Indonesia Perspective Related To Investor-Dispute Mechanism Draft Agreement of Regional Comprehensive Economic Partnership

Upik Mutiara[1], **Rahmad Ramadhan Hasibuan**[2], and **Lupita Risma Candanni**[3]

[1]Lecturer of Faculty of Law, Universitas Muhammadiyah Tangerang.
Email: upik.mutiara@yahoo.com

[2]Alumni of Faculty of Law, Universitas Indonesia
Email: rahmadramdhanhsb@gmail.com

[3]Magisster Student of Faculty of Law, Universitas Indonesia
Email: lupitta.risma@ui.ac.id

Abstract
Regional Comprehensive Economic Partnership (RCEP) is a form of trade agreement between 10 ASEAN Member Countries and 6 ASEAN FTA partner countries which are started in 2011 with the aim of forming modern, interrelated and mutually beneficial economic partnerships between ASEAN member countries and ASEAN partner countries. The agreement which is still under negotiation between the participating countries is especially regulate the investor-state dispute settlement mechanisms which is being written under the Article XX concerning the State-Investor Dispute Settlement. Settlement of investment disputes through the Investor-State Settlement Settlement (ISDS) that still discussed in the draft Regional Comprehensive Economic Partnership (RCEP) multilateral partnership agreement currently being one of the debatable issues. This article will focus on the the Investor-State Dispute Settlement (ISDS) mechanism and how its prospect of implementation in the International Comprehensive Economic Partnership agreement is within the framework of the general principles of International Trade Law by looking at it from an Indonesian perspective.

Keywords: Regional Comprehensive Economic Partnership, Investor-State Settlement Settlement, Investment

Introduction

Foreign investment has become an important factor and is very influential in the sustainable economic development, reducing the level of poverty, and financial stability in a country. Furthermore, the influx of capital flows from the international private sector through foreign investment, especially direct foreign investment into a country also contributes to the growth and development of the country in the long run, especially for developing countries. Therefore, one of the country's main concerns in the context of international relations is focused on how a country can create a favorable investment climate and can encourage the entry of foreign investors (foreign investors).

In the international framework, foreign investment has been recognized and regulated in international regulations under the auspices of the World Trade Organization (WTO) through the Agreement on Trade-Related Investment Measures (TRIMs). The need for a comprehensive arrangement regarding investment is due to the issue of investment that is not only a matter related to a mere trade, but also a sensitive and strategic issue because it is related to macroeconomic policies, social stability, even national economic security, especially for developing countries. This is as stipulated in the Preamble of the Agreement on Trade-Related Investment Measures (TRIMs).

The presence of international trade and foreign direct investment has significantly increased the availability of foreign products and services into host countries, although in practice it cannot be denied that the majority of investors are developed countries, while developing countries and underdeveloped countries (LDCs) are the host countries. Many international agreements related to investment (such as the International Investment Agreement/IIA) have also been made by countries, both bilaterally and multilaterally. In order to implement the development of economy and as an effort to increase national economic growth as aspired to in the constitution, Indonesia has agreed on various international agreements related to investment with various countries.

The Investor-State Dispute Settlement (ISDS) mechanism has always been a clause in every bilateral investment agreement (BIT) and multilateral FTA agreement. The international agreement that will be the focus in this study is the draft of the Regional Comprehensive Economic Partnership (RCEP) trade agreement which in the section concerning “Investment” also includes the Investor-State Dispute Settlement clause under the provision of Article XX.

Dispute resolution through the Investor-State Dispute Settlement mechanism (ISDS) basically provides flexibility for foreign investors (foreign

investors) to be able to sue the host state within an international justice institution, in this case the International Center for Settlement of Investment Disputes (ICSID). This is as stated by Pasha L. Hsieh, "...ISDS provisions, which entitle foreign investors to sue host states in international judicial bodies. ISDS was initially designed to overcome the local court bias and the hurdle for exercising diplomatic protection by investors' home states in public international law." From the statement above, it can be seen that the purpose of regulating the mechanism of dispute settlement through the Investor-State Dispute Settlement (ISDS) is to avoid the alignment of the national judiciary and in implementing diplomatic protection from the investor's home country in the realm of international public law.

In practice, the ideal purpose of establishing the Investor-State Dispute Settlement mechanism stated above is still a problem. This problem is indeed nothing new because the implementation of the Dispute Settlement Investor-State mechanism is considered to be less able to strengthen state sovereignty. These problems as stated in the analysis carried out by the United Nations Agency, United Nations Conference on Trade And Development (UNCTAD):

> "First, there is a continuing debate over whether it is appropriate to use international arbitration as a means of dispute settlement where this may weaken national dispute-settlement systems. Second, the application of international minimum standards for the treatment of aliens and their property is by no means universally accepted. Third, not only developing countries but also, it seems, developed countries may view the process of international dispute settlement in this field with some suspicion. This can be seen from, for example, academic, judicial and political criticism of recent North American Free Trade Agreement (NAFTA) arbitration awards and from the significant disagreements that remained over the form and contents of the investor-State dispute-settlement provisions during the Multilateral Agreement on Investment (MAI) negotiations at the Organisation for Economic Co-operation and Development (OECD)."

Several problems related to the implementation of the Investor-State Dispute Settlement mechanism as seen in the above statement are also supported by the increasing claims filed by investors against the state. From 1987 to 2017 for example, there have been more than eight hundred cases of investment disputes handled through the Investor-State Dispute Settlement (ISDS) mechanism. In the last 30 (thirty) years, there has been a significant increase in the case of the Investor-State Dispute Settlement (ISDS). Indonesia itself has been

faced as the respondent state for 7 (seven) times against the lawsuit of foreign investors, including Oleovest Pte. Ltd. (2016), Indian Metals & Ferro Alloys Ltd (2015), Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara (2014), Churchill Mining and Planet Mining Pty Ltd (2012), Hesham Talaat M. Al-Warraq (2011), Rafat Ali Rizvi (2011), and Cemex Asia Holdings Ltd., with claims that are very high. So far, Indonesia has never been a home state of claimants.

Settlement of investment disputes through the Investor-State Dispute Settlement (ISDS) mechanism and the fact that it even still included in the draft of the Regional Comprehensive Economic Partnership (RCEP) multilateral agreement which is currently in the negotiation stage is still a matter of debate. In accordance with the explanation above, this paper will focus on the elaboration of international legal arrangements that regulate the settlement of investment disputes and an overview of the settlement of investment disputes through the Investor-State Dispute Settlement (ISDS) mechanism within the framework of the general principles of International Trade Law by looking at it from a perspective Indonesia. Based on the research background stated above, this paper will analyze 2 (two) main points of discussion: 2) what is the Regional Comprehensive Economic Partnership trade agreement?, and 2) what is the urgency for Indonesia to support the implementation of investor-state dispute resolution mechanisms in the draft of the Regional Comprehensive Economic Partnership trade agreement?

Literature Review

A. The Principles of International Trade Law

1. Sovereignity

The WTO institutional system and legal system places the principle of state sovereignty as the main principle of the institutional system and legal system. International trade law is under the regime of international law and so the state sovereignty is one of the fundamental principles of this regime. Sovereignty means the highest (superanus). A sovereign state means that the country has the highest power. The highest power means that there are no other power above it. Sovereignty also means omnipotence, as there is no power over it or that is free from the control of others (free from external control). Related to the sovereignty of state jurisdiction, is the state power to form and enforce laws (prescriptive jurisdiction) and the power to enforce the law against people and property and property rights in its territory (jurisdiction enforcement). State power is limited to

the borders of the country concerned, the state power ends where other state powers begin. State sovereignty is the most essential characteristic of a country; a state without sovereignty is not a state.

The formation of the WTO and the enactment of the WTO law against a country shall not to be conflicted with the principle of state sovereignty. The authority of a country to be bound by the full WTO system or not is determined by the country itself. The WTO does not have the authority to force a country to commit itself to the WTO institutional system. Trade arrangements through the WTO system are based on the shared interests of countries towards a system of exploiting the world's natural resources and a fair trading system to meet the common interests of countries or states. The establishment of the WTO system by and for the countries is based on a free and self-determinating rights from countries. State rights as the highest rights based on their sovereignty to join or not participate in the WTO system are fully respected by the WTO system, including the right to participate in or not participate in a certain scheme within the WTO, as well as the implementation of an agreement system of the Plurilateral Trade Agreement. As members of the international community, each country has individual interests and common interests. The nature of the WTO system is a system to harmonize the common interest and individual interests of the WTO Agreement participating countries in the world's natural resources and world trade system as a system to meet the national interests of countries.

2. Equal State

The principle of equal state is a secondary principle of the principle of the state sovereignty as the primary principle. The WTO system views WTO member countries as a sovereign state that is equal to each other. This form of principle can be seen in the WTO institutional membership system and its decision-making system, the rights, obligations and responsibilities of its member countries.

3. Asymmetrical Economic Conditions, Empowering Free Competition

The idea of take into account the asymmetrical conditions of the international community, equalizing competitiveness, and free competition originating from the thoughts of Adam Smith that is open competition in trade liberalization can be carried out only if the requirements for such competition have been fulfilled. Open competition requirements include the equal conditions from all competition participants. In case that there are asymmetrical conditions and inequality of economic capabilities of the competition participants, then the competition should be applied among countries that have fulfilled the

requirements to compete, while those who have not fulfilled the requirements are need to be empowered and equalized.

The idea then became the ideological soul of the WTO Agreement as outlined in various provisions for annexes of the WTO Agreement. The WTO Agreement is a construction of the two main pillars of trade liberalization; 1) liberalization, and 2) strengthening and equalizing the economic capabilities of developing countries. The two pillars are outlined in two principle schemes, namely:

a. Non-discrimination, imbalance and reduction of tariffs; and
b. The principle of safeguards, development, special treatment due to and exception of developing countries and undeveloped countries.

4. Discrimination, Non-discrimination

The principle of non-discrimination requires each member country to provide the same legal and administrative treatment for importers and exporters immediately and unconditionally, without discriminating against origin and destination countries for imports and exports. Article I of the GATT determines that in terms of import duties and levies of any kind imposed on or in connection with import-export or transfer of payments for import-export, the method of imposing such duties and charges, all rules and conditions relating to import-export, all matters referred to in paragaf 2 Article III (national treatment in local taxes) and paragaf 4 Article III (national treatment and legislation, regulations and requirements that affect local sales, offer, purchase, transport, distribution and use), every profit, privileges and immunities given by each member country to each product originating from and intended for each other member country, must be given immediately and unconditionally to similar products originating from or directed to the territory of all member countries.

Some other provisions of the GATT allow discrimination, for example Article XVI (subsidies for economic improvement), Article XVIl (state-owned companies), Article XVIII (import restrictions to improve people's living standards), and Article XIX (emergency measures to overcome economic pressures).

5. Exception, Special Treatment

Exceptions and special treatment can be done for national interests, such as: improving people's living standards, maintaining economic balance, overcoming economic difficulties from economic pressures, and others.

6. Reciprocity

This principle require every member country that enjoys concessions from other member countries (recipients of concessions) to provide the same concessions to other member of concessionaires.

7. Peaceful Settlement of Dispute

This principle asked for each member country to resolve the dispute between them in a peaceful manner.

8. Dispute Resolution Mechanism

Traditionally, the aspect of dispute resolution under the regime of international law only involves disputes between countries. However, the proliferation of private commercial activities carried out by individuals and companies involved in international trade and/or investment has raised the question of whether these actors should be entitled to certain direct rights to resolve disputes with the countries in which they do business. Under international customary law, a foreign investor is required to seek resolution of such disputes in the court and/or the relevant state court. If this solution fails or is ineffective in resolving disputes—whether because they do not have relevant substantive content, effective enforcement procedures and/or solutions or are the result of denial of justice—the main way for investors is to seek diplomatic protection from one's home country or the company concerned. In addition, generally only countries can submit claims under international law, given that they are the main subject of the system. Non-state private actors do not have the necessary personality of international law and must therefore rely on these indirect ways to justify their legal rights.

Research Methodology

The research method that will be used in this study is a qualitative method. With qualitative methods, the results of the study will not be explained through numbers but are described descriptively because the data collected is narrative information that cannot be calculated and emphasizes on the details. In addition, a literature review will also be carried out in order to develop a conceptual and theoretical framework which ultimately becomes the basis of analysis to discuss the research data obtained. Nonetheless, several quantitative data in the form of a graph regarding the development of the implementation of the Investor-State Dispute Settlement dispute resolution mechanism by the researchers from the

World Trade Organization is also used. This data is important because indeed the application of library data alone will not be enough to describe the factual conditions and implementation of these mechanisms as needed.

Based on the explanation above, in the use of this qualitative research method, this research will begin by conducting legal studies related to research topics through books, journals and other scientific writings, as well as legal regulations and agreements related to research topics to be able to build initial views regarding the topics to be discussed. The legal instruments that form the basis of this research include the provisions of international law relating to investment law, both in the form of hard laws and soft laws. In addition, there are several relevant national laws and regulations that will be reviewed such as Law Number 25 of 2007 concerning Investment (State Gazette of the Republic of Indonesia of 2007 Number 67, Supplement to the State Gazette of the Republic of Indonesia Number 4724). Regarding the object of research, this study will limit its scope to the Investor-State Dispute Settlement mechanism which is regulated in bilateral and multilateral agreements relating to Indonesia. In addition, restrictions are also made on the entry into force agreement considering that there are several agreements containing the Investor-State Dispute Settlement mechanism made by Indonesia and other countries that have been terminated.

Then, the research will be continued by collecting non-legal materials related to the implementation of the Investor-State Dispute Settlement mechanism in the field. Non-legal material in the form of statistical data is obtained through various writings and research issued by United Nations research and World Trade Organizations. All of these materials will eventually be analyzed using a comparative approach. This method is useful for uncovering the background of the agreement on the arrangement of the Investor-State Dispute Settlement mechanism from two or more countries, both developed and developing countries, as a basis for recommendations for the preparation and amendment of investment dispute resolution clauses in future international agreements.

Results

Investor-State Disputes Settlement Mechanism in the Draft of the Regional Comprehensive Economic Partnership Agreement

The Association of Southeast Asian Nations (ASEAN) consisting of Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, and has trade and economic relations that develop with each other through free trade agreements with

countries in the East Asia region. At present, ASEAN already has free trade agreements with six partners, such as the People's Republic of China (ACFTA), Republic of Korea (AKFTA), Japan (AJCEP), India (AIFTA) and Australia and New Zealand (AANZFTA).

The Regional Comprehensive Economic Partnership (RCEP), which consists of 16 countries (10 ASEAN Member Countries and 6 ASEAN FTA partner countries), was initiated by Indonesia when it was the Chair of ASEAN in 2011 with the aim to reduce overlapping among current FTAs, avoiding "confusing noodle bowl" of various existing FTAs, as well as consolidating ASEAN + 1 FTA. RCEP was formed with the aim of forming a modern, comprehensive, high-quality and mutually beneficial economic partnership between ASEAN Member Countries and ASEAN Partner Countries.

In 2012 on the 21st ASEAN Summit and Other Related Summits, Heads of State/Government approved the Guiding Principles and Objectives for Negotiating RCEP and announced the commencement of negotiations in early 2013. Indonesia was appointed as the country coordinator of RCEP and chair of Negotiating Trade Committee (TNC)-RCEP. Initially, RCEP was targeted to be completed in 2015, but until now the RCEP negotiations are still ongoing. Furthermore, based on the Decrees of RCEP Heads of State during the 1st RCEP Summit in 2017, it was decided that RCEP negotiations should be sought to be completed by 2018.

RCEP negotiations include 9 Working Groups (WGs), including WG of trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute resolution, e-commerce, small and medium enterprises (SMEs) and Procurement of Goods. RCEP has the potential to provide significant opportunities for businesses in the East Asia region and create "The World's Largest Trading Bloc" given the fact that 16 countries participating in RCEP reach almost half of the world's population; contribute around 30 percent of global GDP; creating 29% of total world trade and 26% of World FDI flows. In addition RCEP can encourage increased competitiveness, global production networks and promote regional supply chains, through increased market access, increased commitment with ASEAN speech partners, reduction or elimination of trade barriers, and increased technology transfer.

Draft of Chapter on Investment: Investor-State Dispute Settlement Mechanism

The investor-state dispute settlement mechanism in the draft of Regional Comprehensive Economic Partnership trade agreement is included in Article XX

concerning the Investor-State Dispute Settlement. As with other clauses in the draft trade agreement, the clause regarding the investor-state dispute settlement mechanism is also still in the stage of negotiation between participating countries. Some of the main points of the clause are as follows:

Article XX Investor-State Dispute Settlement Note: So far, China, Japan and Korea have submitted texts for ISDS. Article [C, J, K: Consultation(s)] [J, K: and Negotiation]
[J, K: 1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures,] [J: such as good offices, conciliation and mediation.] [C: 1. In the event of an investment dispute, after two months since the occurrence of the measure or event giving rise to the dispute, the claimant may deliver to the respondent a written request for consultations. The request shall: specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise; for each claim, identify the provision of this Chapter or the investment agreement alleged to have been breached and any other relevant provisions; for each claim, identify the measures or events giving rise to the claim; for each claim, indicate whether the claim is made on its own behalf or on behalf of the enterprise; for each claim, provide a brief summary of the legal and factual basis sufficient to present the problem clearly; and specify the relief sought, the approximate amount of damages claimed and its standard or basis for calculation.] [C: 2. After a request for consultations is made pursuant to this Section, the claimant and the respondent shall initially seek to resolve the dispute through consultations.] [J: 2. The claimant shall deliver to the respondent a written request for consultations setting forth a brief description of facts regarding the measure or measures at issue.]

[J: 3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.]

[C: 3. If the disputing parties reach a mutually agreed solution to a dispute or certain claims thereof formally raised under this Section, they shall abide by and comply with the mutually agreed solution reached under this Article without delay.]

[C, J, K: ARTICLE X.X: Submission of a Claim to Arbitration]

1. [C, K: In the event that] [J: If] an/a [K: disputing party considers that an] investment dispute [J: has not been resolved within 6 months of the receipt by the respondent of a written request for] [C, K: cannot be settled by] consultation(s) [C: under Article X.28 (Consultations) within 120 days after the date of receipt of the request for consultations,] [J: pursuant to Article II.18(2):] [K: and negotiation:]

[C, J, K: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim]

[C, J, K: (i) that the respondent has breached]

[C, J, K: (A) an obligation under] [J, K: Section A,] [J: or] [C: Articles X.3 (National Treatment) and X.4 (Most-Favored Nation Treatment) provided that the claim does not in any way relate to treatment with respect to establishment, acquisition or expansion of investments in the territory of the respondent;]

[C: (B) an obligation under Article X.5 (Minimum Standard of Treatment), Article X.7 (Senior Management and Boards of Directors and Entry of Personnel), Article X.9 (Expropriation and Compensation), Article X.10 (Compensation for Losses) and Article X.11 (Transfers);] [K: (B) an investment authorization,] [C, K: or]

[C, J. K: [C, K: (C)] [J: (B)] an investment agreement;] [C, J: and]

[C, J, K: (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach[C: 1]; and]

[C: FN: 1 For greater certainty, the loss or damage incurred by the claimant that forms the subject matter of a claim under sub-paragraph (a) shall not include reflective loss or damage suffered by the claimant because of loss or damage caused to an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly by reason of, or arising out of the alleged breach by the respondent.]

[C, J, K: (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim]

[C, J, K: (i) that the respondent has breached]

[C, J, K: (A) an obligation under] [C: Articles X.3 (National Treatment) and X.4 (Most-favored nation treatment) provided that the claim does not in any way relate to treatment with respect to establishment, acquisition or expansion of investments in the territory of the respondent;] [J, K: section A,]

[C: (B) an obligation under Articles Article X.5 (Minimum Standard of Treatment), Article X.7 (Senior Management and Boards of Directors and Entry of Personnel), Article X.9 (Expropriation and Compensation), Article X.10 (Compensation for Losses) and Article X.11 (Transfers);] [C, J: or]

[K: (B) an investment authorization, or]

[C, J, K: [C, K: (C)] [J: (B)] an investment agreement; and]

[C, J, K: (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,]

[C: provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.]

[J, K: provided that a claimant may submit pursuant to subparagraph (a)(i)[J: (B)] [K: (C)] or (b)(i) [J: (B)] [K: (C)] a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.]

[C: 2. A claimant cannot submit or continue to pursue a claim under this Section where the investment of the claimant in the territory of the respondent is held indirectly by an investor of a non-Party, and the investor of the non-Party submits or has submitted a claim with respect to the same measure or event under any agreement between the respondent and that non-Party.]

[J, K: 2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:]

[J, K: (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;]

[J, K: (b) for each claim, the provision of this Agreement,] [K: investment authorization,] [J, K: or investment agreement alleged to have been breached and any other relevant provisions;]

[J, K: (c) the legal and factual basis for each claim; and]

[J, K: (d) the relief sought and the approximate amount of damages claimed.]

[K: 3. Provided that six months have elapsed since the events giving rise to the claim,] [C, J: 3.] [C, K: A] [J: The] [C, J, K: claimant may submit a claim referred to in paragraph 1 [J: under one of the following alternatives] :]

[C, J, K: (a) [C, K: under] the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the [C, K: non-disputing] Party [J: of the claimant] are parties to the ICSID Convention] [C: and the claimant waives its right to request annulment of the award with the Secretary-General in accordance with the ICSID Convention Article 52;]

[C, J, K: (b) [C, K: under] the ICSID Additional Facility Rules, provided that either the respondent or the [C, K: non-disputing] Party [J: of the claimant] is a party to the ICSID Convention;]

[C, J, K: (c) under the UNCITRAL Arbitration Rules; or]

[C, J, K: (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.]

[C: 4. Where a claim is submitted to arbitration under paragraph 3(b), (c) and (d) (except where a claim is submitted to any other arbitration institution under paragraph 3(d)), the disputing parties and the tribunal constituted thereunder shall request ICSID to provide administrative services for the arbitration proceedings. All Parties shall endeavor to make proper institutional arrangements with ICSID to accommodate such requests following the entry into force of this Agreement.]

[C, J, K: 5. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of [K: ,] or request for [K: ,] arbitration ("notice of arbitration"):]

[C, J, K: (a) referred to in [C, K: paragraph 1 of Article 36 of] the ICSID Convention is received by the Secretary-General;]

[C, J, K: (b) referred to in [C, K: Article 2 of Schedule C of] the ICSID Additional Facility Rules is received by the Secretary-General;]

[C, J, K: (c) referred to in [C, K: Article 3 of] the UNCITRAL Arbitration Rules, together with the statement of claim referred to [J: there] in [C, K: Article [C: 20] [K: 18] of the UNCITRAL Arbitration Rules,] are received by the respondent; or]

[C, J, K: (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent] [C: provided that no claim shall be deemed submitted under this Section if that claim is asserted by the claimant for the first time after such notice of arbitration is submitted.]

[C, J, K: A [C: counterclaim] [J,K: claim] asserted by the [J, K: claimant for the first time] [C: respondent within 180 days] after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.]

[J, K: 5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.]

[C: 6. A notice of arbitration shall:

[C: (a) specify the name and address of the claimant and, where a claim is submitted on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, the name, address, and place of incorporation of the enterprise;]

[C: (b) for each claim, identify the provision of this Chapter or the investment agreement alleged to have been breached and any other relevant provisions;

(c) for each claim, identify the measure or event giving rise to the claim;

(d) for each claim, indicate whether the claim is made on its own behalf or on behalf of the enterprise;

(e) for each claim, provide a brief summary of the legal and factual basis sufficient to present the problem clearly; and

(f) specify the relief sought, the approximate amount of damages claimed and its standard or basis for calculation.]

[C: 7] [J, K: 6] The claimant shall provide with the notice of arbitration:

[C, J, K: (a) the name of the arbitrator that the claimant appoints; or]

[C, J, K: (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.]

[C: 8. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Chapter provided that, in the case of arbitration under the UNCITRAL Arbitration Rules, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applicable unless the disputing parties otherwise agree.]

[C, J, K: ARTICLE X.33: Conduct of the Arbitration]

[C, J, K: 1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article[C: Article X.29 (Submission of a Claim to Arbitration)(3)] [J, X.19.3] [K: X.18.3]. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules] [J, K: , provided that the place shall be in the territory of a State that is a party to the New York Convention.]

[K: 2. At the request of a disputing party, and unless the disputing parties otherwise agree, the tribunal may determine the place of meetings, including consultations and hearings, taking into consideration appropriate factors, including the convenience of the parties and the arbitrators, the location of the subject matter, and the proximity of evidence. The preceding sentence is without prejudice to any appropriate factors a tribunal may consider under paragraph 1.]

[C, J: 2] [K: 3] [C: Each] [J: A] [K: The] [J, K: non-disputing] Party may make oral and written submissions to the tribunal regarding the interpretation of this] [C: Chapter.] [J, K: Agreement.] [K: On the request of a disputing party, the non-disputing Party should resubmit its oral submission in writing.]

[J: 3] [K: 4] After [J: consultation with] [K: consulting] the disputing parties, the tribunal may [J: accept and consider] [K: allow a party or entity that is not a disputing party to file a] written amicus curiae submission(s) [J: regarding a matter of fact or law] [K: with the tribunal regarding a matter] within the scope of the dispute [J: that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party that has a significant interest in the arbitral proceedings. Each submission shall identify the author, disclose any affiliation, direct or indirect, with any disputing party, and identify any person, government, or other entity that has provided, or will provide, any financial or other assistance

in preparing the submission. Each submission shall be in a language of the arbitration, and comply with any page limits and deadlines set by the tribunal. The tribunal shall provide the disputing parties with an opportunity to respond to such submissions. The tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.] [K: In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:]

[K: (a) the amicus curiae submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;]

[K: (b) the amicus curiae submission would address a matter within the scope of the dispute; and]

[K: (c) the amicus curiae has a significant interest in the proceeding.]

[K: The tribunal shall ensure that the amicus curiae submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the amicus curiae submission.]

[C: 3. Subject to paragraph 2, without written consent of the disputing parties, the tribunal shall have no authority to accept or consider amicus curiae submissions from a person or entity that is not a disputing party.]

[C, J, K: 4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, [C, K: a tribunal shall address and decide as a preliminary question any] [J: , such as an objection that a dispute is not within the competence of the tribunal, including an objection to the tribunal's jurisdiction, a tribunal shall address and decide as a preliminary question] objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article [C: X.39 (Awards of First Instance)] [J: X29] [K: X28]

[C, J, K: (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial] [J, K: or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment.]

[C, J, K: (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for

considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor/e.]

[C, J, K: (c) In deciding an objection under this paragraph, the tribunal shall assume to be true [J: the] claimant's factual allegations in support of any claim in the notice of arbitration [J, K: (or any amendment thereof)] and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in [J: the relevant] article [C: 20] K: 18] of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.]

[C, J, K: (d) The respondent does not waive any objection as to competence [J: , including an objection to jurisdiction,] or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph [C: 5] [J, K: 6]

[C, J: 5] [K: 6] In the event that the respondent so requests within 45 days [C, J: after] [K: of the date] the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph [C, J: 4] [K: 6] [C, K: and] [J: or] any objection that the dispute is not within the tribunal's competence [J: including an objection that the dispute is not within the tribunal's jurisdiction]. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor/e, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.]

[C, J: 6] [K: 7] When it decides a respondent's objection under paragraph [C, J: 4 or 5] [K: 5 or 6], the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.]

[C, J: 7] [K: 8] [C: Without prejudice to Article X.13 (Subrogation),] [C, J, K: A respondent may not assert as a defense, counterclaim, [K: or] right of set-off, or for any other reason [K: ,] that the claimant [C: or the enterprise referred to in Article X.29 (Submission of a Claim to Arbitration)(1)(b)] has

received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an [C: indemnity,] insurance or guarantee contract] [K: , except with respect to any subrogation as provided for in Article X.14.]

[J: 8] K: 9] A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article [J: X19] [K: X18]. For purposes of this paragraph, an order includes a recommendation.]

[J: 9] [K: (a)] In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties [K: and to the non-disputing Party]. Within 60 days after [K: the date] the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after [J: the expiration of] [K: the date] the 60-day comment period [K: expires.]

[K: (b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 11 or Annex X-D.]

[J: 10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article X.29 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article X.24.]

[K: 11. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article X.28 in arbitrations commenced after the multilateral agreement enters into force between the Parties.]

ARTICLE [C: X.38] [J: X28] [K: X27] Consolidation
[C, J, K: 1. Where two or more claims have been submitted separately to arbitration under Article [J, K:X.18.1] [C: X.29 (Submission of a Claim to Arbitration) (1)] and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.] 2. [C, J, K: A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:] [C, J, K: (a) the names and addresses of all the disputing parties sought to be covered by the order;] [C, J, K: (b) the nature of the order sought; and] [C, J, K: (c) the grounds on which the order is sought.] 3. [C, J, K: Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.] [C, J, K: 4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:] [C, J, K: (a) one arbitrator appointed by agreement of the claimants;] [C, J, K: (b) one arbitrator appointed by the respondent; and] [C, J, K: (c) the presiding arbitrator appointed by the Secretary-General [C: from the list of chairpersons established pursuant to Article X.32 (Constitution of the Tribunal)(5)] [J, K: , provided, however, that the presiding arbitrator shall not be a national [J, of the respondent or of a Party of any claimant.] [K: of either Party.] 5. [C, J, K: If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed [C: from the list of arbitrations established pursuant to Article X.32 (Constitution of the Tribunal) (5)] [K: If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an

arbitrator, the Secretary-General shall appoint a national of the non-disputing Party].]
6. [C, J, K: Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article [C: X29 (Submission of a Claim to Arbitration)(1)] [J: X19.1] [K: X18.1] have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:]
[C, J, K: (a) assume jurisdiction over, and hear and determine together, all or part of the claims;]
[C, J, K: (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or]
[C, J, K: (c) instruct a tribunal previously established under Article [C: X32 (Constitution of the Tribunal)] [J: X22] [K: X21] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that]
[C, J, K: (i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
(ii) that tribunal shall decide whether any prior hearing shall be repeated.]
[C, J, K: 7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article [C: X29 (Submission of a Claim to Arbitration)(1)] [J: X19.1] [K: X18.1] and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:]
[C, J, K: (a) the name and address of the claimant;
(b) the nature of the order sought; and
(c) the grounds on which the order is sought.]
[C, J, K: The claimant shall deliver a copy of its request to the Secretary-General.]
8. [C, J, K: A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this [J, K: Section] [C: Chapter, provided that, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration shall not be applicable unless the disputing parties otherwise agree]

9. [C, J, K: A tribunal established under Article [C: X32 (Constitution of the Tribunal)] [J: X22] [K: X21] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.] 10. [C, J, K: On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article [C: X32 (Constitution of the Tribunal)] [J: X22] [K: X21] be stayed, unless the latter tribunal has already adjourned its proceedings.]
ARTICLE [C: X.39: Awards of First Instance] [J: X29 Awards] [K: X28 Award]
[C: Where a Tribunal makes an award against a respondent, the Tribunal may award, separately or in combination, only monetary damages and restitution of property, but the respondent may pay monetary damages in lieu of restitution. A Tribunal may not award punitive damages. A disputing Party shall abide by and comply with an arbitral award.] [C, J, K: 1. Where a tribunal makes a/an [J, K: final] award against a respondent, the tribunal may award, separately or in combination, only:] [C, J, K: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.] [J: 2. For greater certainty, when an investor of a Party submits a claim to arbitration under Article X.19.1(a), it may recover only for loss or damage that it has incurred in its capacity as an investor of a Party.] [C, J, K: A tribunal may also award costs and attorney's fees [J: incurred by the disputing parties in connection with the arbitral proceeding and shall determine how and by whom those costs and attorney's fees shall be paid, in accordance] in accordance with this [C: Chapter] [J, K: Section] and the applicable arbitration rules.] [C: 2] [J: 4] [K: 3] Subject to paragraph 1, where a claim is submitted to arbitration under Article [C: 29 (Submission of a Claim to Arbitration)(1)(b)][J: X19.1(b)] [K: X18.1(b)]: an award of restitution of property shall provide that restitution be made to the enterprise; an award of monetary damages and any applicable interest shall provide that the

sum be paid to the enterprise; and
the award shall provide that it is made without prejudice to any right that any person may have [C, K: in the relief] under applicable domestic law [J: law in the relief provided in the award.]
[C: provided that such relief does not grant or result in duplicated remedies to any person in light of the award rendered.]
[C: 3] [J: 5] [K: 4] A tribunal may not award punitive damages.]
[J: 6] [K: 5] An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.]
[J: 7] [K: 6] Subject to paragraph [J: 8] [K: 7] and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.]
[J: 8] [K: 7] A disputing party may not seek enforcement of a final award until:
(a) in the case of a final award made under the ICSID Convention,
(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
(ii) revision or annulment proceedings have been completed; and]
[J, K: (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article [J: X.19.3(d)] [K: X.18.3(d)],
(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.]
[J: 9] [K: 8] Each Party shall provide for the enforcement of an award in its territory.]
[J: 10] [K: 9] If the respondent fails to abide by or comply with a final award, on delivery of a request by the [K: non-disputing] Party [J: of the claimant], a panel shall be established under Article [J: [XX].xx (Establishment of Panel/ an Arbitral Tribunal Article of the Dispute Settlement Chapter)] [K: [XX].9 (Establishment of Panel of the Dispute Settlement Chapter)]. The requesting Party may seek in such proceedings:
a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
in accordance with Article [J: [XX].xx (Panel Report/ Initial Report Article of the Dispute Settlement Chapter)] [K: Article [XX].11 (Panel Report of the Dispute Settlement Chapter)] a recommendation that the respondent abide by or

comply with the final award.] [J: 11] [K: 10] A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph [J: 10] [K: 9] [J: 12] [K: 11] A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.]

Urgency for Indonesia to Support the Implementation of the Investor-State Dispute Settlement Mechanism in the Draft of Regional Comprehensive Economic Partnership Agreement

In order to implement and enforce the provisions of international trade regulated in the WTO (including provisions regarding foreign investment or investment) into national law, Indonesia then ratified the contents of the WTO Agreement through Law Number 7 of 1994 concerning Ratification of the Agreement Establishing The World Trade Organization (Approval of Establishment of a World Trade Organization) (State Gazette of the Republic of Indonesia of 1994 Number 57, Supplement to the State Gazette of the Republic of Indonesia Number 3564). As a further and comprehensive form of regulation, Indonesia has also made laws and regulations relating to investment currently in effect through Law Number 25 of 2007 concerning Investment (State Gazette of the Republic of Indonesia of 2007 Number 67, Supplement to the State Gazette of the Republic of Indonesia Number 4724).

General Explanation of Law Number 25 of 2007 concerning Investment (State Gazette of the Republic of Indonesia of 2007 Number 67, Supplement to the State Gazette of the Republic of Indonesia Number 4724) states the following:

"One of the objectives of the establishment of state government is to improve public prosperity. Such mandate has been described, among others, in Article 33 of the 1945 Constitution of the Republic of Indonesia and it constitutes the constitutional mandate outlining the making of the entire rules of law in economic sector. The constitution requires that national economic development be based on the principle of democracy capable of creating the realisation of Indonesian economic sovereignty. The connection of economic development with players of people economy is further specified with the Determination of the

People Consultative Assembly of the Republic of Indonesia Number: XVI/MPR/1998 concerning Political Economy in the Framework of Economic Democracy as the materialistic legal source. Hence investment development for micro, small and medium-sized enterprises, and cooperatives become part of investment basic policy."

The general explanation is that basically, investment arrangements in Indonesia are based on directions and within the scope of the constitution, the 1945 Constitution of the Republic of Indonesia, in order to achieve state goals, namely to promote public welfare for all Indonesian people.

International agreements relating to investment contain various clauses which are the result of mutual agreement between the parties who signed them. Basically, international agreements related to investment contain minimum standards of investment protection that must be carried out by the host state. First, there is fair and equitable treatment in the sense that there is no discrimination against all types of investment, whether domestic investment or foreign investment. Second, full protection and security guarantees from the state to be able to provide compensation to foreign investors in the event of losses due to war, armed conflict, emergencies, or rebellions. Third, there is protection from all forms of nationalization and the obligation to provide compensation in the event that this is done. Fourth, there is a state-level dispute resolution mechanism with investors known as "Investor-State Dispute Settlements."

Investor-State Dispute Settlement or dispute settlement mechanism between investors and the state is an international dispute resolution mechanism in the field of investment. This mechanism changes the initial pattern of views of international relations where in general dispute resolution can only be resolved through state mechanisms with the state (state-state dispute settlement). The Investor-State Dispute Settlement mechanism overrides efforts to exhaustion of local remedies that should have been done first by investors if there is a conflict or the existence of a host state action that is considered detrimental to investors or investors. This mechanism is regulated in the Bilateral Investment Treaties (BITs) or the Investment Improvement and Protection Agreement (P4M) specifically agreed one of the dispute resolution clauses.

Traditionally, dispute resolution under international law only involves disputes between countries. However, the proliferation of private commercial activities carried out by individuals and companies involved in international trade and/or investment has raised the question of whether these actors should be entitled to certain direct rights to resolve disputes with the countries in which they do business. Under international customary law, a foreign investor is required to

seek resolution of such disputes in the court and/or the relevant state court. If this solution fails or is ineffective in resolving disputes—whether because they do not have relevant substantive content, effective enforcement procedures and/or solutions or are the result of denial of justice—the main way for investors is to seek diplomatic protection from one's home country or the company concerned. In addition, generally only countries can submit claims under international law, given that they are the main subject of the system. Non-state private actors do not have the necessary personality of international law and must therefore rely on these indirect ways to justify their legal rights.

The establishment of the dispute resolution mechanism between investors and the state actually no longer has the urgency to be applied in the international investment regime. As is known, the WTO institutional system and legal system basically places the principle of state sovereignty as the main principle of the institutional system and legal system. International trade law is under the regime of international law and so that state sovereignty is one of the fundamental principles that must be applied. Sovereignty means the highest (superanus). A sovereign state means that the country has the highest power. The highest power means that there are no other power above it. Sovereignty also means omnipotence, as there is no power over it or that is free from the control of others (free from external control). Related to the sovereignty of state jurisdiction, is the state power to form and enforce laws (prescriptive jurisdiction) and the power to enforce the law against people and property and property rights in its territory (jurisdiction enforcement). State power is limited to the borders of the country concerned, the state power ends where other state powers begin. State sovereignty is the most essential characteristic of a country; a state without sovereignty is not a state.

The formation of the WTO and the establishment and enactment of the contents of WTO's laws against a country do not conflict with the principle of state sovereignty. The authority of a country to participate in or not be bound by the full WTO system is determined by the country itself. The WTO does not have the authority to force a country to commit itself to the WTO institutional system. Trade arrangements through the WTO system are based on the shared interests of countries towards a system of exploiting the world's natural resources and a fair trading system to meet the common interests of countries (the common interest of states). The establishment of the WTO system by and the application of the WTO system to countries is based on free and self-determination rights from countries. State rights as the highest rights based on their sovereignty to join or not participate in the WTO system are fully respected by the WTO system, including

the right to participate in or not participate in a certain scheme within the WTO, as well as the implementation of an agreement system of the Plurilateral Trade Agreement. As members of the international community, each country has individual interests and common interests. The nature of the WTO system is a system to harmonize the common interest and individual interests of the WTO Agreement participating countries in the world's natural resources and world trade system as a system to meet the national interests of countries.

In addition, there is the principle of equal state. The WTO system views WTO member countries as a sovereign state that is equal to each other. This form of principle can be seen in the WTO institutional membership system and its decision-making system, the rights, obligations and responsibilities of its member countries. The idea of having to pay attention to the asymmetrical conditions of the international community, equalizing competitiveness, and free competition originating from Adam Smith that is open competition in trade liberalization can only be carried out if the requirements for such competition have been fulfilled. Open competition requirements include equal conditions from all competition participants. In the event that there are asymmetrical conditions and inequality of economic capabilities of the competition participants, then the competition should be applied among countries that have fulfilled the requirements to compete, while those who have not fulfilled the requirements need to be empowered and equalized first.

The principle of non-discrimination requires each member country to provide the same legal and administrative treatment for importers and exporters immediately and unconditionally, without discriminating against origin and destination countries for imports and exports. Article I of the GATT determines that in terms of import duties and levies of any kind imposed on or in connection with import-export or transfer of payments for import-export, the method of imposing such duties and charges, all rules and conditions relating to import-export, all matters referred to in paragaf 2 Article III (national treatment in local taxes) and paragaf 4 Article III (national treatment and legislation, regulations and requirements that affect local sales, offer, purchase, transport, distribution and use), every profit, privileges and immunities given by each member country to each product originating from and intended for each other member country, must be given immediately and unconditionally to similar products originating from or directed to the territory of all member countries. Some other provisions of the GATT allow discrimination, for example Article XVI (subsidies for economic improvement), Article XVIl (state companies), Article XVIII (import restrictions to improve people's living standards), and

Article XIX (emergency measures to overcome economic pressures). Exceptions and special treatment can also be done in meeting national interests, such as: improving people's living standards, maintaining economic balance, overcoming economic difficulties from economic pressures, and others. Finally, it is important for every member country to resolve the dispute between them in a peaceful manner.

The fact shows that the decision of foreign investors to invest more is determined by political stability, the potential for economic growth, the availability of infrastructure and other commercial considerations. Thus, the existence of a dispute resolution mechanism between investors and the state is not something that is absolutely necessary to advance foreign investment in Indonesia. The provisions of an international investment agreement that give investors too much rights need to be balanced with their obligations, by continuing to review various international investment agreements that still include investor-state dispute resolution clauses, and changing the dispute resolution mechanism in the RCEP trade agreement design to State and state dispute resolution mechanisms so that the main principles of the WTO, namely state sovereignty, can be maintained in the framework of policy making according to the national development strategies of member countries.

Conclusion

The Investor-State Dispute Settlement is an international dispute resolution mechanism in the field of investment, which is currently re-included in the draft draft multilateral Regional Comprehensive Economic Partnership (RCEP) agreement. This mechanism changes the initial pattern of views of international relations where in general dispute resolution can only be resolved through state mechanisms with the state (state-state dispute settlement).

From the Indonesia perspective, foreign investors should not be given the right to directly file a claim in international arbitration without requiring prior approval from the government. The dispute resolution mechanism in RCEP draft agreement then needs to be adjusted again with Article 32 Paragraph 4 of the Investment Law. In accordance with these provisions, a dispute will be resolved through an international arbitration mechanism if foreign investors and the Indonesian Government make a special agreement in writing to submit the dispute to international arbitration.

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