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The Cooling-Off Period Under the International Investment Law Regime in the Indonesian Regulations Context

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Abstract

This article seeks to find methods for preventing the chilling effect of International Investment Law ("IIL"), according to the Indonesian legal system. The IIL has been known as one of the controversial legal regimes in international law, due to its main issue to balance the right of foreign investors and the sovereignty of the host state. From the host state's point of view, an international arbitration tribunal award in favor of the foreign investors may cause a chilling effect on its right to regulate an investment measure. Since Indonesia is a country that is currently experiencing this effect, the article herein provides three discussions on how the chilling effect can be prevented. In providing these discussions, this article applies the doctrinal approach by taking into account the cases in hand, particularly where Indonesia is one of the parties. The first discussion provides explanations concerning the *Tecmed v. Mexico* case, which reflects how the absence of domestic law concerning cooling-off period may damage a state's sovereignty. This discussion also provides findings in *Amco v. Indonesia* and *Oleovest v. Indonesia*, which shall be considered as cases

where Indonesia applied its cooling-off period, despite its defeat in the Amco's Tribunal. Furthermore, the second discussion explains how the cooling-off period and the exhaustion of local remedies are interconnected. This discussion shows the weakness within the Indonesian legal system and an example of the Indonesian government's BITs, which consist of a cooling-off period, despite not transposed to its national law. Last but not least, the third discussion explores how a mediation and administrative court shall be utilized by Indonesia as a cooling-off period mechanism. This discussion also consists of recommendations on how Indonesia's national investment law shall be amended in preventing the IIL chilling effect.

KEYWORDS *Cooling Off Period, Chilling Effect, International Investment, Investor-State Dispute Settlement*

Introduction

International Investment Law (hereinafter, the 'IIL') has always been perceived as one of the most controversial branches of international law.[1] Such perception arose due to the debacle between states concerning the balancing between the foreign investors' protection right and the right to regulate an investment measure.[2] Due to its complexity, IIL is perceived as a legal instrument that attracts foreign investors and as a subsidiary instrument to a state's economic development.[3]

The controversial nature of IIL is inseparable from the chilling effect caused by the formal or procedural rule of this norm *in concreto* international arbitration tribunal award.[4] Such an award may rule as a punishment to a host state, due to its measure being contrary to the legitimate expectation of the foreign investor.[5] One of the forms of the chilling effect is the fulfillment of

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1 Radi, Yannick. *Rules and Practices of International Investment Law and Arbitration*. (Cambridge: Cambridge University Press, 2020).

2 Radi.

3 Radi.

4 Moehlecke, Carolina. "The chilling effect of international investment disputes: limited challenges to state sovereignty." *International Studies Quarterly* 64, no. 1 (2020): 1-12.

5 Arato, Julian. "The private law critique of international investment law." *American Journal of International Law* 113, no. 1 (2019): 1-53.

compensation to a foreign investor based on the country's budget and the obligation of a host state in changing its contested measure.[6] The arbitration tribunal mentioned in this paragraph is also known as the Investor-State Dispute Settlement (hereinafter, the 'ISDS'), which is prominently applied by the International Centre for Settlement of Investment Disputes (hereinafter, the 'ICSID') under Article 1 paragraph (2) ICSID Convention.[7]

One of the benchmark decisions of the ISDS award provided by ICSID arbitrators concerning the existence of this chilling effect can be viewed in the finding adopted by the tribunal for *Tecmed v. Mexico*.[8] Under this ruling, the tribunal *inter alia* stated that the host states are obliged to act consistently, free from ambiguity, and transparently in their relations with the foreign investors, so that foreign investors may comply with all the rules, regulations, policies, and administrative practices or directives in order to plan their investments while complying to such regulations.[9] The finding herein has proven that the international arbitration tribunal is reluctant in taking into account the public purpose aspect while ruling a dispute between a foreign investor and its host state.

As an antithesis of such existence, the article herein perceives that the state shall provide measures that may cause the existence of cooling-off periods before or after a chilling effect is imposed by an investment arbitration. Generally, cooling-off periods are an IIL feature that requires (foreign) investors to abstain from an arbitration proceeding initiation in a specified period against the host state and to attempt to settle the dispute amicably.[10] In explaining how such a concept can be applied as an antithesis to the chilling effect caused by IIL, the article answers it in three parts.

The first part of this article discusses a lesson learned from the *Tecmed v. Mexico* case and the importance of a cooling-off period under the IIL regime. Furthermore, the second part of this article explains how the application of the

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[6] Radi, Yannick. "'Philip Morris *v* Uruguay' regulatory measures in international investment law: To be or not to be compensated?." *ICSID Review: Foreign Investment Law Journal* 33, no. 1 (2018): 74-80.

[7] van den Berg, Albert Jan. "Appeal mechanism for ISDS awards: interaction with the New York and ICSID Conventions." *ICSID Review-Foreign Investment Law Journal* 34, no. 1 (2019): 156-189.

[8] Radi, "'Philip Morris *v* Uruguay' regulatory measures in international investment law: To be or not to be compensated?."

[9] Radi.

[10] Sharma, Abeer. "The Cooling-Off Period in the Energy Charter Treaty: Existing Problems and the Way Forward." *SSRN* April 24 (2018), available at https://ssrn.com/abstract=3272322

principle of exhaustion on local remedies can be enacted with the cooling-off period according to investment treaties, in which Indonesia is a party and cases in international arbitration where Indonesia was involved. Last but not least, the third discussion explains how a dispute settlement through mediation and the administrative court can be perceived as an institution that may avoid or overcome the chilling effect of the IIL regime. It is important to note that this article is written based on the Indonesian law perspective as it aims to show how Indonesia may overcome such a chilling effect.

The article is written based on the doctrinal method through the transposition of the law in the book to the three legal issues mentioned above.[11] Such a method is complemented with the case approach by applying the findings or the *ratio decidendi* of ICSID arbitration awards, the application of legal doctrines and or the legal substance of international treaties, and the involved cases whereby, in particular, Indonesia becomes one of the parties.[12] Furthermore, this article is also written by gathering primary legal sources consisting of Indonesian regulations, bilateral investment treaties, and ICSID arbitration awards.[13] Those national regulations applied in answering those legal issues are Law Number 25 the Year 2007 (hereinafter, the 'Investment Law'), Law Number 1 the Year 1967 (hereinafter, the 'Foreign Investment Law'), Law Number 5 the Year 1986 & Law Number 9 the Year 2004 (hereinafter, the 'Administrative Court Law') and the Supreme Court Regulation Number 1 the Year 2016 (hereinafter, the 'Mediation Procedure Regulation'). Meanwhile, the BITs applied in this article are the Indonesia-Singapore BIT, Indonesia-Denmark BIT, Indonesia-Iran BIT, Croatia-Indonesia BIT, and Indonesia-Algeria BIT. Last but not least, this article also applies the findings on the awards consisting of *Tecmed v. Mexico*, *Amco v. Indonesia*, *Oleovest v. Indonesia,* and *Churchill Mining v. Indonesia*. The secondary legal sources applied in this article are legal doctrines quoted from books and articles obtained from Indonesian libraries and international law reviews discussing international investment law.

This article is written based on prescriptive research. The research therein offers the cooling-off mechanism as a method for conducting investment disputes amicably before a settlement through investment arbitration. The analysis applied in this article is an inductive analysis by perceiving the cooling-

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[11] Nurhayati, Yati, Ifrani Ifrani, and M. Yasir Said. "Metodologi normatif dan empiris dalam perspektif ilmu hukum." *Jurnal Penegakan Hukum Indonesia* 2, no. 1 (2021): 1-20.

[12] Asikin, Zainal. *Pengantar Metode Penelitian Hukum.* (Jakarta: Raja Grafindo Persada, 2004).

[13] Asikin.

off mechanism scattered in several Indonesian regulations, BITs, and IIL cases in particular whereby Indonesia was involved as one of the parties. From those norms, this article takes a general conclusion explaining how Indonesia may utilize its cooling-off mechanism according to its national law before and during the occurrence of an investor-state dispute in international arbitration.

A Lesson Learned from Tecmed *v.* Mexico and The Application of the Cooling Off Period Under The International Investment Law

Since this article has provided a brief explanation concerning what the cooling-off period means, the passage herein provides its early explanations in an *argumentum a contrario*. The explanation herein transposed the traditional concept expressed by the Permanent Court of International Justice (hereinafter, the 'PCIJ') in the Lotus Case, a dispute between French and Turkey due to the application of extraterritorial jurisdiction of Turkish criminal law to the French ship officer.[14] The PCIJ opined that the criminal jurisdiction exercised by Turkey to the French ship officer due to an accident that occurred on the high seas between the Lotus Ship and the Boz Korut ship was not prohibited under international law.[15]

Max Huber as the court's president at that time expressed that an action is permissible under international law, if such action is not prohibited under treaties or customary international law.[16] Therefore, the court decided that Turkey did not violate international law since there is no rule prohibiting Turkey from prosecuting Lieutenant Demons.[17] From the finding of this judgment, it can also be expressed that a state may not exceed its sovereignty constituted under the international law on its jurisdiction.[18] By understanding Argent's commentary on this case, this article expresses that international law

[14] Beaulac, Stéphane, "The *Lotus* Case in Context: Sovereignty, Westphalia, Vattel, and Positivism", in Stephen Allen, and others (eds), *The Oxford Handbook of Jurisdiction in International Law.* (Oxford: Oxford University Press, 2019).

[15] d'Argent, Pierre. "Teaching International Law Massively." In *Teaching International Law* (Leiden: BRILL, 2023)

[16] d'Argent.

[17] Beaulac, "The *Lotus* Case in Context: Sovereignty, Westphalia, Vattel, and Positivism".

[18] Hesse, Pia. "Comment: neither Sunken Vessel nor Blooming Flower! The Lotus Principle and International Humanitarian Law." In *International Humanitarian Law in Areas of Limited Statehood.* (Nomos Verlagsgesellschaft mbH & Co. KG, 2018).

only prohibits what it explicitly prohibits, and such perception has indeed shown that international law has a strict positivistic nature.[19]

Even though the Lotus Case is not related to IIL, the finding explained above indeed reflected the chilling effect that can also be found in the *Tecmed v. Mexico* case. The discussion below explains how the absence of the rules concerning cooling-off periods under this case may cause a host state chilled by the international arbitration tribunal award.[20] The dispute herein involved Tecmed, S.A., a commercial company organized under Spanish Law, which has incorporated under Mexican law by holding 99% of the shares of Cytrar as the claimant of this dispute against the Government of the United Mexican States as the respondent.

This dispute had its own ties under the ICSID Tribunal Jurisdiction since it covered the implementation of the Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the United Mexican States or the Spain and Mexican Bilateral Investment Treaty and Mexican National Law (hereinafter, the 'Spain-Mexican BIT').[21] Under Article 2 paragraph (2) of the Spain-Mexican BIT, this agreement is applied retroactively to investments made before it entered into force by the investors of a Contracting Party. Therefore, Tecmed may exercise ICSID jurisdiction under this agreement, despite it having started its investment before the entry-to-force date of the Spain-Mexican BIT on December 18th, 1996.

Furthermore, the *ratio materie* of this dispute covers the rejection of the Mexican government to renew the authorization to operate the landfill owned by Tecmed through Cytar. Tecmed, as the claimant in this dispute, argued that such rejection is equivalent to an illegal expropriation. In responding to the measure explained above, Tecmed argued that the Mexican Government violates stipulations under the Spain-Mexican BIT as mentioned herein:

1. Article 2 paragraph (1) on the promotion and admission of investments;
2. Article 3 on the protection of investments;
3. Article 4 paragraph (1) on fair and equitable treatment;
4. Article 4 paragraph (2) on the most favorable treatment;
5. Article 4 paragraph (5) on national treatment; and

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[19] d'Argent, "Teaching International Law Massively."

[20] Laryea, Emmanuel T. "Legitimate expectations in investment treaty law: concept and scope of application." In *Handbook of International Investment Law and Policy*. (London: Springer, 2020), pp. 1-24.

[21] Choiniere, Haden, and Vladislav Maksimov. "Investor-State Dispute Settlement and Sustainable Development: Negative Externalities and a Need for Reform." *AIB Insights* 22, no. 1 (2022): 1-5.

6. Article 5 on nationalization and expropriation.

While contesting the applicability of the Spain-Mexican BIT mentioned above, the claimant also has Mexican regulations concerning the authority in issuing licenses and a measure allowing the Mexican community to impose peer pressure on a foreign investor.[22] The tribunal finally concluded the Mexican government has violated its obligation under Articles 4 paragraph (1) concerning the National Treatment and 5 paragraph (1) concerning the nationalization and expropriation. Therefore, the Mexican government was forced to pay Tecmed the amount of US$ 5,533,017.12, plus compound interest with an annual rate of 6% and such payment shall be conducted promptly, adequately, and effectively.[23]

By explaining this dispute in a brief, the article herein does not identify the fact that a cooling-off period or exhaustion on local remedies mechanism exists either within the Spain-Mexican BIT or the Mexican Regulation in providing facilities to its foreign investors. The absence of a cooling-off period has caused Mexico to be contested directly to the ICSID tribunal without the settlement of an investment dispute through Mexican national law *prima facie*. Hence, by knowing the award of the tribunal condemning Mexico as the host state in this case, it can be understood that Mexico suffered the chilling effect of that arbitration award forcing itself to pay a certain amount of money and changing its national law contested in that dispute.[24]

In today's climate, cooling-off or waiting periods are clauses that exist in almost 90% of investment treaties.[25] Such a provision obliges foreign investors to hold off an initiation to an investment arbitration for a certain period to ensure that the investment dispute can be settled through an alternative means.[26] This mechanism is applied to prevent the commencement of a long

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[22] Laryea, "Legitimate expectations in investment treaty law: concept and scope of application."

[23] Choiniere, and Maksimov. "Investor-State Dispute Settlement and Sustainable Development: Negative Externalities and a Need for Reform."

[24] Moehlecke, "The chilling effect of international investment disputes: limited challenges to state sovereignty."

[25] Di Pietro, Domenico, and Kevin Cheung. "The Definition of Investor in Investment Treaty Arbitration: Overview of Common Issues in the Context of the ICSID Convention." In *Handbook of International Investment Law and Policy* (Singapore: Springer Singapore, 2020), pp. 1-26.

[26] Verbist, Herman. "Mediation as an Alternative Method to Settle Investor-State Disputes." In *Handbook of International Investment Law and Policy* (Singapore: Springer Singapore, 2020), pp.1-28.

and expensive international arbitration procedure with potential political risk.[27] Through this mechanism, investment disputes can be settled through a more amicable method.[28] The implementation of this mechanism can be conducted by adhering to the cooling-off mechanism clause in an investment treaty or a contract and through the adoption of national law concerning a cooling-off period mechanism.

The cooling-off period mechanism can be perceived as the same mechanism as the periodic exhaustion of local remedies.[29] Radi explained that although the concept of exhaustion on local remedies is not a new concept under investment treaties, the duration of the time limit is a new feature.[30] By understanding the stipulation under the Indian model of a bilateral investment treaty, it can be explained that the exhaustion of local remedies is an obligation for a foreign investor to submit their case to the domestic tribunal of the host state.[31] Under the public international regime, this mechanism is one of the international customary laws adhered to Article 44 on State Responsibility for Internationally Wrongful Act (hereinafter, the 'ARSIWA'). Letter (b) of this article *inter alia* expresses that '*A state responsibility may not be invoked if the claim is one which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.*'[32]

From the explanations above, it can be perceived that both the cooling-off period and the periodic exhaustion of local remedies are obliged settle a dispute through domestic means *prima facie*.[33] The only difference between those two concepts is the periodic exhaustion of local remedies was adopted by the international responsibility regime *in concreto* the international responsibility regime, while the cooling-off period is both a concept and rule introduced and implemented in the IIL regime. The explanation herein is historically justifiable, since the exhaustion on local remedies is drafted along with other rules on state responsibility by the International Law Commission,

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[27] Moehlecke, Carolina, and Rachel L. Wellhausen. "Political risk and international investment law." *Annual Review of Political Science* 25, no. 1 (2022): 485-507.

[28] Verbist, "Mediation as an Alternative Method to Settle Investor-State Disputes."

[29] Muminov, Farruhbek, and Jędrzej Górski. "Uzbekistan's New Bilateral Investment Treaty Standpoint: In Case of Uzbekistan-Turkey bit (2018)." In *The Law and Policy of New Eurasian Regionalization*. (Leiden: Brill Nijhoff, 2021), pp. 412-430.

[30] Radi, *Rules and Practices of International Investment Law and Arbitration.*

[31] Radi.

[32] Trindade, Antônio Augusto Cançado. *International Law for Humankind: Towards a New Jus Gentium*. Vol. 6. (Leiden: BRILL, 2010).

[33] Choiniere, and Maksimov. "Investor-State Dispute Settlement and Sustainable Development: Negative Externalities and a Need for Reform."

led by Roberto Ago in 1962.[34] The rules on exhaustion and the cooling-off period may be qualified as the same dispute settlement method. However, the cooling-off period mechanism itself is a legal concept having a wider scope if it is compared with the exhaustion of the local remedies concept. This conceptual classification is supported by the finding in two IIL cases explained herein.

The Connection between the Cooling-Off Period Mechanism with the Rules on Exhaustion on Local Remedies

A. Cooling Off Period under Law Number 1 of 1967 concerning Foreign Investment

Letter (a) of the Foreign Investment Law Preamble expresses that the main reason why Indonesia adopted this law in 1967 was due to the large number of natural resources owned by Indonesia.[35] Furthermore, letter (f) of the Preamble states that foreign investment was opened in closed sectors to maximize Indonesia's economic development.[36] The premise lies within letter (f) and is in line with Radi's opinion stating that IIL has always been perceived

[34] Argent, Pierre D. *International Law Textbook: Claiming Responsibility*. (UC Louvain & edX, 2021). *See also* Petrovic, Drazen. "Pierre DArgent. Les reparations de guerre en droit international public: la responsabilite internationale des Etats a lepreuve de la guerre. Bruxelles: Emile Bruylant, 2002. Pp. 904. A150. ISBN: 2802715933* Andrea Gattini. Le riparazioni di guerra nel diritto internazionale. Padova: CEDAM, 2003. Pp. 722. A59. ISBN: 8813245149." *European Journal of International Law* 16, no. 5 (2005): 1008-1008.

[35] Amira, Arianti Nur. "Perbandingan Pengaturan Status Penanaman Modal Perseroan Terbuka dalam Undang-Undang No. 1 Tahun 1967 tentang Penanaman Modal Asing juncto Undang-Undang No 6 Tahun 1968 tentang Penanaman Modal dalam Negeri dan Undang-Undang No. 25 Tahun 2007 tentang Penanaman Modal." *Jurnal Legal Reasoning* 2, no. 1 (2019): 1-15. *See also* Yunisavitri, Emaniar. "Implementasi Peraturan Pemerintah Terkait dengan Kepemilikan Saham Dari Modal Asing." *Unnes Law Journal* 1, no. 1 (2012): 29-36; Adiastuti, Anugrah. "Implementasi Foreign Direct Investment (FDI) di Indonesia (Sebelum dan Setelah diundangkannya Undang-Undang Nomor 25 Tahun 2007 Tentang Penanaman Modal)." *Pandecta Research Law Journal* 6, no. 2 (2011): 139-149.

[36] Amira, "Perbandingan Pengaturan Status Penanaman Modal Perseroan Terbuka dalam Undang-Undang No. 1 Tahun 1967 tentang Penanaman Modal Asing juncto Undang-Undang No 6 Tahun 1968 tentang Penanaman Modal dalam Negeri dan Undang-Undang No. 25 Tahun 2007 tentang Penanaman Modal."

as an instrument in achieving economic development.[37] Letter (f) of the Foreign Investment, is justifiable during that period by understanding the fact that foreign investment was opened during that day due to the continuous poverty that occurred in Indonesia.[38]

In general, the Foreign Investment Law does not provide any stipulation concerning dispute settlement due to the interpretation of an investment agreement or a contract. Therefore, this law also generally does not provide any rules concerning the cooling-off period. However, Article 22 paragraph (2) of the Foreign Investment Law provides a cooling-off period through negotiations concerning the amount of compensation that should be given to the foreign investor due to its expropriated property by the Indonesian government.[39] This paragraph also obliges both parties to settle such disputes in international arbitration if the cooling-off period fails to settle the dispute.[40]

Article 22 of this law is the exception to the Indonesian government's commitment to not conduct a direct expropriation or a creeping expropriation.[41] Such promise is set forth under Article 21 of the Foreign Investment Law *inter alia,* stating that the Indonesian government will not conduct any direct or indirect expropriation unless it is constituted under its national law based on public purpose.[42] The formulation of this article is in line with the police power doctrine stating that an expropriation is permissible once it fulfills the elements of public purpose, non-discrimination, and due process.[43] From this explanation, it can be understood that this repealed regulation provides a cooling-off period regardless of its limited scope of application.

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[37] Radi, *Rules and Practices of International Investment Law and Arbitration.*

[38] Amira, "Perbandingan Pengaturan Status Penanaman Modal Perseroan Terbuka dalam Undang-Undang No. 1 Tahun 1967 tentang Penanaman Modal Asing juncto Undang-Undang No 6 Tahun 1968 tentang Penanaman Modal dalam Negeri dan Undang-Undang No. 25 Tahun 2007 tentang Penanaman Modal."

[39] Surya, I. Kadek Adi. "Kajian Yuridis Undang-Undang Penanaman Modal Bagi Investor Asing yang Dinasionalisasi dalam Penanaman Modal di Indonesia." *Vidya Wertta: Media Komunikasi Universitas Hindu Indonesia* 6, no. 1 (2023): 60-73.

[40] Surya.

[41] Surya.

[42] Surya.

[43] Ranjan, Prabhash. "Police powers, indirect expropriation in international investment law, and article 31 (3)(c) of the VCLT: A critique of Philip Morris *v.* Uruguay." *Asian Journal of International Law* 9, no. 1 (2019): 98-124.

B. Indonesia Ratification on ICSID Convention and the Obligation on Exhaustion Local Remedies

Indonesia ratified the ICSID Convention on June 29th, 1968 through the adoption of Law Number 5 Year 1968.[44] Before the adoption of this law or the ratification of the convention, Indonesia had taken into account several legal facts herein. The ratification of the ICSID Convention will apply to the People Consultative Assembly Decrees Number No. XII/MPRS/1966 and Number XXIII/MPRS/1966, which encouraged the conduct of foreign investment in Indonesia.[45] Furthermore, this Convention is ratified as Indonesia is one of the member states of the International Bank for Reconstruction and Development. Last but not least, Indonesia signed the ICSID Convention on February 16th, 1968, fulfilling the formal requirement to ratify a treaty.[46]

Article 26 of the ICSID Convention permits the contracting parties to implement the exhaustion of local remedies mechanism.[47] It can be implemented through administrative or judicial remedies under that contracting party's domestic legal system. Furthermore, the exhaustion of the local remedy's mechanism can be adhered to by the contracting party in adopting an investment agreement with another contracting party and in adopting an investment contract as a host state with its foreign investor.[48] Even though the IIL literature differs this concept from the cooling-off period concept, this discussion provides the reason why both concepts can be interpreted as the same matter under the Indonesian legal system.

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[44] Amalia, Prita, and Garry Gumelar Pratama. "Indonesia dan ICSID: Pengecualian Yurisdiksi ICSID oleh Keputusan Presiden." *Majalah Hukum Nasional* 48, no. 1 (2018): 1-21.

[45] Irwandi, Irwandi. "Kedudukan TAP MPR dan Implikasinya terhadap Hierarki Peraturan Perundang Undangan di Indonesia." *Inovatif: Jurnal Ilmu Hukum* 6, no. 2 (2013): 90-104.

[46] Amalia, and Pratama. "Indonesia dan ICSID: Pengecualian Yurisdiksi ICSID oleh Keputusan Presiden."

[47] Zachou, Eleni-Eirini. "The Enforcement of Arbitral Awards under the scope of the Energy Charter Treaty and the Washington Convention (ICSID)." *Thesis.* (Greece: School of Law, Democritus University of Thrace, 2020). Available online at https://repo.lib.duth.gr/jspui/bitstream/123456789/15953/1/ZachouEE_2020.pdf. *See also* Smutny, Abby Cohen, Anne D. Smith, and McCoy Pitt. "Enforcement of ICSID Convention Arbitral Awards in US Courts." *Pepperdine Law Review* 43, no. 5 (2016): 649-680.

[48] Yin, Wei. "Challenges, issues in China-EU investment agreement and the implication on China's domestic reform." *Asia Pacific Law Review* 26, no. 2 (2018): 170-202.

C. *The Dispute Settlement Mechanism under Law Number 25 of 2007 concerning Investment*

After explaining the cooling-off period scope of application, the article explains the relation between the cooling-off period mechanism with the rules on exhaustion on local remedies. The explanation is provided based on Indonesia's positive law consisting of Law Number 25 the Year 2007 concerning Investment (hereinafter, the 'Indonesian Investment Law') and several Indonesia bilateral treaties with other states. The discussion is meant to reflect what Indonesia can do better to prevent the upcoming chilling effect of the IIL regime.

Under the Indonesian Investment Law, Indonesia does not provide a concise mechanism concerning the cooling-off period on an ISDS.[49] Such formulation can be seen in Article 32 of the Indonesian Investment Law.[50] This article *inter alia* provides a dispute settlement mechanism consisting of negotiation, alternative dispute resolution, judicial dispute settlement, and arbitration consisting of arbitration and foreign arbitration.[51] The first paragraph of this article obliges foreign investors to settle their dispute with the Indonesian government through negotiation *prima facie*.[52] The next paragraph furthermore obliges the investors to settle their dispute through alternative dispute resolution including through arbitration.[53] Unfortunately, only a settlement between a domestic investor *vis-à-vis* the Indonesian government

[49] Nugroho, Muhammad Hildan Yudanto. "Penyelesaian Sengketa Terhadap Penanam Modal Asing Yang Melanggar Kontrak di Indonesia." *Lakidende Law Review* 1, no. 3 (2022): 261-276. For further discussion and another cases, *please also see* Suwarsit, Suwarsit, and Yoyo Arifardhani. "The Settlement of Mining Disputes and The Implementation of International Arbitration Awards." *Pandecta Research Law Journal* 17, no. 1 (2022): 18-28; Nainggolan, Christian Imanuel. "International Law and Dispute Resolution in the Context of Renewable Energy Development: A Review of the Case of Downstreaming of Nickel Ores by Indonesia." *International Law Discourse in Southeast Asia* 2, no. 2 (2023): 221-250.

[50] Amira, "Perbandingan Pengaturan Status Penanaman Modal Perseroan Terbuka dalam Undang-Undang No. 1 Tahun 1967 tentang Penanaman Modal Asing juncto Undang-Undang No 6 Tahun 1968 tentang Penanaman Modal dalam Negeri dan Undang-Undang No. 25 Tahun 2007 tentang Penanaman Modal."

[51] Kasim, Helmi. "Arbitrase Sebagai Mekanisme Penyelesaian Sengketa Penanaman Modal." *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 7, no. 1 (2018): 79-96.

[52] Kasim.

[53] Kasim.

shall be settled through the domestic court.[54] Meanwhile, a dispute between a foreign investor *vis-à-vis* the Indonesian government as a host state shall be settled through international arbitration.[55]

By understanding the legal substance explained above, this article expresses that the cooling-off period under paragraph one of that article is not formulated concisely. This unbriefed statement is delivered since Article 32 of the Indonesian Investment Law does not stipulate how long a cooling-off period shall be held.[56] This may of course cause a revolving door situation for both the Indonesian government and the foreign investor. The solution concerning the issue is explained further in the third discussion of this article.

Furthermore, the absence of a foreign investor obligation to settle a dispute in the domestic court is another issue that can cause Indonesia to get chilled by the effect of the procedural IIL.[57] The Investment Law's article does consider that the existence of the rule on exhaustion on local remedies was adopted to the foreign investor's lack of trust in a host state domestic court.[58] However, since this mechanism has evolved and modified with the grace period of settling a dispute at a domestic level, the existence of this mechanism shall not be perceived as a foreign investor's lack of trust anymore.[59]

Such a statement is supported by customary international law stating that available means and methods according to domestic law shall be taken *prima facie*.[60] This customary norm can be found in the Interhandel Case ruled by the ICJ in 1959.[61] The judges *inter alia* ruled that before a dispute is settled in an international court or tribunal, the state where the violation occurred shall have an opportunity to exercise its measure within the framework of its domestic

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[54] Kasim.

[55] Herlani, Ahmad Fajar. "Pilihan Forum Penyelesaian Sengketa Investasi." *Nurani Hukum* 3, no. 2 (2020): 49-56.

[56] Nugroho, "Penyelesaian Sengketa Terhadap Penanam Modal Asing Yang Melanggar Kontrak di Indonesia."

[57] Moehlecke, "The chilling effect of international investment disputes: limited challenges to state sovereignty."

[58] Van Bockhaven, Vicky. "Anioto and nebeli: local power bases and the negotiation of customary chieftaincy in the Belgian Congo (ca. 1930–1950)." *Journal of Eastern African Studies* 14, no. 1 (2020): 63-83.

[59] Radi, *Rules and Practices of International Investment Law and Arbitration.*

[60] d'Argent, "Teaching International Law Massively."

[61] O'Reilly, Declan. "Morals and Money: Ideology and Pragmatism in the Kennedy Administration's Settlement of the Interhandel-General Aniline &Film Case 1962-1965." *Journal of Economics* 8, no. 2 (2020): 25-38.

legal system.[62] The rules on exhaustion on local remedies shall not be confused with a similar provision in international investment agreements known as the cooling off period.[63] This treaty mechanism obliges disputing parties to resort to amicable means of dispute settlement for a specified period before initiating international arbitration.[64] The example of that amicable means negotiation, conciliation, and mediation, but does not include local administrative or judicial remedies.[65]

In avoiding an ambiguous understanding and being persistent with the discussion in the first discussion, this article perceives that a cooling-off period is any means other than a dispute settlement through an international court or tribunal. This article interpreted both administrative and judicial remedies as a mechanism that can be qualified as a cooling-off period too. This is because both amicable means consisting of negotiation, conciliation, and mediation, and the settlement through a domestic court may avoid the chilling effect created by an international arbitration tribunal award in favor of the foreign investor. Furthermore, the stance adopted by this article is relevant under the Indonesian legal system since the Indonesian domestic court provides a method for settling an investor-state dispute through the mediation process. This justification is supported by the third discussion of this paper and for now, the discussion herein provides the cooling-off period mechanism applied by Indonesia in several of its active BIT as the basis for expressing what Indonesia can do better.

The Indonesian Investment Law is amended by Government Regulation on the Lieu of Law Number 22 of 2022 concerning Job Creation (hereinafter, the 'New Job Creation Law').[66] The amendment of the investment law can be found in Article 77 of the New Job Creation Law only change Article 12 of the investment law. From the following amendment, the Indonesian government reduced the negative list of the investment sectors from 20 (twenty) sectors to

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62 O'Reilly.

63 Sharma, "The Cooling-Off Period in the Energy Charter Treaty: Existing Problems and the Way Forward."

64 Sharma.

65 Noone, Mary Anne, and Lola Akin Ojelabi. "Alternative dispute resolution and access to justice in Australia." *International Journal of Law in Context* 16, no. 2 (2020): 108-127.

66 Gartina GN, Rd Mila, and Agung Iriantoro. "Pengaruh Ketentuan Skala Usaha Pada Ketepatan Legalitas UMKM Sesuai Dengan Amanat Peraturan Pemerintah Pengganti Undang-Undang Republik Indonesia (Perppu) Nomor 2 Tahun 2022 Tentang Perubahan Atas Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja." *Otentik's*: *Jurnal Hukum Kenotariatan* 5, no. 1 (2023): 23-38.

6 (six) sectors only.[67] Therefore, there is no stipulation under Article 77 of the New Job Creation Law which changes the dispute settlement stipulation.[68] This government regulation on the lieu of law was issued due to the judicial review stating that Law Number 11 Year 2020 (hereinafter, the 'Job Creation Law') was not adopted based on the law concerning the legislation *in concreto* Law Number 12 Year 2011 concerning the Adoption of Regulations (hereinafter, the 'Adoption of Regulations Law').[69] Instead of adjusting the Job Creation Law with stipulations under the Adoption of Regulations Law, the government issued the government regulation in the lieu of law mentioned above.[70]

D. Cooling Off Period under Indonesia Bilateral Investment Treaties

Since Indonesia does not have any regulation constituting its BIT model like India, this article provides examples of Indonesia's BITs with other states which contain a cooling-off period. The five BITs mentioned herein oblige their parties to settle their dispute in the ICSID Arbitration if the cooling-off period is unable to settle a dispute arising due to the implementation of the interpretation of this treaty. Those treaties' cooling-off period clauses are explainable:

1. **Indonesia-Singapore BIT**
   Article 15 paragraph 1 of this treaty obliges its parties (could be a foreign investor and one of the parties' governments or a government *vis-à-vis* government) to settle a dispute through negotiation/ consultation or a third-party non-binding procedure. Paragraph 3 of this article states that such amicable dispute settlement shall be conducted within thirty days of the written consultation unless the disputing parties otherwise agree. From this article, it can be understood that this BIT applies thirty days of cooling off period.
2. **Indonesia-Denmark BIT**
   Unlike the Indonesia-Singapore BIT, Article 10 paragraph 1 of this BIT obliges the parties to settle a dispute arising due to the implementation of this treaty through diplomatic channels. Therefore, this treaty only permits

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[67] Gartina GN.

[68] Gartina GN.

[69] Setyawan, Yhannu. "Rancangan Undang-Undang Omnibus Law Cipta Kerja Dalam Perspektif Undang-Undang Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan." *Jurnal Ilmiah Hukum dan Keadilan* 7, no. 1 (2020): 150-164.

[70] Setyawan.

a government-government investment dispute mechanism instead of the ISDS mechanism. Paragraph 2 of this article obliges parties to conduct the diplomatic protection procedure within 6 (six) months.

3. **Indonesia-Iran BIT**
   This BIT precisely obliges one of the party's foreign investors *vis-à-vis* one of the party's host states to settle their dispute through negotiation and consultation *prima facie*. The obligation is formulated under Article 11 paragraph 1 of the BIT. Paragraph 2 of that article expressed that the cooling-off period exists within six months from the date of the claim notification of one of the parties to the other.
4. **Croatia-Indonesia BIT**
   Like the Indonesia-Iran BIT, this treaty also obliges the parties to settle their dispute through the ISDIS mechanism. Article 10 paragraph 1 of this treaty obliges the parties of this dispute to settle it by negotiations. The next paragraph states that such negotiation shall be conducted within 6 (six) months since the written notification has been submitted by one of the parties.
5. **Indonesia-Algeria BIT**
   Finally, Article X paragraph 1 of this treaty obliges its parties to settle their dispute through negotiations before the ISDS mechanism. Paragraph 2 of this article expressed that such a cooling-off period shall be conducted within six months since the written notification is filed by one of the parties' foreign investors. Like the previous four BITs, this treaty obliges its parties to settle their dispute in ICSID.

E. Indonesian Cases

1. The Amco *v.* Republic of Indonesia (1990)

The first case addressed in explaining the implementation of a cooling-off period is the *AMCO v. Indonesia* Case. This investor-state dispute was caused by Indonesia's unilateral act of seizing Hotel Kartika Plaza by its Army and Police from March 31st to April 1st, 1980. Such seizure was conducted due to PT Amco's failure to fulfill its obligation to perform its investment and to report its investment obligations to PT Wisma as required by the Indonesian Capital Investment Coordination Board (*Badan Koordinasi Penanaman Modal-BKPM*). Such failure caused PT Wisma to report PT Amco's current action to BKPM, further causing the Indonesian government to terminate PT Amco's license in managing the Hotel Kartika Plaza.

During the dispute settlement period, precisely after the first tribunal award, Indonesia requested the establishment of an Ad Hoc Committee under

Article 52 paragraph (3) of this ICSID Convention. The stipulation therein permits the establishment of an annulment committee if a tribunal awards an investment dispute based on one or more of the following grounds under Article 53 paragraph (1) ICSID Convention. Such a request was filed on March 1985 to ensure the stay of enforcement upon the furnishing by Indonesia of an irrevocable and unconditional bank guarantee. It was of course filed to ensure that the first tribunal award condemning Indonesia to pay money in the sum of US$3,200,000 with an interest to be paid cannot be executed by AMCO as the claimant.

Another request for Annulment of the award was filed on October 3rd, 1990, but this time it was filed by both parties for the Second Award of June 5th, 1990. The third request for Annulment was then filed on February 14th, 1991 by Indonesia for the Supplemental Award of October 17th, 1990. The effect of the request caused the arbitration award unenforceable by AMCO and Indonesia may not fulfill its obligation to provide the bank guarantee. This remedy is not the same as the cooling-off period explained above, as it creates a "stay" period after the dispute instead of before the dispute in the international arbitration tribunal. However, since it causes foreign investors unable to claim their rights on protection and compensation, a granted annulment request therefore can be qualified as a cooling-off mechanism.

2. Oleovest *v.* Republic of Indonesia (2017)

Another example of a cooling-off invocation can be found in the case of *Oleovest v. Indonesia*. This dispute fulfilled the ICSID arbitration jurisdiction under the dispute settlement clause of the Indonesia-Singapore BIT on August 10th, 2016. However, this case was discontinued on December 12th, 2017 due to the consensus of both Oleovest Pte Ltd as the claimant and the Indonesian government as the respondent. Unlike the *AMCO v. Indonesia* case, the cooling-off period in this dispute occurred at the time when the case was ongoing.

From the explanations in the discussion, the cooling-off period does not only consists of a period where a foreign investor is obliged to refrain from a dispute settlement through an international tribunal before a dispute. However, it also consists of a period where the individual refrains from a dispute when the proceeding is ongoing base on his consent and after the award is issued by the tribunal base on his consent. Therefore, unlike the general conceptual understanding within the IIL literature as explained above, the cooling-off period does not only consist of obligations, but it also rights.

Based on those cases, it can be seen that the cooling-off mechanism has existed ever since the AMCO Case. However, at that time, such a mechanism

was not developed as it is in the present time. The essence concerning the presentation of the cases above is by knowing the fact that Indonesia has implemented the cooling-off period mechanism in settling its investment dispute regardless of whether the outcome of such dispute favors the country or not. Indonesia needs to be persistent in keeping this stance to provide the best means and methods in settling a dispute before the settlement in the investment arbitration which may cause a chilling effect.

3. The Churchill Mining *v.* Indonesia case

From the explanations above, it can be understood that Indonesia indeed has a big gap between its national regulation and its BIT which may potentially cause the chilling effect of IIL may breach Indonesia's right to regulate its investment measure. An example of such a chilling effect can be seen in commentaries on the *Churchill Mining v. Indonesia* case. This dispute is admitted by ICSID based on the United Kingdom-Indonesia BIT and it involved Churchill Mining Plc and Planet Mining Pty Ltd as the claimant and the Government of Indonesia as the respondent. The subject matter of this dispute was the Forged and Fabricated Ridlatama Mining License as the result of the claimant's failure in obtaining their mining license. Although the tribunal for this case stated that the claimant's claim was inadmissible, this case caused the Indonesian Government to bear a cost in the amount of 8,6 Million USD in joining the tribunal proceeding and the amount of 1,85 Million USD by involving itself in the annulment procedure.

As explained in the introduction of this article, the chilling effect does not only consist of the obligation of a state in changing its measure due to its failure to fulfill its obligation under its BIT or investment agreement, but also because of the host state's obligation to expense a large number of budgets to join the ISDS procedure regardless of the outcome. Therefore, the *Churchill Mining v. Indonesia* case can be considered as one of the ISDS cases involving Indonesia which cause itself to expense a large amount of money acquired from its taxpayers. Such premise is of course without prejudice to the fact that the Indonesian government has succeeded to uphold its domestic law concerning the prohibition of forgery and fraud.

Based on the case above, this article understood that this chilling effect issue can either be fixed through the amendment of Indonesian material law concerning investment protection or by implementing Indonesian procedural law. The procedural law mentioned in the previous sentence refers to domestic law procedures allowing Indonesian foreign investor to settle their investment dispute through local remedies *prima facie*. From this point of view, this article

explains how the mediation between the Republic of Indonesia Supreme Court and the administrative court can be utilized as a forum for settling a dispute between a foreign investor and the Indonesian government. This discussion implements both the cooling-off period concept and the periodical exhaustion on local remedies concept.

From the discussions in this section, it can be understood that the cooling-off period and the exhaustion of local remedies have no difference under Indonesian domestic law. This statement is based on the doctrine above stating that the cooling-off period is a way in settling a dispute amicably excluding the judicial settlement in a domestic court. Since Indonesia also provides a mediation procedure within its judicial authority laws, the two concepts do not need to differ one from another. That judicial law is explained in the next discussion below.

4. The Freeport Case

Despite the tension between the Indonesian government and PT Freeport due to the implementation and interpretation of Freeport's investment contract, this case ended without a settlement through international investment arbitration. To understand the chronologies of this dispute, one may not separate it from the fact that in 1967, the Government of Indonesia under the Soeharto Administration adopted a Contract of Work (also known in Bahasa Indonesia as the *Kontrak Karya*) with the Freeport.[71] This contract benefited Freeport due to its attribution to Freeport allowing it to expand its business and explore Papua's copper and gold.[72] The contract of work was then converted into '*Ijin Usaha Pertambangan Khusus*', known as the 'IUPK', a company licensing regime based on the latter Mineral and Coal Mining Law and the Ministry of Energy and Mineral Resources Number 5 of 2017, which obliges a holder of a contract of work to sell the processing result in a certain amount for a maximum of five years to convert the contractual rights into a Special Mining Business License for Production Operations.[73]

This conversation was qualified as an expropriation by Freeport, causing them to threaten the Indonesian government to be sued in international investment arbitration.[74] A renegotiation was then tried during President

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[71] Zada, Khamami, et al. "Law and Sovereignty of the State in the Renegotiation of Freeport Contracts in Papua." *Jurnal Cita Hukum 9,* no. 2 (2021): 319-338.

[72] Zada, et.al.

[73] Zada, et.al.

[74] Zada, et.al.

Yudhoyono's administration.[75] A firm decision within the Government of Indonesia to take over 51% of the Freeport's share was then adopted during President Widodo's administration.[76] During this administration, the Government of Indonesia succeed to acquire Freeport's consent to conduct divestation on 51% of its shares to the Indonesian government (where 10% of those divested shares will fall under the ownership of the Papua Regional Government and the Timika District), build a smelter in Indonesia within 5 years, pay tax higher compared to the tax paid during the contract of the work period, and extend its operation until 2041 through the issuance of a permit.[77] This acquisition was conducted by PT Inalum, a state mining holding company that bought the PT Rio Tinto Indonesia shares in the amount of 40%.[78] That transaction was then followed by shares conversion by PT Freeport Indonesia through a right issue turning into 45,6%.[79] PT Inalum then bought Freeport McMoran Shares under the amount of 5,4%, making the total of the transaction 51%.[80]

From this case, Indonesia as a host state succeeded to implement a cooling-off mechanism without allowing its opposing party to challenge its measure against an international investment arbitration. The Freeport Case can be perceived as a successful case, despite its tiresome negotiation process proceeded both by the Indonesian government and Freeport. This case shall be perceived as Indonesia's motivation to adopt a domestic regulation that allows itself to implement a cooling-off period mechanism for its foreign investors to avoid an investment dispute through the ISDS mechanism. The next discussion discusses how Indonesia's domestic procedural laws can be utilized to implement the cooling-off mechanism.

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75 Zada, et.al.

76 Zada, et.al.

77 Franedya, Roy. "Resmi Diakuisisi, Ini Empat Kesepakatan RI dengan Freeport", *CNBC Indonesia*, December 22, 2018. Online at https://www.cnbcindonesia.com/news/20181222102042-4-47594/resmi-diakuisisi-ini-empat-kesepakatan-ri-dengan-freeport

78 Asmara, Chandra Gian. "Akuisisi 51% Saham Freeport Rp 55,8 T Lunas Dibayar Hari Ini!", *CNBC Indonesia,* December 21, 2018. Online at https://www.cnbcindonesia.com/news/20181221164359-4-47516/akuisisi-51-saham-freeport-rp-558-t-lunas-dibayar-hari-ini

79 Asmara.

80 Asmara.

The Utilization of Mediation & Administrative Court Procedure in Settling Investor-State Disputes in Indonesia

The presence of a third party in a dispute may not only be perceived as a person having the authority to decide the winner or the loser between the disputing parties. A third party may also pick his role in settling a dispute by providing a non-binding solution or recommendation for the disputing parties. This mechanism is also known as the mediation and the third party having a role in settling the dispute is known as the mediator. A mediator's role consists of building good communication between the disputing parties, reducing the high tension of the disputing parties in creating a situation probable to negotiate, becoming an effective information channel for the disputing parties, and providing a solution to settle the dispute of the parties. The discussion below explains Indonesia's domestic law providing such a dispute settlement mechanism, before explaining how this mechanism can be implemented as one of the cooling-off period mechanisms.

Under its domestic legal system, Indonesia adopted the Supreme Court Regulation Number 1 in the Year 2016 concerning Mediation Procedure in the Court (hereinafter, the 'Mediation Procedure Regulation').[81] This regulation is adopted by the Supreme Court based on Article 4 Law Number 48 the Year 2009 concerning the Judicial Authority (hereinafter, the 'Judicial Authority Law') *inter alia* stating that the court is obliged to help justice seekers solve procedural barriers to achieve the speedy trial principle.[82] This mediation process can be conducted once a claimant files a civil lawsuit to the court located in the respondent's domicile *prima facie* and the scope of this mediation may

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[81] Anindito, Teguh, Aris Priyadi, and Arif Awaludin. "Pelaksanaan Peraturan Mahkamah Agung Nomor 1 Tahun 2016Tentang Prosedur Mediasi ei Pengadilan Negeri Banyumas." *Cakrawala Hukum* 24, no. 1 (2022): 23-32.

[82] Aristeus, Syprianus. "Eksekusi Ideal Perkara Perdata Berdasarkan Asas Keadilan Korelasinya dalam Upaya Mewujudkan Peradilan Sederhana, Cepat dan Biaya Ringan." *Jurnal Penelitian Hukum De Jure* 20, no. 3 (2020): 379-390. For further discussion concerning to this issue, *please also see* Setyowati, Retno Kus. "The Conclusive Phase of Civil Case Resolution: Examining Execution and Post-Decision Challenges in Indonesian Civil Procedural Law." *Unnes Law Journal* 9, no. 2 (2023): 311-332; Pratiwi, Sahira Jati, Steven Steven, and Adinda Destaloka Putri Permatasari. "The Application of E-Court as an Effort to Modernize the Justice Administration in Indonesia: Challenges & Problems." *Indonesian Journal of Advocacy and Legal Services* 2, no. 1 (2020): 39-56.

also consist of legal facts not mentioned in the claimant's lawsuit.[83] The Mediation Procedure Regulation explained that this confidential procedure consists of a limited grace period explained herein.

In activating this jurisdiction, the district court judge shall delay the main procedure for 30 working days and the disputing parties shall choose the mediator within that period.[84] This medication may only be conducted for 30 working days since the order concerning the mediation commencement is announced.[85] The dispute settlement period can be extended into 30 working days, based on the disputing parties' consent and such request for extension shall be addressed to the judges examining the case.[86] The stipulation concerning the grace periods mentioned above is constituted under Article 24 of the regulation.[87] Article 27 of the Mediation Procedure Regulation states that a written peace agreement (*acte van dading*) shall be adopted by the disputing parties if the mediation procedure has succeeded.[88] Such a consensus shall not be adopted contrary to the law, public order, or morality, and it shall not cause an injury to a third party.[89] Furthermore, that peace agreement shall be executable by both parties.[90]

From the conceptual and technical explanations above, it can be understood that this mediation procedure has its essential elements mentioned herein: 1) The mediation procedure is a means of settling a dispute based on the consensus of the disputing parties; 2) Parties requested neutral and impartial third parties known as the mediator; 3) The mediator has no obligation to rule on a dispute, but it only must help both parties to find the proper solution to settle the dispute arising between them. Besides that, the peace agreement adopted by the disputing parties has a fortifying nature to the consensus

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[83] Anindito, Priyadi, and Awaludin. "Pelaksanaan Peraturan Mahkamah Agung Nomor 1 Tahun 2016Tentang Prosedur Mediasi di Pengadilan Negeri Banyumas."

[84] *See* Goldberg, Stephen B., Jeanne M. Brett, and Beatrice Blohorn-Brenneur. "The Roles of the Mediator and the Disputing Parties at Each Step of the Mediation Process." *How Mediation Works*. (London: Emerald Publishing Limited, 2017), pp. 17-57.

[85] *See* Silbey, Susan S., and Sally E. Merry. "Mediator settlement strategies." *Mediation*. (London: Routledge, 2018), pp. 183-208.

[86] Grappo, David. "Questions litigators ask about mediation." *Dispute Resolution Journal* 55, no. 2 (2000): 32-43.

[87] Anindito, Priyadi, and Awaludin. "Pelaksanaan Peraturan Mahkamah Agung Nomor 1 Tahun 2016Tentang Prosedur Mediasi di Pengadilan Negeri Banyumas."

[88] Goldberg, Brett, and Blohorn-Brenneur. "The Roles of the Mediator and the Disputing Parties at Each Step of the Mediation Process."

[89] Grappo, "Questions litigators ask about mediation."

[90] Grappo.

adopted by both parties and it has an executorial power as a judicial decision.[91] The peace agreement executorial power stems from the universal principle of *pacta sunt servanda,* obliging parties to an agreement to implement their agreement in good faith.[92]

Although a dispute between individuals, in this case, a foreign investor with a governmental body is generally qualified as an administrative dispute under the Indonesian legal system, it may still be settled through a district court. This statement is addressed based on the fact that a tort conducted by a government (*onrechtmatige overheidsdaad*) shall be filed to the administrative court based on Law Number 30 the Year 2014 concerning the Governance Administrative (hereinafter, the 'Governance Administrative Law') and Supreme Court Regulation Number 2 the Year 2019 concerning The Guidance in Settling Government Measure and A Tort by the Government (hereinafter, the 'Supreme Court Regulation Number 2/2019'). In explaining the scope of these regulations, this article provides a finding concerning the explanation regarding "measure" in the tribunal of *OI European Group v. Venezuela* to provide its relevancies according to the IIL.

In defining the word 'measure', this tribunal states that "*it encompasses all types of administrative, legislative or judicial acts performed by any of the branches of the government of the Bolivarian Republic (or by any other entity for whose acts the Republic is liable by international law).*"[93] The tribunal also stated that although the measure is not defined in the Venezuela-Netherlands BIT, the measure shall be interpreted extensively. Such an approach was conducted through the implementation of Article 31 paragraph (1) Vienna Convention on the Law of Treaties 1969.[94] This stipulation *inter alia* stated that a treaty shall be interpreted in good faith in its context and the light of its object and purpose.[95] From the finding of this tribunal, it can be understood that the measure does not only consist of an act of a government in invoking abstract and concrete norm, but also of any act conducted for and on behalf of the host state.

Under Indonesian administrative law, the measure consists of a government legal act constituted under civil law and an act regulated under

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[91] Grappo.

[92] Schmalenbach, Kirsten. "Article 26: Pacta Sunt Servanda." In *Vienna Convention on the Law of Treaties: A commentary*. (Springer Berlin Heidelberg, 2018).

[93] Radi, *Rules and Practices of International Investment Law and Arbitration.*

[94] Dörr, Oliver. "Article 31: General rule of interpretation." In *Vienna Convention on the Law of Treaties: A commentary*. (Springer Berlin Heidelberg, 2018).

[95] Dörr.

public law. The government act constituted under civil law consists of any act which causes the government to be liable under the civil liability regime such as adopting an agreement with non-governmental actors. Meanwhile, a government act regulated under public law is any activity conducted for public purposes according to the regulations. This act also consists of discretionary measures, which shall not be invoked and conducted contrary to the material law. Since the discussion herein has discussed how Indonesia as a host state may be liable through a civil procedure *prima facie*, before being sued in an international arbitration tribunal, the next paragraph provides a discussion concerning how the Indonesian government may be liable before the administrative court.

The Indonesian administrative court is regulated based on three laws, namely Law Number 5 the Year 1986, Law Number 9 the Year 2004, and Law Number 51 the Year 2009 that should be read altogether (hereinafter, the 'Administrative Court Law'). Article 1 number 3 Administrative Court Law stated that the subject matter of this court is an administrative decree. This stipulation stated that an administrative decree is "*A written decree issued by a Governmental Organ or Authority consisting administrative law act (or public law act) based on the applicable regulation, having a concrete, individual, and final nature, having an effect to a natural person or a legal person.*" Article 2 of this law negatively expressed those measures which shall not be qualified as an administrative decree is: "*a. An administrative decree qualified as an act constituted by the civil law; b. An administrative decree having a general nature; c. An administrative decree which still requires the validity of a higher authority; d. An administrative decree issued based on the Criminal Code and the Criminal Procedural Code or other criminal law regulations; e. An administrative decree issued by a judicial organ based on the applicable regulation; f. An administrative decree of the Indonesian armed forces; and g. An administrative decree of the General Election Commission both at the national level and the municipal level.*"

To determine which dispute shall be understood as an administrative dispute, the classification mentioned above shall be interpreted systematically based on the Governance Administration Law explained above. Article 2 letter (a) mentioned that a civil law action of a government shall not be qualified as the subject matter of the Administration Court Law. However, since the Governance Administration Law expressed that a tort conducted by the government is qualified as an act that shall be contested in the Administrative Court, such stipulation shall be interpreted in a precautious manner. Therefore, a civil law action by the Indonesian government that fulfill the element of

Article 2 letter a of the Administration Court Law only consists of civil liability arising due to negligence in implementing a contract or a breach of contract.

Before discussing how the Administrative Court can be operated as one of the methods in implementing the cooling-off period, it is important to know the three types of examination under this law. The first type of examination is the normal procedure. This procedure requires the claimant to be examined under the dismissal procedure before the main examination by the tribunal, to ensure whether the claim can be contested according to the Administration Court Law or not. Despite the existence of the revolving door since this procedure has no certain period, the refusal of the dismissal procedure can be contested within fourteen days after the decree concerning the early examination is issued. The second type is known as the expedited trial (in Bahasa Indonesia: *acara cepat*) examination adjudicated by a single judge under a total period of 49 (forty-nine) days based on Articles 98 and 99 of the Administration Court Law. Unlike the normal procedure, this due process does not recognize the dismissal procedure. Finally, the third type of examination is the short examination which can be triggered due to the refusal of the decree concerning the dismissal procedure outcome constituted under Article 62 of the Administrative Court.

Since the administrative court procedure explained above has created a revolving door due to its lack of constitution concerning the grace period on the normal procedure examination, this matter can be fixed through the implementation of the cooling-off period mechanism. This article suggested that an ISDS arises due to an object in the form of an administrative decree that shall be settled through the normal procedure in the period of 90 days. This is without prejudice to the right of foreign investors to settle their disagreement based on a speedy trial or a short examination.

Meanwhile, for a measure invoked by the Indonesian government other than the administration decree, it shall be settled through mediation as explained above. This mediation will be effective to be used especially in a dispute arising due to the implementation and/or the interpretation of a state contract. As it is written in the Supreme Court regulation mentioned above, the period of the mediation shall be 90 (ninety) days as it is currently constituted. By utilizing both the administrative court and the mediation procedures explained in the paragraph herein, the chilling effect of the arbitration tribunal can be prevented by Indonesia. To ensure that these ideas have their legal certainties in nature, this article furthermore suggests that those mechanisms shall be adhered to the Indonesian Investment Law by amending Article 32 of the law.

Conclusion

From the *Tecmed v. Mexico* case, it can be understood that the cooling-off period is a mechanism necessary to be adopted by a state. Such necessity is caused by the notion that a state will directly feel the chilling effect of the IIL through its arbitration award if its national law or its investment agreement does not provide any stipulation concerning the cooling-off period or the exhaustion of local remedies.

Indonesia itself has implemented the practice of cooling off according to its ICSID case law. This can be seen in the *AMCO v. Indonesia* case and the *Oleovest v. Indonesia* case where Indonesia implemented this mechanism during the dispute settlement period. Furthermore, the cooling-off period has been scattered across several Indonesian BITs with other states and in its national law concerning the mediation procedure. However, it is unfortunate that Indonesian investment law does not constitute any stipulations concerning the cooling-off period and or the exhaustion of local remedies.

Due to such weaknesses and the important lesson learned from the *Churchill Mining v. Indonesia* case, this article suggests that Indonesia should amend the dispute settlement rule within the Investment Law. By amending that stipulation, foreign investors may utilize the mediation procedure explained above and the administrative court in settling the investment dispute that arose due to Indonesian government measures. From here, Indonesia might be able to avoid the chilling effect of the IIL. Such confidence lies within this article since the concepts of cooling off and the exhaustion of local remedies shall not be confused nor differed according to the Indonesian law perspective.

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Penanaman Modal Asing juncto Undang-Undang No 6 Tahun 1968 tentang Penanaman Modal dalam Negeri dan Undang-Undang No. 25 Tahun 2007 tentang Penanaman Modal." *Jurnal Legal Reasoning* 2, no. 1 (2019): 1-15.

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