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Navigating International Investment Law in Southeast Asia: The Case of Unfair Competition in Indonesia's Mining Sector

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Abstract

This paper explores the intersection between international investment law and domestic regulatory frameworks in Southeast Asia, with a particular focus on unfair competition in Indonesia's mining sector. As Southeast Asia continues to attract foreign direct investment (FDI), legal disputes involving foreign investors and host states have become more frequent, particularly in resource-rich industries. Using Indonesia as a case study, this research analyzes how allegations of unfair competition—such as discriminatory licensing, state favoritism toward domestic enterprises, and lack of transparency—can trigger claims under international investment agreements (IIAs). The novelty of this paper lies in its focus on the underexplored tension between international investment protections and national efforts to regulate competition in strategic sectors. Through doctrinal legal analysis and selected case reviews, the paper highlights inconsistencies between Indonesia's domestic legal framework and its international obligations, particularly under bilateral investment treaties

(BITs). The contribution of this study is twofold: first, it provides a critical legal mapping of how unfair competition claims in the mining sector may escalate to investor-state dispute settlement (ISDS); second, it offers policy recommendations to harmonize investment protection with fair competition principles. Ultimately, this paper argues that unless Southeast Asian countries, particularly Indonesia, reform their investment governance and competition policies, they risk increased litigation and a chilling effect on sustainable investment. This research adds to the growing discourse on how developing countries can balance investor protection with national economic sovereignty.

KEYWORDS *International Investment Law, Unfair Competition, Mining Sector, Indonesia, Investor-State Dispute Settlement*

Introduction

Over the past two decades, Southeast Asia has emerged as a critical node in global supply chains, particularly in resource-intensive industries. Among these, the extractive sector—including mining and mineral processing—has attracted substantial foreign direct investment (FDI), driven by rising global demand for energy transition minerals such as nickel, cobalt, and copper.[1] The region's abundant natural resources, coupled with policy incentives and infrastructure investments, have made it an attractive destination for multinational mining corporations seeking long-term resource security.[2]

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1 Chia Siow Yue, "Trade, Foreign Direct Investment and Economic Development of Southeast Asia," *The Pacific Review* 12, no. 2 (1999): 249–70, https://doi.org/10.1080/09512749908719290; Laura Diaconu, "The Foreign Direct Investments in South-East Asia during the Last Two Decades," *Procedia Economics and Finance* 15 (2014): 903–8, https://doi.org/10.1016/S2212-5671(14)00554-1; Mollah Aminul Islam et al., "Does Foreign Direct Investment Deepen the Financial System in Southeast Asian Economies?," *Journal of Multinational Financial Management* 61 (2021): 100682, https://doi.org/10.1016/j.mulfin.2021.100682.

2 Hong Hiep Hoang and Duc Hung Bui, "Determinants of Foreign Direct Investment in ASEAN: A Panel Approach," *Management Science Letters* 5, no. 2 (2015): 213–22, https://doi.org/10.5267/j.msl.2014.12.015; Tajul Ariffin Masron and Zulkornain Yusop, "The ASEAN Investment Area, Other FDI Initiatives, and Intra-ASEAN Foreign Direct Investment," *Asian-Pacific Economic Literature* 26, no. 2 (2012): 88–103, https://doi.org/10.1111/j.1467-8411.2012.01346.x.

Indonesia, as the largest economy in Southeast Asia and a major exporter of critical minerals, plays a pivotal role in this evolving landscape.[3] Its geological endowments, particularly in nickel, position the country as a strategic supplier in the global push toward green technologies, including electric vehicle batteries and renewable energy infrastructure. This positioning has been reinforced by successive Indonesian administrations, which have prioritized downstream development and value-added processing as part of broader industrialization goals.[4]

In response to these opportunities, Indonesia has witnessed a surge in foreign investment in its mining sector, especially from East Asian and European investors.[5] These investments have been facilitated through bilateral investment treaties (BITs), free trade agreements (FTAs), and broader multilateral frameworks that offer protections to foreign investors, including guarantees against expropriation, fair and equitable treatment (FET), and access to investor-state dispute settlement (ISDS) mechanisms.[6]

Yet, despite these developments, tensions have surfaced between the protection of foreign investment and concerns over unfair competition in domestic markets.[7] Recent policy shifts in Indonesia—including export bans, local content requirements, and the preferential treatment of state-

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3 Khairu Rizal and Arifudin Idrus, "Global Critical Mineral Review and Challenges on Its Exploration in Indonesia," *Indonesian Mining Journal* 27, no. 2 (2024): 97–123, https://doi.org/10.30556/imj.Vol27.No2.2024.1605.

4 Julia Tijaja and Mohammad Faisal, "Industrial Policy in Indonesia: A Global Value Chain Perspective," *Asian Development Bank Economics Working Paper Series* 411 (2014); Csaba Moldicz, "Increasing Domestic Value Added: Modernizing the Economy," in *Indonesia's Economy After Joko Widodo: Economic Growth and Transformation* (Cham: Springer Nature Switzerland, 2025), 43–73.

5 Robert E. Lipsey and Fredrik Sjöholm, "Foreign Direct Investment and Growth in East Asia: Lessons for Indonesia," *Bulletin of Indonesian Economic Studies* 47, no. 1 (2011): 35–63, https://doi.org/10.1080/00074918.2011.556055; J. Thomas Lindblad, "Foreign Direct Investment in Indonesia: Fifty Years of Discourse," *Bulletin of Indonesian Economic Studies* 51, no. 2 (2015): 217–37, https://doi.org/10.1080/00074918.2015.1061913.

6 *See* An Chandrawulan, *Hukum Perusahaan Multinasional: Liberalisasi Hukum Perdagangan Internasional & Hukum Penanaman Modal* (Bandung: Penerbit Alumni, 2022). See also Salim Saleh Thalib, "Implementasi Prinsip Perlindungan Investasi Asing di Indonesia," *Jurnal Ilmu Hukum, Humaniora dan Politik (JIHHP)* 5, no. 1 (2024), https://doi.org/10.38035/jihhp.v5i1.3148; Antony Crockett, "Indonesia's Bilateral Investment Treaties: Between Generations?," *ICSID Review-Foreign Investment Law Journal* 30, no. 2 (2015): 437–48, https://doi.org/10.1093/icsidreview/siv003.

7 Simon Butt, "Foreign Investment in Indonesia: The Problem of Legal Uncertainty," in *Foreign Investment and Dispute Resolution Law and Practice in Asia* (London: Routledge, 2012), 112–34.

owned enterprises (SOEs)—have been perceived by some foreign investors as discriminatory and inconsistent with the country's international obligations under investment treaties.[8]

This tension reveals a deeper conflict between sovereign regulatory autonomy and the obligations embedded within international investment law.[9] While host states like Indonesia seek to rebalance the benefits of resource extraction through regulatory interventions, foreign investors often view these measures as undermining legal certainty and the investment climate. Allegations of unfair competition—where domestic firms, particularly SOEs or politically connected entities, are seen as receiving preferential treatment—further complicate the legal landscape.[10]

Such circumstances have given rise to legal and policy controversies surrounding the extent to which host states can regulate in the public interest without breaching their international legal commitments. These issues are particularly pronounced in the extractive industries, where the stakes are high, the actors are powerful, and the legal norms are evolving.

Against this backdrop, this paper investigates two interrelated research questions: First, how does Indonesia's treatment of foreign investors in the mining sector intersect with international investment law? Second, what legal risks arise under international law when allegations of unfair competition emerge in the context of foreign investor operations?

8 *See* Esty Hayu Dewanti, "Persyaratan Kandungan Lokal (Local Content Requirements) di Indonesia dan Kaitannya dengan Perjanjian Internasional di Bidang Investasi," *Yuridika* 27, no. 3 (2012): 203–16, https://doi.org/10.20473/ydk.v27i3.300; Alysha Fairuz Azura Kulzum, Soesi Idayanti, and Kanti Rahayu, "Problematika Hukum Peningkatan Investasi Asing di Indonesia (Legal Problems of Increasing Foreign Investment in Indonesia)," *TRAKTAT: Jurnal Hukum Ekonomi dan Bisnis* 1, no. 1 (2024): 37–60, https://jurnal.sitasi.id/traktat/article/view/139. See also Dewi Kurnia Widyastuti, "Foreign Investment Regulation in Indonesia: Making a Case for Reform in Regulating Foreign Investment in Public Companies" (PhD thesis, Macquarie University, 2019); Arumugam Rajenthran, "Indonesia: An Overview of The Legal Framework for Foreign Direct Investment," *ISEAS Working Papers, Economics and Finance* (2002): 1.

9 Kain Keita et al., "Sovereignity Issues and Legal Framework Challenges for Foreign Direct Investment in Developing Countries," *International Journal of Law and Society (IJLS)* 2, no. 2 (2023): 142–54, https://doi.org/10.59683/ijls.v2i2.41; Fifi Junita, "The Foreign Mining Investment Regime in Indonesia: Regulatory Risk under Resource Nationalism Policy and How International Investment Treaties Provide Protection," *Journal of Energy & Natural Resources Law* 33, no. 3 (2015): 241–65, https://doi.org/10.1080/02646811.2015.1057028.

10 Huta Disyon and Elisatris Gultom, "Critical Review of the Implementation of the Making of SOE as a Holding from Anti-Monopoly and Unfair Business Competition Perspective," *Jurnal Penelitian Hukum De Jure* 22, no. 2 (2022): 191–204, https://doi.org/10.30641/dejure.2022.V22.191-204.

These questions aim to uncover the legal uncertainties that foreign investors face when navigating regulatory changes in host states like Indonesia. They also seek to analyze how claims of unfair treatment or discriminatory practices—often raised in international arbitration—are addressed within the framework of international economic law.

The primary objective of this paper is to explore the legal interplay between Indonesia's domestic regulatory framework in the mining sector and its obligations under international investment treaties. Specifically, the paper aims to assess whether and how certain Indonesian policies could be challenged under international law, particularly on grounds of unfair competition or discriminatory treatment.[11]

A secondary objective is to highlight the legal risks and strategic considerations that both states and investors must navigate in sectors characterized by high political sensitivity and regulatory volatility. By identifying potential points of legal conflict, the paper seeks to contribute to more balanced policymaking and investment governance that aligns developmental objectives with legal predictability.

The significance of this inquiry is both theoretical and practical. Theoretically, the paper contributes to ongoing debates about the boundaries of sovereign regulatory power in the investment law regime. Practically, it provides insights for legal practitioners, policymakers, and corporate actors involved in cross-border mining investments, particularly in emerging markets where the rule of law may be unevenly applied.

This paper adopts an interdisciplinary legal approach[12], drawing on principles of international investment law, competition law, and

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[11] *See* Eleanor M. Fox, "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia," *Harvard International Law Journal* 41, no. 2 (2000): 579–94, https://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.publications&personid=19924.

[12] An interdisciplinary legal approach involves integrating knowledge from various academic disciplines, such as economics, sociology, psychology, political science, and history, into the analysis and practice of law. This approach recognizes that legal issues are often complex and cannot be fully understood or resolved through legal principles alone. By incorporating insights from other fields, legal professionals can develop a more holistic understanding of the issues at hand and propose more effective and equitable solutions. For example, incorporating economic theory can help analyze the impact of legal rules on market behavior, while psychological insights can enhance understanding of criminal behavior or the reliability of witness testimony. This approach enriches legal research, policymaking, and practice, ensuring that legal solutions are not only theoretically sound but also socially, culturally, and economically informed. See Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law," *Erasmus Law Review* 2015, no. 3

comparative public policy. The analysis is grounded in treaty interpretation, case law from investment arbitration tribunals, and selected examples from Indonesia's mining sector. The methodology includes a doctrinal review of key legal instruments—such as Indonesia's BITs and domestic mining regulations—as well as case studies that illustrate the practical consequences of regulatory conflict.

The paper also situates its analysis within broader theoretical frameworks concerning regulatory sovereignty, the fragmentation of international law, and the political economy of natural resources. This allows for a more holistic understanding of the challenges faced by host states and investors alike.

To contextualize the legal analysis, the paper draws on several prominent examples. These include the nickel export ban implemented in 2020, which triggered a complaint by the European Union at the World Trade Organization[13], and the increasing role of SOEs like PT Aneka Tambang (Antam) in joint ventures with foreign investors[14]. Such examples demonstrate how policy tools intended to promote national development can simultaneously raise questions of discriminatory treatment and market distortion under international law.

Another illustrative case is the 2012 divestment requirement imposed on foreign mining companies, compelling them to gradually transfer

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(2015): 130–38, https://doi.org/10.5553/ELR.000055; Wendy Schrama, "How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method," *Utrecht Law Review* (2011): 147–62, https://doi.org/10.18352/ulr.152.

13 Annisa Fitriani et al., "The European Union's Legal Challenge to Indonesia's Nickel Export Ban at the World Trade Organization," *Research Horizon* 5, no. 2 (2025): 63–70, https://doi.org/10.54518/rh.5.2.2025.63-70; I. Gusti Ngurah Parikesit Widiatedja, "Indonesia's Export Ban on Nickel Ore: Does It Violate the World Trade Organization (WTO) Rules?," *Journal of World Trade* 55, no. 4 (2021), https://doi.org/10.54629/jli.v12i4.424; Reinpal Falefi, Hikmat Zakky Almubaraq, and Nora Lelyana, "Nickel Ban and Indonesia's Defense: A WTO Dispute with Implications for National Security," *Journal of International Trade, Logistics and Law* 9, no. 2 (2023): 1–9, https://doaj.org/article/4ab7669b7669468298263f2f48f0b861; Nooraini Dyah Rahmawati and Erbin Swara, "Indonesia's Nickel Export Ban: Between Industrial Downstreaming and International Trade Disputes," *Fortiori Law Journal* 5, no. 1 (2025): 19–36, https://doi.org/10.47200/flj.v5i01.3051.

14 Rahma Wiyanti and Rosita Wulandari, "Analysis of Enterprise Financial Performance Before and After to Build of State Owned Enterprises (SOEs) Holding in the Affiliation of the Holding Mining Industry Indonesia," *Call for Papers–2nd International Seminar on Accounting for Society*, vol. 5; Raden Roro Theresia Tri Widorini, "Legal Status of the Holding Company of Mining State-Owned Enterprises Under the Context of Direct Capital Participation Sourcing from the Separate State's Assets," in *2018 International Conference on Energy and Mining Law (ICEML 2018)* (Atlantis Press, 2018).

ownership stakes to Indonesian entities.[15] While justified on sovereignty and economic nationalism grounds, such policies have been cited by investors as creating an uneven playing field, potentially violating investment protection standards.

Despite the growing relevance of these issues, scholarly attention to the specific intersection of unfair competition claims and foreign investor protections in Indonesia's mining sector remains limited. Much of the existing literature focuses either on general FDI trends or on discrete legal challenges in investor-state arbitration.[16] There is a lack of sustained analysis examining how competition-related grievances intersect with treaty-based claims, particularly in politically sensitive industries like mining.

Moreover, while there has been extensive debate over regulatory takings and the fair and equitable treatment standard, less attention has been given to how allegations of unfair competition—whether through SOE favoritism or opaque permitting processes—could form the basis of legal risk for host states.[17] This gap in the literature suggests a need for

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[15] Suwarsit Suwarsit and Yoyo Arifardhani, "Implications of Divestment Regulations Indonesia on Foreign Mining Companies as Contract Holders," *Russian Law Journal* 11, no. 5 (2023): 353–66. See also J. Thomas Lindblad, "Foreign Direct Investment in Indonesia: Fifty Years of Discourse," *Bulletin of Indonesian Economic Studies* 51, no. 2 (2015): 217–37, https://doi.org/10.1080/00074918.2015.1061913.

[16] *See* Flavia Marisi, *Rethinking Investor-State Arbitration*, vol. 27 (New York: Springer Nature, 2023); Alexander W. Resar and Tai-Heng Cheng, "Investor State Arbitration in a Changing World Order," *Brill Research Perspectives in International Investment Law and Arbitration* 3, no. 2–3 (2021): 1–89, https://doi.org/10.1163/24055778-12340009; Juan Pahala Christian, "Tinjauan Kritis Sistem Penyelesaian Sengketa Investasi Internasional dan Dampaknya terhadap Kepentingan Nasional Indonesia," *Judge: Jurnal Hukum* 6, no. 2 (2025): 228–43, https://doi.org/10.54209/judge.v6i02.1359; Maulia Nurfadillah and Diana Setiawati, "Peluang Arbitrase dalam Penyelesaian Sengketa Investasi untuk Melindungi Investor Asing di Indonesia," *Jurnal Ilmiah Nusantara* 2, no. 2 (2025): 68–75, https://doi.org/10.61722/jinu.v2i2.3559.

[17] *See* Rahayu Hartini, Muhammad Arief, and Adi Permana, "Implementation of Business Competition Compliance Program to Prevent Unfair Business Competition Practices Against Business Enterprises," *Audito Comparative Law Journal (ACLJ)* 5, no. 1 (2024): 42–55, https://doi.org/10.22219/aclj.v5i1.29780; Huta Disyon and Elisatris Gultom, "Critical Review of the Implementation of the Making of SOE as a Holding from Anti-Monopoly and Unfair Business Competition Perspective," *Jurnal Penelitian Hukum De Jure* 22, no. 2 (2022): 191–204, https://doi.org/10.30641/dejure.2022.V22.191-204; Ni Luh Made Mahendrawati, "Prohibition of Monopolistic Practices and Unfair Business Competition in Indonesia: A Legal Mechanism to Balance the Public Interest," *International Journal of Criminology and Sociology* 10 (2021): 1023–28, https://doi.org/10.6000/1929-4409.2021.10.120.

more integrated analysis that brings together investment law and competition policy.

This paper contributes to filling that gap by offering a focused examination of the legal vulnerabilities that arise at the intersection of foreign investment protection, domestic economic nationalism, and anti-competitive state conduct. It further adds a Southeast Asian perspective—often underrepresented in global investment law scholarship—while highlighting the strategic importance of Indonesia in global supply chains. By framing these issues within the context of legal doctrine and real-world practice, the paper aims to advance academic understanding and inform legal strategies for dispute prevention and resolution in the extractive sector.

Conceptual and Legal Framework

A. Overview of International Investment Law

International Investment Law (IIL) is a body of treaty-based and customary rules that govern the relationship between states and foreign investors. Its principal objective is to promote and protect cross-border investments by ensuring legal certainty and stability.[18] This is achieved through various substantive standards, including Fair and Equitable Treatment (FET), National Treatment (NT), Most-Favored Nation (MFN), and protection against unlawful expropriation. These standards are typically enshrined in Bilateral Investment Treaties (BITs), Free Trade Agreements (FTAs) with investment chapters, and multilateral instruments.[19]

The FET standard is widely regarded as the cornerstone of modern investment treaties. It is intended to ensure that host states treat foreign investors in a manner consistent with legitimate expectations, procedural

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[18] Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2022); David Collins, *An Introduction to International Investment Law* (Cambridge, MA: Cambridge University Press, 2023). See also Giovanna Adinolfi, "Soft Law in International Investment Law and Arbitration," *The Italian Review of International and Comparative Law* 1, no. 1 (2021): 86–112, https://doi.org/10.1163/27725650-01010005.

[19] Shi Li, Long Zhao, and Hao Shen, "Foreign Direct Investment and Institutional Environment: The Impact of Bilateral Investment Treaties," *Applied Economics* 53, no. 30 (2021): 3535–48, https://doi.org/10.1080/00036846.2021.1883535.

fairness, and good faith.[20] Scholars such as Schill (2009) argue that FET has evolved into a norm balancing investor protection with host state regulatory autonomy.[21] Tribunals have interpreted FET to include protection against arbitrary, discriminatory, and non-transparent conduct. This principle is particularly relevant in sectors such as mining, where regulatory changes—such as export bans or licensing modifications—can drastically affect the profitability and feasibility of investments.

National Treatment (NT) obligates host states to treat foreign investors no less favorably than domestic investors in like circumstances. This principle is designed to prevent protectionist practices that distort competition. The MFN clause, in turn, requires states to extend to foreign investors treatment no less favorable than that accorded to investors from third countries.[22] These clauses often allow foreign investors to "import" more favorable provisions from other treaties, as demonstrated in Maffezini *v.* Spain (2000), where an MFN clause was used to access dispute settlement rights from a third-party treaty.[23]

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20 Shonali Pachauri et al., "Fairness Considerations in Global Mitigation Investments," *Science* 378, no. 6624 (2022): 1057–59, https://doi.org/10.1126/science.adf0067.

21 Stephan W. Schill, "Ioana Tudor. The Fair and Equitable Treatment Standard in the International Law of Foreign Investment," *European Journal of International Law* 20, no. 1 (2009): 236–39, https://doi.org/10.1093/ejil/chp009.

22 José Pedro Villablanca Gutiérrez, "The Use of MFN Clauses in Investment Arbitration: The Problem of Importation," *Journal of International Dispute Settlement* 15, no. 3 (2024): 424–39, https://doi.org/10.1093/jnlids/idae008; James M. Claxton, "The Standard of Most-Favored-Nation Treatment in Investor-State Dispute Settlement Practice," in *Handbook of International Investment Law and Policy* (Singapore: Springer Singapore, 2021), 271–301.

23 The *Maffezini v. Spain* case (2000) is a landmark decision in international investment law concerning the use of Most-Favored-Nation (MFN) clauses in Bilateral Investment Treaties (BITs). Luigi Maffezini, an Argentine investor, filed a claim against Spain under the Argentina-Spain BIT after disputes arose over his investment in a Spanish company. The treaty included a requirement that investors exhaust local remedies in Spain for at least 18 months before seeking international arbitration. Maffezini, however, argued that the MFN clause in the BIT allowed him to bypass this waiting period by invoking dispute resolution provisions from Spain's BITs with other countries, which did not require such exhaustion. The ICSID tribunal ruled in Maffezini's favor, holding that the MFN clause could be used to import more favorable procedural terms from other treaties, thus allowing him to proceed directly to arbitration without waiting 18 months. The decision was significant because it expanded the scope of MFN clauses, enabling investors to access more favorable dispute resolution mechanisms from other treaties. This interpretation was controversial, as it allowed investors to bypass procedural safeguards designed to protect host states, leading to debates over the potential misuse of MFN clauses in future cases. See ICSID, *Emilio Agustín Maffezini v. The Kingdom of*

Protection against expropriation, whether direct or indirect, remains one of the most litigated aspects of IIL. Direct expropriation involves overt state seizure, whereas indirect expropriation refers to regulatory measures that significantly diminish the value of an investment.[24] In Tecmed *v.* Mexico (2003)[25], the tribunal noted that even measures taken in the public interest could amount to indirect expropriation if they are disproportionate or lack due process. This is highly relevant in Indonesia's context, where environmental and national development regulations have been contested by foreign investors.

Spain, ICSID Case No. ARB/97/7, https://www.italaw.com/cases/641. See also Dzulfiki Muhammad Rizki, Kholis Roisah, and Nanik Trihastuti, "Pertanggungjawaban Negara atas Acta Jure Imperii Perusahaan Yang Diduga BUMN (Studi Terhadap Kasus Emilio Agustin Maffezini v. Kingdom of Spain)," *Diponegoro Law Journal* 10, no. 1 (2021): 108–23, https://doi.org/10.14710/dlj.2021.29808; Дилжан Бактыбекова, "The Notion of a Dispute in Determining Jurisdiction Ratione Temporis in International Investment Arbitration," *Журнал ВШЭ по международному праву (HSE University Journal of International Law)* 3, no. 2 (2025): 51–78, https://jil.hse.ru/article/download/28169/22970.

24 Kwok Tung Wong and Eco Hamersma, "On Acts of Expropriation: Balancing State Regulation and Investor Protection in International Law," *Kobe University Law Review* 55 (2024): 73–85, https://doi.org/10.24546/0100494125.

25 The case *Tecnicas Medioambientales Tecmed S.A. (Tecmed) v. Mexico* (2003) is a landmark decision in international investment arbitration, particularly regarding the Fair and Equitable Treatment (FET) standard and indirect expropriation. Tecmed, a Spanish company, operated a hazardous waste landfill in Mexico under a license granted by Mexican authorities. When Tecmed sought to renew the license, the government denied the request, citing environmental concerns and public opposition. As a result, Tecmed could no longer operate the facility and claimed that Mexico's actions violated the Mexico–Spain Bilateral Investment Treaty (BIT). The ICSID tribunal ruled in favor of Tecmed, holding that Mexico had breached the FET obligation under the BIT. The tribunal emphasized that host states must act transparently, consistently, and in good faith, while respecting the legitimate expectations of foreign investors. It also found that the refusal to renew the license amounted to indirect expropriation, as Tecmed was deprived of the value and control of its investment without adequate compensation. This case is significant for shaping the modern understanding of the FET standard and the limits of regulatory authority. It established that even non-discriminatory regulatory actions can breach investment treaty obligations if they disproportionately harm investors without due process or justification. See ICSID, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, https://www.italaw.com/cases/1087. See also Kareem Sallam, "The Scope and Justification of Legitimate Expectations Protection under FET Clauses: Case Law Study," *International Journal of Doctrine, Judiciary and Legislation* 3, no. 1 (2022): 110–22; Liuhui Wang, "On the Functional Reinforcement of the Principle of Proportionality to Investors' Legitimate Expectations in International Investment Arbitration," *Studies in Law and Justice* 2, no. 4 (2023): 50–57.

However, the interpretation and application of these principles remain contested. Critics, including Sornarajah, argue that the IIL regime excessively constrains state sovereignty and reinforces an asymmetric global order.[26] Nonetheless, these principles remain binding under many treaties signed by Indonesia, and they have direct implications for the country's regulatory space, especially in politically sensitive sectors like mining.

Indonesia's exposure to IIL has increased in recent years due to the growing number of treaties it is party to and the increasing number of disputes initiated by foreign investors. Consequently, understanding the scope and limits of these protections is essential to evaluate how they interact with allegations of unfair competition and regulatory interventions in Indonesia's mining sector.

B. Definition and Legal Scope of "Unfair Competition"

The concept of unfair competition is typically rooted in domestic competition law, though it has international relevance, particularly when actions by a state or state-affiliated entity distort market dynamics to the detriment of foreign investors.[27] Generally, unfair competition refers to any deceptive, fraudulent, or anti-competitive conduct that harms other businesses or distorts fair market practices.[28] Under international law, the

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[26] Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge, MA: Cambridge University Press, 2021).

[27] R. P. Rustagi, *Investment Management Theory and Practice* (New Delhi: Sultan Chand & Sons, 2021). See also Rahmadi Tektona, "Quo Vadis: Kepastian Hukum Aturan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat Pada Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja," *Jurnal Persaingan Usaha* 2, no. 1 (2022): 43–54, https://doi.org/10.55869/kppu.v3i-.51; Amanda Ayu Rizkia and Suci Rahmawati, "Faktor-Faktor Yang Mempengaruhi Anti Monopoli dan Persaiangan Bisnis Tidak Sehat: Globalisasi Ekonomi, Persaingan Usaha, dan Pelaku Usaha (Literature Review Etika)," *Jurnal Ilmu Manajemen Terapan* 2, no. 5 (2021): 631–43, https://doi.org/10.31933/jimt.v2i5.572; Herry Subagyo, "Pengembangan etika bisnis dalam manajemen investasi," *Fair Value: Jurnal Ilmiah Akuntansi dan Keuangan* 4, no. Special Issue 5 (2022): 2101–10.

[28] Frauke Henning-Bodewig, *Unfair Competition Law: European Union and Member States*, vol. 18 (Leiden: Kluwer Law International BV, 2006); Andrew Terry, "Unfair Competition and the Misappropriation of a Competitor's Trade Values," *The Modern Law Review* 51, no. 3 (1988): 296–322, https://doi.org/10.1111/j.1468-2230.1988.tb01758.x. For further context and cases, see also Siti Dhurotun Muniroh and Ubaidillah Kamal, "The Indication of Unfair Business Competition Practice in the Implementation of Public Procurement Auction Using E-Tendering," *Journal of Private and Commercial*

definition is less settled, but it can intersect with investment protections when discriminatory or arbitrary treatment by a host state adversely affects foreign investors.

Indonesia's Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition provides the domestic legal basis for regulating anti-competitive behavior. The law prohibits abuse of dominant position, collusive practices, and discriminatory treatment by both private and state actors.[29] However, enforcement has been uneven, particularly when SOEs or politically connected entities are involved. This raises concerns about regulatory capture and unequal market conditions.

In investment arbitration, "unfair competition" is not typically invoked as a standalone legal claim, but it can be embedded in allegations of FET violations or discriminatory treatment. For example, if a foreign investor is subject to more burdensome licensing requirements than a local competitor, or if SOEs receive preferential access to mineral concessions,

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Law 2, no. 2 (2018): 78–93, https://doi.org/10.15294/jpcl.v2i2.15700; Raden Murjiyanto, "The Effectiveness of Law Enforcement against Violations of the Law on Prohibition of Monopolistic Practices and Unfair Business Competition," in *1st International Conference on Indonesian Legal Studies (ICILS 2018)* (Atlantis Press, 2018); Haiqal Riski Ramadhan, Darminto Hartono Paulus, and Giovanni Marcello, "Prohibition of Monopolistic Practices in Business Trials in Indonesia: Reforming on Business Competition Supervisory Commission," *Journal of Law and Legal Reform* 4, no. 2 (2023): 163–82, https://doi.org/10.15294/jllr.v4i2.61043; Muhammad Iqbal Baiquni and Waspiah Waspiah, "Two Decades of Business Competition Law: How Has Indonesian Competition Law Transformed?," *Journal of Private and Commercial Law* 7, no. 1 (2023): 45–68, https://doi.org/10.15294/jpcl.v7i1.44355; Luh Putu Yeyen Karista Putri et al., "Comparative Analysis of Indonesia's Minimum Capital Requirements for Foreign Direct Investment," *Lex Scientia Law Review* 7, no. 1 (2023): 179–214, https://doi.org/10.15294/lesrev.v7i1.64664; Agus Lanini et al., "Standardisation of Foreign Labour Investigation of Mineral Mining Company," *Sriwijaya Law Review* (2024): 183–96, https://doi.org/10.28946/slrev.Vol8.Iss1.2227.pp183-196; Agus Lanini et al., "Synchronization of TRIMs Principles in the Legislation of Mining Sector in Indonesia," *International Journal of Scientific & Technology Research* 5, no. 4 (2016): 84–88.

[29] Johanes E. Paendong, "Perlindungan Hukum Bagi Pelaku Usaha Kecil dalam Persaingan Usaha di Indonesia Menurut Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat," *Lex Privatum* 5, no. 4 (2017), https://ejournal.unsrat.ac.id/v2/index.php/lexprivatum/article/view/16096; Ria Sintha Devi et al., "Persaingan Usaha Tidak Sehat Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat," *Jurnal Ilmiah METADATA* 6, no. 1 (2024): 108–18, https://doi.org/10.47652/metadata.v6i1.469.

such conduct may amount to a breach of the National Treatment or FET standard. In Occidental *v.* Ecuador (2004)[30], differential treatment between domestic and foreign companies was a central issue in the tribunal's finding of a treaty violation.

Some scholars have begun to explore the convergence of competition law and investment law. Fox and Trebilcock argue that as global markets become more integrated, host state favoritism or protectionist industrial policy—though politically rational—may clash

[30] Occidental (a U.S. oil company) had a contract with Ecuador for oil exploration and production. Under the U.S.–Ecuador BIT, Occidental was entitled to a refund of Value Added Tax (VAT) paid on goods and services used in its operations. Initially, Ecuador granted the refunds, but later the Ecuadorian tax authority (SRI) changed its position and denied further refunds, claiming that Occidental was not eligible. Occidental filed a claim at the London Court of International Arbitration (LCIA) under the BIT, arguing that Ecuador's reversal breached the FET standard, harmed its legitimate expectations, and amounted to discriminatory treatment. The tribunal ruled in favor of Occidental, finding that Ecuador's inconsistent behavior and sudden reversal of VAT policy violated the FET standard. The tribunal held that a host state must act transparently and respect the investor's legitimate expectations based on prior assurances or consistent practice. The case reinforced the principle that arbitrary or inconsistent regulatory changes by a host state can breach international investment obligations, especially when they affect core business expectations. See UNCITRAL, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, https://www.italaw.com/cases/761. See also Susan D. Franck, "Occidental Exploration & Production co. v. Republic of Ecuador. Final Award. London Court of International Arbitration Administered Case No. UN 3467," *American Journal of International Law* 99, no. 3 (2005): 675–81, https://doi.org/10.2307/1602299; Borzu Sabahi and Kabir Duggal, "Occidental Petroleum v Ecuador (2012) Observations on Proportionality, Assessment of Damages and Contributory Fault," *ICSID Review* 28, no. 2 (2013): 279–90, https://doi.org/10.1093/icsidreview/sit021; Susan D. Frank and Daniel Bodansky, "International Decisions: Occidental Exploration & Production co. v. Republic of Ecuador," *American Journal of International Law* 99, no. 3 (2005): 675–81, https://doi.org/10.2307/1602299; Ximena Fuentes, "Proportionality Analysis and Disproportionate Damages: Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador: ICSID Case No. ARB/06/11, Award, 5 October 2012 (L. Yves Fortier, David AR Williams, Brigitte Stern) and Dissenting Opinion, 20 September 2012 (Brigitte Stern)," *The Journal of World Investment & Trade* 16, no. 2 (2015): 315–24, https://brill.com/previewpdf/journals/jwit/16/2/article-p315_5.xml; Isha Reddy, Galuh Ayu Widuri, and Rizki Ramadhana Arya Putra, "Debt or Development? A Study of Indonesia's Foreign Debt and Its Impact on Economic Justice for Future Generations," *Indonesian Economic Justice Review* 2, no. 2 (2025), https://doi.org/10.65815/g25j2q64.

with international legal obligations.[31] This is particularly relevant in Indonesia, where resource nationalism has led to policies that arguably protect domestic entities to the detriment of foreign investors.

From a legal theory perspective, this interaction can be viewed through the lens of global administrative law or transnational legal pluralism, which recognize the overlapping and sometimes conflicting legal regimes that govern global economic interactions. The lack of a unified framework to address unfair competition in international investment law creates a legal gap, leaving foreign investors reliant on general investment treaty standards for protection.

Therefore, in the absence of explicit rules on unfair competition at the international level, tribunals must interpret general investment protections in ways that incorporate principles of market fairness, transparency, and equal treatment. This interpretive flexibility can serve both as an opportunity for redress and a source of legal uncertainty for investors operating in complex regulatory environments like Indonesia.

C. Overview of Relevant IIAs and BITs Involving Indonesia

Indonesia is party to more than 60 Bilateral Investment Treaties (BITs) and several International Investment Agreements (IIAs), though its relationship with these treaties has evolved significantly over the last decade. In 2014, the Indonesian government began terminating several BITs, citing concerns over sovereignty and the risk of adverse arbitration awards. Despite this, many BITs remain in force due to “sunset clauses”, which continue treaty protections for 10–15 years post-termination.[32]

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31 Eleanor M. Fox and Michael J. Trebilcock, eds., *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford: Oxford University Press, 2013).

32 Alvin Yeo and Smitha Menon, "Indonesia–Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement," *Asian Dispute Review* 18, no. 3 (2016), https://doi.org/10.54648/ADR2016025; Kamal Fahmi Kurnia, "Gagasan Metode Sunset Clauses dalam Sistem Perundang-Undangan di Indonesia," *Justicia Sains: Jurnal Ilmu Hukum* 2, no. 2 (2017): 213–36, https://doi.org/10.24967/jcs.v2i2.304.

Prominent examples include the Indonesia–Singapore BIT (2005)[33], Indonesia–UK BIT (1976)[34], and the ASEAN Comprehensive Investment Agreement (ACIA)[35]. These treaties contain standard investment protections—FET, NT, MFN, and protection against expropriation—as well as access to ISDS mechanisms. Some agreements, like the Indonesia–Australia Comprehensive Economic Partnership Agreement (IA-CEPA)[36], contain carve-outs and regulatory exceptions intended to preserve policy space, including in the extractive sector.

The content of these agreements is critical in evaluating Indonesia's legal exposure to foreign investor claims. For instance, under the Indonesia–Netherlands BIT, the tribunal in Churchill Mining PLC *v.* Indonesia (2016) found jurisdiction to hear a dispute concerning the revocation of mining licenses, although the claim was ultimately dismissed on the merits.[37] This case illustrates how IIA obligations can be invoked by mining companies when they perceive regulatory treatment to be arbitrary or discriminatory.

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33 *See* Agreement between the Government of the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments (Indonesia-Singapore BIT 2005), https://edit.wti.org/document/show/a5acf1be-3c64-4d7a-94b5-05c9c53a94cf.

34 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments (Indonesia - United Kingdom BIT (1976). Online at https://edit.wti.org/document/show/cae2b84b-8a2c-483c-a85d-a8ce73d91c90?textBlockId=9f1dcc0d-c207-4de7-9770-188a47346fe6&page=1

35 *See* ASEAN Comprehensive Investment Agreement (ACIA), online at https://www.asean.org/wp-content/uploads/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf

36 Australian Government, *Indonesia-Australia Comprehensive Economic Partnership Agreement*. Online at https://www.dfat.gov.au/trade/agreements/in-force/iacepa/indonesia-australia-comprehensive-economic-partnership-agreement

37 Jawad Ahmad, "Complicity in Forgery and Investor Due Diligence over Local Partners: Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case Nos ARB/12/14 and ARB/12/40, Award, 6 December 2016 (Gabrielle Kaufmann-Kohler, Michael Hwang, Albert Jan van den Berg)," *The Journal of World Investment & Trade* 19, no. 2 (2018): 293–304, https://doi.org/10.1163/22119000-12340089; Caroline Le Moullec, "Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016," *European Investment Law and Arbitration Review* 2, no. 1 (2017), https://doi.org/10.1163/24689017-00201005.

Scholars such as Reinisch[38] and Dolzer, et al have noted that the language of IIAs often lacks precision, leaving significant interpretive discretion to arbitral tribunals.[39] This raises questions about consistency and legitimacy, particularly when tribunals must weigh investor rights against host state regulatory objectives, such as environmental protection or resource sovereignty.

Moreover, the inclusion of MFN clauses in many of Indonesia's treaties increases the complexity of legal analysis. Investors may seek to rely on more favorable provisions from other BITs, thereby expanding the scope of their protections. This "*cherry-picking*" effect can pose significant legal risks for host states attempting to implement sector-specific reforms, such as local content requirements or licensing restrictions in mining. Therefore, understanding Indonesia's treaty network and the specific protections available under each instrument is essential for assessing the legality of regulatory actions under international law, particularly when these actions result in unequal competitive conditions or perceived investor discrimination.

D. Domestic Legal Framework on Competition and Investment in Indonesia's Mining Sector

Indonesia's legal regime governing mining and investment is composed of multiple, overlapping instruments, including constitutional provisions, sector-specific statutes, and presidential regulations. At the constitutional level, Article 33 of the 1945 Constitution mandates that natural resources be controlled by the state and used for the greatest benefit of the people. This principle underpins the state's discretionary authority over resource management and supports the pursuit of national development goals, including local industry promotion.[40]

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38 August Reinisch, "The EU on the Investment Path-Quo Vadis Europe? The Future of EU BITs and other Investment Agreements," *Santa Clara Journal of International Law* 12, no. 1 (2014): 111–57, https://digitalcommons.law.scu.edu/scujil/vol12/iss1/.

39 Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2022).

40 Suyanto Edi Wibowo, "Memahami Makna Pasal 33 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Perihal Penguasaan oleh Negara Terhadap Sumber Daya Alam: Comprehend the Meaning of Article 33 of the 1945 Constitution of the Republic of Indonesia on State Authority Over Natural Resources," *Jurnal Legislasi Indonesia* 12, no. 4 (2018): 1–57; Fadli Zon, Muhammad Iskandar, and Susanto Zuhdi, "Tinjauan Sejarah Hukum Pasal 33 UUD 1945 sebagai Ideologi Ekonomi (The Legal

The central legislative instrument for mining is Law No. 3 of 2020, which amends Law No. 4 of 2009 on Mineral and Coal Mining (Minerba Law). This law introduces significant changes, including the centralization of licensing authority, the extension of mining permits, and the requirement for increased domestic processing and refining of minerals (smelter obligations).[41] While these reforms aim to boost value-added industries, they may disadvantage foreign firms unable to meet localization requirements quickly or economically.

From a competition law perspective, Law No. 5 of 1999, enforced by the Business Competition Supervisory Commission (KPPU), prohibits anti-competitive agreements, abuse of dominant positions, and other forms of market manipulation.[42] However, the application of competition law to state-owned enterprises and public procurement remains limited. This creates potential inconsistencies in how market actors—particularly foreign investors—are treated relative to domestic firms, especially SOEs.

The government's preferential treatment of SOEs in resource extraction and processing is particularly problematic. For example, the exclusive rights granted to firms like PT Aneka Tambang (Antam) in certain nickel concessions, or the public-private partnership models that require foreign investors to partner with state entities, may raise legal issues under national treatment and FET clauses in investment treaties. These policies may also contravene domestic competition law if they result in market foreclosure.

Legal scholars, such as Butt and Lindsey, have highlighted the fragmented and sometimes opaque nature of Indonesia's regulatory environment, which poses challenges for legal certainty and transparency. The inconsistent enforcement of laws and shifting political priorities add to the complexity, making it difficult for foreign investors to accurately

History Review of Article 33 UUD 1945 as Economic Ideology)," *Negara Hukum: Membangun Hukum Untuk Keadilan dan Kesejahteraan* 7, no. 1 (2017): 111–25, https://doi.org/10.22212/jnh.v7i1.925; Irfan Nur Rachman, "Politik Hukum Pengelolaan Sumber Daya Alam Menurut Pasal 33 UUD 1945," *Jurnal Konstitusi* 13, no. 1 (2016): 195–212, https://doi.org/10.31078/jk1319.

41 *See* Republic of Indonesia, *Undang-undang Nomor 3 Tahun 2020 Tentang Perubahan Atas Undang-undang Nomor 4 Tahun 2009 Tentang Pertambangan Mineral dan Batubara*. Jakarta: Sekretariat Negara, 2020. Online at https://www.peraturan.go.id/eng/uu-no-3-tahun-2020

42 *See* Republic of Indonesia, *Undang-undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*. Jakarta: Sekretariat Negara, 2020. Online at https://peraturan.go.id/id/uu-no-5-tahun-1999

assess legal risks.[43] Additionally, while Indonesia's domestic legal framework seeks to balance developmental goals with regulatory control, its intersection with international legal commitments raises significant questions. These tensions become especially acute when domestic measures are perceived to restrict competition unfairly or selectively benefit certain market participants.

E. Investor-State Dispute Settlement (ISDS) Mechanism

The Investor-State Dispute Settlement (ISDS) mechanism is a cornerstone of modern investment treaties, providing foreign investors with a procedural right to bring claims directly against host states before international arbitral tribunals. This mechanism is intended to depoliticize disputes and provide a neutral forum for resolving complex investment claims, particularly in contexts where domestic courts may lack independence or capacity.[44]

In Indonesia's case, ISDS mechanisms are available under numerous BITs and FTAs. Notable tribunals involving Indonesia include Churchill Mining *v.* Indonesia (ICSID, 2016) and Newmont *v.* Indonesia (UNCITRAL, 2014). In the latter, the dispute arose from export restrictions imposed under the Minerba Law, which Newmont alleged constituted indirect expropriation and a breach of FET. The case was eventually settled, but it highlighted how ISDS can be used as leverage against regulatory measures that negatively impact foreign investors.

Despite its intended neutrality, the ISDS system has been subject to intense academic and policy debate. Critics, including Van Harten[45] and Titi[46], argue that ISDS disproportionately favors investors and undermines democratic decision-making. Conversely, defenders like Born and

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[43] Simon Butt and Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (London: Bloomsbury Publishing, 2012).

[44] Won-Mog Choi, "The Present and Future of the Investor-State Dispute Settlement Paradigm," *Journal of International Economic Law* 10, no. 3 (2007): 725–47, https://doi.org/10.1093/jiel/jgm024; Rachel L. Wellhausen, "Recent Trends in Investor–State Dispute Settlement," *Journal of International Dispute Settlement* 7, no. 1 (2016): 117–35, https://doi.org/10.1093/jnlids/idv038.

[45] Gus Van Harten, *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020).

[46] Catharine Titi, "Are Investment Tribunals Adjudicating Political Disputes?," *Journal of International Arbitration* 32, no. 3 (2015), https://doi.org/10.54648/JOIA2015011.

Rutledge view ISDS as a vital component of the international rule of law, particularly in jurisdictions with weak judicial systems.[47]

In response to these concerns, Indonesia has sought to reform its approach to investment arbitration. It has renegotiated or terminated several BITs and has proposed including domestic exhaustion requirements and joint committees for dispute prevention in future IIAs. Nevertheless, given the binding nature of existing treaties with long sunset clauses, ISDS remains a relevant and powerful tool for foreign investors in Indonesia.

In the context of mining and unfair competition, ISDS mechanisms can be invoked when foreign investors face discriminatory licensing, arbitrary tax regimes, or de facto expropriation through regulatory overreach. However, tribunals must balance investor protection with the state's right to regulate in the public interest—a principle increasingly recognized in awards and treaty preambles, such as in Urbaser *v.* Argentina (2016).[48]

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47 Peter B. Rutledge, *Arbitration and the Constitution* (Cambridge, MA: Cambridge University Press, 2013); Alexandra Born, "Reforming Investor-State Dispute Settlement (ISDS): European Union Flexing its Normative Power?" (PhD thesis, Queen's University Belfast, 2021).

48 The *Urbaser v. Argentina* (2016) case is a landmark in international investment arbitration, particularly for its treatment of corporate responsibility and human rights. Urbaser S.A., a Spanish investor, held shares in a consortium managing water and sewage services in Buenos Aires under a concession agreement. Following Argentina's 2001–2002 financial crisis, the government implemented emergency measures, including freezing utility tariffs. Urbaser claimed these actions violated the Argentina–Spain Bilateral Investment Treaty (BIT) by constituting indirect expropriation and breaching the fair and equitable treatment (FET) standard. In a unique development, Argentina filed a counterclaim, arguing that Urbaser failed to fulfill its obligation to uphold the human right to water, a duty allegedly arising from both the concession and international human rights law. The ICSID tribunal rejected Argentina's counterclaim, holding that corporations do not currently have enforceable obligations under international human rights law. However, the tribunal acknowledged for the first time that corporations can, in principle, bear responsibilities in relation to human rights, even if not yet binding under current legal frameworks. This case is significant for opening the door to the integration of human rights considerations in investment disputes, and for initiating debate about the evolving role of corporations in international legal accountability. See ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, https://www.italaw.com/cases/1144. See also Gonzalo Flores, "Aguas Argentinas SA, Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic (ICSID Case No. ARB/03/19) Introductory Note," *ICSID Review* 21, no. 1 (2006): 339–41, https://doi.org/10.1093/icsidreview/21.1.339; Alastair Livesey, "Urbaser SA and

The use of ISDS in mining disputes underscores the importance of legal predictability and equal treatment in resource governance. As Indonesia continues to reform its regulatory landscape, understanding the operation of ISDS and its interaction with both domestic law and international obligations is essential for managing legal risks and ensuring investor confidence.

The Southeast Asian Context

A. Regional Trends in Foreign Investment and Legal Disputes

Southeast Asia has experienced a sustained surge in foreign direct investment (FDI) over the past two decades, making it one of the most dynamic investment destinations among emerging markets.[49] According to the UNCTAD World Investment Report (2024), ASEAN received over USD 220 billion in FDI inflows in 2023, with significant allocations directed toward infrastructure, digital economy, and extractive industries. Indonesia, Vietnam, and the Philippines have been among the top recipients, due in part to their abundant natural resources and large domestic markets.[50]

In the extractive sector, particularly mining, Southeast Asia has become increasingly attractive for investors seeking access to critical minerals. The global shift towards renewable energy and electric mobility has increased demand for nickel, cobalt, lithium, and rare earths, much of which are found in countries like Indonesia and the Philippines. This regional trend is further driven by resource nationalism strategies, wherein states attempt to move up the value chain by encouraging domestic processing and limiting raw material exports.[51]

Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic," *World Trade Review* 17, no. 1 (2018): 175–78, https://doi.org/10.1017/S1474745617000556.

[49] Stephen Thomsen, Misuzu Otsuka, and Boram Lee, "The Evolving Role of Southeast Asia in Global FDI Flows," *Center for Asian Studies* (2011): 1–51.

[50] *See* The ASEAN Secretariat, *ASEAN Investment Report 2024 - ASEAN Economic Community 2025 and Foreign Direct Investment* (Jakarta: ASEAN Secretariat, October 2024).

[51] *See* Philip Andrews-Speed, Mingda Qiu, and Christopher Len, "Chinese Engagement in Southeast Asian Energy and Mineral Resources: Motivations and Outlook," in *The Geoeconomics and Geopolitics of Chinese Development and Investment in Asia* (London: Routledge, 2018), 42–68; Indah Dwi Qurbani, Raphael J. Heffron, and Arrial Thoriq

Despite growing FDI, the region has also witnessed an increase in legal disputes between foreign investors and host states, especially in sectors prone to regulatory volatility. Southeast Asian governments have imposed sudden export restrictions, revised tax regimes, or renegotiated concession terms—measures that investors sometimes perceive as breaches of international investment agreements (IIAs). For example, Laos, Vietnam, and Cambodia have each faced international arbitration over infrastructure and natural resource disputes, highlighting legal uncertainties in the region.[52]

These disputes are often linked to broader governance challenges, including lack of transparency, limited judicial independence, and the politicization of resource management. In several instances, foreign investors have turned to Investor-State Dispute Settlement (ISDS) mechanisms, citing violations of treaty obligations such as Fair and Equitable Treatment (FET), expropriation without compensation, or denial of justice. Tribunals in these cases must often interpret treaty provisions in light of domestic legal complexities and socio-political considerations.

Scholars such as Julien Chaisse[53] and Mark Feldman[54] argue that Southeast Asia represents a microcosm of the broader tensions in international investment law—a region where economic liberalization coexists with statist control and legal fluidity. They note that while ASEAN countries increasingly rely on FDI, they also seek to preserve regulatory autonomy, particularly in sensitive sectors like mining, energy,

Setyo Rifano, "Justice and Critical Mineral Development in Indonesia and across ASEAN," *The Extractive Industries and Society* 8, no. 1 (2021): 355–62, https://doi.org/10.1016/j.exis.2020.11.017; Terry O'Callaghan and Vlado Vivoda, "Problems of Regulatory Governance in the Mining Sector in Asia," *Transnational Corporations* 22, no. 1 (2015): 31–57, https://doi.org/10.18356/34aec3e7-en.

52 Ana Maria Daza-Clark, "Enforcing Transboundary Water Obligations through Investment Treaty Arbitration: China, Laos and the Mekong River," *Review of European, Comparative & International Environmental Law* 29, no. 3 (2020): 442–53, https://doi.org/10.1111/reel.12365; Manh Dzung Nguyen and Thi Thu Trang Nguyen, "International Investment Dispute Resolution in Vietnam: Opportunities and Challenges," *The Journal of World Investment & Trade* 18, no. 5–6 (2017): 918–41, https://doi.org/10.1163/22119000-12340066.

53 Julien Chaisse, "The Shifting Tectonics of International Investment Law-Structure and Dynamics of Rules and Arbitration on Foreign Investment in the Asia-Pacific Region," *The George Washington International Law Review* 47, no. 3 (2015): 563–638.

54 Mark Feldman, "International Investment Obligations and Industrial Policy: Evolution in Treaty Practice," *RTA Exchange* (International Centre for Trade and Sustainable Development and Inter-American Development Bank, 2018).

and agriculture. Thus, while Southeast Asia remains an attractive investment hub, it is also a jurisdictionally complex and politically sensitive region, requiring investors to navigate a mosaic of legal regimes, shifting policy priorities, and multi-level governance structures.

B. ASEAN's Investment Protection Instruments (e.g., ACIA)

In response to the growing volume and complexity of regional investment, ASEAN has developed its own set of legal instruments to promote and protect intra-regional investment flows. The most comprehensive of these is the ASEAN Comprehensive Investment Agreement (ACIA), signed in 2009 and ratified by all ten ASEAN member states. The ACIA seeks to liberalize, promote, and protect cross-border investments within the ASEAN Economic Community (AEC), and it incorporates standard investment protections alongside provisions tailored to the regional context.[55]

ACIA provides investors with a legal framework grounded in four key pillars: investment liberalization, protection, promotion, and facilitation. It includes core substantive standards such as national treatment, most-favored-nation treatment, FET, and protection from expropriation. Moreover, it guarantees free transfer of funds and access to ISDS for disputes between investors and host states, albeit with some procedural limitations and exceptions for sensitive sectors.[56]

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[55] Zewei Zhong, "The ASEAN Comprehensive Investment Agreement: Realizing a Regional Community," *Asian Journal of Comparative Law* 6 (2011): 1–39, https://doi.org/10.1017/S219460780000048X; Julien Chaisse and Sufian Jusoh, "The ASEAN Comprehensive Investment Agreement: The Regionalisation of Laws and Policy on Foreign Investment," in *The ASEAN Comprehensive Investment Agreement* (London: Edward Elgar Publishing, 2016); Kim Anh Dao, "The Evolution of ASEAN International Investment Agreements: Insights from the Past and Future Directions," *VNU Journal of Science: Legal Studies* 41, no. 1 (2025).

[56] Andrew Battisson and Leigh Missig, "Dispute Resolution under the ASEAN Comprehensive Investment Agreement 2009," *Asian Dispute Review* 12, no. 2 (2010), https://kluwerlawonline.com/journalarticle/Asian+Dispute+Review/12.2/ADR2010012; Intan Soeparna, "ASEAN Investment Dispute Settlement: A Challenge to the ASEAN Enhanced Dispute Settlement Mechanism," *Chinese (Taiwan) Yearbook of International Law and Affairs* (2019): 298; D. A. Desierto, "'For Greater Certainty': Balancing Economic Integration and Investor Protection in the New ASEAN Investment Agreements," *Transnational Dispute Management (TDM)* 8, no. 5 (2011), https://www.transnational-dispute-management.com/article.asp?key=1768.

One of ACIA's distinguishing features is its explicit recognition of special and differential treatment for less developed ASEAN members, such as Laos and Myanmar, allowing them more policy space. It also contains a "*right to regulate*" clause, affirming the authority of states to adopt measures in pursuit of legitimate public policy objectives, such as environmental protection, public health, and economic development.

Legal scholars such as Chester Brown have commended ACIA for striking a balance between investor protection and regulatory sovereignty, although its effectiveness remains uneven due to implementation gaps and varying levels of legal infrastructure across member states. In practice, the protection it offers depends significantly on domestic legal enforcement and the political will of host states.[57]

Despite its strengths, the ACIA does not override or replace bilateral investment treaties (BITs) signed among ASEAN members or with third-party states. In fact, legal fragmentation remains a challenge, as some ASEAN countries have dozens of BITs and FTAs in force, often with differing standards, dispute resolution mechanisms, and scope of coverage. This "spaghetti bowl" of treaties complicates legal predictability and creates opportunities for treaty shopping.[58]

For foreign investors in sectors like mining, the ACIA can serve as both a shield and a sword: it provides a baseline level of legal security, while also allowing recourse to international arbitration in the face of discriminatory or arbitrary state actions. However, the treaty's effectiveness ultimately hinges on its integration into national legal systems and the consistency of interpretation by arbitral tribunals.

C. Challenges Specific to Southeast Asia (Governance, Legal Fragmentation, SOEs)

While ASEAN has made significant progress in institutionalizing regional investment protection, major challenges persist that undermine investor confidence and legal stability. One of the most prominent issues is governance quality, particularly in relation to rule of law, bureaucratic transparency, and corruption control. The World Bank's Worldwide

[57] *See* Chester Brown and Kate Miles, eds., *Evolution in Investment Treaty Law and Arbitration* (Cambridge, MA: Cambridge University Press, 2011).

[58] Zakaria Sorgho, "The Spread of International Trade Agreements: A Dynamics towards the 'Spaghetti Bowl' Phenomenon?," in *Handbook of International Trade Agreements* (London: Routledge, 2018), 41–55; Juliana Peixoto Batista, "Legal Fragmentation and Asymmetries in the WTO: Spaghetti Bowl or Policy Space?," *Revista Direito GV* 14 (2018): 169–91, https://doi.org/10.1590/2317-6172201807.

Governance Indicators consistently show wide variation among ASEAN members, with countries like Singapore and Malaysia scoring highly, while others, including Myanmar and Cambodia, lag significantly.

This governance gap directly impacts the predictability and consistency of regulatory frameworks. Foreign investors often face difficulties obtaining clear guidance on licensing procedures, tax obligations, and environmental compliance. Moreover, changes in political leadership frequently bring shifts in regulatory priorities, especially in resource-rich sectors. Such unpredictability increases the risk of legal disputes and can be construed as violations of the FET standard under IIAs.

Another major challenge is legal fragmentation. Despite regional integration efforts, Southeast Asian countries operate under diverse legal systems—ranging from common law in Singapore and Malaysia, to civil law in Vietnam and Thailand, to mixed or pluralist systems in Indonesia and the Philippines. The lack of harmonization in legal definitions, dispute resolution practices, and administrative procedures creates compliance challenges for multinational investors operating across multiple jurisdictions.

In the mining sector, state-owned enterprises (SOEs) often enjoy preferential access to licenses, regulatory exemptions, and political patronage. This can distort competition and undermine the principle of national treatment. For instance, Indonesia's policies favoring SOEs in strategic mineral development projects—such as nickel refining—have raised concerns among foreign investors, who argue that these practices create de facto market exclusion. Similar patterns have been observed in Vietnam's coal sector and Malaysia's oil and gas industries.

Legal scholars such as Susan Rose-Ackerman[59] and Yukio Okamoto[60] have emphasized how governance weaknesses and SOE dominance can lead to "regulatory capture", where policy and enforcement are skewed toward powerful domestic interests. In such environments, foreign investors may have limited avenues for fair recourse within domestic systems, making ISDS a crucial mechanism for protecting investment rights. Additionally, Southeast Asia's institutional capacity to adjudicate complex investor-state disputes remains

59 S. Rose-Ackerman, "Political Corruption and Democracy," *Connecticut Journal of International Law* 14 (1999): 363, https://openyls.law.yale.edu/handle/20.500.13051/4975.

60 Yukio Okamoto, "Japan and the United States: The Essential Alliance," *Washington Quarterly* 25, no. 2 (2002): 59–72.

underdeveloped in many jurisdictions.[61] While countries like Singapore have advanced arbitration infrastructure, others lack specialized courts or trained legal professionals to handle cross-border investment cases. This institutional asymmetry exacerbates the reliance on international arbitration and underscores the region's uneven readiness to implement the standards embedded in international investment law.[62]

Case Study of Unfair Competition in Indonesia's Mining Sector

A. Mining in Indonesia's Economic and Legal History

Indonesia's mining sector has long served as a cornerstone of its economic development. From the Dutch colonial era through the post-independence period, the extraction of natural resources—especially coal, gold, copper, and more recently, nickel—has generated substantial revenues for the state. The sector continues to play a critical role in employment, export earnings, and regional development, contributing approximately 5% to GDP and representing over 20% of total export value in recent years.

In the post-Suharto era, Indonesia embarked on a series of legal reforms aimed at improving governance and attracting foreign investment. The Mineral and Coal Mining Law No. 4 of 2009 (amended by Law No. 3 of 2020) restructured the sector by replacing the contract-based system with a licensing regime (*Izin Usaha Pertambangan*, or IUP), centralizing authority, and imposing local content requirements. While these reforms aimed to increase state control and ensure sustainability, they also introduced significant regulatory volatility, often to the detriment of foreign investors.

The nationalistic turn in mining governance has been driven by the principle of "*resource sovereignty*", enshrined in Article 33(3) of the Indonesian Constitution, which vests control of natural resources in the

61 Umair Ghori, "Investment Court System or 'Regional' Dispute Settlement?: The Uncertain Future of Investor-State Dispute Settlement," *Bond Law Review* 30, no. 1 (2018): 83–117, https://doi.org/10.53300/001c.5663.

62 Tran Hoang Tu Linh, "Commercial Arbitration in Asia: Legal Developments and Regional Dynamics from an ASEAN Perspective," *Asia Pacific Law Review* (2025): 1–26, https://doi.org/10.1080/10192557.2024.2445627.

state. While this provision provides a legal basis for Indonesia's assertive policies, it also creates potential friction with international legal obligations, particularly when such policies result in discriminatory treatment or sudden regulatory changes.

From a legal theory standpoint, this reflects the tension between sovereign regulatory autonomy and the protection of investor rights, a dilemma at the heart of international investment law. Scholars such as Sornarajah[63] have noted that in resource-rich developing countries, the assertion of sovereignty often conflicts with the liberal commitments embedded in bilateral investment treaties (BITs), particularly in politically sensitive sectors like mining.

This historical and regulatory context sets the stage for analyzing how certain domestic policies in Indonesia's mining sector may give rise to unfair competition—either through intentional discrimination or unintended regulatory asymmetry—and the extent to which these practices may be challengeable under international investment law (IIL).

B. Unfair Competition Issues in Indonesia's Mining Sector

Despite policy goals aimed at ensuring fairness and sustainability, several practices within Indonesia's mining sector have raised concerns over unfair competition, particularly from the perspective of foreign investors. These concerns often relate to discriminatory licensing processes, preferential treatment to state-owned enterprises (SOEs), and sudden regulatory changes that disproportionately affect foreign entities.

One key issue involves the opaque and inconsistent licensing process for mining permits. Although the Minerba Law intended to standardize the issuance of mining licenses, investors have frequently reported delays, lack of transparency, and administrative discretion that disproportionately disadvantage foreign firms. Cases have emerged where IUPs granted to foreign investors were later annulled or not extended, while similar licenses for domestic or SOE actors were maintained or fast-tracked.

The preferential treatment granted to SOEs such as PT Aneka Tambang (Antam) and PT Indonesia Asahan Aluminium (Inalum) also

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63 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge, MA: Cambridge University Press, 2021). See also Muthucumaraswamy Sornarajah, "Disintegration and Change in the International Law on Foreign Investment," *Journal of International Economic Law* 23, no. 2 (2020): 413–29, https://doi.org/10.1093/jiel/jgaa014.

distorts competition. These entities are often given priority access to mining concessions, infrastructure, and strategic partnerships, sometimes under direct instruction from the government. In some cases, foreign firms have been compelled to enter joint ventures with these SOEs as a condition for investment, limiting their autonomy and profitability. This raises questions of de facto discrimination, potentially violating the National Treatment and Fair and Equitable Treatment (FET) standards under applicable BITs.

Moreover, Indonesia has introduced sudden regulatory changes, such as the nickel ore export ban (effective January 2020), which significantly impacted foreign investors who had relied on previous permissions to export raw materials. While the policy aimed to promote domestic smelting and value-added production, it was introduced with limited transitional support or compensation mechanisms. Investors from China, the EU, and Australia voiced concerns that these measures altered the economic terms of their investments and unfairly benefited domestic actors prepared for such changes.

These regulatory shifts have not always been accompanied by clear legal justifications or stakeholder consultations, leading to perceptions of arbitrariness and regulatory risk. In IIL, such actions may constitute indirect expropriation or breach of legitimate expectations, particularly where substantial sunk costs were made under previous legal regimes.

The confluence of these practices creates a landscape in which foreign investors may be exposed to legal uncertainty, market distortion, and unequal competitive conditions. These issues are particularly concerning in light of Indonesia's obligations under various IIAs, which require it to accord non-discriminatory treatment, maintain a stable legal environment, and act in good faith.

C. Specific Cases and Disputes: Churchill Mining v. Indonesia

Perhaps the most illustrative example of legal and procedural unfairness in Indonesia's mining sector is the Churchill Mining and Planet Mining v. Republic of Indonesia arbitration, conducted under ICSID and UNCITRAL rules. The case arose from the Indonesian government's revocation of mining licenses originally granted to Churchill's local partner in East Kutai, East Kalimantan, which allegedly held significant coal reserves.

Churchill claimed that its investment—valued at over USD 1 billion—was unlawfully expropriated after the licenses were retroactively declared invalid. The Indonesian authorities argued that the original licenses had been fraudulently obtained and that Churchill had failed to exercise sufficient due diligence. The tribunal eventually dismissed the claim on jurisdictional and evidentiary grounds, concluding that Churchill had not proven ownership of a protected investment under the applicable UK-Indonesia BIT.

However, despite the tribunal's ruling, the case revealed deeper concerns about the lack of regulatory transparency, inconsistent enforcement, and legal insecurity faced by foreign investors. Churchill argued that it was unfairly treated compared to domestic actors, and that its licenses were invalidated in a manner that lacked due process, raising potential FET and expropriation issues—though the tribunal ultimately did not rule on the merits.

This case also underscores the limitations of relying solely on BITs for investor protection, especially where domestic governance structures are weak or where documentation and contractual clarity are lacking. It highlights the evidentiary burden that investors must meet to establish treaty claims and the importance of legal risk assessment in high-stakes extractive sector investments. Furthermore, some legal scholars have pointed to Churchill Mining as emblematic of broader patterns in emerging market disputes, where formal protections under investment treaties are undermined by legal fragmentation, administrative opacity, and uneven enforcement.[64]

D. Analysis of Unfair Competition and IIL Obligations

[64] *See* Mmiselo Freedom Qumba, "South Africa's Move Away from International Investor-State Dispute: A Breakthrough or Bad Omen for Investment in the Developing World?," *De Jure Law Journal* 52, no. 1 (2019): 358–79, https://doi.org/10.17159/2225-7160/2019/v52a19; Carolina Macho Gómez, "ADRs' Alternative Dispute Resolution 'in International Trade," *Cuadernos Derecho Transnacional* 5 (2013): 398, https://e-revistas.uc3m.es/index.php/CDT/en/article/view/1828; Isuru Devendra, "Consent in ICSID Arbitration–Case of Planet Mining Pty Ltd v Republic of Indonesia," *Asian International Arbitration Journal* 10, no. 2 (2014), https://kluwerlawonline.com/journalarticle/Asian+International+Arbitration+Journal/10.2/AIAJ2014010; Joy Fernando and Muhammad Sood, "Penyelesaian Sengketa antara Perusahaan Minerba Asing dengan Pemerintah melalui ICSID (Churchill & Planet Mining)," *Commerce Law* 5, no. 1 (2025): 250–60, https://doi.org/10.29303/commercelaw.v5i1.3802.

The issues discussed above demonstrate several ways in which Indonesia's domestic policies and regulatory practices in the mining sector may come into tension with its obligations under international investment law (IIL). Specifically, practices that result in preferential treatment of SOEs, discriminatory licensing procedures, or regulatory surprises may constitute breaches of National Treatment (NT), Fair and Equitable Treatment (FET), or even indirect expropriation under applicable IIAs.[65]

Under the FET standard, host states must act transparently, avoid arbitrary treatment, and respect investors' legitimate expectations. As seen in the nickel export ban and inconsistent licensing enforcement, sudden regulatory shifts without proper notice or stakeholder engagement may undermine these expectations. While states retain the right to regulate in the public interest, such regulation must be proportional, non-discriminatory, and implemented with due process to remain consistent with IIL norms.

Discriminatory treatment in licensing or enforcement—such as the preferential granting of mining concessions to SOEs or domestic firms—may also violate the National Treatment obligation. The comparison must be between foreign and domestic investors "in like circumstances." Where SOEs are favored in access to permits or joint venture negotiations, and foreign investors are subjected to higher compliance burdens or regulatory scrutiny, this differential treatment may give rise to actionable claims under IIL.

Furthermore, when regulatory measures—such as the revocation of licenses or mandatory divestment policies—have the effect of depriving an investor of the value or control of their investment, this may amount to indirect expropriation, especially if such actions are not accompanied by compensation. The threshold for such a claim, as articulated in Tecmed *v.* Mexico (2003) and Metalclad *v.* Mexico (2000), involves assessing the economic impact, the investor's expectations, and the public interest purpose of the regulation.[66]

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[65] *See* Rudoff Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties," *The International Lawyer* 39, no. 1 (2005): 87–106, https://www.jstor.org/stable/40707790.

[66] *See also* Auke Plantinga and Bert Scholtens, "The Financial Impact of Fossil Fuel Divestment," *Climate Policy* 21, no. 1 (2021): 107–19, https://doi.org/10.1080/14693062.2020.1806020; Auke Plantinga and Bert Scholtens, "The Finance Perspective on Fossil Fuel Divestment," *Current Opinion in Environmental Sustainability* 66 (2024): 101394, https://doi.org/10.1016/j.cosust.2023.101394.

Indonesia may attempt to defend such measures under treaty exceptions for public policy or development objectives. Many BITs, including ASEAN's ACIA, include "right to regulate" clauses, which provide host states with legal latitude to pursue public interest measures. However, these exceptions are not absolute; they are subject to good faith, non-discrimination, and necessity tests, as affirmed in cases such as Philip Morris *v.* Uruguay (2016).

Therefore, while Indonesia is entitled to pursue industrial policy and resource nationalism, these objectives must be balanced with the obligations arising from its international treaties. Failure to do so risks increased exposure to arbitration claims, reputational harm, and the erosion of investor confidence—particularly in sectors where high capital intensity and long-term commitments make regulatory stability paramount.

Legal and Policy Analysis

A. Potential Breaches of International Obligations

Indonesia's regulatory practices in the mining sector, particularly those involving discriminatory treatment and regulatory volatility, risk breaching obligations under multiple Bilateral Investment Treaties (BITs) and the ASEAN Comprehensive Investment Agreement (ACIA). These treaties typically impose obligations related to Fair and Equitable Treatment (FET), National Treatment (NT), Most-Favoured-Nation (MFN) clauses, and protection from expropriation.

For instance, the Indonesia–UK BIT (1976) (invoked in *Churchill Mining v. Indonesia*) includes a broad FET clause and a protection against expropriation provision. Similarly, ACIA Article 11 guarantees FET and Article 5 mandates National Treatment for investors from ASEAN member states. When Indonesia grants preferential access to strategic concessions to SOEs or imposes restrictions selectively on foreign investors, it may breach these treaty obligations.

The FET standard, as elaborated in arbitral awards like *Tecmed v. Mexico (2003)* and *LG&E v. Argentina (2006)*, requires host states to provide a stable and predictable regulatory environment, act transparently, and avoid arbitrary or discriminatory conduct. The sudden imposition of the nickel export ban under Ministerial Regulation No. 11/2019—which disrupted previously approved business models and disproportionately harmed foreign investors—could be interpreted as violating these principles.

Further, Indonesia's practice of favoring state-owned enterprises (SOEs) like PT Aneka Tambang in the licensing and operation of mines may contravene the National Treatment obligation under treaties such as the Indonesia–Singapore BIT (2005) and ACIA Article 5. If foreign investors in like circumstances are subject to more burdensome regulatory or licensing processes than domestic competitors, such distinctions may not withstand scrutiny under IIL.

Legal scholars such as Dolzer, et al argue that the object and purpose of investment treaties are to protect the economic interests of foreign investors through legally binding standards. Therefore, any state conduct that undermines legal certainty and equal treatment risks triggering treaty breaches and consequent ISDS claims.[67]

B. How Unfair Competition Practices Can Lead to ISDS Claims

Unfair competition, while primarily a domestic economic concern, can give rise to ISDS claims when it stems from state action or regulatory conduct that violates international legal standards. For example, when foreign investors are systematically disadvantaged by discriminatory licensing rules, opaque bureaucratic procedures, or favoritism towards SOEs, these practices may be actionable under BITs and investment chapters in Free Trade Agreements (FTAs).

Although most BITs do not explicitly reference "*unfair competition*," such practices can fall under the scope of indirect expropriation or FET violations. In Occidental *v.* Ecuador (2004), the tribunal found a breach of FET where the investor faced inconsistent regulatory treatment, even though the measures were legally permissible under domestic law.[68] Similarly, Indonesia's Minerba Law (Law No. 3 of 2020) and related

67 Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2022). See also Laurens JE Timmer, "The Meaning of 'Investment' as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre," *Journal of International Arbitration* 29, no. 4 (2012), https://doi.org/10.54648/JOIA2012024.

68 *See* Susan D. Franck, "Occidental Exploration & Production co. v. Republic of Ecuador. Final Award. London Court of International Arbitration Administered Case No. UN 3467," *American Journal of International Law* 99, no. 3 (2005): 675–81, https://doi.org/10.2307/1602299.

implementing regulations may be challenged if they are enforced inconsistently or retroactively to the detriment of foreign entities.

Moreover, unfair competition involving state favoritism may also violate MFN clauses, allowing foreign investors to import more favorable treatment granted to third-party investors. This issue is especially salient given Indonesia's expansive treaty network, many of which include broad MFN provisions, such as in the Indonesia–Netherlands BIT.

The ISDS system, therefore, becomes the primary legal mechanism through which investors may seek remedies. Arbitration tribunals have shown increasing willingness to scrutinize domestic regulatory behavior, particularly where state conduct results in de facto discrimination or renders an investment unviable. In Methanex *v.* USA (2005), although the investor's claim was dismissed, the tribunal acknowledged that state action targeting a foreign investor without due process or with discriminatory intent could constitute a treaty violation.[69]

As Yannaca-Small notes, ISDS tribunals are not merely adjudicators of expropriation, but also of governance quality. Thus, when unfair competition arises from systemic governance failures—such as lack of transparency, regulatory inconsistency, or corruption—it opens the door for liability under IIL.[70]

C. Tensions Between Regulatory Autonomy and Investor Protection

A key tension in international investment law lies between host state regulatory autonomy and foreign investor protection. This is especially pronounced in developing countries like Indonesia, where state intervention in strategic sectors such as mining is viewed as essential to national development and economic sovereignty.

The Indonesian Constitution, particularly Article 33(3), declares that natural resources shall be controlled by the state and used for the greatest benefit of the people. This provision has been the basis for state-centric policies such as local content requirements, export bans, and mandatory divestment, as seen in Government Regulation No. 1/2017. While these policies may serve legitimate public purposes, they must be balanced

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69 Todd Weiler, "Methanex Corp. v. USA: Turning the Page on NAFTA Chapter Eleven," *Journal of World Investment & Trade* 6 (2005): 903.

70 Katia Yannaca-Small, "Parallel Proceedings," in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski et al. (Oxford: Oxford University Press, 2008), 1008-48.

against treaty obligations not to treat foreign investors unfairly or inequitably.

Legal scholars like Titi[71] and Schill[72] argue that investment treaties must accommodate the state's right to regulate, particularly in areas such as environmental protection, resource management, and industrial policy. Yet, the principle of proportionality—a core element of modern IIL jurisprudence—requires that regulatory measures be necessary, non-discriminatory, and balanced in their effects on investors.

Recent arbitral jurisprudence, such as Urbaser *v.* Argentina (2016), reflects a growing recognition of states' regulatory space. However, tribunals have also clarified that this space is not unlimited.[73] In AES *v.* Hungary (2010), for example, the tribunal found that even legitimate policy objectives must be pursued in a non-arbitrary and transparent manner, especially where investors had made long-term capital-intensive commitments.[74]

In Indonesia's case, abrupt regulatory changes—like the nickel export ban or divestment mandates—without adequate transitional mechanisms or prior consultations can undermine legal predictability and investor confidence. The challenge lies in aligning domestic regulatory objectives with international legal commitments, ensuring that public interest measures are procedurally fair, substantively reasonable, and consistent with treaty standards.

D. Assessment of Legal Gaps and Enforcement Challenges

Indonesia's increasing integration into the international investment law (IIL) regime, exemplified by its participation in over 60 bilateral investment treaties (BITs), the ASEAN Comprehensive Investment Agreement (ACIA), and various trade agreements with investment chapters, has not been matched by a corresponding development in domestic legal infrastructure. While Indonesia formally accepts

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71 *See* Titi, "Are investment tribunals adjudicating political disputes?."

72 Schill, "Ioana Tudor. The Fair and Equitable Treatment Standard in the International Law of Foreign Investment."

73 Edward Guntrip, "Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of Urbaser v. Argentina," *Brill Open Law* 1, no. 1 (2018): 37–60, https://doi.org/10.1163/23527072-00101004.

74 Charles Owen Verrill Jr, "The International Centre for Settlement of Investment Disputes: AES Summit Generation Ltd. v. Republic of Hungary," *International Legal Materials* 50, no. 2 (2011): 181–225.

international legal standards related to investor protection—such as fair and equitable treatment (FET), national treatment, and protection against expropriation—there remain significant legal and institutional gaps that weaken the effective enforcement of these obligations. These gaps contribute to legal uncertainty, elevate the risk of investor-state disputes, and, more broadly, hinder the creation of a level playing field for domestic and foreign actors in strategic sectors like mining.

One of the most persistent challenges lies in the fragmentation between national and subnational regulatory authorities. Although the revised Mineral and Coal Mining Law (Law No. 3 of 2020) aimed to centralize the authority to issue mining licenses (*Izin Usaha Pertambangan*, or IUP) under the Ministry of Energy and Mineral Resources (ESDM), in practice, local governments continue to exert significant influence over land use approvals (*izin lokasi*), environmental permits, and community engagement processes. These local-level decisions often become bottlenecks in project implementation, especially for foreign investors unfamiliar with the regional political landscape. This regulatory fragmentation leads to inconsistent enforcement, overlapping jurisdictions, and the potential for arbitrary decisions at the subnational level.

This problem is exacerbated by the absence of a robust judicial mechanism capable of resolving investment disputes at the national level. Although the Indonesian court system theoretically provides avenues for challenging administrative decisions, foreign investors frequently view domestic courts as unreliable, inefficient, and prone to political or commercial interference. Reports by the World Bank and Transparency International have consistently identified Indonesia's judiciary as suffering from case backlog, weak enforcement of judgments, and inadequate technical expertise in complex commercial or investment matters. As a result, investors often bypass domestic remedies and proceed directly to Investor-State Dispute Settlement (ISDS) mechanisms under applicable treaties.

This judicial inadequacy not only raises questions about access to justice but also highlights a broader structural issue concerning the rule of law. Investment tribunals, while primarily tasked with interpreting treaty obligations, increasingly consider the host state's legal and institutional environment in evaluating breaches of FET and other standards. In White Industries *v.* India (2011), for example, the tribunal found that judicial delay constituted a breach of the effective means standard embedded in the India–Australia BIT.[75] A similar line of reasoning could be invoked in cases involving Indonesia, especially where judicial inaction or inconsistency impedes the enforcement of legal rights associated with investment contracts or licenses.

Equally important is the lack of clarity regarding the domestic legal status of international investment treaties. Indonesia's legal system, based on a monist tradition with dualist tendencies, does not automatically incorporate international treaty obligations into domestic law without enabling legislation. While Law No. 24 of 2000 on International Treaties governs the ratification process, it does not specify how BIT obligations should be interpreted or enforced by Indonesian courts. As a result, there is no unified framework for applying international investment law at the domestic level, leading to ambiguity about the hierarchy between treaty norms and conflicting national regulations.

This ambiguity creates a significant treaty implementation gap. For instance, while the ACIA obliges states to ensure national treatment and FET for investors from other ASEAN countries, there is limited evidence that Indonesian courts or regulatory bodies reference ACIA provisions when adjudicating investor grievances. The legal disconnect between Indonesia's treaty commitments and their domestic enforcement renders such protections theoretical rather than practical, undermining investor confidence in the host country's legal reliability. Scholars such as Christoph Schreuer and Jeswald Salacuse have emphasized the importance of internalizing treaty obligations into domestic legal systems as a critical factor in achieving the objectives of international investment law.[76]

Another pressing issue is regulatory instability, which undermines legal predictability and increases the risk of claims for indirect expropriation or breach of legitimate expectations. Over the past decade, Indonesia has issued a series of frequent and often abrupt regulatory changes, particularly in the mining sector. One notable example is Ministerial Regulation No. 26/2018, which imposes restrictions on foreign ownership in certain mining operations and mandates gradual divestment to Indonesian entities. Such policies, though justified by the government on the grounds of resource nationalism and economic sovereignty, have

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[75] Patricia Nacimiento and Sven Lange, "White Industries Australia Limited v The Republic of India," *ICSID Review* 27, no. 2 (2012): 274–80, https://doi.org/10.1093/icsidreview/sis022.

[76] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, MA: Cambridge University Press, 2009); Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2021).

frequently been adopted without comprehensive impact assessments or stakeholder consultation.

The practice of enacting ministerial regulations (*Peraturan Menteri*) with limited parliamentary oversight contributes to a hyperactive regulatory environment, which can erode the stability and predictability required for long-term investment planning. From a legal theory perspective, this situation reflects the tension between the "developmental state" model, in which the government exercises discretionary regulatory power to steer the economy, and the liberal legal order underpinning IIL, which prioritizes transparency, legal certainty, and investor expectations. This divergence is especially evident in the extractive industries, where strategic objectives often take precedence over legal formalism.

Moreover, Indonesia's tendency to enact retroactive or transitional rules without clear compensation mechanisms raises concerns regarding potential breaches of the expropriation standard under IIL. While direct expropriation is rare, indirect expropriation—where state measures substantially deprive investors of the use or value of their investment—has been the subject of numerous arbitral awards, including Metalclad *v.* Mexico (2000) and Azurix *v.* Argentina (2006). When policies like sudden export bans or retroactive licensing cancellations are imposed without due process or fair compensation, Indonesia risks exposure to similar claims.

An additional enforcement challenge arises from the discretionary role of state-owned enterprises (SOEs), which often benefit from regulatory favoritism. In the mining sector, SOEs such as PT Antam and PT Inalum receive preferential access to exploration licenses, infrastructure, and government-backed financing. These privileges are often justified under the national interest doctrine but can lead to de facto discrimination against foreign investors, violating national treatment provisions in BITs. The lack of transparency in how these privileges are conferred further complicates efforts to hold regulatory authorities accountable.

From a governance theory perspective, these dynamics contribute to what Rose-Ackerman describes as "regulatory capture", where policy and enforcement are disproportionately shaped by domestic incumbents or politically connected entities.[77] This raises broader concerns about competitive neutrality and the ability of foreign investors to operate on equal footing within Indonesia's legal framework. Without clear

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[77] Susan Rose-Ackerman, ed., *Public Sector Performance, Corruption and State Capture in a Globalized World*, vol. 296 (London: Routledge, 2024).

safeguards or judicial remedies, the accumulation of informal advantages by SOEs creates systemic disadvantages for private foreign investors.

Finally, the broader challenge lies in the normative fragmentation of legal orders in Indonesia. As articulated by Koskenniemi and Leino[78], this fragmentation refers to the coexistence of overlapping and sometimes conflicting legal regimes—domestic administrative law, constitutional principles, regional integration law (ACIA), and global investment law—without a clearly defined hierarchy or conflict resolution mechanism. This legal pluralism, while reflective of Indonesia's complex legal heritage, creates uncertainty for both regulators and investors. It also impedes coherent policy formulation and enforcement.

To address these enforcement challenges, institutional reforms are essential. Scholars like Susan Franck[79] and Gus Van Harten[80] have called for greater transparency in regulatory rulemaking, judicial capacity-building, and better coordination between domestic agencies and international legal obligations. For Indonesia, this may entail establishing a specialized investment dispute resolution body, similar to the Indian Investment Facilitation Cell or Brazil's ombudsman model.[81] Additionally, integrating treaty obligations more explicitly into national legislation, possibly through a dedicated Investment Law Reform Act, could bridge the current enforcement gap.

Furthermore, while Indonesia remains committed to attracting foreign direct investment and upholding its international legal obligations, the absence of a coherent domestic legal and institutional framework

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[78] Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law* 15, no. 3 (2002): 553–79, https://doi.org/10.1017/S0922156502000262.

[79] Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions," *Fordham Law Review* 73, no. 4 (2005): 1521–25, https://ir.lawnet.fordham.edu/flr/vol73/iss4/10/; Gael Nicolás Ríos Calderón and Aitana Noelia, "The Case of Water Privatization in Bolivia: Substantive Justice and the Right to Water as a Human Right: El Caso de la Privatización del Agua en Bolivia: Justicia Sustantiva y Derecho al Agua como Derecho Humano," *Crítica de da Justicia Sustantiva* 1, no. 2 (2025): 181–204, https://publications.socipol.org/index.php/cjs/article/view/27.

[80] Gus Van Harten, "The Public—Private Distinction in the International Arbitration of Individual Claims against the State," *International & Comparative Law Quarterly* 56, no. 2 (2007): 371–93, https://doi.org/10.1093/iclq/lei168.

[81] Henrique Choer Moraes and Pedro Mendonça Cavalcante, "The Brazil-India Investment Co-operation and Facilitation Treaty: Giving Concrete Meaning to the 'Right to Regulate' in Investment Treaty Making," *ICSID Review-Foreign Investment Law Journal* 36, no. 2 (2021): 304–18, https://doi.org/10.1093/icsidreview/siab013.

significantly undermines these efforts. Strengthening domestic enforcement mechanisms, improving regulatory coherence, and fostering a culture of legal predictability are not only essential for preventing disputes but also for sustaining Indonesia's position in the competitive global investment landscape—especially in high-value sectors such as mining.

Recommendations and Reform Options

To address the legal and institutional challenges identified in the previous sections, Indonesia must pursue a multi-layered reform agenda that balances the protection of foreign investment with the preservation of national interests. A central theme of these reforms should be improving the coherence between domestic regulatory frameworks and Indonesia's international obligations under bilateral investment treaties (BITs), the ASEAN Comprehensive Investment Agreement (ACIA), and other trade-related investment frameworks. This will require both legal harmonization and institutional capacity-building at the national and regional levels.

The first and most urgent priority is the harmonization of domestic regulations with international investment obligations. Currently, inconsistencies between sectoral laws, subnational regulations, and Indonesia's international treaty commitments create significant legal uncertainty. To resolve this, Indonesia should consider adopting a comprehensive investment law that consolidates relevant standards from BITs, the ACIA, and other international instruments into a unified domestic legal framework. This law should explicitly recognize treaty obligations, define the rights and duties of investors, and create procedural safeguards aligned with international norms such as fair and equitable treatment (FET), national treatment, and protection from expropriation. Legal scholars such as Jeswald Salacuse have advocated for such legislative reforms to bridge the "*implementation gap*" between treaty law and domestic enforcement.[82]

Second, Indonesia must significantly enhance transparency and the rule of law in the licensing and regulatory process, particularly in sensitive sectors like mining. The lack of procedural transparency in the issuance, renewal, and revocation of mining licenses continues to be a major source of legal disputes and investor distrust. To address this, Indonesia should develop a centralized, publicly accessible licensing database that records

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[82] Salacuse, *The Law of Investment Treaties*.

the status, ownership, and compliance history of all mining permits. In addition, regulatory decisions—especially those involving revocation or amendment of permits—should be subject to clear procedural rules, mandatory reasoning, and administrative review. These reforms align with the principles of good regulatory governance, as advocated by the OECD Guidelines on Regulatory Policy and Governance, and would contribute to reducing perceptions of arbitrariness and favoritism.

Third, there is a pressing need to strengthen domestic competition law enforcement to ensure a level playing field for all investors. The preferential treatment of state-owned enterprises (SOEs), as observed in the mining and energy sectors, undermines competitive neutrality and deters foreign participation. Indonesia's Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition provides a legal basis for addressing market abuse and collusion, but enforcement remains uneven and under-resourced. Strengthening the *Komisi Pengawas Persaingan Usaha* (KPPU)—Indonesia's competition authority—through increased funding, technical capacity, and legal authority is critical. The KPPU should be empowered to review and challenge not only private anti-competitive behavior but also instances of regulatory favoritism toward SOEs that distort market dynamics. Legal scholars such as Eleanor Fox have emphasized the importance of competition law as a complementary tool to investment law in addressing structural unfairness in developing economies.

Fourth, Indonesia should pursue treaty reform to balance investor protection with regulatory sovereignty. While past BITs were often negotiated with broad investor protections and limited safeguards for public policy space, recent global practice has shifted toward more balanced treaty drafting. Indonesia can follow this trend by modernizing its BITs and adopting model clauses that include right-to-regulate provisions, carve-outs for public interest measures, and more precise definitions of FET and expropriation. For example, the EU–Vietnam Investment Protection Agreement includes detailed exceptions that preserve the host state's ability to regulate in areas such as environment, public health, and labor. Adopting similar treaty language in Indonesia's future negotiations would help recalibrate the investment regime to reflect a more equitable balance between investor rights and national development goals. Moreover, phasing out outdated treaties that lack these safeguards—through renegotiation or formal termination—would reduce Indonesia's exposure to excessive ISDS claims.

Fifth, Indonesia should prioritize regional collaboration in legal capacity building and treaty negotiation, particularly within the framework of ASEAN. Legal and institutional disparities across Southeast Asia create uneven playing fields and reduce the credibility of regional instruments like ACIA. To strengthen collective legal capacity, ASEAN members could establish a regional center for investment law and dispute resolution, offering training, advisory services, and shared legal resources to support treaty negotiations and dispute management. Collaborative platforms could also facilitate the exchange of best practices on issues such as ISDS reform, sustainable investment policies, and the integration of environmental and social governance (ESG) standards. As suggested by Julien Chaisse and Locknie Hsu, such regional legal harmonization efforts can enhance the bargaining power of developing countries in global treaty negotiations and reduce asymmetries in investor-state relations.[83]

Furthermore, Indonesia must consider the development of domestic alternatives to ISDS, such as a specialized investment court or an investment ombudsman mechanism, to provide timely and cost-effective resolution of investor grievances. This would also relieve pressure on international arbitration and build investor trust in the domestic legal system. Any such mechanism must be grounded in legal independence, technical competence, and procedural fairness, drawing from comparative models like the Indian Investment Facilitation Cell or Korea's Ombudsman for Foreign Investors. Over time, such domestic mechanisms can complement the international regime, particularly where disputes arise from regulatory or administrative actions.

Finally, Indonesia's reform agenda should be informed by a whole-of-government approach, ensuring coordination among the Ministry of Investment, Ministry of Law and Human Rights, sectoral regulators, and regional authorities. Policy coherence requires that investment-related decisions are not made in isolation but consider overlapping obligations, risks, and development goals. Inter-agency legal review mechanisms should be instituted to assess the investment law implications of new regulations before they are enacted. Such institutional coordination is necessary to prevent the kind of regulatory fragmentation and conflicting policy signals that have historically undermined Indonesia's investment climate.

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83 Chaisse, "The Shifting Tectonics of International Investment Law"; Locknie Hsu, "Source Code Provisions and Evolving Exceptions in Economic Agreements," *Global Trade and Customs Journal* 20, no. 2 (2025), https://doi.org/10.54648/gtcj2025016.

In the further, Indonesia stands at a critical juncture in its effort to reconcile its aspirations for economic sovereignty with its obligations under international investment law. Legal reform must be pursued not only to prevent future ISDS claims but to ensure that the investment regime supports inclusive, transparent, and sustainable development. By harmonizing its laws, strengthening institutions, and engaging more strategically at the regional and international level, Indonesia can build a more resilient and equitable investment governance framework.

Conclusion

This paper has examined the intersection of Indonesia's foreign investment governance in the mining sector with international investment law (IIL), highlighting the growing tensions between investor protection, regulatory autonomy, and domestic competition fairness. It has traced the rise of foreign direct investment (FDI) in Southeast Asia's extractive industries, Indonesia's strategic position in global mineral supply chains, and the legal frictions emerging from preferential treatment toward domestic actors, especially state-owned enterprises (SOEs). Through a conceptual and legal framework grounded in IIL principles—such as fair and equitable treatment (FET), national treatment, and protection against expropriation—the study analyzed how regulatory practices in Indonesia, including sudden policy shifts and opaque licensing regimes, may expose the state to investor-state dispute settlement (ISDS) risks. Case studies such as *Churchill Mining v. Indonesia* further underscored the legal and reputational implications of inconsistent regulatory behavior, particularly in the context of international treaty obligations.

The findings have broader implications not only for Indonesia but for the Southeast Asian region as a whole. As ASEAN member states deepen economic integration under instruments like the ASEAN Comprehensive Investment Agreement (ACIA), disparities in legal enforcement, regulatory coherence, and investor treatment threaten to create uneven playing fields. The persistence of legal gaps—such as weak judicial enforcement, fragmented regulatory authority, and a lack of treaty implementation frameworks—suggests a systemic need for institutional strengthening and policy reform. In this context, Indonesia serves both as a cautionary tale and a potential leader in shaping a more equitable investment climate. Its experience highlights the delicate balance that must be struck between attracting quality investment, protecting strategic national interests, and adhering to rule-of-law principles that underpin the legitimacy of the investment governance regime.

Looking forward, the paper calls for a more balanced and sustainable model of investment governance—one that respects investor rights while affirming the host state's sovereign right to regulate in the public interest. Legal harmonization, greater transparency, stronger competition law enforcement, and strategic treaty reform are essential to building this model. Furthermore, regional collaboration in legal capacity-building and negotiation strategies can empower Southeast Asian states to engage with international investment law on more equitable terms. As the global economy transitions toward greener and more strategic supply chains—particularly in critical minerals—the credibility and fairness of legal institutions in resource-rich countries like Indonesia will increasingly determine both their attractiveness to investors and their ability to retain policy space for national development. A forward-looking, integrated approach to legal and policy reform will thus be key to achieving inclusive, sustainable, and legally coherent investment governance.

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