INDONESIA’S EXPERIENCE: IIA REVIEW

ABDULKADIR JAILANI
MINISTRY OF FOREIGN AFFAIRS
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• Provisions of the existing IIA’s are outdated.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.