

## ACKNOWLEDGEMENTS

First and foremost, the Author would like to praise and gratitude to the Lord, for it is owed to Him and His blessings that the Author is able to complete this thesis, “Legal Analysis of Foreign Investors Abuse of Rights of the Investor-State Dispute Settlement Clause in Bilateral Investment Treaties involving Indonesia under International Investment Law.” This thesis is written for the purpose of fulfilling one of the academic requirements required in order to obtain a Bachelor of Law Degree in Universitas Pelita Harapan, Faculty of Law.

The Author would like to acknowledge the mentioned parties for their contribution in the completion of this thesis. Without their consistent support, this thesis would not have been completed to its maximum potential. Hence, the Author would like to extend her deepest, most sincere gratitude:

1. To Prof. Dr. Bintan R. Saragih, S.H., as the Dean of the Faculty of Law Universitas Pelita Harapan for his utmost consideration and guidance to every student.
2. To Dr. Vincensia Esti Purnama Sari, S.H., M.Hum., as the Head of Faculty of Law Universitas Pelita Harapan for her continuous support.
3. To Dr. Velliana Tanaya, S.H., M.H., as the Director of Faculty of Law Universitas Pelita Harapan for her guidance.
4. To Michelle Engel Limenta, S.H., LL.M., Ph.D., as the Author’s advisor, for always selflessly providing her time to guide the Author throughout her thesis-writing journey, considering her packed schedule. The completion of this thesis was successful because of nothing but her patience, constant support and motivation. The Author would like to extend further gratitude

to her advisor for not only helping her in her thesis-writing journey professionally, but also helping her grow as an individual.

5. To the Author's Foreign Direct Investment Moot Coach, Ms. Jessica Los Banõs, LL.B., MTM., M.B.A., for pushing me to always do better and teaching me that the sky is not the limit. Thank you for her constant patience, time and support in growing me professionally and personally.
6. To all the lecturers and employees of the Faculty of Law in Universitas Pelita Harapan who has guided the Author throughout her journey in law school.
7. To the Author's biggest blessing, Mohan Sabhnani, Jashan Sadarangani, Lovina Sadarangani and Prasheena Sadarangani for their constant support throughout this journey. Thank you for giving her the strength, along with unconditional love throughout this journey. Everything I do, I do for you.
8. To the Author's best friends; Khushi Chugani, Saloni Akar, Vinti Punjabi, Afsana Mahtani, Unishka Kirpalani, Himani Tekwani, Priyanka Sharma and Sovina Taneja, thank you for sticking by her through the highs and lows. Thank you for the laughter and memorable moments always.
9. To the Bobbas, my support system; Joy Budiana, Sharon Cahyadi, Tiffany Revilia, Kalista Iskandar and Grace Walia, thank you for the motivation and making my university routine one to look forward to every single day. Our fun moments will always be one to cherish. Thank you for your drive and moral support, without it this thesis would not be as is.
10. To the Foreign Direct Investment Moot Team; Mike Demetrius, Grace Walia, Kalista Iskandar, cheers to always having each other's backs and

always learning something new from each other everyday. Thank you for always pushing each other to do better than yesterday.

11. To the Jessup Team; Kalista Iskandar, Agnes Guntara, Olivia Karlina and Miqaila Ameen, thank you for all the fun basecamp moments and always pushing one another to strive for the better.

12. To all the Seniors of the International Law Moot Court Community; Johan Kurnia, Sianti Candra, Astrid Desmonda, Nadya Mulya, Bernice Koean, Rica Dharma, Josha Ponggawa, Felix Chandra, Sabrina Christabel, Indith Chandra, Indira Kantiana and Hanna Yovita thank you for pushing her to be the best that she can be always. The work ethic that she has assimilated through all of you has allowed her to grow as an individual.

13. To the partners, associates and friends in my internship at SSEK, thank you for providing the Author with the scope to obtain unlimited knowledge.

In addition, the Author is eternally grateful to have received the opportunity to be able to construct the said thesis. It is to be known that the Author is open to any sort of constructive criticism that the audience has to offer. This thesis aims to assist Indonesia's legal development in any way, shape or form to step forward towards a positive development within the system.

Tangerang, 9 June 2020

The Author,

Manika Jashan Sadarangani

## TABLE OF CONTENTS

THESIS.....	i
PERNYATAAN DAN PERSETUJUAN UNGGAH TUGAR AKHIR .....	ii
THESIS ADVISOR APPROVAL .....	iii
EXAMINATION BOARD APPROVAL.....	iv
ABSTRAK.....	v
ACKNOWLEDGEMENTS .....	vi
TABLE OF CONTENTS .....	ix
LIST OF FIGURES.....	xiv
LIST OF TABLES.....	xv
LIST OF ABBREVIATIONS.....	xvi
CHAPTER I.....	1
INTRODUCTION.....	1
1.1 Background.....	1
1.2 Research Questions.....	8
1.3 Research Purpose.....	8
1.4 Benefits of The Research.....	9
1.4.1 Theoretical Benefits.....	9
1.4.2 Practical Benefits.....	9

1.5 Framework of Writing .....	9
<b>CHAPTER II.....</b>	<b>12</b>
<b>LITERATURE REVIEW .....</b>	<b>12</b>
2.1 Theoretical Framework.....	12
2.1.1 Overview of International Investment Law .....	12
2.1.2 Overview of Indonesian Investment Law and regulations governing FDI in Indonesia.....	14
2.1.3 Bilateral Investment Treaties .....	18
2.1.3.1 Overview of BITs .....	18
2.1.3.2 Main provisions included within a BIT to accord protection to investors.....	22
2.1.3.2.1 Definition of “investor” .....	22
2.1.3.2.2 Definition of “investment” .....	26
2.1.3.2.3 Rights and protection accorded to investors within a BIT .....	27
2.1.4 Investor-State Dispute Settlement Clause Within BITs .....	30
2.1.4.1 Overview of ISDS Clause within BITs .....	30
2.1.4.2 Content of an ISDS clause within a BIT .....	32
2.1.4.3 States’ concerns with the ISDS clause within BITs .....	36
2.1.4.4 ISDS disputes brought by investors against Indonesia.....	38
2.1.5 Abuse of Rights .....	40
2.1.6 A State’s Right to Regulate .....	43
2.2 Conceptual Framework.....	47
<b>CHAPTER III.....</b>	<b>49</b>

<b>RESEARCH METHODOLOGY.....</b>	<b>49</b>
3.1 Definition of Resarch.....	49
3.2 Types of Legal Research .....	49
3.3 Types of Data.....	50
3.3.1 Primary Legal Source .....	50
3.3.2 Secondary Legal Source .....	52
3.3.3 Tertiary Legal Source .....	53
3.4 Data Analysis Method .....	53
3.5 Research Approach.....	53
<b>CHAPTER IV .....</b>	<b>55</b>
<b>ANALYSIS.....</b>	<b>55</b>
4.1 Whether Disputes Initiated by Foreign Investors that Intervenes With Indonesia’s Implementation of Regulations Relating to Public Policies Constitutes as an Abuse Under International Investment Law .....	55
4.1.1 Disputes initiated by foreign investors against Indonesia that have intervened with its public policy in regard to environment and public welfare .....	56
4.1.1.1 Indonesia’s right to protect the environment as the area of protection of public policy which have been challenged by foreign investors using the ISDS clause within BITs .....	56

4.1.1.2 Indonesia's protection of public welfare as the area of protection of public policy which have been challenged by foreign investors using the ISDS clause within BITs .....	59
4.1.2 Whether the Initiated Disputes and Threats by foreign investors against Indonesia's public policies constitute as abuse of rights within International Investment Law .....	62
4.1.2.1 Interpretation of the scope of disputes within the common Indonesian ISDS clause within a BIT.....	63
4.1.2.2 Interpretation of whether the conduct of foreign investors constitute an abuse of rights in light of the good faith principle and past jurisprudence .....	67
4.1.2.3 Whether such Initiated Disputes constitute as abuse of rights under International Investment Law .....	68
4.2 Alternative Approaches Indonesia Can Adopt to the ISDS Clause Within BITs	71
4.2.1 Include General Exception and Security Exception Clauses within the BIT .....	71
4.2.2 Narrow the grounds for filing a Claim under the ISDS clause.....	74
4.2.3 Include a compensation threshold within the BIT .....	75
<b>CHAPTER V .....</b>	<b>78</b>
<b>CONCLUSION AND RECOMMENDATIONS.....</b>	<b>78</b>
5.1 Conclusion .....	78
5.2 Recommendations .....	79

<b>BIBLIOGRAPHY.....</b>	<b>82</b>
--------------------------	-----------





## LIST OF FIGURES

Figure 2.1	FDI inflows to Indonesia from 1970 to 2014 .....	15
------------	--------------------------------------------------	----



## LIST OF TABLES

Table 2.1	Difference between the Old Investment Law and New Investment Law .....	15
Table 2.2	Tests for determining the nationality of a legal entity .....	24
Table 2.3	Types of Institutions to settle Arbitration Disputes.....	33



## LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
BKPM	Capital Investment Coordinating Board
CIL	Customary International Law
FDI	Foreign Direct Investment
ICSID	International Centre for Settlement of Investment Disputes
ICC	International Chamber of Commerce
IIA	International Investment Agreement
IIL	International Investment Law
ISDS	Investor-State Dispute Settlement
PCA	Permanent Court of Arbitration
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
VCLT	The Vienna Convention on the law of Treaties