

# **THESIS**

## **INTERNATIONAL LEGAL REVIEW OF THE EXISTENCE OF INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) IN FOSSIL FUELS INVESTOR PROTECTION**



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MAKASSAR  
2023**

**TITLE PAGE**

**INTERNATIONAL LEGAL REVIEW OF THE EXISTENCE OF  
INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)  
IN FOSSIL FUELS INVESTOR PROTECTION**

As a Final Project for the Department of International Law Undergraduate  
Program in the Legal Studies Program

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**INTERNATIONAL LEGAL REVIEW OF THE EXISTENCE OF  
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IN FOSSIL FUELS INVESTOR PROTECTION**

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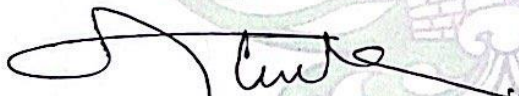
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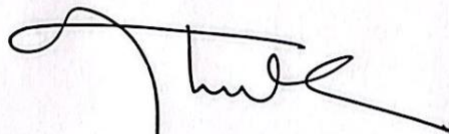
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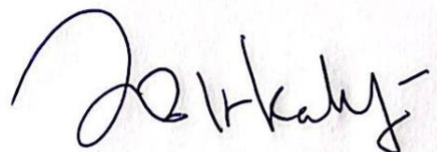
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## ABSTRACT

**FA'UREY AFFAIZA (B011191020) with the title International Legal Review of the Existence of Investor-State Dispute Settlement in Fossil Fuels Investor supervised by Juajir Sumardi and Birkah Latif.**

This research objective is to determine how the existence of ISDS affects the settlement of disputes of fossil fuels, given that ISDS is known to prioritize the rights of state investors regardless of their investment activities and that fossil fuels individually have a negative impact on the environment.

In this study, the author utilized a normative research methodology to analyze the ISDS clause for resolving investment disputes within international investment agreements. Furthermore, the author's analysis is strengthened by reading journals, books, dictionaries, statutes, etc.

The research leads the author to the conclusion that ISDS exists as an investment dispute settlement based on international law. Frequently, investor states receive compensation from the host state. On the other hand, investment activities in fossil fuels that exceeded the maximum limit specified in the International Investment Agreement (IIA) between countries had negative effects on the environmental conditions of the host state. Also, ISDS directly related to international law and its derivatives, such as International Economic Law, International Investment Law, International Environmental Law, and International Climate Change Law.

Key Words : Fossil Fuels Investment, Investor-State Dispute Settlement (ISDS), International Investment Agreement (IIA)

## FOREWORD

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Makassar, 23 May 2023

Author

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## CHAPTER I INTRODUCTION

### A. Background of the Problems

Energy is an essential need for modern society, which has given rise to the concept of energy security, closely related to the availability of unrestricted energy resources at affordable prices.<sup>1</sup> Fossil Fuels are an energy source that is frequently employed. Fossil fuels are natural resources that contain carbon, such as coal, oil, and natural gas.<sup>2</sup> National Geographic defines fossil fuels as energy formed from plant and animal corpses.<sup>3</sup> This energy is found in the earth's crust and consists of carbon and hydrogen.<sup>4</sup> Fossil fuels are a type of energy that exist and play a significant part in ensuring the public's welfare. As part of its duties, the state is responsible for ensuring its citizens' welfare, including: a.) To Fulfill; b.) To Respect; and c.) To Protect.

Each country must consider these three obligations so that their implementation does not require unequal treatment because fossil fuels are part of the state obligation to fulfill. Determining how to use fossil fuels in a way that all residents can

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<sup>1</sup> International Energy Agency ('IEA'), 'Energy Security' <https://www.iea.org/topics/energysecurity/>, accessed 18 October 2022)

<sup>2</sup> Google arts and Culture. *Bahan Bakar Fosil.* <https://artsandculture.google.com/entity/m0cx6y?hl=id> (accessed 24 October 2022)

<sup>3</sup> National Geographics. *Fossil fuels.* <https://education.nationalgeographic.org/resource/fossil-fuels> (accessed 24 October 2022)

<sup>4</sup> *Ibid.*

benefit from is, therefore, the state's job to accomplish the desired social welfare.

Fossil fuels are well known to be the primary source of life in all countries, being used for things like: a) transportation, b) generating electricity, c) fertilizing, d) supplying the chemical industry, e) creating polymers, etc. But unfortunately, in its use so far, fossil fuels are a type of non-renewable natural resource (in a short time). This is because fossil fuels are formed from the process of sedimentation and decomposition of living things that takes millions of years. That is why, the use of this fuel must be done wisely and responsibly.<sup>5</sup>

In regard to the fact that fossil fuels are nonrenewable energy sources, their existence is a double-edged sword. Its advantages are essential, but their effects can break environmental balance. The relationship between fossil fuels and environmental conditions is not one that is favorable. Based on international law, the impact of fossil fuels will be felt globally because they are the primary source of energy used by all countries. Presently an environmental imbalance occurs in a country due to the use of fossil fuels, consequently another country likewise encounter an environmental imbalance.

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<sup>5</sup> Vita. "Mengenal Jenis bahan Bakar Fosil", Kurusuke, <https://kurusuke.red/mengenal-jenis-bahan-bakar-fosil/>, accessed 27 October 2022.

Emissions are produced as a result of the combustion techniques used to burn fossil fuels. Exhaust emissions, also known as carbon emissions, are produced when fossil fuels are used. Carbon emissions from the combustion of fossil fuels cause pollution and climate change. Carbon Monoxide (CO), Carbon Dioxide (CO<sub>2</sub>), various carbonate compounds, various Nitrogen Oxides (NO<sub>x</sub>), and sulfur (SO<sub>x</sub>) are the compounds in carbon emissions.<sup>6</sup> The composition of these emissions will result in smoke, acid rain, global warming, and climate change. This situation makes environmental imbalances more likely, and it's a shame that it's become a reality as long as fossil fuels are still used.

Currently, climate change has the most significant influence, Consider Indonesia, where weather patterns are becoming less predictable than usual. In general, the rainy season will last from the beginning of October to the beginning of April, while the dry season will last from the beginning of April to the beginning of October. Nevertheless, the weather patterns in Indonesia are unstable, with the rainy season being longer than usual and accompanied by hot weather. As stated by data of Badan Meteorologi Klimatologi dan Geofisika (BMKG), on

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<sup>6</sup> Syahril Machmud, et.al. "Analisis Pengaruh Tahun Perakitan Terhadap Emisi Gas Buang Kendaraan Bermotor" Jurnal Mesin Nusantara, Vol. 4. 2021. p. 22

September 2022 In almost all regions of Indonesia, Positive anomaly values are seen in September 2022 at 88 BMKG monitoring stations for the average air temperature anomaly per station (hotter than the climatological average).<sup>7</sup>

Climate change has an impact on other countries as well. Pakistan, known as the "Country of a Thousand Lights," uses a significant amount of fossil fuels, with a total of 21.45 million cubic meters as of June 2019. Previously, in 2016, the government of Pakistan proposed increasing hydrocarbon production in the country, increasing natural gas imports, diversifying the installed capacity portfolio of power plants, raising domestic energy efficiency standards, eliminating natural gas subsidies, and addressing the energy industry's circular debt problem. Thus, climate change is perceived in Pakistan to refer to erratic weather patterns.<sup>8</sup> According to data, the rainy season in Pakistan causes damage every year, with the 2010 rainy season having the most significant impact, affecting 21 million people.<sup>9</sup> The existence of fossil fuels will be a problem and a global consumption. It is extremely difficult for countries to abandon its use because,

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<sup>7</sup>BMKG. 2022. "Ekstrim Perubahan Iklim" <https://www.bmkg.go.id/iklim/?p=ekstrem-perubahan-iklim>. accessed 29 October 2022.

<sup>8</sup> EIA. 2016. "Pakistan Overview" <https://www.eia.gov/international/analysis/country/PAK> accessed 29 October 2022

<sup>9</sup> IBERDROLA. 2022. "Which Countries are most threatened by and vulnerable climate change?" <https://www.iberdrola.com/sustainability/top-countries-most-affected-by-climate-change> accessed 30 October 2022.



again, its existence turns into the most important thing in everyday life. As a result, environmental issues caused by the use of fossil fuels are a major problem that affects all living things. Countries dealing with environmental challenges caused by fossil fuels are unable to move freely since these fuels cannot be used independently.

The need for adequate economic and technological assistance to achieve comprehensive utilization for the welfare of citizens is advantageous. As a result, countries must accept energy investments made by parties with more significant reserves of fossil fuels to invest in developing countries. Investing in developed countries is common; in this case, the party investing is also known as an Investor Company, which generally invests in a company or legal entity by bringing the country of origin or known as investor state<sup>10</sup> and the host state<sup>11</sup> is the country where the investment is made.

Investment activities refer to the principle of reciprocity or mutual protection. This principle stipulates that in the event a country desires favorable treatment from other nations, it must

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<sup>10</sup> The author will use the term "Investor State" to refer to the investors' country of origin.

<sup>11</sup> The author will use the term "Host State" to refer to the country that receives an investment.

extend the same courtesy to other countries.<sup>12</sup> Aside from fossil fuels investment activities, the principle of reciprocity also applies.

According to International Law, investment activities are the same as a state cooperative activity with other countries, also known as acts of diplomacy between countries. The principle of reciprocity is recognized and accepted as a general legal principle that underpins provisions in international agreements<sup>13</sup> and customary international law within the framework of diplomatic law.<sup>14</sup> When a country engages in investment activities, it is bound by international agreements known as International Investment Agreements (IIAs), which include a the three following forms<sup>15</sup> :

- a) Bilateral Investment Treaties (BITs);
- b) Multilateral Investment Treaties (MITs); and
- c) Free Trade Agreements (FTAs).

The term "Promotion and Protection of Investments Agreement" is frequently used to refer to the formation of

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<sup>12</sup> Wisnu Indaryanto. "Kedaulatan Indonesia Di Antara Virus Corona Versus Asas Resiprositas Dan Asas Manfaat (Tinjauan Yuridis Peraturan Presiden Nomor 21 Tahun 2016 Tentang Bebas Visa Kunjungan)", Jurnal Legislasi Indonesia, June 2020, p. 121.

<sup>13</sup> The provisions of International Law become the basis for enforcing regulations from countries through multilateral provisions to their application in the national sphere, see Birkah Latif and Kadaruddin, Pengantar Hukum Internasional, Pustaka Pena Press, 2013, p.22.

<sup>14</sup> *Ibid*, p. 125.

<sup>15</sup> Kristen Boon, "Theorizing Responsibility in the Investor-State Dispute Resolution System", St. John's Law Review, Vol. 95, No.2, 2022., p. 255.

investment agreements between countries that take place through the use of Bilateral Investment Treaties (BITs). BITs are legally binding bilateral investment agreements between two countries that stipulate reciprocity investment protection and promotion.<sup>16</sup> The United Nations Conference on Trade and Development (UNCTAD)<sup>17</sup> reinforces that the definition of BITs is based on the reciprocity encouragement between two countries, which is carried out in this case by the companies of these countries with investment promotion and protection. The country that sign the BIT commit to adhering to particular standards regarding the treatment of foreign investment within their territories.<sup>18</sup> Following the bilateral investment agreement, the activities include investments in fossil fuels. During the development of bilateral investment agreements, Investors apply them as protection against policies and actions of the host state that are deemed harmful to investors and their investment endeavor's.<sup>19</sup>

Existence of BITs as a basis for investor investment. With an emphasis on investor protection, BITs are commonly viewed

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<sup>16</sup> Kavaljit Singh, et.al, "Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices, Both Ends", (Netherland, 2016),p. 1.

<sup>17</sup> UNCTAD is a United Nations (UN) organization capable of handling trade, investment, and development issues.

<sup>18</sup> Laura Natalia Sembiring, "Urgensi Perjanjian Investasi Bilateral Antara Indonesia Dan Negara Lain Dengan Klausula Penyelesaian Sengketa Investor-State Dispute Settlement", *Drmasisya Jurnal Program Magister Hukum Fakultas Hukum Universitas Indonesia*, December 2021, p. 1942.

as unilateral in their content. They refer to clauses in BITs that emphasize investor protection in the host state. The clause in question is more in favour of investors, a clause regarding dispute resolution that will be carried out if, during the investment period, there is a conflict that occurs. Dispute settlement is referred to as Investor-State Dispute Settlement (ISDS).

According from the data 67 countries, including Indonesia, are bound by investment-related BITs or The Promotion and Protection of Investments (TPI) agreement. Various statuses of these agreements have yet to be ratified, have expired, or are still in effect. Most of them have not countries that are still in force, such as the ones listed below<sup>20</sup> :

No.	Bilateral Investment Treaty of Indonesia (BITs)	The Signature Date	Date of Entry into Force
1.	Indonesia-Sweden	17/09/1992	18/02/1993
2.	Indonesia-Jordan	12/11/1996	09/02/1999
3.	Indonesia- South Korea	16/02/1991	10/03/1994
4.	Indonesia-Thailand	17/02/1998	05/11/1998
5.	Indonesia-Norway	26/11/1991	01/10/1994
6.	Indonesia-Tunisia	13/05/1992	12/09/1992
7.	Indonesia-UK	27/04/1976	24/03/1997
8.	Indonesia-Morocco	14/03/1997	21/03/2002
9.	Indonesia-Uzbekistan	27/08/1996	27/04/1997
10.	Indonesia-Tunisia	13/05/1992	12/09/1992
11.	Indonesia-Singapore	11/10/2018	09/03/2021
12.	Indonesia-UEA	24/07/2019	03/12/2021

Table 1. Bilateral Investment Treaty of Indonesia

<sup>20</sup> David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?*, Asian Journal of International Law, 7, 2017, p.2.



Over the years, Indonesia has yet to continue the BITs, intending to review the provisions contained in BITs to prioritize national interests. In the other hand, some experts believe that Indonesia's actions are brave because most BITs only include clauses protecting the interests of foreign investors.<sup>21</sup> Indonesia signed the International Centre for the Settlement of Investment Disputes (ICSID) despite not being a member of convention. On 16 February 1968, followed by the proclamation Undang-Undang No. 5 Tahun 1968 Settlement of Disputes Between the State and Foreign Investors Relating Investment. That is does not make Indonesia unaware that implementing the BITs is risky for Indonesia as the host state because the terms contained in the BITs might hurt the countries concerned. Investors have the ability to sue the host state when it does not conform the protection standards that must be obtained by Investors contained in BITs, including:

- a. Discriminatory treatment of all investment types, both foreign and domestic, is prohibited;
- b. Host-state providing safeguards for the protection and security of the investors obligation to provide compensation for losses suffered by corporations as a

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<sup>21</sup> David Price, *Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?*, *Asian Journal of International Law*, 7, 2017, p.2.

- result of war, armed conflict, revolution, state emergency, riots, or rebellions;
- c. Obtaining protection against expropriation or annexation and mandating compensation;
  - d. The investor or host state has the right to resolve disputes through the "Investor-State Dispute Settlement (ISDS)," whose role is to mediate problems by aligning the investor and host-state levels;
  - e. Foreign and domestic investors must be treated without discrimination by the host state;
  - f. The host state protects from expropriation or nationalization and requires compensation.

ISDS is executed in conjunction with the Arbitration Institute, commonly known as ICSID. Developing countries that accept investment from affluent countries frequently receive investment, such as investment in fossil fuels, which is desperately required by developing countries, but the influence of fossil fuels on the host state. Specifically, the environmental impact. As is the case in Mozambique, Guyana, and Venezuela, which are confronting the ecological consequences of fossil fuel consumption. In the occurrence that the host state terminates this protected initiative, an investor state in fossil fuels could file suit. Potentially resulting in a loss of more than USD 20 billion through

ISDS claims. The same thing occurred in Indonesia in the form of investment requests.

Most ISDS cases faced by Indonesia originate from mining investors who refuse to implement purification policies on mining land in Indonesia. As evidenced by the Churchill Mining Case. At the time, Indonesia was adjudged the winner of the lawsuit, with the right to claim USD 9.4 million in court expenses reimbursement.<sup>22</sup> Churchill Mining could not pay the court expenses incurred against Indonesia due to financial issues. Though, Churchill Mining's residual assets were added up then, it would have been insignificant, They barely covered the necessary court costs. Indonesia lost as a result of this event, despite its victory over Churchill Mining. In light of the disagreement between Indonesia and Churchill Mining, it is only logical to refer to ISDS as an uneven dispute settlement mechanism compared to the host state. Other examples are Indonesia's conflicts with Newmont and India's Metal Ferro Alloys.

The presence of disputes illustrates the application of ISDS, which has been controlled in bilateral investment agreements, including fossil fuels investment activities that might lead to environmental imbalances in the host state. The presence of

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<sup>22</sup> *Ibid.*

disputes illustrates the application of ISDS, which has been controlled in bilateral investment agreements and includes fossil fuel investment activities that might lead to environmental imbalances in the host state. The author is compelled to examine the implementation of ISDS from the perspective of international law, analysing the ISDS principle and its impact on international environmental law. Regarding this, The author composed a thesis with the title **“International Legal Review Of The Existence of Investor-State Dispute Settlement (ISDS) In Fossil Fuels Investor Protection.”**

#### **B. Formulation of the Problems**

1. How is the existence of ISDS reviewed based on international law?
2. How does ISDS affect the protection of fossil fuels investors?

#### **C. Research Objectives**

1. Recognize how the presence of the implementation of ISDS viewed by international law.
2. Analyze how the implementation of ISDS affects the level of protection provided to investors in fossil fuels

## **D. Research Usage**

### **1. Academic Usage**

This research might contribute to a better knowledge of international legal studies, including the implications of enacting ISDS in safeguarding fossil fuel investors.

### **2. Practical Usage**

This research might serve as a resource for the government as it considers the effect of investing in fossil fuels, which not only makes money but also has an environmental impact on ISDS when protection is given to fossil fuel investors.

## **E. Originality of Research**

1. Andi Muhammad Faiz Adani, 2017, *Penyelesaian Sengketa Investor-State Dispute Settlement (ISDS) melalui International Centre for Settlement (ICSID) ditinjau dari perspektif HAM Internasional*, Thesis, This research project focuses on worldwide human rights issues. It describes investments in general, rather than specific investment activity.
2. Hilman Ramadhani, 2017, *Tinjauan Yuridis Eksistensi Instrument Investor-State Dispute Settlement (ISDS) dalam Perjanjian Investasi Internasional (PII) (Perspektif Hukum ekonomi dan Al-Maslahah)*, Thesis, Through the lenses of Islamic law and international economic law, this thesis

analyses ISDS provisions in IIAs. also, avoiding dealing with specific investments, which include fossil fuels.

Based on the previously disclosed study titles, there is a significant difference between this research and its predecessors. In prior studies, more emphasis was placed on the implementation of ISDS rather than its effect, and the focus should have emphasized some investment activities. In the meanwhile, the direction of the authors' research proposal was to explain international law on the applicability of ISDS to the protection of fossil fuel investors.

## **F. Research Methodology**

### **1. Type of Research**

The research conducted by the author is normative juridical research. In his book, Soerjono Soekanto put forward a normative juridical approach, namely legal research conducted by examining library materials or secondary data as a basis for research by performing a search of regulations and literature related to the problem under study.<sup>23</sup> Normative legal research focuses on positive law inventory, legal principles and doctrine, legal findings *in*

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<sup>23</sup> Soerjono Soekanto dan Sri Mamudja, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, (Jakarta :Rajawali Pers,2001, p. 3-14.

*concreto* cases, legal systematics, levels of synchronization, comparative law, and legal history.<sup>24</sup>

## **2. Research Locations**

The research location is the region or location where the author conducts research. In this investigation, the author selected the following location:

1. The Library Faculty of Law of Hasanuddin University
2. The central library of Hasanuddin University

## **3. Data Types and Sources**

### **a. Types of Data**

In this research, the author put focuses on 3 types of data. Primary legal materials, secondary legal materials and tertiary materials.

#### a) Primary legal materials

Refer to Peter Marzuki Mahmud Marzuki, primary legal material is legal material that is authoritative, meaning it has authority. Primary legal materials display original thought, report on new discoveries, or provide current data.<sup>25</sup> Like a real phenomenon that occurs when it is not supposed to.

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<sup>24</sup> Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, (Bandung: PT. Citra Aditya Bakti, 2004),p. 52.

<sup>25</sup> University of Minnesota Crookston. Primary, Secondary and Tertiary Sources, <https://crk.umn.edu/library/primary-secondary-and-tertiary-sources> Accessed 22 February 2023.

b) Secondary legal materials

Secondary legal materials complement primary legal materials.<sup>26</sup> such as drafts of legislation, international agreement, scholarly manuscripts, etc.

c) Tertiary legal materials

Tertiary legal materials supplement primary and secondary legal materials by offering additional instructions or clarifications. In addition, there are media-accessible legal resources, also known as tertiary legal materials.<sup>27</sup> Includes dictionary, internet, newspaper, etc.

**b. Data Source**

The additional data is used as a source by the author in this study :

- a) Bilateral agreements of countries regarding investments or BITs;
- b) International instruments pertinent to the author's research, such as conventions, bilateral agreements, and declarations;
- c) Books pertinent to the author's research; and

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<sup>26</sup> Meray Hendrik Mezak, Jenis, *Metode dan Pendekatan Dalam Penelitian Hukum*, Faculty of Law Pelita Harapan University Journal, Vol. 5 No.3 Tahun 2006, p. 87.

<sup>27</sup> *Ibid.*



- d) Other literature pertinent to the author's research, such as journals, research results, or other sources of information in the form of hard copy or soft copy obtained directly or through the internet.

#### **4. Methods of Collecting Data**

The data collecting approach used in this study was literature research strategies targeted at acquiring secondary data required in this study and having relevance to the debate presented.

The literature review approach guides the author to gather scientific information relevant to the examination of literature and discussion of ideas and concepts of international law on the application of ISDS to fossil fuels investors when the ISDS provision is present in bilateral investment treaties or BITs.

#### **5. Analysis Data**

This is a normative study in which the author utilizes materials gathered via a literature review, which was sourced from books and other relevant publications. The author's data will next be examined using the descriptive analysis approach.

## **CHAPTER II**

### **LITERATURE REVIEW AND ANALYSIS THE EXISTENCE OF ISDS BASED ON INTERNATIONAL LAW**

#### **A. International Investment Agreements (IIAs)**

International Investment Agreements (IIAs) is a form of agreement between countries that addresses issues pertaining to cross-border investments, typically with the objectives of protecting, promoting, and liberalizing such investments. As a result of its regulation, the IIA comprises of many sorts based on the countries involved as parties, including bilateral, multilateral, and free trade agreements. Each type of IIAs has its specific explanation, as described below:

##### **1. Bilateral Investment Treaties (BITs)**

###### **a.) Background of BITs**

Before the implementation of BITs, customary international law served to safeguard investors so that the protection offered at the time was inadequate. Previously, international law protecting foreign investors was included in the general law regulating state liability to foreign parties (the public law on state responsibility for injuries to aliens).<sup>28</sup> Unfortunately, investors or home

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<sup>28</sup> Yacob Rihwanto, "Bilateral *Investment Treaties* dan Penyelesaian Arbitase Internasional (Studi Kasus Pencabutan Izin Kuasa Pertambangan Churchill Mining)", *Lex Renaissance*, Vo.1 No.1, January 2016, p. 111.

states had no power to sue the host state at the time. Only the country of origin of foreign investors who have been expropriated may seek compensation, not the investors themselves.<sup>29</sup>

In bilateral agreements, nations build relationships of mutual benefit. To ensure investors' admission, a state treatment of each investment must be consistent.<sup>30</sup>

Since the 1970s, bilateral agreement institutions have been acknowledged in the context of investment.<sup>31</sup> Been acknowledged within the context of the International Guarantee Agreement (IGA). BITs are now a source of international law in the sphere of investment, and these bilateral agreements are often inked by developing countries to safeguard investors. On the other hand, it is very uncommon for BITs to be negotiated between developed countries. This is because investors think that the government of the host state already has enough domestic legislation and would not discriminate.<sup>32</sup> The first bilateral investment treaty (BIT) was signed between

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p.108.

<sup>31</sup> *Ibid.*

<sup>32</sup> Ryan J. Bubb dan Susan Rose-Ackerman, 2007, *BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation Of Foreign Investment*, 27 *Int'l Rev. L. & Econ.* 291 p. 3

West Germany and Pakistan in 1959<sup>33</sup> and their number has increased rapidly since then, despite the fact that research indicates that BITs do nothing to attract foreign investment.<sup>34</sup>

#### **b.) Definition of BITs**

Bilateral Investment Treaties (BITs) are bilateral investor treaties signed by two countries that bind rights and duties in enabling investment entrance in each host state. Based on the Thomas Reuters Practical Law Dictionary defines BITs as follows:

*“An agreement between two countries containing joint undertakings for the promotion and protection of private investments made by the signatories in each other’s territories. These agreements establish the terms and conditions under which citizens of one country invest in the other, including their rights and protections.”*<sup>35</sup>

According to this definition, an agreement between two countries is founded on the concept of reciprocity in the form of protection by both parties. In this instance, the country is bound by the agreement. The bilateral agreement also specifies the terms and circumstances of investor protection in the host state.

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<sup>33</sup> Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (Netherland: Kluwer Academic Publisher, 1995), p.1.

<sup>34</sup> Marry Haward-Driemeier, “ Do Bilateral Investment Treaties Attract Foreign Direct Investment?”, Policy Research Working paper, 2003, p.9.

<sup>35</sup> Thomas Reuters Practical Law Dictionary

### **c.) BITs status in Implementation**

The implementation of BITs is fundamentally designed to protect investors, such that the presence of standard treatment for investors by the host state ensures that all of these interests are still taken into account when money is poured into the host state. BIT is designed to entice international investors to develop their capital in the host state. As more and more investors enter the government, it is believed that economic growth will rise. Thus, it is anticipated that introducing BITs would benefit both the host state and investor state.<sup>36</sup>

## **2. Multilateral Investment Treaties (MITs)**

### **a.) Background of MITs**

Through May of 1995, the Organization for Economic Cooperation and Development (OECD) began negotiations on a Multilateral Investment Treaties (MITs). The United States, seeking to prevent intervention from poor countries, viewed the OECD Council as a "safe" group because only wealthy countries are members.<sup>37</sup> International investment

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<sup>36</sup> Citra Mutiara Virginia, 2005, Implementation of Bilateral Investment Treaties (BIT) in Foreign Investment in Indonesia Based on Law No. 25 of 2007 concerning Investment, Faculty of Law, Padjadjaran University, Bandung.

<sup>37</sup> Global Policy Forum, Multilateral Agreement on investment, <https://archive.globalpolicy.org/globalization/globalization-of-the-economy-2-1/multilateral-agreement-on-investment-2-5.html> accessed 14 March 2023.

Treaties (MITs) has existed in diverse forms and at varying degrees for longer than a hundred years. Efforts to develop a framework for the protection of foreign investments stretch back to the 1920s, including the negotiation of a draft treaty by the League of Nations. Beginning in the second half of the 20th century, bilateral investment treaties (BITs), which are signed by two countries and outline the terms under which investment can occur between them, were used to develop investment protection. The United Nations established the International Centre for the Settlement of Investment Disputes (ICSID) in 1965, and The OECD drafted the Convention on the Protection of Foreign Property in 1967, but it was not ratified.

**b.) Definition of MITs**

Definition of MITs known as a agreement that involves more than two states (or groups of states) that seeks to encourage reciprocal investment by investors of the parties, including providing for rights and protections for foreign investors and investments, and how any disputes that may arise are to be resolved.<sup>38</sup>

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<sup>38</sup> Lexis Nexis, Multilateral Investment Treaty, <https://www.lexisnexis.co.uk/legal/glossary/multilateral-investment-treaty> accessed 14 March 2023

Nevertheless, MITs are also well-known as agreement reached between a lot of countries, containing provisions to protect investments made by individuals and companies in each other's territories; the agreement protects investments made in both countries. Similar provisions to those found in bilateral investment treaties can be found in multilateral investment treaties (MITs), the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT).<sup>39</sup>

### **c.) MITs status in Implementation**

The implementation of MITs is identical to that of BITs, which facilitates the investor state's rights. So even the position of MITs in their implementation protects the rights of parties from both the Investor's state and the home state. In actuality, however, MITs incorporate a dispute resolution mechanism through the Investor-State Dispute Settlement (ISDS), so asserting the rights of state investors is based on ISDS principles. so the existence of IIAs including MITs or BITs is known as an agreement

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<sup>39</sup> Thomson Reuters, Multilateral Investment Treaty, [https://uk.practicallaw.thomsonreuters.com/4-502-5545?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-502-5545?transitionType=Default&contextData=(sc.Default)&firstPage=true) , Accessed 14 March 2023

that safeguards investments made by individuals and organizations in their respective fields.<sup>40</sup>

### 3. Free Trade Agreements (FTAs)

#### a.) Background of FTAs

In principle, worldwide free commerce is identical to trade between neighbors, municipalities, or states. Nonetheless, it permits<sup>41</sup> firms in each country to concentrate on creating and selling the commodities that make the best use of their resources, while others import scarce or unavailable goods. This combination of domestic production and international trade enables economies to achieve quicker growth while better serving consumer demands.<sup>42</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> It was also found that many local communities were not considered and their interests included in permits:

...from local sources with no regard to the surrounding natural environment.

See Birkah Latif, *Mining in Indonesia: A Business and Human Rights Approach*, University of Washington, LLM Paper, 2014.

This condition this condition was then strengthened and included in various investment agreement initiations including one of them is the Bilateral Investment Treaties. Birkah Latif, *Kedudukan Bilateral Investment Treaties (Bits) Dalam Perkembangan Hukum Investasi Di Indonesia*, Tesis Universitas Airlangga, 2009.

In order to balance utilization from an economic perspective as well as environmental protection, the environmental law principles of Sustainable Development are used. See also Birkah Latif, *Integrasi Prinsip Ekonomi Dan Lingkungan Dalam Perdagangan Bebas (Analisis Terhadap Perjanjian Masyarakat Ekonomi Asean (MEA))*, disertasi Fakultas Hukum Universitas Hasanuddin, 2020.

In addition to using environmental natural resources, investors must also support the local community so as not to reduce their access to existing food sources. Muh. Hasrul, Birkah Latif, Padma D Liman, Laode Syarif, *The Environmental Law Enforcement of Access To Food As A Fundamental Rights*, *Russian Law Journal*, Vol. 10 No. 2 (2022).

<sup>42</sup> Adam Barone, "Free Trade Agreement (FTA) Definition : How it works, with Example", <https://www.investopedia.com/terms/f/free-trade.asp#citation-6> accessed 14 March 2023.



In 1817, economist David Ricardo popularized this concept in his work *"On the Principles of Political Economics and Taxes."* He maintained that free trade increases the variety and decreases the prices of commodities accessible in a country while maximizing the use of its indigenous <sup>43</sup> resources, expertise, and knowledge.<sup>44</sup>

### **b.) Definitions of FTAs**

Free Trade Agreements (FTAs) is a pact between two or more countries that aims to eliminate trade obstacles. It resembles a simple exchange between countries. Its primary objective is to facilitate international transactions, enhance investment opportunities, encourage mutual trade, and make doing business easier.<sup>45</sup> FTA do not address cross-border labor mobility, common currencies, consistent standards, or other common policies like

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<sup>43</sup> Birkah Latif, Agung Syaputra, Nurul Zaskia dan Rifda Aprilia, Konsep Dan Perlindungan HAM: Aktualisasi Kearifan Lokal Menuju Kabupaten HAM, 2018, Pustaka Pena Press, Makassar, p. 12. stated:

The push to support human rights as part of the regulatory role of countries in ensuring that their people enjoy the development process and do not receive negative impacts such as destructive environmental damage that can lead to disaster for them.

<sup>44</sup> David Ricardo, *On the Principles of Political Economy and taxation*, 3th ed., (Kitchener; Batoche Books, 2001).

<sup>45</sup> Wallstreetmojo team, "What is Free Trade Agreement?" <https://www.wallstreetmojo.com/free-trade-agreement/> accessed 14 March 2023

taxes. Signatory countries apply their own tariff rates to countries outside the free trade area.<sup>46</sup>

### **c.) FTAs Status in Implementation**

Being a part of IIAs renders the existence of FTAs similar to that of BITs and MITs. Considering the existence of an investment agreement when a dispute exists between the parties. The formula for FTAs includes a dispute settlement clause using the ISDS mechanism. In this approach, the rights of the investor countries are frequently prioritized in the execution of FTAs.

ISDS essentially gives monetary compensation to investors who have been disadvantaged.<sup>47</sup> This is different from the original FTA agreement. Free trade policy is frequently implemented through a formal and mutual agreement between the involved countries. However, a free trade policy may entail the absence of trade restrictions.<sup>48</sup>

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<sup>46</sup> Global Negotiator, "Free Trade Agreement (FTA)", <https://www.globalnegotiator.com/international-trade/dictionary/free-trade-agreement-fta/> accessed 14 March 2023.

<sup>47</sup> Giana Matauseja, "Investment Court System (ICS) Sebagai Alternatif Baru Investor-State Dispute Settlement (ISDS)", *Drmasisya Journal*, Law Magister Program, Faculty of Law Indonesia University, Vol.1 No.2, June 2021, p. 781.

<sup>48</sup> Adam Barone, "Free Trade Agreement (FTA) Definition : How it works, with Example", <https://www.investopedia.com/terms/f/free-trade.asp#citation-6> accessed 14 March 2023.

## **B. International Centre for Settlement of Investment Dispute (ICSID)**

### **1. Background of ICSID**

The International Centre for the Settlement of International Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1966. The treaty<sup>49</sup> offers provisions for mediating or arbitration conflicts between a country and foreign people or firms investing in the country. The World Bank initiated the formation of ICSID for the first time and identified Washington, D.C. as its permanent home. The economic trends of the 1950s and 1960s also influenced the development of ICSID. During that period, emerging countries nationalized foreign enterprises hidden inside their sovereign territories. The nationalization of a French firm in Tunisia was one of the nationalization instances that directly impacted the World Bank and led to the formation of the ICSID. General Charles de Gaulle reacted strongly to the former colony's administration's actions, labeling them as barbarism and promptly withdrawing any economic (financial) assistance planned for

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<sup>49</sup> International agreements are part of the sources of international law and have a more detailed position in the argument for the contents of obligations. See Birkah Latif dan Kadaruddin, 2013, *Hukum Internasional*, Pustaka Pena Press. Also see Birkah Latif dan Kadaruddin, 2013, *Hukum Perjanjian Internasional*, Pustaka Pena Press.

Tunisia. The incident stunned the world community, concerned that the two states relations might devolve into an all-out conflict that would kill many lives.

The United Nations established the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, also known as the ICSID convention. The ICSID convention was developed in such a way that the concept of ICSID is known as an independent entity that originated from the Investment Dispute Settlement Agreement between States and Citizens from Other Countries. On March 18, 1965, the Director General of the International Bank for Reconstruction and Development (World Bank) drafted the convention. The convention entered into force on October 14, 1966, when the first 20 countries approved it.<sup>50</sup>

## **2. ICSID's Legal Basis**

The formation of ICSID is based on an agreement between countries initiated by the World Bank through the ICSID Agreement. The ICSID Convention was founded on March 18, 1965, in Washington, D.C., and went into effect on October 14, 1966, a month after 20 countries ratified it.

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<sup>50</sup> Rzk/M-3, ICSID, Medan Pertempuran Investor Asing dan Pemerintah, <https://www.hukumonline.com/berita/a/icsid-medan-pertempuran-investor-asing-dan-pemerintah--hol20228>, accessed 28 November 2022.

This Convention's formulation has two primary goals. First, by providing mechanisms in the form of arbitration or mediation, holes in legal means of settling investment problems can be closed. Second, stimulate and defend the movement of capital from industrialized to emerging countries. The Centre's position reflects the first goal of this congress (ICSID).

### **3. Jurisdiction of the ICSID**

ICSID's jurisdiction over investment disputes is exclusive and limited when one party is the host state, and the other is an investor state or host state. The ICSID appoints an arbitration or conciliation body to deal with investment disputes. Moreover, ICSID's role in resolving investment disputes is limited to monitoring and establishing rules.

## **C. Investor-State Dispute Settlement (ISDS)**

### **1. Background of the establishment of ISDS**

ISDS was originally mentioned in the BITs' clause. ISDS is a clause in contracts, international agreements (BITs), or national laws that gives investors<sup>51</sup> the ability to

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<sup>51</sup> Syahrul Fauzul Kabir, "Krisis Dan Reformasi: Penyelesaian Sengketa Dalam Perjanjian Investasi Bilateral Di Negara Dunia Ketiga", *Mimbar Hukum*, Vol.33, No.22, 2021, p. 407.

sue the host state through international mechanisms. According to Indonesia for Global Justice ISDS is a dispute settlement mechanism that permits lawsuits by investors against the state for the implementation of regulations and laws considered not to protect investor interests, The International Centre for Investment Disputes is a global institution for investment arbitration <sup>52</sup>

In the description of the definition of ISDS itself, international investment law specialists have ultimately been unable to agree upon a uniform definition of ISDS. Regrettably, some analysts view ISDS as a means of resolving disputes between investors and the state arising from violations of international investment law.<sup>53</sup> According to the European Commission on Investment, ISDS defined as follows:

*"ISDS is a mechanism that is integrated into international investment agreements. It facilitates an investor state country to sue the country that is hosting the investor."*

The presence of dispute settlement through ISDS is only necessarily governed by the justifications included in BITs. Before the introduction of BITs, investors did not have

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<sup>52</sup> UNCTAD, "Investment Policy Hub: International Investment Agreements Navigator", p. 1.

<sup>53</sup> *Ibid.*

the power to sue the host state in a dispute between countries. According to data published by UNCTAD, there are four reasons for using ISDS to resolve disputes, as follows: a) Most Favored Nations; b) National Treatment; d) Non-Exploration; and e) Fair and Equitable Treatment.

## **2. ISDS fundamental principles**

The fundamental idea behind ISDS is strongly tied to the state right to regulate. In this circumstance, the government has two rights: a) the right to control foreign investment to advance priority national development; and b) the right to control as a means of safeguarding the welfare of citizens from the detrimental effects of investment. The following three fundamental principles support ISDS-regulated country rights, as follows :

### **a) The Rights of the Country to Regulate Expropriation**

Expropriation, according to Black Law Dictionary, is the voluntary surrender of rights or claims of acts of releasing or relinquishing their rights to something.<sup>54</sup>

Expropriation is also a concept in international law that states cannot take property from a foreign party

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<sup>54</sup> “Expropriation” Black’s Law Dictionary 4<sup>th</sup> edition, p. 692.

without adequate compensation, whether for the public good or otherwise.<sup>55</sup>

The state right to expropriation is governed by BITs that the countries involved have agreed to. BITs between countries have short, general clauses about indirect takeovers. These clauses focus on the effects of state actions to regulate or not regulate in terms of actions with compensation implications and actions without compensation implications. As an example of a BIT that is in effect in the United States

*“Remuneration is required for every other step or sequence of direct or indirect measures that are equivalent to an expropriation, such as the imposition of taxes or the compelled sale of all or part of an investment.”*<sup>56</sup>

Simple terms, the meaning of the statement is that any actions taken by a country that have the potential to affect other countries, in this case, constitute investment. Therefore, the host state is responsible for complying with the BITs' compensation provisions.

#### b) The State Right to Regulate the Fair and Equitable Treatment

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<sup>55</sup> Ian Brownlie. Public International Law 6<sup>th</sup> edition. Oxford University Press. 2003, p 509.

<sup>56</sup> Dolzer and Stevens, “Bilateral Investment Treaties”, International Centre Settlement for Investment Dispute (ICSID). 1995, p. 98.



Under this principle, the state can regulate fair and equitable treatment under the rule of law. Demonstrated by providing investors with assurances against stable and predictable legal authorities, consistent decision-making by the host state, protection against discrimination, and transparency when investing with the host state. Two crucial factors are considered: (1) General principles for environmental protection<sup>57</sup> and (2) Circumstances that justify state regulations that treat foreign investors differently than domestic investors.<sup>58</sup> In investment dispute cases involving the United States v. Lithuania, the tribunal has applied the principle of fair and equitable treatment. In that instance, the ICSID tribunal:

*“A State is allowed to make any laws it wants, change them, or even repeal them. Unless a contract is already in force, whether it contains a stability provision or not. The modification of the regulatory system brought about by an investor's investment is not flawed. Everyone in business or investing is aware that laws are subject to change throughout time. But it's against the law for a State to use its legislative*

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<sup>57</sup> La Ode M. Syarif, Maskun, dan Birkah Latif, “Evolusi Kebijakan dan Prinsip-Prinsip Lingkungan Global”, 2015, Hukum Lingkungan: Teori, Legislasi dan Studi Kasus, USAID, Kemitraan and The Asia Foundation, Jakarta, p. 62. *urge:the potential for environmental damage must be taken into account in relation to environmental protection to minimize the possibility of environmental damage actually occurring using the principles of environmental law.*

<sup>58</sup> S.D. Myers, Inc. v. Canada (Court decision 13 November 2000), 40 I.L.M. 1408, Paragraph 250.

*Authority in an unfair, unreasonable, or unequal manner.”*

The conclusion that can be drawn from this statement is that countries are free to implement, modify, or abandon their state policies. Despite the agreement regarding the stabilization clause and other clauses, Under these circumstances, changes to investor guarantee policies cannot be denied when making investments. Every investor must know that the host state can alter policies anytime. It has been highlighted, that disputes might occur when the host government takes arbitrary steps against investors. The state's jurisdiction to regulate national treatment

This principle emphasizes treating foreign and domestic investors equally. The "similarity" factor is evaluated and considered by the state's right to regulate national treatment. Therefore, foreign investors must be treated similarly to domestic investors<sup>59</sup>. Therefore, the objective of protecting the

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<sup>59</sup> Andi Muhammad Faiz, *Penyelesaian Sengketa Investor-State Dispute Settlement (ISDS) Melalui International Centre For Settlement Of Investment Dispute (ICSID) Ditinjau Dari Perspektif Ham Internasional*, Thesis of Law Study, Faculty of Law Hasanuddin University, 2017, p. 24.

environment<sup>60</sup> must be taken into account when comparing the situations of foreign investors and domestic investors.<sup>61</sup>

### **3. Investor Protection Forms in ISDS Implementation**

Based on the preceding description, ISDS aims to protect investors who invest in host states to generate interest and ensure legal certainty for foreign investors to invest in other countries. Accordingly the ISDS form of protection prioritizes investor rights that the host state must fulfill, as follows: a) Providing legal certainty to investors by forming international agreements or BITs before the agreement is made; b) Granting investors the right to sue the host state when the action violates the BITs agreement, and c) Ensuring that the

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<sup>60</sup> In preserving the environment, the state implements its policies in the form of: The development of countries in the world has their own patterns and policies. Each country will have a goal of their priorities for their domestic. See Birkah Latif, SM Noor, Juajir Sumardi, Irwansyah, "Indonesia Comparative Advantage in Responding to ASEAN Economic Community's Challenge" (Marine Sector Analysis Study), *International Journal of Global Community*, Volume I Nomor 1 March 2018, p. 18.

This is in line with the emphasis on environmental issues and their use that: Each countries take benefit from their natural resources, agriculture, marine and or non- natural resources. See Birkah Latif, SM Noor, Juajir Sumardi, Irwansyah, "Sustainable development and sea protection: Trade on fish and fishery product 2019" IOP, p.22.

In the study of environmental protection it is stated that: The sustainable environment has become the foremost issue for the organizations and also attain the intentions of recent studies. see lin K S., Kadarudin, Hasrul M., Birkah Latif, "The Impact Of Green Human Resource Practices On Environmental Performance", *Polish Journal of Management Studies*, Volulme 22 Nomor 2, 2020, p. 470.

In this regard, consideration of the issue of sustainability must cover all aspects, not only the economic aspect, but also strengthening vulnerable groups and elements of environmental protection: Inclusion of the context of sustainable development to the possibility of under-development and insecurity is a detection of optimization of the development itself, especially for indigenous peoples' rights. Birkah Latif, "Indonesian and Climate Change", *Journal of Law, Policy and Globalization*, Volume 45, 2016, p. 8.

<sup>61</sup> S.D. Myers, *Op.Cit.*, paragraph 285.

host state protects each investor's rights.<sup>62</sup> ISDS is of particular concern to countries, particularly developing countries like Bolivia, Venezuela, and others. In anticipation of a lawsuit against the state in an international tribunal, they even decided to withdraw their membership from the ICSID.

Indonesia avoids the ISDS mechanism as well. One of Indonesia's extensive bilateral agreements with Thailand is the "Agreement Between the Governments of the Republic of Indonesia and the Kingdom of Thailand for the Promotion and Protection of Investments." If the country, in its position as a host state, pursues a dispute with investors concerning the ISDS mechanism, it may incur significant losses. ISDS was a matter of domestic regulation/policy, so the host state's failure in ISDS was costly from a financial and regulatory standpoint.

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<sup>62</sup>Martines Eklesia, Jeany Anita Kermite dan Rudolf S. Mamengko, *Penyelesaian Sengketa Investor Asing Dalam Mekanisme Investor-State Dispute Settlement (ISDS) dan Implikasinya Dalam Sistem Hukum Indonesia*, thesis article, Faculty of Law Sam Ratulangi University.

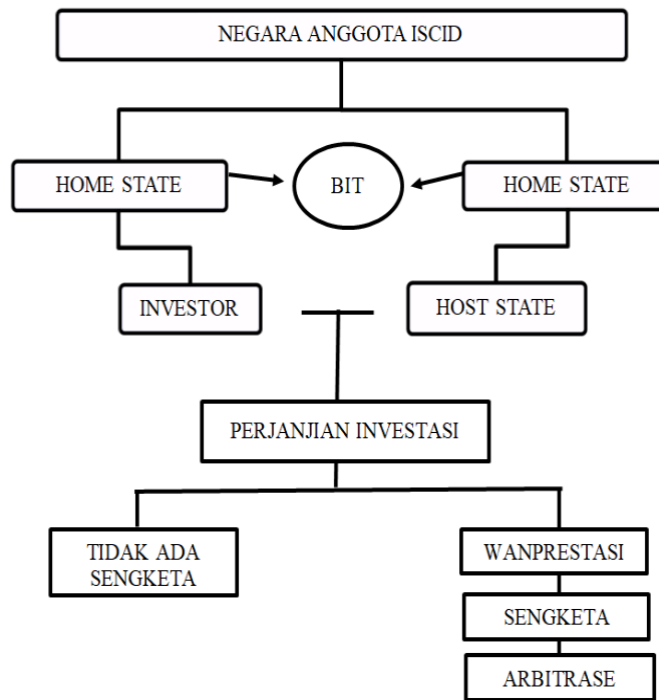


Figure 1. Schematic of a relation between the investor and the host state<sup>63</sup>

#### 4. Dispute Settlement Mechanism through ISDS

ISDS is administered by the International Centre for the Settlement of Investment Disputes (ICSID), which was created by the Convention on the settlement of investment disputes between states and nationals of other states, which was adopted on March 18, 1965 in Washington, United States.<sup>64</sup> The convention stipulates the establishment of the Centre, an institution charged with resolving investment disputes. The centre becomes an arbitration panel, which is the formation of the ad hoc ICSID, whose sole purpose is to settle disputes between investors and the state.<sup>65</sup> The establishment of the Centre is intended to serve as a forum

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Convention on the settlement of Investment disputes between states and nationals of other states, art.1 (1).

for the conciliation and arbitration of investment disputes between member countries and citizens of other member countries, following the terms of this convention.<sup>66</sup>

#### **D. Investor-State Dispute Settlement (ISDS) based on International Law**

##### **1. The Existence of ISDS as a Mechanism of Dispute Settlement According to International Law**

In international law, dispute settlement is categorized as either peaceful or violent. In the settlement of disputes referred to in Article 2(3) of the United Nations Charter, when the pressure of each country involved in the dispute is resolved peacefully, the United Nations Charter is referred to:

*“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>67</sup>*

The countries involved in the dispute are also expected to prioritize peaceful dispute settlement. Conflicting countries seek to defend their rights. In international law, it is also known that there is political dispute resolution, in which

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<sup>66</sup> Convention on the settlement of Investment disputes between states and nationals of other states, art.1 (2)

<sup>67</sup> Article 2 (3) Charter of the United Nations

disputes are settled outside of the court mechanism, including; a.) negotiation; b.) mediation; c.) good offices; and d.) conciliation<sup>68</sup> After going through the political route and failing to find a point of agreement, the disputing countries can consider going through the legal route as an option. Arbitration and international courts both way have two different types of settlements.

ISDS exists as a mechanism for resolving investment disputes legally through arbitration, or in other words, as a dispute resolution mechanism outside of court whenever investment disputes are dragged into the legal system. Instead, it is regulated by the arbitral institution, namely ICSID, as described previously.

Even when a settlement is reached peacefully, it frequently results in losses for one party. The same is true for ISDS mediated investment disputes involving the state and host states. ISDS remains an element of the IIAs, which governments are still required to uphold. On the other hand, individuals have previously discussed the pros and cons of implementing ISDS. The relationship between the cases

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<sup>68</sup> Sefriani, *Hukum Internasional: Suatu Pengantar*, (Jakarta: Raja Grafindo,2010), p.325.

handled prioritizes the investor state's interests over those of the host state.

The necessity and efficacy of ISDS are currently the subject of considerable debate. The Transatlantic Trade and Investment Partnership (TTIP) includes ISDS-related discussions. International Investment Agreements are one of the ISDS factors that exist as a dispute settlement mechanism, which includes the option for the investor state and the host state to settle any disputes that arise. The particulars of ISDS agreements vary, but the vast majority follow a pattern. There will be a clause requiring a claimant to provide written notice of a dispute to the host state.

The investor state is the claimant and the host state is the defendant in ISDS. The investment agreements will establish who has standing to bring a claim. The majority of respondents define "investor" and "investment." Claimants can typically be individuals or organizations. In order to file an ISDS claim before an arbitral tribunal, the investor state must have invested in another nation, both countries must have consented to ISDS, and the investor must allege that the state has violated one or more of the investor's rights under the treaty.



## 2. The position of ISDS on international law

ISDS is known as international law instrument that ties two parties, either the investor or the state.<sup>69</sup>The Existence of Investor-State Dispute Settlement (ISDS) as always related to international law. According that, because ISDS is known to originate from BITs clauses, when bilateral investment treaties cover the investment roles of two countries, international law has a crucial part in implementing treaties between two countries.

The position of ISDS is intimately tied in international law to International Economic Law (IEL) and International Investment Law (IIL) , the two disciplines of international law. This thesis will continue to demonstrate that the existence of ISDS is more than just tied to investment or economics. In practice, this was consistent with the rise of ISDS in implementing fossil fuels resources, which resulted in disputes. whenever the discourse solely focuses on the economic or investment aspect, the response will be biased towards the Investor state. However, the investment in fossil fuels disadvantaged the host state by the excessive use of

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<sup>69</sup> Sefriani, "The Urgency of International Investment Agreements (IIA) And Investor-State Dispute Settlement (ISDS) for Indonesia", *Dinamika Hukum Journal*, Faculty of Law, Universitas Islam Indonesia, Vol. 18 No. 2, May 2018, P. 248.

fossil fuels, which impacts<sup>70</sup> the host state. The relationship between ISDS and international environmental law develops at this phase. ISDS exists in the international law field as follows:

**a.) Implementation ISDS relation on International Economic Law**

International Economic Law (IEL) involves both the behavior of sovereign country in their economic relationships and the behavior of private parties in cross-border economic and commercial activities.<sup>71</sup>

Also emphasized that, International economic law is a branch of international law that encompasses both the conduct of investor state in international scale bridging economic and business transactions.<sup>72</sup>

Implementing investments by state investors in host states bound by BITs is inextricably linked to IEL. Remember that investment activities are covered in the disciplines of IEL of which International Investment Law (IIL) is one. Despite this, analyzing the presence

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<sup>70</sup> In everyday life, the environment has a very important role in the life of humans and living things. The primacy of the environment not only requires protection from the local (country) level but also affects other countries (across national borders). See Birkah Latif, 2020, Pengantar Hukum Lingkungan Internasional, Pustaka Pena, p. 1.

<sup>71</sup> Cornell Law School, "International Economic Law", [https://www.law.cornell.edu/wex/international\\_economic\\_law](https://www.law.cornell.edu/wex/international_economic_law) Accessed 08 March 2023.

<sup>72</sup> University of Lincoln, "What is International Economic Law?", <https://online.lincoln.ac.uk/what-is-international-economic-law/> Accessed 09 March 2023

of investment between IEL and IIL will remain relevant. Investment operations covered by IIL will only be able to exist with IEL because IEL is the backbone of all country-specific investment implementations.

As a result, the implementation of ISDS will primarily focus on IEL and IIL as disciplines that explicitly address investment operations. IEL is the base of all implementations in economics, business, and investing. As previously explained in the definition of IEL. According to Georg Erler's statement, that

*"All classifications of legal principles about economic relations can only be comprehended if they are connected, both of these disciplines are dependent on one another."*<sup>73</sup>

#### **b.) Implementation ISDS relation on International Investment Law**

International Investment Law is one of the fields of international law that is increasing the rapidly, as shown by the quantity of BITs and investment chapters in a growing number of regional and mega-regional trade treaties.<sup>74</sup> International Economic Law (IEL) and

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<sup>73</sup>G. Erler, Grundprobleme des Internationalen Wirtschaftsrechts, from Hualala Adolf, Hukum Ekonomi Internasional: suatu pengantar, 7<sup>th</sup> ed, (Bandung : Kencana Media, 2019), P. 6.

<sup>74</sup> Sabahi, et.al. International Investment Law and Arbitration: History, Modern Practice, and Future Prospects, International Investment Law and Arbitration Journal, 1.1 (2017) 1–64.

International Investment Law (IIL) are inseparable entities. As a subfield of IEL, it makes IIL more particular in implementing investments agreed upon between the two countries.

The clauses of the BITs define ISDS as the preferable dispute settlement method in the event of a controversy between state and home-state investors.

The implementation of investment follows the agreement between the investor-state and the host state; thus, the implementation of ISDS becomes an agreement between the two countries. So that the implementation is based on IIL and IEL is not neglected as a fundamental scientific discipline of any investment activity connected to international economics and business.

**c.) Implementation ISDS Relation on International Environmental Law**

ISDS as a forum for resolving disputes between Investor states and host states. The issue



arose due to the rejection of a previously negotiated agreement based on BITs.

International Environmental Law is an essential discipline for the execution of investment activities. That is due to the fact that investment activities influence the environmental balance. The main consideration is the object of the investment, particularly when it threatens the environment's balance. Similarly, fossil fuel investments have a substantial impact on the environment. Environmental issues primarily impact the protection of biodiversity and ecosystems, the treatment of waste and chemicals or harmful chemicals, pollution and crisis prevention, the effective operation and use of resources (energy, water, and others), the protection of the atmosphere, and the decrease in emissions of greenhouse gases.<sup>75</sup>

ISDS is considered to be an essential tool for attracting the substantial investments required for the transition to a sustainable economy. Also are depicted as being capable of addressing the alleged "pollution havens,"

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<sup>75</sup> Garin Respaut Magali, Environmental Issues in ISDS, <https://jusmundi.com/en/document/publication/en-environmental-issues-in-isds> Accessed 10 March 2023.

the "regulatory chilling effect," or the lower end of the "environmental Kuznets curve".<sup>76</sup> So, it could be stated that the link between the ISDS and the Environmental Law is not directly proportionate, as the ISDS was implemented due to the host state's environmental issues. The issue emerges when the Investor State violates the treaty investment limit, which frequently has a detrimental effect on the environmental situation of the host state. therefore decreasing environmental balance.

**d.) Implementation ISDS Relation on International Climate Change Law**

International Environmental Law was intimately connected to ISDS implementation. The host state's environmental issues frequently precipitate the rise of international disputes. Consequently, the ISDS and Environmental Law interact as a platform for the host state to argue for its rights when environmental damage causes losses.

International Climate Change Law is a subfield of International Environmental Law Similar to the

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<sup>76</sup> *Ibid.*

relationship between ISDS and International Environmental Law, which is not strictly proportionate. International Climate Change Law emphasizes the impact of investment activities on the environment, especially the occurrence of climate change. Climate change is posing some serious difficulties for the investment treaty system<sup>77</sup>. Most International Investment Agreements (IIAs) do not clearly include or control climate objectives. The investment agreement system, which was mostly developed before substantial climate action, is "climate neutral or climate blind" at best. Thus, analysts are concerned that it "fails to progress climate action and also hinders it."<sup>78</sup> The existence of ISDS cannot stand without support. Discipline of international law is an essential factor ISDS exist as a dispute settlement mechanism. However, as is well known, International Law has a variety of disciplines, as previously described, in which each discipline has different views on the implementation of ISDS.

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<sup>77</sup> Watson Farley & Williams, ISDS and Climate Change : What Happens Next?, <https://www.wfw.com/articles/isds-and-climate-change-what-happens-next/> Accessed 11 March 2023

<sup>78</sup> *Ibid.*