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"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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# Study of Indonesia's participation in ICSID

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## ABSTRACT

Indonesia has ratified the International Convention Centre For Settlement Of Investment Disputes (ICSID) with the enactment of Law No. 5 of 1968 concerning settlement of disputes between Countries with foreign Citizen on Investment on June 29, 1968. The purpose of the ratification of the ICSID Convention is to encourage and foster foreign investment in Indonesia as well as provide legal certainty to the settlement of disputes between governments and foreign investors. Until now there are some cases in which the Indonesian government in dispute with foreign investors include Amco, Kaltim Prima Coal. (KPC), Asia Camex Holding and Churchill Mining Plc. After decades of economic growth in Indonesia into the top 5 of the world economy as well as the Law No. 30 of 1999 on Arbitration, becomes interesting when reviewing and analyzing the participation of Indonesia in the ICSID, so attractive when assessing why Indonesia participated in the ICSID Convention? How profits were and damages Indonesia joined the ICSID? And how the government should adopt the attitude of Indonesia as a member of the ICSID fore? The method used is a normative juridical by studying the principles of the law derived from the materials library. Specifications research is descriptive analytical. The data used are secondary data consists of primary legal materials, secondary law and tertiary legal materials. The data was then analyzed qualitatively and the results outlined in report form.

*Keywords: Analysis, Indonesia, ICSID.*

## A. Introduction

Basically every investor makes an investment in a country wants no future disputes between investors and the government and society, so that the investment objective of obtaining maximum profit can be achieved. However inactivity investment is possible there are disputes between foreign investors with both central government and the government are revoke licenses business before the time. Therefore any community or group in need of specific ways to resolve disputes and enforce the norm-norm that essential. (Lawrence M Friedman, 2015 : 189)

Emil Durkheim (1858-1917) one of the leaders of modern social science who was born in France very the existence of an order in society through solidarity or integration. According to him socialism can make morality in a society becomes high but Durkheim disagreed when the context of socialism is associated with violence. Given the high

degree of morality that the ideals Durkheim to establish a society which is peaceful, orderly, and free of conflict will be achieved. (Yesmil Anwar and Adang, 2013 : 132) Paragraph 32 (1) and paragraph (4) of Law No. 25 Year 2007 on Investment set procedures for resolving disputes arising from the investment the government of and foreign investment can be made by consensus and the if settlement agreement is reached, it can be resolved through arbitration international agreed by the parties. Lack of regulation concerning the procedures for the settlement of disputes through consensus and arbitration international is expected to provide legal certainty to the parties as well as efforts to resolve the dispute between Indonesian government and foreign investors.

Indonesia has ratified convention International Centre For Settlement Of Investment Disputes (ICSID) with the enactment of Law No. 5 of 1968 on the Settlement of Disputes Between Countries With Foreign Citizen On Investment on June 29, 1968. Ratification of the ICSID Convention is to encourage and foster investment foreign in Indonesia as well as providing legal certainty for settlement of disputes between governments and foreign investors to maintain order. In words, other the order is a condition for the continuity of the relationships between fellow members socialism. (Sadjipto Rahardjo, 1982 : 28) Today there are several cases where Indonesia dispute with foreign investors include Amco, Kaltim Prima Coal. (KPC), Asia Camex Holding and Churchill Mining Plc. After of decades economic growth in Indonesia into the top 5 of the world economy as well as the Law No. 30 of 1999 on Arbitration, becomes interesting when reviewing and analyzing Indonesia's participation in ICSID.

## **B. Problem Formulation**

From this background, the author tries to formulate the problem as follows:

1. Why is the Government of Indonesia participated in the ICSID Convention?
2. What advantages and disadvantages of the Indonesian government to join the ICSID?
3. What is the attitude that should be taken by the government of Indonesia as a member of future the ICSID?

## **C. Indonesia's participation in ICSID Convention**

Development of a country's economy can not be done simply rely on the government's role as development requires capital. huge Development requires the

investor / investors both domestically and abroad in order to achieve national economic growth. According to Auguste Comte science is basically nothing more than an extension of a very simple method of common sense on all the facts which are subject to the human mind. By the way of thinking that eventually will give birth to the theory of positivism that. (Tesimal Anwar and Adang, 2013 : 122) Indonesia is the country that have long been attractive domestic investors and investor foreign by referring to Law No. 1 of 1967 concerning Investment Foreign Law No. 6 of 1968 on Investment Domestic capital. In order to accelerate national economic development as well as the face of a changing global economy and the incompatibility with the need for accelerating the development of the economy and development in the field of investment, the government on 26 April 2007 Law Number 25 Year 2007 regarding Investment capital and declare Law No. 1 of 1967 on Investment Foreign Investment and Law No. 6 of 1968 concerning Domestic Investment null and void. Kelsen states that the law is the primary norm which provides sanction. (Muchamad Ali Safaat, 2016 : 37) Therefore the consequences of the ratification of the ICSID Indonesia obliged to settle the dispute between the government and foreign citizens through ICSID.

In an effort to encourage, foster, and provide legal certainty to foreign investment in Indonesia need a rule to facilitate investment activities. Efforts arrangements regarding settlement of the disputes between governments and foreign capital investment done by ratifying the ICSID Convention by Act No. 5 of 1968 on the Settlement of Disputes Between Countries With Foreign Nationals Regarding Investment. The government measures also followed by the issuance of Presidential Decree No. 34 of 1981 and the Supreme Court Regulation. With the law No. 5 In 1968, the resolution process dispute involving the government and foreign investors shall be subject to *the provisions of the International Centre For Settlement Of Investment Disputes (ICSID)*. In the settlement of disputes referred to ICSID must be approved by both parties. The Convention itself means an agreement formal with multilateral and does not deal with policy high-level (high policy). (Jawahir Thantowi, 2016 : 82) In conducting the ratification of a convention a state must subdue ourselves to the entire charge of the convention. This is certainly not excessive remembering function of conventions is civility of a country as well as written guidance in handling international disputes. Karl Marx (1818-1883) states that in terms of the process of capitalism is an economic system which recognizes only one law that is the law of the bargain in the market. This is certainly very related to dispute resolution mechanisms in

Indonesia, where there are several means of dispute resolution that can be done by the parties that consensus agreement, an international arbitration should be based on the agreement of the parties.

Indonesia was officially incorporated as a member of the ICSID on 28 October 1968 with the enactment of Law No. 5 of 1968 (gazette No. 2 of 1968) Dispute Between Countries With Foreign Nationals Regarding Investment. In this case the ICSID put the requirements and / or obligations to its member countries, namely:

1. The Convention requires member states to exclude a area any state that can not or excluded to become parties to the ICSID arbitration. In accordance with Article 70 of the ICSID Convention.
2. The Convention provides the opportunity for member states to apply for territory that includes federal state for to be or jurisdiction over a party to the ICSID arbitration accordance in with Article 25 paragraph (1) and (3) of the convention.
3. The Convention provides the opportunity for member states to submit notices of any disputes which
4. The Convention provides the opportunity for member states to designate the competent authorities to recognize and enforce ICSID arbitration decision in accordance with Article 54 paragraph (2) of the Convention.
5. The Convention also obliges member states to allow (the provisions of) the Convention becomes binding for all citizens or legal subject member. (Huala Adolf and An An Chandrawulan, 2015 :137-138)

Country Indonesia joined as a member of the ICSID by circumstances, in the 1960s Indonesia as the country's newly independent and newly giat-jealous developing a national economy that one of them invited foreign investors to invest in Indonesia. One way to attract foreign investors to invest in Indonesia is the off through ratification of the ICSID, 1965. Consideration of Indonesia's participation in ICSID can be found in the preamble of Law No. 5 of 1968 which is to encourage and foster foreign investment in Indonesia, the Republic of Indonesia as a member of International Bank for reconstruction and development (International Bank for Reconstruction and Development) as well as Indonesia's membership in Monetary Fund and International (International Monetary Found) have an interest

in relations international in order to financial assistance by financial international institutions. Based on these considerations Indonesian government ratified ICSID convention with the enactment of Law No. 5 of 1968 on the Settlement of Disputes Between Countries With Foreign Nationals Regarding Investment.

#### **D. Analysis of Profit and Loss Indonesia In ICSID**

Basically, foreign direct investment has been seen in Indonesia since the Dutch colonial rule. Investments at that time took place in the form of the movement of people (investors) together with capital from Europe to countries in Asia, Africa, and America Selatan.<sup>8</sup> presence of investors foreign is one form of capitalism that started spreading. (Huala Adolf, 2010 : 15) Developing countries, especially Indonesia. In the view of Market capitalism is an economic system that is free that is free from restrictions by the authorities, free of restrictions production. (Adji Saekto, 2015 : 120) In the implementation of the investment made possible disputes involving the parties, namely investors, foreign the central government, local governments and citizens. Government disputes with investors is unwanted by both sides in cooperation investment capital, but it can not be avoided because part of the risk to be borne. Forms of dispute resolution government to foreign investors actually resolved by the courts where the investment is located, but foreign investors generally lack confidence in the enforcement law carried out by the judiciary, given that the dispute is the government with foreign investment that are likely the government of a state law enforcement can intervene in the settlement of disputes between governments and foreign investors.

On 14 October 1966 in Washington United States ratify *the convention Washington or the International Centre For Settlement Of Investment Disputes (ICSID)*, which was born from the *Convention on the Settlement of Investment Dispute Between State and National of Other States* sebagai solution to the settlement of disputes between governments and foreign investors at a time the need for dispute resolution institutions. ICSID is an agency under the auspices World Bank now been made ratification by 151 countries of the world including Indonesia. ([www.worldbank.org](http://www.worldbank.org)). Indonesia as a member of the World Bank has ratified the Convention on

*the International Centre For Settlement Of Investment Disputes (ICSID)* to enact Law No. 5 1968 (gazette No. 2 of 1968) Dispute Between countries With Foreign Nationals Regarding Investment. Interest Indonesia did ICSID ratification isto encourage

and foster foreign investment in Indonesia. Indonesia despite doing rafisikasi ICSID pursuant to Article 25 paragraph (1) and Article 36 paragraph (2) Rail ICSID not automatically be submitted to ICSID, but every dispute first obtaining the consent of the parties to be settled through ICSID. As a follow up on the decision of the ICSID Arbitration government has also established the Presidential Decree No. 34 of 1981 as well as the Supreme Court Regulation No. 1 of 1990 on the implementation of the decision of the arbitration institution in Indonesia. The entire legislation above aims to provide legal options for foreign investors to resolve disputes in investment by the government at the same time the government also has particularly the goal to encourage and increase the confidence of foreign investors to invest in Indonesia

The development of Indonesia's investment experience ups and downs along with the development situation of Indonesia as a condition of the world as internal factors and external factors in determining investment, but the overall development of investment in Indonesia is good quite. Konvention ICSID which has been ratified by Indonesia become one of the considerations for investors to make their investment in Indonesia, it is certainly not surprising when viewed from the practice court before the era reformasi world, where legal intervention from authorities. Therefore the benefit to Indonesia is the confidence of foreign investors in investing in which foreign investors are granted the right to settle the dispute at ICSID. In the ICSID Convention provisions stipulated that the essential requirement is that there should be a primary legal dispute arising directly against investors, foreign which a dispute arose between a participant countries and a citizen of the convention participants. Also the conditions to be met, namely the parties should not give his consent in writing where the parties agree to choose the path of arbitration for disputes. (Aminuddin Ilmar, 2010 :229-230) Besides the settlement of disputes in the field of investment in the ICSID require cost very large to pay for administrative costs, arbitrators and lawyers who are experts in the field of settlement of disputes between governments and foreign investors in ICSID.

#### **E. Members of the Government of Indonesia as ICSID Future**

History of the International Centre for the Settlement of Investment Disputes (ICSID) can not be separated from the presence of the World Bank, It is based that the ICSID is the dispute resolution body of foreign investment by the government of a country. The World Bank or the World Bank was formed in 1944 and entered into force

on 27 December 1945. The World Bank and the International Development Association (IDA) and the International Finance Corporation (IFC) is referred to as the World Bank Group. The World Bank is one of the specialized agencies of the UN and is headquartered in Washington DC United States of America. (Triyana Yohanes, 2015, 36-37) Indonesia ratified the ICSID Convention since the date of 29, 1968 June by Law No. 5 of 1968 concerning Disputes Between Countries With Foreign Nationals Regarding Investment. This law brings consequences in the form of dispute resolution Indonesian government with foreign investment shall be done through ICSID. Based on data from Indonesia ratified the ICSID since until now there are five cases of disputes between the Indonesian government and investors foreign are Amco Asia Corp. filed in 1980 was completed in 1992 with a decision that the Indonesian government should pay to Amco of \$2,567,966.20 with interest ,

Dispute Churchill Mining Plc in 2012 concerned the revocation of business licenses Churchill made by the government of East Kutai. process for There solving disputes between Churchill Mining Plc against the Indonesian government until now has not been completed at the tribunal ICSID. Indonesia government in 2011 also obtained a lawsuit done by Rafat Ali Rizki citizens. British The dispute began when Rafat Ali to invest in Indonesia through a company incorporated in the Bahamas is Chinkara Capital Limited. Rafat Ali filed a lawsuit because they feel harmed by policies government issued bail out Bank Centuri Rp. 6.7 trillion, resulting in losses for shareholders. Dispute PT. Newmont Nusa Tenggara (Nusa Tenggara Partnership BV and PT. Newmont Nusa Tenggara) filed a lawsuit against the government of Indonesia on June 30, 2014 but before the Secretary General of ICSID tribunal forming composition PT. Newmont Nusa Tenggara filed a withdrawal of the lawsuit. The action against government the Indonesian raised no objection to the withdrawal of the lawsuit PT. Newmont Nusa Tenggara and the Secretary General of ICSID issued a determination that essentially terminate and not proceed with the arbitration.

In January 27, 2004 Camex Asia Holding also referred the request to the ICSID dispute resolution where these problems Camex Asia Holding made a purchase of 25.5% stake in PT. Semen Gresik and in 2001 acquired the right to become majority owner, but Indonesia government refuse the release of shares in Camex. Similarly, government dispute East Kalimantan with PT. Kaltim Prima Coal in 2007 at which time the agreement of the purchase of 51% stock PT. Kaltim Prima Coal by the government of East Kalimantan,



but the share purchase protracted due to disagreement about the price. Of the few cases that delivers Indonesia in dispute at ICSID and wholly as a defendant as well as the most concern is Indonesia suffered defeat and had to pay compensation value is very large.

Indonesian government's ratification of the ICSID Convention had an impact, huge where Indonesia shall be subject to and comply with international regulations in the field of dispute resolution in the field of investment. Ratification makes a country is obliged and has the responsibility to implement the provisions of the ICSID in good faith. This principle is enshrined in the Vienna Convention on International Agreement Article 26 of the Vienna Convention under the title *Pacta sunt servanda* declare that International treaties, these countries should implement the agreement with the goodwill charge baik. (Huala Adolf and An An Chandrawulan, 2015 :95)

Investors making a claim to the ICSID put the government Indonesian quite overwhelmed, this is because of the claim for compensation was unusually large as well as the foreign investor lawsuit requires the Indonesian government to respond to the lawsuit. This is certainly not an easy matter, since in the process responsible in ICSID should have a powerful ability though in this case the government can be represented by the Board Coordinating (BKPM) or the Indonesian government appoint a lawyer who had a role in handling investment particularly in ICSID. Besides, the settlement of disputes in investment in the ICSID midwives require a very large cost. European Commission study results early reported average costs for litigants in international arbitration is about 8 million US dollars. When the exchange rate of 1 US dollar is USD.13,000 it costs the government about Rp. 104 billion. For developing countries like Indonesia fund costs Rp. 104 billion is certainly a very large and burdensome to the Indonesian government. This costs about 75% to pay fees for foreign lawyers and expert witnesses as well as the rest to pay the cost of the arbitrator and sekretariat arbitrase. (Huala Adolf and An An Chandrawulan, 2010 :97)

Argument above provides an opportunity for the Indonesian government to remain in ICSID and declared themselves to be out of the ICSID. Indonesia currently has economic growth diangka 5% annum with a ratio of inflation of 3% with the support of natural resources are abundant, Indonesia as well as the international market is very promising for foreign investors, with a population of 250 million people and improved law enforcement, especially in the Administrative Court. With that Indonesia may declare themselves out of the ICSID Convention in 1965 and relies on law enforcement through judicial Indonesia under the umbrella of the Supreme Court.

## F. Conclusion

- Efforts to encourage, foster, and provide legal certainty to foreign investment in Indonesia need a rule to stimulate and facilitate investment activities, therefore the government of the Republic of Indonesia ratified the convention ICSID 1965.
- Benefits for Indonesia after the ratification of the ICSID is the growing confidence of foreign investors to invest in Indonesia while the Indonesian losses is the high costs incurred Indonesian government to resolve in ICSID.
- Indonesia may declare themselves out of the ICSID Convention in 1965 and on relies law enforcement through judicial Indonesia under the umbrella of the Supreme Court.

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