)	Supreme Court	Bachelor degree from Tujuh Belas Agustus University, Jakarta, Indonesia.	Judge of administrative court
6.	Maruarar Siahaan, SH I. August 16, 2003-August 16, 2008 II. August 16, 2008-January 1, 2010 (retired)	Supreme Court	Bachelor degree from University of Indonesia.	Judge of court of general jurisdiction
7.	Prof. Ahmad S Natabaya, SH.,LLM August 16, 2003-August 16, 2008	President Megawati	Bachelor degree from Sriwijaya University. Master degree from Indiana School of Law, USA.	Professor of Law at Sriwijaya University
8.	Prof. Abdul M Fadjar, SH., MS August 16, 2003-August 16, 2008.	President Megawati	Bachelor degree from Gadjah Mada University Master degree from Airlangga University.	Professor of Law at Brawijaya University (public university).
9.	I Dewa Gede Palguna., SH.,M.H I. August 16, 2003-August	President Megawati.	Bachelor degree from Udaya University, Indonesia. Master degree from	Lecturer at Udayana University School of Law (public university).

	16, 2008. II. January 7, 2015- January 7, 2020	President Widodo	Padjajaran University, Indonesia.	
10.	Prof. Dr. Mohammad Mahfud MD., SH April 1, 2008- April 1, 2013	House of Representative	Bachelor degree from Indonesia Islamic University. Master degree from Gadjah Mada University, Indonesia. Doctorate degree from Gadjah Mada University, Indonesia.	Professor of Law at Indonesia Islamic University. Minister of Justice and Human Rights (2001) Vice chairman of Official of National Awakening Party (Islamic-based party)
11.	Dr. Muhammad A Sanusi, SH.,M.Hum May 29, 2008- March 2, 2011.	Supreme Court	Bachelor degree from Hasanudin University, Indonesia. Master degree from Indonesia Islamic University Doctorate degree from University of Indonesia.	Judge of court of general jurisdiction
12.	Prof. Dr. Achmad Sodiki, SH August 16, 2008- July 22, 2013	President Yudhoyono	Bachelor degree from Brawijaya University, Indonesia. Doctorate degree from Airlangga University, Indonesia.	Professor of Law at Brawijaya University (public university)
13.	M. Akil Mochtar.,SH.,MH I. August 16, 2008-August 16, 2013 II. August 13, 2013-November 1, 2013 (dismissed due to bribery case)	House of Representative	High School: Muhammadiyah in Pontianak. Bachelor degree from Panca Bhakti, Indonesia Master degree from Padjajaran University, Indonesia Doctorate degree from Padjajaran University, Indonesia.	Legislature 1999-2004 and 2004-2009 from Functional Group Party (Partai Golongan Karya).
14.	Dr. Hamdan Zoelva.,SH.,MH April 1, 2008- January 7, 2015	President Yudhoyono	Bachelor degree from Hasanuddin University, Indonesia Master degree from Padjajaran University, Indonesia. Doctorate degree from	Part time lecturer at Muslim University Indonesia and Sharia School State Institute of Islamic Studies Makassar Indonesia. Lawyer

			Padjajaran University, Indonesia.	Vice chairman of Commission III House of Representative 1999-2004
15.	Drs. Ahmad F Sumadi.,SH.,M.H um January 7, 2010- January 7, 2015	Supreme Court	Bachelor degree from State Institute of Islamic Studies, Semarang, Indonesia. Bachelor degree from Muhammadiyah University, Yogyakarta Indonesia. Master degree from Indonesia Islamic University.	Judge of court of religious affairs
16.	Dr. Mohammad Alim. SH.,M.Hum I. June 26, 2008- June 24, 2013 II. June 24, 2013- April 21, 2015 (retired).	Supreme Court	Bachelor degree from Hasanudin University, Indonesia. Master degree from Indonesia Islamic University. Doctorate degree from Indonesia Islamic University.	Judge of court of general jurisdiction
17.	Prof. Dr. Maria F Indrati.,SH I. August 16, 2008-August 13, 2013. II. August 13, 2013-August 13, 2018.	President Yudhoyono	Bachelor degree from University of Indonesia. Master degree from University of Indonesia Doctorate degree from University of Indonesia	Professor of Law at University of Indonesia (public university).
18.	Dr. Anwar Usman., SH.,MH I. April 6, 2011- April 6, 2016 I. April 6, 2016- April 6, 2021	Supreme Court	Bachelor degree from Islamic University Jakarta, Indonesia.	Judge of court of general jurisdiction
19.	Prof. Dr. Arief Hidayat.,SH.,MH April 1 2013-April 1, 2018	House of Representative	Bachelor degree from Diponegoro University, Indonesia. Master degree from Airlangga University, Indonesia. Doctorate degree from	Professor of Law at Diponegoro University (public university).

			Diponegoro University, Indonesia.	
20.	Dr. Patrialis Akbar.,SH.,MH August 13, 2013- July 22, 2018	President Yudhoyono	Bachelor degree from Muhammadiyah University Jakarta, Indonesia. Master degree from Gadjah Mada University, Indonesia. Doctorate degree from Padjajaran University, Indonesia.	Lecturer at Muhammadiyah University, Jakarta (1989 – 1992) Member of legislature (1999 – 2004) from National Mandate Party (a moderate Islamic party). Ministry of Law and Human Rights (2009-2011)
21.	Dr. Wahiduddin Adams., SH.MA March 21, 2014- March 21 2019	House of Representative	Bachelor degree from Muhammadiyah University, Jakarta. Master Degree from Islamic State University, Jakarta, Indonesia. Doctorate degree from Islamic State University Jakarta, Indonesia. (2005)	Staff in the Ministry of Law and Human rights (2004-2014) Lecturer at Shari'a School Islamic State University, Jakarta, Indonesia (2002-now). Lecturer at School of Law Muhammadiyah University, Jakarta, Indonesia (2006-now).
22.	Prof. Dr. Aswanto SH.,MSi.,DFM March 21, 2014- March 21, 2019	House of Representative	Bachelor degree from Hasanuddin University, Indonesia. Master degree from Gadjah Mada University, Indonesia. Doctorate degree from Airlangga University, Indonesia. Diploma in Forensic Medicine and Human Rights, Institute of Groningen State University, Netherland.	Professor of Law Hasanuddin University (public university).
23.	Dr. Suhartoyo.,SH.,M H January 7, 2015- January 7, 2020.	Supreme Court	Bachelor degree from Indonesia Islamic University, Yogyakarta. Master degree from Tarumanegara	Judge of court of general jurisdiction

			University, Indonesia	
24.	Dr. Manahan MP Sitompul,SH, M.Hum April 28, 2015- January 7, 2020.	Supreme Court	Bachelor degree and Doctorate degree from Sumatera Utara University, Indonesia.	Judge of court of general jurisdiction

Looking at the Court justices' connection with *Muhammadiyah* or Islam, in general, is interesting not only with respect to the landmark *BP Migas* and *Water Resource* cases but also considering that in the meantime the Court is examining three judicial review cases petitioned by them. Not to mention the possibility of filing other judicial reviews for 115 laws that now are being scrutinized. Unfortunately, the petitions for those three laws: Foreign Exchange and Exchange Rate System; Investment; and Electricity Law are unavailable for public at the time being.

From *BP Migas* and *Water Resources* cases, only in the latter case *Muhammadiyah* expressly quoted Koran verses as the basis for its petition.¹⁶⁹ The Koran indicated that water was God's creation and Islamic teaching emphasized the importance of it for life. Therefore, according to the group, the water resource shall be managed and distributed fairly for all human beings.¹⁷⁰ This argument implies *Muhammadiyah* preference for SOEs to control the water resources since they are not profit oriented.

In the consideration, the Court responded 'water is the basic element for living given by *Allah Subhanahuwata'ala*,'¹⁷¹ hence, "there is a public right attach to it (*res commune*) which means water is commonly owned by all people."¹⁷² This consideration indicates that the Court also refer to the Islamic teaching cited by the petitioner. Nevertheless, other than

¹⁶⁹ The Koran surah Al-Baqarah: 164, Al-Ankabut: 63 and Ar-Ruum: 24.

¹⁷⁰ The Constitutional Court Decision No 85/PUU-XI/2013, 15-16.

¹⁷¹ Allah Subhanahuwata'ala is the way Muslims call their god.

¹⁷² The Constitutional Court Decision No 85/PUU-XI/2013, 133.

that remark, the rest of the Court's argument did not show further adherence to Islamic principle.

In the cases presented in Chapter IV, the Constitutional Court has been dealing with the meaning of 'state control,' the issue of privatization, defining economic democracy, national sovereignty, and recognition of indigenous rights. Not only does court's interpretation strike down various provisions or law giving roles to FDI, but also weaken FDI in various sectors. Thus, the Court has frustrated the government efforts to provide greater roles for FDI in several branches of production and exploitation of natural resources. The discussion below shows the Constitutional Court's interpretation of the contested issues in the judicial review. It is evident that in most occasions the Court agreed with the interpretation and understanding provided by the claimants, including Islamic CSOs. Below is the summary of Constitutional Court's interpretation on the legal issues raised in the judicial review cases:

State control

The Constitutional Court's interpretation of Article 33 of the Constitution requires the 'state control' of important branches of production and natural resources. The meaning of 'control' has been a matter of significant debate: does it require a full statehood in the form of policy making, regulating, managing, administering and supervising; or is regulatory power enough. In the judicial review cases discussed in Chapter IV, the Court has opted to require direct management control in a full statehood in interpreting Article 33. In *Electricity* case, the Constitutional Court considered the state's power to regulate natural resources did not of itself constitute state control. Moreover, mere civil ownership by the state was not 'control by the state' because natural resources were public assets collectively owned by all Indonesians and the state was required to control those assets for the greatest benefits of the Indonesian people. In this case, the Court established five activities that constitute state control: making policies, administering, regulating, managing, and supervising. And at least for natural

resources, these five activities needed to be performed for one purpose: the greatest prosperity of the people.¹⁷³

In *BP Migas* case, BP Migas's roles to advise the Energy and Mineral Resources Minister on cooperation contracts, production plans, budgets and the appointment of oil and gas sellers are considered as eliminating 'state control' within the meaning of Article 33. The Court suggested that the state should directly involve in oil and gas operations because "maximum benefit" could only be delivered if the State exercises its full statehood by being directly involved in the exploration and extraction through SOE and making related policy.¹⁷⁴ The Court also contended that the authority given to BP Migas to enter into a contract with private business entities had degraded the state's control over natural resources.¹⁷⁵

In the *Coastal water and small island* case, the court held that the words "controlled by the state" shall be understood more than as a private ownership, since such understanding would not be likely to be able to reach "greatest benefit of the people." The Court suggested that the terms "controlled by the state" shall be understood as state domination.¹⁷⁶ Furthermore, the coastal water concessions given to private parties were interpreted as transferring the 'control' from state to private entities.¹⁷⁷

From the above cases, the Constitutional Court emphasized that the government should remain in control of critical areas of production, because if production were fall "into the hands of someone powerful, the community could be afflicted."¹⁷⁸ Even though the Court did not explain further who 'someone powerful' is, it could easily be understood to be private enterprises including foreign investors.

¹⁷³ The Constitutional Court decision 3/PUU-VIII/2010, 15.

¹⁷⁴ The Constitutional Court decision 36/PUU-X/2012, 99-100.

¹⁷⁵ *Ibid.*, 108.

¹⁷⁶ The Constitutional Court decision No 3/PUU-VIII/2010, 157.

¹⁷⁷ The Constitutional Court decision No 3/PUU-VIII/2010, 161.

¹⁷⁸ The Constitutional Court decision No 149/PUU-VII/2009, 335.

Economic democracy

In *Coastal Water and Small Island* case, the Court contended that coastal water concessions breached economic democracy, togetherness principle and efficiency with justice. According to the Court, togetherness principle requires the involvement of Indonesian people in conducting economic activities. Thus, private companies' exploitation of natural resources disregards economic democracy.¹⁷⁹

In *Water Resources* case, the Court ruled that economic democracy sees the country as a collective, not individualistic, and not liberal so that the national economy is structured as a joint venture on the basis of kinship.¹⁸⁰ Consequently, privatization over water resources which represents liberalization is not in agreement with economic democracy.¹⁸¹

Privatization

The Court interpreted Article 33 (2) to require state control over important branches of production, in fact, this means prohibiting privatization in the areas. In *Electricity* case, the Constitutional Court rejected privatization because profits sharing between the government and the private company did not benefit the people. Allowing private competition does not necessarily ensure public prosperity because private investors would give priority to its profits. Therefore, the prosperity of the people could not be achieved because the state has to share the profit with private companies. Moreover, the Court indicated that privatization would potentially raise the electricity price since there is no longer state control involved. Privatization could also result in losing jobs for Indonesians¹⁸²

In *Coastal water and small island*, the Court declared that concessions over coastal water was a form of privatization of natural resources and breached Article 33 (3) of the Constitution. The Court further suggested that licensing mechanism could be used instead of

¹⁷⁹ Constitutional Court decision No 3/PUU-VIII/2010, 163.

¹⁸⁰ The Constitutional Court Decision No 85/PUU-XI/2013, 135

¹⁸¹ The Constitutional Court Decision No 85/PUU-XI/2013, 140.

¹⁸² The Constitutional Court decision No 001-021-022/PUU-I/2003,p 330 .

concession.¹⁸³ The Court also did not permit the government to simply ‘contract out’ the exploitation and management of natural resources, such as land, forests, oil and natural gas to private sectors. In *Water Resources* case, the Court ruled that a permit issued by the government could only do privatization over water resources. Hence, private sectors cannot claim ownership of water resources, but only use water allocated by the government. Water resources management shall be prioritized to state-owned enterprise or regional government-owned enterprise.¹⁸⁴

Interpretation on state sovereignty

In *Investment Law* case, the Court concerned about the advance renewal of land rights since it could eliminate the sovereignty of the state including its capacity to regulate, maintain, manage, and oversee the use of the land, water, and natural resources. The Court held that upfront extensions caused the state lose its sovereignty to revoke or refuse to extend these rights.¹⁸⁵

Recognition of Indigenous right

Despite the positive effect of the Court’s recognition of native rights on the indigenous community, the decisions in *Plantation Law* case and *Coastal Water and small islands* have negatively impacted FDI. The state control over land, water, and natural resources shall also consider the prevailing rights, both individual and collective, of people adhering to customary law owned by indigenous people. As a result, rights over indigenous land cannot be granted to private companies without approval from the indigenous communities.

In the decision of *Electricity* case, *BP Migas* case, *Investment Law* case, and *Water Resources* case the Constitutional Court has been consistent in establishing limitations.

Firstly, control by the state means that government shall have involvement over the important

¹⁸³ The Constitutional Court decision No 3/PUU-VIII/2010, 164-165.

¹⁸⁴ The Constitutional Court Decision No 85/PUU-XI/2013, 138-139 .

¹⁸⁵ Constitutional Court decision No 2122/PUU V/2007.

branch of economic resources for the welfare of the people, and secondly, the management of economic resources by the government shall be directed to the prosperity of the people. The above limitation means that privatization upon the important branch of economic resources shall be regarded as against the Constitution while the latter means that the government shall protect the weak people from the adverse impact of liberalism rather than surrender to market forces.

In its decision to determine whether the privatization regulated in the Electricity Law is considered against the Article 33, the Constitutional Court applied a literal and conservative interpretation. Article 33 was mainly influenced by the rejection of individualism as the symbol of capitalism and colonialism. It used to be associated with the authoritarian control of economic sphere. The court also took historical interpretation where Article 33 was mainly influenced by the rejection of individualism as the symbol of capitalism and colonialism. And also the Court considered the original intent of Mohammad Hatta who had the concept of the economic system who said:

The aspiration embedded in Article 33 of the 1945 Constitution is that massive productions whenever possible are conducted by the Government with the assistance of foreign loan. If this scheme does not succeed, it is also necessary to give opportunities to foreign business to invest in Indonesia with the requirements determined by the Government. Such is the way that we thought of how to carry out economic development on the basis of Article 33 of the Constitution.

Political analyst Kevin O'Rourke criticized the Constitutional approach to interpretation saying that the Constitutional Court made errors in interpreting the Constitution showing "a lack of appreciation for economic fundamentals."¹⁸⁶ The exceptional character of Article 33 and its textual interpretation by the Constitutional Court could be generalized to give an impression that Indonesia is not open to FDI. This perception could shrink foreign investment and it would be contrary to the Indonesian government's campaign to promote foreign investment.

¹⁸⁶ The Constitutional Court Decision No 149/PUU-VII/2009

Simon Butt and Tim Lindsey stated that the Court did not properly distinguish Article 33(2) from Article 33 (3). While Article 33(3) requires the state to use its control over natural resources for the greatest benefit of the people, Article 33(2) does not mention the purpose for the greatest benefit of the people. It merely stipulates “the state to ‘control’ them, without elaborating the purpose of such control.”¹⁸⁷ Butt and Lindsey stated that “the drafters of the Constitution could deliberately set the difference.” It was possible that the drafters of the Constitution pictured that “the level of state control required by Article 33(2) was different from that of Article 33 (3) given that they appeared to attach more significance to natural resources than to branches of production.”¹⁸⁸

2. Modernist Actors

Modernist nationalists show their pro-national attitude in more subtle ways. They center upon the rationalist approach, stressing the practical importance of foreign investment, understanding and acknowledging that cooperation with FDI can foster greater growth and development. Modernist nationalists appeal to circumstances that would make nationalist policies reasonable. They also isolate themselves from such hostile forms of nationalism and mainly seek to offer and advocate relatively moderate versions of sovereignty. Therefore, the modernists’ approach is more flexible to take advantage of foreign capital. Modern nationalists support economic policy that follows the national purpose and direction.¹⁸⁹ Instead of aiming at removing the significant role of foreign investor, the modernist group concerns with prioritizing national interests and making economic decisions with the intention of uniting and strengthening the state.

¹⁸⁷ Simon Butt and Tim Lindsey, “Economic Reform When the Constitution Matters: Indonesia’s Constitutional Court and Article 33,” *Bulletin of Indonesian Economic Studies*, vol. 44 (2008) 251-252.

¹⁸⁸ *Ibid.*

¹⁸⁹ Rawi Abdelal, "Nationalism and International Political Economy in Eurasia," in *Economic Nationalism in a Globalizing World*, ed. Eric Helleiner and Andreas Pickel (Ithaca, N.Y.: Cornell University Press, 2005), 26.

a. The Indonesian Government

The first modernist actor is the government, represented by its officials. There are two main government institutions directly involve in BIT moratorium policy and drafting process of model BIT, namely the Ministry of Foreign Affairs, more specifically the Directorate for Treaties of Economic, Social and Cultural Affairs; and the Indonesian Investment Coordinating Board (BKPM).

BIT moratorium policy and model BIT are considered as concrete actions to limit FDI protection. Such a shift could be categorized as a slowdown of FDI liberalization.¹⁹⁰ The government is no longer subscribe to the concept “the more FDI, the better,” rather it emphasize is changing toward the quality of FDI attracted.¹⁹¹ BIT moratorium and limitation to arbitration do not suggest the end of FDI liberalization in Indonesia. There is an increasing ambivalence in government’s attitude towards FDI and it cannot be taken for granted that openness to FDI will persist. By reviewing BIT and limiting investment arbitration, Indonesia is sending a signal to its BIT partners and the international community about its dissatisfaction with how the current foreign investment regime works; the impacts of FDI’s activities; as well as foreign investors’ threats to domestic state policy

The subtle approach to sovereignty issues appears the model BIT which strikes a balance between investor protection and national interest as well as state’s sovereignty. The model BIT was motivated by government’s desire to retain its legitimacy among the Indonesian people by formulating BIT without excessive FDI protection. The model emphasizes on the state’s sovereignty to make and enforces the law and policies related FDI without fear of a possible lawsuit. Moreover, the growing unease with FDI as can be seen from increasing of investment disputes by MNCs for alleged misconduct done by the

¹⁹⁰ Interview with informant no. 1 Indonesia Investment Coordinating Board BKPM, informant no 1 of Ministry of Foreign Affairs.

¹⁹¹ Interview informant no. 2 Indonesia Investment Coordinating Board BKPM, informant no 1 of Ministry of Foreign Affairs .

Indonesian government was also the trigger of the BIT model. Such efforts include: removing FET standards so that not every government measures negatively impact FDI could raise state's liability; requiring written consent before MNCs file cases to arbitration;¹⁹² explicitly excludes the contract-related claim from BIT claim,¹⁹³ and imposing obligations to FDI such as good corporate governance and corporate social responsibility.¹⁹⁴

In July 2015, Abdulkadir Jailani¹⁹⁵ admitted that among the government officers there was a temptation to include broadly drafted clauses on public policy exceptions. They argued that the incorporation of a set of robust provisions that may serve as valuable tools to safeguard public policy interest would provide additional comfort to the government.¹⁹⁶ However, the government realized that foreign investors might perceive that the existence of such clause would potentially defeat the purpose of concluding BIT as an instrument to attract FDI. Consequently, public policy exceptions are limited to measures or policies taken in good faith to protect public morals; to maintain public order; to protect human, animal, plant, and health; to conserve natural resources; to secure compliance with laws or regulations; and to protect national treasures of artistic, historic, cultural or archaeological value.¹⁹⁷

Following the *Electricity Law* case which annulled Law No. 20 of 2002 on Electricity, the government enacted a new Electricity Law: Law No. 30 of 2009. Protectionist and nationalist natures of Law No. 30 of 2009 are visible in various provisions. While private capital can be granted a license to provide electricity for public use, PLN, the electricity SOE, has the right of priority to supply power to customers. The preference of SOE over private

¹⁹² Article 24(5) Indonesia Model BIT.

¹⁹³ Article 2(5) Indonesian Model BIT.

¹⁹⁴ Article 13 Indonesian Model BIT.

¹⁹⁵ The then Director for Treaties of Economic, Social and Cultural Affairs, Ministry of Foreign Affairs.

¹⁹⁶ Abdulkadir Jailani, Indonesia's Perspective on Review of International Investment Agreements, South Centre Investment Policy Brief, No 1, July 2015, available at: https://www.southcentre.int/wp-content/uploads/2015/07/IPB1_Indonesia-Perspective-on-Review-of-Intl-Inv-Agreements_EN.pdf.

¹⁹⁷ Article 19A(1) Indonesian Model BIT.

capital is expressly stated in a couple of provisions. Firstly, Article 3 paragraph 1 states that the government (central or regional government) shall control power supplies.¹⁹⁸ Paragraph 2 elaborates the term ‘control’ to include establishing policies, regulation, and supervision and manage/conduct electricity supply business. In respect to commercialization of electricity sector, Article 4 paragraph 1 stipulates that the conduct of power supply business by the Government and the regional governments shall be authorized to government-owned enterprises. Preference to SOE is also expressed in Article 11 paragraph 1 which stipulates that power supply business shall be conducted by government-owned enterprises, private entities, or cooperatives. Paragraph 2 states that SOE shall receive priority to do public power supply business. Hence, the state electricity company, PLN, once again becomes the main provider of power supply in the country.

The Law No. 30 of 2009 gives broader power to the government to design policy, regulation, administrative, management, set guidelines to consumer power tariffs, and monitoring aspects of the electricity sector.¹⁹⁹ Regarding the electricity price, the Law stipulates the government shall approve power sales prices and electrical grid rent prices.²⁰⁰ Another nationalist approach by the government was taken in respond to *BP Migas* case. After the Constitutional Court dissolved BP Migas, the President issued Presidential Regulation No. 9 of 2013 regarding the Management of Upstream Oil and Gas Activities which establish a government unit called the Special Work Unit for Upstream Oil and Gas Activities (SKK Migas). SKK Migas assumes BP Migas duties until the issuance of the new Oil and Gas Law.

¹⁹⁸ Public power supply business shall include the following types of business:

- a. power generation;
- b. power transmission;
- c. power distribution; and/or
- d. power sale

¹⁹⁹ Article 5 and Article 46 Law No 30 of 2009.

²⁰⁰ Article 33 (1) and (2) Law No 30 of 2009.

In April 2015, the government proposed a revision of Law No. 22 of 2001 to the House of Representative (DPR). One of the proposals was to change SKK Migas into a ‘specially established’ SOE which means that it is not formed under the Law No. 19 of 2003 concerning State-Owned Enterprise rather; rather it will be set under Oil and Gas Law with particular duties to sign contracts with energy companies working in Indonesia be it: regional-owned enterprises, cooperatives, or private enterprises including MNCs. Upstream oil and gas sector will be conducted wholly based on licenses given by the government to that specifically-assigned SOE and Pertamina. This approach is considered a *win win* solution amidst the rising resource nationalism

The government considered the Constitutional Court decision which defined ‘state control’ as a direct management over natural resources. According to the Court, this direct control can be done by granting a concession to one or several SOEs to manage the business in upstream oil and gas sectors. The government asserts that ‘specially formed’ SOE would later make contracts with other business entities include local government-owned enterprises; cooperative; small and medium enterprises; and private enterprises. This way, all the aspects of ‘state control’ as mandated by the Constitutional Court would be satisfied.²⁰¹

When the specifically-formed SOE is set, Pertamina will also have the authority to manage oil and gas blocks on its own under a direct appointment by the government. Thus, it does not need a contract with the specifically-set SOE. This way, Pertamina will no longer monopolize both the upstream and downstream sectors. Up until June 2016, the House of Representative has not decided whether or not SKK Migas can be transformed into that kind of SOE.

Following the Water Resources case which annulled Law No. 7 of 2004, water resources management referred to Law No. 11 of 1974. However, since that Law does not

²⁰¹ Stated by the then Minister of Energy and Mineral Resources, Sudirman Said, available at <http://industri.bisnis.com/read/20160607/44/555387/skk-migas-tetap-diarahkan-jadi-bumn-khusus>, <http://industri.kontan.co.id/news/menteri-esdm-usul-skk-migas-jadi-bumn-khusus>,

regulate on industry engaged in the exploitation of water, the Indonesian government issued two Government Regulations on 28 December 2015: Government Regulation No. 121 of 2015 on the Water Resources Business and Government Regulation No. 122 of 2015 on the Drinking Water Supply System.

Water management under those two regulations is heavily regulated because the government wants to maintain its stance on prioritizing state control on the water. Article 2 paragraph 1 (e) Government Regulation No. 121 of 2015 gives top priority to SOEs or regional-owned enterprises to conduct water resources business. Sub-paragraph f further mentions that business permit for private companies are given under certain conditions and strictly follow the principles of the Regulation. Similarly, Government Regulation on Drinking Water Supply System also prioritizes SOE and region-owned company. Private enterprises can only provide drinking water supply to meet their need in the area beyond the reach of SOE or region-owned company.²⁰²

The limited ownership by private and foreign companies is considered as a form of relaxation by the government since previously in the draft of the regulation there was a provision prohibits foreign ownership. The final draft has accommodated suggestions from private businesses especially in the food and beverage industry which employs 4.2 million workers across Indonesia.²⁰³

Hence, in electricity; oil and gas; and water resources sectors, the Indonesian government prioritizes SOE and local-owned company while allowing collaborations with foreign and local private entities. Policy to prioritize public enterprises can be considered as nationalistic policy since the government asserts control over natural resources and electricity which result in less participation for foreign investors.

²⁰² Article 52 Government Regulation No 122 of 2015.

²⁰³ Government relaxes water rules to allow private ownership, the Jakarta Post June 30, 2015, available at: <http://www.thejakartapost.com/news/2015/06/30/govt-relaxes-water-rules-allow-private-ownership.html>

b. Non-government Actors

In addition to the government, there are scholars and lawyers who contribute to the shift of attitude against FDI. In formulating BIT moratorium and drafting BIT model, BKPM and Ministry of Foreign Affairs involve legal scholars and lawyers to conduct a thorough study on how to overcome the flaws that the current BITs have; and to help to provide input for a model BIT which balance state interest and FDI protection.²⁰⁴ Lawyers involved in the study share similar views that model BIT has the spirit to contain restrictions on foreign investor's claims.

Firstly, the lawyers proposed ways to minimize claim against the Indonesian government by suggesting a clearer restriction on the definition of investment which only covers direct investment to reduce claim against the government. Besides, they also realize FET may harm Indonesia because it has a broad interpretation which can be used as an entrance to claims by foreign investors. Hence, they suggested that claim based on violations of FET is limited to the denial of justice in criminal, civil or administrative justice. The next way to minimize arbitration case is by avoiding the increase of contract claim based. The lawyers suggested drafting a provision expressly distinguished treaty claim from contract claim. Lastly, these lawyers understand that arbitration is important to dispute settlement for FDI. Thus, instead of removing arbitration, the lawyers proposed a provision that restricts the use of international arbitration.²⁰⁵

The lawyers also criticize provisions in the existing BIT, for example, rule regarding repatriation which sets that repatriation is done without delay which means that there is no reason to the Indonesian government to delay the implementation of the transfer. They consider that this provision can be used by investors of bad faith in which they repatriate to avoid the fulfillment of financial obligations to creditors, taxation, labor, or other obligations

²⁰⁴ PT Rensa Kerta Mukti is designated to organize the research which involve seminars and field research. Among those who participate in the project were legal scholars and professional lawyers.

²⁰⁵ Interview Informant no 1 lawyer.

associated with its investment in Indonesia. Therefore, they suggested that provisions of repatriation should be formulated in such a way as to avoid repatriation by investors of bad faith.²⁰⁶

Lawyers interviewed in this research supported the government to limit compensation to give only the immediate loss suffered by foreign investors. Immediate loss excludes speculative losses against gains or losses in the future or moral losses as a result of the expropriation. This limit the compensation demands of investors with losses that are not directly experienced by investors cannot be filed.²⁰⁷

In addition to lawyers, the study also involved legal scholars. Among them is a prominent legal scholar, Hikmahanto Juwana.²⁰⁸ He wrote an article in a newspaper and spoke in various seminars in which he strongly recommended the government to withdraw from the ICSID saying that under the ICSID system, the Indonesian government is unable to give “the same level playing field” for domestic and foreign investors.²⁰⁹ Juwana also stated that BIT review should focus to improve the provisions to put Indonesia in a better position saying that the existing BITs were drafted at the time when Indonesia was in dire need of FDI, so the BITs gave too broad protection to FDI. However, this time Indonesia is in a higher economic stage and has sufficient FDI. Indonesia should focus its attention to focus on the quality of FDI rather than the quantity.²¹⁰ Juwana was also among several experts who gave the recommendation to the Ministry of Energy and Mineral Resources regarding the proposal to transform SKK Migas into a specifically-assigned SOE.²¹¹

²⁰⁶ Written report provided by law firm.

²⁰⁷ Interview Informant no 2 lawyer.

²⁰⁸ A law professor of University of Indonesia School of Law.

²⁰⁹ Juwana, Indonesia Should Withdraw from ICSID, the Jakarta Post, April 2, 2014, available at: <http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html>, accessed at 5/15/2015. Juwana also stated this in a conference in University of Indonesia on June 13, 2014. His opinion was countered by Abdulkadir Jailani of Ministry of Foreign Affairs saying that withdrawal from the ICSID would not answer the problems of mounting law suit since Indonesia also bound by many other treaties and agreements which refer to arbitration.

²¹⁰ Interview informant no 1 legal scholar.

²¹¹ Interview with Hikmahanto Juwana.

It is due to considerations given by scholar and lawyers that ICSID arbitration is missing from the Model BIT. They also suggested the consent requirement in the Model BIT arguing that in the current BITs foreign investors might force the government to arbitrate to reduce the potential of claims.²¹² The actors from modernist nationalist understand the need for a balance between protection to FDI and state's sovereignty. Hence, they formulate policy and model BIT that move from absolute protections to FDI to a model that maintains both investor's and host state's interest equally.

B. Interaction Between the Actors

The government faces a dilemma between attracting FDI and protecting the nation's interests. Strong opposition from CSOs, prominent individuals, and the Constitutional Court's decisions have all motivated its policy decisions to reduce protection given to FDI and to impose them with new obligations. The government in its role as a policy maker faces a tension between the duty to protect FDI due to the need to attract FDI and benefit from it, and the need to advance national interests by limiting FDI's roles by maintaining policy space. Furthermore, the government also faces pressures from various stakeholders group such as CSOs which become prominent players, and their views need to be taken into account.²¹³ For the government, its stand within the backlash is based on the need to maintain a balance between the country's need for FDI and the mounting calls for prioritizing national interests and sovereignty. Reviewing BITs and drafting a model BIT could serve as efforts to meet the challenge at the national level.

In respect to traditionalist judicial review, legislatures criticized the 'constitutional jihad' and other judicial reviews. Asrul Sani, a lawmaker in the House of Representatives, said that constitutional jihad would be better at the beginning of the drafting process of laws,

²¹² Government Revises Investment treaties, *the Jakarta Post*, May 12, 2015 <http://www.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html>, accessed at July 14, 2015.

²¹³ Sauvart, *The International Investment Law*, 5.

rather than focusing on challenging them after they are enacted. Sani appreciates what *Muhammadiyah* has been doing, but suggesting that preventive measures should also be taken in the drafting process.²¹⁴ An informant from the Ministry of Foreign Affairs predicted that jihad *Muhammadiyah* would potentially create a financial loss if MNCs brought the changing policy to arbitration. Under some BITs, changing law or policy would fall under FET standard which raises state's liability.²¹⁵

Indonesian Peasant Union agreed with Asrul Sani's proposal saying that instead of spending resources on judicial review, it demands CSO to be given the opportunity to take part in legislative drafting. It has been started in 2008 when the Union participated in drafting the Food Law. The Bill was brought to the legislation board in the House of Representatives and entered into National Legislation Program in 2010. The Bill was passed into Law No. 18 of 2012, while there were many criticisms; the Union had successfully included the principle of food sovereignty. Thus, according to the Union, pushing the government to issue legislation on the rights of peasants could be a more efficient way to achieve change than a long process of judicial review. However, it also said that the use of the Constitutional Court for challenging legislation will still be an important tool for some time to come.²¹⁶

The reaction towards the Court varies. Government officials and parliamentarians see with negative eyes. According to Simon Butt, this is because "until the Constitutional Court was established, both of the executive and legislative enjoy no scrutiny and never experience their laws invalidated."²¹⁷ The Constitutional Court halts that by changing regulatory in the oil and gas sectors; electricity sector, and water resources sectors. The annulment of Law No. 22 of 2001 which brought to an end Pertamina's monopoly over oil sector would likely to

²¹⁴Hukum online, Anggota DPR Ajak Muhammadiyah Berjihad di Parlemen (A Legislative member invite Muhammadiyah to do jihad in the House of Representative), July 8, 2015, available at: <http://www.hukumonline.com/berita/baca/lt559cb8905f4a6/anggota-dpr-ajak-muhammadiyah-berjihad-di-parlemen>, accessed at August 12, 2016.

²¹⁵ Interview with informant No 2 Ministry of Foreign Affairs.

²¹⁶ Fathoni, *Challenging the constitutionality*, 12.

²¹⁷ Butt, *Indonesia's Constitutional Court*, .

bring Pertamina back to its previous role. The same thing happened with the Law No. 20 of 2002 on Electricity which was known for competition-oriented electricity. The PLN's monopoly over power before the enactment of Law No. 20 of 2002 would likely to take place. The annulment of those laws may be marred the spirit of regulatory changes to open up the market to FDI to create efficiency and competition.

Through the Constitutional Court decision in *BP Migas* case, *Electricity Law*, *Water Resources Law*, Indonesian might be likely to see the continuance of inefficiency and corrupt practices of SOEs. After the economic crises, it was revealed that during the New Order regime, most of Indonesian SOEs had been poorly managed which resulted in a very low profit. Until the end of 1997, with total assets of \$ 57.6 billion the average of return on investment and return on equity of SOE was respectively 3.5 percent which showed the low level of asset utilization and the high degree of production costs. These low returns were the result of the monopoly position of many industries coupled with the lack of responsibility demonstrated by the management of these SOEs. Many top leadership positions were patronage appointments made with bureaucrats in the technical departments that controlled state enterprises. Until the 'specifically formed' SOE is formed, Pertamina might return as the primary and most important player of oil industries. The company's notorious image as the cash cow for Suharto's and his cannot be erased. And also the ineffective and unprofessional conduct of many state-owned businesses is haunting.

The legislature criticized that the court lacks the expertise and legitimacy to make decisions about economic policy matters. In addition, the government also objected since the Court prevented it from continuing economic reform without considering the consequences. For example, the privatization of electricity had to be stopped. Regardless the fact that privatization was critical to ensure that Indonesia would have sufficient electricity to meet

demand as Indonesian's electrification rate was only 65 percent, one of the lowest in Southeast Asia.

For CSOs actors, the Constitutional Court is seen as a battleground to challenge laws they deemed to violate the Constitution and the rights given by it. The so-called nationalism which translated into a spirit of anti-modern colonialism and hostility to liberalism and capitalism seem to be the dominant factor for them in scrutinizing the laws. Their concern about the liberalization of investment regime is that it encourages inequality. They emphasize that economic development requires a more equitable distribution of wealth among the people. From this perspective, the real goal is not merely increased productivity efficiency as put forward by liberalism, but for the welfare of the nation. Thus, sustainable developments which prevent environmental degradation and reduce inequality of wealth distribution and at the same time protecting particular groups of individuals are the primary motives of their movement.

For CSOs, the move from mere advocacy to the judicial sphere in the Constitutional Court might have also been caused by the failure in some efforts to bring foreign investor before the general trial court for alleged criminal actions Harney and Olivia acclaim that a "judicial review is a way to go to the root of the legality of FDI operations, as using practical problems approach is deemed ineffective." Thus, the CSO employ ideological approach using state's economic ideology as an entrance to halt FDI operation. This "ideological war"²¹⁸ seems to be more efficient to keep out FDIs and their commercial motives while at the same time maintain economic ideology stated in the Constitution.

Evidently, the CSO groups have shown keen interests in foreign investment policy making process. Participation in government policy making is a key concern for CSOs. They demand a democratic and inclusive process of involvement. These types of CSOs works are

²¹⁸ This term is used by Stefano Harney and Rota Olivia, Civil Society and Civil Society Organizations in Indonesia, Paper presented at conference at International Labor Organization Geneva, August 2003, 8 to describe the battle between CSO works at sexual exploitation and the government.

among the most dangerous and revolutionary in Indonesia today. These CSOs heroic work in what is known for some people as 'jihad created controversy and hope. They are relatively a small group whose impacts are tremendous. If *Muhammadiyah* continues with its plan to file judicial review for other 115 laws and regulations, the consequences would be disturbing for FDI and the Indonesian government. It is a threat toward government efforts to provide legal certainty and positive investment climate, two essentials component for FDI.

Despite differences in the motives of the actors, there are commonalities behind them. They all agree on the importance of sustainable development, more opportunities for domestic investors, and human rights issues. The Constitutional Court is seemingly echoing CSO's ideas in deciding the meaning of state control. This way, the Court legalizes nationalism in limiting FDI involvement.

After all, it is hard to imagine Indonesia without FDIs. Until now, foreign investment is still undoubtedly a major force in Indonesia's economic activities. If the government moves too far from what foreign investors consider to be an appropriate investment climate, they can pull their investment back. There should be a rebalancing of interests. To create healthy investment climate conducive to economic growth and sustainable development, appropriate framework conditions need to be in place both at the national and the international level.²¹⁹ Jakob Sorensen, the head of the European Chamber of Commerce in Jakarta, said that the Indonesian government needed to step in and reassure foreign investors saying "We are really lacking clarity. We need a clear policy direction."²²⁰ It is, therefore, very important to find out various means by which states would exert greater control over the economy but at the same time provides positive investment climate.

²¹⁹ Zhan, Weber, and Karl, *International Investment Rulemaking*, 200.

²²⁰ Charlotte Greenfield and Eveline Danubrata, RPT-Legal 'jihad' against private sector gathers pace in Indonesia, Apr 26, 2015, <http://www.reuters.com/article/indonesia-investment-idUSL4N0XL4R120150426>, accessed September 19, 2016.

C. Conclusion

The discussion of this chapter has shown that traditionalist nationalists play a crucial role in the backlash against FDI. Some of the victories achieved during the reform era are strengthening the legitimacy of civil society in a variety of important roles. CSOs have been campaigning to expose the mismanagement of Indonesian natural resources. In addition to that, civil society movement in the Constitutional Court has the burden of mitigating the effect of liberalization. They are entrusted to help to provide for the welfare and protection of people exploited by FDI's activities. This series of actions are the demand for the return of control over resources from the foreign parties to the state, arguing that the system has failed to make the state fulfilled its mission to use natural resources for the wealth of the people. Instead, openness to foreign investors has been contributing substantially to impoverish Indonesian people and denying indigenous and other communities rights to land and resources.

Islamic-based CSO' constitutional *jihad* is motivated by two things namely: the Islamic values which teach Muslim to help other in need and also inconsistency of capitalism with Islamic teachings. Secondly, it is motivated by the democratization in Indonesia after reform which provides space for intellectual Muslim to discuss Islamic value through state mechanism. For other types of CSO, they pragmatic views of the real problems created the current practice of FDI are apparently to be the leading cause. It is well known that the entrance of CSO in foreign investment issues and more precisely for judicial review before the Constitutional Court is new and has remarkable impacts. After CSOs made their way to the Constitutional Court, this new trend goes on. It is can also be seen as CSO's roles in promoting nationalism and in bringing general concerns of the practical impact of FDI toward society and environment to the attention of international community.

Even though each actor has its reason for backlash, one common thing is the perception that corporate interests have a far wider range of resources for shaping policy. Foreign investment liberalization creates wealth, but most of it goes to corporations or ends in the hands of political cronies. Foreign investment regime change will not simply be a matter of economic rationality. Rather, it will be an inherently political process in which conflict between contending interests, rather than economic rationality, plays the detrimental role. The *Constitutional Jihad* movement seems to confirm Rosser's thought that whilst the system corruption, nepotism, and favoritism were significantly reduced, it is not clear that the political and social preconditions for liberal markets have yet appeared.²²¹

²²¹ Rosser, *The Politics of Economic Liberalization*, 193.

Chapter VI

CONCLUSIONS AND RECOMMENDATIONS

History has shown that Indonesia often adopts economic reforms following difficult economic circumstances. To heal from the economic catastrophe during Old Order, the New Order government opened the country to Foreign Direct Investment (FDI) which had previously been banned. This reform brought multinational companies to Indonesia. Sudden decrease in oil price in 1980 which led to the plunging oil revenue pushed the government to implement economic reforms that foster industrial development. A similar thing occurred in the late 1990s when reform was implemented as part of the International Monetary Fund (IMF) conditional loan agreement to economic recovery after the Asian crises.

The involvement of FDI in developing countries is encouraged by international development agencies such as the IMF and the World Bank which stipulate that FDI is crucial elements in the efforts to reduce poverty. Developing countries, therefore, demonstrated commitments to investment liberalization unilaterally through domestic legal reform; and bilaterally or multilaterally by becoming parties to the ICSID Convention, signing investment agreements and also referring to international arbitration for dispute settlement.

In Indonesia, unilateral liberalization was started through the enactment of Law No. 1 of 1967 concerning Foreign Investment and other regulations where investment barriers were removed, investment incentives were applied, and the administrative procedure was simplified. With the combination of certain degrees of protectionism, liberalization effort continued until the end of the 1990s. However, there has been a significant shift in the attitude towards liberalization of FDI. While the progress in Indonesia toward the liberalization led to economic development during the New Order era, democratization which took place in the early 2000s brought a huge challenge to Indonesia's openness to FDI.

Recognition of the economic benefits afforded by freedom of capital movements clashed with concerns about loss of national sovereignty and other possible adverse consequence.

While some empirical research finds that liberalization has a significant and positive impact on FDI, this study reveals liberalization has been the primary factor of Indonesia's changing attitude against foreign investment regime. The BITs Indonesia signed represented the liberal nature of investment provisions. The generous protection given to FDI without giving obligation is seen as detrimental. There is no balance between promoting foreign investment and protecting national interests. The national legal frameworks are considered to be too encouraging to FDI. Furthermore, the arbitration cases filed by multi-national companies against state's law and regulations are seen to breach the sovereignty of the government. Civil society and government institutions are working together in the effort to increase Indonesia's bargaining position before the FDI by drafting a model BIT.

The source of the backlash in Indonesia may be distilled into two causes: substantively, the treatment given to FDI, and procedurally, the use of international arbitration. Across the board, civil society groups, scholars, and local businesses have voiced dissatisfaction with the international investment regime. They have expressed concerns about concessions and preferential treatment given to FDI as well as the system of investor-state dispute settlement. As a result, the international investment regime in Indonesia is experiencing a crisis of legitimacy as there is a rejection of norms, practices, and structures of the system. The primary concern of Indonesia is that those agreements primarily reflect the interest of foreign investors. Substantively, this can be seen from provisions aimed to give protection to FDI without giving them obligations. On the other hand, BIT put significant obligations to Indonesia as a host state without adequately address its rights. Moreover, not only does BITs are used to limit the regulatory space of the Indonesian government, but also forces the government to implement policies that could be harmful to domestic investors or to

compete with FDI. There is also concern on the procedural issues on how the investment disputes are handled. The arbitration provision in the BIT allows investors to bypass domestic courts and lodge claims against the Indonesian government directly with the ICSID tribunal or other arbitration tribunals.

The current backlash against foreign investment in Indonesia portrays that adherence to liberalization could result in policymaking limitation. Balancing interests to achieve legitimate and efficient policies is a primary and pressing challenge in the current President Widodo's government efforts. Based on the preceding discussion and analysis, the following conclusions and recommendations can be drawn to answer the research questions posed in Chapter I. The questions are what accounts for Indonesia's current shift away from global investment regime; what are the forms of adverse reactions shown against foreign investment law; and who are the actors behind such a backlash.

A. CONCLUSIONS

1. What accounts for Indonesia's current shift away from global investment regime

This research confirms that liberalization has led to the rise of nationalism. The nationalistic sentiment is then channeled through the Constitutional Court by civil society organizations (CSOs) asking the court to invalidate and annulled several foreign-investment related laws on the basis that the laws are in breach of the Constitution, mostly Article 33. In the CSOs interpretation, Article 33 requires the state to control important branches of production and natural resources directly. While the meaning of 'control' has been debated over the years, the Constitutional Court chooses to interpret it narrowly by requiring the state to manage them directly instead of control through regulation. Consequently, any provisions and Laws that give direct control to foreign participation in the natural resources or critical sectors of production are annulled.

After the Independence in 1945 up to mid-1960s or during the Old Order era, nationalism was adamant in Indonesia as the reaction of colonialization. It resulted in the expropriation and nationalization of many foreign companies considered vital to state welfare which caused in decreasing number of FDI. However, the New Order era in the late 1960s sought to a better position by moving away from nationalistic to economic liberalism, as proven by the enactment of the Investment Law, ratifying the ICSID Convention, and conclusion of BITs. This liberalization is believed to contribute to Indonesian development during the New Order Era significantly. The Asian economic crises that spread to Indonesia in 1997/1998 had helped to force President Suharto to step down. Democratization that followed has opened a new room for CSO to participate in the public sphere by among other things protesting against laws considered as pro-foreign investors. Their strong voices are attributable to the current government BIT moratorium policy and BIT model drafting. Apparently, their initiatives to file judicial reviews have changed the national policy direction becoming protectionism which indicates nationalism.

Behind the move from nationalism to liberalism and back to nationalism is a combination of interrelated historical and theoretical explanations. Historical explanation for nationalism during the Old Order was due to the traumatic experience from the Dutch colonization which exploited the country's resources for centuries. The change from nationalism to liberalism during the New Order was due to the need to reverse Indonesia's decapitalization through capital flight and huge debt-servicing and to regain economic lost as a result of inward orientation. While during the reform era, embracement to liberalism was because of the requirement stipulated from international donors such as the IMF and World Bank as conditions for the loan. These international donors are apparently followed the neoliberal economic theory claims that efficient allocation can be furthered in a market free of distorting access restrictions.

Concerning openness on FDI, privatization could be considered as the most challenged one. Following the crises, state industries in Indonesia from oil companies, telecommunications, cement industries, and electricity have been opened for private participations. This opening broadens the sector for FDI's involvement and raised their role in the Indonesian economy. Privatization gave rise to the awakening of nationalism voiced mainly by CSOs through judicial reviews before the Constitutional Court to challenge private participations in several important sectors of the economy. As a result, the Court annulled all or part of Electricity Law, Oil and Gas Law, Investment Law, Plantation Law, Coastal and Remote Areas Law, Forestry Law, and Water Resources Law.

The next most challenged is investment arbitration. The primary function of investment arbitration is to provide the venue for dispute resolution by determining rights and obligation of investors and host states, and thus increase the predictability of the international investment regime. Thus, from the legal perspective, liberalization is seen to bring up more possibilities for host state of investment to be dragged to international arbitration which is considered to be detrimental to the country's financial condition and sovereignty.

While proponents of arbitration argue that it is the only available means to resolve investment disputes impartially, many developing countries like those in Latin America and Indonesia see arbitration as harming. To date, Indonesia has been sued by multi-national companies before the investment arbitration in ICSID in the following cases: *Amco*, *Cemex*, *Newmont*, *Rafat Ali*, *Churchill*, and *Planet Mining*. Some commentators see the liberalization of foreign investment as a neo-colonialism where the dominating function of foreign investors allows developed countries to exercise control over and exploit developing countries.

2. The forms of backlash against foreign investment

Even though liberalization trend of foreign investment is still continuing, there are several indications that the perception of the balance of costs and benefits of FDI change. Indonesia is entering a phase of a downturn in policies and attitudes towards FDI which can be seen as a backlash. The backlash against foreign investment regime takes four different forms namely: protectionist policies, judicial review in the Constitutional Court, BIT moratorium policy and drafting of BIT model which limits access to arbitration and reduce preferential treatment to FDI.

The protectionist policy is manifested by intervention in the economy to ensure that the state through its state-owned enterprises controls the natural resources and any vital branch of production. Besides, it also aims to direct foreign investment activities to support national interests. The Constitutional Court is authorized to conduct a judicial review of laws deemed contradictory to the Constitution. Democratization that happened in Indonesia following the economic crises opened up an opportunity for CSOs to voice their concern regarding the impact of FDI toward indigenous community, forestry, environment, as well as natural resources. They filed judicial review on various laws which give access to private participation such as oil and gas, electricity, forestry, and water resources asking the Court to declare those legislations to be unconstitutional because they breach Article 28 and Article 33 of the Constitution.

In seven out of eight cases, the Court rendered decisions in favor of the claimants. This could be seen as a reflection of Court's resistance on FDI. Consequently, the laws or some provisions of them are declared null and void. The nullification of legislations creates legal uncertainty for foreign investors in those areas.

The next form of backlash is BIT moratorium policy which was taken in 2012 where the government decided neither to sign new BIT nor to extend the expiry ones. The reason

behind this policy is because the government considered many of the BITs is no longer relevant and therefore need to be fixed, adjusted with the conditions and state's interest. Moreover, BIT has been criticized for giving too much power to FDI. The current system of regional economy is often cited as the example as the central government can no longer exercise full control over local administrations. Thus, it is not fair for the central government to be brought to the ICSID due to local administration's actions.

Currently, the government specifically the Ministry of Foreign Affairs and the Investment Coordinating Board (BKPM) are in the finalization stage of formulating a model BIT with more sovereign-friendly provisions. The model BIT is drafted as an attempt to balance the interest of protecting investors while providing policy space for regulation in the public interest on issues such as indigenous people, forestry, environment, or health. Moreover, the model also imposed several obligations to investors such as good corporate governance and corporate social responsibility.

The last form of backlash is the limitation on investment arbitration and reduction of preferential treatment. The majority of Indonesian BITs contain clauses offering ICSID arbitration as a method of dispute settlement. In most of the cases that Indonesia encountered, foreign investors and arbitral tribunals assumed that consent to arbitration had been given in advance before the dispute arose which was in the signing of the treaty. Thus, foreign investors can sue the government quite easily.

In the model BIT, Indonesia requires a written consent before a multi-national company can sue the government before arbitration. Consent requirement creates a challenge for investors since it is unlikely for the Indonesian government to give its consent to arbitration easily. Consent requirement is the result of the perspectives that arbitration is another form of domination where multinational companies, mostly from developed countries, are given direct access to sue the government of the host states for matters

considered within the sovereignty of the state. Consequently, international investment system is deemed to serve to maximize the protection of investors rather than the host states. These assertions come from the perspectives on how arbitral tribunals handle the cases: substantively, their expansive interpretation of foreign investors' protections, and procedurally, the broad rendering of the *arbitrability* of disputes. The limitation to arbitration leads to a dilemma for investors whether to invest in a potentially risky but profitable market such as in Indonesia in the very restrictive arbitration.

The model BIT also requires the exhaustion of local remedies for a period of time before international proceedings are instituted. A requirement of this kind as a condition for arbitration creates a considerable burden to foreign investors. A decision by a domestic court in a complex investment dispute is likely to take an extended period of time. Even if such a decision should have been rendered, the dispute is likely to persist if investors are dissatisfied with the decisions. For investors, exhaustion of local remedies will likely to delay the resolution and add additional costs.

All these developments in arbitration demonstrate a potentially serious resistance to FDI. From above explanation, it is evident that Indonesia's actions are less harsh than attempts from South Africa, Venezuela, Bolivia, Ecuador or Argentina in which they want to cancel BITs or completely withdraw from the ICSID Convention. All the efforts are aimed to reduce the potentials of the Indonesian government to be sued before international investment arbitration. Consent requirement and the removal of ICSID arbitration in the model BIT is meant to discourage foreign investors to sue the government through international dispute resolution, and therefore to encourage negotiation and to use of Indonesian courts.

3. The Actors Behind Current Backlash

Two different groups of actors play an important role in the growing unease with FDI namely traditionalist nationalist and modernist nationalist. The traditionalist group consists of

various CSOs, some prominent individuals, and the Constitutional Court, while the modernist comes from the government, scholar and lawyers.

When democratization occurred after the fall of President Suharto, the amendment of the Constitution took place which brought into being the Constitutional Court. Enjoying their new democratic rights, CSOs began to voice their concerns, among other things regarding the welfare of indigenous communities, environment, natural resources and the role of the state in the economy. They grouped themselves in a number of coalitions to monitor the activities of the state to promote just public policies, to carry out advocacy, to influence or to draft new laws, as well as to file a judicial review against laws they deemed in breach of the Constitution. CSOs requested judicial review of foreign investment-related laws arguing those legislations to be incompatible with the Constitution due to the opportunity given to FDI to participate in the economic activities deemed crucial to the welfare of the nation. Besides, CSOs also negotiate with the government in policy making activities related to foreign investment. They are actively involved in the drafting process of BIT model. They also give their insights on the arbitration cases that the state is now encounter.

Since the Court is the guardian of the Constitution, and there is no appeal mechanism for its decision, it is widely accepted that its interpretation is the real meaning of the Constitution as intended by the founding fathers. Thus the Constitutional Court becomes a valuable player through its interpretative tasks including important doctrinal principles that clarify legal meanings in important economic and social sphere such as the meaning of “state control” in Article 33 of the Constitution. Through its interpretation, the Court declared that the government acted unconstitutionally in attempting to privatize key industries such as oil and gas, water, and electricity.

Such literal and narrow interpretations have motivated *Muhammadiyah* to further examine law related foreign investment to be reviewed by the Court. *Muhammadiyah* finding

on 115 laws potentially breach Article 33 of the Constitution would not only prolong the backlash against foreign investment but also would likely to inspire other CSOs to file judicial reviews.

The next actor is prominent individuals. They either directly or indirectly involve in the judicial review cases play roles in the negative perception towards foreign investors. As expert witnesses, their point of view is often referred to the Constitutional Court to help to come to its decisions. The view of ‘people’s economy’ voiced by prominent individuals, including their opinion on the importance of promoting national sovereignty over energy sectors has apparently been taken into account by the Constitutional Court in narrowly interpreting “state control.” In addition, the government is continuously involving academicians and legal practitioners in formulating BIT review policy and drafting of Model BIT. The removal of reference to ICSID arbitration and the ‘consent’ provision in the Model BIT are among the examples of legal scholar’s thought on how foreign investors’ access to arbitration could be limited.

The modernist nationalist namely government, individual, and lawyers differ in the way they see FDI. They use nationalist sentiment to create policies that promote national interest without disallowing FDI to play roles in natural resources sectors or important branch of production. Such policies are made because the modernists acknowledge the advantages offer by FDI to improve efficiency and the benefit for the development. Hence, the modernist group does not use aggressive forms to repress FDI, instead, they seek to construct and defend a moderate version of nationalism.

Various development discussed in this research do not indicate an end to FDI liberalization in Indonesia or a slowdown in FDI flows. Rather they suggest a rollback of liberalization and show that there is a growing backlash indicated by increasing ambivalence in attitudes towards FDI and that it cannot be taken for granted that FDI openness will persist.

The debate in New Order era between technocrats and nationalists apparently still continued until post-reform era with wider participants.

There have been many different views on the role that the government should play in the liberalization of investment. Differences exist between the government, various stakeholders and scholars, and also within civil societies. The traditionalist group is expecting a policy that gives a certain level of protection for specific industries, and more cautious approach towards concluding further international investment agreements. On the other hand, those who are in favor of liberalization, including international stakeholders, demand more liberalization and economic integration arguing that the current liberalization is insufficient.

The endurance of a regime depends on the regime effectiveness, willingness and ability to abide, and robustness, the ability to stand external threats and challenges. Indonesia's old BIT which follows protection approach is no longer suitable for the current condition and therefore need to be replaced by BIT that provides more balanced post-establishment rules.

B. RECOMMENDATIONS

Considering the changing attitude against foreign investment that takes place in Indonesia lately while the country still needs foreign investor participation in the economy, the government has to be more cautious in its effort to attract FDI. There are two considerations: firstly, with Article 33 of the Constitution remains widely debated, and the Constitutional Court maintains its view of direct roles of the government in the economy, legal reforms to improve efficiency and create positive investment climate would not be easy to do. Secondly, the increased concentration of FDI in developed countries means that developing countries like Indonesia have to compete with other developing countries for a relatively small share of foreign investment. Japan, the United States, and the European

Countries compete for each other to maintain their share of business and economic activities through MNCs.

President Widodo administration has to continue promoting investment opportunities while at the same time keep the balance between maintaining its policy to provide positive investment climate and responding the mounting pressures from CSOs which demand restriction on FDI roles. Promoting investment is important because, regardless the intense hostility against FDI shown recently, FDI is still crucial for Indonesia for three reasons: Firstly, FDI can contribute to modernizing Indonesia's industrial basis, ramp up its manufacturing industry in order to reduce its dependence on volatile commodities for its export performance. Secondly, FDI inflows are stable and long-term capital inflows that support the balance of payment. Thirdly, FDI may help to diversify the Indonesian economy, if linked with access to new markets.

The government not only has to maintain stability in legal order since legal uncertainty poses a threat to foreign investment, but also focuses on broader issues. Globally, there are growing policy changes to address the flaws in the existing international investment regime. Indonesia concerns most with the issue of sovereignty, preserving the right of the state to exercise its regulatory and policy space, and government control over natural resources, while other countries are moving forward with the issue of coherence between BITs and other policy areas such as taxation, public health and safety, and environmental protection. For this reason, Indonesia should move from sovereignty issues to emerging social, economic, environmental and developmental challenges.

The growing hostility towards FDI could contribute to more disputes between investors and the government. Indonesia has witnessed the rising number of arbitration in the past few years almost all of them brought by foreign investors against alleged misconduct by the Indonesian government. This momentum should be used by the government to negotiate

and reformulate the rights and obligations between them to avoid future conflicts. Both the government and MNCs should pay more attention to the rule of law, including by developing a consistent and transparent FDI related legislations that respect the interests of all involved in the investment process.

With changing societal attitudes among developing countries, in international level, a rule of the game is needed to regulate foreign investment on an equal footing across different states with different economic level. Thus, the Indonesian government may increasingly put less restrictive emphasis on ways to attract FDI and more on measures that are crucial to maximizing the FDI benefits. With the pressures from CSOs to grow to ask for reforms, the government may attempt to target types of FDI it considers to be the most important for the economic development. Thus, it emphasizes the quality of the FDI. Such a shift could be combined with a slowdown of FDI liberalization. The effort to improve investment climate should be done through a more holistic approach which involves slower liberalization to allow the state to adapt to the new circumstances, develop its financial system, and educate its population. Such an approach should also include the ability to adopt policies that favor long-term over short-term foreign investment. There should be a balance between liberalization and deregulation to deviate from a strict neoliberal policy.

BIBLIOGRAPHY

BOOKS

Abbas, Anwar. “*Bung Hatta & Ekonomi Islam, Pergulatan Menangkap Makna Keadilan dan Kesejahteraan, (Mr. Hatta and Islamic Economy, The Battle to Understand the Meaning of Welfare and Justice)*,” Jakarta: Multi Pressindo, 2008.

Abdelal, Rawi. "Nationalism and International Political Economy in Eurasia," in *Economic Nationalism in a Globalizing World*, ed. Eric Helleiner and Andreas Pickel, Ithaca, N.Y.: Cornell University Press, 2005.

Abdullah, M. Amin. “Muhammadiyah’s Experience in Promoting Civil Society on the Eve of the 21st Century,” in *Islam and Civil Society in South East Asia*, eds. Nakamuro Mitsuo, Sharon Siddique, Omar Farouk, Singapore: ISEAS Yusof Ishak Institute, 2001.

Alles, Delphine. *Transnational Islamic Actors and Indonesia's Foreign Policy: Transcending the State*, London, New York, Routledge Taylor & Francis Group: 2016.

Arief, Sritua. “*Ekonomi Kerakyatan Indonesia Mengenang Bung Hatta Bapak Ekonomi Kerakyatan Indonesia,*” (*Indonesia’s People’s Economy Commemorating Mr. Hatta the Father of Indonesia’s People Economy*) Surakarta: Muhammadiyah University Press, 2002.

Barichello, Richard, and Flatter, Frank. “Trade Policy Reform in Indonesia,” in *Reforming Economic Systems in Developing Countries*, ed. DH Perkins and Michael Roemer, Cambridge: Harvard University Press, 1991.

Barma, Naazneen H. , Kaiser, Kai, Tuan Minh Le, Vinuela, Lorena. “*Rents to Riches the Political Economy of Natural Resource-Led Development.*” Washington DC: the World Bank , 2012.

Beitinger-Lee, Verena. (*Un*) *Civil Society and Political Change in Indonesia: A Contested Arena*, London & New York: Routledge, 2009.

Bjorklund, Andrea K. ” Improving the International Investment Law and Policy System: Report of the Rapporteur Second Columbia International Investment Conference: What’s Next in International Investment Law and Policy?” in *The Evolving International Investment Regime*, ed. Jose E. Alvarez et all, Oxford: Oxford University Press, 2011.

Bolivar, Gisela. The Effect of Survival and Withdrawal Clauses in Investment Treaties: Protection of Investments in Latin America, in *Regionalism in International Investment Law*, ed. Leon E. Trakman and Nicola W. Ranieri, Oxford: Oxford University Press, 2013.

Buchanan, James. “Reform in the Rent Seeking Society” in *Toward a Theory of the Rent-Seeking Society*, ed. J. Buchanan, R Tollison and G Tullock, Texas: Texas A &M University Press, 1980.

Burhani, Ahmad Najib. “Liberal and Conservative Discourses in the Muhammadiyah: The Struggle for the Face of Reformist Islam in Indonesia,” in *Contemporary Development in Indonesian Islam*, ed. Martin van Bruinisse, Singapore: ISEAS Yusof Ishak Institute, 2013.

Bush, Robin. *Nahdlatul Ulama and the Struggle for Power Within Islam and Politics in Indonesia*, Singapore: ISEAS Yusof Ishak Institute, 2009.

Butt, Simon., “Indonesia’s Constitutional Court: Conservative activist or strategic operator?” in *The Judicialization of Politics in Asia*, ed. Bjorn Dressel, New York: Routledge, 2012.

Choirie, Effendy. *Privatisasi Versus Neo-Sosialisme Indonesia (Privatization versus Neo-Socialism Indonesia)*, Jakarta: LP3ES, 2003.

Crouch, Harold. *Patrimonialism and Military Rule in Indonesia*, Cambridge: Cambridge University Press, 1979.

Cahyono, Heru . *Pangkopkamtib Jenderal Soemitro dan Peristiwa 15 Januari '74 : sebagaimana dituturkan kepada Heru Cahyono, (General Soemiitro and Malari Incident January 15, 1974: as stated to Heru Cahyono)*, Jakarta : Pustaka Sinar Harapan, 1998.

Collins, Elizabeth Fuller. *Indonesia Betrayed*, Honolulu: University of Hawaii Press, 2007.

Dahm, Berhard. “*Sukarno and the Struggle for Indonesian Independence*,” New York: Cornell University Press, 1969.

David, Harvey, *A Brief History of Neoliberalism*, New York: Oxford University Press, 2005.

Dick, Howard. “Formation of the Nation-State, 1930s-1966, in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*,” eds. Howard Dick et all, Honolulu: Allen & Unwin and University of Hawai’i Press: 2002.

Dressel, Bjorn. *The Judicialization of Politics in Asia: Towards a Framework of Analysis*, (Routledge, Taylor & Francis Group, 2012.

Echandi, Roberto, “What Do developing Countries Expect from the International Investment Regime?” in *the Evolving International Investment Regime*, eds. Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino(Oxford University Press, 2011.

Falaakh, Muhammad Fajrul. “Nahdlatul Ulama and Civil Society in Indonesia,” in *Islam and Civil Society in South East Asia*, eds. Nakamuro Mitsuo, Sharon Siddique, Omar Farouk, Singapore: ISEAS Yusof Ishak Institute, 2001.

Franck, Susan D. “Considering Recalibration of International Investment Agreements: Empirical Insights,” in *the Evolving International Investment Regime*, eds. Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino, Oxford: Oxford University Press, 2011.

Gedicks, Al. *Resource Rebels: Native Challenges to Mining and Oil Corporations*, Cambridge Massachusetts: South End Press, 2001.

Hadiz, Vedi R. *Islamic Populism in Indonesia and the Middle East*, Cambridge: Cambridge University Press, 2016.

Harten, GV. *Investment Treaty Arbitration and Public Law* , Oxford: Oxford University Press, 2007.

Hefner, Robert W. *Islam in an Era of Nation State: Politics and Religious Renewal in Muslim Southeast Asia*, Honolulu: University of Hawaii Press, 1996.

Hill, Hal and Wee, Thee Kian. *Indonesia's Technological Challenges*, Canberra: Australian National University, Institute of South East Asian Studies, 1998.

Hill, Hal and Narjoko, Dionisius. "Managing Industrialization in Globalizing Economy: Lesson from the Suharto Era," in *Soeharto's New Order and Its Legacy: Essays in Honor of Harold Crouch*, ed. Edward Aspinall, Greg Fealy, Canberra: Australia National University ePress, 2010.

Holtzappel, Coen J G and Ramstedt, Martin. "*Decentralization and Regional Autonomy in Indonesia Implementation and Challenges.*" Singapore: Institute of Southeast Asian Studies, 2009.

Houben, Vincent J.H. "The Pre-Modern Economies of the Archipelago," in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*, eds. Howard Dick et all, Honolulu: Allen & Unwin and University of Hawai'i Press: 2002.

Houben, Vincent J.H. "Java in the 19th Century: Consolidation of a Territorial State" in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*, eds. Howard Dick et all, Honolulu: Allen & Unwin and University of Hawai'i Press: 2002.

James, William E., and .Stephenson, Sherry M. "The Evolution of Economic Policy Reform: Determinants, Sequencing and Reasons for Success," in *Deregulation and Development in Indonesia*, eds. Farrukh Iqbal and William E. James, Praeger, 2002.

James, William E. and Nasution, Anwar. "Economic Reforms During the Crisis and Beyond," in *Deregulation and Development in Indonesia*, eds. Farrukh Iqbal and William E. James, Praeger, 2002.

Johnson, Harry. 'The ideology of economic policy in new states', in: David Wall (ed), *Chicago essay in economic development*, Chicago: University of Chicago Press, 1972.

Laird, Ian A. "A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*", in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Todd Weiler, London: Cameron May, 2005.

Law, Liem Siok. "Menuju Rakyat Berdaulat, Wawancara Adi Sasono Ketua Umum Dekopin Oleh Liem Siok Law, (Toward Sovereignty of the People)," an interview with Adi Sasono the Chairman of National Cooperative Council), Jakarta: Republika , 2008.

Lindbald, J Thomas. "The Late Colonial State and Economic Expansion, 1900-1930s, in *The Emergence of A National Economy: An Economic History of Indonesia, 1800-2000*," eds. Howard Dick et all (Honolulu: Allen & Unwin and University of Hawai'i Press: 2002).

- Lindsey, Tim and Butt, Simon. *The Constitution of Indonesia: A Contextual Analysis*, Oxford: Hart Publishing, 2012.
- McLachlan QC, Campbell ., Shore, Laurence ., Weiniger, Matthew. *International Investment Arbitration Substantive Principles*, Oxford: Oxford International Arbitration Series, 2007.
- Mann, Howard .“Civil Society Perspectives: What Do Key Stakeholders Expect from the International Investment Regime?” in *the Evolving International Investment Regime*, eds. Jose E. Alvarez and Karl P. Sauvant with Kamil Gerard Ahmed and Gabriela P. Vizcaino, Oxford University Press, 2011
- Mietzner, Marcus. “Personal Triumph and Political Turmoil: Abdurrahman Wahid and Indonesia’s Struggle for Reform,” in *The Presidency of Abdurrahman Wahid: an Assessment after the First Year*, ed. Damien Kingsbury, Monash Asia Institute, Monash University, 2001.
- Mills, Alex. “The Balancing of Interests in International Investment Law and Arbitration,” in *The Foundations of International Investment Law*, eds. Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales, Oxford: Oxford University Press, 2014.
- Mistelis, Loukas A. “Confidentiality and Third Party Participation UPS v. Canada and Methanex Corp v. United States,” in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. Todd Weiler, London: Cameron May, 2005.
- Mitsuo, Nakamuro. “Introduction in Islam and Civil Society” in *South East Asia*, eds. Nakamuro Mitsuo, Sharon Siddique, Omar Farouk, Singaopre: ISEAS Yusof Ishak Institute, 2001.
- Mubyarto, *Ekonomi Rakyat Program IDT & Demokrasi Ekonomi Indonesia (People’s Economy IDT Program & Economic Democracy Indonesia)*, Yogyakarta: Aditya Media, 1997.
- Mubyarto, *Reformasi Sistem Ekonomi: Dari Kapitalisme menuju Ekonomi Kerakyatan (Economic Reform: From Capitalism towards People’s Economy)*, Yogyakarta: Aditya Media, 1998.
- Mubyarto, *Amandemen Konstitusi & Pergulatan Pakar Ekonomi (Amendment of Constitution & Economic Expert Debate)*, Yogyakarta: Aditya Media, 2001.
- Murcott, Susan. *Arsenic Contamination in the World: an International Sourcebook*, IWA Publishing, 2012.
- Onwuamaegbu, Ucheora. “International Dispute Settlement Mechanisms-Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions,” in *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, ed. Katia Yannaca-Small, Oxford: Oxford University press, 2010.
- Pagestu, Mari. “Foreign Investment Policy: Evolution and Characteristic,” in *Deregulation and Development in Indonesia*, eds. Farrukh Iqbal and William E. James, Prageer, 2002.

Prasentiantono, Tony. "Political Economy of Privatization of State-Owned Enterprises in Indonesia," in *Business In Indonesia*, eds. M Chatib Basri and Pierre Van Der Eng, Singapore: ISEAS, Yushof Ishak Institue, 2004.

Prawiro, Radius. *Indonesia's Struggle for Economic Development: Pragmatism in Action*, Oxford University press, 1998.

Radius Prawiro, *Pergulatan Indonesia Membangun Ekonomi: Pragmatisme dalam Aksi, (Indonesia's Effort to Develop Economy: Pragmatism in Action)*, Jakarta: Elex MK., 1998.

Purwanto, Bambang. "Economic Decolonialization and the Rise of Indonesian Military Business," in *Indonesian Economic Decolonization in Regional and International Perspective*, ed. J. Thomas Linblad and Peter Post, Leiden: KITLV Press, 2009.

Rahardjo, Dawam ., *Small Scale Business in the Indonesian Economy*, Jakarta: The Ministry of Cooperatives and Small Enterprises, 1994.

Rahardjo, Dawam. *Pembangunan Pascamodernis (Post-modern Development), Esai esai ekonomi politik (Essays in Political Economy)*, Jakarta: Insist Press INFID, 2012.

Robison, Richard. *Indonesia; the Rise of Capital*, Sydney: Allen and Unwin, 1986.

Rosser, Andrew. *The Politics of Economic Liberalization in Indonesia: State, Market and Power*, New York: Routledge Curzon, 2002.

Sadli, M. "The Indonesian Crisis." In *Southeast Asia's Economic Crisis: Origins, Lessons, and the Way Forward*, edited by. H.W. Arndt & H.Hill, 16-27. Singapore: Institute of Southeast Asian Studies, 1999.

Salacuse, Jeswald W. *The Law of Investment Treaties*. Oxford: Oxford University Press, 2010.

Salacuse, Jeswald W. *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, Oxford: Oxford University Press, 2013.

Sauvant, Karl P. and Alvarez, Jose E. *Introduction: International Investment Law in Transition*, Oxford: Oxford University Press, 2011.

Scwartz, Adam. *A Nation in Waiting: Indonesia in the 1990s*, Westview Press, 1994.

Schultz, Thomas. "Against Consistency in Investment Arbitration," in *The Foundations of International Investment Law*, eds. Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales, Oxford: Oxford University Press, 2014.

Sieder, R., Schjolden, L., and Angell, A. *The Judicialization of Politics in Latin America*, New York: Palgrave Macmillan, 2005.

Sornarajah, M, *The International Law on Foreign Investment*, Cambridge: Cambridge University Press, 2012.

Sri Edi Swasono, *Modal Asing, Beban Hutang Luar Negeri dan EKoonomi Indonesia (Foreign Investment, Foreign Debt, and Indonesian Economy)*, Jakarta: University of Indonesia, 1987.

Subedi, Surya, P. *International Investment Law: Reconciling Policy and Principle*, Oxford: Hart Publishing, 2012.

Trakman, Leon E., and Musayelyan, David. "Caveat Investors-Where do Things stand Now?" in *Alternative Visions of the International Law on Foreign Investment, Essays in Honour of Muthucumaraswamy Sornarajah*, ed. C.L.Lim, Cambridge: Cambridge University press, 2016.

Trubek, David M and Santos, Alvaro. *The New Law and Economic Development; A Critical Appraisal*, Cambridge: Cambridge University Press, 2006.

Vandelde, Kenneth J. "A Brief History of International Investment Agreements," in *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flow*, eds. Karl P. Sauvant and Lisa E. Sachs, 2009.

Vandavelde, Kenneth J. *Bilateral Investment Treaties*, Oxford: Oxford University Press, 2010.

Vandelde, Kenneth J. "International Law on Foreign Investment, in Alternative Visions of the International Law on Foreign Investment," in *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah*, ed. C.L.Lim, Cambridge: Cambridge University press, 2016.

Vickers, Adrian, *A History of Modern Indonesia*, Cambridge: University of Cambridge Press, 2005.

Waincymer, Jeffry. "Balancing Property Rights and Human Rights in Expropriation", in *Human Rights in International Investment Law and Arbitration* eds. Pierre Marie-Dupuy et al. Oxford: Oxford University press, 2009.

Weeramantry, J. Romesh. *Treaty Interpretation in Investment Arbitration*, Oxford: Oxford International Arbitration Series, 2012.

Wie, Thee Kian. "The Soeharto era and after: stability, development and crisis 1966-2000," in *the Emergence of a National Economy*, ed. H. Dick, V. Houben, J. Th. Lindblad & Thee Kian Wie, Sydney: Allen&Unwin, 2002.

Wie, Thee Kian. *Recollections: the Indonesian Economy, 1950s-1990s*, Singapore: Institute of Southeast Asian Studies, 2003.

Wie, Thee Kian. "Indonesianization Economic aspects of decolonization in Indonesia in the 1950s," in *Indonesian Economic Decolonization in Regional and International Perspective*, ed. J. Thomas Linblad and Peter Post, Leiden: KITLV Press, 2009.

World Bank, *The East Asian Miracle: Economic Growth and Public Policy*, New York: Oxford University Press, 1993.

Yasni, Zainul . *Bung Hatta Menjawab (Mr. Hatta Answers), an Interview between Muhammad Hatta and Dr. Z Yasni 1902-1980*, Jakarta: Gunung Agung, 2002.

Zhan, James., Weber, Jorg., and arl, Joachim. "International Investment Rulemaking at the Beginning of the Twenty-First Century: Stocktaking and Options for the Way Forward," in *The Evolving International Investment Regime*, eds. Jose E. Alvarez et all, Oxford: Oxford University Press, 2011.

JOURNALS

Agarwal., Jamuna P, "Determinants of Foreign Direct Investment: A Survey," *Weltwirtschaftliches Archiv*, vol. 116 (1980) 739-773, available at https://www.jstor.org/stable/40438670?seq=1#page_scan_tab_contents

Arato, Julian. "Corporations as Lawmakers," *Harvard International Law Journal*, vol. 56 (2015) 229-295.

Borensztein, E., Gregorio, J.De. and J.W Lee, How Does Foreign Direct Investment Affect Economic Growth, *Journal of International Economics*, vol. 45 (1998) 115-135.

Bosma, Ulbe . "The Cultivation System (1830-1870) and Its Private Entrepreneurs in Colonial Java," *Journal of Southeast Asian Studies*, vol. 28 (2007) 275-291.

Brower, Charles N., and Blanchard, Sadie. "What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States," *Columbia Journal of Transnational Law*, vol. 52 (2014) 689.

Burt ,Eric M. "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization," *American Journal of International Law and Policy*, vol. 12 (1997): 1015-1061.

Butt, Simon., and Lindsey, Lindsey. "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and Article 33," *Bulletin of Indonesian Economic Studies*, vol. 44, (2008) 239-262.

Butt, Simon and Siregar, Fritz E. "State Control over Natural Resources" in Indonesia: Implications of the Oil and Natural Gas law Case of 2012, *Journal of Energy and Natural Resources Law*, (2015).

Choudhury, Barnali. " Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights," *Alberta Law Review*, vol. 46 (2009) 983-1002.

Click, Reid W., and Weiner, Robert J. "Resource nationalism meets the market: Political risk and the value of petroleum reserves," *Journal of International Business Studies*, vol. 41, no. 5 (2010).

Dagbanja, Dominic N. "The Limitation of Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective," *Journal of African Law*, vol. 60, no. 1 (2016).

- Deaton, Angus. "Commodity Prices and Growth in Africa," *Journal of Economic Perspectives*, vol.13 (1999): 23-40.
- Dupont, Cedric. "Towards a New Heuristic Model: Investment Arbitration as a political System," *Journal of International Dispute Settlement*, vol. 7, no. 1 (2016) 3-30.
- Fox, Genevieve , A Future for International Investment? Modifying BITs to Drive Economic Development, *Georgetown Journal of International Law*, vol.46 (2014) 230-258.
- Franck, Susan D. "Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development: Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law," *Pacific McGeorge Global Business & Development Law Journal*, vol. 19 (2007) 337-372.
- Franck, Susan D. "Empirically Evaluating Claims about Investment Treaty Arbitration," *North Carolina Law Review* vol. 86 (2007) 1-86.
- Franck, Susan D. "Rationalizing Costs in Investment Treaty Arbitration," *Washington University Law Review*, vol. 88 (2011) 769-851.
- Franck, Susan. D. Review: The Public International Law Regime Governing International Investment by José E. Alvarez. *The American Journal of International Law*, vol. 106 (2012).
- Franck, Susan D . "Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes," *Virginia Journal of International Law*, vol. 55 (2014) 13-71.
- Gillman, Eric. "The End of Investor-State Arbitration in Ecuador? An Analysis of Article 422 of the Constitution of 2008," *American Review of International Arbitration*, vol. 19 (2008): 269-299.
- Ginsburg, Tom. "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance," *International Law Review of Law and Economic*, vol. 25 (2005) 107.
- Ginsburg, Tom., and Shaffer, Gregory . "The Empirical Turn in International Legal Scholarship," 106 *American Journal of International Law* vol. 106. No.1 (2012).
- Gore, Charles, The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries' *World Development Journal*, Vol. 28, no. 5 (2000) 789-804.
- Gottwald, Eric. "Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?" *American University International Law Review* vol.22, no. 2 (2007).
- Hermes, Niels and Lensink, Robert, 'Foreign Direct Investment, Financial Development and Economic Growth' *Journal of Development Studies*, vol. 40, no.1 (2003).

Hosen, Nadirsyah. "The Constitutional Court and 'Islamic' Judges in Indonesia," *Australian Journal of Asian Law*, vol. 16, no. 2 (2016) 1-11.

Landau, Henry. "Economic and Political Nationalism and Private Foreign Investments," *Journal of International Law and Policy*, Vol. 2. No.2 (1972) 169 -178.

Losari, Junianto James., and Ewing-Chow, Michael . "Reflective or Reactionary? Indonesia's Approaches to International Investment Agreements and Recommendations for the Future," *Transnational Dispute Management*, vol. 12, no. 1, (2015).

Jova, Joseph J. , Private Investment in Latin America: Renegotiating the Bargain, *Texas International Law Journal*, vol. 19. (1984).

Kantor, Mark. "International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?" *Fordham International Law Journal*, vol. 24, no 4, (2000).

Kaushal, Asha . "Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime," *Harvard International Law Journal*, vol. 50 (2009) 491.

Latipulhayat, Atip. "State Control and the Privatisation of the Indonesian Telecommunications Industry: From Ownership to Regulation," *Journal of International Commercial Law and Technology*, vol. 5, no. 2 (2010).

Leal-Arcas, Rafael. "The Multilateralization of International Investment Law," *North Carolina Journal of International Law and Commercial Regulation*, vol. 35 (2009): 33-135.

Ma, David. "A BIT Unfair?: An Illustration of the Backlash Against International Arbitration in Latin America," *Journal of Dispute Resolution*, vol. 2012, no. 2 (2012).

McArthur, Kathleen S; Ormachea, Pablo A; "International Investor-State Arbitration: An Empirical Analysis of ICSID Decision on Jurisdiction," *The Review of Litigation* , Vol. 28, No. 3 , (2009) 559.

McLeod, Ross H. "Survey of Recent Developments," *Bulletin of Indonesian Economic Studies*, vol. 29 (1993) 3-42.

Moran, Theodore H. The UN and Transnational Corporations from Code of Conduct to Global Compact, *Transnational Corporations* Vo.18 No. 2 (2009) 91-112.

Odumosu, Ibronke T. "The Antinomies of the (Continued) Relevance of ICSID to the Third World," *San Diego International Law Journal*, vol. 8 (2007) 345-385.

Park, William W. "Arbitrator Integrity: The Transitory and the Permanent," *San Diego Law Review*, vol. 46 (2009) 629-703.

Pegg, Scott. "Can policy intervention beat the resource curse? Evidence from the Chad-Cameroon pipeline project", *Oxford Journal of African Affairs*, vol. 105. Issue 418 (2005): 1-25.

Robison, Richard . “Power and Economy in Suharto’s Indonesia, ” *Journal of Contemporary Asia* (1990) 99.

Salacuse, Jewald W. and Sullivan, Nicholas P.” Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain,” *Harvard International Law Journal*, vol. 46 (2006) 75-79.

Salacuse, Jeswald W. “The Emerging Global Regime for Investment,” *Harvard International Law Journal*, vol. 51. No 2, 2010.

Soesastro, M. Hadi . “Asian Survey, “*University of California Press*, vol. 29, no. 9 (1989).

Srinivasan T, ”Neoclassical Political Economy, the State and Economic Development” *Asian Development Review*, vol. 3 (1985) 38-58.

Srividya, Jandhyala,, Henisz, Witold ., and Mansfield, Edward . ‘Three Waves of BITs: The Global Diffusion of Foreign Investment Policy,’ *Journal of Conflict Resolution* vol. 55 (2011) 1047–1073.

Trakman, Leon E. “Foreign Direct Investment: Hazard or Opportunity?,” *George Washington International Law Review*, vol. 41(2009) 1-66.

Trakman, Leon E. “The ICSID under Siege,” *Cornell International Law Journal*, vol. 45 (2012).

Trakman, Leon E., and Musayelyan, “The Repudiation of Investor-State Arbitration and Subsequent Treaty Practice: The Resurgence of Qualified Investor-State Arbitration,” *ICSID Review*, Vol. 31, No 1 (2016).

Vandevelde, Kenneth J. “Sustainable Liberalism and International Investment Regime,” *Michigan Journal of International Law*, vol. 19 (1998) 383

Vandelde, Kenneth J. “The Political Economy of a Bilateral Investment Treaty,” *The American Society of International Law Journal*, vol. 92 (1998) 621-641.

Waelde, T. and Kolo, A., 2001, “Environmental Regulation, Investment Protection and ‘Regulatory Taking’ in International Law, *International Comparative Law Quarterly*, vol. 50 (2008).

Wick, Diana Marie . “The Counter-Productivity of ICSID Denunciation and Proposals for Change,” , *Journal of International Business and Law*, vol 11, (2012): 239-291.

Widiyanto, Asfa. “Salahuddin Wahid and the Defense of Minority Rights in Contemporary Indonesia,” *Al-Jamiah: Journal of Islamic Studies* Vol. 52, no. 2 (2014) 271-307.

THESIS/PAPER/REPORT

Bresnan, John . *The United States, the International Monetary Fund and the Indonesian Financial Crisis*, Discussion Paper No.8 , Discussion Paper Series APEC Study Center Columbia University 30 June 1998 available at

<https://www8.gsb.columbia.edu/apec/sites/apec/files/files/discussion/bresnan2.pdf> , accessed at June 21, 2015.

Butt, Simon ., Nottage, Luke., and Williams, Brett. “Indonesian investments and international treaty law,” 14 May 2012, available at: <http://www.eastasiaforum.org/2012/05/14/indonesian-investments-and-international-treaty-law/>, accessed at August 13, 2016.

Chandra, Alexander C. “The Role of Non-State Actors in ASEAN,” in *Revisiting Southeast ASEAN Regionalism*, p 74, available at: http://www.alternative-regionalisms.org/wp-content/uploads/2009/09/chandra_non-stateactorsinasean.pdf, accessed September 27, 2016

Direktorat Otonomi Daerah (Bappenas), Analysis in Formulating Mid-term Policies for Revitalizing Decentralization and Regional Autonomy Processes 2010–2014 (Kajian Perumusan Arah Kebijakan Jangka Menengah Bidang Revitalisasi Proses Desentralisasi dan Otonomi Daerah Tahun 2010–2014) (Badan Perencanaan dan Pembangunan Nasional 2009) IV-74.

Fathoni, Yudha “Challenging the constitutionality of Indonesia’s Investment Law, *International Institute for Environment and Development*,” 2014, 12, available at: <http://pubs.iied.org/pdfs/G03721.pdf>, accessed September 27, 2016.

Halle Mark ., and Peterson, Luke Eric. “Investment Provisions in Free Trade Agreements and Investment Treaties: Opportunities and Threats for Developing Countries,” Discussion Paper at Asia-Pacific Trade and Investment Initiative UNDP Regional Centre in Colombo December 2005 Dec 2005, at 23 available at <http://www.snap-undp.org/elibrary/Publications/InvestmentProvisions.pdf>.accessed at April 21, 2016.

Hallward-Driemeier, Mary, “Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit-and They Could Bite,” Policy Research Working Papers. August 2003.

Harney, Stefano., and Olivia, Rota . “Civil Society and Civil Society Organizations in Indonesia,” Paper presented at conference at International Labor Organization Geneva, August 2003. Available at: <http://www.ilo.org/public/english/protection/ses/download/docs/civil.pdf>, accessed September 1, 2016.

Hefner, Robert W. “Islam in Indonesia's Political Future,” *Project Asia*, 2002. Available at: www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA594233, accessed September 22, 2016.

ICMI Menolak Aset Negara dijual ke Asing (ICMI refuses State’s Asset being Sold to Foreigners), Liputan 6, December 29, 2001. <http://news.liputan6.com/read/26220/icmi-menolak-aset-negara-dijual-ke-asing>, accessed at October 17, 2016.

Knorich, Jan and I Berger, Axe. *Friends of Foes? Interactions Between Indonesia’s International Investment Agreement and National Law*, German Development Institute, 2014, p 3, http://www.die-gdi.de/uploads/media/Studies_82.pdf accessed at August, 20, 2015.

Lindbald, Von J. Thomas. *Colonial Ryle and Economic Development: A Review of the Recent Historiography on Indonesia*, 15. http://www.digitalis.uni-koeln.de/JWG/jwg_139_9-22.pdf

MacIntyre, A., 2003, 'Institutions and the political economy of corruption in developing countries', Discussion Paper, workshop on Corruption, Stanford University, 31 January–1 February.

Malam Persaudaraan Sumpah Pemuda Gema Inti Bali Hadirkan Tokoh Nasional (Youth Pledge Day Commemoration: Gema Inti Bali Invites National Figures) <http://gemainti.org/bali/malam-persaudaraan-sumpah-pemuda-gema-inti-bali-hadirkan-tokoh-nasional/> accessed at October 17, 2016.

McLeod, Ross H. "Privatization Failures in Indonesia," Indonesia Project, Economic Division, the Australian National University, 6, available at <https://cnnd.crawford.anu.edu.au/acde/publications/publish/papers/wp2003/wp-econ-2003-05.pdf>. Accessed January 12, 2016.

Patunru, Arianto A. and Rahardja, Sjamsu." Trade protectionism in Indonesia: Bad Times and Bad Policy," Lowy Institute for International Policy, July 2015, <http://www.lowyinstitute.org/publications/trade-protectionism-indonesia-bad-times-and-bad-policy>, accessed November 16, 2015

Rasuanto, Bur. "*Keadilan Sosial Pandangan Deontologis Rawls dan Habermas: Suatu Studi Filsafat Politik.*" (*Social Justice from Deontologist Rawls and Habermas: A study of Political Philosophy*), Summary of Ph.D Dissertation, University of Indonesia, 1999.

Richburg, Keith B., "Indonesia's Most Dangerous Man," *The Washington Post*, March 2, 1999, available at https://www.washingtonpost.com/archive/politics/1999/03/02/indonesias-most-dangerous-man/407061e7-495d-4620-91ca-9b0817810b45/?utm_term=.5b7ce31a7aa5, accessed at August 26, 2016.

Rock, Michael T. "The Politics of Development Policy and Development Policy Reform in New Order Indonesia," William Davidson Institute Working Paper Number 632 November 2003, available at <https://core.ac.uk/download/pdf/7051027.pdf>, accessed at May 20, 2015.

Rosert, Diana. "The Stakes Are High: A review of the financial costs of investment treaty arbitration," *International Institute for Sustainable Development*, July 2014, available at: <http://www.iisd.org/sites/default/files/publications/stakes-are-high-review-financial-costs-investment-treaty-arbitration.pdf>, accessed August 14, 2016.

Redfern, William A. "Sukarno's Guided Democracy and the Takeovers of Foreign Companies in Indonesia in the 1960s," PhD dissertation, the University of Michigan, 2010.

Rintuh Cornelis ., and Miar, *Kelembagaan dan Ekonomi Rakyat (Institution and People's Economy)*, Yogyakarta: BPF, 2005.

Rivera-Batiz, Francisco L. "Foreign Direct Investment in Latin America: Current Trends and Future Prospects," United Nations, Interregional Cooperation in Trade and Investment: Asia-Latin America," United Nations Economic and Social Commission for Asia and the Pacific, Studies in Trade

and Investment No. 43, New York, 2000, 161-191, available at:
<http://www.columbia.edu/~flr9/documents/fdi.pdf>, accessed at: 7/10/2016.

Rosser, Andrew . “Why did Indonesia overcome the resource curse?” IDS Working Paper 222, Institute of Development Studies, March 2004, p 17. Available at:
<http://www2.ids.ac.uk/futurestate/pdfs/wp222.pdf>, accessed at 7/12/2016

Sachs Jeffrey D. and Warner, Andrew M. “Natural Resource Abundance and Economic Growth,” National Bureau of Economic Research Working Paper 5398, December 1995, p 3. Available at <http://www.nber.org/papers/w5398.pdf>, accessed at 12/7/2016.

Sauvant, Karl P.. “The International Investment Law and Policy Regime: Challenges and Options,” “Overview Paper, E15 Task Force on Investment Policy, July 2015.

Schill, Stephan W. *Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?*, 4th Global Admin. L. Seminar (June 13-14, 2008).

Stijns , Jean-Philippe C. “Natural Resources Abundance and Economic Growth Revisited,” University of California at Berkeley Department of Economics, November 2000, p 28. Available at
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.321.8113&rep=rep1&type=pdf>, accessed at 12/6/2016

Hadi Soesatro and Thee Kian Wie , “Comprehensive Investment Policies in a Competitive Environment,” Paper presented at a Conference on the Indonesian Economic Recovery in a Changing Environment, Jakarta 4-5 October 2000.

Susanti, Bivitri,. *'Neoliberalism and its Resistance in Indonesia's Constitutional Reform 1999–2002'* Master Thesis., University of Warwick, 2002.

Velde, Dirk Willem te. “Foreign Direct Investment and Development A historical perspective,” Background paper for ‘World Economic and Social Survey for 2006’, Overseas Development Institute, available at:
<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/850.pdf>, accessed at: 7/10/2016

Ward, Halina. “Resource Nationalism and Sustainable Development: a primer and key issues,” IIED Working Paper, March 2009, available at: <http://pubs.iied.org/pdfs/G02507.pdf>, accessed August 15, 2016.

Williamson and DeLong, Natural Resources and Convergence in the Nineteenth and Twentieth Centuries, Unpublished paper, Harvard University, 1994.

Yackee, Jason W. “Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence,” 2010, University of Wisconsin Legal Studies Research Paper No. 1114, available at
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887 accessed September 19, 2015.

NEWSPAPER

Ewing-Chow, Michael, and Losari, Junianto James. "Indonesia should not withdraw from the ICSID." *The Jakarta Post*, April 24, 2014, available at <http://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html>. Accessed at: May 15, 2015.

Genealogi Jihad Konstitusi, October 27, 2015, available at: <http://www.republika.co.id/berita/koran/opini-koran/15/10/27/nwva472-genealogi-jihad-konstitusia> accessed June 23, 2016.

Government to overhaul oil and gas business, *the Jakarta Post*, April 9, 2015, Available at <http://www.thejakartapost.com/news/2015/04/09/govt-overhaul-oil-and-gas-business.html> accessed July 6, 2016.

Government Revises Investment treaties, *the Jakarta Post*, May 12, 2015 <http://www.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html>, accessed at July 14, 2015.

Government relaxes water rules to allow private ownership, *the Jakarta Post* June 30, 2015, available at: <http://www.thejakartapost.com/news/2015/06/30/govt-relaxes-water-rules-allow-private-ownership.html> accessed August 18, 2016.

Greenfield Charlotte, and Danubrata, Eveline. "RPT-Legal 'jihad' against private sector gathers pace in Indonesia," Reuters Sun Apr 26, 2015, <http://www.reuters.com/article/indonesia-investment-idUSL4N0XL4R120150426> accessed June 21, 2016

Hermansyah, Anton . "TPP may bankrupt Indonesia, activists say" *the Jakarta Post*, available <http://www.thejakartapost.com/news/2016/02/15/tpp-may-bankrupt-indonesia-activists-say.html>, accessed August 12, 2016.

Jaelani, Abdulkadir. Kedaulatan dalam Perjanjian Investasi Internasional (Sovereignty in Investment Treaty), *KOMPAS* Newspaper, May 27, 2015.

Jailani Abdulkadir , Ministry of Foreign Affairs, "Indonesia's Perspective on Investment Agreement Review," *Investment Policy Brief*, no. 1, Juli 2015, available at: <https://kadirjailani.wordpress.com/2015/07/16/indonesias-perspective-on-investment-agreement-review/>, accessed July 12, 2015.

Juwana, Hikmahanto. "Indonesia Should Withdraw from the ICSID." *The Jakarta Post*. April 2, 2014, available at <http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html>. Accessed at: May 15, 2015.

Juwana, Hikmahanto and Minister Amir Syamsuddin, Indonesia Should Exit Bilateral Investment Treaties, <http://en.hukumonline.com/pages/lt539ed4bbd9f64/indonesia-should-exit-bilateral-investment-treaties>, June 16, 2014, accessed at February 1, 2015.

Knottnerus, Roeline., and Roos van Os, "The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection", January 12, 2012, *Investment treaty News, International Institute*

for Sustainable Development available at: <https://www.iisd.org/itn/2012/01/12/the-netherlands-treaty-shopping/>, accessed at August 11, 2016

LSM Lingkungan Hidup Protes Putusan Sela Kasus Newmont (Environmental NGO Protests Interlocutory Judgment in Newmont Case), 16 NOVEMBER 2005, <https://m.tempo.co/read/news/2005/11/16/05569275/lsm-lingkungan-hidup-protes-putusan-sela-kasus-newmont>. Accessed August 20, 2016.

M. Dawam, Rahardjo. "Masalah Amandemen UUD, Khususnya Pasal Ekonomi," (Issues on Constitutional Amendment, Especially Economic Articles), Kompas Daily, 13 June 2001.

Tampubolon, Hans David. "RI firms invest heavily abroad," *the Jakarta Post*, February 13, 2012, <http://www.thejakartapost.com/news/2012/02/13/ri-firms-invest-heavily-abroad.html>, accessed at August 15, 2016.

Tempo. *Nabil Makarim Setuju Dengan Penambangan di Hutan Lindung* (Nabil Makarim Agrees with Mining in Protected Forests), *Tempo*. June 15, 2002.

Tempo, July 23, 2015, "Constitutional Jihad, Muhammadiyah New Jihad." Available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11501#.V6q1Q5grKM8> accessed January 20, 2016.

Yonnedi, E. "Why has Indonesia's privatization policy failed?" *The Jakarta Post Daily*, available at <http://www.thejakartapost.com/news/2003/01/06/why-has-indonesia039s-privatization-policy-failed.html>

INTERNET

Adam, Hanieh. "Democracy Promotion and Neoliberalism in the Middle East," *International Journal of Socialist Renewal*, Issue 29, (2006). Available: <http://links.org.au/node/224>, accessed July 17, 2016.

Agosin, Manuel R. and Mayer, Ricardo. Foreign Investment in Developing Countries: Does it Crowd in Domestic Investment? *The World Investment Report*, No 14. 2000, <http://unctad.org/en/pub/pubframe.htm>. Accessed at June 6, 2015

American Chamber, More Politics, Less Oil and Gas?, available at http://www.gbgingonesia.com/en/main/partners_updates/amcham/more_politics_less_oil_and_gas.php, accessed August 17, 2016.

Amrta Website at: <http://www.amrta-institute.org/profile/about-amrta-insitute>, accessed September 28, 2016.

Amrta, "Dominasi Asing dalam Sektor Sumber Daya Air Indonesia (foreign Domination over Water Resources in Indonesia)," March 10, 2016, <http://www.amrta-institute.org/updates/144-the-reliable-performance-of-public-water-services>, accessed September 28, 2016.

Antlov, Hans. “Rustam Ibrahim and Peter van Tuijl, NGO Governance and Accountability in Indonesia: Challenges in a Newly Democratizing Country,” 2005, 2. Available at: http://www.icnl.org/research/library/files/Indonesia/Peter_NGO%20accountability%20in%20Indonesia%20July%2005%20version.pdf accessed July 7, 2016.

Asanuma, Shinji, “Natural Resource Abundance and Economic Development: A Curse? Or A Blessing? – Lessons from Indonesia’s Experience,” available at http://policydialogue.org/files/events/Asanuma_nat_resource_abundance_and_economic_dev.pdf, accessed at June 23, 2015

Australian Government, Department of Foreign Affairs and Trade, ‘Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity’ (April 2011), available at: http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf accessed May 14, 2016.

Australian Government, Department of Foreign Affairs and Trade, ‘Trade and Investment Topics-State Dispute Settlement’ <http://dfat.gov.au/trade/topics/pages/isds.aspx> accessed May 14, 2016.

Butler, Rhett A. “In landmark ruling, Indonesia’s indigenous people win right to millions of hectares of forest,” May 17, 2003, <https://news.mongabay.com/2013/05/in-landmark-ruling-indonesias-indigenous-people-win-right-to-millions-of-hectares-of-forest/> accessed at July 21, 2016

Carim, Xavier . “Update on the Review of Bilateral Investment Treaties in South Africa.” Prepared for the Parliamentary Portfolio Committee on Trade and Investment.” Available at: https://www.thedti.gov.za/parliament/2013/bit's_in_sa.pdf, accessed at May 12, 2015

Churchill pre-tax losses narrow | Interactive Investor, <http://www.iii.co.uk/stockmarketwire/82344/churchill-pre-tax-losses-narrow>, accessed November 16, 2015.

Commission of Corruption Eradication of Indonesia, ‘Memorandum of Understanding and Collective Action Plan: Annex 1 on Harmonization of Policies and Regulations (Nota Kesepakatan dan Rencana Aksi Bersama: Lampiran 1 Harmonisasi Kebijakan dan Peraturan Perundangan)’ <<http://acch.kpk.go.id/documents/10157/34337/Lampiran+1+-+Nota+Kesepakatan+Bersama.pdf>> accessed August 13, 2016.

Company Profile - Churchill Mining PLC, <http://www.churchillmining.com/corporate/company-profile> accessed November 16, 2015.

Cotula, Lorenzo. “The Regulatory Taking Doctrine, International Institute for Environment and Development,” Briefing, 3 August 2007, available at: <http://pubs.iied.org/pdfs/17014IIED.pdf>., accessed May 6, 2016.

Desy, Christina., and Sahbani, Agus. “Muhammadiyah to Continue Its Constitutional Jihad,” *Hukum Online*, April 22, 2015 available at

<http://en.hukumonline.com/pages/lt553765365e6f3/muhammadiyah-to-continue-its-constitutional-jihad-accessed-at-August-2,-2016>.

Devi, Bernadetta and Prayogo, Dodi. "Mining and Development in Indonesia: An Overview of the Regulatory Framework and Policies." IM4DC Action Research Report, available at m4dc.org/wp-content/uploads/2013/09/Mining-and-Development-in-Indonesia.pdf

Do Bilateral Investment Treaties (BITs) foster FDI?,
http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Market_Brief_-
accessed November 1, 2016.

Doing Business in Indonesia: 2015 Country Commercial Guide for U.S. Companies, United States of America Department of Commerce, available at:
http://www.export.gov/indonesia/build/groups/public/@eg_id/documents/webcontent/eg_id_089369.pdf, down loaded: February 5, 2016.

Executive Summary: The Macroeconomics of Poverty Reduction in Indonesia an Independent Study Supported by the United Nations Development Program available at <http://www.ipc-undp.org/publications/reports/Indonesia.pdf>, accessed at August 20, 2015.

Fischer, Stanley, April 8, 1998 "The Asian Crisis, the IMF, and the Japanese Economy," Tokyo: IMF Website,
<http://www.imf.org/external/np/speeches/1998/040898.htm>, accessed: October 5, 2016.

Freeport Faces Investigation Due to Recent Disaster and Past Mismanagement," vol. 5, no 9, (2000) *Business Week On-Line*, July 31, 2000, <http://www.clarku.edu/~jsarkis/freeport2.doc>. Accessed August 13, 2016.

Gómez, Katia Fach. Latin America and the ICSID: David versus Goliath?, Social Science Research Network, available at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325. Accessed April 4, 2015.

Greenfield, Charlotte., and Danubrata, Eveline. "RPT-Legal 'jihad' against private sector gathers pace in Indonesia," Apr 26, 2015, <http://www.reuters.com/article/indonesia-investment-idUSL4N0XL4R120150426>, accessed September 19, 2016

Herbert Smith Freehills in London, Ben Blawn and Shawn Donnan. "Indonesia to terminate more than 60 Bilateral Investment treaty." article can be found in <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3SVIfHD6e>. accessed November 16, 2015.

Hizbut Tahir Indoensia's website: HTI Ajak Umat Tolak Perpanjangan Kontrak Migas RI dengan Asing (HTI Encourages Indonesian Muslims to Refuse Oil and Gas Contract Extension between Indonesia and Foreign Parties , <http://hizbut-tahrir.or.id/2012/11/01/hti-ajak-umat-tolak-perpanjangan-kontrak-migas-ri-dengan-asing/>, accessed June 23, 2016.

Hukum online, Anggota DPR Ajak Muhammadiyah Berjihad di Parlemen (A Legislative member invite Muhammadiyah to do jihad in the House of Representative), July 8, 2015, available at: <http://www.hukumonline.com/berita/baca/lt559cb8905f4a6/anggota-dpr-ajak-muhammadiyah-berjihad-di-parlemen>, accessed at August 12, 2016.

ICSID and Latin America: Criticisms, withdrawals and regional alternatives :
<http://www.bilaterals.org/?icsid-and-latin-america-criticisms#sthash.56LrqZFR.dpuf>,
Accessed at April 4, 2015.

ICSID: International Centre for Settlement of Investment Dispute available at
<https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx>, accessed October 23,
2014.

Indonesia for Global Justice, Desak MK Uji Materi “ASEAN Charter” (Demand
Constitutional Court Review “ASEAN Charter”), 11/19/2012,
<http://www.neraca.co.id/article/21725/desak-mk-uji-materi-asean-charter-indonesia-for-global-justice-igj>, accessed September 27, 2016.

Indonesia: Inquiry Into Recent Riots in Jakarta. Available at YouTube,
<http://www.youtube.com/watch?v=w9cG81ZXqXw> (accessed July 20, 2016).

Indonesian Oil and Gas Regulator Held to Be Unconstitutional,
<http://www.gibsondunn.com/publications/Pages/Indonesian-Oil-and-Gas-Regulator-He> ,
accessed November 16, 2015.

Indonesia Opens 35 sectors to foreigners, closes 20 others, Ayomi Amindoni and Anton
Hermansyah, the Jakarta Post, February 11 2016, available at:
<http://www.thejakartapost.com/news/2016/02/11/indonesia-opens-35-sectors-foreigners-closes-20-others.html>, accessed July 1, 2016.

Indonesia Rentan Gugatan di Lembaga Arbitrase Internasional (Indonesia is Vulnerable to
Claim before International Arbitration), February 17, 2013,
<http://energitoday.com/2013/02/indonesia-rentan-gugatan-di-lembaga-arbitrase-internasional/?popup>, accessed June 10, 2016.

Indonesia Terminated 18 BITs, Asia-Pacific Network on Food Sovereignty, May 25, 2015, at
<http://www.apnfs.info/indonesia-terminated-18-bits.html>, accessed September 25, 2016.

International IDEA, “Democratization in Indonesia: An Assessment, International Institute
for Democracy and Electoral Assistance” 2000, 111, available at:
<http://www.idea.int/publications/country/indonesia.cfm>, accessed September 22, 2016.

International NGO Forum on Indonesian Development, “Tentang INFID (CETAK) revisi,”
<http://infid.org/wp-content/uploads/2015/09/Profile-tentang-INFID.pdf>, accessed July 17,
2016.

Investment and Taxation Guide, Mining in Indonesia, May 2015, 7th edition, available at:
<https://www.pwc.com/id/en/publications/assets/eumpublications/mining/mining-in-indonesia-2015.pdf>, accessed June 15, 2015.

Investment Treaty News. “Venezuela’s Withdrawal From ICSID: What it Does and Does Not
Achieve,” April 13, 2012, available at <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/>, accessed at, February 3, 2015.

'Investor cuma cari untung di RI terus dibawa kabur ke negaranya' (Investor merely Want to Gain Profit from Indonesia to be Repatriated to Their Hoem Countries), available at: <https://www.merdeka.com/peristiwa/investor-cuma-cari-untung-di-ri-terus-dibawa-kabur-ke-negaranya.html>, accessed September 13, 2016.

Konrad von Moltke, "An International Investment Regime? Issues of Sustainability, International Institute for Sustainable Development, available at An International Investment Regime? Issues of Sustainability," available at: <https://www.iisd.org/pdf/investment.pdf>, accessed June 13, 2016.

Lawyer in Herbert Smith Freehills in London, Ben Blawn and Shawn Donnan, Indonesia to terminate more than 60 Bilateral Investment treaty, May 26, 2014 article can be found in <http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz3SVlfHD6e>

Muhammadiyah Duga 115 UU Bertentangan Dengan Konstitusi (Muhammadiyah Suspects 115 Contradict with the Constitution): <http://news.detik.com/berita/2888451/muhammadiyah-duga-115-uu-bertentangan-dengan-konstitusi>; Jihad Konstitusi Jihad Baru Muhammadiyah (Constitutional Jihad, a New Jihad for Muhammadiyah) available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11501#.WAPIO-ArKM8>. Accessed August 14, 2016

Mossalam, Mohammad . "Process Matters: South Africa Experience Exiting Its BITs," The Global Economic Governance Programme, University of Oxford, Working Paper January 2015, available at http://www.globaleconomicgovernance.org/sites/geg/files/GEG%20WP_97%20Process%20matters%20-%20South%20Africas%20experience%20exiting%20its%20BITs%20Mohammad%20Mossalam.pdf, accessed May 12, 2016.

NEPAD: drawing lessons from theories of foreign direct ..., <http://www.thefreelibrary.com/NEPAD%3a+drawing+lessons+from+theories+of+foreign+> (accessed November 20, 2015).

Neumayer, Eric. "Multilateral Agreement on Investment: Lessons for the WTO from the Failed OECD-Negotiations," *Wirtschaftspolitische Bloetter*, vol. 46, no. 6 (2010) 618-628. Available at SSRN: <https://ssrn.com/abstract=203348>, accessed December 5, 2016.

New Study Shows US Investment in Indonesia Tops \$65, <http://www.amcham.or.id/fe/4302-new-study-shows-us-investment-in-indonesia-tops-> .accessed November 16, 2015.

Nones, Jon A . PT Newmont's Richard Ness Cleared of All Charges in Indonesia, <http://www.resourceinvestor.com/2007/04/23/pt-newmonts-richard-ness-cleared-all-charges-indonesia>, accessed at: 7/12/2016

OECD Economic Surveys Indonesia, March 2015, 3, available at: <https://www.oecd.org/eco/surveys/Overview-Indonesia-2015.pdf>, accessed at August 1, 2016.

Peinhardt, Clint., and Allee, Todd. "Failure to Deliver: The Investment Effects of United States Preferential; Economic Agreements," *The World Economy* (2012), 771, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9701.2012.01440.x/epdf>. accessed March 10, 2016.

Peterson, Luke Eric. "In policy switch, Australia disavows need for investor-state arbitration provisions in trade and investment agreements," Apr 14, 2011, available at <http://www.iareporter.com/articles/20110414>, accessed February 1, 2015.

Porterfield, Matthew C. "A Distinction Without a Difference? The Interpretation of Fair and Equitable Treatment Under Customary International Law by Investment Tribunals," *Investment Treaty News*, March 22, 2013, available at: <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/>, accessed at August 15, 2016.

Rahnama, Mashaallah ., Samavati, Hedayah ., Dilts, David A., "An Analysis of Capital Flight from East Asian Emerging Economies," available at <https://www.usi.edu/media/3655130/Analysis-of-Capital-Flight.pdf>, accessed October 5, 2016

Reuters: Legal 'jihad' against private sector gathers pace in Indonesia, April 24, 2015 available at: <http://www.reuters.com/article/indonesia-investment-idUSL4N0XL2Z920150424>, accessed August 1, 2016.

Sauvant, Karl P. "The International Investment Law and Policy Regime: Challenges and Options." E15 Task Force on Investment Policy, International Centre for Trade and Sustainable Development, May 2015, p 2, available at <http://ccsi.columbia.edu/files/2015/08/KPS-E15-Overview-Paper-May-15-published.pdf>, accessed on June 1, 2015.

Sejarah Penjajahan Indonesia (Indonesian History of Colonialization) Indonesia – Investment, available at <http://www.indonesia-investments.com/culture/politics/colonial-history/item178>. Accessed June 2, 2015

Silaban, Mary. What Does the Future Hold for SKK Migas?, February 21, 2013, available at: <http://www.amcham.or.id/fe/3821-what-does-the-future-hold-for-skkmigas>, accessed June 10, 2016.

Sikarwar, Deepshikha. 'Government to Draft Model Treaty on MNCs' Mediation Rush,' *The Economic Times* (9 August 2013) available at http://articles.economictimes.indiatimes.com/2013-08-9/news/41240891_1_bipa-international-arbitration-white-industries-australia/. Accessed June 23, 2016.

South Africa Pushes Phase-Out Early Bilateral Investment Treaties at Least Two Separate Brushes with Investor-State Arbitration', *Investment Arbitration Reporter* (23 September 2012) http://www.iareporter.com/articles/20120924_1. accessed June 23, 2016/

Stephen Sherlock, Indonesia's New President: Continuity, Change and the Problems Ahead, 11 November 1999, Parliament of Australia, available at:

[http://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/Publications Archive/CIB/cib9900/2000CIB10](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib9900/2000CIB10), accessed February 20, 2015.

Syarifudin , Umar. “Ironi Negeri Seribu Blok Migas (the Irony of a State with Thousands Blocks Oil and Gas),” article published in Hizbut Tahi Indoensia website, Available at: <http://hizbut-tahrir.or.id/2016/06/13/ironi-negeri-seribu-blok-migas/>, accessed June 23, 2016

The case of Newmont Mining vs. Indonesia: Netherlands-Indonesia BIT rolls back implementation of new Indonesian Mining Law, 12 November 2014, available at: <https://www.tni.org/en/briefing/netherlands-indonesia-bit-rolls-back-implementation-new-indonesian-mining-law>, accessed November 16, 2015.

The United State Trade Representative, Indonesia, available at <https://ustr.gov/sites/default/files/2013%20NTE%20Indonesia%20Final.pdf>, accessed at August 16, 2015.

The World Bank’s Poverty Global Practice Team in the Jakarta Office, “Indonesia’s Rising Divide,” March 2016, available at: <http://pubdocs.worldbank.org/en/16261460705088179/Indonesias-Rising-Divide-English.pdf> accessed July 21, 2016. Using Gini coefficient data this article shows how income inequality is increasing from the time of economic recovery (post crises) from 2000 to 2014.

The World Bank Press Release, “Indonesia: Businesses To Work Together with Government towards Sustainable Development Goals,” June 9, 2015, available at: <http://www.worldbank.org/en/news/press-release/2015/06/09/businesses-to-work-together-with-government-towards-sustainable-development-goals>, accessed August 3, 2016.

Trade protectionism in Indonesia: Bad times and bad policy, <https://www.lowyinstitute.org/publications/trade-protectionism-indonesia-bad-tim> (accessed November 16, 2015).

UNCTAD, Bilateral Investment Treaty 1959-1999, United Nations 2000, 1-2. Available at <http://unctad.org/en/docs/poiteiid2.en.pdf>, accessed March 10, 2016.

UNCTAD World Investment Report Trans National Corporations, Extractive Industries and Development, United Nations 2007, p 93 available at http://unctad.org/en/Docs/wir2007_en.pdf, accessed at December 7, 2016.

UNCTAD, “South-South Investment Agreements Proliferating.” *IIA Monitor* no. 1 (2006) 1. Available at http://unctad.org/en/docs/webiteit20061_en.pdf, accessed March 10, 2016.

UNCTAD 2014 World Investment Report, available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf, accessed at April, 4, 2015.

UNCTAD, World Investment Report 2012: Towards a New Generation of Investment Policies, available at <http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf>, 139, accessed August 10, 2016.

United Nations Conference on Trade and Development (UNCTAD), IIA Issues Note No. 2: Reform of Investor

-State Dispute Settlement: In Search of a Roadmap, http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf, accessed at April 4, 2015.

United States of America Department of State, Indonesia Investment Climate Statement 2015, p 8, available at: <http://www.state.gov/documents/organization/241809.pdf>, accessed August 1, 2016.

Update on Indonesia BIT Reviews, February 24, 2015, available at: <http://igj.or.id/update-on-indonesia-bits-review/>, accessed at September 27, 2016.

Water Law Crisis Opens Floodgates - [amcham.or.id](http://www.amcham.or.id), <http://www.amcham.or.id/fe/4919-water-law-crisis-opens-floodgates> accessed November 1, 2016.

Website of Indonesia for Global Justice, <http://igj.or.id/profile/>, accessed September 27, 2016.

World Bank, World Development Indicators, 2000, available at <http://documents.worldbank.org/curated/en/462341468766204683/pdf/multi0page.pdf> accessed at August 20, 2015

COURT DECISION

Constitutional Court decision No 001-021-022/PUU-I/2003, available at <http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/Putusan022PUUI2003.pdf>, accessed February 19, 2015.

Constitutional Court decision No 21-22/PUU-V/2007, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_Putusan%2021-22%20PUU%20V%202007%20Baca%2025%20Maret%202008_ASLI2.pdf, accessed January 24, 2015.

Constitutional Court decision No 148/PUU-VII/2009, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_putusan149-puu-vii-2009%20_Edy%20Edy_%20telah%20baca_LWE.pdf, accessed January 24, 2015

Constitutional Court decision 3/PUU-VIII/2010 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_putusan149-puu-vii-2009%20_Edy%20Edy_%20telah%20baca_LWE.pdf accessed February 19, 2015.

The Constitutional Court decision No 33/PUU-IX/2011, available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_33%20PUU%202011_ASEANcharter_telah_baca_26Feb2013%20final.pdf, accessed at January 22, 2016.

Constitutional Court decision No 35/PUU-X/2012 available at: http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_3

5%20PUU%202012-Kehutanan-telah%20ucap%2016%20Mei%202013.pdf, accessed at January 22, 2016.

Constitutional Court decision No 36/PUU-X/2012, available at:
http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_36%20PUU%202012%20migas%20-%20telah%20baca%2013%20Nov%202012.pdf, accessed February 2, 2015.

Constitutional Court decision No 55/PUU-VIII/2012 , available at:
http://www.mahkamahkonstitusi.go.id/public/content/persidangan/risalah/risalah_sidang_Putusan%20No.93.PHPU.D-IX.2011,%20tgl.%2019%20Sept%202011.pdf, accessed at: February 20, 2015.

The Constitutional Court Decision No 85/PUU-XI/2013, available at:
http://www.mahkamahkonstitusi.go.id/public/content/persidangan/putusan/putusan_sidang_2131_85_PUU_2013-UU_SumberDayaAir-Dikabulkan-telahucap-18Feb2015-FINAL-%20wmActionWiz.pdf, accessed February 21, 2016.

ARBITRATION DECISION

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1

Cemex Asia Holdings Ltd v. Republic of Indonesia, ICSID Case No. ARB/04/3

Rafat Ali Rizvi v. Republic of Indonesia, ICSID Case No. ARB/11/13

Churchill Mining PLC v. Republic of Indonesia, ICSID Case No. ARB/12/14

Planet Mining v. Republic of Indonesia ICSID Case No. ARB/12/40.

Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15)

Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others, ICSID Case No. ARB/07/3