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Indonesia's Bilateral Investment Treaties: Modernising for the 21st Century

By Arif Havas Oegroseno

Synopsis

Indonesia will be revising all its bilateral investment treaties for a fairer deal, but it is plainly inaccurate to say these will be terminated all at once, as wrongly portrayed by some. It is time for others to accept a 21st century Indonesia.

Commentary

INDONESIA'S INTENT to end bilateral investment treaties as they conclude their life spans has been questioned again and again by the Western media. One example is the article by The Financial Times "Miners attacks Indonesia mineral rules" on 1 July 2014. The global notion that Indonesia is bad news for foreign investors had come up previously in FT on 26 March 2014 entitled "Indonesia to terminate more than 60 bilateral investment treaties".

My colleague from the Centre for International Law of the National University of Singapore (NUS), Prof Michael Ewing-Chow, and his Indonesian colleague James Losari, have rightly challenged the use of the term "terminate" by FT. They preferred the more accurate expression "Indonesia is letting its bilateral treaties lapse so as to negotiate better ones".

"Terminate" inaccurate

This word "terminate" seems to have emerged from the Dutch Embassy Press Release last March which stated "Indonesia has informed the Netherlands that it has decided to terminate the Bilateral Investment Treaty". That release also stated that "The Indonesian Government has mentioned it intends to terminate all of its 67 bilateral investment treaties".

This notion is incorrect, yet since then, business and investors, international lawyers and academics viewed Indonesia as not investor-friendly. Indonesia is perceived as nationalistic and being unreasonable because it will terminate 67 BITs all at once.

Of course, Buy America or the promotion of European Industrial Champions is not economic nationalism, it is just good policy that all countries must consider to do as well. Imagine: Buy Indonesia Law! Buy Singapore Law! Buy Malaysia Law!

Dutch and Indonesian civil societies, however, considered the Indonesian move as “a brave decision”. They believed that Western BITs are aggressive and only represent corporate interests. The do-gooders may be right. But let’s be objective.

No doubt we are a brave people. We got our independence not as a benevolent gift from our former coloniser. We fought a long and bloody war in villages, cities, foreign capitals and the United Nations. However, in this context, the right and objective word is neither bravery nor nationalism. It is simply fairness, no fancy heroism or fanaticism.

History of BITs

BITs of Indonesia and many developed countries were signed in the 1970s, 1990s, and early 2000s, which means that most of them were made during the previous century. Some of them were actually signed during the Cold War. They were signed when global economic power has not shifted to Asia. And Indonesia was neither a stable democracy nor a member of G20. They were signed when Indonesian GDP was not USD 1.2 trillion, and Indonesian middle class was not 90 million.

The Indonesian economy was under the spell of the Dutch-led Intergovernmental Group on Indonesia (IGGI). And in those days, China and Korea were not global economic players.

The words “foreign investment” were identical to Western investment. Indonesians buying European football club (s) --- yes plural --- or investing in Europe, the US or Africa was an idea of a mad man.

One of Indonesia’s bilateral investment treaties was, and still, is intended to protect foreign investors’ investments in Indonesia only. It does not provide the possibility of protecting Indonesian investment in the home countries of the investors. In other words: no reciprocity; one-way street. Indonesia is considered just a place to play, not a player. Indonesia is perceived to be poor forever.

The reshaping of the world economy and global power has not only affected the nature of Indonesian and Asian economies, but also the nature of Indonesia’s partners themselves.

ASEAN, for example, will become a Community in 2015, something unimaginable in the previous century. And ASEAN, with its partners, is now negotiating the establishment of a regional economic partnership, the RCEP, covering three billion people. And in Europe, for instance, the EU of post-Lisbon Treaty has found itself in deeper integration that has created peace, stability and wealth in Europe that many in the world cherish.

Face of the 21st century

Today, EU member states cannot negotiate FTAs or BITs by themselves. The sovereignty on this matter has been transferred to the EU Trade Commissioner who wields a very powerful portfolio in Brussels.

Indonesia is not seeking to terminate all BITs unilaterally at once. Indonesia intends to discontinue the BIT in accordance with the terms of the Treaty. This is neither illegal nor nationalistic. It does not require rocket science to see that. Thus, the flurry of allegations by my fellow lawyers are neither warranted nor rational. It seems the expectation is that if Indonesia makes noise just brand it nationalistic and let the world loathe its policies.

The fact that Indonesia has 67 BITs from the previous century with many different forms and contents also beg the pertinent question whether Indonesia needs a template or standard BIT. Or should Indonesia just let every BIT be negotiated and signed individually without any regard for consistency and changing realities. I strongly believe that a consistent template is indeed needed to guide our BIT negotiators.

It should not come as a shock that Indonesia wants to update, modernise and balance its BITs. It would, however, be a shock indeed if today there are strong objections by others to change BITs signed in the previous century. It should equally be a shock that Indonesia is continually expected to

have one-way BITs, and remain like an old colonial playground that only sells raw materials with no added value.

Indonesia should work on a BIT template that is consistent with its national interests and international law. While constructing this, Indonesia should also invest in building a coterie of highly intelligent and assertive international trade and investment lawyers, equipped with proper mandates and resources to defend the country.

This team should work hard to end unfair investment practices through strong litigation against multinationals in international adjudications and refer as many cases as possible to the WTO for all kinds of unfair trade practices and protectionism imposed on Indonesia.

Surely, this is not nationalism. It is just what international law provides. It is just the face of the 21st century.

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