UNTAG Law Review (ULREV)
Volume 7, Issue 2, November 2023, PP 104-115
ISSN 2549-4910 (online) & ISSN 2579-5279 (print)
http://jurnal.untagsmg.ac.id/indeks.php/ulrev/indeks
www.fakhukum.untagsmg.ac.id

CONSISTENCY OF INDONESIA'S INTERNATIONAL TREATY IMPLEMENTATION IN THE FIELD OF INVESTMENT IN THE NATIONAL LEGAL SYSTEM: A POLITICAL PERSPECTIVE OF LAW TO REALIZE COMMUNITY WELFARE

Eva Arief
Faculty of law, Universitas 17 Agustus 1945 Semarang, Indonesia
evaarief21@gmail.com

ABSTRACT*; This research examines the issue of consistency in the implementation of Indonesia's international agreements in the field of investment in Indonesia's national legal system, with a focus on achieving public welfare. The political implementation of Indonesian International Treaties in the field of investment into national law is divided into two periods. The period before the Constitutional Court Decision Number 13/PUU-XVI/2018 and the subsequent period. The court decision mainly talks about how to ratify an international treaty. Article 2 of Law No. 24/2000 on International Agreements states that ratification of international agreements is done in two ways, namely ratification by passing a law by the Parliament and ratification by issuing a presidential regulation by the President. Ratification through parliament if an international agreement has a broad and fundamental impact on the livelihood of the people related to the financial burden of the state and or requires amendments to the law as stipulated in article 11 paragraph (2) of the 1945 Constitution. Meanwhile, the position of international agreements in the field of investment, based on Article 11 (2), the ratification of International Agreements is based on Presidential Regulations. At the same time, there are international investment agreements whose material can have a broad and fundamental impact on people's lives, so the absence of parliamentary control can lead to inequality and potential negative impacts on people's welfare. Through normative legal research methods, the findings show that foreign investment must provide the maximum benefit for economic development and public welfare, and the ratification of international investment agreements can be done either through presidential regulations or legislation by passing a law.*

Keywords: Political Law, International Treaties, Investment, Public Welfare.

INTRODUCTION

International treaties play an important role in facilitating cooperation, promoting stability, and resolving disputes between states. International agreements provide a framework for interaction and establish rules and norms that guide state behavior. These agreements often give rise to legal obligations that parties must fulfill and may include mechanisms to monitor compliance and resolve disputes. International agreements can vary in their scope and legal nature, ranging from bilateral agreements between two states to multilateral agreements involving many states.

International treaties are one form of international legal politics, where legal politics are used as a tool to enter into an agreement between countries or world organizations. Meanwhile, legal politics is the basis for determining the direction of a country's policy.

In the field of investment, International Investment Agreements (IIAs) play an important role in providing legal certainty, protecting investor rights, and promoting economic growth. These agreements set out the terms and conditions of investment between countries, outlining the rights and obligations of host countries and foreign investors. However, the effective implementation of international investment treaties in national legal systems remains a challenge, often resulting in inconsistencies and potential negative consequences for the welfare of society.

Indonesia, as a rapidly developing country and an attractive destination for foreign investment, faces the challenge of ensuring consistent and effective implementation of international investment treaties in its national legal system. The Indonesian government recognizes the importance of

attracting foreign investment to spur economic growth, create jobs, and enhance technological advancement. To achieve this goal, Indonesia has signed various international investment treaties, including bilateral investment treaties (BITs) and free trade agreements (FTAs) that contain provisions related to investment protection and dispute settlement mechanisms.

According to the latest data released by the Investment Coordinating Board (BKPM), Indonesia received US$43 billion in foreign investment in 2022, an increase of 44% from 2021, which is the highest amount in the country's history. When combined with domestic investment, Indonesia's investment reached IDR 1,207 trillion (US$80 billion), a 34% increase from the previous year.[1]

Lima besar investasi asing negara di Indonesia pada tahun 2022	
Singapura	US$13,3 miliar
Cina	US$8,2 miliar
Hongkong	US$5,5 miliar
Jepang	US$3,6 miliar
Malaysia	US$3,3 miliar

(BKPM, 2023)

However, even though these agreements already exist, problems arise when they are applied in the Indonesian legal system. Article 11 paragraph (2) of the 1945 Constitution provides guidance that all international agreements that have a broad and fundamental impact on the lives of many people, which are related to the financial burden of the state and / or require amendments to the law, ratification into national law must require approval from the Government. House of Representatives/DPR (Parliament).

It is undeniable that the material of international investment agreements often has a broad impact on people's daily lives. Unfortunately, Article 10 of Law No. 24/2000 on International Agreements, which regulates the criteria for international agreements whose ratification requires parliamentary approval, does not cover international investment agreements. Instead, ratification of International Investment Agreements is done by issuing a presidential regulation that refers to Article 11 of Law No. 24/2000.

In this regard, the author views that parliament as the people's representative needs to know whether international investment agreements signed by the government fulfill the interests of the people or not. Meanwhile, Indonesian positive law does not provide mitigation treatment when the international investment agreement is considered detrimental and does not provide the best benefits for national law or public welfare. Whereas there is a provision in Article 46 of the 1969 Vienna Convention on the Law of Treaties, "A State may not withdraw its consent to be bound by an international treaty because it is deemed to violate its internal domestic law", it is necessary to formulate a rule whereby the government must obtain parliamentary approval through legislative consultative measures before or during ongoing negotiations.

Therefore, this research tries to present the consistency of legal politics in the implementation of international investment treaties into national law. Moreover, before and after the Constitutional Court Decision Number 13/PUU-XVI/2018.

RESEARCH METHODS

[1] Ayman Falak Medina, Indonesia’s Breakthrough Year for Foreign Investment in 2022, Www.Aseanbriefing.Com, 2023, February 28.

This research uses normative legal research methods. According to Soerjono Soekanto (2006)[2], Normative legal research is an approach that focuses on analyzing applicable legal norms. This method aims to understand and explain the content, structure, and existing legal system. Soekanto emphasized the importance of understanding the applicable legal norms and regulations as the basis for research. Soerjono Soekanto further explained that normative legal research includes: a) Research on legal principles; b) Research on legal systematics; c) Research on the level of vertical and horizontal synchronization; d) Legal comparison; e) Legal history.

The author uses legal principles and a legal systematic approach in this research. In conducting normative legal research, the legal principles approach is used to analyze existing legal norms by referring to the principles that apply to the legal system concerned. This approach aims to understand the principles underlying the formation and interpretation of legal norms as well as the practical consequences that can be taken. According to Sudikno Mertokusumo[3], legal principles are not concrete laws, but rather general and abstract ideas that form the basis for formulating and implementing legal norms.

While the legal systematic approach means examining the systematics of certain laws and regulations.[4] Here the author does not review the laws and regulations from a technical point of view, but examines the basic understanding of the legal system contained in the laws and regulations. The analysis is only carried out on articles whose contents constitute a rule of law.

The sources of legal materials used consist of primary and secondary legal materials. Primary legal materials are legal materials derived from legislation, including the 1945 Constitution, Law Number 24 of 2000 concerning International Agreements, Law Number 25 of 2007 concerning Investment, as well as international conventions and agreements such as the 1969 Vienna Convention on the Law of Treaties. Secondary legal materials include books, journal articles, and legal papers.

DISCUSSION

Foreign Investment and Development for Community Welfare

Investment in Indonesia is regulated in Law No. 25 of 2007 on Investment. According to this regulation, what is meant by Foreign Investment is an investment activity to conduct business in the territory of the Unitary State of the Republic of Indonesia and is carried out by foreign investors, both those who use foreign capital entirely or jointly with domestic investors.[5] Sornarajah[6] said that Foreign Direct Investment (FDI) includes and involves assets, whether movable or immovable, which are used within the territory of a particular country and to generate wealth through a total or partial control of the asset owner. The motive for a company to invest in a country is to seek profits, these profits are obtained from various factors: cheap labor wages, proximity to sources of raw materials, the breadth of new markets, selling technology (brands, patents, trade secrets, industrial designs), selling raw materials to be made into finished goods, incentives for investors, and the special status of certain countries in international trade.[7]

The first reason a country invites foreign capital is to increase economic growth, in order to expand employment. Then with the influx of foreign capital, other objectives are achieved such as developing import substitution industries to save foreign exchange, transferring technology, building infrastructure, and developing underdeveloped areas.[8]

Different levels of Foreign Direct Investment (FDI) range based on the type of company involved and the reason for investment. Investors (FDI) may purchase a company in the target country

[2] Soekanto, Soerjono, *Pengantar Penelitian Hukum,* Penerbit Universitas Indonesia, Jakarta, 2006.
[3] Mertokusumo, Sudikno, *Bab-Bab Tentang Penemuan Hukum*, Citra Aditya Bakti, Jakarta, 1993.
[4] Op.Cit, Soekanto, Soerjono, hlm. 225.
[5] *Lihat* Pasal 1 UU Nomor 25 Tahun 2007
[6] M. Sornarajah dalam Kusnowibowo, *Hukum Investasi Internasional*, Pustaka Reka Cipta, Bandung, 2013, hlm. 8
[7] Rajagukguk, Erman, *Hukum Investasi, Penanaman Modal Asing (PMA) dan Penanaman Modal Dalam Negeri (PMDN),* Rajawali Pers, Depok, 2019, hlm. 1
[8] Ibid, hlm. 22

through a merger or acquisition, establish a new venture, or expand the operations of an existing company. Other forms of foreign investment include acquiring stakes in related companies, establishing wholly-owned companies, and participating in cross-border equity joint ventures.

The size of FDI is always directly proportional to the reduction of unemployment. In 2022, the Investment Agency (BPKM) released data showing that total FDI in 2022 amounted to US$45.6 billion. This amount increased by 44.2% compared to 2021 which amounted to US$31.09 billion or equivalent to 54.2% of total foreign investment and domestic investment (BPKM, 2023). Meanwhile, unemployment data reached 5.86% or 8.42 million people as of August 2022. The figure was recorded to have decreased in the same period from 6.49% or 9.1 million people (BPS, 2023)[9].

There is a possible theoretical argument that the advantages of having foreign investors in a country are vast, regardless of the pros and cons of foreign investment. The intended advantage is that the entry of foreign investors can provide many benefits for the welfare of society, such as absorbing labor from the country receiving the capital. Demand for domestic products can be created as raw materials. Increased foreign exchange and export-oriented foreign investors can significantly increase government revenue from the taxation department, technology transfer, and knowledge transfer. From this point of view, it can be seen that in areas where foreign investment operates, the presence of investors plays a major role in economic development, as is the case in Nigeria and Indonesia. The condition in Nigeria was stated by O. Oladipo[10], which asserts that FDI leads to economic growth and that government consumption expenditure, openness to international trade and human capital are complementary to Nigeria's economic growth. Indonesia and Nigeria, although located in different regions and have different socio-economic characteristics, have some similarities such as large populations, infrastructure development challenges, and natural resources.

However, FDI also comes with disadvantages in several ways. Stefan Calimanu (2021)[11] of FDI Research outlines the weaknesses of FDI, including:

1. Risk of political change: Political movements in other countries can change at any time, which can hinder investors.
2. Negative exchange rates: FDI affects exchange rates and can benefit one country or hurt another.
3. Higher costs: Investors may find that investing abroad is more expensive than exporting goods. Often more money is invested in machinery and intellectual property than in the wages of local workers. economically unfavorable.
4. Economic inability: FDI is capital-intensive from the investor's perspective, which is sometimes very risky or economically unfeasible.
5. Expropriation: Constant political changes can lead to expropriation. In this case, the governments of such countries control the properties and assets of investors.
6. Modern economic colonialism: Many Third World countries, or at least countries with a colonial history, are concerned that foreign direct investment will lead to a form of modern economic colonialism that exposes the host country to exploitation by foreign companies.
7. Poor performance: Multinationals criticized for poor working conditions in foreign factories.

Charles. P. Kindleberger (1986)[12] added that FDI can lead to economic dualism, causing socio-political problems. He cited the example of Venezuela, where workers in oil companies earn more than their counterparts in agricultural companies. This will shift the development of agriculture and tend to attract people to work in the oil sector. As a result, Venezuela could face a shortage of goods and agricultural products.

[9] Biro Pusat Statistik, 2023.
[10] O. Oladipo, *Foreign Direct Investment (FDI) : Determinants and Growths Effect in a Small Open Economy*, Economic Growth E-Journal, 2010.
[11] Calimanu, Stefan, *Advantages And Disadvantages of Foreign Direct Investment*, Research FDI, 2021.
[12] Kindleberger, Charles P, *International Economics* (A.J Bunardhi, Ed.), Aksara Baru, Jakarta, 1986.

Hendra Try Ardianto (2016)[13] found the phenomenon of the government issuing more Mining Business Licenses. But in fact, this does not guarantee more significant state revenue. On the contrary, in some cases, mining companies always leave ex-mining pits untreated, causing ecological damage. In this case, the community suffers from a lack of clean air and water, improper irrigation functions, sea sedimentation, the threat of landslides, and others.

Therefore, the government must consider the high capitalization value of FDI and its contribution to state revenue as equivalent to the welfare of the people. To achieve this goal, appropriate regulations and balancing measures that accommodate the interests of foreign investors and the welfare-oriented interests of the national people must be adequately considered in the political paradigm of law.

In implementing national development, Indonesia essentially adheres to the concept of a welfare state. A welfare state refers to a system of government in which the state plays a key role in improving the welfare and social security of its citizens. Pancasila, the basic philosophy of life of the Indonesian nation, the fifth principle mentions the principle of social justice. The focus on social justice for the Indonesian people means that the direction of Indonesia's national development is oriented towards the welfare of the people. Satjipto Rahadjo (1993)[14] Defines the principle of social justice in Pancasila by prioritizing equal rights and community welfare. This concept includes the fair distribution of economic resources and equal opportunities for all individuals.[15]

The 1945 Constitution of the Republic of Indonesia has provided guidelines on how the government should utilize its natural resources for the greatest prosperity of the people. The focus of the state's sovereignty over its natural resources and the alignment of its utilization to the people revolves around Article 33 of the 1945 Constitution, which states:

1. The economy is organized as a joint venture based on the principle of kinship.
2. Production sectors that are important to the state and control the lives of many people are under the control of the State.
3. The land, water, and natural resources contained therein are under the authority of the state and are used for the greatest prosperity of the people.

Article 33 of the 1945 Constitution, commonly referred to as the "Economic Justice" article, which is derived from the fifth principle of Pancasila, discusses the principles of economic and social justice. It emphasizes the importance of ensuring equitable distribution of wealth and the collective welfare of Indonesian society. Article 33 highlights the role of the state in controlling strategic sectors and natural resources for the greatest prosperity of the people. It affirms that the land, water and natural resources in the territory of Indonesia shall be controlled by the state and shall be used for the greatest prosperity of the Indonesian people. The state is responsible for managing and regulating these resources to advance the public interest.

Furthermore, Article 33 states that the state is obliged to regulate and supervise production activities to ensure public welfare. Encourage the development of cooperatives and small businesses to empower and protect the interests of the people. In relation to Foreign Investment Agreements, the executive is obliged to control and regulate foreign investment so that it is in line with national interests and contributes to the welfare of the Indonesian people.

Political Consistency of Law in International Investment Agreements

[13] Ardianto, Hendra Tri, *Mitos Tambang Untung Kesejahteraan Pertarungan Wacana Kesejahteraan Dalam Kebijakan Pertambangan*, PolPov, 2016.
[14] Rahardjo, Satjipto, *Keadilan Sosial Pancasila* : Vol. 2 (1), Yuridika, Surabaya, 1993.
[15] Pancasila adalah landasan filosofis Negara Kesatuan Republik Indonesia. Ia menjadi ideologi resmi negara dan pedoman bangsa Indonesia. Kata “Pancasila” berasal dari bahasa Sansekerta, dimana “panca” berarti “lima”, dan “sila” berarti “asas” atau “moral”. Prinsip-prinsip Pancasila diantaranya; Tuhan Yang Maha Esa, Kemanusiaan, Persatuan Indonesia, Demokrasi, dan Keadilan Sosial. Pancasila secara resmi diadopsi sebagai ideologi negara oleh pemerintah Indonesia pada tanggal 1 Juni 1945, pada saat proses perumusan konstitusi negara. Hal ini dirancang untuk memberikan kerangka pemersatu bagi masyarakat Indonesia yang beragam, yang terdiri dari berbagai kelompok etnis, agama, dan budaya .

Etymologically, Political Law (rechtspolitiek) consists of two words recht which means law and politiek which means politics. The term rechtspolitiek is often confused with politieekrecht which means political law. According to van Maarseveen, the term politieekrecht refers to the term constitutional law. Meanwhile, the politics of law refers to legal policy.[16]

Calvin R. Massey Discussing the politics of law refers to the separation of powers, federalism, and the interpretation of constitutional provisions, highlighting the interaction between political and legal dynamics. The politics of law as defined by Calvin, encompasses the principles and legal framework governing the exercise of power and the functioning of government institutions.[17]

In the Dutch dictionary by van der Tas, the word politiek means beleid or policy. (Wasito W., 2000)[18]. The Cambridge Dictionary defines politics as "the ability to make the right decisions". (Kamus Cambridge, 2023). The meaning of policy has various definitions. Carl J. Friedrich (1963)[19] describes policy as a series of actions proposed by a person, group or government in a certain environment by showing obstacles and opportunities in implementing the policy proposal in order to achieve certain goals.

Satjipto Rahardjo[20] explaining politics can mean the activity of choosing a particular social goal. In law, we will also be faced with a similar problem, namely with the need to make a choice about the goals and methods to be used to achieve these goals. Law as a social phenomenon is also related to the issue of legal politics because law is not an autonomous institution, but is interrelated with other aspects of society. Law has its own dynamics and legal politics is one of the factors that cause dynamics to occur because it is directed towards the ius constituendum, namely the law that should apply. Lemaire [21] explains that legal politics is part of legislative policy and according to him legal politics is part of political science in general, which examines how the establishment of laws should be (ius constituendum).

International Investment Agreements (IIAs) are legally binding bilateral or multilateral agreements that set out the terms and conditions of investment flows between countries, and typically include provisions on protection, promotion, and facilitation (UNCTAD, 2020)[22]. A state's agreement to be bound by an international investment treaty (mostly Bilateral or Multilateral Investment Treaties) has internal and external legal effects. The external legal effect is that the state assumes the obligations and rights of the international treaty, while the internal legal effect is that the international treaty enters and applies as part of a state's domestic law.

Based on the above definition, what is meant by the Political Law of international investment agreements is the political and legal aspects related to the negotiation, implementation and enforcement of international investment agreements. Political law also includes political and economic aspects that influence the negotiation and implementation of international investment agreements, including an understanding of the power dynamics, interests of various actors, and geopolitical considerations that shape the content and outcomes of investment agreements. (Jonathan Bonnitcha et al., 2017)[23]

Countries that have signed International Investment Agreements (IIAs) commit to adhere to certain standards in the treatment of foreign investment in their territory. IIAs will also establish procedures for resolving disputes in the event of non-compliance with these obligations. The most common types of IIAs are Bilateral Investment Treaties (BITs) and Preference Trade and

[16] Soemantri, Undang-Undang Dasar 1945, *Kedudukan dan Artinya Dalam Kehidupan Bernegara*, Jurnal Demokrasi dan HAM, 2001.
[17] Massey, Calvin R, *American Constitution Law : Power and Liberties*, Wolters Kluwer, 2017.
[18] W, Wasito, *Kamus Umum Belanda – Indonesia*, van Ho.
[19] Friedrich, Carl. J, *Man and His Government*, Mc.Graw-Hill
[20] Rahardjo, Satjipto, *Ilmu Hukum,* Citra Aditya Bakti, Cetakan V, Bandung, 2000, hlm.352.
[21] Trubek, David M, *Max Weber on Law and The Rise of Capitalisme*, *Winconsin Law Rewiew*, vol. 1972, hlm. 740.
[22] UNCTAD, *World Investment Report 2020 : International Production Beyond the Pandemic.*
[23] Bonnitcha, Jonathan, Waibel, Michael, & Poulsen, Lauge N. Skovgaard, *The Political Economy of The Investment Treaty Regime*, Oxford University Press, 2017.

Investment Agreements (PTIAs). International tax treaties and double taxation agreements (DTTs) are also considered IIAs, as taxation generally has an important impact on foreign investment.[24]

BITs are primarily concerned with the admission, treatment, and protection of foreign investment. This usually includes investments by companies or individuals in countries within the territory of the counterparty. Meanwhile, PTIA is a trade cooperation agreement between countries that agrees to reduce tariffs on certain products originating from countries that have signed the agreement so that the tariffs applied to these products are lower than the tariffs imposed on other countries outside PTIA. Then international taxation agreements deal more with double taxation issues in international financial activities.

In addition, there is also the Comprehensive Economic Partnership Agreement (CEPA) which is also an economic cooperation agreement but more comprehensive, which not only regulates tariff reduction but also concerns market access, capacity building, and trade facilitation, as well as investment.(Seskab RI, 2023).[25]

The legal politics of international investment agreements in Indonesia is divided into two periods. First, the period before the decision of the Constitutional Court Number 13/PUU-XVI/2018) in 2018 and the period after the decision. This is mainly sourced from Law Number 24 Year 2000 on International Agreements. Article 10 of Law Number 24 Year 2000 regulates that international agreements (treaties) are ratified in two ways: (1) ratification by ratification law by the DPR/Parliament (2) issuance of a decree by the President. The threshold that distinguishes the two methods is rooted in Article 11 paragraph (2) of the 1945 Constitution which states:

"The President in making other international agreements that have a broad and fundamental impact on the livelihood of many people related to the burden on state finances and / or require amendments or the formation of laws, must obtain permission from Parliament for approval"

However, the 1945 Constitution does not elaborate further on the definition of broad and fundamental impacts, what is meant by public life, and what are the limits of the state's financial burden. This arises when the question arises "Do International Investment Agreements (IIAs) have a broad and fundamental impact on people's lives? Or are IIAs partly or wholly related to the financial burden of the state?"

International Investment Agreements prior to Decree No. 13/2018

Prior to the enactment of Decision No. 13/2018, the process of internalizing IIAs into the domestic legal system was mostly done through the issuance of Presidential Regulations. This refers to Article 11 of the International Treaties Law which states:

" *Ratification of a treaty whose material is other than listed in Article 10, shall be carried out by Presidential Decree*…"

Article 10 of Law Number 24 Year 2004 regulates six areas of international agreements ratified by law, which are carried out based on the substance of the agreement material and not based on the form, name, or type of agreement, if it relates to:

1. Political, peace, defense and security issues;
2. Changes in the territory or delimitation of the territory of the Republic of Indonesia;

[24]Beberapa contoh BITs, PTIA, DDT yang telah diratifikasi, antara lain: (1) BITS Indonesia-Singapura (Perjanjian Antara Pemerintah Republik Indonesia dan Pemerintah Republik Singapura tentang Promosi dan Perlindungan Penanaman Modal): Disahkan melalui Keputusan Presiden 97/2020. (2) PTIAs Indonesia-Pakistan (Perjanjian Perdagangan Preferensi Antara Pemerintah Republik Indonesia Dan Pemerintah Republik Islam Pakistan): Disahkan dengan Keputusan Presiden 98/2012. (3) DTTs Indonesia-Republik Ceko (Perjanjian Antara Pemerintah Republik Indonesia Dan Pemerintah Republik Ceko Tentang Penghindaran Pajak Berganda Dan Pencegahan Penghindaran Fiskal Berkenaan Dengan Pajak Atas Penghasilan): disahkan dengan Keputusan Presiden 79 /1995.

[25]Contoh CEPA: CEPA Indonesia-Chile (Perjanjian Kemitraan Ekonomi Komprehensif Antara Pemerintah Republik Indonesia dan Pemerintah Republik Chili): Disahkan dengan Keputusan Presiden 11/2019

3. Sovereignty or sovereign rights of the state;
4. Human rights and the environment;
5. Establishment of a new legal method;
6. Foreign loans and/or grants.

This means that international investment agreements are not covered by Article 10, which also means that by their nature, international investment agreements are not considered to have an impact on the lives of the general public.

According to the official explanation of Law No. 20/2004 Article 11, agreements that require ratification by presidential decree include technical and procedural cooperation in the fields of science, technology, economics, engineering, trade, culture, commercial shipping, double taxation avoidance, and investment protection cooperation as well as agreements of a technical nature. Based on this explanation, IIAs are not possible by legislation on the grounds that IIAs may affect the livelihoods of many people and are related to the state's financial burden, requiring amendments or legislation.

The following are some examples of IIAs ratifications that Indonesia conducted with other countries prior to the adoption of Decree No. 13/2018, among others:

1. *Agreement Between the Government of the Republic of Indonesia and the Government of the Russian Federation on the Promotion and Protection of Investment (Ratified by Presidential Decree 7 of 2009 (LN. 2009/No. 7)/Came into Force on October 15, 2009)*.
2. *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark Concerning the Promotion and Protection of Investment (Ratified by Presidential Decree 33 of 2009 (LN. 2009/No. 116)/Came into Force on October 15, 2009)*.
3. *Agreement Between the Government of the Republic of Indonesia and the Government of Finland Concerning the Promotion and Protection of Investment (Ratified by Presidential Decree 29 of 2008 (LN. 2008/No. 71)/Came into Force on August 2, 2009)*.
4. *Agreement on the Promotion and Reciprocal Protection of Investment between the Government of the Republic of Indonesia and the Government of the Islamic Republic of Iran (Ratified by Presidential Decree 66 of 2008 (LN. 2008/No. 155)/Came into force on March 28, 2009) 4. (UNCTAD), 2023)* (UNCTAD), 2023).

Considering that most IIAs are authorized through presidential decrees, even though their material substance involves fundamental impacts on people's lives. Article 10 of Law No. 24/2000 may be unconstitutional in relation to Article 11(2) of the 1945 Constitution.

In addition, the material substance between Article 11 paragraph (2) of the 1945 Constitution and Article 10 of Law Number 24 Year 2000 tends to be inconsistent. The criteria contained in Article 10 of Law Number 24 Year 2000 do not take into account the provision of "a broad and fundamental impact on people's livelihoods related to the financial burden on the state". At the same time, some types of international investment agreements can have a broad and fundamental impact on people's lives, related to the financial burden on the state, which must be approved by parliament.

Other inconsistencies, for example, what if an international agreement is mentioned in Article 10 of Law Number 24 Year 2000 but does not have a broad and fundamental impact on people's lives related to the state's financial burden? Does it still need parliamentary approval? Meanwhile, other forms of international agreements that are not covered in Article 10 of Law Number 24 Year 2000 can actually have a broad and fundamental impact on society.

The inconsistencies mentioned above led to a Judicial Review at the Constitutional Court filed by several elements of society consisting of individuals and communities/non-profit organizations. The Constitutional Court's decision marks a significant change in Indonesia's political legal view

on international investment treaties.[26] An in-depth discussion on the impact of the court decision will be presented in the following sub-chapters.

International Investment Agreements after the adoption of Decree No. 13/2018

The Indonesian Constitutional Court has issued Decision Number 13/PUU-XVI/2018 (Decision Number 13/2018) in November 2018. The decision was made after a long process of the plaintiffs' claims that Articles 2, 9 (2), 10, and 11 paragraph (1) of the Tract Law are unconstitutional, especially Article 11 paragraph (2) of the 1945 Constitution, which is based on "broad and fundamental impacts on the livelihoods of many people associated with the burden on state finances." These articles consist of:

Article 2 : *The Minister gives political consideration and takes necessary steps in making and ratifying treaties after consultation with the House of Representatives on matters relating to the public interest.*

Article 9 (2) : *Ratification of international treaties is done by law or presidential decree*.

Article 10 : *The ratification of an international treaty is done by law if it relates to:*

1. *matters of state politics, peace, defense, and security;*
2. *Perubahan wilayah atau penetapan batas wilayah negara Republik Indonesia;*
3. *Kedaulatan atau hak berdaulat negara;*
4. *Hak asasi manusia dan lingkungan hidup;*
5. *Pembentukan kaedah hukum baru;*
6. *Pinjaman dan/atau hibah luar negeri.*

Article 11 : *Ratification of international agreements whose material is not included in the magteri as referred to in Article 10, shall be carried out by presidential decree. ..*

The plaintiffs, consisting of individuals and several community/non-profit organizations as representatives of the people, jointly argued that international investment agreements or IIAs made by the president are considered agreements that must receive prior parliamentary approval before being ratified as stipulated in Article 11(2) of the 1945 Constitution. Moreover, it is argued that Parliament is the representative of the people and as such must be informed and authorized to approve or reject such agreements. The absence of parliamentary approval would raise concerns about the loss of the essence of people's power in the process of ratifying international agreements.

The Constitutional Court had considered Article 10 of Law No. 24/2000 unconstitutional because it only limited the types of international agreements that had a broad and fundamental impact on people's lives related to the burden on state finances. Meanwhile, Articles 2, 9 paragraph (2), and 11 remain constitutional. The decision is based on the consideration that,

"The development of international relations has intensified, causing the global community to increasingly depend on each other to fulfill their needs, and this in turn will affect Indonesia's national interests".

The court's consideration emphasized that there may be current and future international agreements that will have a significant impact on people's lives and are not covered by Article 10 of Law 24/2000. Through the repeal of Article 10 of Law No. 24 of 2000, the court ultimately decided that the manner of ratification of such international agreements would be done on a case-by-case basis. Therefore, the respective government or competent authority must assess which international agreements require parliamentary approval for ratification and which international agreements can be ratified through the issuance of a presidential decree.

[26] Pasal 10 ayat (1) Undang-Undang 24 Tahun 2003 tentang Mahkamah Konstitusi sebagaimana telah diubah dengan Undang-Undang 8 Tahun 2011 menyebutkan bahwa Mahkamah Konstitusi berwenang menguji manakah putusannya yang bersifat final dan mengikat konstitusionalitas undang-undang terhadap UUD 1945.

Decision No. 13/2018 also answers various questions raised by the plaintiffs about the role of parliament in giving "approval" and ratifying international agreements by "enacting" legislation; as well as, the criteria for international agreements that need to be ratified by parliament. Decision No. 13/2018 also answers various questions raised by the plaintiffs on (1), the role of Parliament in granting "approval" and ratifying international agreements by "enacting" legislation; and (2), the criteria for agreements that need to be ratified by Parliament.

In relation to the first question, the Plaintiff argues that the Treaty does not implicitly define Parliament's "consent" to the treaty-making process and only mentions Parliament's role in carrying out the "ratification" of certain types of international agreements as provided for in Article 10 of the Treaty. Actions that lead to ambiguity.[27]

The above question has been raised by various jurists and expert representatives of the government as to whether approval and ratification by law are separate processes or part of the same process. The view of government representatives expressed in the Treaty Law refers to approval and ratification as an integrated process in which parliamentary approval is ultimately reflected in the ratified law. When referring to the 1945 Constitution, this view assumes that the role of the DPR under Article 11 paragraph (2) in approving international treaties is the same as the role of the DPR under Article 20 of the 1945 Constitution, which states “every law (to be passed) must obtain approval from parliament. In this regard, the government views that the term "approval" in Article 20 of the Constitution has the legal effect of Article 11(2) of the Constitution which must be followed up by parliament by enacting or enacting laws.

However, in Decision No. 13/2018, the Constitutional Court held that approval and ratification are two separate processes. Damos Dumoli Agusman, an International Law expert, explains that the Constitutional Court's new interpretation provides two distinctions between these processes:

First, parliamentary approval is intended as a consultative mechanism between the government and parliament that can be realized by providing parliamentary recommendations on "consent to be bound" to certain international agreements. In this consultative process, parliament can give approval at an early stage before the international treaty negotiation process. Consultative action by the government and parliament prior to the negotiation of a particular international treaty can also prevent the state from violating international law; as stipulated in Article 46 of the 1969 Vienna Convention, a state may not revoke its "consent to be bound" to a treaty because the treaty is invalid under its national law. Secondly, ratification by parliament is intended as a legal instrument that brings international agreements into the national legal system through the enactment of legislation. (Damos Dumoli Agusman, 2019)[28]. Therefore, parliamentary approval is not an integral part of the internal ratification mechanism. In other words, parliamentary approval does not have to be expressed in the ratification law. (Jessica Vincentia Marpaung, 2020)[29].

Decree No. 13/2018 also outlines that the ratification process is only required if the treaty provides for the agreement to be expressed through ratification. Implicitly, the internalization of international treaties into domestic law sometimes requires ratification if the treaty-making steps consist only of negotiation, signing and ratification.[30] Therefore, if the treaty-making steps can be carried out through negotiation and signing, then ratification is not mandatory.

[27] Dalam kaitan ini, para penggugat berpendapat bahwa pengertian “persetujuan” tidak perlu ditindaklanjuti dengan pembentukan undang-undang. Hal ini hanya dapat berupa pemberitahuan kepada parlemen dan masing-masing badan parlemen yang berwenang yang menyatakan bahwa perjanjian internasional yang bersangkutan tidak melanggar sistem hukum dalam negeri dengan segala cara.

[28] Agusman, Damos Dumoli, *Putusan Judicial Review MK Atas UU Nomor 24 Tahun 2000 tentang Perjanjian Internasional : Apa Yang Berubah ?* Opinio Juris, 2019, 24.

[29]Marpaung, Jessica Vincentia, *The Constitutionality of International Investment Agreements in Indonesia Post Issuance of The Constitutional Court Decision Number 13/PUU-XVI/2018*, Law Review, 14 (3).

[30]Konvensi Wina tentang Hukum Perjanjian tahun 1969 mengakui dua cara untuk membuat perjanjian internasional; (1) negosiasi dan penandatanganan, (2) negosiasi, penandatanganan, dan ratifikasi. Persetujuan negara untuk terikat pada suatu perjanjian yang dinyatakan dengan tanda tangan yang diatur dalam Pasal 12 Konvensi

To answer the second question, when Parliament's approval is required, the fundamental issue lies in the criteria or threshold applied to international agreements that require Parliament's approval as stipulated in Article 11 paragraph (2) of the 1945 Constitution. In relation to IIAs, such procedures can avoid adverse impacts on Indonesia's commitment to investment and economic progress in favor of the interests of people's welfare based on the provisions stipulated in Article 33 of the 1945 Constitution.

CONCLUSION

Based on the above discussion, the author draws the following conclusions:

1. The legal policy of Indonesia's Investment Treaty primarily focuses on improving the welfare of the community in accordance with the principles set out in Article 33 of the 1945 Constitution; meaning that foreign investment must provide maximum benefits for economic development and the welfare of the people;
2. The implementation of international investment treaties into national law is divided into two periods, namely before and after the Constitutional Court Decision Number 13/PUU-XVI/2018. Prior to the Constitutional Court decision, ratification of foreign investment treaties into the national legal system required a presidential regulation. However, after the court decision, the ratification process can be done through a presidential regulation or by law. Suppose the international investment agreement significantly has a broad and fundamental impact on people's lives related to the state's financial burden. In this case, the ratification is done through a law as stipulated in Article 11 paragraph (2) of the 1945 Constitution.

REFERENCES

HUKUM & PERJANJIAN

Konvensi Wina tentang Hukum Perjanjian (1969). Mulai berlaku 27 Januari 1980. UNTS Vol. 1155 Hal.331

Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

UU No. 24 Tahun 2000 tentang Traktat A ct. Mulai berlaku tanggal 23 Oktober 2000. LN. 2000/ No.185, TLN NO. 4012

Undang-Undang Nomor 25 Tahun 2007 tentang Penanaman Modal. Mulai Berlaku 26 April 2008. LN.2007/NO.67, TLN NO.4724

Putusan Mahkamah Konstitusi Republik Indonesia Nomor 13/PUU-XVI/2018

BUKU

Calvin R. Massey. (2017). *Hukum Konstitusi Amerika: Kekuasaan dan Kebebasan* . Kluwer Dunia.

Carl J.Friedrich. (1963). *Manusia dan Pemerintahannya* . McGraw-Hill.

Charles. P.Kindleberger. (1986). *Ekonomi Internasional* (A.J Bunardhi, Ed.). Aksara Baru.

Gunarto Suhardi. (2004). *Beberapa Elemen Penting Dalam Hukum Perdagangan Internasional* . Universitas Atmajaya Yogyakarta

Hendra Coba Ardianto. (2016). *Mitos Tambang Untung Kesejahteraan Pertarungan Wacana Kesejahteraan dalam Kebijakan Pertambangan* . PolGov.

Jonathan Bonnitcha, Michael Waibel, & Lauge N. Skovgaard Poulsen. (2017). *Ekonomi Politik Rezim Perjanjian Investasi* . Pers Universitas Oxford.

Panji Anoraga. (2006). *Pengantar Pasar Modal* . PT Rineka Cipta.

Satjipto Rahadjo. (1993). *Keadilan Sosial Pancasila : Vol. 2 (1)* . Gema Yuridika.

Soemantri. (2001). Undang-Undang Dasar 1945, Kedudukan dan Artinya dalam Kehidupan Bernegara. *Jurnal Demokrasi Dan HAM , 1* (4).

Soerjono Soekanto. (2006). *Pengantar Penelitian Hukum* . Penerbit Universitas Indonesia.

Sudikno Mertokusumo. (1993). *Bab-Bab Tentang Penemuan Hukum* . Citra Aditya Bakti.

Wasito W. (2000). *Kamus Umum Belanda Indonesia* . van Ho.

JURNAL

Damos Dumoli Agusman. (2019). Putusan Judicial Review MK atas UU No. 24 Tahun 2000 tentang Perjanjian Internasional: Apa yang Berubah? *Opini Juris , 24* .

Jessica Vincentia Marpaung. (2020). KONSTITUSIONALITAS PERJANJIAN INVESTASI INTERNASIONAL DI INDONESIA PASCA TERTERANYA PUTUSAN MAHKAMAH KONSITUSI NOMOR 13/PUU-XVI/2018. *Tinjauan Hukum , 14* (3).

O.Oladipo. (2010). Investasi Asing Langsung (FDI: Faktor Penentu dan Pengaruh Pertumbuhan dalam Perekonomian Terbuka Kecil. *Pertumbuhan Ekonomi EJournal* .

SUMBER INTERNET

Ayman Falak Madinah. (2023, 28 Februari). *Tahun Terobosan Penanaman Modal Asing Indonesia pada tahun 2022* . Www.Aseanbriefing.Com.

BPKM. (2023). *Realisasi Investasi Asing ke Indonesia Melonjak 44,2% pada tahun 2022* .

BPS. (2023). *Jumlah Angka Pengangguran per Agustus 2022* .

Seskab RI. (2023). *Perkembangan Perjanjian Perdagangan Bilateral antara Indonesia dengan Negara Mitra Baca selengkapnya: https://setkab.go.id/perkembangan-perjanjian-perdagangan-bilateral-antara-indonesia-dengan-negara-mitra/* . Seskab.Go.Id.

Stefan Kalimanu. (2021). *16 Keuntungan Dan Kerugian Penanaman Modal Asing Langsung* . PenelitianFDI.

Konferensi PBB tentang Perdagangan dan Pembangunan (UNCTAD). (2003). *Pusat Kebijakan Investasi* . UNCTAD.

KONFERENSI PBB tentang Perdagangan dan Pembangunan (UNCTAD. (2020). *Laporan Investasi Dunia 2020: Produksi Internasional Melampaui Pandemi* .