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International arbitration as an alternative instrument for foreign share divestment settlement in Indonesia

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Keywords

International Arbitration, Dispute Resolution, Foreign Investment, Indonesian Law.

Abstract

Dispute resolution through international arbitration has many advantages, one of which is the expertise of the arbitrator so that dispute resolution through international arbitration can attract foreign investors to do business in the recipient country such as Indonesia. The problem is that foreign investment in Indonesia through mining law has been nationalized by requiring foreign investment to be divested. For this matter, it is important to find a solutionto the problem of how International Arbitration can be an instrument for resolving foreign investment disputes in Indonesia so that foreign investment parties know and have the opportunity to resolve their disputes at the International Arbitration Institute. The results of the study show that international arbitration can be an alternative instrument for resolving foreign investment disputes in Indonesia if there is a dispute in the investment sector between the Government and foreign investors which is agreed upon by the parties, both the Indonesian Government and the Foreign Investment Party.

1. Introduction

Alternative Dispute Resolution (ADR) is a term that first appeared in the United States. The concept of ADR is an answer to the dissatisfaction that arises in the lives of people in America against the court system. This dissatisfaction arises because the settlement of disputes through the courts takes a long time due to the accumulation of cases in court so that it requires a large amount of money, as well as public doubts about the ability of judges to solve complex problems that require certain skills to solve them. The complexity can be caused by the substance of the case which is full of scientific problems (scientifically complicated) or it can also be due to the number and breadth of stakeholders who must be involved. For this reason, legal practitioners and academics have developed ADR as a disputeresolution tool that is able to bridge the needs of people seeking justice in resolving disputes between them.[1]

[1] Rachmadi Usman, *Mediasi di Pengadilan dalam Teori dan Praktik*, (Jakarta: Sinar Grafika, 2012), 2.

According to its historical development, arbitration has long been practiced since the time of Ancient Greece and the golden age of the Romans and Jews and continues to develop in trading countries in Europe, such as England and the Netherlands. Arbitration developments in other European countries such as France occurred in 1250, Scotland in 1695, Ireland in 1700, and Denmark in 1795. In addition to Arbitration developing in European countries, the spread of Arbitration in the United States occurred at the time of massive immigration. Europeans to what they call the land of hope, namely the United States around 1870.[2]

The spread of arbitration in Europe at that time was still in a simple form which had three characteristics, namely: new people used arbitration after the dispute was born, so before a dispute arose the parties did not and had not promised in advance that if a dispute occurred it would be resolved through arbitration, arbitration is used to resolve the dispute. Disputes between neighboring relatives or those that live together and have an interest in maintaining good relations, and finally the arbitrators are chosen are those who are well known to the parties and are not bound by certainties.[3]

Arbitration is a way of resolving a civil dispute outside the general court which is based on a written arbitration agreement made by the disputing parties. Dispute resolution through arbitration has advantages, such as decisions are taken by arbitrators or arbitration tribunals who are experts in their respective fields apart from there is no possibility of taking sides in the decision-making process, it is faster than litigation, and it applies internationally.[4]

In Indonesia, there are currently several arbitration institutions that provide arbitration services, for example, the Indonesian National Arbitration Board (BANI), the National Sharia Arbitration Board (Basyarnas), the Indonesian Capital Market Arbitration Board (BAPMI), the Indonesian Muamalat Arbitration Board (BAMUI), and the Association of Market Legal Consultants Capital (HKHPM). Besides that, there are also international-minded institutional arbitrations that have existed and have been established for a long time. They are ICC (The International Chamber of Commerce), UNCITRAL (United Nations Commission on International Trade Law), SIAC (Singapore International Arbitration Convention), and ICSID (The International Center for Settlement of Investment Disputes).[5]

In general, arbitration is called international if the nationalities of the parties are different, both domicile and place of residence. Besides, there are differences of opinion whether the arbitration is called international, i.e. if the agreement that is the source of the case has a link point of more than one country (for example, arbitration between have the same nationality, which concerns the transportation dispute that goes beyond the restrictions).

International Arbitration Advantages are widely used in the sale and purchase of merchandise (eg: chocolate, coffee, tea, wheat, fodder, lubricating oil, sugar, iron, rice), building construction (eg: hospitals, roads, and factories in developing countries).), joint ventures (eg: to carry out large projects), agreements on service providers (eg: hotels, and brand use permits, loan agreements). There are several reasons why these considerations were chosen asdescribed below:[6]

a. The expertise of the arbitrator, with this expertise, must mean not only technical and juridical expert, but also fame in practice, nationally this expertise is an important factor in the selection of arbitration;

[2] Huala Adolf, *Dasar-Dasar Prinsip dan Filosofi Arbitrase Cetakan Kedua*, (Bandung: Keni Media, 2015), 17.
[3] *Ibid.*
[4] I Made Widnyana, *Alternatif Penyelesaian Sengketa*, (Jakarta: PT Fikahati Aneska, 2009), 215.
[5] Suyud Margono, *Alternative Dispute Resolution dan Arbitrase : Proses Pelembagaan dan Aspek Hukum* (Jakarta: Ghalia Indonesia, 2000), 125.
[6] Girsang, SH., *Arbitrase*, (Jakarta: Litbang Diklat Mahkamah Agung RI, 1992), 24.

b. To a stronger degree, this applies to international agreements which generally do not know the intricacies of international agreements. National and International Arbitrations apply that arbitration is limited to one level, indeed there are exceptions to appeal, but in International arbitration, this is almost never done (except for commercialarbitrations);
c. In international arbitration based on rules, this imbalance will not occur, because both parties have previously known the contents of the arbitration rules which are usually very simple. Whereas in international arbitration only one institution (namely the arbitral tribunal) is authorized, in the absence of an arbitration agreement, but national judges from various countries feel they are authorized over the same international transaction;
d. Arbitration has an informal nature so that the arbitral tribunal and the parties can bring the issue to the core more quickly. Whereas foreign parties (lack of trust in judges from a foreign country, especially if the foreign country is a country from another party;
e. The application of material law. The National Judge is somewhat inclined (understandably) to apply his own laws, since these are the laws he knows best. Symptoms like this are reduced in International Arbitration, besides that International Arbitrators are also more inclined to use international trade. Some even postulate that a new mercantoria law has emerged, which concerns the implementation of international decisions.

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The many advantages of using international arbitration will certainly attract foreign investment using international arbitration in the settlement of trade disputes. Even though Indonesia was occupied and colonized by the Japanese at the time. The assets belonging to foreigners were confiscated by Japan and by the Japanese returned to their owners after Indonesia's independence. During the Japanese occupation, there was no direct foreign investment into Indonesia and very little foreign investment came to Indonesia.[7]

In 1967 foreign investment underwent several policies. This policy shows that foreign direct investment is returned to Indonesia. This foreign investment is intended specifically for foreign investment by issuing the Law of the Republic of Indonesia Number 1 of 1967 concerning Foreign Investment and only a year later the issuance of Law of the Republic of Indonesia Number 6 of 1968 concerning Domestic Investment which is specifically for Domestic Investment.

The foreign capital mentioned above is a foreign payment instrument that is not part of Indonesia's foreign exchange assets, tools for companies including new inventions belonging to foreigners, and part of company profits that can be used as means of payment or exchange.[8]

Sornarajah divides the risk in foreign investment into several types. They are ideological hostility, nationalism, ethnicity as a factor, changes in industrial patterns, contracts made by the previous regime, burdensome contracts, economic regulations, human rights and problems environment, law, and order situation.[9]

Erman Rajagukguk believes that the State of Indonesia has experienced two divestments which he considers as nationalization. The first

[7]An An Chandrawulan, *Hukum Perusahaan Multinasional Liberalisasi Hukum Perdagangan Internasional dan Hukum Penanaman Modal*, (Bandung: PT Alumni, Bandung, 2014), 44.
[8] Rahmi Jened, *Teori dan Kebijakan Hukum Investasi Langsung (Direct Investment)*, (Jakarta: Kencana, 2016), 39.
[9] Sornarajah. M, *The International Law On Foreign Investment*, Third Edition, (USA: Cambridge University Press, 2010), 69.

nationalization occurred in 1958, which was marked by the takeover of a Dutch-owned company. Then the main problem started from the sale of tobacco from a former Dutch company that was nationalized by the Indonesian government. The owner of the nationalized company claims the tobacco is partly his. The Bremen Court in its decision stated, among other things, that the nationalization carried out by the Indonesian government was the right of a sovereign state.[10]

The second nationalization occurred around 1962. According to Erman Rajagukguk, the second nationalization was marked by the presence of the Indonesian government in a confrontation with Malaysia. The Indonesian government considered the United States and Britain as the main supporters of the formation of Malaysia and considered Neo- colonialism/neo-imperialism so that Indonesia opened close relations with the Soviet Union, Eastern European countries, Cuba, China, North Vietnam, and South Korea.[11]

Nationalization is the right of the State to regulate its economy, as contained in the investment law Article 7 of the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, which explains that the Government of Indonesia will not take nationalization actions or take over the ownership rights of investors, except by the regulation.

Mining law is in the Article 112 Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining. The Indonesian side as a State with sovereignty over its economy has taken over foreign ownership rights by requiring foreign capital to be divested.

The obligation to divest shares to the Indonesian side consists of the Government, Regional Government, State-Owned Enterprises, Regional-Owned Enterprises, and National Private Enterprises, applies to foreign investors in the mineral and coal mining sector with share ownership or capital of more than 51% (fifty-one percent) within a predetermined time, namely after five years of production.

The legal background of investment in Indonesia to obtain capital is not only obtained from within the country but also obtained from abroad (foreign). Foreign capital that has taken over ownership rights by the State of Indonesia as regulated in the mining law Article 112 of the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining.

The existence of foreign investors with the Indonesian state as the owner of mineral and coal mining resources has the potential to cause disputes, and in avoiding the possibility of discrimination in dispute resolution, it is important for foreign investors to choose dispute resolution through the International Arbitration Institute. In addition, resolving disputes through International Arbitration provides more benefits, one of which is the expertise of the Arbitrator than dispute resolution through national arbitration in Indonesia.

Fifi believes that the risk of foreign mining investment in Indonesia has shifted to the adoption of nationalist policies whose implementation is inconsistent and increases the risk to investors.[12] This research, from the research location that took place in Indonesia, has distinguished research on international arbitration cases between the state and foreign private parties in Libyan.[13]

[10]Erman Rajagujguk, *Hukum Invenstasi di Indonesia Anatomi Undang-Undang No.25 Tahun 2007 tentang Penanaman Modal*,(Jakarta: Fakultas Hukum Universitas Al-Azhar Indonesia, 2007), 48.

[11] *Ibid.*

[12] Fifi Junita, "The foreign mining investment regime in Indonesia: regulatory risk under resource nationalism policy and how international investment treaties provide protection", *Journal Of Energy & Natural Resources Law*, 33 no. 3 (2015). DOI: https://www.tandfonline.com/doi/abs/10.1080/02646811.2015.1057028

[13] Mehren. B. V. Robert & Kourides. P. Nicholas , "International Arbitrations between States and Foreign Private Parties: the Libyan Nationalization Cases", *American Journal of International Law* , 75 no. 3, (1981), 476 – 552. DOI: https://doi.org/10.2307/2200685

Based on the above background, it is necessary to find a solution, namely how international arbitration can be an alternative instrument for resolving foreign share disvestment disputes in Indonesia.

2. Method

This research is a type of normative juridical research because according to Saefullah Wiradipradja, normative or doctrinal juridical research is qualitative (not in the form of numbers).[14] The approach used in this research includes a legal approach that is not only regulated in Indonesian national law but also regulated in international law related to dispute resolution through Arbitration and its Relationship with Foreign Investment in Indonesia. The data obtained from various laws, both Indonesian and international, are analyzed and then presented descriptively to find solutions to problems with International Arbitration as an alternative instrument for resolving foreign investment disputes in Indonesia.

3. Results and Discussion

3.1. International Arbitration in International Law

The classical doctrine of the state simply requires three elements that must be possessed by a political society before it can be accepted as a state according to international law, namely the government, the region, and the people.[15] This is like the provisions contained in the 1933 Montevideo Convention as international law, which states that a State must have a permanent resident, territorial capacity, and a government capable of establishing relations with other countries.

For a country, it is important to establish international relations even though it is limited so that its international personality is not completely lost. The ability to establish external relations also depends on the recognition of other countries because without the recognition of other countries it is difficult for a new country to establish international relations with other countries, for that the requirements for the establishment of a country with the recognition of other countries absolutely must be fulfilled.[16]

Article 1 Paragraph (2) of the United Nations Charter describes friendly relations between nations based on respect for the principles of equal rights and the right of the people to self-determination and taking other appropriate measures to strengthen universal peace. The application of the principle of self-determination can be found in the proclamation of the national independence of a nation free from the colonial system, such as the Proclamation of Independence of the Republic of Indonesia on August 17, 1945.[17]

The Preamble to the 1945 Constitution of the Republic of Indonesia states that it is by the grace of God Almighty and motivated by a noble desire to live a free national life that the Indonesian people hereby declare their independence.

This paragraph is a statement or proclamation of Indonesian independence to the international community regarding the intention of the Indonesian people to establish the an independent Republic of Indonesia, thus the statement of the Proclamation of Independence of the Republic of Indonesia has earned its place in the concept of international law. Indonesian National Law has issued Law No. 24 of 2000 concerning International Treaties.

[14] Saefullah Wiradipradja, *Penuntun Praktis Metode Penelitian dan Penulisan Karya Ilmiah Hukum*, (Bandung: Keni Media, 2015), 25.
[15] Isharyanto, *Ilmu Negara*, (Surakarta: Oase Pustaka, 2016), 35.
[16] Yudha Bhakti Ardhiwisastra, *Imunitas Kedaulatan Negara di Forum Pengadilan Asing*, (Bandung: Alumni, 1999), 59.
[17] *Ibid.*, 72

Law Number 24 of 2000 concerning International Agreements does not explicitly mention international economic agreements, but because international economic agreements are agreements that are generally subject to the principles of international agreements, it can be concluded that international economic agreements of the Republic of Indonesia are subject to the Act. Law Number 24 of 2000 concerning International Agreements, and international agreements not only create rights and obligations between countries but also between countries and international organizations which indirectly international agreements also regulate the relationship or economic interests of individuals with their countries.[18]

UNCITRAL Model Law, Arbitration is a way of settling a civil dispute outside the general court which is based on an arbitration agreement made in writing by the disputing parties. Arbitration can be considered as international arbitration if it fulfills the following conditions: The parties to an arbitration agreement, at the time the agreement was made, their place of business was in different countries, then the parties in determining the place of arbitration if determined following the agreement arbitration, and any place where most of the obligations of the commercial relationship are to be carried out or the place with which the subject matter of the dispute is most closely related or the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[19]

Suleman Batubara explained that international arbitration is the opposite of national arbitration, a dispute resolution carried out through arbitration bodies both inside and outside the country where one of the parties has a different nationality or foreign element. Foreign elements referred to in an arbitration agreement are:[20]

a. The parties who make clauses or have an arbitration agreement at the time of agreeing have their place of business in different countries;
b. If the place of arbitration specified in this arbitration agreement is located outside the country where the parties have their business;
c. If a place where the most important part of the obligations or trade relations of the parties must be carried out or the place where the object of the dispute is most closely related is outside the country of business of the parties;
d. If the parties have expressly agreed that the object of their arbitration agreement relates to more than one country.

Some institutions can be said to be international arbitration institutions according to Indonesian law graduates, such as SIAC, UNCITRAL, ICC, and ICSID. National arbitration and international arbitration have advantages when compared to general courts because dispute resolution through arbitration is guaranteed confidentiality, can be avoided due to procedural and administrative delays, the parties can choose an arbitrator according to their beliefs, the parties can determine legal options to resolve the problem and the arbitrator's decision is decisions that bind the parties and through simple procedures (procedures) can be implemented.[21]

In addition, the advantages of arbitration, such as there are no possibility of taking sides in the decision-making process, decisions are taken by the Arbitrator or Arbitration Tribunal who are experts in their respective fields, faster than general courts, and the court is not authorized to adjudicate disputes whose parties have been bound in arbitration agreement (clause).[22]

The many advantages of dispute resolution through Arbitration are of course supported by the principles contained in Arbitration. The principles in the Arbitration referred to are as follows:[23]

[18] Huala Adolf, *Hukum Ekonomi Internasional Suatu Pengantar, (*Bandung:Keni Media, 2015), 121.
[19] Article 1 (3) UNCITRAL Model Law on International Commercial Arbitration 1985. UNCITRAL Model Law on International Commercial Arbitration 1985, With amendments as adopted in 2006
[20] Suleman Batubara & Orinton Purba, *Arbitrase Internasional Penyelesaian Sengketa Investasi Asing Melalui ICSID UNCITRAL dan SIAC*, (Jakarta: Raih ASA Sukses, 2013), 14.
[21] Yahya Harahap, *Arbitrase*, (Jakarta: Sinar Grafika, 2004) 5.
[22] I Made Widnyana, *Op.Cit.*, 215.
[23] Huala Adolf, *Dasar-Dasar Prinsip dan Filosofi Arbitrase Cetakan Kedua*, *Op. Cit*., 23-30

a. The principle of the autonomy of the parties: the principle of the autonomy of the parties is sometimes equated with the doctrine of the law of the parties because the agreement agreed upon by the parties is the law for the parties. Article 31 Paragraph (1)of the Law of the Republic of Indonesia Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, explains that the parties in a firm and written agreement are free to determine the arbitration procedure used in the examination of disputes as long as they do not conflict with the provisions of the Regulation of the Republic of Indonesia Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration.

b. Pacta Sunt Servanda principle: this basic principle develops in the field of contract law which has the important meaning that the agreement is binding on the parties. In practice, this principle has a deep understanding where if the parties have agreed to resolve the dispute through arbitration then the parties must consequently submit it to Arbitration.

c. The principle of good faith: this principle is the same as the principle of Pacta Sunt Servanda, the principle of good faith is required to exist before, during, or after the arbitration takes place, including good faith in implementing the Arbitration award regardless of the outcome.

d. The principle of efficiency: the principle of efficiency is required and manifested in the implementation of arbitral proceedings and in the implementation of arbitral awards, especially foreign arbitrations, in the implementation of efficiency arbitration hearings in the form of time. Law of the Republic of Indonesia Number 30 of 1999 concerning Alternative Dispute Resolution and Arbitration, which explains that arbitration proceedings must be completed within 180 (one hundred and eighty) days after the arbitrator and arbitration panel was formed

Some of the principles contained in dispute resolution through Arbitration, both National and International Arbitration, as well as the principle of good faith is one of the principles contained in peaceful dispute resolution, which is the fourth fundamental principle in dispute resolution between countries. The Manila Declaration in promoting the peaceful settlement of disputes, among others, states the following:[24]

a. The disputing states must seek in good faith and a cooperative spirit the resolution of their international disputes as quickly and fairly as possible.
b. States should consider the important role that the General Assembly, the Security Council, the International Court of Justice, and the Secretary-General of the United Nations can play in the resolution of a dispute.
c. The Declaration also states that there are various ways that the organs of the United Nations can play for the parties to settle disputes.

The United Nations, to establish international cooperation to solve problems in the economic, social, cultural, or humanitarian nature, and become the center for harmonizing all actions of nations in achieving common goals such as maintaining international peace and security. Article 2 Paragraph (4) of the United Nations Charter states that all members of the United Nations shall abstain from threatening or using violence against the integrity or politics of another country's territory.

The prohibition on the use of force in the United Nations Charter, in Article 33, has explained that the parties must first seek a settlement of the dispute by means of negotiation, investigation, mediation, conciliation, arbitration, courts, submitting it to regional organizations or bodies, or other peaceful dispute resolution methods of their own choosing.

Arbitration is one of the references in the settlement of peaceful disputes between countries contained in the United Nations Charter. It is also regulated in the Hague Peace Conference which began with the initiative of Russian Tsar Nicholas II in 1898. The Hague Peace Conference has two

[24] *Ibid.,* 11.

important meanings, namely making an important contribution to the law of war and an important contribution to the rules of peaceful settlement of disputes between countries.[25]

Based on Article 38 of The Hague Convention 1907, the submission of disputes to Arbitration is not forced because the submission of dispute resolution through the Arbitration body makes it possible for the parties to the dispute. In addition to the United Nations Charterand the Hague Peace Conference, one of the principles contained in the Bandung Declaration explains, among other things: peaceful settlement of international disputes can include negotiations, conciliation, courts, or arbitration.

International law Article 13 of the Covenant of the League of Nations explains the obligation of member states to resolve their disputes to arbitration or international courts that cannot be resolved satisfactorily through diplomacy. This is one form of the implementation of good faith, to avoid the war that occurs from the members of the Convention's participants.

One of the international arbitrations such as UNCITRAL is under consideration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006, meaning that international arbitration significantly contributes to the establishment of a unified legal framework for dispute resolution fair and efficient manner arising in international commercial relations.

Arbitration, both international and national arbitration as a way of resolving civil disputes outside of a general court based on an arbitration agreement, is one of the methods of peaceful dispute resolution that is in accordance with various international laws such as the United Nations Charter, The Hague Peace Conference, the Principles of Bandung Declaration, as well as those contained in the Covenant of the League of Nations.

[25] Huala Adolf, *Hukum Penyelesaian Sengketa Internasional*, (Bandung: Sinar Grafika, 2019), 9.

3.2. Implementation of International Arbitration under Indonesian Law

Based on Article 27 Paragraph 1 of the ICSID Convention, diplomatic channels have been closed with the submission of dispute resolution to the ICSID Arbitration Board. Likewise, the decision of the Arbitration Board is binding on the parties and there can be no appeal or remedy other than those stipulated in the convention.

The ICSID Convention was established by the World Bank with the aim of being cooperation between developed countries and developing countries in order to avoid disputes characterized by different socio-economic conditions for dispute resolution through arbitration, especially in the case of disputes in the investment sector.[26]

According to Article 25, ICSID contains at least several basic requirements that must be met by the parties to be able to use arbitration. The condition is that there must be an agreement, Rationale Material Jurisdiction, and Rationale Personae Jurisdiction. Furthermore, Article 25 of the ICSID Convention states that the State is a party in giving consent to ICSID arbitration without distinguishing whether the State is in the status of iure imperii and iure gestiones. Whether a sovereign state can be sued before a forum from another country and whether a state actor can be tested by judges from other countries.[27]

In addition to the ICSID Convention, the provisions of international law as the legal basis for implementing international Arbitration awards are also regulated by the 1958 New York Convention. The original text of the 1958 New York Convention is the Convention concerning the recognition and enforcement of Foreign Arbitral Awards. The main objective of the New York Convention 1958 seeks to simplify the issue of recognition and enforcementof foreign arbitral

[26] Rubino-Sammartano. Mauro, *International Arbitration Law And Practice*, Second Edition, (USA: Kluwer International, 2001), 81.

[27] Sudargo Gautama, *Soal-Soal Hukum Perdata Internasional*, (Bandung:Alumni, 1981), 4.

awards, at least in the countries that are parties to the Convention. In essence, there are two main arrangements, namely regulating the arbitration agreement, especially the validity of the arbitration agreement and the recognition and implementation ofthe arbitral award.

The points contained in the 1958 New York Convention include, among others, the meaning of foreign arbitral awards which explain arbitral awards made in the territory of another country from the country in which recognition and execution of the arbitral award are requested, the principle of reciprocity, limitations as long as the dispute is disputed. trade, in written form, the arbitration has absolute competence, the arbitration award is final and binding, execution is subject to ius sanguinus.

Article 1 Paragraph (1) of the 1958 New York Convention emphasizes the importance of the nationality of the disputing parties because of the need for recognition and enforcement of arbitral awards made within the territory of a State, while Article 3 of the New York Convention stipulates that each Contracting State is obliged to recognize the arbitral award as a legally binding award and enforce it in accordance with the procedural rules in the territory where the award will be enforced, in accordance with the conditions described. No more severe conditions shall be imposed or the imposition of higher costs in connection with the recognition and enforcement of arbitral awards in accordance with the 1958 New York Convention, compared to the conditions applied to the recognition and enforcement of domestic arbitral awards.

Article IV of the 1958 New York Convention regulates the conditions for obtaining recognition and implementation which can be carried out by submitting an original decision that is actually ratified and if necessary, the original decision is translated into the official language of the State by an official or sworn translator or by the diplomatic or consular corps. The provisions of Article IV of the 1958 New York Convention are specifically formulated to avoid the requirement for applicants to submit evidence of a double exequatur or double review of the decision. The winning party in an arbitral tribunal has the right to request the recognition and enforcement of a foreign arbitral award without first having to prove that the award is binding in the country where the award was made.

Based on Article 3 of the New York Convention above, basically, the arbitration award is in the nature of every request for recognition and execution from one of the participating countries to other country participants, the execution must be carried out, but Article 5 of the New York Convention provides the possibility for a participating country to refuse it. Briefly, some of the reasons for the refusal were that the Arbitration agreement was made invalid in terms of the applicable law, the parties authorized to make the arbitration or the law in force in the country where the request for execution was requested, one of the parties did not get a reasonable opportunity to defend their interests, the arbitration award handed down is not in accordance with the affirmation given, the arbitration enforcement deviates so that it is not in accordance with the procedures determined by the parties in the agreement, and the arbitration award is not yet binding.

One of the main focuses of the 1958 New York Convention, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, was signed on June 10, 1958, in New York City. When this Convention was born, the arbitration experts at that time recognized that this Convention was an improvement step in the recognition and implementation of an arbitral award made abroad, especially among the member countries of the Convention. The New York Convention entered into force on June 2, 1959.

The State of Indonesia is one of the participants who participated in ratifying the 1958 New York Convention. This was marked by the Decree of the President of the Republic of Indonesia Number 34 of 1981 concerning the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which

was signed in New York on June 10, 1958 and has come into force on 7 June 1959. Law of the Republic of Indonesia Number 5 of 1968 concerning the Settlement of Disputes between the State and Foreign Citizens Regarding Investment explains that the implementation of the decision of the Arbitration Court as referred to in the Convention requires a statement from the Supreme Court which is then a letter was sent to the District Court.

The interpretation of international arbitral awards is expressly explained in Indonesian national law through Article 1 point 9 of the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. The decision in question isa decision handed down by an arbitration institution or an individual arbitrator outside the jurisdiction of the Republic of Indonesia, or a decision by an arbitration institution or an individual arbitrator according to the laws of the Republic of Indonesia is considered an international arbitration award.

The final and binding international arbitration award in accordance with the provisions of the source of the engagement in Indonesia, namely Article 1320 of the Civil Code (Burgerlijk Wetboek Voor Indonesie), states that the conditions for a valid agreement must meet several conditions, namely an agreement between the parties, the parties are capable of carrying out legal actions, agreements regarding certain matters, and the object of the agreement must be about causes that are lawful or do not violate the law.

The Objective Terms as regulated in Article 1320 of the Civil Code when reviewed according to Article 5 of the Law of the Republic of Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, disputes can be resolved through arbitration only disputes in the trade sector and regarding rights which according to law and laws and regulations are fully controlled by the disputing parties and disputes that cannot be resolved through arbitration are disputes which according to the laws and regulations cannot bereconciled.

The implementation of International Arbitration to be carried out in Indonesia is the right of the State of Indonesia in regulating its economy. Article 33 of the 1945 Constitution of the Republic of Indonesia is an economic system that functions as a provider of impetus for production, functions in coordinating individual activities in an economy, as a regulator in the distribution of production results to all members of society so that it can be carried out as expected and creates certain mechanisms for the proper distribution of goods and services.[28]

Then the Indonesian economic system which is regulated in Article 33 of the 1945 Constitution of the Republic of Indonesia, in its implementation is regulated in laws, such as Law Number 14 of 1970 concerning Basic Provisions of Judicial Power, Law of the Republicof Indonesia Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, as well as other laws.

Article 3 Paragraph (1) of Law Number 14 of 1970 Basic Provisions of Judicial Power, settlement of disputes out of court on the basis of peace or through arbitration is still allowed, but the arbitrator's decision only has executive power after obtaining permission or an order to be executed from the court. Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 1990 concerning Procedures for Implementing Foreign Arbitration Awards, explaining the procedure for applying for an exequatur is explained, among others, namely: The submission of the application file must be accompanied by the original decision or derivative of the foreign Arbitration award which has been authenticated in accordance with the provisions concerning authentication of foreign documents, as well as their official translated texts, in accordance with the legal provisions in force in Indonesia.

[28] Didik J. Rachbini, dkk, *Ekonomi Pancasila Sistem Perekonomian Untuk Mewujudkan Kesejahteraan Sosial menurut Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, (Jakarta: Lembaga Pengkajian MPR RI, 2017), 116.

Application for the execution of an International Arbitration award can only be made after being registered at the Registrar of the Central Jakarta District Court and the International Arbitration Award is only recognized and can be enforced in the jurisdiction of the Republic of Indonesia, if it fulfills several conditions, namely:[29]

a. The award is rendered by an arbitrator or arbitral tribunal in a country with the Indonesian state bound by an agreement, either bilaterally or multilaterally;
b. Regarding the recognition and implementation of the International Arbitration Award, the decision is in accordance with the provisions of Indonesian law, including in the scope of trade law;
c. The decision is enforceable and does not conflict with public order;
d. The decision can be executed in Indonesia after obtaining an exequatur from the Head of the Central Jakarta District Court;
e. Decisions concerning the Republic of Indonesia as a party to the dispute can only be implemented after obtaining an exequatur from the Supreme Court of the Republic of Indonesia which is delegated to the Central Jakarta District Court.

The implementation of international arbitration awards according to Indonesian law must meet several conditions, one of which is the decision handed down by an arbitrator or arbitration tribunal in a country with the Indonesian state bound by agreements, both bilaterally and multilaterally. Regarding the recognition and implementation of an international arbitral award, if the starting point is Article 3 of the New York Convention, then a request for recognition and execution from one of the participating countries to a participant in another country must be carried out, but Article 5 of the New York Convention provides the possibility for the participating country to refuse it.[30]

3.3. Dispute Resolution in Indonesian Investment Law

For developing countries, foreign investment has a very large role in the country's economy. They are competing to open themselves to foreign investment by creating preconditions that can attract foreign investors. From the macroeconomic aspect, foreign investment is an effort to utilize excess funds, both from public and private sources. While from a microeconomic perspective, foreign investment can be seen as an entrepreneurial activity by an investor in a certain area of the country to the company in another country.[31]

In general, foreign investment can be divided into two types, namely direct investment and portfolio investment. Direct investment is an entrepreneurial activity (entrepreneurial activity) by investing long-term capital. Direct investment can also be considered as a payment with the aim of investing in assets in order to create a permanent economic relationship. In foreign direct investment, the direct investment funds are used to carry out business activities or procure production equipment or facilities, such as buying land, opening factories, bringing in machinery, buying raw materials.[32]

Foreign capital or capital originating from abroad for developing countries such as Indonesia in addition to having a positive impact can also have a negative impact. The positive impacts of foreign investment include increasing foreign exchange from export sales, increasing the number of job vacancies for local residents, and increasing public income through taxation.[33]

[29] Article 66 Undang-Undang Republik Indonesia Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa

[30] Suwarsit Suwarsit & Yoyo Arifardhani, "The Settlement of Mining Disputes and The Implementation of International Arbitration Awards", *Pandecta Research Law Journal*, 17 no. 1 (2022): 18-28.
DOI: http://dx.doi.org/10.15294/pandecta.v17i1.32557

[31] Oentoeng Soeropati. *Hukum Investasi Asing*, (Salatiga: Fakultas Hukum Universitas Kristen Satyawacana, 1999), 17.

[32] Michael P. Todaro, *Pembangunan Ekonomi di Dunia Ketiga, Edisi Ketujuh*, (Jakarta: Erlangga, 2000), 157.

[33] Amien Bendar, *Hukum Penanaman Modal Asing Implementasi untuk Pertambangan di Indonesia*, (Yogjakarta: UII Press, 2018), 56.

The negative impact of foreign investment can be such as foreign domination over the economy and interference in the political problems of the host country, the local industry can die, the introduction of unsuitable technology to the host country, damage to the host country's environment, reduced local sources of income, and negative social effects such as the introduction of consumption patterns and bad behavior.[34]

The reason foreign investment can have a negative impact is that foreign companies can give the opposite attitude because the country that owns foreign capital is the center of the economy and the country that receives capital is only as an economic service that is not important to the economic center, namely the country that owns foreign capital, the entry of foreign capital into the country. the recipient of capital in the practice of foreign investors returning the original capital and profits are doubled from the capital they carry, foreign investors use natural resources without paying attention to the interests and needs of the recipient country of capital to make the recipient country lose the work of its people which then results in the welfare of its people not being fulfilled.[35]

In short, the foreign investment that can have a positive and negative impact on the recipient country can be interpreted as a gift or disaster, said to be a gift because the capital recipient country needs investment to boost income and economic growth while it is said to be a disaster because the presence of foreign investment will actually dominate important economic assets of the country by taking advantage of differences in capital and technology.[36]

The existence of foreign investment that can have a positive and negative impact on a recipient country of capital, of course, the State of Indonesia through its sovereignty which is interpreted in regulations, can take over foreign investment or nationalization. Although the presence of foreign investment can stop the economic decline and carry out economic development, as an effort to increase production which is marked by the issuance of Law of the Republic of Indonesia Number 1 of 1967 concerning Foreign Investment.

The presence of the Law of the Republic of Indonesia Number 1 of 1967 concerning Foreign Investment, foreign investment entering Indonesia can carry out its business directly in Indonesia, and foreign investment entering Indonesia is marked by the existence of a contract made by the Government of Indonesia and the Mining Contractor.

The form of business entity of a mining contractor company is in the form of a contract because mining entrepreneurs at the time of the issuance of Law of the Republic of Indonesia Number 1 of 1967 concerning Foreign Investment are holding contracts made by the Government of Indonesia with mining contractor business actors, both domestic mining contractors and foreign mining contractors.

This form of contract is very attractive to investors, where mining companies can ask the government to guarantee the creation of good cooperation between the local government where the mining site is located and other government agencies, granting special rights to groundwater, requesting special tariffs on royalties and taxes, special provisions regarding the physical security of the mine site, and the settlement of customary rights over excavated land and sacred places.[37]

Law of the Republic of Indonesia Number 1 of 1967 concerning Foreign Investment, after 40 years is considered no longer in accordance with Indonesian national and international developments as legal considerations for the

[34] *Ibid.*
[35] An An Chandrawulan, *Op. Cit.*, hlm. 61-64.
[36] Wasisto Raharjo Jati. Ed, *Nasionalisme Pertambangan Di Indonesia Tantangan dan Harapan*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2018), 3.
[37] Nanik Trihastuti, *Hukum Kontrak Karya Pola Kerjasama Pengusahaan Pertambangan di Indonesia*, (Malang: Setara Press, 2013), 51.

issuance of a new investment regulation, namely the issuance of Law of the Republic of Indonesia Number 25 of 2007 concerning Capital investment.

Investment law regulated in the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment is a consequence that must be obeyed, especially because Indonesia involves in various international cooperation as a member of the Organization (World Trade Organization/WTO). This is because the investment law reform in Law Number 25 of 2007 concerning Investment contains the principle of tariff protection, the principle of prohibition of restrictions, and the principle of legal certainty.[38]

The principle of legal certainty can be seen in its body which explains that investment is carried out through several principles, one of which is the principle of legal certainty. Article 1 point 1 of the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, no longer distinguishes the capital obtained can come from domestic investors or foreign investment. This is a form of investment law in Indonesia that no longer discriminates againstforeign investment.

The existence of foreign investment or can also be referred to as foreign investors in the recipient country, such as in Indonesia. According to Pandu Rizky, countries in the world entering into investment agreements provide legal protection for investment activities, and in investment agreements, there are general requirements to comply with the national laws of the host country to obtain protection from their investments.[39] One of the legal protections for foreign investment in Indonesia is that the Indonesian government provides relief to foreign investors for the entry fee of electronic goods or equipment for the purposes of foreign investment in Indonesia.[40]

Indonesian investment law through the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment provides space for the Government to take policies to anticipate various international agreements that occur and at the same time encourage other international cooperation to increase regional and international market opportunities for various goods and services from Indonesia. In addition, the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, regulates the right to transfer assets and the right to transfer and repatriate with due regard to legal responsibilities and social obligations that must be completed by investors.

Investments that are not only domestic investments, in transferring their assets to the desired party, but the possibility of disputes between investors and the Government of Indonesia also needs to be anticipated, especially in Article 7 Paragraph (1) of the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, the Government of Indonesia will not take actions to nationalize or take over ownership except by law.

The takeover of ownership rights to investments made by the State of Indonesia is not impossible because the Mining Law through Article 112 of the Law of the Republic of Indonesia Number 4 of 2009 concerning Mineral and Coal Mining has forced foreign investment to be divested to the Indonesian side.

The form of legal protection provided by the Government of Indonesia to foreign investment in terms of nationalization of companies is that the, Government will not take nationalization actions

[38]Acep Rohendi, "Prinsip Liberalisasi Perdagangan WTO dalam Pembaharuan Hukum Investasi di Indonesia (Undang-Undang Nomor 25 Tahun 2007)", *Padjadjaran Jurnal Ilmu Hukum*, 1 No. 2 (2014): 9.
DOI*: https://doi.org/10.22304/pjih.v1n2.a10*

[39] Pandu Rizky Putra Pratama & Prita Amalia, "The ISDS Mechanism and Standards of Protection in the Investment Treaty", *Lentera Hukum*, 7 no. 2 (2020): 153-170. DOI: https://doi.org/10.19184/ejlh.v7i2.17348

[40]Nanci Yosepin Simbolon, "Perlindungan Hukum bagi Penanaman modal asing (PMA) di Indonesia", *Jurnal Darma Agung*, 28 no. 1 (2020).
DOI: http://dx.doi.org/10.46930/ojsuda.v28i1.461

or take over investors' ownership rights, except by law. The government will provide compensation the amount of which is determined based on the market price. Both parties have not reached an agreement on compensation or compensation, the settlement is carried out through arbitration.[41]

Some forms of legal protection against foreign investment against the nationalization of foreign investment parties can be resolved in an Arbitration institution, while the Arbitration in question is not explained in detail whether it can be Indonesian National Arbitration such as BANI or International Arbitration such as UNCITRAL. Foreign investment disputes to the Government are not only disputes over the takeover of capital ownership rights but can also be other disputes over policies that are considered detrimental to foreign investors.

The choice of investment dispute resolution forums available in Indonesia or outside Indonesia can be used to resolve conflicts that occur with mutually beneficial solutions.[42] The establishment of the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment is a juridical consequence of the ratification of the WTO Agreement. TRIMs, which aims to create investment law, including investment dispute settlement law, which is in accordance with the wishes of foreign investors such as containing legal character that is certain, fair, and efficient and based on the legal spirit that directs the government and foreign investment to resolve investment disputes through international arbitration rather than courts even national arbitration in Indonesia. [43]

Indonesian investment law as a consequence of becoming a member of the Organization (World Trade Organization/WTO), and having the principle of legal certainty has regulated ifthere is a dispute in the investment sector between the Government and investment, the parties must first resolve the dispute through deliberation and consensus, but if deliberation and consensus are not reached, it can be done through arbitration or court.

Foreign investment in Indonesia is based on the agreement of the parties, such as when the entry of foreign investment through a mining contract does not rule out the possibility that the dispute will be resolved out of court. This belief is because Indonesian investment law expressly legal protections against the takeover of foreign investment ownership rights can beresolved in the arbitration which is not fully regulated whether national arbitration or international arbitration.

Opportunities for Foreign Investment disputes to be resolved through International Arbitration Article 32 Paragraph (4) of the Law of the Republic of Indonesia Number 25 of 2007 concerning Investment, expressly stipulates that the disputing parties, both the Indonesian Government and foreign investment parties or foreign investors, are in accordance with agreements that have invested in Indonesia can be settled in an international arbitration institution.

4. Conclusion

International arbitration as an alternative settlement of foreign share divestment disputes in Indonesia, can be carried out by investors if the dispute is a foreign investment dispute with the Indonesian government based on an agreement. Without making an agreement, foreign investment disputes with the Indonesian government can be refused to be resolved in an international arbitration institution. This is in line with Arbitration which means as a way of settling a civil dispute outside the general court based on an arbitration agreement made in writing by the disputing parties.

[41]Emkel Deanta Ginting, Perlindungan Hukum Terhadap Penanaman Modal Asing dalam Hal Nasionalisasi atas Perusahaan, Skripsi, Departemen Hukum Ekonomi, Universitas Sumantera Utara Medan, 2018. http://repositori.usu.ac.id/handle/123456789/5168

[42] Ahmad Fajar Herlani, "Pilihan Forum Penyelesaian Sengketa Investasi", *Nurani Hukum Jurnal Of Legal Studies*, 3 no. 2 (2020): 49-56. DOI: http://dx.doi.org/10.51825/nhk.v3i2.9205

[43] Muhammad Syaifuddin, "Perspektif Global Penyelesaian Sengketa Investasi di Indonesia", D*ejure Jurnal Hukum dan Syariah*, 3 no. 1 (2011): 58-70.
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