Trend Gugatan Investor Tambang Asing Terhadap Indonesia

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Investor-State Dispute Settlement

75% of the ISDS is in the Mining Sector

ICSID:
- Newmont (Netherland) vs Indonesia
- Churchill Mining Plc. (UK) vs Indonesia
- Planet Mining (UK) vs Indonesia
- Rafat Ali Rizvi (UK) vs Indonesia
- Cemex Asia Ltd (Mexico) vs Indonesia
- Amco Asia Corporation (USA) vs Indonesia

UNCITRAL:
- Karaha Bodas Company (USA) vs Indonesia

Indonesia for Global Justice - 2014

Get ready to pay billions in law suits

FIPA
Investment Protection Treaties

Bilateral Investment Treaties (BITs)
Perjanjian dua negara antara Indonesia dengan Inggris, Belanda, Belgia, Singapura, Jerman, dll

Multilateral Investment Agreement
TRIMS, GATS, ICSID Convention, MIGA Convention, dll

Comprehensive Free Trade Agreement
ACIA, ASEAN-China FTA, ASEAN-Japan FTA, ASEAN-EU FTA, ASEAN-NZ FTA, dll

Indonesia:
- 64 BIT
- 15 Comprehensive FTA
- 24 MIA

Indonesia for Global Justice
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Basis of Consent invoked to establish ICSID Jurisdiction in New Cases Registered in FY2015 under the ICSID Convention and Additional Facility Rules:

- Bilateral Investment Treaty (BIT)
- Dominican Republic–United States–Central America Free Trade Agreement (DR-CAFTA)
- Investment Contract between the Investor and the Host-State
- Investment Law of the Host-State
- North American Free Trade Agreement (NAFTA)
- Energy Charter Treaty (ECT)
- Canada-Peru Free Trade Agreement
- Central America-Panama Free Trade Agreement

![chart showing the distribution of cases](chart.png)

BIT: 50

Pengaturan ISDS Di Indonesia

BIT: 64

MIA: 24

FTA: 15

Dasar Gugatan ISDS

@IGJ2015
Standard of Investment Protections

**Standard of Protection**
- Fair and equitable treatment (prinsip non-diskriminasi),
- Full protection and security
- Expropriation (Pengambilalihan dan Nasionalisasi)
- Transfer of funds and Tax Incetives
- Investment Promotion dan transparansi
- Umbrella Clause
- **Investor-State Dispute Settlement (Mekanisme penyelesaian sengketa )**

**BITs**
- **First**, The end of the colonial era
- **Secondly**, there was a demand to take over the business in form of nationalization as well as claims for compensation that suffered during the war.

The first BITs: German-Pakistan (1959)
Dasar Gugatan Churcill Mining Plt.

- On 13 March 2013, Churchill and Planet filed their Memorial on Jurisdiction and the Merits, enclosing 348 exhibits and 69 legal exhibits. In the Request for Relief, Churchill requested the following relief: (i) a declaration that Indonesia had violated Article 5 of the UK-Indonesia BIT; (ii) a declaration that Indonesia had violated Article 3 of the UK-Indonesia BIT”.

**Pasal 3: Fair & Equitable Treatment**

**Pasal 5: Larangan Nasionalisasi**

(ICSID doc: Churchill Mining Plc (the claimant) v. Republic of Indonesia (the respondent) ICSID Case No. ARB/12/14 and 12/40 Page 25)
Melanggengkan Kolonialisme

Negara-negara inilah yang memiliki ikatan sejarah cukup panjang terkait dengan dominasi perkebunan dan pertambangan di Indonesia sejak jaman kolonialisme.

BITs Indonesia di Era 1967-1970an

- 1976 Inggris
- 1974 Swiss
- 1973 Perancis
- 1970 Belgia
- 1969 Norway
- 1968 Jerman & Belanda
ISDS VS Kedaulatan Negara???

- **Mekanisme ISDS** → Gugatan oleh investor terhadap negara atas penerapan peraturan perundang-undangan yang ‘dianggap tidak melindungi kepentingan investor’, di lembaga arbitrase internasional bernama ICSID (International Center Settlement for Investment Disputes).

- **Standar perlindungan investasi**: Aturan mengenai fair and equitable treatment (prinsip non-diskriminasi); Full protection and security; Larangan Nasionalisasi (Expropriation); Kebebasan Transfer of funds; investment Promotion dan transparansi; Mekanisme penyelesaian sengketa (Investor-State Dispute Settlement/ISDS)

- **Dampaknya** → Hilangnya Policy Space Negara & Hak Negara untuk dapat mengatur sesuai dengan kepentingan nasional dan perlindungan terhadap hak-hak rakyat yang dilindungi dalam Konstitusi.
FAKTA ISDS

dari 568 Kasus, 70% nya di sektor tambang dan migas

70%

Kasus ISDS Indonesia, ada di sektor tambang

50%

Yang digugat Adalah Negara Berkembang

60%

DISTRIBUTION OF NEW CASES REGISTERED IN FY2015 UNDER THE ICSID CONVENTION AND ADDITIONAL FACILITY RULES, BY ECONOMIC SECTOR

- Information & Communication
- Agriculture, Fishing & Forestry
- Oil, Gas & Mining
- Electric Power & Other Energy
- Water, Sanitation & Flood Protection
- Construction
- Tourism
- Other Industry
- Transportation
- Services & Trade
- Finance

27%
31%
20%
11%
12%
5%
2%
<table>
<thead>
<tr>
<th>Policy being challenged</th>
<th>Case</th>
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<tbody>
<tr>
<td>Health</td>
<td>• Philip Morris vs Uruguay</td>
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<td></td>
<td>• Philip Morris vs Australia</td>
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<td></td>
<td>• Eli Lilly vs Canada</td>
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<td>Public services: delivery of water</td>
<td>• Rechtel vs Bolivia</td>
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<td>• Suez vs Argentina</td>
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<td>• Vivendi vs Argentina</td>
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<td>• Biwater Gauff v Tanzania</td>
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<td>Rans on mining (due to environmental regulations)</td>
<td>• Pacific Rim v El Salvador</td>
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<td>• Renco vs Peru</td>
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<td>• Churchill Mining vs. Indonesia</td>
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<td>• Infinito Gold vs. Costa Rica</td>
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<td>Regulations aiming to improve labour rights (minimum wage,</td>
<td>• Veolia vs Egypt</td>
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<td>minimum hiring of locals)</td>
<td>• Astaldi vs Honduras</td>
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<td>• Golden East vs Mongolia</td>
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<td>Regulations regarding disposal of hazardous waste</td>
<td>• Metalclad vs Mexico</td>
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<td>• Tecmed vs Mexico</td>
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<td>• Baird v USA</td>
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<td>Regulations to fight apartheid</td>
<td>• Piero Foresti vs South Africa</td>
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<td>Environmental protection</td>
<td>• Lone Pine Resources vs. Canada</td>
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<td>• Vattenfall v Germany</td>
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<td>• Methanex v. United States</td>
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<td>• Parkerings v. Lithuania</td>
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<td>• Glamis v. United States</td>
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<td>Austerity measures (cuts to subsidies)</td>
<td>• 15 PV investors vs Spain</td>
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<td>• Charanne and Construction Investments vs Spain</td>
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<td>• Isolux Infrastructure Netherlands vs Spain</td>
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<td>• Abengoa / CSP Equity Investment vs Spain</td>
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<td>• Rtreef vs Spain</td>
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<td>• Antin vs Spain</td>
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<td>• Eiser Infrastructure vs Spain</td>
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<td>Debt restructuring as a result of financial crisis</td>
<td>• Poštová bank and Istrokapital vs Greece</td>
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<td>• Marfin Investment Group (MIG) vs Cyprus</td>
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<td>• Abaclat vs Argentina</td>
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**Figure 4. Most frequent home States (total as of end 2014)**

- United States
- Netherlands
- United Kingdom
- Germany
- France
- Canada
- Italy
- Spain
- Switzerland
- Turkey
- Belgium
- Austria

**Source:** UNCTAD, ISDS database.
**Note:** Preliminary data for 2014.
Indonesian Investment Board (BKPM) will renew bilateral investment agreements with all countries.

In June 2014, Indonesia Government announced the termination of the BIT between Indonesia and the Netherlands.

Mahendra Siregar: "we are reviewing BIT with all countries, to renew all the agreement"
Empat Alasan RI Mereview BITs

- **Pertama**, tidak ada keseimbangan antara perlindungan investor dengan kedaulatan nasional;
- **Kedua**, tidak ada policy space
- **Ketiga**, penerapan mekanisme ISDS
- **Keempat**, Override National Legislation

(Abdulkadir Jailani, “Rethinking BITs”, 2016)
Substantive Limitations

1. Pembatasan Definisi Investasi
2. Penyempitan lingkup National Treatment
   (Post-Establishment & Menerapkan Pengecualian untuk UMKM, sektor SDA, dan sektor terkait dengan keamanan nasional)
3. Penghapusan klausul FET
4. Pembatasan terhadap MFN (Pre-establishment, ISDS, Existing and future IIAs, FTAs dll,
5. Indirect Expropriation
Strategi Pemerintah Indonesia

Abdulkadir Jailani (2015):

“Indonesia considers limiting the scope of application of the ISDS provision. The limitation would be substantive and procedural in nature”

**Procedural Limitations:**

- introducing separate consent requirements
- Special Agreement
- Domestic courts & Alternative Dispute Resolution