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JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate students from any major to contribute in scientific research and writing in regards to Business Law, Public International Law, Private International Law and Comparative Studies. The Editorial Board receives any research paper and conceptual article that has never been published in any other media. The writing requirement can be found at the inside back cover of this journal.

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

Legal research and writing are the two most paramount skills that must be possessed by law students. Realizing this, the Juris Gentium Law Review ("**JGLR**") exists to cater the rising need of law students to polish those aforesaid skills. As the first student-run scientific law journal in Indonesia, JGLR provides an opportunity for undergraduate students to not only channel their interest to express their views through writing articles, but to also hone their editing and organizational skills by becoming the Editorial Board.

It is evident that the quality of the articles submitted has been steadily increasing throughout the years, since Universitas Gadjah Mada awarded grants in show of full support and acknowledges JGLR as the top ten best academic journals published in the university. This marks a tremendous achievement that proves the capability of undergraduate law students to produce well-written academic articles, while also simultaneously run an excellent law journal.

Since its establishment in 2012, the JGLR family has been expanding – in terms of its writers, review experts and even readerships. Even though the journey to reach where they are now have not always been smooth sailing, I am proud to see these students fight against all odds and come out of the battles victorious. That being said, I would like to congratulate the Community of the International Moot Court and the JGLR Editorial Board for publishing yet another exceptional edition that is a pleasure to read. Hopefully, JGLR will grow to become one of the most premier scientific law journals in both Indonesia and the international world.

Prof. M. Hawin, S.H., LL.M., Ph.D

Dean of Faculty of Law

Universitas Gadjah mada

FOREWORD FROM THE PRESIDENT
COMMUNITY OF INTERNATIONAL MOOT COURT
FACULTY OF LAW UNIVERSITY GADJAH MADA

As an abode to law students who are driven, critical and longing to write, the Juris Gentium Law Review ("**JGLR**") has produced a total of five editions in the past five years. Each of the articles submitted dissects the most-heated legal issues of the particular period and thereby showcases the perspectives of the emerging generation. Aligned together, these articles illustrate the different transformations of multifarious public and private international laws over the years. By fostering this culture of expression through writing, JGLR has delivered its commitment to help law students develop their legal knowledge and skills in preparation against the ever-changing world. After all, I believe that JGLR's intention to provoke law students to convey their responses on the ongoing legal challenges is what led to its remarkable success.

As the President of the Community of International Moot Court, I hereby present JGLR's fifth edition with pride. This year, the articles take contemporary issues, revolving around the topics of business law, investment law and space law, to an intriguing edge. The writers demonstrate a thorough understanding of international legal aspects, without leaving out their genuine concern towards the betterment of Indonesia's legal decisions and application of laws. With a balanced discussion on both international and national contexts, this edition undoubtedly adds a new paradigm that appeals to the readers at a personal level and hence invites them to ponder along.

As for future endeavors, JGLR is envisioned bring together a diverse pool of law students and legal practitioners as writers and executive reviewers respectively. In furtherance, it is my utmost hope for the publications to be widened in order to expand the valuable knowledge poured into this writing to readers from various universities. May JGLR continue to be the media that nurtures two of the most compatible passions of all time: law and writing, and may this be contagious through reading our journal.

Adrian Aditya Prakoso

President of the Community of International Moot Court
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE EDITOR IN CHIEF

JURIS GENTIUM LAW REVIEW

FACULTY OF LAW UNIVERSITY GADJAH MADA

It is with my utmost pleasure to present you the 4th Volume of Juris Gentium Law Review. As a law journal that is fully run by students, Juris Gentium Law Review strives to develop the interest and enhancing students' ability on legal writing. Their journal will also be examined and reviewed by profound and exceptional Executive Reviewers that wield expertise on each journal.

The quality of this year's journal is outstanding. Refah Gagrag Anyar in her "*Analysis on the Subject of Bilateral Investment Treaties Termination*" gives us a view and understanding on the concerns on the wave of BIT terminations conducted by several countries, including Indonesia. Within Dio Herdiawan Tobing's and Olivia Natasha's "*Celestial Anarchy: States' Right to Self-Defense in Outer Space*", they analyzes legal and political frameworks applicable to limit state's right to self-defense in outer space as states aimed to Weaponized Outer Space. Naila Sjarif and Rizki Karim in their article on "*Deciphering the Dystrophic Riddle of Trans-Pacific Partnership Agreement's Isds: Is It Really worth Joining, Indonesia?"*, questioning Indonesia's intention to join the *Trans-Pacific Partnership Agreement,* particularly by analyzing the *Investor-State Dispute Settlement*. Bunga Dita Rahma Cesaria in her "*Harmonization of International Sales Law: CISG as Supplement to Indonesian Contract Law*" promotes the use of CISG in Indonesia, as CISG adheres with the Indonesian contract law, therefore she gives an analyses on the issue and promotes the use of CISG. Lastly, Olivia N. Maryatmo and Ardhitia P. Rusyadi in "*The Legality Of 'Disgorgement Of Profits' In Case Of A Breach Under CISG",* discusses how the method of disgorgement can be intertwined with the use of CISG in order to calculate damages.

Undoubtedly, I could not have published this edition without the countless effort and hardwork from this year's high-reaching Editorial Boards; Anaq Pratama, Naila Sjarif, Olivia Natasha, and Refah Gagrag Anyar. They were very patience and determined ever since the inception of this edition. I would also like to thank the Faculty of Law, Universitas Gadjah Mada, exceptional Executive Reviewers, and fellow seniors of the past editorial board who have fostered Juris Gentium Law Review

Albertus Aldio Primadi

Editor in Chief of Juris Gentium Law Review

Faculty of Law Universitas Gadjah Mada

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AN ANALYSIS ON THE SUBJECT OF BILATERAL INVESTMENT TREATIES TERMINATION*

Refah Gagrag Anyar**

Abstract

Bilateral investment treaties (BITs) are a major subset of international investment agreements, in which two States agree to promote and protect investments made by investors from respective countries. Many States have been willing to give up certain immunities and privileges for perceived economic benefits associated with BITs. In recent years, however, a slew of countries have voiced their dissatisfaction with the current international BIT regime and indicated intentions to terminate their BITs. Most, but not all, are developing countries, Indonesia included. This wave of terminations raises concerns about the stability of BITs and their future, and also questions on whether or not a rule of customary international law in regards to the termination of BITs is currently developing. This article analyses the State practices on BIT terminations in an attempt to further understand their legal effects and underlying causes, and also to discern whether these State practices form a pattern that can lead to the development of a new customary international law.

Intisari

Perjanjian Investasi Bilateral (BITs) adalah subset utama perjanjian investasi internasional, dimana dua Negara sepakat untuk mempromosikan dan melindungi investasi yang dilakukan oleh investor dari Negara masing-masing. Banyak Negara telah bersedia untuk menyerahkan kekebalan dan keistimewaan tertentu untuk manfaat-manfaat ekonomi terkait dengan BITs. Tetapi dalam beberapa tahun terakhir beberapa Negara telah menyatakan ketidakpuasan mereka dengan rezim BIT internasional saat ini dan menunjukkan niat untuk mengakhiri BITs mereka. Kebanyakan, walaupun tidak semua Negara tersebut merupakan Negara-negara berkembang, termasuk Indonesia. Gelombang pemutusan ini menimbulkan kekhawatiran tentang stabilitas BITs dan masa depan mereka, serta menimbulkan pertanyaan apakah aturan hukum kebiasaan internasional dalam pemutusan BITs sedang berkembang atau tidak. Artikel ini menganalisa praktik Negara pada pemutusan BIT dalam upaya untuk lebih memahami akibat hukum mereka dan penyebab yang mendasarinya, dan juga untuk melihat apakah praktik Negara ini membentuk pola yang dapat mengarah pad pengembangan hukum kebiasaan internasional yang baru.

Keywords: bilateral investment treaties, termination, international investment law
Kata Kunci: perjanjian investasi bilateral, pemutusan, hukum investasi internasional

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** 2014; Business Law; Faculty of Law; Universitas Gadjah Mada, Yogyakarta, Indonesia.

A. Background

The first BIT was concluded in 1959 between Germany and Pakistan.[1] There are now over 2500 BITs in force (UNCTAD, 2013). This dramatic increase is mainly attributed to perceived economic benefits, such as increases in the flow of foreign direct investment (FDI). While there are studies that underline the positive effect of BITs on FDI (Neumayer & Spess, 2005), a sizable number of countries have opted to terminate their BITs,[2] whether due to dissatisfaction with a prevailing BIT or accession to a regional economic organization. [3] This sparks concerns about the stability of the BIT regime and the fate of associated FDI. The question that follows, and the focus of this article, is how does States approach BIT termination? We will examine the practices of State when terminating the BIT. State practice is the general, consistent behavior of States regarding certain issues and one of the key components in ascertaining whether a rule of international customary law exists, alongside *opinio juris,* which is a sense of belief of the State that what they are doing is legally necessary. This article analyzes how and why States terminate their BITs, using data from the United Nations Conference on Trade and Development (UNCTAD), World Bank and Organization for Economic Cooperation and Development (OECD), and other international organizations. Part II of this article discusses the motivations behind BIT terminations. Part III analyzes state practices practice upon terminating BITs. Part IV discusses the legal effects of terminations and their effectiveness of various method of terminations. Finally, Part V considers the future of BITs.

B. Understanding the Motives Behind BIT Terminations

i. The economic benefits of BIT: real or illusory?

It is useful to analyze States' motives in concluding BITs, before analyzing why states may want to terminate BITs. In the 1980s and 1990s, when a sizeable number of BITs were concluded, a notion prevailed that BITs would increase FDI. Developing countries, eager to attract FDI were quick to conclude BITs with developed capital-exporting countries. In this period, BITs more closely resembled standard contracts rather than typical treaties between sovereign nations. Capital-exporting countries usually relied on a template or model BIT, to which developing countries usually agreed subject to few or no amendments, either because they had little negotiating power or they simply are too eager to conclude BITs and experience the alleged growth in FDI to care much about the terms. These model BITs also explain why many BITs are very similar and, despite their numbers, only a few BIT types exist. A typical modern BIT includes provisions designed to offer absolute (i.e. treatment in which the exact meaning is already pre-determined) and relative (i.e. treatment in which the meaning is determined by the treatment accorded to other investors) standard of treatments to investors, protections against expropriation or nationalization, investor-state dispute

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[1] See, the Entry into Force of Bilateral Investment Treaties, IIA Monitor No. 3, New York and Geneva (UNCTAD 2006), p. 2.

[2] See for example, the termination of Indonesia-Netherlands BIT. See for example, the termination of South Africa-Benelux BIT. A couple of countries, like Ecuador and Bolivia have gone further and denounced the ICSID Convention, which is the basis of many investor-State arbitration rules.

[3] Several EU Member States that joined in the 2000s have concluded BITs with older EU Member States prior to their accession, creating a network of intra-EU BITs. The European Commission has stated that these intra-EU BITs are obsolete and has asked Member States to terminate them.

settlement and other privileges, such as guarantees against restrictions on investors freely transferring money between contracting states.

Such privileges and benefits were designed to make a country as attractive as possible to investors. However, some evidence suggests that BITs may not have a significant economic impact. A 2002 study by World Bank suggests that "even the relatively strong protections in BITs do not seem to have increased flows of investment to signatory developing countries." This study further states that "countries that have concluded a BIT were no more likely to receive FDI than were countries without such a pact." Indeed, when one sees what has happened in Brazil, a country that has seen substantial FDI growth despite having no BITs currently in force, and compare this to the plight of some Central American nations which, despite having a great number of BITs in force only see little FDI growth (Peterson, 2004), one may conclude that the perceived economic advantages of BITs have been exaggerated. This may have contributed to the backlash against BITs.

ii. Abundant international arbitrations

Many of the countries that have recently opted to discontinue their BITs are developing countries. [4] Some of these developing countries are currently or have been involved in investor-state disputes.[5]

The dispute settlement clause in a BIT typically enables an investor to initiate a claim before an international arbitration tribunal against the contracting state for violations of the BIT's provisions. Such clauses were initially designed to protect investors from the alleged biases of local courts and provide them with another avenue of legal recourse where local remedies were impossible or cumbersome.

Countries usually have to issue policies in the name of public interest and fulfilling domestic and international developmental goals. Some of these policies can be quite intrusive, such as having a quota for domestic workers (which some countries claim is important to protect domestic workers from cheaper immigrant labor), restricting foreign access to certain industries, or giving preferences to certain marginalized groups in certain industries (which some countries claim is necessary to correct inequality).[6] These policies may be interpreted to be violating some of the substantive protections included in the BIT, such as fair and equitable treatment, and the non-discrimination principle. But even though states contend that these policies and regulations are necessary, most BITs do not have exceptions for policies designed to fulfill development goals. If an investor considers a policy or a regulation to be

[4] "Developing countries" in this journal article shall be defined as countries that are listed as "low-income countries" or "lower middle-income countries" or "upper middle-income countries" by the World Bank. According to the UNCTAD IIA database, 41 out of 68 BITs that have been terminated and not replaced involved at least one country in one of those three listed categories.

[5] See for example, *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia* (ICSID Case No. ARB 12/14 and 12/40). In 2007, a group of Luxembourgian and Italian investors brought a claim against South Africa under the South Africa-Italy BIT and the South Africa-Luxembourg BIT, claiming that the enactment of an act was a form of expropriation. The case was settled in 2010 which precluded deciding on the merits.

[6] For example, the claim that was brought by the Luxembourgian and Italian investors against South Africa is prompted by a bill that would give Black Africans, who have been historically marginalized, preferences over foreign investors and domestic White African investors in mining rights. While investors claim that the bill is discriminative, the South African government contends that the bill is needed to correct the injustice that has been borne by Black Africans for years.

violating their rights under the BIT, they could threaten to take a state to international arbitration.

Arbitration is expensive and not all countries can afford it. Moreover, there have been several studies that suggest that, relative to their per capita incomes and budgets, developing countries pay more than developed countries when defending themselves in international arbitrations. One must also take into account the large compensation amounts investors seek, which often reaches hundreds of millions of dollars.[7] It is not very surprising then, that a lot of countries chose to settle with investors making claims instead of going to arbitration.

Some recent examples of international arbitrations influencing governmental policy-making are when the Togolese and Australian governments were planning to introduce a plain-packaging policy to reduce cigarette consumption in their countries. A tobacco company threatened to initiate international arbitrations against both states under respective BITs if they proceeded with their plain-packaging policies. Furthermore, they sent a letter insinuating to the Togolese government that the plain-packaging policy would violate their constitution and binding regional and international agreements, and that Togo was in no position to anger their international partners; the Togolese government decided to scrap their proposed bill.[8] The Australian government decided to proceed with its bill and face the prospect of arbitration.[9] While the case against the Australian government was dismissed on jurisdictional ground, the Togolese government's decision to abandon its policy presents a clear example of how the mere threat of arbitration can influence a state's policy-making process. Considering that arbitrations often proceed behind closed doors and that settlement details with investors are also often confidential, which may lead to certain transparency issues. Some states pride themselves on having an independent legislature, and may not take too kindly to foreign investors using an arbitration clause as leverage to influence their decision-making process.

Judicial corruption and partial law enforcement are real issues that face investors, especially those who invest in developing countries. Historically, cases of forced expropriation and nationalization by a government have been supported by the judiciary, leaving investors with no legal recourse to recoup their assets. Local law also may also not uphold international standards. International arbitration is also sometimes more swift and effective compared to local court proceedings, which may go on for years. A BIT is designed to prevent such things from happening again, but the perceived disadvantages of investor-state dispute settlement clauses and arbitration threats by overzealous investors may have spurred some countries to shun BITs altogether.

C. State Practice Regarding BIT Terminations

i. Termination Clause

In the international law of treaties, a treaty is considered lawfully terminated if the procedure prescribed in the treaty itself is followed, or if all of the contracting parties consent to termination.[10] Most BITs have a termination clause that provides that

[7] For example, Churchill Mining seeks $1 billion in damages from Indonesia.

[8] Se: The Economist (2016, August 6). No logo. *The Economist*. Retrieved from: http://www.economist.com

[9] The case would then be adjudicated in the PCA as *Philip Morris Asia Limited (Hong Kong) v. the Commonwealth of Australia.*

[10] See VCLT, Article 59

the treaty will remain in force for a number of years before it can be terminated. The termination clauses in modern-day BITs are broad and varied, but they typically fall into two categories (UNCTAD, 2013). Either the treaty will remain in force for a number of years and thereafter it will:

- remain in force indefinitely until terminated. After the initial 'entry into force' period, a contracting party may invoke the termination procedure at any time. This is known as an "anytime termination" clause;[11] or
- there will be a window period when a contracting state may invoke the termination procedure. If the window period elapses with no termination, a second 'entry into force period' will commence. A contracting state may not invoke the termination procedure outside of the window period. This is also known as an "end-of-term termination" clause.[12]

Most BITs fall under the first category (UNCTAD, 2013). Regardless of the type of termination clause, there will usually be a waiting period before a termination can take effect. Generally, the termination clause only requires the contracting state to notify the other contracting state of its intention to terminate the BIT. This notification will trigger a waiting period after which the BIT will be terminated regardless of whether the other contracting state consents. Therefore, the procedure ascribed in the BIT falls under the category of unilateral termination.

Given it is easy to determine the exact termination date and the consent of the other contracting state is not required, countries tend to prefer the procedure laid out in the BITs when terminating them.[13] For example, Indonesia chose to use this method when terminating its BIT with The Netherlands, which had an "end-of-termination" clause. Ecuador also chose to follow this termination procedure when it terminated its BIT with the United States, which had an "anytime termination" clause. However, it is not very effective time-wise, as countries may have to wait a number of years before they can terminate, and vis-à-vis end-of-termination BITs, they would also have to be precise in doing so during the window period, or else they would risk putting the BIT in force for a number of years without there being a possibility of termination. This is not a viable option to states that have to terminate their BIT in order to conform with requirements laid out by a regional organization e.g. the European Union. This explains why there are some states that terminate their BITs outside of the ascribed procedure.

To ensure the legality of their action, most States when terminating their BITs prefer to follow the procedure laid out in the relevant BIT.[14] Nonetheless, it is possible to terminate outside of the procedure if both contracting parties consent. Terminating a BIT in this way is considered risky, as there is no definite legal definition of "consent" and one cannot make sure when the treaty is terminated. Considering that most BITs have very strict time-based rights and protections (e.g. relating to the sunset clause), this would only create confusion.

[11] See for example, South Africa-Nigeria BIT; see also, South Africa-Denmark BIT

[12] See for example, the Netherlands-Bangladesh BIT; see also, the Netherlands-Indonesia BIT.

[13] According to the UNCTAD IIA database, there are 53 cases of BIT termination categorized as"unilaterally denounced."

[14] According to the UNCTAD IIA database, there are 18 cases of BIT termination by consent, compared to 53 cases of BIT termination by expiration and unilateral termination.

The Vienna Convention on the Law of Treaties states that if a Party wishing to terminate a treaty notifies the other contracting party of its intention, and the other contracting party makes no objection for more than three months, "the party making the notification *may carry out*…the measure which it has proposed." [15] [Emphasis added.] The words "may carry out" are problematic as it is not clear whether the party wishing to terminate can terminate the treaty outright, or that it can carry out the procedure to terminate the treaty but the other party would still be able to make an objection past the three months date.. Some suggest that the treaty would still be operable until at least the acquiescence of the other contracting party has been established (Dorr & Schmalenbach, 2012) but again, there is no one definite way to establish acquiescence and it has to be assessed on a case-by-case basis. Considering most BITs have very strict time-based rights and protections (e.g. the sunset clause), it is paramount to accurately determine the exact date of the termination as it would influence the validity of investor claims.

Due to the legal uncertainty associated with this procedure, there are only few instances of states using it. Although, when both parties are willing and consent is clearly established, it is a useful and powerful tool to effectively terminate a BIT as one does not have to wait for the ascribed duration of the official termination procedure to take effect.[16]

ii. The Consequences of a BIT Termination

When a BIT is terminated, the host state is no longer required to afford investors that are nationals of the other contracting state the privileges and protections provided in the BIT. However, most BITs have a "survival clause". [17] This sunset clause ensures that existing investments still enjoy the privileges and protections under the BIT for a specified number of years after the termination. As a result, it is ineffective to terminate a BIT for the purpose of invalidating an ongoing investor-state arbitration. To get away from the survival period mandated by the BIT, a state could withdraw from the relevant multilateral investment arbitration treaty, as did Bolivia and Ecuador when they withdrew from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (otherwise known as the ICSID Convention). But if the relevant BIT provides for recourse to another international arbitration tribunal, the claims would still have to be faced in such a tribunal. Barring very exceptional circumstances, a BIT termination could only prevent future investor-state disputes from going to international arbitration.

But not every country that terminates their BITs keep them terminated. A large number of them renegotiate at a later date.[18] Perhaps, over the years a country will gain a more advantageous bargaining position and become dissatisfied with the current BIT regime. But negotiating a new treaty is time-consuming. It could take months, perhaps even years, for a new BIT to be signed. Meanwhile, investors will be stuck in limbo, especially if the new BIT would only afford protections to investments

[15] Vienna Convention on the Law of Treaties, Article 65.

[16] For example, Ireland and Italy when terminating their intra-EU BITs opted to use this method instead. So far they have not faced any repercussions.

[17] See for example, Article XII of the Ecuador-United States BIT

[18] In the UNCTAD database, there are 104 cases of BIT termination and replacement involving developing countries.

made on or after the date of its entry into force.

On the other hand, terminating a BIT might have detrimental effects to FDI. New investors might hesitate in investing if they are not sure they would be guaranteed the same privileges and protections as those that came before. And, as stated above, a BIT is very likely the only protection investors have when dealing with an unstable government. A BIT termination could be taken as a signal that the government of a country is not very welcoming to investors.

iii. BITs: What Happens Next?

Though this wave of BIT terminations is quite concerning, in the long run, BITs will remain an important part of the international investment agreement network. While investor-state arbitration may be one of the leading causes of BIT termination, there is little evidence that investor-state dispute settlement clauses will be dropped altogether. A more likely course is a negotiation of more limited dispute settlement clauses, which will, for example, require investors seek remedies through local courts first or barring certain important measures to be brought to arbitration.[19] There is also a recent trend for multilateral investment treaties and free trade agreements to adopt a more BIT-like approach by including some clauses found in BITs, such as the investor-state dispute settlement clause. An example of such clauses can be found in the Trans-Pacific Partnership Treaty, which Australia has agreed to join. Some countries that have terminated their BITs now would still have obligations arising from some multilateral investment agreements.

However, the questions that arise when a country terminates their BITs should not be ignored. There has to be a reform in the international investment regime, not only in the way that international investment agreements are drafted, but also in how international investment arbitration tribunals work. The concerns about the transparency of international arbitration courts, the compatibility between BITs and developmental goals, the balance between government and investor rights and obligations are valid, but the solution is not to shun BITs altogether. That would be like amputating an arm when stitching the wound would suffice. Countries would need to band together to correct these deficiencies, perhaps by including clauses in the BIT that would allow leniency on policies that aim to fulfill developmental goals, pushing for more transparent and consistent arbitration tribunals, fostering dispute avoidance and promoting more peaceful alternative dispute resolution methods, such as mediation and conciliation

[19] A recent example of this type of dispute settlement clause is found on the Australia-Korea Free Trade Agreement.

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CELESTIAL ANARCHY: STATES' RIGHT TO SELF-DEFENSE IN OUTER SPACE*

Dio H. Tobing and Olivia N. Maryatmo*****

Abstract

This article examines to what extent States' right to self-defence should be applied in the outer space. The concept of self-defence within international regulations remains debatable. Brought by the existing reality in international system, this article analyses and suggests in further details that the act of States' right for self-defence should be limited to the act of militarization and not weaponization in the outer space. The argument in this article is carried by the perspective of realism that argues the structure of international system as an anarchy in which states are naturally competing one and another for the purpose of power due to the effect of living within power stratification. Consequently, if states are allowed to exercise their right to self-defence without any limitation, the context of self-defence becomes broader and will constitute a threat towards international peace and security. Therefore, the right of states to self-defence should be limited within the context of outer space to support only military purpose without any form space-to-space, space-to-earth, or earth-to-space weapons.

Intisari

Artikel ini menelaah sejauh mana hak bela diri suatu negara dapat diaplikasikan di ruang angkasa. Perdebatan penerapan konsep dari hak bela diri yang dianut di aturan internasional menjadi status quo. Didorong dengan adanya pengaturan di dalam tatanan internasional, artikel ini menganalisa dan memberikan saran serta arahan bahwa hak bela diri suatu negara seharusnya hanya dibatasi untuk militerisasi bukan untuk mempersenjatai ruang angkasa. Argumen didalam artikel ini terpengaruh akan sudut pandang realism yang menyatakan bahwa struktur hukum internasional dapat diibaratkan suatu anarki yang mana tiap negara berlomba-lomba untuk mencapai kekuatan yang paling hebat, hal ini dikarenakan adanya pemikiran dimana negara yang paling kuat akan menguasai. Maka dari itu, apabila negara diperbolehkan untuk menerapkan hak bela dirinya di ruang angkasa tanpa adanya batasan, maka konteks hak bela diri akan menjadi lebih luas dan menjadi ancaman tersendiri bagi perdamaian internasional. Sehingga, hak bela diri negara di ruang angkasa haruslah dibatasi hanya untuk militerisasi bukanlah untuk mempersenjatai dirinya.

Keywords: Self-defence, outer space, militarization, weaponization, space law.
Kata Kunci: Hak bela diri, ruang angkasa, Militerisasi, mempersenjatai, hukum ruang angkasa.

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A. The nature of self-defence in space

The exploration of the outer space was initially begun as agenda during the Cold War period. The Soviet Union was the first party initiating the launch of Sputnik I in October 1957 followed by Sputnik II. Seeing the Soviet Union has stolen the first start, later in January 1958, the U.S. began its space mission by launching the Explorer I in January (Launius, 2004). The space race of the Great Powers during the Cold War was seemed to be a common practice, however, after the fall of the Soviet Union, the space race has ended and the international community began to invest on their own space missions.

There has been a little argument during the time that the outer space would be used for military purposes. It was then only being used for the purposes of communication, which became the reason on why States launched satellites constantly to support the means of telecommunication. Nowadays, the issues faced by states are broader than space exploration. We have come into an age in which space is seen as a source of defence and economics. There has been a huge debate on the attempt of militarization of space and especially the weaponization of space made by states. However, the legal frameworks related to the utilization of the outer space made in the 20th century seemed to be lacking on regulation related to this matter.

The provision written on Art. 51 of the Charter of the United Nations grant "the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations". The concept of self-defense is one of the most relevant topics in international relations because it is a peremptory norm (Green, 2011), which can be utilized by states when others are infringing their sovereignty.

The right for self-defense is also very important because it justifies any action conducted by states to protect their people, territorial integrity, and any other domestic aspects. However, in the 21st century, the debate of individual and collective self-defense has extended up to the exercise on states' rights to conduct anticipatory or preemptive self-defense. This debate has been around the international community to justify active military exercise in foreign soil due to emergence of threat towards national sovereignty.

Similar to what is being debated by the international community, the contested concept of 'anticipatory' or 'preemptive' of self-defense have drawn-out to the outer space. The notion of preemptive self-defense is about the use of force by a state to repel an attacked before an actual attack has taken place, before the army of the enemy has crossed its border, and before the bombs of the enemy fall upon its territory (Lohr, 1985). The word 'anticipatory' refers to the ability to foresee the consequences of an action and to take measures aimed at checking or countering those consequences (Joyner & Arend, 2000).

States may have right to do anything in airspace because the concept of sovereignty has made them eligible to do so if their actions do not breach other states' sovereignty, yet it is different on the case of space. The concept of sovereignty is not applicable in space, as Art. I of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies sets as follows;

> "The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their

> degree of economic or scientific development, and shall be the province of all mankind."

As well as what is being clearly emphasized under the provision of the similar treaty on Art. II, that;

> "Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."

In this regard, when this specific treaty has already provided regulation that no states in this world shall claim sovereignty in the outer space, the concept of sovereignty on the outer space can be concluded to be distinct from any other concept whether it is aerial, land, or water sovereignty. Reflected from the provision of the treaty, then states must refrain from any action that will endanger the existence of outer space and other nations (Vasilogeorgi, 2011) and thus, the nature of the outer space has shifted from any concept related of sovereignty because it is not subject to any claim. Being brought by this idea on the nature of the outer space, this article suggests that the employment of outer space for defense purpose under Art. 51 of the United Nations (UN) Charter shall only be limited to states' action of militarization and not weaponization.

Although, states may claim that such action related to the attempt of space weaponization would enhance the creation of peaceful environment for the benefits on mankind, and even though it seems this project would actually work in line with the UN through the Committee on the Peaceful Uses of Outer Space (COPUOS), the lack of agreement on understanding the definition of 'peaceful uses of outer space' provides advantages for states to conduct any action in which they believe would be 'peaceful'. However, it would bring massive disadvantages for the international community for this loophole in international law. Thus, if states' right for self-defense were not limited, there would be an increasing number of percentages on states' suspicions towards their neighbor and the sense of insecurity, which would constitute threat to international peace and stability.

B. Outer space in the system of anarchy

Before moving on the understanding related to space and the system of anarchy, we must fully understand the distinction of militarization and weaponization. An act of space militarization is very different towards space weaponization. While space militarization has been an accomplished fact since the early age of space era (Wolff, 2003), space weaponization remains having no single provision under legal term related to militarization and weaponization - not even the UN has provided legal term on this. Many scholars believe that militarization would be similar to weaponization but to a certain degree this is not accurate. It is indeed that militarization may end up in the act of weaponization, but fundamentally, they are different because space weaponization is related on states' use of space weapons, with attempt, whether, to target earth or space objects. Therefore, such words as 'space weaponization' is not only limited to the placement of weapons in the outer space as what many people have believed.

Canadian Government has submitted Working Paper on the agenda of Prevention of an Arms Race in Outer Space (PAROS) to the Conference on Disarmament (CD) on the classification of weapons as Earth-to-Earth (or Earth-to-Space-to-Earth), Earth-to-Space, Space-to-Space, and Space-to-Earth weapons. However, this is

not an agreed term because states have different agenda on the outer space, which leads to the lack of definition on "space weapons".

In the international community, the use of space weapons has not been entirely banned because states have different agenda related to the use of space, especially when it is related to militarization and weaponization. For instance, China and Russia have agenda to refrain from any action related to placement of weapons in space. This includes the placement of space-to-space and space-to-earth weapons, reflected on the draft treaty submitted to CD. However, seeing that the U.S. stayed abstain on the resolution of the UN General Assembly (GA) on "Prevention of an arms race in outer space" and firmly stands against on the resolution on "No first placement of weapons in outer space", the U.S. might have another hidden agenda in this issue. As an implication, thus, the U.S. does not classify yet the definition of space weapons.

Although space is not yet weaponized as there are no weapons deployed yet in space to attack terrestrial objects or active terrestrial weapon in purpose to target space, such action should preferably be eliminated. This is because the possibility of emerging space arms race in the future if not being prevented. Derived by the basic assumption of the "Realism Grand Theory" in international relations which emphasized on the idea of power maximization and security (Morgenthau, 1948), states are characterized as a power seeker because they exist in an international system characterized by the nature of "anarchy" (Bull, 1977).

Anarchy does not mean chaos at all, however, it simply describes the nature of international system in which would be very dependent on states' interests. Reflected form this idea, it also applicable to explain the existence of international regimes. Realism perspective does not ignore order on the existence of international arrangements, institutions, or regimes (Waltz, 1978). It simply argues that international regimes are determined by structural patterns in which it should be supported by capabilities and reflect systemic patterns, if not they would largely be ignored and break down (Gehring, 1994). This idea goes similarly in the case of space arms race.

Although the idea of space weaponization is claimed for self-defense purpose, if not being prevented, the strategic balance of power in international politics would be disrupted. The idea is derived by realist perspective, which argues that states' are naturally lust for power and therefore, the other states' attempt on pursuing space weapons would trigger the rest to do likewise, although the expansion of space weaponization is claimed on behalf of defensive purpose. This is the nature of international politics in which a defensive behavior of a state can be seen as an offensive measure by the rest because states are exist under the livelihood of power stratification in which they would naturally race to accumulate power in order to gain more influence or simply to balance others in order to achieve their national and self-defence interests. This idea is realized from the case 'space race' as an international agenda during the Cold War period. After around four months after the Soviet Union stunned the world through launching the Sputnik, the U.S. began to launch Explorer I, America's first artificial satellite, in January 1958 (New York Times, 2008). If space weapons are not to be banned, in the near future, the similar race will take place in more destructive manner.

C. International regulations on space weaponization

The concept of sovereignty for states extends to air, land, and water. There is no doubt for water sovereignty as regulated by The United Nations Convention on the Law of the Sea (UNCLOS) legally recognizing this issue. For the case of aerial sovereignty, the international community has also created a legal framework as codified in Art. I of the Chicago Convention regulating that "the contracting State has complete and exclusive sovereignty over the airspace above its territory" in which more or less has been ratified by all member states of the UN. As the case is different for the outer space as sovereignty does not extend to the outer space, supposedly, there should be an agreed definition on when does airspace ends and outer space begins.

Scientifically speaking, the outer space begins at approximately 100 km as proposed by aeronautical scientist Theodore von Kármán in which he believes that a vehicle would fly faster after passing this point (Jenkins, 2005). Unfortunately, speaking of a legal matter, there is no such international regulation that defines the legal distinction that strictly separates the airspace and outer space yet (Freeland, 2010). The implication on the lack of definition provided for the term "outer space" in legal science would be related to activities being conducted in space.

In this matter, even though some scholars argue that the altitude of 100 kilometers above sea level can be considered as relevant customary space law or "edge of space", in which any activities and objects placed beyond this "edge of space" would be considered as space activities and space objects (Ferreira-Snyman, 2013), there is no single international arrangement to agree on this custom, therefore, not all entities recognize this as an agreement due to the fact this idea has not been codified in international law. The implication would be states may claim their space activities being conducted within their sovereign airspace due to this obscurity.

The U.S. claimed that the outer space for them starts at the altitude of 80 kilometers and anyone who have travelled to an altitude of 80 kilometers or more shall be regarded as astronauts (Pimbblet, 2010). However, another scientific finding also claimed that space begins at 118 kilometers above Earth's surface (SPACE, 2009). The legal implication derived from such claims can be terrifying due to the lack of agreement on international level because astronauts deployed in the outer space are not 'standing' on its own country's sovereignty because they have stepped out from their country's legal boundaries of their sovereign airspace.

Furthermore, in the case of countries that acknowledge the legal edge of space below the approximate number of the so-called international custom and scientific findings, it would not be a problem. However, what if there are countries that launch weapon activities in the space and claimed that the activities fall under their sovereignty because it is still taking place within their airspace? The lack of definition of the term "outer space" would have great implication on human security and national security of a country when it is related to the act of militarization and weaponization. If the legality of weaponization of outer space for self-defense is not to be defined in this vacuum of legal definition on the outer space, states can claim that their weapon activity takes place within a country's airspace and not passing through the edge of space. Absolutely this action would have a great impact on the stability of the international environment due to the emergence of the sense on insecurity. To some extent, there is a possibility where space arms race can be triggered.

The first loophole which has been addressed related to international space

law lies on the definition of outer space and secondly, it is associated to the law on weaponizing the space. What is missing from Art. 4 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies and other international treaties regulating space activities is related to the placement of weapons in which do not fall under the categories of nuclear weapons or Weapons of Mass Destruction (WMDs). The first paragraph of Art. 4 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies only says as follows;

> "States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner."

If we analyze the wording in the aforementioned article, it is clear that the sentence in bold only regulates the placement of nuclear and WMDs and does not provide a legal basis containing prohibition to proliferate other types of weapons in space. In other words, the specification provided in the Art. 4 of the treaty only refers to nuclear weapons and WMDs, thus it entails a deliberate exclusion of conventional weapons on the part of the framers of this specific article from the scope of its application (Bourbonnie□re, 2007). Consequently, this loophole in international law can lead to the possibility of states claiming that their action on placing weapons in space does not violate international law because the attempt of such 'weapon installment' is not governed under the treaty.

However, nobody can actually ensure that such weapon that is being installed falls under the categorization of nuclear of WMDs or not. Therefore, there is a high necessity to ban all action related to the placement and installment of any kinds of weapon in the outer space, although the claim is non-nuclear or non-WMDs and in like with the purpose of self-defense. The importance to limit states' action on the outer space is needed to ensure that space arms race does not emerge as it will disrupt international stability in the system of anarchy.

Related to the attempt to entirely ban the placement of weapons on the outer space, the People's Republic of China and Russian Federation have already introduced draft Treaty for negotiation since 2008 to the CD named as Prevention of the Placement of Weapons in Outer Space and of the Threat or Use of Force against Outer Space Objects (PPWT). However, although the treaty was updated by revision in 2014, still, One Major Power in international community, the U.S., remains staying as an opposing actor towards the treaty.

The U.S. claimed that the "draft PPWT (CD/1985) proposed by Russia and China, like the 2008 version, remains fundamentally flawed". This is very worrying because the U.S. delegation put justification that, "it is not possible with existing technologies and/or cooperative measures to effectively verify an agreement banning space-based weapons," when there aim of the draft PPWT is to "prevent outer space turning into a new area of weapons placement or an arena for military confrontation and thereby to avert a grave danger to international peace and security" by mainly not to place any weapons in outer space and not to resort to the threat or use

of force against outer space objects of States Parties.

Another worrying fact is also related to the adoption of the General Assembly Resolution A/RES/69/32 concerning the commitment of international community on "No first placement of weapons in outer space". The U.S. is one of the parties in which voted against the resolution. Related to this, the international community is to question what is the agenda of the "space racer" countries in space.

Although some people argue that the UN Charter Art. 2 (4) indeed provides that "*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*" and even though the provision of Vienna Convention on the Law of Treaties on the "later treaty" would prevail over an "earlier treaty" is not applicable due to effect of Art. 103 of the UN Charter, this means that the right to individual and collective self-defense as a *jus cogens* norm would also prevail over the prohibitions contained in the Outer Space Treaty (Bourbonnie□re, 2007).

Due to its *jus cogens* nature, self-defense will always prevail. Therefore, there should be an international agreement to limit the extent of self-defense that should be applied in outer space and to prevent states' argument of anticipatory or preemptive self-defense. If the loophole of international space law is to be closed by establishing frameworks on elaboration of the extension on the right to self-defense application in outer space, space arms race can be prevented due to the fact that *lex specialis derogat lex generali* rule is widely-accepted in international sphere.

If there is a guideline on the application of self-defense in outer space, the UN Charter would still remain as the most fundamental source of law yet the specific rule will prevail. As the expected guideline is to prevent weaponization but only grant militarization as a matter of self-defense, thus, insecurity of states on arms race would be decreased and stability of international community would be restored. At last, there is a shared burden to ban space weaponization to limit alibi likewise the justification that if a humanitarian crisis creates disruptive towards international order that would likely soon create an imminent threat states, then, pre-emptive attack can be considered as self-defense (Tobing, 2015) due to the legal vacuum on the extension and practicality of states' rights to self-defense.

D. Conclusion

States' outreach for their outer space interests is not merely a dream anymore. We are currently living in a space era where all of us, entities of the Earth, are depending on the use of space for daily life purposes. Similar to the interests of individual, states individually would pursue their national interests for the benefits of their being. As reflected on the UN Charter, the right to self-defense has been a primary interest of states to ensure their livelihood by exercising 'self-help' to ensure their 'survival'. In the system of anarchy and the uncertainty of international regulation on the use of space, states will pursue their security interests as the steps are clear in this space age of the world. Therefore, as what the article argues, there should be a shared burden in the international community to close the loophole of the outer space treaty, particularly as being mentioned, to define the legal edge of space, the regulation on the placement of conventional weapons, and also to create a specific regulation on to what extent states' rights to self-defense shall be enacted in space. These regulations should be taken into account in international

policy-making process in order to prevent space arms race and warfare from emerging by justifying such actions conducted by states are in accordance to the right of self-defense, codified in Art. 51 of the UN Charter.

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DECIPHERING THE DYSTROPHIC RIDDLE OF TRANS-PACIFIC PARTNERSHIP AGREEMENT'S ISDS: IS IT REALLY WORTH JOINING, INDONESIA?*

Naila Sjarif** **and Rizki Karim*****

Abstract

*Indonesia's discomfort of being overly exposed to international claims lodged by foreign investors is prominent – up to the point wherein it intended to terminate or let lapse all of its Bilateral Investment Treaties ("**BIT**") in 2014. In the same year, Indonesia declared its intention to join the Trans-Pacific Partnership Agreement ("**TPPA**"), a newly emerging and potentially the largest free-trade agreement worldwide. In light of the foregoing, this Article will focus on TPPA's investment chapter, particularly the Investor-State Dispute Settlement ("**ISDS**") provision, as a ground to justify Indonesia's intention to join the TPPA considering Indonesia's well-known discomfort over ISDS provisions currently exist in its BITs. On its façade, TPPA's investment chapter purports to heal the past wounds inflicted by ISDS systems upon States by containing safeguards to cushion host-States' common fears of being attacked by foreign investors' claims. This either tilt heads in disapproval or spark an interest for countries to join. The debatable credibility of TPPA's ISDS provision gave rise to this Article's analysis on whether such provision would really console some of the concerns of host-States, specifically Indonesia, in relation to the ISDS mechanism currently in force in their investment treaties.*

Intisari

Indonesia terkenal atas ketidaknyamanannya untuk terlibat dalam klaim internasional yang diajukan oleh investor asing—sampai-sampai berniat untuk mengakhiri semua Perjanjian Investment Bilateral (Bilateral Investment Treaties/"BIT") pada tahun 2014. Di tahun yang sama, Indonesia mengutarakan niatnya untuk bergabung dalam Trans-Pacific Partnership Agreement ("TPPA"), sebuah perjanjian perdagangan bebas baru yang berpotensi menjadi perjanjian perdagangan bebas terbesar di dunia. Artikel ini akan fokus kepada bagian investasi dari TPPA, khususnya pada pasal penyelesaian sengketa antara Investor dan Negara (Investor-State Dispute Settlement/"ISDS"), sebagai dasar pembenaran niat Indonesia untuk bergabung dengan TPPA, dengan mempertimbangkan ketidaknyamanan Indonesia atas pasal-pasal ISDS yang ada di BIT saat ini. Pasal-pasal investasi TPPA dimaksudkan untuk menenangkan Negara dengan memberi perlindungan kepada Negara tuan rumah dari serangan klaim investor Asing, walaupun mengundang celaan dari beberaoa pihak. Kredibilitas yang belum pasti dari pasal-pasal ISDS TPPA memunculkan analisis dari Artikel ini, bahwa apakah ketentuan tersebut akan menyembuhkan ketakutan Negara, Indonesia khususnya, dalam hubungannya dengan mekanisme ISDS yang saat ini sedang berlaku di perjanjian investasinya

Keywords: Trans-Pacific Partnership Agreement, Investor-State dispute settlement, foreign direct investment, Indonesia

Kata Kunci: Trans-Pacific Partnership Agreement, penyelesaian sengketa Investor-Negara, investasi asing langsung, Indonesia.

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A. Introduction

Should it finally be ratified, the Trans-Pacific Partnership ("**TPP**") will be the largest free trade area in the world. The agreement itself, TPPA, was released in late November 2015, and compressively covers rules ranging from, Technical Barriers, Telecommunications, Rules of Origin, Intellectual Property, Investment Protection, and many more.

TPPA was negotiated, and subsequently concluded, by twelve Pacific Rim countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam (Tung, 2015), which represent almost 40% of the global trade. Since then, more countries are willing to join this partnership.

Indonesia is one of those countries. In 2015, President Joko Widodo told Barrack Obama, the United States President, that Indonesia is interested in signing the TPPA (Ginanjar (BBC Indonesia), 2015). Joining TPP will definitely bring considerable changes to Indonesia considering the comprehensive and extensive regulations covered by the agreement, but the balancing weight of whether or not Indonesia should join must eventually be discussed more than in one writing.

This Article, meanwhile, draws attention to Indonesia's decision to terminate its BIT with Netherlands in 2014, and its concurrent declaration that it will not renew all of its existing BITs (Van den Pas & Damanik, 2014; Beckmann et al, 2014). Out of all the varying reasoning, the turning point was definitely Indonesia's recent legal exposure against foreign investors' claim. The *Churchill* case served as one example, in which Indonesia is currently facing the prospect of losing out 1 billion USD claims against a multinational British Company *Churchill* before ICSID Tribunal, as it lost in the jurisdiction phase, whereas the merits remain pending (*Churchill Mining* v. *Indonesia*; *Planet Mining* v. *Indonesia*).

Following the aforementioned events, Indonesia's then-President, Susilo Bambang Yudhoyono, emphasized that he does not want multinational companies to put pressure on developing countries like Indonesia (American Chamber of Commerce in Indonesia, 2014). Even though talks and suggestions have been circulating regarding Indonesia's plan to only renegotiate its current BITs, none has been finalized yet (Crocket, 2015; Oegroseno, 2014; Amianti, 2015). The message though was clear: Indonesia was not comfortable with its excessive legal exposure against claims from foreign investors.

Now, presuming that Indonesia would eventually let lapse or at least renegotiate all of its BITs, Indonesia would definitely try to limit the legal exposure to avoid investor's claims over investments that Indonesia never intended to provide BIT protections to. If Indonesia were to be successful in doing so, it would be interesting to examine whether TPPA would provide Indonesia with the kind of provisions it desires presently – or instead, whether TPPA would drag Indonesia back to square one with all of its concerns regarding its excessive legal exposure.

In this line, it is crucial first to discuss the provision that allows multinational companies to bring international claims against State directly before international tribunals, which is the ISDS provision.

B. ISDS and Host-State's Concerns

ISDS is a system that enables investors to directly sue a host-State for any violations of investment-related protections. Generally, investors prefer to sue host-States through international arbitration. In most BITs, access to international arbitrations are provided for investors, either directly or following satisfaction of certain conditions

such as cooling-off periods or recourse to national courts for certain period of time.

Admittedly, ISDS, and through its extension, international arbitration, has become one of the most frequently invoked provisions by foreign investors over the past two decades. It is not telling that investors tend to rely on this provision to bring their disputes before international arbitration, as investors are often reluctant to go to host-States courts (Miller & Hicks, 2015).

This was generally accepted in cases wherein host-States were eager to promote their investments, especially when these States were in the stage of developing, such as Indonesia. This is probably why at least in 60 out of 64 BITs concluded by Indonesia with various States, Indonesia has provided its standing consent to arbitrate against any qualified investors wishing to submit a dispute in arbitration (Churchill, ¶ 204).

Access to arbitration, as provided by most of ISDS mechanism, is not exactly a bad thing for host-States. However, it does become a concern when investors are allowed to abuse this provision by bringing frivolous claims, or when tribunals misinterpreted the scope of its jurisdiction due to the insufficient definitions of various terms of the treaties.

For example, the unclear definition of the term 'investment' in Indonesia-UK BIT caused the tribunal in *Rivzi* to interpret the term as not being limited to foreign direct investment Company, as opposed to what Indonesia actually intended (*Rivzi v Indonesia,* ¶ 142). Although in that case *Rivzi* was eventually denied jurisdiction, the tribunal's interpretation on the term 'investment' may be relied in other cases to allow treaty protection to virtually any investment from UK, either direct or indirect.

It is cases such as this that have caused host-States to be increasingly more wary of the over-reliance on ISDS by investors (Warren, 2015). Australia's reaction towards ISDS serves as an epitome of this. Following several suits filed against Australia by tobacco-company Philip Morris over Australia's new plain-tobacco-packaging rules, Australia declared that it was against the inclusion of ISDS in TPPA (Hurst, 2015). However, upon the release of TPPA's text, Australia eventually agreed to the inclusion of ISDS, seemingly to be content with the ISDS's modifications contained in TPPA.

The questions then that this paper will subsequently try to answer is whether TPPA's ISDS would really console the various concerns host-States – especially Indonesia – over ISDS, as discussed next.

C.TPPA's ISDS

TPPA's ISDS have been regarded by some as a state-of-art, as it purports to upgrade and reformed the currently existing ISDS systems (Tung, 2015; USTR, 2015). The fact that Australia finally agreed to its inclusion may support this notion. Nonetheless, equally, there has been growing resistance towards TPPA's ISDS.

Subsequently, in order to eventually determine whether TPPA does console host-State's concerns over ISDS, a thorough analysis on the whole agreement must be done. For the purpose of this Article though, the focus will only be on the provisions that are in dire need of modifications for Indonesia, i.e. the scope of covered investment, consent to arbitration, and regulatory measures.

Further, this Article will also discuss some notable provisions that are incorporated in the TPPA that have been heralded as 'reformative', such as the provisions panels for arbitrators, appellate mechanism, and cost of arbitrations and frivolous claims (USTR, 2015.)

A. The Term Investment

As briefly mentioned, one of Indonesia's main concern over its current BITs is the term 'investment'. This term, contained in practically all investment treaties, determines which investment located in the host-State may enjoy protection from an investment treaty, and which may not. Indonesia has made it clear that its intention was only to give protections to foreign direct investment company that is allowed admission and subsequently supervised by the Indonesia Investment Supervisory Board ("**BKPM**") (Rivzi, ¶ 74, 109).

There have been at least two cases where Indonesia felt it was let down by the tribunal's overreaching interpretation on the term investment in an investment treaty. The first one is *Rivzi,* as mentioned previously.

The second one is *Al-Warraq v. Indonesia,* where Indonesia lost in jurisdiction phase, but eventually won on the merits. In *Al-Warraq,* the investment treaty relied by the investor was the Organization of the Islamic Conference Investment Treaty ("**OIC**"), which Indonesia was a party of. The OIC members had limited arbitration mechanism only for State-to-State dispute. However, due to the insufficiently clear language, the tribunal refused to follow the intention of the members and instead followed the "current trends", and thus granted the right to bring arbitration against a host-State to the investor (Al-Warraq, ¶ 76).

Now, presuming that Indonesia would eventually lapse or renegotiate all of its BITs, Indonesia is most likely to be interested to limit the meaning of the term 'investment' to only what it really intended to mean. But if Indonesia joins the TPPA, Indonesia will be on the brink of experiencing similar concern over the term 'investment' all over again.

This is because TPPA defines the term of the covered investment in the broadest style possible: "*every asset that an investment owns or controls, directly or indirectly, that has the characteristics of an investment, including such characterizes as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*" (Article 9.1 TPPA).

Thus, it can be seen that TPPA intended to cover all types of investment, either direct or directly controlled by any foreign investors from the other Member-States. Consequently, cases such as *Rivzi* or *Al-Warraq* may repeat all over again if investors were to sue Indonesia under TPPA.

B. Consent to Arbitration

Access to arbitration is definitely an important provision in any investment treaties. Notwithstanding that, it is worth to note that 'consent' is the cornerstone of arbitration and hence, an arbitration should not be commenced when both parties have not consented to such arbitration (Poudret/Besson, p. 229).

In *Churchill,* Indonesia tried to argue that the term 'shall assent to consent' does not amount to Indonesia's automatic consent to arbitrate against any investors wishing to arbitrate against Indonesia under the UK-Indonesia BIT. Despite that, the tribunal refused Indonesia's arguments and eventually allowed the investor to continue on the merits of the case (Churchill, ¶ 238-239).

Seeing that Indonesia has provided its automatic consent to arbitrate in 60 out of 64 of its BITs (61 now since *Churchill*), if Indonesia were to eventually lapse or at least negotiate all of its BITs, Indonesia is most likely to be interested to limit the scope of consent to shield them from future non-consented investor arbitrations. However, joining the TPPA would hinder such interest, since Article 9.19 TPPA stipulates "*each Party consents to the submission of a claim to arbitration under this Section in accordance with this agreement*", which simply enables

investors to bring disputes to arbitration against Indonesia any time they desire. In other words, Indonesia will be treated as if they have automatically consented to arbitrate.

The only limitation to arbitration provided under TPPA is only the 6-months cooling-off period where investors are obliged to conduct amicable consultations first. But bearing in mind that arbitral tribunals in the past have regarded a cooling-off period provision as mere procedural nicety rather than condition to arbitration, such limitation is as good as moot (Born/Scekik, p. 239).

Consequently, signing the TPPA is equivalent to Indonesia's automatic consent to arbitrate against investors from at least its 12 current members – which seems to foreshadow a distressful experience, especially reminiscing back on the *Churchill* case.

C. Regulatory Measures

In international investment law, one of the most heated debate is the distinction between what constitutes as expropriation and what is considered as regulatory measures. While the former entails compensatory obligation, the latter does not (Saluka, ¶ 262). However, the distinction is often too vague and investors tend to abuse any measures imposed by a host-State to be amounting expropriation if such measure were to harm their investments in any way.

For example, related to Indonesia, in both *Rivzi* and *Al-Warraq,* the investors claimed expropriation of their investment upon the decrease of the relative percentage of the whole of the capital of their shares in Bank Century, although the percentage decrease actually did not affect their overall ownership of their shares. The decrease was actually caused by Indonesia government's decision to help Bank Century by injecting a great amount of capital to save the very same bank (Rivzi, ¶ 38; Al-Warraq, ¶ 44).

Although both investors did not prevail in their respective expropriation claims, it is wise for Indonesia in the future to make sure that it is capable of adopting a measure for the good of the State without running the risk of being sued by foreign investors who are dissatisfied with such measure.

At a glimpse, TPPA ensures that host-States are guaranteed with protection to adopt a regulatory measure without being subjected to investors' expropriation claims. Article 9.15 TPPA provides: "*Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure* <u>*otherwise consistent with this Chapter*</u> *that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.*"

Arguably, this provision is the bait that successfully lured Australia to accept ISDS inclusion in TPPA. The Australian trade minister even praised the provision by describing it as a safeguard that will protect new environmental and health policy and regulations from lawsuits by foreign investors (Ludlam, 2016).

That is not entirely true. The wording '*otherwise consistent with this Chapter*' is a disguised loophole for investors to trample the sovereignty of states. In other words, *any* measure adopted by a host-State, whether it be on health or environmental regulatory grounds, must be consistent with the TPPA. In spite of the fact that tribunals have no authority to force a government to change the laws put into question by an investor, governments often step back from imposing a certain measure to avoid having to pay compensatory damages (Kelsey & Wallach, 2012).

Therefore, with so much room for an overreaching interpretation, investors are naturally inclined to argue that any regulatory measure adopted by host-States that may have harmed their investments in any way amounts as amounting to expropriation. It appears that a State's right to perform its regulatory measures is viewed as subordinate to the other provisions of the investment chapter (Tung, 2015). With that in mind, the position of foreign investors are elevated to an equal standing with each TPPA's signatory members – potentially including Indonesia.

D. Independence and Impartiality of Arbitrators

Arbitral tribunals consist of private individuals who are entrusted with the power to review government actions and award compensation damages – which is why independence and impartiality of arbitrators are crucial. In practice though, studies have revealed that over 50% of ISDS arbitrators have also acted as counsel for investors in other ISDS cases (Gaukrodger & Gordon, 2012) and that most agreements lack substantive conflict of interest disclosure requirements (Knox & Markell, 2012).

The design of ISDS tribunals allows lawyers to 'change hats' or rotate between dual roles in a manner that would be unethical for judges (Evatt, Thomas, Wilson et. al., 2012). Consequently, the candidate pool is sometimes seen as biased (UNCTAD, 2013) and awards are granted through unhealthy compromises (Gaukrodger & Gordon, 2012). Obviously, this fear is not entirely justified as there are too still arbitrators that are both independence and impartial. Nevertheless, there is an existing concern to combat this issue amongst host-States.

To a certain extent, the same holds true for Indonesia. For example, Indonesia lost twice in jurisdiction phase in two different cases: *Al-Warraq* and *Churchill*. Both cases involve, at least according to Indonesia, a misinterpretation of the scope of jurisdiction of the tribunals in a way they applied broad interpretation of the term 'investment' and 'consent' respectively, thus favoring the investor to proceed to the merits of the case (Al-Warraq, ¶ 76; Churchill, ¶ 238). Although surely the tribunals had justifications on their respective finding, it is interesting to note that the two cases shared one same arbitrator.

To facilitate such concern, TPPA intends to create a code of conduct for arbitrators in ISDS. As of now, such code is not yet established, yet if there was to be any indication, it will not facilitate the said concern at all. This indication can be found in Article 28.10(d), where TPPA has established a code of conduct for the general Dispute Settlement's panelists. Under this article, all panelists must comply with the code of conduct in the Rules of Procedure enshrined in Art. 28.13.

Strangely though, the so-called code of conduct is not enforced by an independent entity outside the dispute. Rather, it would be established by TPP's Commission, composed of government representatives of each party at the level of ministers or senior officials (Art. 27.1 TPP). On top of that, there are no ethical canons or principles stipulated for guidance or to explain how these arbitrators should behave or act.

Should these indications are applied to ISDS as well, then alas, what is essential to prevent the legal uncertainty, conflict of interests or any abuse of discretion, is actually missing in TPPA.

E. Appellate Mechanism

Due to its awards that are final with no recourse to appeal, arbitration is

reputable for conducting fast proceedings. Despite that, there have been inconsistent legal findings for the same cases based on the same facts by different arbitral tribunals.

This is exactly what happened when four American energy companies, CMS Transmission Co., LG&E Energy Corp., Enron Corp., and Sempra Energy International filed the same claim separately against Argentina under the 1991 U.S-Argentina BIT (Alvarez & Khamsi, 2009). Such divergent decisions create difficulty for States to enforce adopt measures that will not breach its international obligations to foreign investors.

Even though there have not been exactly such similar inconsistency in arbitral tribunal's findings that are related to Indonesia, the fact that Indonesia is infamously known for its reputation for being reluctant to enforce foreign arbitral award since *Karahabodas* case may shine some light to the concerning nature of the finality of foreign arbitral awards in Indonesia (Al-Gozaly, p. 130)

That being said, creating an appellate body for investment arbitration might be a possible solution to bring consistency in decisions that would satisfy both host-States and investors alike. A final ruling by an appellate body would have been able to bring consistency to the result, thereby treating all similarly situated investors with uniformity, providing a clear guidance for host-State with respect to its economic measures and contribute to the development of investment treaty law (Tung, 2015).

Possibly, it was in this line that TPPA's ISDS makes room for the establishment of an appellate body (Art. 9.22(10) TPP). Even so, this possibility was not first made by TPP. In fact, in the 2012 US Model BIT, the same provision can be found in Article 28 where the US was open to the idea of future appellate mechanism for investment arbitration. Thus, it was somehow regrettable that TPP member states did not actually develop the appellate mechanism that has been contemplated since back in 2012.

F. Cost of Arbitration Proceeding and Frivolous Claims

Host-States are repelled to borne the costs of ISDS proceedings, since there is an increasing concern regarding the economic costs and lack of accountability involved in the process (Warren, 2015). ISDS cases often result in millions of dollars in damages and litigation fees (Casale, 2015). To be more specific, the average arbitration cost of one case is US$8 million, with 80% of it being the costs of legal representation and experts, while the average arbitration fees is US$3,000 per day (Kelsey & Wallach, 2012).

Such high costs are relatively harmful to host-States, especially those that are still developing, such as Indonesia. This may be best epitomized in the still on-going *Churchill* Case that has extended beyond two years, involving 20 different procedural orders, each adding more to the arbitration's cost (*Churchill,* Procedural Orders). The recent report even suggested that Indonesia has failed to pay its fair shares of the proceedings, causing the arbitration to be in static (Newsham, 2016).

Furthermore, the high amount of cost that needs to be borne bothers host-State even more when it comes to frivolous claims. Accordingly, TPPA's ISDS intends to contain strong safeguards to prevent abusive and frivolous claims. Article 9.22(4) states that tribunal shall decide as a preliminary question about a claim that is '*manifestly without legal merit*.'

Nonetheless, other precedent investment agreements, such as NAFTA, already contains similar provisions, yet are

still prone to frivolous claims. Admittedly, unlike TPPA, they do not stipulate the wording '*manifestly without legal merit*.' In spite of that, it is relatively doubtful that an addition of four words in TPPA will result in a significant improvement in prevention of frivolous claims (John & Sachs, 2015).

On the other hand, TPPA allows legal costs to be recovered by the host-State in cases of frivolous claim, but this is not to be mistaken as a relief. Long before TPPA, tribunals were already granted the power to award attorney's fees and costs against parties claiming frivolous claims (See Art. 61(2) ICSID; Art. 42 UNCITRAL; Art. 10.20(6) US-DR-CAFTA). Regardless, tribunals have been rather reluctant to exercise such powers, often instead ordering parties to bear its own costs. Subsequently, TPPA's reiteration of such power does not convince a party's ability to recover legal costs (Public Citizen, 2015). Currently, host-States are still prone to bear the high cost of international arbitration even when it comes to frivolous claims.

I. Conclusion

As of today, heated debates concerning ISDS are still ongoing. Australia might have finally conceded to ISDS's inclusion in TPPA, but this does not prove that other countries will be as easily compromised (Simmons, 2015).

In respect to Indonesia, as discussed above, at least three of Indonesia's main concerns over ISDS mechanism, which are the scope of covered investment, the scope of consent to arbitration, and distinction between what constitutes as regulatory measure and expropriation, are not exactly consoled by TPPA.

Meanwhile, the other notable provisions in regard to TPPA's ISDS, such as code of ethics on arbitrators, possibility of appellate mechanism, as well as the provision regarding cost of arbitrations and frivolous claims, provide too little – if not at all – consolations over host-States' general concern over ISDS.

Obviously, there are other provisions within TPPA's investment chapter, as well as its ISDS provisions that may be worth to examine to determine whether Indonesia should join TPPA based exclusively on its investment chapter. Nevertheless, based on the limited findings of the Authors, presently the TPPA falls short of consoling Indonesia's concern over ISDS.

For that reason, if Indonesia either terminates, let lapse or renegotiates all of its BITs, up to the point that will perhaps greatly benefit Indonesia as a host-State, it would be regrettable to sign the TPPA, which would only pull back Indonesia to square one; to face the same old concerns over ISDS all over again.

Ultimately, as premised in the introduction, in answering whether Indonesia should join TPP, due considerations are to be given to the other parts of the agreement, aside of the investment chapter and its ISDS provision. Correspondingly, Indonesia should look out elsewhere than the investment chapter in TPP to find more reasons – stronger reasons – to be part of this potentially largest free trade in the world

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HARMONIZATION OF INTERNATIONAL SALES LAW: CISG AS SUPPLEMENT TO INDONESIAN CONTRACT LAW*

Bunga Dita Rahma Cesaria**

Abstract

The development of the market has promoted free and flexible traffic of goods to enter and leave any countries in the world. Automatically, parties are in need to a simpler, safer and more agreeable way of making a deal especially on the issue of applicable law. In their contract, parties would prefer to choose applicable law that is harmonized and widely recognized rather than spending time to negotiate on applying national law of their own. Convention on Contract for the International Sale of Goods (CISG) is one uniform codification established to waive the long-standing problem of choice of law. Seeing that Indonesia has not become one of them, resolving dispute involving Indonesian party will uphold provisions inherited from Dutch (KUHPer). This is a problem of law among parties that has been ratifying the CISG, since it would raise the notion "which law would prevail to resolve a dispute?". This article aims to encourage Indonesian parties of international sales contract to consider CISG as the choice of law. This is because CISG can supplement inadequacies of Book III KUHPer in some issues such as; formation of contract, obligation of parties and remedies.

Intisari

Perkembangan pasar telah mempromosikan kebebasan dan kemudahan jalur perdagangan barang untuk masuk dan meninggalkan suatu negara. Secara automatis. para pihak membutuhkan suatu cara yang lebih sederhana untuk menyepakati hukum mana yang akan berlaku apabila terjadi sengketa. Didalam dunia perjanjian, para pihak akan cenderung memilih hukum yang sudah terharmonisasi dan dikenal luas, daripada memilih hukum negaranya sendiri yang terkadang memperlambat proses penyelesaian sengketa. Convention on Contract for the International Sale of Goods (CISG) adalah suatu kodifikasi yang diciptakan untuk menghilangkan permasalahan yang telah lama ada, yaitu perihal pilihan hukum. Melihat keadaan dimana Indonesia belum menjadi negara anggota dari CISG, maka penyelesaian sengketa yang pihaknya melibatkan pihak Indonesia akan berpatokan pada hukum colonial yaitu KUHPer. Ini menjadi problema bagi masyarakat dunia yang telah meratifikasi CISG, dikarenakan akan timbul pertanyaan "Hukum mana kah yang akan berlaku untuk menyelesaikan sengketa?". Artikel ini bertujuan untuk memberikan saran kepada para pihak yang berasal dari Indonesia untuk menggunakan CISG sebagai pilihan hukum dalam perdagangan barang. Hal ini dikarenakan CISG dapat memenuhi kekosongan dan kekurangan dalam KUHPer.

Keywords: CISG, commercial law, choice of law, KUHPer, Indonesia.
Kata Kunci: CISG, hukum perniagaan, pilihan hukum, KUHPer, Indonesia.

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A. Introduction

To date, CISG has already had 85 signatory parties since 1998. This puts CISG as one of the most successful uniform law considering that its signatory parties comprise of states from every geographical region, every stage of economic development and every major legal, social, and economic system (Felemegas, 2000-2001). Nevertheless, Indonesia has not followed the trend of acceding to the convention yet.

The fact that Indonesia has not acceded to CISG yet is perhaps because Indonesian parties to international sale of goods do not put so much attention to the contract's choice of law. Based on a recent research taken by Badan Pembinaan Hukum Nasional, Ministry of Law and Human Rights of Indonesia, where usually traders insists on applying their national law, majority of Indonesian traders that deal with foreign parties (for example European Union, United States/Canada, Singapore, England, Australia, China, and ASEAN Countries), agree to appoint their counterparty's domestic law as the applicable law for the contract. Considering that some of those countries are signatories to CISG, appointing their national law would automatically mean appointing CISG as the governing law for the contract (Bonell, 1987).

This should raise a question: does Indonesian party actually understand that applying *alien* law in the contract would consequently put them in the least safe position? Foreign law is definitely unfamiliar for Indonesian party themselves, their counsel, and Indonesian law enforcement (in case of any disputes). In this situation, Indonesian party is getting the so called 'information disadvantage' (Fountoulakis, 2005). Thus, the foreign law might only benefit the party that insists on having it written in the contract.

This article would not advice Indonesian party to insist on the application of Indonesian Contract Law contained in Book III of Indonesian Civil Code. It is understandable that Indonesian Contract Law which was codified on 1847 contains insufficient provisions to accommodate parties' needs in international sales contract. Rather, following the fact that Indonesian parties commonly choose other counter party's national law which leads to application of CISG, this article would introduce the benefits of CISG to supplement Indonesian Contract Law contained in Indonesian Civil Code that Indonesian parties to international sale of goods should be aware of.

To achieve the aim encouraging Indonesian parties to designate CISG as the applicable law, this article will argue that actually CISG can cover the inadequacies of certain provisions in Book III KUHPer. Especially, this article will focus on examining CISG and Book III of KUHPer in the matters of formation, obligations of parties and avoidance of contract. The three matters are chosen among other various matters because those three are the most important issues as they determine the beginning of the contract was made, how the contract should be executed, and how the contract can possibly be ended. Avoidance of contract is indeed rather specific as part of types of remedies, however, avoidance of contract is to be discussed among other types of remedies because it is the last resort of remedies and it may applies differently depending on the type of contract as it will be elaborated further in this article.

B. CISG as Harmonized Rule of International Contract Law

From the actors of international sales of goods perspective, seller and buyer, they face varies of problems such as determining

applicable rule for their contract. Rule by more than one governmental source can complicate the transaction (Brand, 2000). However, as a result of established trade with the same problem in years, merchants around the world have developed an idea known as *lex mercatoria* or law of merchants that governs international trade among them. Efforts to codify this law had been taken by the International Institute for the Unification of Private Law (UNIDROIT), which could not finish the work, and United Nations Commission on International Trade Law (UNCITRAL), which was able to produce Uniform Law on the International Sale of Goods (ULIS) and Uniform Law of Formation of International Sales Contracts (ULF). Later, the two conventions were modified in order to render them capable of wider acceptance by countries of different legal, social and economic system. The result was adoption by diplomatic conference in 1980 regarding the Convention on Contracts for International Sale of Goods (CISG). CISG was then adopted in 1980.

CISG is established as a convention which has international character. This international character implies that the general purpose of CISG is the standardization of law at a level above national law in order to avoid a long-standing problem of conflict of law among states (DiMatteo *et all*, 2005). One particular purpose of CISG is to "provide a uniform text of law for international sale of goods" (Explanatory Note by the UNCITRAL Secretariat). This purpose places CISG within movement towards internationalization of sales law and the creation of a new *lex mercatoria* (DiMatteo *et all*, 2005). CISG has been intended to facilitate and solve the problem of applicable rule to govern international sale. Therefore, CISG is suitable for the trend of international trade conducted by seller and buyer around the world.

CISG has been the most successful effort from UNCITRAL. Within the period of 16 years, from the year of 2000-2016, there have been approximately 1300 court decisions from all over the world under the jurisdiction of CISG (Yearbook of CISG cases: 2000-2016) as the applicable law for the merits. From the fact that parties in different countries choose and from the repeated use of CISG in cases, show that the convention is suitable in accommodating the transaction between parties despite the differences of each state's national legislation.

C. The Scope and Applicability of CISG

CISG applies to international contract of sale of goods and such contract under the scope of CISG should also be the only contract discussed in this essay. CISG does not define the meaning of "international contract of sale of goods", rather the definition can be derived from its provisions. The international character of the contract is seen from parties' different places of business when contract is concluded (Holdsworth, 2001). While contract of sales is not defined explicitly by this convention, some exclusions are made to sales by auction, sales made during enforcement proceeding ordered by court of law, sales wherein the seller provides substantial part of material necessary for production of the goods and sales wherein seller needs to provides services in addition to delivery of goods (*Ibid*). Lastly, goods that fall within the scope of CISG are basically movable goods with exclusions as drawn in Article 2, such as goods for personal use, goods sold by auction or execution by court, stocks, shares, securities, negotiable instruments, money, ships, vessels, hovercraft, aircraft, and electricity.

Application of CISG to Indonesian parties' contract is not impossible from the perspective of CISG and Indonesian Civil

Code despite the fact that Indonesia is not a party to this convention. Application of CISG to contract involving Indonesian parties can be done through fulfilment of Article 1(1)(a) of the convention; the convention applies when the rules of private international law leads to the application of the law of contracting states. This happens automatically when Indonesian parties agree to use national law of their counter party which also a contracting state of CISG. With due regards to general principle of party autonomy, Article 6 of this convention allows parties to choose to exclude all or part of the convention to apply in the contract. The exclusion must be expressed with clear intention pursuant with Article 8 in which intention should be clearly manifested from at or after the conclusion of the contract (CISG-AC Opinion No. 16).

From the provision of Indonesian Civil Code, designation of CISG under the contract is also made possible. Article 1338 of Indonesian Civil Code states that agreement becomes law to those who made it. This means that either appointment of CISG as choice of law or exclusion of it wholly or partly would still bind parties according to Indonesian Civil Code. Given this, there should be no hurdles of CISG to apply as long as parties have agreed to it.

D. Comparing Indonesian Contract Law and CISG

Indonesian contract law is governed in Book III of Indonesian Civil Code regarding Obligations. There are no different law governing international contract. The suitability of Indonesian Contract Law with CISG can firstly be seen from some contract principles upheld by both. In general, Book III of Indonesian Civil Code affirms some widely recognized contract principles such as the principle of good faith and freedom of contract which both are regulated under Article 1338 Indonesian Civil Code. CISG promotes the same principles. Firstly, under Article 7, interpretation of CISG is to be made with observance of good faith. Secondly, Article 6 illustrates a freedom of contract by allowing parties to this convention to derogate from all or part of this convention. This being said that even though the CISG, once being ratified, becomes the national law of one country, there will still be a room for certain national law to be applicable once parties agree explicitly in the contract to apply such law (Bonell, 1987). Parties can even modify certain provisions under CISG based on Article 6 (Enderlein & Maskow, 1992). Given that, the basic principles contained in Indonesian Civil Code are upheld within CISG as well.

However, not only principles in contract, but there are indeed some aspects that shows that CISG can supplement and covers insufficiencies of Indonesian Civil Code. This section will compare the provisions of Indonesian Civil Code and CISG with regards to formation of contract, obligations of parties, and avoidance of contract.

E. Formation of sales contract

According to Indonesian Civil Code, sale and purchase is an agreement and such agreement is concluded when the parties have reached a consent on the goods and the price even though the goods have not been delivered and the price has not been paid. The price of the goods is to be determined by parties or evaluated by third party.

Meanwhile, according to Article 23 of CISG, a contract is concluded when an acceptance of an offer becomes effective. With regards to an offer, Article 14 (1) of CISG stipulates that

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to

be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

Acceptance, according to Article 18(1) and (2) is

> "A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. "

An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction … An oral offer must be accepted immediately unless the circumstances indicate otherwise.

Formation of contract is indeed rooted from common law tradition (Butler, 2007). However, the abovementioned provision of CISG has provided an example to compromise between the civil and common law system (Id.) where CISG does not require party to prove concepts similar with common law such as offer and acceptance (Chemical Products Case). It recognizes that a contract may be established by an act. This means that CISG still upholds the principle of consent between parties as the most important in formulating a contract without having regard to how such consent is expressed.

This is similar with provision upheld by Indonesian Civil Code where contract is formulated as long as parties have reached consent. It can be derived from the two regulations that provisions on formation of contract and when contracts are deemed concluded between Indonesian Civil Code and CISG is not contrary to each other. Both regulations consider the contract is concluded when parties agree on the goods and the price. Indonesian Civil Code, however, does not explain on how agreement is achieved while CISG asserts that such agreement (or acceptance) can be derived from parties' statement or conduct and further such acceptance is effective when it reaches the offeror. Therefore, even though Indonesia, as a civil law country, does not uphold the offer and acceptance as condition to form a contract in its contract law, CISG can fill the gap of Indonesia's only requirement of consent in formation of contract.

F. Obligation of Parties

Indonesian Civil Code stipulates that sale and purchase is an agreement by which one party binds himself to deliver a good whereas the other party promises to pay the price as agreed upon. In sale and purchase, parties are divided into seller and buyer. Firstly, the main obligations of seller according to Article 1474 of Indonesian Civil Code are to deliver the goods sold and to safeguard it. Delivery means the transfer of the goods sold to the power and the possession of the buyer (Article 1457 Indonesian Civil Code). Seller is also obliged to ensure that the goods delivered by the seller must be in the same condition as it was at the time of the selling (Article 1481 Indonesian Civil Code). Secondly, the buyer has the obligation to pay the purchase price at the time and place determined by the agreement. If such time and place are not determined, the buyer must pay the price at the time and place of delivery should take place.

Compared to CISG, the provisions regarding obligations of parties in this convention do not have that much of a different. Article 30 of CISG stipulates that obligations of seller are:

> "[…] deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention."

Nevertheless, with regards to the goods delivered, CISG takes a more detail explanation in which it obliges the seller to deliver the goods in the quality, quantity, and description as well as packaging required by the contract. Conformity of the goods is measured from which the goods (Article 35 CISG):

> "*(a)* Are fit for the purposes for which goods of the same description would ordinarily be used;
> *(b)* Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
> *(c)* Possess the qualities of goods which the seller has held out to the buyer as a sample or model;
> *(d)* Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

Meanwhile obligation of buyer is stipulated under CISG to pay the price of the goods and take delivery of them as required by the contract and the convention. In the matter of obligation of parties, Indonesian Civil Code's provisions are in line with CISG. Similar to the previous matter, obligations of parties under CISG is regulated in a more detail manner than the Indonesian Civil Code in regards to specifying 'the conforming goods' and thus it is possible to be supplemented to the Indonesian Civil Code.

G. Avoidance of contract

Avoidance of contract in Indonesian Civil Code is considered as one of a cause of breach of contract. This matter is interestingly regulated under the Indonesian Civil Code because avoidance of contract is categorized as conditional obligations. Article 1266 of Indonesian Civil Code regulates that:

> "The condition of dissolution of the agreement is always implied as to occur in mutual agreements, in the event one of the parties does not comply with his obligation.
> In such event, the agreement is not dissolved according to the law, but the dissolution must be requested through the court."

In the event the condition of dissolution is not expressed in the agreement, the judge is free, with due regard of the circumstances, at the defender's request, to allow time to the defendant to comply as yet with his obligation, which time, however, may not exceed a period of one month.

Deriving from the aforementioned article, condition of avoidance should be stated in the agreement. According to Subekti, the aforementioned article should not be interpreted as considering all non-compliance of one party as condition to avoid the contract. Rather, breach of contract by one party should not be deemed as automatically become condition to dissolve or avoid the contract. Considering that avoidance of contract should be asked to the judge, the judge then would have to decide whether the breach should result to an avoidance. The judge may decide that the breach is too insignificant to the transaction and deny the aggrieved party's claim to avoid the contract. Additionally, claiming to avoid the contract by reason of

a breach that is not too significant will consequently violate the principle of good faith uphold by Article 1338 of Indonesian Civil Code. Furthermore, the principle of good faith is also upheld since, when condition of avoidance is not explicitly stated, the judge can provide additional time to the breaching party to fulfil its obligation.

On the other hand, CISG sets three conditions that can result on avoidance; fundamental breach of contract, failure or refusal to perform within a reasonable grace period, and anticipatory breach. Firstly, fundamental breach of contract is a breach that it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

Article 25 of CISG requires that the breach must cause detriment. Such detriment must then nullify or essentially depreciate the aggrieved party's reasonable expectation under the contract. Additionally, such detriment must be foreseeable by the breaching party at the time of conclusion of the contract (Babiak, 1992). Furthermore, Article 49 and 64 of CISG stipulate that buyer and seller can avoid the contract when the opposing party's non-performance amounts to fundamental breach of contract.

Secondly, a contract can be avoided by the aggrieved party at the time of failure or refusal to perform within reasonable grace period. This is in the case when one of the party fails to perform its obligation within the period stipulated under the contract and the aggrieved party gives *nachfrist* ultimatum; additional period provided for the breaching party to perform. When the breaching party fails or refuse to perform within such additional period of time, the aggrieved party can declare avoidance of contract.

Thirdly, a party can also avoid the contract even before the period of the contract has ended. The conditions are when the breaching party either declare that it will not or will not be able to perform before the performance date or declare that it will not or will not be able to perform substantial part or all of his obligations within the time for performance.

It is clear that in the matter of avoidance of contract, Indonesian Civil Code provides stricter ground than CISG does. Indonesian Civil Code assume that all condition to dissolve should be stated in the contract otherwise the judge will determine the significance of the breach. Furthermore, there is no clear threshold of a breach that can result in avoidance of contract. Meanwhile CISG provides 3 (three) possibilities for party to avoid contract.

The strict regulation on termination of contract by Indonesian Contract Law should raise a concern in today's development of certain market such as the market of commodity. Commodity market is subject to price fluctuations where curing the breach is not an appropriate remedy (Winsor, 2010). Hence, usually timely delivery is always the essence of the contract (Schwenzer & Hachem, 2009). To bring this matter into the context of comparing Indonesian Contract Law and CISG, when parties stipulate in the contract that timely delivery is of the essence, avoidance can be accommodated by Indonesian Contract Law. However, when it is not expressly stipulated in the contract, Indonesian Contract Law cannot easily provide a termination as an immediate and less costly exit for parties. CISG, on the other hand, has already adapted to this condition. CISG makes it possible for timely delivery to be the essence of the contract even without parties stipulating it in the contract by interpretation through Article

8(2) and (3) of this convention; intention of parties are taken from understanding of a reasonable person of the same kind and negotiations, practices, usages and any subsequent conduct of the parties. Hence, according to CISG, the practices established in the market of commodity; strict compliance to timely delivery and conformity of goods are of the essence, can be acknowledged and become the reason of avoidance of contract.

Bearing this fact, Indonesian Contract Law is not anymore suitable to be applicable for certain international sales, especially sales of commodity. CISG, on the other hand, able to adapt with development. Therefore, it is preferable if parties designate CISG as the choice of law of the contract in the matter that the type of contract would possibly need a quick exit from the breach.

H. Should Indonesia Accede to CISG Then?

Bearing that CISG can supplement Indonesian Contract Law in certain important aspects of international sale of goods contract should raise an issue of whether or not accession to CISG is necessary. Even though the three aspects elaborated above cannot be the threshold to answer such matter, the fact that other countries with various legal system has ratified it at least should make Indonesia consider the significance of this convention in Indonesia's national law.

Nowadays, Indonesia is not the only lost duck on the lone side of the pond in this situation. England, in fact, also has not acceded to CISG despite the fact that its non-accession to CISG is significant since most England's trading partners in the European Union are contracting states of CISG (Hoffman, 2010).

There are two reasons why England has not ratified CISG. Firstly, the ministers do not see ratification of CISG as a priority neither it has desire to do so (Moss, 2005-2006). UK's reluctance to ratify CISG relies on the fact that CISG is less suitable to govern commodity sales than English Law. English Law has stricter standard in case of avoidance based on the reason of non-conforming goods and documents. The other reason being UK's experience in ratifying uniform sales law on 1964; ULIS and ULFIS. These conventions left unused in UK's case laws because UK's reservation to these conventions where the conventions permitted UK to apply uniform law only when the parties agree. This kind of reservation cannot be made under CISG thus CISG will bring real change to English Law on international contract.

Despite being in the same position, Indonesia's reasons to not accede to CISG cannot be similar with UK except for the fact that in Indonesia, CISG also lacks of legislative priority[20]. Indonesia does not have experience like UK where it has every uniformed its contract law thus Indonesia cannot yet able to find the suitable uniformity to its national law. The author cannot think of any reason other than Indonesia's lack of attention to reform its law in this matter when CISG is actually supplementary to Indonesian Contract Law and it can provides certain gap-filling provision where Indonesian Contract Law is no more suitable to govern certain matters. Nevertheless, even if there will be a complicated and long process for Indonesia to accede to CISG, Indonesian parties can still benefit from this convention by way of appointing this convention in their contract

[20] Indonesian Contract Law reform has not been filed in National Legal Program (Prolegnas) 2010-2014

since, as mentioned above, application of CISG is possible for Indonesian parties.

I. Conclusion

In conclusion, in the matter of formation of contract, obligations of parties, and avoidance of contract, there are no contradiction between Indonesian Contract Law and CISG. Rather, CISG can be seen as supplement to Indonesian Civil Code; it can possibly provide the civil code more detail explanation regarding the respective issues. Therefore, Indonesian parties to international sale of goods should consider to designate CISG as the applicable law in order to benefit from its provisions in their dealing with their counter party.

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THE LEGALITY OF 'DISGORGEMENT OF PROFITS' IN CASE OF A BREACH UNDER CISG*

Olivia N. Maryatmo ** **and Ardhitia P. Rusyadi**** *

Abstract

The situation where an aggrieved party wants to claim damages does not always benefit their position to ask for compensation. For instance, in some cases, the aggrieved party's loss is hard – and even impossible to be calculated. When an aggrieved party wants to claim damages, CISG requires the damages to be equal to the sum of the loss. However, when the loss itself is hard to be calculated, how would the aggrieved party claim for their damages? This is where the disgorgement of profits comes into play.

The disgorgement of profits is a method of calculating damages by allowing the aggrieved party to strip off the profits gained by the breaching party. Even though CISG has never mention anything about the calculation method, some scholars argue that disgorgement of profits cannot be applied due to its punitive nature. This paper will discuss about the legality of disgorgement of profits in theory and current practice to be applied under CISG in case of a breach.

Intisari

Situasi dimana pihak yang dirugikan ingin menuntut ganti rugi tidak selalu mengguntungkan posisi mereka untuk meminta kompensasi. Misalnya, dalam beberapa kasus, kerugian pihak yang dirugikan sulit — dan bahkan mustahil untuk dihitung. Ketika pihak yang dirugikan ingin menuntut ganti rugi,CISG mengharuskan jumlah ganti rugi setara dengah jumlah yang dirugikan. Namun, ketika jumlah kerugian itu sendiri sulit untuk dihitung, bagaimana cara pihak yang dirugikan menuntut ganti rugi? Disinilah disgorgement of profits berperan sebagai cara untuk mengatasi masalah tersebut.

Disgorgement of profits adalah metode penghitungan kerugian yang memungkinkan untuk pihak yang dirugikan untuk menanggalkan keutungan yang diperoleh oleh pihak yang merugikan atau melanggar. Meskipun CISG tidak pernah menyebutkan apa-apa tentang metode perhitungan kerugian, beberapa pakar hukum berpendapat bahwa disgorgement of profits tidak dapat diterapkan karena bersifat menghukum bukan mengompensasi. Makalah ini akan membahas tentang legalitas disgorgement of profits dalam teori dan praktek saat ini untuk diterapkan dibawah CISG dalam kasus pelanggaran kontrak.

Keywords: Disgorgement, CISG, damages, punitive, compensatory

Kata Kunci: *Disgorgement, CISG, ganti rugi, menghukum, kompensasi*

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A. Introduction

The United Nations Convention on Contracts for the International Sale of Goods ("CISG") is an international agreement, which forms a unification of international sales law (*Schwenzer*). This convention regulates a uniform law that upholds equal rights for both seller and buyer (*Kelly*). In case of a breach, CISG protects the right of the buyer where the aggrieved party can claim for damages based on a breach committed by the breaching party.

Article 45 of CISG stipulates "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may claim damages as provided by Article 74 to 77". However, Article 74 CISG does not define damages exhaustively. It does not provide specific guidelines for calculating damages (*CISG Commentary*). The CISG only explicitly states that the damages that can be awarded only consist of a sum equal to the loss, including loss of profit as a consequence of the breach (*Art. 74 CISG*). In practice, sometimes the loss suffered by the aggrieved party is often hard to calculate and even impossible to be calculated. For example, loss of goodwill or loss of reputation that is impossible be calculated. These circumstances made it impossible for the buyer to claim their right under the Convention.

By definition, disgorgement of profits principle is a calculation method in awarding damages to an aggrieved by stripping off the breaching party's gains. The gains made by breaching party are seen to be reflecting the loss suffered by the aggrieved party (*Schwenzer/Hachem in Saidov/Cunnington*). This principle would answer the above situation where the loss is hard or even impossible to be calculated. However, up until today, even though this principle has been widely used under national jurisdiction, the legality of disgorgement of profits under CISG is still in question. This is due to the clash of scholarly opinion upon the purpose of disgorgement of profits. Primarily such an award given through disgorgement of profit aims to strip the gain received by the party in breach, thereby deterring future breaches, making this principle punitive in nature (*Barnett*). On the contrary, the drafter of CISG – Ingeborg Schwenzer, suggests that such an award serves a compensatory purpose (*Schwenzer*). That is why up until today the legality of disgorgement of profits in CISG is still in question.

B. Awarding Damages Under Article 74 CISG

Under CISG, in the event of a breach, a buyer is entitled to claim damages if the seller fails to perform any of its obligations as provided in Arts. 74 to 77. The principle stipulated in Art. 74 is 'brief but powerful' (*Schwenzer*), which aims to fully compensate the aggrieved party for its loss and thus it has a compensatory nature (*CISG Ac. Op.*). The plain wording of Art. 74 CISG is as follows:

> "Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." (Emphasis added).

This article should be interpreted liberally (*Schwenzer*), as it gives the dispute settlement body the authority to determine the aggrieved party's "loss suffered ... as a

consequence of the breach" based on the circumstances of the particular case (*CISG Ac. Op*). Art. 74 only limit the granting of the award with two requirements. The first requirement is that the loss should be a consequence of the breach. Second, it should meet the foreseeability element. It does not limit on how the dispute settlement body would grant such calculation of loss. However, according to Art 74 itself, the compensation for the loss that has to be given to the breaching party has to be "sum equal to the loss". This means that the aggrieved party could not get more than they are supposed to get. The rationale behind is due to the need to prevent the aggrieved party to enrich themselves. Although a claim for breaching party's gain is also to avoid unjust enrichment (*McCamus*), in order to avoid the unjust enrichment, the aggrieved party has to calculate the loss that they suffered (*Lookofsky*).

In some cases, the loss could be very difficult and even impossible to calculate, such difficulties arise when goods are non-substitutable, such as loss of reputation because the non substitutability itself is connected with the fact that there is no telling how much money would satisfy the aggrieved party itself (*Thel/Siegelman*). Not only that, for example, market price is often difficult to calculate because it can change anytime depends on the situation. As the market price is difficult to calculate, the profits made by the breaching party can be taken into account in calculating the minimum loss of the aggrieved party (*Schwenzer/Hachem in Saidov/Cunnington*). When there is a difficulty on calculating damages, disgorgement of profit could be the most viable solution in awarding such damages, as the profit that the breaching party gains from its breach of contract could help measure the aggrieved party's loss where it is difficult to place (*Saidov*).

In some cases, punitive nature of disgorgement of profit does not suit the compensatory nature of Article 74 CISG (*Plastic Carpets Case*). The disgorgement of profits is a gain-based calculation of damages. It allows the aggrieved party to refer to the profits the seller earned with a third party to calculate its own damage (*Schwenzer*). In other words, the concept of disgorgement of profit is to put the *breaching party* in the same position as if the breach did not occur. This principle has the same meaning as the performance interest principle under Art 74 CISG. Moreover, this principle focuses on the breaching party's gain instead of the aggrieved party's loss. Whereas the concept of Art. 74 CISG is to put the *aggrieved party* in the same position as if the breach did not occur (*CISG Ac. Op. No. 6*).

C. The current practice of awarding damages based on Disgorgement of Profits

Disgorgement of profits is commonly recognized in various domestic legal systems, as it complies with the purposes of CISG that is certainty and uniformity. In status quo, there is no precedent yet that an award is granted based on a disgorgement of profits in CISG. However, disgorgement of profits can be found as a general practice in some countries, especially countries with civil law jurisdiction. As a matter of fact, disgorgement principle is increasingly recognized today in cases where courts award damages for a breach of contract (*Robertson; Dubai Aluminum Co Ltd. v. Salaam Hendrix v. PPX.*). Even national jurisdictions have widely varying views on disgorgement principle (*Scalise*).

The current practice of awarding damages based on disgorgement of profits has been done in several countries, such as Israel, Ireland, Netherlands, and England. For example, in *Adras case,* disgorgement

was awarded for breach of contract on the basis of unjust enrichment. The case was awarded on the basis of domestic Israeli law (A*dras Chmorey Binyan v Harlow & Jones GmbH*). Disgorgement of profit is also a remedy recognized in tort in some jurisdictions (*Schwenzer*). Irish civil law also has allowed the application of disgorgement of profits that arises from breach of contract for many years (*Hondjus and Jansen*), especially in the case of contractual wrongs. There is a precedent where the disgorgement of profits awarded because the defendant acted in bad faith. The bad faith constituted on that case was reflected on the action of the defendant for achieving gain from his wrongdoing (*Hickey v Roches stores*). Further, the disgorgement of profit is also applied in the Dutch Civil Code, where it is used as a means of quantifying the damages to which an aggrieved party (*Waeyen-Scheers v Naus*). This principle has also been affirmed in *Attorney General v. Blake,* where disgorgement was awarded to the aggrieved party, noting that the defendant's profit providing the measure of a loss was difficult to measure (*Attorney General v Blake*).

Seeing the wide practice of awarding damages based on disgorgement of profits, it does not close the possibility of disgorgement of profit to be applied under CISG. The reason is because CISG is an international convention, which serves as a form of unification of law. Disregarding the possibility of disgorgement would undermine the Convention in the core area of damages, as domestic remedies applied precisely in the cases for which the CISG was originally designed (*Schwenzer/Hachem in Saidov/ Cunnington*). Moreover, within some circumstances, it is also possible to claim loss based on the breaching party's profits (*Schwenzer*). Therefore, seeing the wide practice of disgorgement of profits, it does not preclude the possibility of this principle to be implemented under CISG.

D. Reflection of CISG in Disgorgement of Profits

i. Awarding Damages by Disgorgement of Profits is in line with the full compensation principle in CISG

Awarding the gains of the breaching party as measure of damages actually fulfills the purpose of Art. 74 CISG because of two reasons. First, this Article is intended to afford an aggrieved party c*ompensation,* and awarding gain-based damages falls within the scope of compensatory damages. Based on a commentary on Art. 74 CISG, a dispute settlement body may, when assessing damages, also consider benefits gained by the breaching party from the breach of contract (*Schwenzer and Schlechtriem*). Especially in cases where the party's loss is not adequate to compensate the party and the aggrieved party cannot calculate the amount of loss, it could be justified to rely on disgorgement of profits to achieve the result of full compensation (*Saidov*).

Commentators of CISG, Schwenzer and Hachem, also specifically state, "The gains by the breaching party can easily be viewed as nothing more than a presumption of what the aggrieved party has actually lost." (*Schwenzer and Hachem*). "Thus," they continue, "we are still in the realm of compensatory damages." (*Id.*). Other commentators of CISG have also supported this view (*Schmidt-Ahrendts*). Had the breaching party not breached the contract; they will not gain the profit at the first place. By disgorging the seller's profits to the advantage of the buyer, it compensates the damages that the buyer suffered due to the breach of contract (*Saidov*). That is why the disgorgement of profits falls within the

compensatory nature instead of punitive. Even if it is considered as punitive damages, in some circumstances, especially in the event of an international breach committed in bad faith, a court or tribunal should allow taking a punitive punishment when awarding damages (*Schwenzer and Hachem*).

ii. Awarding Damages by Disgorgement of Profits acts as a 'gap filler' in CISG

The application of disgorgement of profits under the CISG is necessary in order to fill the gap in the CISG. The Secretariat Commentary on the 1978 Draft of the CISG, the closest text to an official commentary, noted that the CISG does not specify the method for determining loss. Instead, "The court or arbitral dispute settlement body must calculate that loss in the manner which is best suited to the circumstances." (*CISG Commentary*). In addition, disgorgement of profits has only become a prominent remedy since the drafting of the CISG. Allowing its silence to exclude the availability of a remedy would not be in line with the drafter's intention (*Schwenzer and Spagnolo*). Thus, it means that CISG leaves the interpretation of awarding damages to the discretion of the dispute settlement body.

Scholar Schmidt-Ahrendts stated that,

> *"One of the main goals of the CISG is to provide parties with a uniform and complete set of rules governing international sales contracts. This purpose would be severely undermined if, although a contract is governed by the CISG, too many issues would still have to be solved by applying national law."*

Without the guide of interpretation on calculating damages such as disgorgement of profits, some jurisdictions will allow for a claim for awarding gain-based damages while others will not. Consequently, it will undermine the idea of uniformity on which the CISG, particularly Art. 74 CISG, are based (*Ahrendts*).

Art. 7 (1) CISG provides that when interpreting the CISG, courts must give regard to its international character, the need to promote the uniformity in its application and the observance of good faith. In order to do so, the courts must interpret the Convention autonomously. This means that the Convention must be applied and interpreted exclusively on its own terms, having regard to the principles of the Convention and Convention-related decisions in oversees jurisdiction (*CISG Digest; XX Cucine S.p.A. v. Rosda Nigeria Limited*).

In regards to the interpretation, Art. 7(2) CISG provides that "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principle [...]". Internal gaps in the CISG are subject to be settled in conformity with its underlying principles (*Art. 7(2) CISG*) this can be done through analogy (*Bianca and Bonell*), or by applying principles. Since the Convention is silent on the calculation method, through general principle, the disgorgement principle is applicable in awarding the aggrieved party's loss. Therefore the application of disgorgement of profits can be constituted as 'gap filler' in the Convention as it interprets the calculation method of Art. 74 CISG.

E. Disgorgement of profits accords with the general principles under CISG

As has been already explained above, under article 7 (2) of CISG, if something is not govern by the Convention then it can be settled using general principles. CISG embraces many general principles and one of them is good faith, which is embodied in Article 7 CISG,

including Art. 74 (*Bianca and Bonell*). Private law should not focus on financial but also good faith and fairness (*Scmidt-Ahrendts*). Even though minority of scholars opined that good faith is no more than a general interpretive principle, the majority view suggest that Art. 7 are a substantive criterion of the CISG, with broad practical application (*Id.*).

In order to promote the observance of good faith in international trade, it is necessary to fully compensate the injured party and to put the breaching party to the position it should have been by summoning the breaching party to surrender the ill-gotten benefits. In relation to that, CISG must not limit the focus of remedial provisions to the compensation of financial losses, but seek to promote good faith and fairness, prevention of unlawful and unethical behavior, and the allocation of risks and gains in a fair and just manner (*Schwenzer and Leisinger*).

The obligation to act in good faith should evolve with modern development in order for CISG to remain relevant in current commercial contexts (*Kroll, et.al.*). Disgorgement of profits is a suitable remedy especially if the party in breach acted in bad faith, because disgorging the profits is a logical interpretation by the principle that a wrongdoer shall not profit from its wrong doing (McCamus, Dagan). Allowing the application of disgorgement of profits obtained through breach of contract in bad faith promotes compliance of good faith, as referred in CISG (*Schlechtriem*). Seeing that the application of disgorgement of profits is in line with the good faith principle embodied in CISG, it affirms the legality of such principle in awarding damages under CISG.

Not only good faith, CISG also embraces general principle of *pacta sunt servanda* and the performance principle. These principles could be seen in Art. 46, which means that the contract should be obeyed and gives the right for an aggrieved party to require specific performance to the breaching party in order to fulfill its contractual obligation (*Vanto*). The purpose of the law of damages is the evolution of the pure compensation of the loss to a precaution mechanism in order to support *pacta sunt servanda* (*Scwenzer/Hachem in Saidov/Cunnington*). One of the ways is by disgorgement of profits because permitting this claim is very important for the parties to fulfill their obligations under the contract as based on the general principle of the CISG that is *pacta sunt servanda* (*Magnus*).

Moreover, the rationale behind disgorgement lies in the connection with specific performance [*Cunnington, Waddams*], because performance principle is also allows disgorgement of profits (*Schwenzer in Schlechtriem/ Schwenzer Art 74*). For example as seen in the cases of *Jarvis v Swan Tours, Ruxley Electronics and Construction Ltd. V Forsyth, and also Farley v Skinner*. Those cases specifically provide an application of performance principle. These principles should be applied when interpreting CISG in order to meet demands as the promotion of contractual rights (*Schwenzer/Hachem in Saidov/Cunnington*). Thus, according to general principles that CISG recognized, it still possible to use disgorgement of profits.

F. Conclusion

In status quo, the absence of calculation method to award an aggrieved party's damages leaves a range of interpretations in awarding damages under CISG. One of the calculation methods is a doctrine called disgorgement of profits. The legality of disgorgement of profits in awarding damages under CISG is still debated among scholars. One believes that the punitive nature of disgorgement of

profit does not suit the compensatory nature of CISG (*Plastic Carpets Case*). On the other hand, awarding an aggrieved party through disgorgement of profits can actually reflect the purpose of Art. 74 CISG, which is to compensate the aggrieved party. Theoretically, through the interpretation of general principle (*Art. 7(2) CISG*), disgorgement of profits can be applied under the ambit of CISG. Even though there is no precedent on disgorgement of profits to be used under CISG yet, there is a possibility that disgorgement of profits will be used under the application of Art. 74 CISG and Art. 7(1) as a gap filler of the Convention in the future practice.

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