



USE OF CONCILIATION AS A METHOD FOR INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT IN INTERNATIONAL INVESTMENT AGREEMENT

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ABSTRACT

An International Investment Agreement is an agreement formed between countries which provides a legal umbrella for carrying out foreign investment activities for related parties. One of the problems criticized in international investment agreements is related to settlement methods that tend to use arbitration, which is currently widely criticized in practice. The aim of this research is to assess the effectiveness of conciliation as a method of resolving international investment disputes and the advantages of using conciliation as a method of resolving international investment settlements for Indonesia. This research uses descriptive analytical methods and data analysis is carried out using qualitative juridical methods. From the results of this research, it can be seen that in practice conciliation is still not widely used to complete a settlement. However, seeing the many criticisms of settlements through arbitration, it can be said that there is a push to use other settlement alternatives to complete a settlement. In this case, conciliation can be an option and has many advantages considering the characteristics of fast, efficient and flexible conciliation.

Keywords: international investment dispute settlement methods; international investment agreements; conciliation.

I. INTRODUCTION

As a country with a large workforce, abundant resources and a vast territory, it cannot be denied that carrying out development requires enormous capital, especially since Indonesia is an archipelagic country so that in order to carry out equitable development, high mobilization is needed. Therefore, the role of investment is necessary to help the growth and development of the state economy. Article 1 paragraph 1 of Law Number 25 of 2007 concerning Investment (hereinafter referred to as Law No. 25 of 2007) states that investment is all forms of investing activities, both by domestic investors and foreign investors to carry out business in Indonesian territory. Based on this explanation it can be concluded that in Indonesia, investment is divided into two, namely Domestic Investment and Foreign Investment. In dealing with the economy, foreign investment is an important factor in determining a country's economic growth, employment, income, and the flow of international trade. Apart from bringing in capital, foreign investment also has another positive impact on the country receiving the capital. One way is to bring innovation to countries receiving capital so that the country's economy can progress with more effective and efficient business activities.

In the course of foreign investment, recipient countries and organizers of investment (hereinafter referred to as "host state") need to provide protection to owners of capital (hereinafter referred to as "investors") in order to guarantee and create security in investing. This can be achieved by forming an investment agreement which is a binding legal instrument for both parties. Developed countries, as countries that own capital, need instruments that can legally bind and guarantee developing countries in terms of investments that they make in developing countries, therefore developed and developing

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countries form an agreement regarding investment protection to become an instrument commonly known as "International Investment Agreement" (hereinafter referred to as "IIA"). IIA can be categorized into two forms, namely Bilateral Investment Treaty and Treaty with Investment Provisions which are agreements in which there are provisions related to investment such as Free Trade Agreement and Economic Partnership Agreement.

One of the parts that is usually listed in an IIA is a clause related to the Investor-State Dispute Settlement (hereinafter referred to as "ISDS") which is a dispute resolution mechanism between investors and the host state. With the creation of this mechanism, it is hoped that a neutral forum will be created that can examine and resolve problems without the burden of domestic political considerations. However, in practice, ISDS is often considered to be in favor of investors and tends to be detrimental to the host state because it gives investors the flexibility to sue the host state. Many critics state that ISDS provides special rights for foreign investors that are not obtained by local parties and can undermine national sovereignty. Moreover, with the increase in ISDS cases which are also becoming increasingly complex, there is an increase in the time and costs that must be incurred in international arbitration.

Basically one of the characteristics of a BIT is inequality between the two parties to the agreement which usually consists of developed countries providing capital and developing countries that want to withdraw the capital. This situation certainly causes an imbalance in the bargaining position felt by developing countries, including Indonesia. Until July 2020, there were a total of 1061 ISDS cases based on known agreements. Since 2011, there has been an increase in ISDS claims based on agreements against Indonesia. This happens because Indonesia has a lot of ties to BIT which are profitable for investors. In order to address this, Indonesia conducted a review and termination of the International Agreement in the field of Investment which was carried out in order to evaluate and formulate a new approach to IIA. This step can be said to be the right step for Indonesia, seeing that other countries are also doing the same thing, forming a new agreement that protects the host state's autonomy and reduces the potential for ISDS abuse.

On 6 August 2020, the BIT between Indonesia and Australia was officially terminated. The reason for terminating this BIT is because a new agreement has entered into force, namely the Indonesia-Australia Comprehensive Economic Partnership Agreement (hereinafter referred to as the "IA-CEPA") which also regulates investment interests between the two countries. The IA-CEPA is a comprehensive partnership in the economic field that includes trade in goods and services, investment and economic cooperation. One of the objectives of establishing the IA-CEPA is to create an open, facilitative and competitive investment environment, which will increase investment opportunities between the parties through the promotion, protection, facilitation and liberalization of foreign investment. The investment section in the IA-CEPA is listed in Chapter 14, which consists of Part A and Part B and the annexes. Part B of Chapter 14 of the IA-CEPA deals with ISDS. The existence of an ISDS mechanism in the IA-CEPA provides a legal certainty to resolve disputes that may arise between investors and the host state. The existence of a dispute settlement clause is not a new arrangement in an investment agreement. However, in its design, the dispute settlement clause in the IA-CEPA takes a new approach that is different from the IIA in general.

Arbitration is the most commonly used method in terms of international investment dispute resolution, especially using the International Center for the Settlement of Investment Disputes arbitration body (hereinafter referred to as "ICSID"). Almost all ISDS clauses in IIA provide an option to resolve disputes through arbitration. The ISDS clause in the IA-CEPA also provides an option to make arbitration the preferred method of dispute resolution. However, the IA-CEPA has a tiered dispute

resolution clause that is different from other IIAs. First, before submitting to the arbitral body, the parties must first undergo consultations, as stated in Article 14.22 IA-CEPA. Then, if the consultation is not successful, then based on Article 14.23, conciliation can be a prerequisite method for foreign investors before proceeding with a lawsuit to arbitration in the event of a dispute if requested by the party being sued. Until now, there are only two IIAs that have mandatory conciliation provisions, namely IA-CEPA and Hong Kong – United Arab Emirates Bilateral Investment Treaty 2019 (hereinafter referred to as “HK-UAE BIT”). The two IIAs will both come into force in 2020.

The difference between conciliation and other dispute resolution methods lies in the presence of a conciliator who mediates and tries to examine disputes, concludes an agreement with a solution between the parties in the event of an agreement, and forms written recommendations if an agreement is not reached. The recommendation from a conciliator is not binding. The existence of mandatory conciliation is a new innovation in the world of IIA which is very interesting, considering that conciliation is a method that is usually avoided and almost never used by investors when suing. Even though they have advantages, investors tend to choose arbitration because it has many advantages. This raises the question whether investors tend to avoid conciliation because they are considered unable to provide benefits like arbitration.

To date, there have been 7 lawsuits filed against Indonesia based on IIA. The lawsuit filed in the arbitration is of course very detrimental to the state, because in addition to the very large number of investor lawsuits, the state must incur enormous costs for litigation in international arbitration. So far, Indonesia has no other choice but to carry out arbitration if there is a dispute that cannot be resolved peacefully because it has been bound by IIA. Basically, the existence of arbitrage in an IIA is indeed difficult to avoid, in the eyes of investors arbitrage is a foundation in protecting their capital.

With the existence of mandatory conciliation provisions in the ISDS, the party being sued has the opportunity to direct dispute resolution through conciliation before the Investor can sue to the arbitration body. The existence of this provision in one of Indonesia's IIAs which was formed after a review can be seen as one of Indonesia's efforts to avoid resolving disputes through arbitration. Bearing in mind that until now conciliation has rarely been used in settling international investment disputes, the existence of mandatory conciliation is very interesting to note, especially with regard to its effectiveness and benefits for Indonesia. Effectiveness in this regard can be seen from the implementation mechanism, process, and the nature of conciliation.

With the obligatory conciliation in the world of IIA, further discussion is needed regarding conciliation as a method of settling international investment disputes. Based on this description, the author has a connection to discuss more deeply related to the use of mandatory conciliation provisions based on IIA in ISDS and the benefits for Indonesia as the host state.

Based on the explanation previously presented, this journal will answer the following problem formulations: first, how effective is conciliation as a method of settling international investment disputes? Second, what are the advantages of having conciliation provisions in the International Investment Agreement for Indonesia as the host-state?

II. RESEARCH METHODS

This writing aims to complete and develop the discussion regarding the settlement of foreign investment disputes between foreign investors and the state through conciliation. The approach method that will be used in this research is juridical-normative, namely normative legal research which is library research, namely research on secondary data.

III. DISCUSSION AND RESULTS

Investment activities are an important part of improving people's welfare in Indonesia. As stated in the consideration of letter c of Law no. 25 of 2007, investment is needed to accelerate national economic development, realize political and economic sovereignty, and cultivate economic potential into real economic power. With economic growth, it is hoped that social welfare will be created.

There are two sources of investment in Indonesia, namely those originating from within the country (Domestic Investment) and Foreign Investment. Both have an important role as a source of state revenue. Foreign investment is the transfer of tangible or intangible assets from one country to another with the aim of generating wealth under total or partial control of the owner of the assets. Foreign Investment, apart from providing capital, can also improve the quality of technology and human resources in Indonesia due to the transfer of technology and skills.

This is in line with the mandate of Article 33 paragraphs 2 and 3 of the 1945 Constitution which states that production branches which are important for the State and which affect the livelihoods of the public are controlled by the State and natural resources are controlled by the state and used as much as possible for the prosperity of the people. This article needs to be interpreted that the government must hold control over both domestic and foreign investment related to regulation and benefit taking for the benefit of society in order to achieve prosperity.

In order to attract the attention of foreign investors and provide legal certainty, countries can form an international agreement that regulates investment, or commonly referred to as International Investment Agreement. The legal basis for the establishment of an IIA in Indonesia is Article 11 of the 1945 Constitution, which is further clarified in Law Number 24 of 2000 concerning International Agreements. The existence of IIA is also recognized in Law no. 25 of 2007 Article 6 paragraph (2) which states that investors will obtain special rights based on an agreement with Indonesia.

Peter Muchlinski defines IIA as an agreement that involves two countries reciprocally to oversee the standard of treatment stipulated in the agreement in dealing with investors from countries that are bound by the agreement.¹ Basically, an IIA regulates investment protection standards that must be carried out, such as equal and fair treatment, *full protection and security*, protection from expropriation or nationalization, and dispute resolution mechanisms or ISDS.²

The ISDS clause is one of the important parts of the IIA which provides investors with a neutral forum to resolve disputes related to substantive regulations in the IIA. In general, the settlement of these disputes is resolved through arbitration, in particular with the ICSID arbitration body. In connection with the settlement of disputes in the field of investment, Indonesia has ratified it *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (hereinafter referred to as the "ICSID Convention"). This convention was formed because it saw the need for mechanisms and institutions in terms of resolving a dispute that might arise in investment activities.³ Apart from that, Law Number 25 of 2007 has also regulated the settlement of investment disputes, but this cannot be said to be complete.

The use of ISDS that is generally used today is to use international arbitration. Podesta-Costa and Roda states that arbitration is a method of settling international disputes through submission, with an official agreement between the parties, to a third party award, with a definitive decision as a result.⁴

¹ Kusnowibowo, *Op. Cit.*, P. 7

² Rachmi Hertanti dan Rika Febriani, *Indonesia Bilateral Investment Treaties (BITs): Negara Vs Korporasi*, Indonesia for Global Justice, P. 5

³ Opening of the ICSID Convention.

⁴ Huala Adolf, *Hukum Penyelesaian Sengketa Internasional*, (Jakarta: Sinar Grafika, 2020), p. 48

Until now, Indonesia has received many lawsuits related to foreign investment disputes so that it has the highest international investment arbitration case position in ASEAN. This can happen because of the ISDS provisions in Indonesia's IIA which provide an opportunity for investors to freely sue Indonesia in international arbitration bodies. This is of course very detrimental to Indonesia considering the high costs that need to be incurred during proceedings at international arbitration bodies. Therefore, in 2014 the Indonesian government decided to conduct a review of IIA in order to find a new approach to IIA in accordance with national interests.

In the new IIA negotiations, Indonesia is trying to introduce an obligation to use other alternative dispute resolution before going to arbitration. This is done in the hope of avoiding disputes in arbitration which are costly, time-consuming, and have the potential to damage the relationship between the state and investors.⁵ This was achieved by Indonesia in a comprehensive economic partnership agreement between Indonesia and Australia that replaced the Indonesia-Australia BIT. This achievement can be seen in Article 14.23 (1) IA-CEPA which reads:

“If the dispute cannot be resolved within 180 days from the date of receipt of a written request for consultation by the Parties to the dispute, the Parties to the dispute may initiate a conciliation process, which will be mandatory for the disputing investors, with the aim of reaching an amicable settlement. Such a conciliation process must begin with a written request sent by the disputing parties to the disputing investors.”

Apart from IA-CEPA, HK-UAE BIT also has the same provisions in article 8 paragraph 3, where if the consultation process is not successful, and one of the parties wishes to take conciliation steps, then the party wishing to carry out conciliation can make a written submission. Conciliation is a dispute resolution method that involves a third party in an investigation on the basis of a dispute and submission of a report containing recommendations related to dispute resolution.⁶ Further, Bindschedler said that a third party or conciliator involved in a dispute settlement is a neutral party and has involvement because it was requested by the parties to the dispute. Unlike arbitration, conciliation decisions are not binding on the parties.

In the settlement of investment disputes, conciliation is a dispute resolution method that is not of interest to the parties. Until now, the use of conciliation is still very low, for example, based on The ICSID Caseload Statistics Issue 2021-1, in 2020 there was only 1 conciliation case registered under ICSID. This is of course very inversely proportional to arbitration which is in great demand with a total of 54 cases. This is because investors have a tendency to choose arbitrage which is considered to have more profits. Aron Brooches argues that in the business world, there is still a strong prejudice against conciliation, but there is a strong tendency in the world to use conciliation.⁷ Making conciliation a mandatory stage before arbitration is of course a new idea that needs attention. The effectiveness of conciliation as a dispute resolution method needs attention.

Effectiveness is the result of making decisions that lead to doing things right, that help fulfill a mission or achieve a goal.⁸ Effectiveness comes from the word "effective" which means there is an effect, efficacious, can bring results.⁹ So to see the effectiveness of something, it is necessary to pay attention to the purpose and results of that thing. In this case, the parameters for the effectiveness of

⁵ Indonesia, ISDS Reform: a brief perspective from Indonesia, United Nations Commission on International Trade Law Working Group III: ISDS Reform; 37th session, New York, 2018, P. 4

⁶ Malcolm N. Shaw, *International Law*, ed. 6, (New York: Cambridge University Press, 2008), P. 1022

⁷ Aron Brooches, *Avoidance and Settlement of International Investment Disputes, Proceedings of the Annual Meeting American Society of International Law*, vol. 78, 1984, P. 54

⁸ Amin Tunggal Widjaya, *Manajemen Suatu Pengantar*, (Jakarta: Rineka Cipta Jaya, 1993), p. 32

⁹ Indonesia Dictionary, <https://kbbi.web.id/efektif>, [08/03/2021]

conciliation are the implementation mechanism, process, and nature of conciliation. If conciliation is carried out in good faith by both parties, then it is very possible that conciliation can be an efficient dispute resolution step in terms of time and cost. However, there are still opinions stating that the possibility of conciliation can replace arbitration is not realistic.¹⁰ Furthermore, the use of conciliation is considered better if it is used as such two-step *model* mediation-arbitration which is generally used in commercial dispute resolution.¹¹

The pros and cons of using conciliation as a dispute resolution mechanism need to be considered, considering that so far the ISDS clause has proven to be detrimental to Indonesia because it makes it easy for investors to file lawsuits in arbitration. Therefore, it is necessary to pay close attention to the ISDS clause in the IA-CEPA so that it can be used optimally.

1. The Effectiveness of Conciliation as a Dispute Resolution Method in International Investment Agreements

Before analyzing the effectiveness of conciliation as a method of international investment dispute resolution, it is necessary to pay attention to the benchmarks that will base the evaluation of effectiveness in the context of this research. Effectiveness comes from the word "effective" which means there is an effect, efficacious, can bring results.¹² Effectiveness itself can be defined as the result of making decisions that lead to doing things right, which help fulfill a mission or achieve a goal.¹³ In the legal context, legal effectiveness can be interpreted as the ability of the law to create or give birth to circumstances or situations as desired or expected by law.¹⁴ In addition, in the context of solving a problem, effectiveness can be assessed from whether a regime can solve problems that the regime should be fighting or helping to solve.¹⁵

In the context of dispute resolution, effectiveness can be seen from the level of success of a dispute resolution mechanism in achieving the objectives of the mechanism. So based on the explanation that has been given before, the parameters of the effectiveness of conciliation as a method of international investment dispute resolution in this study will be assessed based on two aspects. First, what is the process and role of conciliation in resolving a dispute. Second, whether conciliation for the disputing parties in ISDS can contribute to solving the problems that have so far been in the ISDS process.

Foreign investment is a process in which an investor country obtains ownership of assets with the aim of controlling the production, distribution and other activities of a company in another country, which is a foreign country.*host state*.¹⁶ The main source of foreign investment law is international agreements, which can include bilateral, multilateral and regional agreements. Other sources of foreign investment law are the first, international customs originating from the practice of a country which is increasingly being practiced in relations between countries, such as the payment of compensation in the event of taking over property by a country. Second, the general principles of law such as principle of *consent*, *reciprocity*, *national treatment*, and *most favored nation*. Third, court decisions which become

¹⁰Jack J. Coe Jr, Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch, UC Davis *Journal of International Law and Policy*, Vol. 12, 2005, p. 32

¹¹*Ibid.*

¹²Indonesia Dictionary, *loc. Cit.*

¹³Amen Tunggal Widjaya, *loc.cit*

¹⁴Winaryo Yudho dan Heri Tjandrasari, Efektivitas Hukum Dalam Masyarakat, *Jurnal Hukum & Pembangunan*, Vol 17, No 1, 1987, P. 59.

¹⁵Keisuke Iida, *Is WTO Dispute Settlement Effective?*, *Global Governance* Vol. 10, No. 2 (Apr.–June 2004), p. 208, Accessed via:<https://www.jstor.org/stable/27800522> [15/09/2022]

¹⁶Imad A. Moosa, *Foreign Direct Investment: Theory, Evidence and Practice*, (Melbourne: Palgrave Macmillan, 2002), p. 1.

legal references in understanding legal issues and analyzing a case. Fourth, legal works which are subsidiary legal sources for determining legal rules. Fifth, *soft law* which is a written instrument that lowers rules of conduct which is not intended to be legally binding as such *Charter of Economics Rights and Duties of States*.¹⁷

The existence of IIA in international law is motivated by the existence of foreign investment activities which ultimately encourage countries to bind themselves and form an agreement which is expected to increase investment.¹⁸

When developments occur in foreign investment, it is necessary to pay attention to the legal protection of these investments, bearing in mind that foreign investment activities involve more than one country which of course have differences related to investment rules and policies. Therefore, the IIA was formed, which is an international agreement between countries that causes obligations for countries regarding how to treat foreign investors from treaty partner countries.¹⁹ These agreements can take the form of Bilateral Investment Agreements, Multilateral Investment Agreements, Free Trade Agreements, Economic Partnership Agreements, and Comprehensive Economic Partnership Agreements.

Basically IIA focuses on providing investors with specific international legal rights and remedies to protect their investments in *host-state*.²⁰ Until now there have been many different IIAs that apply in the world, but there are some provisions that generally always exist in an IIA. The provisions are divided into two, namely:²¹

1. Investor Substantive Rights

In IIA, *host state* provide guarantees to investors and their investments from inappropriate risks. The guarantees are in the form of several substantive rights consisting of compensation guarantees in the event of expropriation, guarantees against discriminatory actions, *national treatment*, guarantees of fair and equal treatment, guarantees of investment protection, and guarantees that investment will receive treatment that is no less than what is stated in international law.

2. Investor Procedural Rights

The investor's procedural rights in IIA are the provisions that make IIA special. Procedural rights provide investors with a mechanism to enforce their substantive rights directly. In this case, apart from having substantive rights, investors also have an agreed forum to rectify alleged errors.

Each IIA has different provisions in the ISDS clause, considering that each IIA is the result of negotiations between countries with different backgrounds and objectives. If a country has been bound in an IIA, then that country has agreed to the ISDS regulated in the IIA. However, each country is still trying to limit what things can be sued against ISDS. Therefore, there are several types of provisions that are generally listed in the ISDS clause, namely:²²

¹⁷ Kusnowibowo, *Op. Cit.*, p. 13-23

¹⁸ *Ibid.*, p. 3

¹⁹ Aaron Cosbey dan Howard Mann, *Bilateral Investment Treaties, Mining and national Champions: Making it work*, International Institute for Sustainable Development, 2014, p. 14

²⁰ Howard Mann, *Investment Liberalization: Some Key Elements and Issues in Today's Negotiating Context*, (Singapore: IISD, 2007) p. 3

²¹ Susan D Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, *Pacific McGeorge Global Business & Development Law Journal*, Vol. 19, 2006, p. 342-343

²² August Reinisch, The Scope of Investor-State Dispute Settlement in International Investment Agreement, *Asia Pacific Law Review*, Vol. 21 p. 8-14

a. *Limitation to Treaty Claims*

Countries generally choose to limit disputes that can be contested in arbitration forums to disputes arising from an IIA or due to a violation of IIA standards. This means that a lawsuit can only be filed if the dispute is related to the IIA.

b. *Temporal Limitations*

Most IIAs require the parties to a dispute to settle the dispute amicably first. Generally, this requirement takes the form of an obligation to engage in consultation, negotiation, or other forms for a specified period of time. If the time period has passed, then investors can sue to the arbitration institution. Meanwhile, some IIAs require notification of intent before a dispute can be submitted to an arbitral institution, so that disputes can only be submitted to an arbitral institution after a certain waiting period.

c. *Obligations to Litigate before Domestic Courts*

Domestic courts are one way for countries to avoid lawsuits in international arbitration. In extreme cases, foreign investors are even denied the right to sue to international arbitration. However, provisions like this are rarely seen in IIA. In this case, usually the IIA will oblige the investor to settle the dispute in the domestic Court first and if it cannot be resolved, then the investor can sue to arbitration.

d. *Fork-in-the-Road Clauses*

This provision will usually provide a choice of institutions for investment dispute resolution, such as arbitration or domestic courts, where the alternative choices taken will be final. Therefore, investors must choose wisely

e. *Subject-matter limitations*

Some IIAs provide certain limitations related to the scope of their application, including in terms of dispute resolution. Usually these restrictions are related to tax issues. In addition, other limitations that can be found are related to what can be submitted to arbitration. Narrow ISDS clauses usually only cover disputes relating to the amount and method of compensation in cases of expropriation.

The dispute resolution forum that is most often used in resolving disputes today is Arbitration. Aron Brooches describes 4 different types of use of arbitration in an IIA. First, it only mentions that disputes with the agreement of both parties are submitted to the arbitration body. Second, giving sympathetic consideration to requests for conciliation or arbitration. Third, the obligatory article for host state to agree to any requests from investors, be it submissions for conciliation or arbitration for disputes that arise. Fourth, provide submission and approval of ICSID Arbitration in resolving disputes that occur.

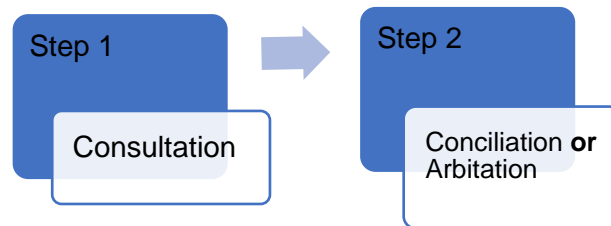
From 1965 to 2020, only 29.8% of IIAs have clauses governing dispute resolution using conciliation. As time goes by, the trend of using conciliation in IIA has decreased.²³ One possible reason to be the cause of this decline is the infrequent use of conciliation. Furthermore, another reason is the lack of knowledge of the disputing parties regarding the potential benefits of using conciliation as a dispute resolution mechanism. In addition, another reason is because the decisions of conciliation are not binding, so they are considered difficult to implement.²⁴

²³Romesh Weeramantry, Brian Chang, and Joel Sherard-Chow, Conciliation and Mediation in Investor-State Dispute Settlement Provisions: A Quantitative and Qualitative Analysis, *ICSID Review*, p. 12

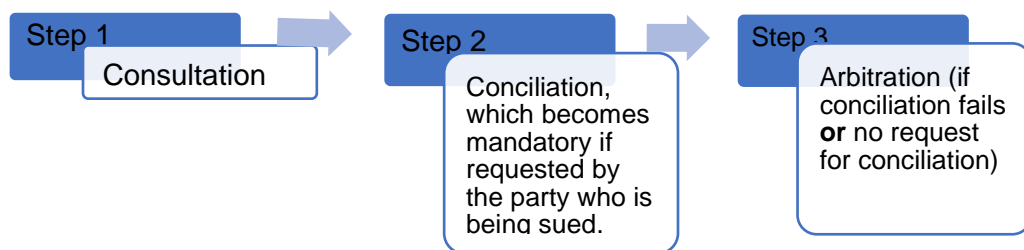
²⁴*Ibid.*

In this journal the author will discuss several examples of ISDS clauses in IIA. As for this journal, the discussion will be carried out on the provisions of the stages of dispute resolution listed in the ISDS, where samples will be taken from 4 different IIAs, namely *Indonesia – Australia Bilateral Investment Treaty*, *Indonesia – India Bilateral Investment Treaty*, *Indonesia – Australia Comprehensive Economic Partnership Agreement*, and *Hong-Kong – UAE Bilateral Investment Treaty*.

In terms of procedure, in Indonesia - Australia BIT and Indonesia - India BIT have the same steps in the dispute resolution mechanism in the majority of IIAs, which are as follows:



While the HK-UAE BIT and IA-CEPA have differences with the Indonesia - Australia BIT and Indonesia - India BIT where the dispute resolution mechanism is as follows:



As a first step in resolving investment disputes, 81% of IIAs who have an ISDS clause require a non-confrontational dispute resolution first.²⁵ This can also be seen in the four IIAs above, where all of them require prior consultation or negotiation when a dispute occurs as an effort to resolve the dispute peacefully. In Indonesia - Australia BIT the scope of disputes discussed is limited to disputes related to investment. Then, when a dispute arises, the first step that must be taken by both parties is consultation and negotiation. In this case, it can be said that consultation and negotiation are mandatory as the first step in the dispute resolution process. Furthermore, the provisions in the Indonesia - India BIT also state the same thing. In these two IIAs, the process of consultation or negotiation was not discussed in depth.

Similar to Indonesia – Australia BIT and Indonesia – India BIT, the first step that must be submitted by investors when there is a dispute in the IA-CEPA is to conduct consultations. The discussion regarding consultation in the IA-CEPA requires investors to provide information relating to the dispute in question in order to facilitate the consultation. This is the same as the consultation provisions in the HK – UAE BIT where the investor must file a written notification to the party being sued stating the name and address of the investor, the provisions of the Agreement which are allegedly

²⁵ J. Pohl, K. Mashigo, dan A. Nohen, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD Working Papers on International Investment: OECD Publishing, 2012, p. 17

violated, the factual and legal basis for the claim, and compensation requested and the amount of damages claimed.

In Indonesia - Australia BIT, if a dispute is incapable to be settled by consultation and negotiation, then there are two options that can be taken to settle the dispute. First, byway of the local court in accordance with the regulations in force in that country and second, through the ICSID with an arbitration or conciliation mechanism. The party that can make decisions on the choice of dispute resolution, in this case, is the investor. Then, in Article 11 (3) that is formulated for the parties that are not part of the ICSID Convention, it is stated that the procedural decision is left to the parties in accordance with the agreement. However, if no agreement is reached within 3 months of the notification, then the dispute is resolved using the arbitration method based on the UNCITRAL Arbitration Rules. Based on these provisions, if a dispute is submitted to ICSID by an investor, the other party must provide written approval no later than 45 days after receipt of the lawsuit. In the event that the two parties cannot determine the method of dispute resolution, the right to pick a forum for dispute settlement is given to the investor. Judging from the ISDS clause, the Indonesia-Australia BIT the authority to choose a forum tends to be given to the investors, so the host-state, if not successful in negotiating the selection of the forum, must follow the dispute resolution forum appointed by the investor.

Like Indonesia - Australia BIT, in Indonesia - India BIT it is the investor who gets the right to pick a dispute settlement mechanism if consultations and negotiations are not successful. In this case, the investor has a choice between the judiciary, arbitration and local administrative bodies or international arbitration and conciliation. As further explained in Article 9 (3) Indonesia – India BIT Conciliation and international arbitration can be submitted to ICSID or Arbitration body to *this* pursuant to the UNCITRAL Arbitration Rules.

The ISDS clause of the IA-CEPA can be said to be a modern ISDS which was formulated after the *Review BIT* by the Indonesian government. This modern nature can be seen from Article 14.23, which is the most different article from other IIAs. As discussed in the previous IIA, ISDS generally provides a choice between arbitration or conciliation which will be determined by the investor. However, in the IA-CEPA *host-state* as the party being sued may require a conciliation process as a dispute resolution mechanism. If previously investors always had the opportunity to choose a dispute resolution forum that was profitable for them, then in this article host-state is given the opportunity to have the right to choose a dispute resolution forum that is more profitable for host-state. In articles 14.24 to 14.35, then the arbitration mechanism is discussed in depth which can only be pursued if the previous consultation and conciliation processes were unsuccessful.

Then, the HK – UAE BIT also has the same clause regarding conciliation with the IA-CEPA. In article 8(3) HK – UAE BIT, it can be seen that if consultation fails to solve the dispute, then the party being sued can submit a dispute resolution through conciliation. However, unlike the IA-CEPA apart from conciliation, the HK – UAE BIT also provides an opportunity for the party being sued to choose other forums for dispute resolution, in this case, the local court of the party being sued. If the dispute cannot be resolved amicably as stated in the previous provisions, then the investor may request for dispute settlement through an Arbitration body, where in the article it is explained that each party is considered to have agreed to a lawsuit to Arbitration even though there is no agreement between the individuals.

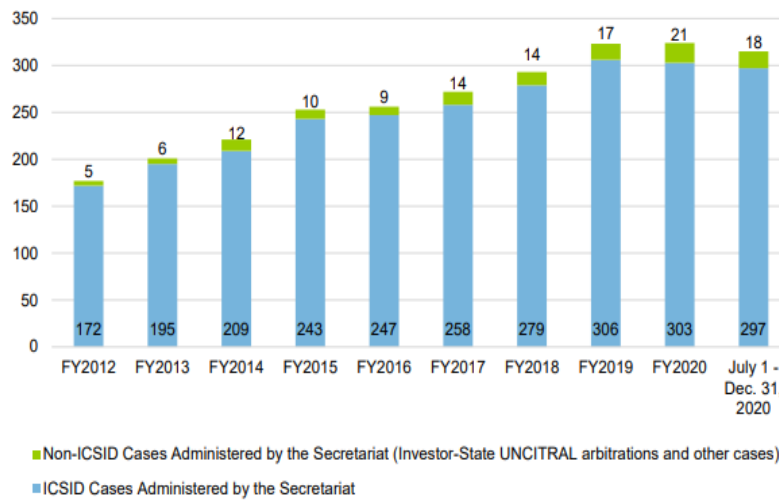


Figure 1: Number of ICSID & Non-ICSID ISDS Cases²⁶

Since the founding of ICSID until December 2020, there have been 803 dispute cases between investors and host-state registered under the ICSID Convention as well as the ICSID Additional Facility Rules which provide forums for arbitration, conciliation, and fact-finding for disputes that are not included in the scope of the ICSID convention. Since the first lawsuit at ICSID in 1972, every year the number of cases submitted to ICSID has increased. The increase in cases is due to developments in the field of investment and also the IIA which provides a dispute resolution mechanism or commonly known as ISDS, so it cannot be denied that disputes arise between investors and host-state.

Based on the picture above, it can be seen that although most disputes were submitted to ICSID, there were also many other cases that went to other dispute resolution bodies such as UNCITRAL Arbitration, which in this case constituted the majority with a total of 93 cases out of 125 cases.

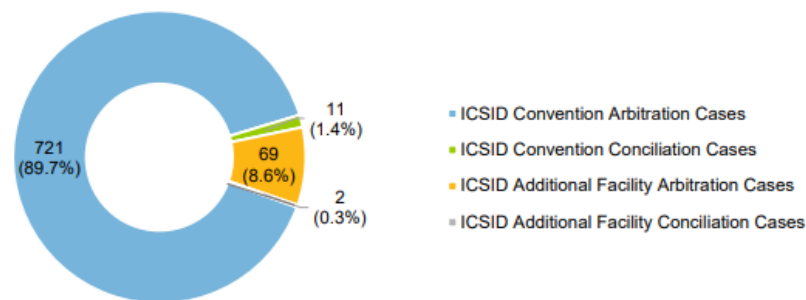


Figure 2: Types of Cases in ICSID²⁷

In ICSID itself, the most registered cases are Arbitration cases based on the ICSID Convention with a total of 721 cases. Furthermore, there is Arbitration based on ICSID *Additional Facility* with a total of 69 cases. Conciliation, in this case can be seen as a dispute resolution mechanism that is less desirable, with a total of 11 cases under the ICSID Convention and 2 cases under the ICSID *Additional Facility*.

²⁶ICSID, *The ICSID Caseload – Statistics Issue 2021-1*, p. 10

²⁷*Ibid.*, p. 9

The increasing number of ISDS cases every year, of course, causes a lot of criticism towards the ISDS formulation listed in an IIA. The criticisms include the following:²⁸

1. Lack of transparency in ISDS

ISDS, which in this context is generally arbitration, ISDS has indeed proven to be less transparent, which is in contrast to government transparency and accountability initiatives from countries around the world.

2. Lack of legitimacy of ISDS arbitrators

Considering that the arbitrator in the case of ISDS will render a decision relating to the validity of a state's actions, it raises many criticisms related to the legitimacy of the ISDS arbitrator. Moreover, it is very likely that dispute cases will be related to public policies issued by the government which are sensitive in nature.

3. ISDS limits the powers of the State to regulate

ISDS is also widely criticized for weakening the power of the state to make a policy, regardless of the goals of the policy. Investors have the right to freely sue the state regarding policies that have been made and cause losses to investors because of the ISDS clause in an IIA.

4. ISDS tends to side with Investors.

Criticism states that ISDS tends to side with investors based on arbitrator decisions and also compensation given to investors who are a threat to state finances, given the very large amount.

5. Inconsistency in ISDS

ISDS generally does not have an appeals mechanism, this allows potentially wrongful decisions to be binding between parties. So the absence of an appeal mechanism will greatly affect the consistency of ISDS. Consistency holds a high role in determining the credibility of a dispute resolution system, due to the fact that users will start to lose trust in a resolution process that keeps on making unexpected results.

For Indonesia itself, currently it has experienced various kinds of lawsuits in international arbitration relating to foreign investment. Even though Indonesia won the majority of the lawsuit, the State also needs to pay attention to the possibility of a lawsuit similar to the previous lawsuit. In addition, even though Indonesia won the lawsuit, it cannot be denied that the political and economic risks arising from investment disputes are detrimental to the state.²⁹

With these criticisms, currently there are many discussions related to ISDS reform, such as the UNCITRAL Working Group III. Many countries also end up reviewing the IIAs they have signed, considering that the majority of ISDS cases are based on agreements made 15-20 years ago.

The existence of a mandatory conciliation clause certainly provides a prominent change compared to the current ISDS system. Even though it has not been used yet, the fact that the party being sued now also has a stake in the selection of the dispute resolution forum can be said to be a positive change, looking at the generally existing IIA practices and clauses, if a dispute occurs, it is the investor who chooses the dispute resolution forum.

Conciliation itself, until now, is still very rarely used in terms of investment dispute resolution. This is based on different factors, such as investors wanting a settlement forum that has legal force, is fast, and is effective. Furthermore, Aron Brooches argues that at ICSID, the low number of conciliation

²⁸C. C. Soares, *Investor-State Dispute Settlement: An Analysis of the Reform Proposals on Its Institutional Structure*, SSRN, 2017, <https://ssrn.com/abstract=2984581>

²⁹Rachmi Hertanti, *Investment Disputes Bankrupting the State*, Indonesia for Global Justice, 2019, Investment Disputes Bankrupting The State - Indonesia for Global Justice (igj.or.id) [20/09/2021]

cases is due to the arbitration option within ISDS.³⁰ Based on this statement, as well as statistics on the use of arbitration and conciliation for dispute resolution, it can be assumed that when there is a choice between arbitration and conciliation, the disputing party will be more likely to choose arbitration.

Furthermore, the existence of this conciliation needs to be considered for its effectiveness. To see the effectiveness of the conciliation clause, it cannot only be seen from the process and role of conciliation in resolving a dispute, but also needs to be added to other aspects, where in this research the second parameter will be whether conciliation can be a solution to the problems that have arisen from ISDS system. This is because, based on data released by ICSID, to date there have only been 13 cases of conciliation, which means only 1.7% of all cases in ICSID³¹ Therefore, the results of the 13 cases cannot be the only reference for the effectiveness of compulsory conciliation considering the number is still very low. The analysis for these two aspects is as follows:

1. The Process and Role of Conciliation in Resolving a Dispute

Both IA-CEPA and HK-UAE BIT states that in order to initiate a conciliation process, a prior written request is required by the party being sued to settle dispute using conciliation.

When the conciliation process has been approved and submitted to the relevant forum, the conciliation process will begin. As a first step, the parties will have the opportunity to choose a conciliator, which is an important process because each party needs to have confidence in the conciliator in order to achieve the desired result.³² The conciliator himself has the role of analyzing the expressions of the two parties, clarifying existing issues, and trying to provide recommendations to the parties based on the results of their evaluation which are expected to help the parties to reach an agreement.³³ Although in conciliation there are recommendations from the conciliator, these recommendations are not binding on the parties.

So far, from 13 cases of treaty-based *conciliation*, there were 78% of cases that were resolved until the conciliator's recommendations were issued, of which 78% only 14% reached an agreement.

In the IA-CEPA and HK-UAE BIT, the ISDS system listed is multi-tiered *ISDS* where there are 3 layers of procedures to resolve disputes. Therefore, disputes that cannot be resolved through conciliation can be continued by filing a lawsuit to the Arbitration forum.

The level of use and success of conciliation to date is still very low, considering that getting an agreement in resolving disputes is a difficult matter because the issue of investment disputes is very complex. However, the existence of a mandatory conciliation clause in IIA will be an incentive for the parties to resolve disputes by agreement. Moreover, with the current development of the economy and business, it allows the parties to consider business interests as the basis for seeking an agreement in conciliation.

2. The Role of Conciliation in Overcoming ISDS Problems

Currently, many parties wish to use other options in dispute resolution besides arbitration. This is due to the duration, complexity and cost of the arbitration, as well as the substantive content of the outcome of the arbitral award.³⁴

³⁰ Aron Brooches, *Loc. Cit.*

³¹ ICSID, *The ICSID Caseload – Statistics Issue 2021-1*, *Op. Cit.*, p. 9

³² Frauke Nitschke, *The ICSID Conciliation Rules in Practice*, 2018, p. 8 SSRNs:<https://ssrn.com/abstract=3257031> [15/6/2022]

³³ *Ibid.*, p. 10

³⁴ Romesh Weeramantry and Brian Chang, *Investor-State Conciliation and Mediation*, Oxford Bibliographies, <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0219.xml>law - Oxford Bibliographies [15/6/2022]

The most frequent criticism regarding arbitration to date is that it is costly and time-consuming. Regarding costs, *the host state* can spend up to 2.3 Million US Dollars, while investors can spend up to 4.1 Million US Dollars.³⁵ Even though this number has decreased, it can still be said to be very large. Moreover, for the losing party, it will be necessary to spend money to pay for the resulting losses,

In terms of time, from 2017 to 2020, the average dispute resolution took around 5 and a half years.³⁶ The time is clearly very long to resolve a dispute, especially if there is an investment project at stake.

Of all arbitration cases that existed from 2017 to 2020, 25% were dismissed due to lack of jurisdiction.³⁷ This is very detrimental for the parties to the dispute because from the start of the arbitration process until a decision is reached to terminate the arbitration process. Dispute resolution using alternative dispute resolution methods other than arbitration such as conciliation, of course, can overcome some of the criticisms of arbitration as mentioned above.

The conciliation process itself, based on the existing cases, does not take as much time as arbitration, starting with the appointment of a conciliator which only takes 14 weeks after registration, which is much faster than the appointment of an arbitrator.³⁸ On average, a conciliation case will take 19 weeks from the time of registration to the issuance of a recommendation.³⁹ However, it should be noted that conciliation recommendations are not binding, so that if an agreement is not reached between the parties, it is possible for the continuation of the dispute to the Arbitration body.

In addition, the costs for proceeding using conciliation are also lower than arbitration. Based on the existing cases, the average cost incurred from a completed conciliation case is USD 91,000 per party excluding legal fees and other costs incurred by the parties.⁴⁰

For example, look at the settlement of cases *Tesoro Petroleum Corporation v. United States. Trinidad and Tobago*, the dispute was resolved within a period of 2 years from 1983 to 1985. In the end, the dispute was resolved following the consensus between the parties with the assistance of a recommendation from the conciliator. This is also one of the advantages of conciliation, namely its flexible nature. Problems that are resolved through conciliation, can be done by finding the best middle ground for the Parties. This has additional positive points from the business side, because it allows the continuation of a collaboration.

Based on this explanation, conciliation is indeed appropriate to be used as a dispute resolution method of choice. The fact that 35% of arbitration cases are resolved by agreement between the parties also shows that there is interest for the parties to resolve disputes by agreement.⁴¹ Furthermore, with the existence of a clause requiring conciliation, the disputing parties will also be motivated to seek benefits from conciliation in resolving disputes. However, given the complexity of the problems that arise between investors and host-state, the use of combination is the best choice for now. Even though, if the dispute is ultimately resolved using the 3 methods listed in the IIA it will take more time and costs, but the situation is better than if an IIA only requires options such as conciliation in its article where when a dispute arises that

³⁵Matthew Hodgson, Yarik Kryvoi and Daniel Hrccka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, Allen & Overy and BIICL, 2018, p. 4

³⁶*Ibid*, p. 32

³⁷*Ibid*

³⁸Frauke Nitschke, *On. Cit*, p. 9

³⁹*Ibid*, p. 18

⁴⁰*Ibid*, p 19

⁴¹UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration. Loc. Cit*

cannot be agreed upon by the conciliation, will lead to a more complicated situation due to the absence of dispute resolution options.

The use of the ISDS combination as stated in the IA – CEPA and HK – UAE BIT can be seen as a positive innovation in the world of ISDS, because it encourages the use of alternative dispute resolution methods other than arbitration, without eliminating arbitration so that legal certainty for each party is guaranteed. The existence of this mandatory conciliation clause can also be an incentive to use alternative dispute resolution other than arbitration in terms of investment dispute resolution. Therefore, the formulation of mandatory conciliation in IIA can be said to be effective in resolving a dispute, if it is formulated with a multi-tiered system.

3. Advantages of Conciliation Clauses in International Investment Agreements for Indonesia as Host-State

Indonesia, as a developing country, certainly needs a lot of roles from foreign investment to encourage existing developments. Therefore, IIA has an important role for Indonesia. The existence of IIA helps convince investors to invest in Indonesia because it provides protection for investors' rights. Including procedural rights, which give investors the opportunity to sue when investors feel their rights have been violated or not fulfilled.

Of the many IIAs in Indonesia, the majority still use clauses that provide freedom for investors to sue the state at the Arbitration Board. Indonesia itself until now has experienced 7 lawsuits in total. This is of course detrimental to the State, because even though there is a decision in favor of the State, proceeding in arbitration takes a lot of money, time and effort. In addition, the majority of disputes that occur are due to policies implemented by the State which are considered by investors to be unprofitable. This of course hampers the freedom of the state in implementing a policy, especially for Indonesia which of course is still developing various aspects of its policies. Therefore, the State needs to find ways to minimize direct lawsuits by Investors to Arbitration bodies.

One of the steps taken by the state to minimize lawsuits against the state by foreign investors is to carry out a *BIT Review*. After the *BIT Review*, now there are many new IIAs that have been created by Indonesia with other countries with various ISDS formulations. This can be seen as an example in the ISDS Clause of the Bilateral Investment Agreement between Indonesia and Singapore, which encourage the parties to give sympathetic consideration to mediation.

In addition, one of the new ISDS formulations can also be seen in the agreement between Indonesia and Australia, namely, the IA-CEPA, which provides an opportunity for host-state to oblige the settlement of disputes to use conciliation first before, if the dispute has not been resolved, proceed to arbitration. ISDS clauses like this certainly provide a new color in dispute settlement between investors and the state. Indonesian *ashost-state* also now has a stake in the selection of dispute resolution forums.

The existence of a mandatory conciliation clause in the IA-CEPA, if one day it is used, of course it will provide many advantages for Indonesia. This is because conciliation itself has many advantages. Moreover, the ISDS formulation in the IA-CEPA itself is multi-tiered where if no agreement is reached in conciliation, then the parties can still continue the dispute through arbitration for the sake of legal certainty. In this case, it can be seen that the ISDS formulation is multi-tiered in IA-CEPA which provides benefits for both parties.

The benefits for Indonesia with the mandatory conciliation in IIA, when used, are as follows:

1. There is a clear presentation of the case in the conciliation process. As the conciliation process progresses, the parties have the opportunity to present their case clearly and in detail. In addition, during the settlement process, a conciliator will have the flexibility to interact with the parties, as well as make recommendations during the process stages, both orally and in writing. Moreover, the Conciliation Rules also oblige the parties to maintain confidentiality of views, statements or offers and without prejudice to facilitate dispute resolution.⁴² Previously, if you look at the Indonesian ISDS cases⁴³, that is:
 - a. *Cemex v. Indonesia - 2004*:

This dispute arose because the plaintiff's contractual option was not exercised to buy majority share ownership in the company where the plaintiff invested, due to alleged opposition from workers and local politicians regarding the takeover of the company by a foreign party.

This case ended with an agreement between the parties.
 - b. *Rafat v. Indonesia – 2011*:

This dispute arose because of the Century bank case, where the Plaintiff was a shareholder and was sentenced by the Court in Indonesia for Fraud and Money Laundering.

This case ended with Indonesia declared won by the arbitral body.
 - c. *Al-Warraq v. Indonesia - 2011*:

This dispute arose because of the Century Bank case, where the Plaintiff was part of the investors who were later charged with fraud in the Financial Sector in Indonesia.

The case ended with neither side winning.
 - d. *Churchill Mining and Planet Mining v. Indonesia - 2012*:

This dispute arose from the Government's unilateral revocation of a mining permit in which the plaintiff had an interest.

This case ended with Indonesia declared won by the arbitral body.
 - e. *Nusa Tenggara v. Indonesia - 2014*:

This dispute arose from the imposition of restrictions on copper exports, including export duties and a ban on exports of copper concentrate which allegedly stopped production at the Batu Hijau copper and gold mine operated by the plaintiffs.

This case ended with a request for termination of the arbitration process by the plaintiff which was also approved by Indonesia.
 - f. *IMFA v. Indonesia - 2015*:

This case arose because of allegations of overlapping coal mining permits owned by the plaintiff with other companies, resulting in a conflict of rights to mine coal in the same area.

This case ended with Indonesia declared won by the arbitral body.
 - g. *Oleovest v. Indonesia - 2016*:

This case ended with a request for termination of the arbitration process by the plaintiff in 2017.

⁴² *Investor-State Conciliation*, Romesh Weeramantry, Brian Chang, dan Andrew Willcocks, <https://jusmundi.com/en/document/wiki/en-investor-state-conciliation> [15/06/2022]

⁴³ *Investment Dispute Settlement Navigator*, United Nations Conference on Trade and Development, <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/97/indonesia/respondent> [15/6/22]

Judging from the 7 disputes that occurred, only 3 of them were resolved until the end of the arbitration process, while the other 4 were resolved between the parties. This shows the intention of both parties to resolve the dispute by agreement without an arbitral award.

Although in general in IIA each disputing party is required to carry out consultations as a first step in dispute resolution, the consultation process often does not produce the expected results. This is because investment disputes are complex issues and need to be viewed from a broad perspective.

By using conciliation as a dispute resolution step, the parties can clearly see the problems that arise with the help of a conciliator, thus enabling the parties to equalize their views and ultimately providing an opportunity to resolve disputes with an agreement between the parties that is more open.

2. Opening Opportunities For Investment Projects Ongoing

One of the benefits of foreign investment is its contribution to development and development in Indonesia. The existence of a dispute in an investment project certainly greatly hampers the progress of the project and allows the cancellation of the project.

The conciliation process has an informal and flexible nature, in which the parties can state their case and with the help of a third party, namely the conciliator, the parties can reach an agreement as is beneficial to both parties' win-win *solution*.

If implemented in Indonesia, dispute resolution using conciliation allows the parties to resolve disputes peacefully until an agreement is reached, making it possible for investors' business to continue in Indonesia, especially long-term *investment*, because there is still a good relationship between the parties.

3. Time, Cost and Energy Savings

Conciliation, in practice, costs much less than Arbitration. In addition, because the time required to resolve an investment dispute can be said to be more concise than arbitration, the costs and time required for additional personnel in resolving disputes will also be less.

4. The Final Result Is More In Accordance With The Interests Of The Parties

As a developing country, every year Indonesia experiences many changes and developments from various angles, starting from infrastructure to laws and regulations. In terms of foreign investment, Indonesia has made many changes in laws, permits, regulations, and obligations that investors need to fulfill.

Developments and changes in this policy certainly have the possibility to trigger disputes, because developments and changes made are often considered detrimental to investors, which in the end the dispute is submitted to an arbitration body. This has led to a lot of criticism of ISDS which states that demands on a country's policies interfere with the country's sovereignty to make regulations and rules in the interests of the country.

This is where Conciliation has an important role, because conciliation is flexible, the state, in this case especially Indonesia, can provide dispute resolution options that can be mutually beneficial to both parties without the need to revoke regulations applied in the country. In contrast to arbitration, where the arbitrator will decide based on the facts on the ground and make it possible to give a decision that requires the state to pay compensation because of a policy that has been formed.

5. ICSID 2022 developments *Conciliation Rules*

In 2022 ICSID *Conciliation Rules*, there are several provisions that are increasingly attractive to conciliation as an investment dispute resolution mechanism of choice. For

example, increased confidentiality is guaranteed regarding information provided during the dispute resolution process in 2022 ICSID *Conciliation Rules* will be beneficial for the parties because it is possible to reach an agreement with terms that are only known by the parties thereby minimizing the exposure of disputes to the public.

Further, Dispute resolution procedures in 2022 ICSID *Conciliation Rules* has also been simplified, such as providing a time limit of 30 days in submitting a rebuttal or objection related to ICSID jurisdiction in resolving a dispute. The existence of this provision is beneficial because it accelerates the ongoing process of dispute resolution, which means that the parties can more quickly obtain legal certainty. In addition, any references to the possibility of the participation of witnesses and expert witnesses during the conciliation process were also removed.

6. In line with Asian Culture in Dispute Resolution

In resolving a dispute, parties from countries with western culture tend to prefer strong dispute resolution methods that tend to lead to litigation. Meanwhile, parties who have an eastern or Asian cultural background tend to use more voluntary and consultative dispute resolution mechanisms based on harmony, flexibility and mutual benefit, where these things better reflect traditional Asian values.⁴⁴

Indonesia itself, as stated in Article 32 paragraph (1) of Law No. 25 of 2007, prioritizes settlement disputes through deliberation and consensus first. Therefore, in this case it can be seen that the use of conciliation as a dispute resolution method is in line with the law and the values applied to Indonesian culture itself.

Based on the explanation above, it can be seen that the existence of a conciliation clause in ISDS provides benefits for Indonesia that cannot be obtained in other IIAs such as the Indonesia-Australia BIT, which was used in the lawsuits of Churchill Mining and Planet Mining v. Indonesia, and Indonesia-India BIT, which only provide options for investors to choose a dispute resolution forum which eventually exposes Indonesia to an Arbitration lawsuit. When compared to directly suing by arbitration, of course seeking a dispute resolution by conciliation first has many advantages for Indonesia which should be reckoned with if one day it is needed to use it.

IV. CONCLUSION

In assessing the effectiveness of conciliation as a settlement of international investment disputes, this research will look at two aspects, namely the process and role of conciliation in resolving a dispute and whether conciliation can contribute to solving problems that have been in the ISDS process so far. In practice, conciliation takes relatively less time and costs less than arbitration. In addition, in practice, 35% of arbitration cases are resolved by agreement between the parties, indicating that there is an interest on the part of the parties to resolve the dispute outside of arbitration. However, the use of conciliation as the sole dispute resolution mechanism in an IIA carries risks given that the conciliator's decision is not binding on the parties. Therefore, the use of conciliation as an ISDS will be effective if it is made in the system as a multi-tiered *dispute settlement* so that when no agreement is reached, the parties can still pursue arbitration.

As a dispute resolution, conciliation certainly has advantages for Indonesia as the *Host-State*. From a legal point of view, the opportunity to resolve disputes through an agreement gives the State

⁴⁴ Herliana, Designing Culturally Conscious Alternative Dispute Resolution to Foster Asian Economic Development, *Mimbar Hukum*, Vol. 23, No. 2, Juni 2011, p. 364

greater space in forming a policy without worrying about arbitration lawsuits. Furthermore, another advantage of conciliation for Indonesia is that it provides an opportunity for countries to continue to carry out cooperation so that the country continues to benefit from a collaboration. The existence of the ICSID 2022 Conciliation Rules certainly also supports the benefits of conciliation itself, such as increased guarantees for confidential information in dispute resolution, as well as simplification of mechanisms that make the dispute resolution process shorter.

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