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JURISDICTIONAL ISSUES OF INTERNATIONAL INVESTMENT DISPUTE RESOLUTION IN ICSID ARBITRATION

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ABSTRACT

This article examines the jurisdictional of ICSID Arbitration and the dispute resolution mechanism of Churchill Mining plc and Planet Mining pty ltd against Indonesia at ICSID. This research is in the form of normative legal research conducted by collecting legal materials. Legal materials are collected using the literature study method by collecting legal materials and information in primary, secondary, and tertiary legal materials. According to Article 25 of ICSID Convention, dispute arising directly from an Investment, absolute requirement of jurisdiction is the existence of a legal dispute. The general secretariat serves as a screening and checks whether the request for arbitration is outside the center's jurisdiction because it is not related to investment. ICSID should no longer need to carry its competency test for too long because both parties have made a contract in determining the choice of forum at ICSID.

Keywords: Investment Dispute; ICSID Jurisdiction; BIT.

INTRODUCTION

Economic growth, decreased unemployment, and knowledge transfer are all foreign investment goals.[1] The Convention the Settlement of Investment Disputes Between States and Nationals of Other States provides for a piece of truly international arbitration machinery, functioning under the aegis of the International Centre of Settlement Investment Dispute (ICSID).",[2] The Indonesian government ratified the ICSID Convention through Law Number 5 of 1968 to anticipate dispute between national and foreign parties in the investment sector.[3]

In the fullness of time with the development of the economy, economic conflicts are also growing. This frequently occurs between developing and developed countries, especially in developing countries that take unilateral action against foreign investors in their territory. These

[1] Kadir, M.Y.A and Farsia. L. "The Inconsistency of ICSID Awards Over Argentina Cases", *Hasanuddin Law Review*,Vol. 6(1), 2007, Page. 1.

[2] Georges R Delaume Et Al, "ll Use Subject To JSTOR Terms and Conditions ICSID Arbitration and The Courts By Georges Disputes Between States Of Investment The ConventionThe Settlement And Nationals Of Other States", *Provides For A Truly Inter, 77:4,* 2015, Page. 245.

[3] Akset, Indonesia limits the jurisdiction of the ICSID, https://aksetlaw.com/news-event/newsflash/indonesia-limits-the-jurisdiction-of-the-icsid/ >, [Accessed on March 28 2021].

unilateral actions then lead to economic conflicts that can lead to economic disputes that can escalate political disputes or open disputes (war). The unilateral actions of developing countries can be in the form of nationalization of companies owned by foreign investors and expropriation of foreign companies. As a way of resolving legal disputes out of court, arbitration forums are not something new in the legal dispute resolution system in Indonesia.[4]

ICSID is the world's leading institution dedicated to resolving global speculation disputes. It has extensive experience in this industry, having managed the majority of the global venture cases. States have designated ICSID as a forum for financial backer State debate settlement in most global speculation agreements and numerous venture laws and agreements.[5] However, Indonesia has signed many Bilateral Investment Treaty (BIT) with partner countries to attract the attention of foreign investors. The dispute settlement clause is a crucial clause in BIT which provides legal certainty and protection for foreign investors. Many BITs made by Indonesia and partner countries appoint ICSID as a dispute resolution institution.[6]

ICSID is also an arbitration institution that resolves disputes between Churchill Mining and the Government of Indonesia. The dispute was resolved by ICSID due to a lawsuit filed related to the revocation of the mining permit owned by the Ridlatama Group in East Kalimantan with an area of approximately 35 thousand hectares by the East Kutai Regency Government. This was done because of a BPK audit that found five fake Mining Authorities issued in 2006-2019.[7]

The ICSID also issued a decision regarding its jurisdiction in examining the Churchill Mining lawsuit addressed to the Government of Indonesia on February 24, 2014. The ICSID decision stated that it has the authority to examine claims filed based on the interpretation of the Bilateral Investment Treaty (BIT) agreement made by Indonesian Government and the United Kingdom regarding the dispute resolution forum.

[4] *Ibid.*
[5] ICSID, About ICSID, <https://icsid.worldbank.org/about >, [Accessed on 28 March 2021].
[6] David Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?", *Asian Journal of International Law* Vol. 7, 2017, Pages. 124–151.
[7] Ide Ayu Gde Wulan Purnamasari, "Kekuatan Mengikat Keputusan ARbitrase ICSID dalam PenyelesaianSengketa Penanaman Modal", *Jurnal Hukum Kenotariatan*, Vol. 5, 2020, Page. 403.

RESEARCH METHODS

The normative juridical research technique was used in the preparation of this article (normative legal research method). The normative juridical research method entails conducting a legal study library through the examination of library resources or secondary data.[8] It uses library research to get data, citing and analyzing data related to an object of the study. The normative approach on this research mostly discusses article 25 (1) of ICSID Convention concerning the center's jurisdiction.

Normative legal research is kind of legal research that will use library research to get data, citing and analyzing data that are related to the object of the research. Based on the nature of this research, primary data and secondary data were analyzed using a qualitative approach. The author in this case determined the content or the meaning of the applicable law which is used as a reference in solving legal problems that are the object of research.

FINDINGS AND ANALYSIS

1. Jurisdictional provisions of ICSID Arbitration.

Article 25 of the 1965 Washington Convention governs the provisions of the ICSID arbitration body's jurisdiction. According to this article, at least three main requirements must be met by the parties to use the ICSID arbitration facility in resolving disputes given to them. First, there must be an agreement. The parties must first reach an agreement to submit the matter to the ICSID arbitration body. In this instance, the Convention requires a written agreement that identifies the use of this arbitration body and is included in an investment agreement language that specifies the submission of a dispute that may arise from the agreement.

However, the agreement to refer problems to this authority does not need to be specified in a separate instrument, according to Article 25 (1) of the convention. The host nation can propose to refer disputes resulting from the existence of an investment agreement with a foreign party to the ICSID arbitration body through its investment legislation, and the investor can agree by accepting the offer in writing. In addition to the contract formed by both parties, one of the parties, particularly the state party to the convention, may notify the ICSID arbitration body in advance of the power of this

[8] Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Prenada Media, 2005, Page. 3.

body in instances faced by that country under Article 25. After the convention has been approved, notification can be issued anytime.

Second, the jurisdiction of materiae. The ICSID arbitration body's jurisdiction is confined to legal disputes arising from an investment. The word "legal disagreement" distinguishes itself from "economic or political dispute." Furthermore, this arbitration body has jurisdiction over disputes regarding rights. On the other hand, disputes or conflicts of interest are not included.

Third, rational personae jurisdiction. The ICSID arbitration body can only hear disputes between countries and other foreign nationals whose countries are also Washington Convention signatories. Even though the disagreement brought to it is a legal dispute over an investment agreement, this arbitration body lacks the competence to judge disputes between the state and another person.

In addition to the contract made by the disputing parties, one of the parties, especially the participating countries of the convention, may notify the ICSID arbitration body beforehand about the authority of this body in cases faced by that country. Such notification can be made At the moment of ratification of the agreement, or at any point in the future, the arbitral tribunal's power over investment disputes may be invoked.

Although the ICSID Convention only consists of states, not individuals or companies, disputes between states and individuals or companies can resolve through ICSID provided there has been an agreement on the appointment. On the other hand, although this convention has been applied to a country, a government has no obligation to resolve investment disputes through ICSID Arbitration, except with written approval. Ratification alone on the ICSID Convention does not cause a convention party country to withdraw from the jurisdiction of the ICSID.

Meanwhile, Churchill Mining plc bases its claim against the Government of Indonesia against Churchill Mining plc's legal standing is based on the Bilateral Investment Treaty between the Governments of Indonesia and the United Kingdom. The following are governed by Article 7 paragraph (1) of the UK-Indonesia Bilateral Investment Treaty:

> "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 Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on March 18 1965 any dispute that may arise in connection with the investment."

Furthermore, Article 2 paragraph (1) BIT gives further specifications for jurisdictions, namely the investment in issue must:

> "Have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it". It does so in the following terms: This Agreement shall only apply to investments of 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."

Based on above, Indonesia sued by Churchill before the ICSID arbitration. Although ICSID arbitration dispute resolution organization is a flexible arbitrartion , the first step is to determine whether or not the case falls under the jurisdiction of the ICSID arbitration body. After being declared to be included in the jurisdiction of ICSID, the dispute is registered by the Secretary-General and forms an arbitration panel consisting of one or several arbitrators with an odd number according to the agreement of the parties (usually 3 people). ICSID's jurisdiction here refers to the limits of application of the Washington Convention, the convention that established ICSID arbitration for this body to function.

However, it should be noted that, even though the Indonesian Goverment has ratified the ICSID convention, it does not automatically mean that every dispute between foreign investors and the Indonesian Government must be fixed by the ICSID Arbitration Board. According to the provisions of Article 25 (3) ICSID Convention, it is stated that in a matter submitted to arbitration, it is still necessary to have approval from the recipient of the country being sued, namely the government of the recipient country. With this agreement, ICSID has made a module on the "arbitration clause" carried out by the parties, in this case foreign investors and the Indonesian side, by the Investment Coordinating Board (BKPM).

Even though the host country and foreign investors have agreed to settle their disputes through an international arbitration body, there are still some things that prevent them from using the international arbitration body, for example, in the case that the dispute resolution process is the jurisdiction of the court of the country concerned. This is referred to as the exhaustion of local remedies by arbitration law specialists.

Based on Article 2 of Law No. 5 of 1968 concerning the Settlement of Disputes between the State and Foreign Citizens Regarding Investment: "The government has the authority to give approval that a dispute regarding investment between the Republic of Indonesia and a foreign citizen

is decided according to the said Convention and to represent the Republic of Indonesia in the dispute with the right ofsubstitution."

According to Article 25 paragraphs (1) and 36 paragraphs (2) of the Convention, any dispute must first obtain the approval of the two disputing parties, before it can be submitted before the Arbitration Court (Arbitral Tribunal). With this article, it is confirmed that the Government has the authority to give the said approval and to represent the Indonesian government where, if necessary, contest the right to substitution.

Based on the regulations, the jurisdiction of the ICSID Arbitration Board is determined by three main elements, namely: "a. the dispute must be a dispute arising directly from the investment; b. the disputing party must be a country that has become a member of ICSID and a citizen; c. there must be a written statement, agreement from both parties to the dispute, regarding the submission of dispute resolution to ICSID."

The problem arose when Indonesia in its response to Churchill's lawsuit denied that it had given written consent to take the case to ICSID. Indonesia's refusal is very crucial for the consideration of the ICSID Arbitration Board in determining its jurisdiction to decide this case. In fact, the Indonesian government does not recognize the words "shall assent" which is literally interpreted as an obligation to agree to a dispute resolution through ICSID Arbitration, while Churchill firmly holds the term as a form of Indonesia's agreement to submit settlement of disputes arising in investment before ICSID.

In customary international law rules and also adopted by Indonesia, to bring a dispute resolution before arbitration, the parties are obliged to make an arbitration agreement. An agreement in the form of an arbitration clause included in a written agreement signed by the parties before the occurrenceof a dispute is called arbitration agreement.

As a result, there are two types of arbitration clauses. First, "pactum de compromittendo", an arbitration clause created by the parties before a dispute occurs, which is contained in the main agreement or separate agreement. Second, "act of compromise", an arbitration clause made after a dispute in connection with the implementation of the main agreement, which must be made in written form.

The explanation of Law no. 5 of 1968 stated that although the convention does not apply to a state, There is no obligation to resolve any issues in accordance with the convention. In practice, this is done with written consent. The agreement is binding and cannot be withdrawn. The written agreement can be permissible by law from a participating country with a citizen of another participant. Based on this argument, it can be concluded that the two-stage system proposed by Indonesia is not necessary because the ratification of the BIT with an arbitration clause in it has clearly shown the Indonesia' s consent to resolve the dispute before ICSID. In addition, the BIT Indonesia – UK is in the form of hardcopy or writing so its validity does not need to bequestioned anymore.

2. The Mechanism of The Settlement of Churchill Mining And Planet Mining Pty Ltd, FormerlyV Republic of Indonesia (ICSID Case No. ARB/12/14

The lawsuit was initiated by the Plaintiffs who accused the Government of Indonesia - in this case, the Regent of East Kutai - of violating BIT Republic of Indonesia - the United Kingdom (RI – UK) and Republik Indonesia – Australia (RI – Australia). The violation referred to is conducting indirect expropriation and violating the principle of fair and equitable treatment through the revocation of the Mining Authorization / Exploitation Mining Business Permit (KP/IUP Exploitation) of the Plaintiffs' subsidiaries (four Ridlatama Group companies) covering an area of approximately 350 square km, in Busang District by the Regent of East Kutai on May 4, 2010.

The Plaintiffs alleged that the infringement had resulted in damages to their investment in Indonesia, and they filed a USD 1.3 billion claim (approximately IDR 18 Trillion). Against this lawsuit, on December 6, 2016, the ICSID Tribunal consisting of Professor Gabrielle Kaufmann- Kohler, Michael Hwang SC, and Professor Albert Jan van den Berg rejected all claims made by the Plaintiffs against the Republic of Indonesia. The ICSID Tribunal also granted the claim of the Government of Indonesia for an award on costs of 9.4 million USD.

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The ICSID Tribunal in the evidentiary trial also received arguments and evidence, including a forensic expert statement submitted by the Government of Indonesia that could prove the existence of a criminal act of forgery, most likely using an autopen machine. The Plaintiffs filed 34 fraudulent documents in the trial, including mining permits for the general survey and exploration stages - which appear to be official/original documents - issued by various government institutions in Indonesia, both central and regional.

Furthermore, the ICSID Tribunal also supports the Government of Indonesia's contention that investments that contravene the law are not entitled to international legal protection. The ICSID Tribunal also determined that the Plaintiffs failed to meet their duty to screen their local partners and adequately manage the licensing procedure (lack of diligence). The ICSID Tribunal finally stated that the Plaintiffs' claims were denied based on the facts and factors.

As with their position, the Plaintiffs filed an annulment of the award on March 31, 2017, under Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). The basic arguments of the lawsuit or the arguments of the lawsuit submitted by the Plaintiffs are as follows: "1. Whereas the ICSID Tribunal is considered to have overstepped its authority (ultra vires); 2. That there has been a serious deviation from the basic rules of procedure; 3. That the decision has failed to state the reasons on which it is based."

The Plaintiffs sought that the ICSID Tribunal's judgement be cancelled, as well as a temporary suspension of the implementation of the ICSID Tribunal's decision, which the Government of Indonesia would carry out. In response to this, the Government of Indonesia (the Defendant) requires the existence of a proper, full and executable guarantee, and rejects the offer of guarantee from the Plaintiffs, because of the form and value of the guarantee which is unreasonable.

The Indonesian Government then requested that the ICSID Committee carefully examine the form and value of the guarantees offered, including by submitting an Indonesian agrarian law expert as an expert witness, and that the ICSID Committee cancel the temporary suspension of the implementation of the ICSID Tribunal's decision. Finally, the ICSID

Committee on March 18, 2019 decided and confirmed Indonesia's victory through a final and binding decision (Decision onAnnulment).

Based on the ICSID Committee Arbitration Award, the benefits for Indonesia include:[9] "1. Indonesia was spared from claims amounting to USD 1.3 billion (approximately IDR 18 trillion submitted by Churchill Mining and Planet Mining); 2. Indonesia received a court fee reimbursement of USD 9.4 million, the largest amount ever decided by the ICSID Tribunal; 3. This is the first victory achieved by the Government of Indonesia at the ICSID Forum in Washington D.C. United States of America; 4. Evidence that the Indonesian State Administrative Court is a transparent and fair judiciary, because previously the Plaintiffs had taken legal action through the State Administrative Court to the Supreme Court's Cassation decision; 5. Evidence that the Government of Indonesia provides a balanced and fair treatment of foreign investors; 6. Evidence that the Government of Indonesia has "sovereignty" in managing the mining sector."

The International Arbitration Award or the ICSID Tribunal with three Arbitrators as the ICSID Committee in Washington DC, United States of America has rejected the Plaintiffs' claims, namely two mining companies from the UK Churchill Mining Plc and Australia Planet Mining Pty Ltd as the Plaintiffs. The ICSID Committee, which examined and decided on the lawsuit, also granted the request of the State/Government of Indonesian Goverment as the Defendant through the International Arbitration forum session on the agenda of reading the decision of the ICSID Committee in the case of reimbursement of litigation costs (award on costs) amounting to 9.4 Million USD.

CONCLUSION

The formation of the 1965 Washington Convention resulted from the world economic situation when several developing countries took unilateral actions against foreign investors in their territories. Based on ICSID jurisdiction, only disputes arising from investment disputes can be resolved through ICSID arbitration. If both parties have written consent, then ICSID can gain jurisdiction over the dispute to be determined. If both parties have expressed their agreement, neither party can withdraw from the ICSID dispute resolution unilaterally.

[9] SETKAB, Indonesia Wins Legal Dispute at ICSID International Arbitration ,<https://setkab.go.id/en/indonesia-wins-legal-dispute-at-icsid-international-arbitration/>, [Accessed on 23 June 2021].

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The mechanism dispute resolution of Churchill Mining Plc Ltd v Republic of Indonesia analysis cases was executed through arbitration under the International Center for Settlement of Investment Dispute (ICSID) and carried out with the provisions stipulated in the ICSID Conventions, Regulation and Rules. The handling of the Churchill case dispute by ICSID through several stages, beginning with the submission of a request, screening requests and registration, number of arbitrators and method of appointment, election and appointment of tribunal members, the constitution of the court, first session, and other procedures (by case of the Churchill Mining only temporary measures used), written procedures, evidence, oral procedures, deliberation, to awards. This procedure revealed that PT Ridlatama had committed fraud and falsified documents, which later became the root cause of the Churchill case. Thus, the agreement between the parties is considered an infringement andChurchill Mining cannot obtain protection for its investment.

Arbitration ICSID is an arbitration body that is specialized in resolving disputes concerning foreign investment or foreign investment. The arrangement for implementing dispute resolution through ICSID arbitration is returned to each party through an agreement or contract. Indonesia as a member has ratified the ICSID convention in the legislation. For this reason, the existence of the ICSID convention is expected to be a concern for the Indonesian Government in establishing agreements or contracts with foreign investment parties or investors to provide clauses or legal options through ICSID arbitration in resolving disputes or disputes that arise later.

The dispute between *Churchill and Planet Mining Plc, ltd v. The Republic of Indonesia* in the case of mining permits in East Kalimantan should be a valuable lesson for the Indonesian Government to be more careful in implementing regulations regarding investment, especially foreign investment. Local governments are also expected to be more cautious in monitoring and granting development business permits (IUP) to investors before investing in an environment, including the validity and authenticity of licensing documents. So that parties do not look for loopholes to violateexisting regulations.

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