

INDONESIA'S EXPERIENCE: IIA REVIEW

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RATIONALES

- The increased exposure to investor claims in international arbitration (UNCTAD: 58 cases in 2012);
- Overriding national legislations and domestic court;
- Tendency of frivolous claims;
- Provisions of the existing IIA's are outdated.

HOW IS THE REVIEW CONDUCTED?

- Discontinuation of IIA's (18 of 64 BIT's so far)
- Reassessing the existing provisions
- Developing a new model of IIA
- Involving academicians, international lawyers, IISD and UNCTAD etc

CHALLENGES OF THE REVIEW

- Discontinuation is done in accordance with the time period of the application of the BITs → Some BITs will take a considerably long time before they can be discontinued (entered into force in the last few years **OR** extended before the review started) ;
- Discontinuation of the “application of an investment chapter” under FTA can only be done through termination the whole FTA (partial withdrawal is not possible)

CHALLENGES OF THE REVIEW

- Some ongoing IIA negotiations under regional FTA's may prejudice the outcome of the review process → stopping the process of the negotiation is difficult, owing to its political instead of legal nature.
- Review process should not scare off investors
- Problem of survival clause → may potentially delay the renegotiation process → its application may be stopped if there is agreement to disapply

CHALLENGES OF THE REVIEW

- How to strike a balance between the preservation of the State interest and policy space with the need to attract foreign investment.
- Advantages and disadvantages of the development of a treaty model

SUBSTANTIVE ISSUES

- Definition of Investment
- National Treatment (NT)
- Most-Favored Nations (MFN)
- Fair and Equitable Treatment (FET)
- (Indirect) Expropriation
- Investor-State Dispute Settlement (ISDS)

DEFINITION OF INVESTMENT

- Current practices → Asset-based approach followed by an illustrative but non-exhaustive list → it may include portfolio investment
- Asset-based approach vs Enterprise-based approach
- Narrow and restrictive definition → targeted particular investment
- Exclusion of portfolio investment
- Contribution to development

NATIONAL TREATMENT (NT)

- It precludes pre-establishment
- Exclusion of special treatment in favour of domestic small/medium enterprises
- Exclusion of measures affecting natural resources
- Exclusion of certain sectors

MOST FAVORED NATIONS (MFN)

- Exclusion of pre-establishment measures
- Exclusion of any existing/future regional economic integration
- Exclusion of existing future investment treaties
- Any preferential treatment granted by the government of Indonesia to any least-developed country
- Exclusion of ISDS

FET

- High degree of unpredictability → exclusive FET clause
- Alternative clause on standard of treatment → shifting the focus from investor rights to denial of justice
- Assurances regarding the fact that investors shall not be subjected to denial of justice in criminal, civil or administrative proceedings → includes also an assurance of police protection from any physical harm

INDIRECT EXPROPRIATION

- Exclusion of indirect expropriation → any measures that have effect or consequences equivalent to expropriation are excluded.
- On the other hand, we maintain the clause of direct expropriation with a high-threshold requirement including public interest, due process of law and appropriate compensation.

ISDS

- ISDS is one of the greatest concern, if not the greatest, in regard to the review process.
- An investor may submit a case to an international arbitration if the Host Country provides specific and separate consent letter.
- If there is no consent from the Host State → dispute shall be settled in domestic court.