

# Trend Gugatan Investor Tambang Asing Terhadap Indonesia

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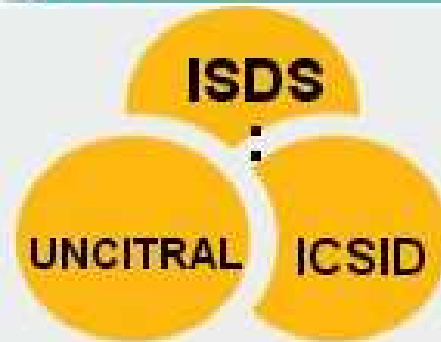


**Indonesia for Global Justice**

# Investor-State Dispute Settlement

**ISDS--> Indonesia Vs TNCs**

**75% of the ISDS is in Mining Sector**



Indonesia for Global Justice - 2014

## ICSID:

Newmont (Netherland) Vs Indonesia  
Churcill 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 Coompany (USA) Vs Indonesia



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# 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

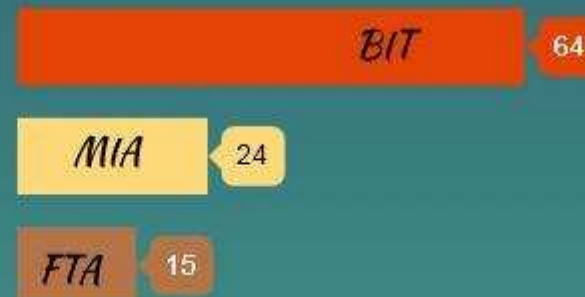


# ISDS DI INDONESIA

"Korporasi asing VS Negara"



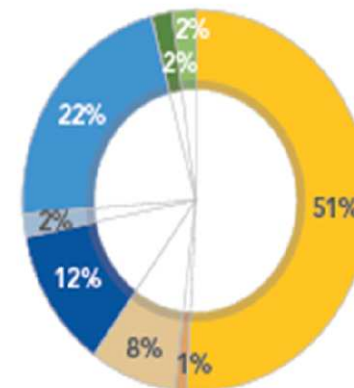
## Pengaturan ISDS Di Indonesia



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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



# 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 Incentives
- ▶ 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 Churchill 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***

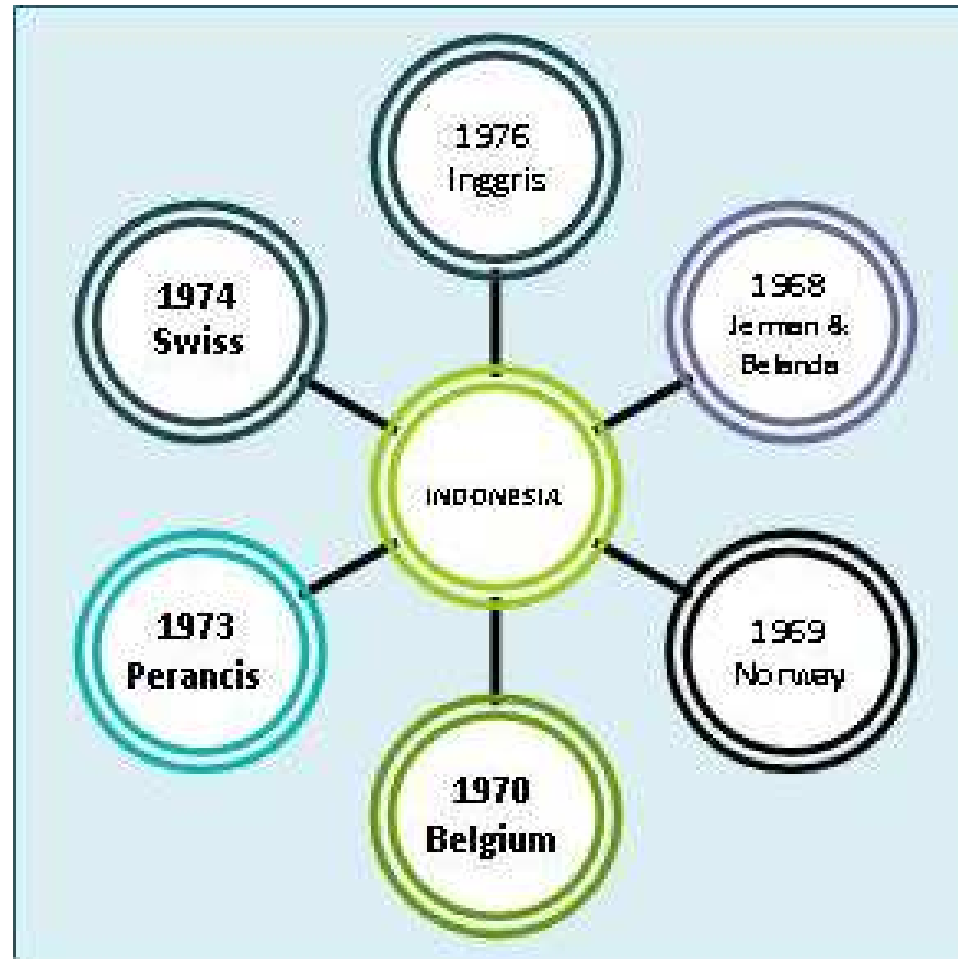
(ICSID doc: Churchil Mining Plc (the claimant) V. Republic of Indonesia (the respondent) ICSID Case No. ARB/12/14 and 12/40 Page 25)



# 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



# 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*

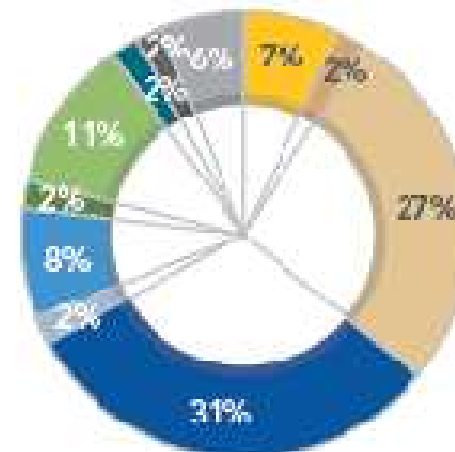
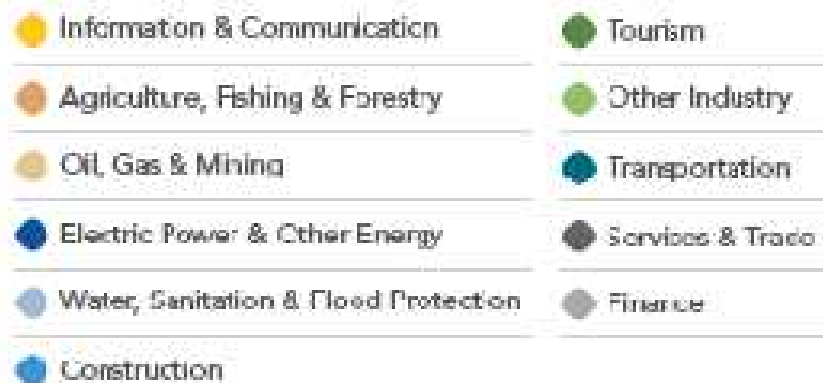
**50%**

*Yang digugat  
Adalah Negara  
Berkembang*

**60%**

Sumber: UNCTAD 2013  
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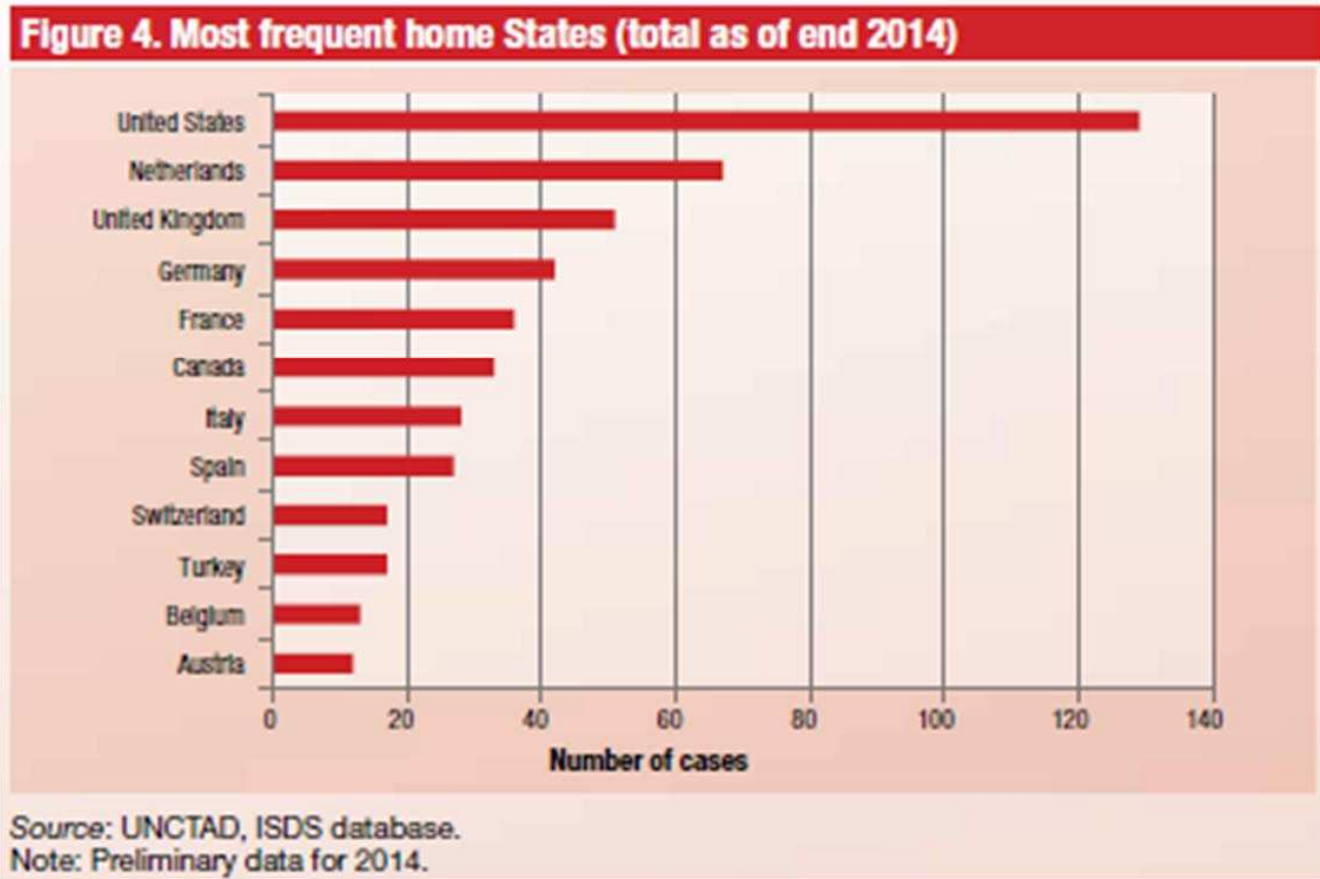
## DISTRIBUTION OF NEW CASES REGISTERED IN FY2015 UNDER THE ICSID CONVENTION AND ADDITIONAL FACILITY RULES, BY ECONOMIC SECTOR



Policy being challenged	Case
Health	<ul style="list-style-type: none"> <li>• Philip Morris vs Uruguay</li> <li>• Philip Morris vs Australia</li> <li>• Eli Lilly vs Canada</li> </ul>
Public services: delivery of water	<ul style="list-style-type: none"> <li>• Bechtel vs Bolivia</li> <li>• Suez vs Argentina</li> <li>• Vivendi vs Argentina</li> <li>• Biwater Gauff v Tanzania</li> </ul>
Bans on mining (due to environmental regulations)	<ul style="list-style-type: none"> <li>• Pacific Rim v El Salvador<sup>3</sup></li> <li>• Renco vs Peru<sup>4</sup></li> <li>• Churchill Mining vs. Indonesia</li> <li>• Infinito Gold vs. Costa Rica</li> </ul>
Regulations aiming to improve labour rights (minimum wage, minimum hiring of locals)	<ul style="list-style-type: none"> <li>• Veolia vs Egypt</li> <li>• Astaldi vs Honduras</li> <li>• Golden East vs Mongolia</li> </ul>
Regulations regarding disposal of hazardous waste	<ul style="list-style-type: none"> <li>• Metalclad vs Mexico</li> <li>• Tecmed vs Mexico</li> <li>• Baird v USA</li> </ul>
Regulations to fight apartheid	<ul style="list-style-type: none"> <li>• Piero Foresti vs South Africa</li> </ul>
Environmental protection	<ul style="list-style-type: none"> <li>• Lone Pine Resources vs. Canada</li> <li>• Vattenfall v Germany</li> <li>• Methanex v. United States</li> <li>• Parkerings v. Lithuania</li> <li>• Glamis v. United States</li> </ul>
Austerity measures (cuts to subsidies)	<ul style="list-style-type: none"> <li>• 15 PV investors vs Spain</li> <li>• Charanne and Construction Investments vs Spain</li> <li>• Isolux Infrastructure Netherlands vs Spain</li> <li>• Abengoa / CSP Equity Investment vs Spain</li> <li>• Rreef vs Spain</li> <li>• Antin vs Spain</li> <li>• Eiser Infrastructure vs Spain</li> </ul>
Debt restructuring as a result of financial crisis	<ul style="list-style-type: none"> <li>• Poštová bank and Istrokapital vs Greece</li> <li>• Marfin Investment Group (MIG) vs Cyprus</li> <li>• Abaclat vs Argentina</li> </ul>



- Laporan UNCTAD 2013-2015, Investor asing asal Amerika Serikat dan Canada adalah negara yang paling aktif menggunakan ISDS, yang nilai gugatannya berkisar US\$ 8 juta hingga US\$ 2,5 Miliar.



# Review & Terminasi BITs Indonesia



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

Indonesian Investment Board (BKPM) will renew bilateral investment agreements with all countries.



Mahendra Siregar: "we are reviewing BIT with all countries, to renew all the agreement"

Hello



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# 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

