CHAPTER I

Introduction

1.1 Background

An impediment to foreign investments in many countries is the perception among investors that in the event of a dispute with a host State, they will find themselves without a valid legal remedy.[1] The arbitration system used by the International Center for the Settlement of Investment Disputes (ICSID) was created by the World Bank in 1965 to address this. Today, it is a hybrid system used to settle private international interest of foreign investors by applying public international law and called Investor-State-Dispute-Settlement (ISDS) system.

In this context, the term "international investment law" primarily means rules and their interpretations in regards to ICSID arbitration through bilateral investment treaties (BITs) and or international investment agreements (IIAs) as binding forces concerning the sovereignty of states. ICSID is often referred to as an example of the privatization of public international law. This legal concept has received significant attention from academics recently in regards to the roles of governments.

Over 50 years ago, Indonesia signed the ICSID Convention, also known as the Washington Convention, on February 1968. That year, the Convention became domestic law in Indonesia through ratification; today, it is Law Number 5

[1] Lucy Reed, Jan Paulsson, and Nigel Blackaby, *Guide to ICSID Arbitration*, 2nd ed. (Alphen aan den Rhijn: Kluwer Law International, 2011), p. xxi.

of 1968 on *Dispute Settlements between the State and Foreign Citizens Regarding Capital Investments*.[2] This domestic ratification had two purposes. The first was to encourage and supervise foreign capital investments in Indonesia under No. XII/MPRS/1966 and No. XXIII/MPRS/1966 of the *People's Consultative Assembly Degree* [*Ketetapan Majelis Permusyawaratan Rakyat Sementara*], and the second was to determine internal legal procedures to waive sovereignty. It was determined that decisions by the ICSID would be submitted through the Supreme Court to the District Court as implementations of such arbitration awards were under the latter's jurisdiction.[3]

Further, Law No. 5 of 1968 noted, "the Republic of Indonesia is a member of the World Bank's International Bank for Reconstruction and Development." Law No. 5 of 1968 was in agreement with one of the core principles of the ICSID regarding host States' sovereign immunity against ICSID awards to contracted members of the ICSID. That is, Law No. 5 of 1968 was based on Article 54 (1) of the ICSID Convention, which is as follows:

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[2] The law is consisting of five articles, namely regarding approving the Convention on the Settlement of Disputes between States and foreign Citizens concerning Investment on the Settlement of Investment Disputes between States and National of other States. The convention entry into force on June 29th, 1968 and the government has the authority to give consent that something of a dispute concerns investment between the Republic of Indonesia and the foreign Citizen shall be decided in accordance with the said Convention and to represent the Republic of Indonesia in such disputes with the right of substitution.

[3] It is written in Article 3 of Law No.5/1968 as follows*: 1. To implement the decision of the Court of Arbitration as referred to in the Convention regarding the dispute between the Republic of Indonesia and the Foreigner in the territory of Indonesia, a Mahkamah Agung (Supreme Court) statement is required that the ruling be implemented. 2. The Supreme Court shall send the declaration referred to in paragraph 1. Of this article to the Pengadilan Negeri (District Court) within the jurisdiction where the ruling should be executed and ordered to implement it.3. The statements and orders referred to in paragraph 2. Of this article shall be submitted to the District Court concerned through the Pengadilan Tinggi (High court) whose jurisdiction covers the jurisdiction of the District Court.* (Free translation from Indonesian to English by Researcher).

> *"Each Contracted State shall recognize each award rendered under this Convention as binding and shall enforce the pecuniary obligations imposed by each award within its territories as if it is a final judgment of a court in that State. A Contracted State with federal constitution may enforce such an award in or though its federal court provided that the court treats the awards as if it is a final judgment of the court of the constituent State."*[4]

However, in regards to jurisdiction, Article 25 (1) of the ICSID Convention stated the following:

> *"The jurisdiction of the Center shall extend to any legal dispute that arises directly out of an investment, and that involves a Contracted State (or any constituent subdivision or agency of a Contracted State designated to the Center by the State) and a citizen of another Contracted State if the parties involved in the disputes consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally."*[5]

Thus, according to Reed et al., Article 25 (1) and Article 54 (1) meant that consent to arbitration on the part of the host State constituted an irrevocable waiver of immunity from the suit (the arbitration). That is, it meant that Indonesia's right to sovereign immunity was waived—the ICSID superseded the sovereignty of the State.[6] It was required that each decision by the ICSID arbitration tribunal be applied to the benefit of the foreign investor and be automatically enforced by Indonesia's domestic court as if it were a final decision of the court system of Indonesia.[7]

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[4] Lucy Reed, Jan Paulsson, and Nigel Blackaby, *op.cit.*, p. 211.

[5] *Ibid*, p. 200.

[6] *Ibid*, p. 51.

[7] ICSID Convention Article 54 (1) mentions *"Each Contracting State shall recognize an award rendered pursuant to this Conventions binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were final judgement of the courts of a constituent state."*See: Lucy Reed, Jan Paulsson, and Nigel Blackaby, *op.cit.*, p. 211.

1.1.1 Benefits of the ICSID System

The system supposedly provided Indonesia with several benefits. Regarding the original intentions of the ICSID Convention, Aron Broches, the General Counsel of the World Bank in 1963, who designed ICSID arbitration, stated depoliticizing of disputes over the interest of investors as one of the benefits as follows:

> *"We must…recognize…that even in those countries in which foreign private investment is welcomed in principle, the terms and conditions on which it operates have given rise to controversy between the host countries and…private investors, and these controversies have, on occasion (ad there are a number of obvious recent examples), involved the national governments of the investors as well. It is beyond doubt that fear of political risks operates as a deterrent to the flow of private foreign capital to developing countries. The World Bank has therefore considered it appropriate to explore whether it can make a contribution to an improvement in the investment climate by reducing the likelihood of unresolved conflicts between host countries and investors and, in particular, can do so in a manner that eliminates the risk of… confrontations between host countries and the national states of…investors."*[8]

Before the ICSID system was created, there were only two kinds of disputes in international law. The first was disputes between states regarding violations of public international law, i.e., treaties. The second was the disputes between private commercial parties regarding international contracts. The latter was settled by applying private international law; private rulings decided what jurisdiction would be applied to each case depending on the nature of the case (Private International Law or Conflict of Law). Therefore, when the ICSID ISDS system was created, it was a new and third type of disputes settlement measure under Public International Law.

[8] Aron Broches, *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* (Dordrecht: Kluwer Academic Publishers, 1995), p. 193.

As Dolzer and Schreuer recently wrote, "in retrospect, it is clear that the creation of the ICSID was the boldest innovative step in the modern history of international cooperation concerning the roles and protection of foreign investments."[9] Dolzer and Schreuer also noted the following:

> *"The success of the concept became apparent when the ICSID Convention quickly entered into force in 1966 . . . especially when, in subsequent decades, more and more investment treaties, bilateral and multilateral, referred to the ICSID as a forum for dispute settlement. For member states, one major advantage of the system was that investment disputes could become "depoliticized" in the sense that the system could prevent confrontations between home States and host States. While for two decades, the ICSID's caseload remained quite modest . . . by the 1990s, the ICSID had become the main forum for the settlement of investment disputes, and Broches' vision had become a reality."*[10]

Indeed, participation in the ICSID Convention must be an opportunity to attract foreign direct investment (FDI)[11] because it allowed foreign investors to sue host States if a BIT was violated. The ICSID thus provided asset security in that it prevented expropriations by host States and addressed a need for safe FDI dispute solutions free from the politics between host States and home States.

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[9] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2012), p. 9.

[10] *Ibid*.

[11] Foreign direct investment (FDI) is the category of international investment that reflects the objective of a resident entity in one economy to obtain a lasting interesting another economy. *OECD Benchmark Definition of FDI*, 4th ed., 2008, available at: https://www.oecd.org /daf/inv/investmentstatisticsandanalysis/40193734.pdf, accessed 25 July 2020).

1.1.2 Criticism of the ICSID System

According to data revealed in October 2016 by Fritz Horas Silalahi, Director of Bilateral and Multilateral Cooperation for the Indonesia Investment Coordinating Board (BKPM), Indonesia faced 12 international investment disputes from 1990 to 2016.[12] Of these, five fell under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), and seven fell under the arbitration rules of the ICSID. The 12 cases were as follows: Amco Asia Corporation and others (the ICSID, 1990); Himpurna California Energy Ltd. v. Perusahaan Listrik Negara (PLN, the UNCITRAL, 1999); Patuha Power Ltd. v. PLN (the UNCITRAL, 1999); Karaha Bodas Co. LLC. v. Pertamina and PLN (the UNCITRAL, 2000); Cemex Asia Holdings Ltd. v. the Republic of Indonesia (the ICSID, 2007); the Republic of Indonesia v. Newmont (the UNCITRAL, 2009); the Government of the Province of East Kalimantan v. Kaltim Prima Coal (the ICSID, 2009); Rafat Ali Rizvi v. the Republic of Indonesia (the ICSID, 2011); Hesham Al Warrag v. the Republic of Indonesia (the UNCITRAL, 2011); Planet Mining Pty. Ltd. and Churchill Mining PLC v. the Republic of Indonesia (the ICSID, 2012); Indian Metal and Ferro Alloys Ltd. (IMFA) v. the Republic of Indonesia (the UNCITRAL, 2015); and OleoVest Pte., Ltd. v. the Republic of Indonesia.

Silalahi compared the number of foreign companies invested in Indonesia from 1990 to 2016 (11,260, number of foreign companies) to the number of

[12] Cited from Investment Coordinating Board, "Indonesia Arbitration Update", (Presentation was presented at APRAG Conference 2016, Bali, October 2016), available at: http://www.apragbali2016.baniarbitration.org/filepaper/Session%203/Fritz%20Silalahi.pdf, accessed 12 March 2020.

investment disputes faced by Indonesia during that time (12 disputes) and the foreign companies with which there were disputes comprised only 0.10% of the total number of investors.[13] Further, Silalahi noted that Indonesia had been using international arbitration for a considerable time, and it had two recognized international arbitration forums. The first was Law No. 5 under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which was established in 1965 which Indonesia ratified the Convention in 1968. The second was Presidential Decree No. 34 under the New York Convention of 1958. Further, regarding the governance of Indonesian dispute settlement laws, Silalahi stated that a hierarchy was applied based on regulation necessities per Governing Laws in Dispute Settlement. The hierarchy of legal effectiveness was BIT provisions on the top, national laws and regulations in the second and general rules and principles for international laws on the third.

However, it is noted that investment disputes or lawsuits that used international arbitration bodies, such as the ICSID, required considerable time and efforts only in regards to Indonesia's government officers (i.e., considerable indirect or "invisible" costs). Such disputes also required considerable legal expenses. For example, when settling Churchill Mining PLC[14] and Planet Mining

[13] *Ibid.*

[14] Churchill Mining PLC (Churchill Mining) was a British company that provided mining services, including general surveys, explorations, and exploitations of mining sites and investments, in Indonesia. The company invested in the East Kutai Coal Project (EKCP), located in East Kutai Regency, Kalimantan Island, Indonesia. The EKCP was a mining project developed jointly by the claimants and Indonesian companies; it involved one of the largest coal deposits on Earth (See: *Churchill Mining v. Indonesia*, https://www.iisd.org/itn/2018/10/18/churchill-mining-v-indonesia/, accessed 5 February 2020).

Pty. Ltd. v. the Republic of Indonesia, which was an ad hoc annulment arbitration only, just one proceeding cost Indonesia USD$1,851,140.23.[15]

Moreover, the case began in 2012, lasted seven years, and required several proceedings. Indonesia, therefore, experienced high costs when settling international arbitration cases. This experience of costs and expenses resulted in criticism of the ICSID in Indonesia.

This criticism was raised during the proceedings of the case mentioned above, Churchill Mining PLC and Planet Mining Pty. Ltd. v. the Republic of Indonesia. The case concerned a coal mining project in Kalimantan; the British investor, Churchill Mining PLC, initiated a lawsuit under the 1977 United Kingdom–Indonesia BIT.[16] The claim initially concerned a change in government policy that resulted in a termination of mining licenses due to environmental issues. The company asserted that Indonesia should pay Churchill Mining USD$2 billion for the loss of its license and the company's legal costs. However, during the case proceedings, the Indonesian Government asserted that the mining licenses belonging to Churchill Mining and its local partner, Ridlatama Group, had been forged. Thus, the ICSID Tribunal rejected Churchill Mining's claim and dismissed the case on 8 December 2016, and Indonesia was freed from paying the $2 billion. Nonetheless, the State had to pay 25% of the legal fees.[17] Churchill Mining

[15] The decision on Annulment between *Churchill Mining Plc. and Planet Mining Pty. Ltd. and the Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40, Annulment Proceedings, 18 March 2019, para. 258.

[16] *Churchill Mining PLC (Churchill) and Planet Mining Pty Ltd (Planet) v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 Procedural Order Number 3, Provisional Order 4 March 2013, filed by the Republic of Indonesia 22 November 2012.

[17] On 8 July 2014, Procedural Order Number 9, regarding provisional measures, was issued by the ICSID Tribunal in regards to Churchill Mining asking for help for its local partner,

appealed for the annulment decision under ICSID rules on 19 June 2018, but the case was once again dismissed at an annulment hearing in Singapore 16–17 July 2018.[18] Finally, on 18 March 2019, the ICSID Tribunal dismissed an annulment appeal by Churchill Mining.

When the initial decision was made by the ICSID Tribunal on 8 December 2016, dismissing Churchill Mining's compensation claim, the Jakarta Post published the following:

> *"Victory—Law and Human Rights Minister Yasonna Laoly announced in Jakarta on Thursday (i.e., 8 December 2016) that the ICSID turned down London-listed Churchill Mining PLC's claim for USD$2 billion in damages. The company was also ordered to pay $9.4 million to Indonesia the minister commented, We were worried, but we kept fighting over and over again because we were sure that we had a solid argument to win this case. Now, I'm proud to say that we did it" . . . this result is expected to become a precedent for future international disputes."*[19]

In response, an international law expert at Universitas Indonesia, Hikmahanto Juwana, commented that it was time for Indonesia to leave the ICSID Convention. One reason Juwana gave was the high cost borne by the Indonesian Government each time it was sued, especially when it lost cases, which required the Government to pay significant amounts of money to compensate foreign investors. Another reason was human resource concerns; Juwana considered Indonesia's regional government sector substandard, among other things, and believed that the

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Ridlatama Group, due to a potential for a criminal investigation by the Indonesian Government into the alleged forgery of the mining licenses (See: *Churchill Mining PLC and Planet Mining Pty. Ltd. v. the Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40).

[18] Procedural Order Number 2, On the Organization of the Hearing Dated 19 June 2018, *Churchill Mining PLC (Churchill) and Planet Mining Pty Ltd (Planet) v. Republic of Indonesia*, ICSID Case Number ARB/12/14 and 12/40, p. 2.

[19] Viriya Singgih, *Indonesia Vindicated in International Arbitration* https://www.thejakartapost.com/news/2016/12/09/indonesia-vindicated-in-international-arbitration.html, accessed 9 December 2019.

Regional Government did not perform appropriately by issuing the forged license, which becomes the significant risk and responsibility the Central Government entailed. Juwana stated the following:

> *"The irresponsible issuance of permits by regional administrations can not be tolerated as it creates . . . messes for the central Government to deal with. Maybe it is. . . time for Indonesia to exit the ICSID Convention; there are too many mischievous investors who want to trick Indonesia with false claims. Just look at the Churchill case."*[20]

Similarly, David Price, an expert in public international law and intellectual property law at Charles Darwin University, also argued against Indonesia's participation in the ICSID Convention. Price noted that Indonesia had expressed concerns regarding what seemed to be excessive corporate rights enshrined in investment law, which had the potential to cause damages, especially financially, and had done so in recent years.[21] Furthermore, he mentioned that Indonesia's IIAs and BITs were unbalanced in regards to the ability of parties to exploit full rights and opportunities for investment protections under the agreements rather than under the terms and conditions of ICSID Convention.[22]

International law practitioners and academics reacted quickly to this criticism, primarily by reviewing BITs and IIAs with Indonesia and the ICSID.

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[20] Viriya Singgih, *Indonesia Vindicated in International Arbitration*, https://www.thejakartapost.com/news/2016/12/09/indonesia-vindicated-in-internationalarbitration.html, accessed 29 February 2020. The Indonesian mining sector comprised coal, bauxite, nickel, gold, copper, silver, and tin. Each project involved significant investments and political risks, such as changes to laws and regulations due to government policies and cases of corruption involving local mining authorities. Each project also involved significant commercial risk in regards to international market prices. Therefore, it was often targeted by foreign gamblers; that is, countries rich in natural resources, such as Indonesia, were often vulnerable to international arbitration claims by foreign investors for significant compensation.

[21] David Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?" *Asian Journal of International Law*, Vol. 7, No. 1, 2017, pp. 124–151.

[22] *Ibid.*

Further, Juwana's statement was a reflection of the wishes and frustrations of Indonesians regarding ICSID arbitration and politicians; citizens were worried about the State's disadvantageous position in proceedings. Juwana explained these concerns in more detail:

> *"The Government of Indonesia should not renew its participation in BITs when they expire; the foreign investment situation had changed since 1968 when Indonesia participated in the Washington Convention (i.e., the ICSID Convention), and now it is investors who need Indonesia. The central Government can no longer risk numerous litigation cases through the ICSID, and these may be caused by the decentralization of activities to local governments. Foreign investors have recourse to the ICSID while domestic investors do not; the ICSID's jurisdiction extends only to cases initiated by foreign investors, and the compensations demanded in ICSID cases are immense. Investors should bring their cases to the Indonesian judiciary or other national dispute mechanisms instead."*[23]

In regards to Juwana's statement that foreign investors needed Indonesia, it is a fact that the credibility of the State in regards to FDI had recently improved and in recent five years, FDI increases in the country; FDI had established a substantial role regarding Indonesia's economic growth.[24] Indeed, FDI in Indonesia had grown to affect a wide range of economic markets; these included not only the natural resource exploration and exportation sectors but also the industrial and service sectors, including recent infrastructure investments.[25]

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[23] Hikmahanto Juwana, *Indonesia Should Withdraw From the ICSID!,*The Jakarta Post, accessed 2 April 2019.

[24] Statistics from the BKPM showed that by 2018, FDI in Indonesia had reached IDR721.3 trillion, a 4.1% increase since 2017. These were for FDI and DDI and were based on Indonesia's five most significant sectors: electricity, gas, and water supply (IDR117.5 trillion, 16.3%); transportation, warehousing, and telecommunications (IDR94.9 trillion, 13.1 %); mining (IDR73.8 trillion, 10.2 %); food (IDR68.8 trillion, 9.5 %); and housing, industrial estates, and office buildings (IDR56.8 trillion, 7.9%). See: https://www.bkpm.go.id/images/uploads/filesiaranpers/PaparanBahasaIndonesiaPressReleaseTW_IV2018.pdf., accessed 22 March 2019.

[25] Economic activities had grown to include the commercial and maintenance (5,059 projects), service (3,094 projects), mining (606 projects), food (1,377 projects), hotel restaurant (2,188 projects), and chemical and pharmaceutical (1,001 projects) sectors, among others, in 2018.

Therefore, the Government's FDI policies should have to be shifted from development to market economics due to significant commercial participation in private foreign investments.[26] Indeed, as Juwana pointed out, such development of FDI's increase has been caused by broader factors rather than the factor of participation of Indonesia to ICSID and that FDI policy should stand based on market economy, where foreign investors come to Indonesia to look for his interest. Finally, the State's domestic legal system had developed sufficiently to benefit foreign investors, including tax incentives. Therefore, there was a need for Indonesia to review its investor-state dispute settlement (ISDS) system, which included BITs and the ICSID.

Moreover, as aforementioned, the ICSID system was disadvantageous for host Sates, and this topic had been thoroughly discussed and studied in international investment law. ICSID arbitration was unilateral; it could be initiated by only foreign investors based on violations of IIAs and BITs.[27] Thus,

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See: BKPM, https://www.bkpm.go.id/images/uploads/filesiaranpers/PaparanBahasaIndonesia PressReleaseTWIV2018.pdf., accessed 22 March 2019.

[26] By 2010, Indonesia had, on average, decreased restrictions across all its sectors more than India and China had; however, it remained more restrictive than Korea and Japan and concerning the OECD average. Further, Indonesia was the least restrictive among these countries regarding its banking, mining, oil and gas, and electricity sectors; the State's foreign equity ceiling was higher than the Asian and world foreign equity ceiling averages. See: M.Lesher, "The OECD Regulatory Reform Review of Indonesia: Market Openness", *OECD Trade Policy Paper Number 138*, (Paris: OECD Publishing, 2012), pp. 30–31.

[27] BITs are agreements that establish the terms and conditions for private investments by the nationals and companies of one State in another state, i.e., FDIs. They are established through trade pacts and are international laws that, in general, address investment agreements between host States and other states. It should be noted that sometimes the term "BIT" represents an agreement that includes multiple agreements, regional agreements, or IIAs. That is, it sometimes refers to a full document, such as a Free Trade Agreement (FTA), when the contents and purposes of various agreements relating to the protection of foreign investment are similar. See: Akira Kotera, *International Investment Agreement* [*Kokusai Toushi Kyoutei]*, (Tokyo: Sanseidou, 2010), pp. 2–4.In this research the term of BIT which is one of the International Law is used in general meaning which covers investment agreement between the States. Sometimes the term BIT represents agreement including multiple, regional, or International Investment

IIAs and BITs were some of the most significant commitments Indonesia had made concerning ICSID arbitration. Signed IIAs and BITs with ISDS clauses were agreements to engage in investor-state arbitration based on the ICSID's arbitration jurisdiction, in general, and affected the laws applicable to dispute proceedings through the ICSID Tribunal.

Further, Indonesia had general complaints against the ICSID system regarding the method used to decide the State's responsibilities. There had been no rulings regarding how the State's BIT responsibilities would be decided, nor had there been any rulings regarding the ICSID's arbitration rules and jurisprudence. The ICSID typically applied the document Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ILC Articles) to relevant situations as it applied to international public law.[28]Article 4 of ILC Articles stated that the conduct of regional governments was the responsibility of the regions' states. [29] Thus, ICSID Tribunal decisions on the misconduct of regional

Agreement (IIA) which is a part of broader agreement such as Free Trade Agreement (FTA) since the content and purpose of those agreement relating to the protection of the foreign investment are similar.

[28] The International Law Commission adopted ILC Articles during its 53rd session in 2001; it was then submitted to the General Assembly as part of the commission's report on that session. The report, which also contained commentaries on the draft articles in the document, appeared in volume II of the commission's 2001 yearbook. See:United Nations, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries*, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, accessed 5 February 2020.

[29] According to the ICSID, the responsibility of regional governments related to Article 4 in ILC Articles, which stated, 1. The conduct of any state organization shall be considered an act of that State under international law, whether the organization exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organization of the Central Government or as a territorial unit of the State. 2. An organization includes any person or entity that has a status following the internal law of the State. Further, "the principle in article 4 applied equally to organizations of the central government and its regional and local units." See: United Nations, *Office of Legal Affairs (OLA)*, https://legal.un.org/ilc/texts/instruments/english/commentaries/962001.pdf, accessed 5 February 2020.

governments were a risk for Indonesia's central Government. However, it remained questionable whether private investments by foreigners were the responsibility of the State or its regions, especially if the governance of licensing authority is confused. It is again the problem of domestic governance rather than the ISDS problems mentioned in BIT or IIA. Therefore, as far as Government participates ISDS unnecessarily, Indonesia will be vulnerable to be sued due to the region's weak governance.

Thus, under ISDS system, when making decisions concerning the State's responsibility for the conduct of actors, whether these actors were state-owned companies, regional governments, government organizations, or citizens, the ICSID primarily applied public international law.[30] However, the applications of public international laws, such as ILC Articles, had been questioned, since the disputes of FDI has nature of private and commercial matters. And how to link the relationship between violations of investment agreements and violations of BITs were controversial.

Another reason BITs were disadvantageous related to their treatment of nationals; jurisdictional conditions of the ICSID excluded claims by local investors against their home states due to the sovereignty of each State. However, some scholars believed such investment disputes should be accommodated as private interest adjustments and should be considered violations of investment agreements between the parties. In such cases, the points of dispute were domestic

[30] Correctly, it applied articles 4, 5, and 8 in ILC Articles in regards to the Actor of Investment Agreement and host States and regards to definitions of various actors in the host State's domestic laws. See: Yumi Nishimura, "Attribution of Conduct in Investment Disputes (*Tousi Funsouniokeru Koui no Kekkaheno Kizoku*), in Akira Kotera et al., eds., *International Investment Agreement* [*Kokusai Toushi Kyoutei*], (Tokyo: Sanseidou, 2010), pp. 175–195.

policies or state regulations of host State, and a question arose: why could foreigners dispute State policies through the ICSID, but not nationals? Disputes with foreigners could be interpreted as interventions regarding the sovereignty of host States, such as the Churchill Mining case. Further, such arbitrations required each host State to compensate foreigners from its national treasury.[31] An additional question was why the State was required to pay foreigners rather than protect domestic investors, although this contradicted BIT principles regarding nationals' treatment.

Further, scholars examined why foreign investors could make claims not only through domestic courts but also through international arbitration, while domestic investors could make claims in only domestic courts. It discriminates against nationals as in the latter, governments could excuse themselves, but in the former, governments could not. These questions highlighted domestic political problems related to the legitimacy of BITs and ICSID arbitration, and in some cases, reflected resistance to IIAs among nationals.[32] As aforementioned, it was noted that the ICSID system was based on claims initiated by foreign investors, and such claims were unilaterally embedded in BITs as states could not make similar claims against such investors.

[31] Akira Kotera *op.cit.*, p. 13.

[32] *Ibid*, p.10. According to Kotera, IIA arbitration changed in 1998; the American company Ethyl made a claim against the Government of Canada based on an IIA, specifically the North American FTA (NAFTA). Ethyl requested compensation for an end to operations caused by an environmental policy change made by the Government of Canada. During the arbitration, both parties reached a reconciliation agreement in which the Canadian Government would compensate Ethyl. An NGO criticized NAFTA as it had an arbitration clause.

Moreover, the ICSID system presented an economic efficiency issue, which was considered one of the most critical factors in the resolution of disputes. It was noted that the economic efficiency of arbitration depended not only on the cost of each dispute but also on the length of each proceeding, which directly affected such costs. These expenses could be divided into three categories: ICSID administrative costs, arbitrator and attorney fees and expenses, and each party's expenses. [33] It was commonly understood that for ICSID arbitrations, lawyers' fees were extremely high. The average cost of arbitration is difficult to calculate due to arbitration secrecy. However, some information regarding these ISDS costs remained available because dispute settlement expenses are crucial to the legitimacy of the system.

Instead of using the three categories as mentioned above, Tim Samples classified this available data into four categories and determined an average cost for each category.[34] The first category was tribunal expenses (i.e., administration costs, including facility and arbitrator expenses). On average, USD$1.04 million was spent on each ICSID case, and USD$1.38 million was spent on each UNCITRAL case. The second category was legal fees (i.e., lawyers' fees and other such expenses). Based on data obtained from arbitration attorneys at the practice Allen & Overy for 324 cases, a claimant's average legal expense for one case was USD$7.4 million and a respondent's average legal expense for one case was USD$5.18 million. However, in some cases, expenses exceeded USD$30 million; with these inclusions, the average legal fee increased to USD$8 million

[33] Lucy Reed, Jan Paulsson, and Nigel Blackaby, *op.cit.,* pp. 154–155.

[34] Tim Samples, "Winning and Losing in ISDSs," *American Business Law Journal*, Vol. 56, Spring 2019, 2019.

for each case. The third category was settlement costs; it was noted that more than 20% of ISDS cases were settled with payments. Argentina paid an average of USD$6 billion per case, Poland paid an average of USD$4 billion per case, and Venezuela paid an average of USD$2.3 billion per case. Finally, the fourth category was award expenses; the average amount paid by states after compensation was awarded USD$522 million. This data showed that arbitration costs could impose extreme hardship on developing states with small budgets; individuals; and small and medium enterprises. It also showed that ICSID arbitration was over five times more expensive than investor-state mediation.[35]

ICSID arbitration could take several years, and this was the main cause of such high costs.[36] For example, the Churchill mentioned above Mining case took seven years. It began on 20 April 2012, when Churchill Mining Executive Chairman David Quinlivan filed the document Request of Legal Protection with Indonesian President Susilo Bambang Yudhoyono. It was not resolved until 2019, and the total cost of the case was USD$12.5 million. The investor requested a compensation amount of USD$2 billion but not successful and the payment of 75% of its arbitration expenses (i.e., USD$9.4 million) of Indonesia was ordered to pay by Tribunal because the case was dismissed, which included arbitrator and lawyers' fees; transportation; daily discussions with judges and witnesses; and other costs. If Indonesia lost the case, these expenses were to be paid from Indonesia's national treasury. When the case was resolved, Indonesia

[35] Ilija Penusliski, "Chapter 22: A Dispute Systems Design Diagnosis of ICSID," in *The Backlash Against Investment Arbitration,* (Alphen aan den Rhijn: Kluwer Law International, 2010), p. 526.

[36] *Ibid*.

still had to pay 25% of the cost (i.e., USD$3.1 million), although it won the case and was freed from the compensation and legal payments requested by the investor.[37] Indeed, under the ISDS system, the host States only have three options of - lose a little, lose a big, or breakeven.

Thus, the claim was made that investment dispute settlements should be made using domestic measures rather than international ones. As Indonesia's BITs did not discuss governing laws and jurisdictions (this omission was common in BITs), foreign investors could choose from several domestic alternatives to international arbitration through the ICSID, the UNCITRAL, and the International Chamber of Commerce (ICC). This claim was related to the sovereignty of host States, jurisdiction issues regarding institutes, and laws applied by the ICSID Tribunal.

Despite these criticisms, Michael Ewing-Chow, an expert in international investment law at Singapore National University, defended Indonesia's participation in the ICSID Convention in response to Juwana. Ewing-Chow stated, "it is important to signal . . . to foreign investors that Indonesia welcomes investment and the importance of protecting Indonesian investors investing abroad." [38] He also noted several reasons why this was important. First, decentralization was a matter of coordination between regional governments and the central Government; second, FDI procedures were a domestic challenge in Indonesia. Third, participation in the ICSID Convention reduced investment risk,

[37] Churchill Mining Plc. and Planet Mining Pty. Ltd. v. Republic of Indonesia, ICSID Case No. ARB/12/14 and ARB/12/40, Final Award, 6 December 2016.

[38] The Jakarta Post, *Indonesia Should Not Withdraw from the ICSID*, https://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-withdraw-icsid.html, accessed 4 July 2018.

and fourth, expensive compensations were not only an ICSID challenge but also a domestic challenge. Finally, fifth, there are multiple arbitration forums, such as the Stockholm Chamber of Commerce (SCC), the ICC, and the UNCITRAL other than ICSID.[39]

These reasons were generalized and may have been made to maintain the status quo. Ewing-Chow defended the ICSID system from the perspective of foreign investors with interests in developing states, who were supported by the World Bank and the United Nations Conference on Trade and Development (UNCTAD).[40] Moreover, as aforementioned, the author asserted that the problems noted by Juwana were procedural issues involving the definition of FDIs by the Indonesian Government and were matters of coordination between Indonesia's regional and central governments.[41] It meant the issues could be addressed in regards to the sovereignty of the host State rather than in regards to international arbitration issues. However, state responsibilities remained questionable, and the

[39] This disagreement with Juwana was not due to a negative relationship between the authors' states or the authors' individuals; instead, it was friendly advice given to Juwana as the authors had a very close relationship. Indeed, Singapore and Indonesia had a special relationship in regards to trade and investment. According to BKPM statistics, in 2018, Singapore was the number one investor in Indonesia in regards to many projects (2,531) and financial investments (USD$2,491,300). However, these investments mostly involved companies affiliated with investors in other countries. For example, a Japanese company would invest in Indonesia by establishing a company in Singapore and using that company to invest in Indonesia. It occurred because Singapore was well established as a trading hub for the region and supported such investments in Indonesia. See: Michael Ewing-Chow, *Indonesia Should Not Withdraw From the ICSID!*TheJakarta Post, 24 April 2014, p. 15 and http://www.siac.org.sg/our-rules/siac-rules2016, accessed 4 July 2018.

[40] The UNCTAD is a permanent intergovernmental body that was established by the United Nations General Assembly in 1964. Its headquarters are located in Geneva, Switzerland, and it had offices in New York and Addis Ababa. The organization is part of the UN Secretariat and reported to the UN General Assembly and Economic and Social Council, but have its membership, leadership, and budget. It published a World Investment Report annually. See: UNCTAD, *About UNCTAD*, https://unctad.org/en/Pages/aboutus.aspx, accessed 5 February 2020.

[41] "Churchill Mining v. Indonesia," https://www.iisd.org/itn/2018/10/18/churchill-mining-v-indonesia/, accessed 11 February 2020.

Ewing-Chow did not address Juwana's argument that investors were attempting to trick Indonesia with false claims. An example of such a false claim is the forged licenses obtained by Churchill Mining, which Ewing-Chow did not note.

Ewing-Chow also defended the ICSID system by stating that Indonesia's participation in the ICSID Convention reduced investment risk and thus positively affected FDIs.[42] However, if Indonesia withdrew from the ICSID Convention, Singapore could be affected as it was one of the top investors in Indonesia. BKPM statistics showed that in 2018, Singapore is number one investing State in the number of the projects (2531 projects) in 2018 and is number one in the amount of investment (US Dollars 2491,3 Million). Finally, Ewing-Chow noted alternative arbitration forums that were mentioned in Indonesia's old BITs.[43] Most of these arbitration institutes were noted in the New York Convention of 1958, in which Indonesia was a participant, and in regards to these forums, Ewing-Chow suggested the possibility of BIT renegotiations. However, this argument assumed

[42] Michael Ewing-Chow and Junianto James Losari, *Indonesia Should Not Withdraw from the ICSID!* https://www.thejakartapost.com/news/2014/04/24/indonesia-should-not-with draw-icsid.html, accessed 11 February 2020.

[43] The Singapore International Arbitration Center (SIAC) commenced operations in 1991 as an independent not-for-profit organization. It developed a reputation for providing quality, efficient, neutral arbitration services to the global business community. Its Court of Arbitration comprised 22 arbitration practitioners from around the world, including Australia, Belgium, China, France, India, Japan, Korea, Singapore, the UK, and the USA. The main functions of its court included arbitrator appointments and case administration supervision. For example, the SIAC had an experienced international panel of over 400 expert arbitrators from over 40 jurisdictions. Appointments were made based on specialist SIAC knowledge regarding arbitrators' expertise, experience, and success. SIAC Rules 2017 (1st Edition, 1 January 2017) included efficient, cost-effective and flexible rules that incorporated features from both civil and conventional law legal systems. These were the primary rules of arbitration is used, and when they came into effect, they superseded previous SIAC rules. However, they did not explain that SIAC arbitration parties can be participants in UNCITRAL arbitration. While these rules were designed for ad hoc arbitration, parties could, with special provisions, enjoy the benefits SIAC arbitration administration. See: *SIAC Investment Rules 2017*, https://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20 Investment%20Rules%202017.pdf, accessed 5 February 2020.

that the legal costs of other arbitration forums were equal to the legal costs of ICSID arbitration.

Abdul Kadir Jaelani, the Director of Economic and Socio-Cultural Agreements and Directorate General of Law and International Treaties for the Ministry of Foreign Affairs, disagreed with Juwana's argument as well.[44] According to Jaelani, withdrawing from the ICSID was not a favourable solution for Indonesia because the Government could still be sued, per Article 25 (1) of the ICSID Convention.[45]

As aforementioned, the article stated the following.

> *"The jurisdiction of the Center shall extend to any legal dispute that arises directly out of an investment and that involves a Contracted State (or any constituent subdivision or agency of a Contracted State designed to the Center by the State) and a citizen of another Contracted State if the parties involved in the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally."*[46]

Indeed, Jaelani asserted the issue was not the ICSID; rather, it was ISDS clauses in Indonesia's BITs,[47] and revising these treaties was the initial step needed to address the dispute with the ICSID Convention. It required a revision of regulations concerning sectors the Government needed to protect to address the

[44] Hukumonline, *Guru Besar Hukum Minta Indonesia Keluar Dari ICSID*, https://www.hukumonline.com/berita-baca/lt5145a99083b4d/guru-besar-hukum-minta-indonesia-keluar-dari-icsid-dated-17-March-2013, accessed 2 February 2020.

[45] *Ibid*.

[46] Article 25,*Washington Convention*, par. 1.

[47] Hukumonline, *Sering Dirugikan, Indonesia Harus Moratorium BIT*, https:// www.hukumonline.com/berita/baca/lt539abacadb117/sering-dirugikan-indonesia-harusmoratoriu m-bit, accessed 2 February 2020.

scope of the investment itself. Moreover, Jaelani noted that BITs were still needed.[48]

However, the arguments mentioned above in favour of the ICSID were not sufficient to argue for the use of an ISDS system under international law. That is, these arguments regarding the ICSID did not resolve the challenges faced by Indonesia. The ICSID system contained two considerations mentioned above for fairness: ICSID Tribunal arbitration judgments and diplomatic negotiations on ISDS under BITs and IIAs.

In 2010, the UNCTAD proposed a sustainable growth plan regarding ISDSs. It was noted that ISDS clauses in BITs and IIAs were not included when NAFTA was renegotiated. This indicated a change in the USA's FDI policy and suggested an alternative to ICSID challenges that fit the UNCTAD's sustainable growth plan. Consequently, ISDSs received significant attention in the literature on international and economic law. It is noted that the main challenge is a conflict between investor interests and sovereignty of host State.

1.2 Formation of Issues

This paper discusses an ISDS system under international law in regards to FDI policies, and this is done from the perspective of developing states, such as Indonesia. Three research questions guided this paper's research,

(1) How does Indonesia's international economic position impact the national investment legal framework?

[48] *Ibid*.

After 1998, rapid economic growth and international support through the Washington Consensus and neoclassic liberal policies affected a wide range of the State's legal framework, and these changes included amendments to the State's Constitution. The analysis will be made whether the national investment legal framework is consistent with these changes.

(2) How investor-state dispute settlement is implemented in Indonesia legal system?

This question considered the benefits ISDSs offered host States in general, the USA's non-ISDS BIT model, and the cost analysis of ISDSs both in general and in regards to Indonesia. Within the Indonesian legal system, the analysis will be made whether the cost for ISDS has merit.

(3) How alternative international dispute settlements be executed within Indonesia's legal system?

Various alternatives, such as Brazil and India's BIT models, will be analyzed. Besides, the international position of Indonesia in regards to the UNCTAD's sustainable plan and the best options available to Indonesia's legal system will be analyzed.

1.3 Aim and Purpose of the Research

The research has aims and purpose to do research and analyze the fundamental position of Indonesia under International Law in relating to Foreign Direct Investment (FDI).

Thus, the aims and purposes of this research are:

1. To review and analyze FDI environment of Indonesia since 1968 in two aspects: i) impact of Globalization to the global economy, and ii) Indonesia's development of economy and legal framework for FDI. The result of this analysis will examine the international position of Indonesia and its influence on the domestic laws and regulations in Indonesia. Furthermore, it will discuss the investment policy of Indonesia.
2. To review and analyze the merit of the ISDS system for the host State from the viewpoint of international law economically and normatively. The normative argument is to confirm the three core benefits in question by referring to the empirical studies by several scholars study results and economically, the analysis is made on the cost analysis basing on the legal cost of ISDS which developing countries have been bearing under arbitration. Impact of such cost is measured against the FDI stock statistic. The result will measure the meaning and value of the ISDS system regarding the merit.
3. To review and analyze the alternative measures replacing the ISDS system and ICSID arbitration. From this analysis, it will discuss the

options which Indonesia can take based on the menu by UNCTAD—taking samples from other non-contracting countries of ICSID, such as India and Brazil.

1.4 Benefits of the Research

1) The results of this research are expected to benefit the government officials, expert of the Republic of Indonesia and its stakeholders in determining FDI policy in future by reviewing the international position of Indonesia. Through the results of a historical analysis of how Globalization has given the impact to the international and domestic situation of Indonesia, from the first year as a member of ICSID (1968) until 50 years later (2019). Through this analysis, it can be seen whether Indonesia has been shifted from the development regime by the Government to the market-oriented regime by private sectors in the field of trade and investment. The results of this study can be input as a reference in reviewing private rulings regarding FDI so that it can provide justice to all nationalities in the context of updating government policy in international law under the Constitution.
2) The results of this research are expected to provide argument regarding the actual situation on the benefits from ISDS. The study will provide policymakers such as the central Government, local Government and experts of the Republic of Indonesia as a reference to make policy paper regarding ISDS and ICSID regime. Especially, after the long time passed

since Indonesia participated in ICSID arbitration, the merit of the system as a dispute solution of FDI will be the essential factor to be reviewed. Especially, re-counting the cost that Indonesia has been experiencing to pay due to the system and the risk that Indonesia is facing against the foreign investors will be the unavoidable factor to be analyzed. The results obtained by cost analysis of ISDS will be an input and supporting material as doctrinal research findings to assess the current situation as a member of ICSID and IIA regime. The factual situation as an ICSID member who has a high risk financially, including legal sovereignty factor on the natural resources. This research also provides insight into policymaking in connection with the justice mentioned in Constitutions.

3) This research contributes to ideas on how to develop of the domestic legal system together with the international commitment of Indonesia by avoiding the risk and strengthen the domestic legal system. From the viewpoint of Indonesia's position in the international society, it is necessary to clarify the options for Indonesia under the menu offered by UNCTAD, by referring not only the sample of the USA which is helpful to invite MNEs' investment but also the samples of India and Brazil from the viewpoint of keeping sovereignty of domestic FDI policy, without participating ICSID Convention.

1.5 Originality

Throughout the results of searching and checking the literature and correspondence conducted by researchers in several Post Graduate for Doctoral Programs for Law Study, Economics Study as well as Social and Political Sciences State and Private Universities, none of the dissertations being or has been studied with the same topic, content and title as this research. Some several dissertations and journals write and discuss ICSID, but the studies discussed are not the same as the research that researchers are doing. The study being studied is not the same as the research theme that the researcher will examine.

The first one is the Dissertation written by Nurnaningsih Amriani from Universitas Sumatera Utara that was written in 2015 titled "*Penerapan Prinsip Keterbukaan atas Putusan Arbitrase ICSID di Indonesia dan Perbandingannya dengan Beberapa Negara*" (The Implementation of Transparency Principles for ICSID Arbitration Awards in Indonesia and Comparison with Several Countries). The research is mainly discussed regarding the disclosure of the ICSID Arbitration Award and the application of Transparency principles in ICSID Arbitration, where Indonesia as the party in the dispute. This Dissertation uses Integration Theory by Smend who is a German legal expert.

The other one is Dissertation wrote by Rouli Anita Velentina with titled "*Penyelesaian Sengketa Penanaman Modal Asing melalui Arbitrase ICSID: antara Mitos dan Realita*" (Investment Dispute Settlement Through ICSID Arbitration:between Myth and Reality). This Dissertation discusses about the principle of the mechanism of investment disputes solutions through ICSID

arbitration from the viewpoint of justice/ fairness, and the practice of the dispute solution for the investors through ICSID Arbitration. The Dissertation uses Redistributive Justice Theory by Frank J. Garcia and Dignified Justice Theory by Teguh Prasetyo viewed from Pancasila.[49] Values and domestic laws in analyzing the questions. The outcome from her Dissertation is to review and analyze the principle of the mechanism of disputes solution from the view of fairness and to conclude the participating Indonesia as an "impacting" member such as chairman, vice-chairman, or honorary councils so that Indonesia can amend the Convention. By using the normative juridical research methods and also supported by empirical juridical research, Rouli discusses the principle of investment dispute resolution mechanism through ICSID arbitration in from justice point of view. The discussion focused on the analysis of practice from legal and non-legal factors, namely the political will of the authorities at that time. In Rouli's opinion, the political will of the authorities at that time influenced the dispute resolution mechanism through ICSID arbitration. She took "The Amco Asia Corporation case and others vs. the Republic of Indonesia" as a case study (ICSID Case No. ARB / 81/1).

Rouli Valentina reviewed the mechanism of investment dispute resolution through ICSID arbitration from the view point of Justice or Fairness. By describing in detail the ICSID institutional framework which has two organs, namely the Administrative Council and the Secretariat. Next, the Administrative

[49] Pancasila is the core ideology of the Indonesian Government consisting of belief in God, Indonesia nationalism, humanitarianism or just and civilized humanity, democracy, and social justice. This ideology consists of five principles. (Oxford Islamic Studies Online, *Pancasila*, http://www.oxfordislamicstudies.com/article/opr/t125/e1818, accessed 5 February 2020.

Council and the Secretariat are described in detail again, including their duties and authorities. Then described the mechanism and procedures for resolving this ICSID Arbitration dispute.

However, Rouli research that is examined in Universitas Pelita Harapan is different from the Dissertation that the Author mentioned above. The differences between them are; first, this research analyzes on Privatization of Public Law in the Case of International Investment Law, by using Richard Posner's Theory of Efficiency who mentions that justice is efficiency and can be assessed by economic analysis for the law implementation. This research is regarding another adjustment function which is ISDS articles in BIT or IIA, viewed from host State like Indonesia, not adopt ISDS in FDI dispute solutions, and to build up the stronger domestic legal system as long shot.

Second, this research also studies how the global investment law has influenced national laws under Globalization and how the investment legal framework in Indonesia has been developed.

1.6 Systematic of Writing

This Dissertation consists of five chapters; each chapter will discuss as follows:

Chapter One is an introduction, describing the background of the problem that makes this topic relevant and interesting to be researched. Whether Indonesia withdraws from ICSID was argued in 2014. In the introduction, described the argument between pro-ICSID who insisted on the merits of host State and anti-

ICSID who have a criticism regarding ICSID arbitration. There will be views or opinions about ICSID from the government side, nationalists and experts, both domestic and foreign. Nevertheless, views and opinion vary depending on where we stand, host State as respondent or Investor side as claimant of arbitration. Hikmahanto and Ewing-Chow are one of the academic and experts who have contradiction opinions regarding Indonesia participation on ICSID convention. This chapter outlines, in general, the legal basis of the ICSID regulation, a brief description of the concepts and Formation of Issues, the aims and purposes of the research and the benefits of doing research. However, the balancing fairness between investors interest and sovereignty of host State is not only in the hand of Tribunal of ICSID but also in the negotiation regarding ISDS articles in BIT and IIA. Since there was no conclusion from arguments regarding ICSID, the Dissertation is regarding the ISDS system. At the end of this chapter will review the systematic discussion of research writing that outlines the content or description of each chapter to be examined. Overall, this chapter contains an introduction and basic guidelines in conducting studies or research description, as well as preliminary analysis related to this research topic.

Chapter Two consists of two parts of the framework on the subject. First part will be regarding theoretical framework, which is mainly to explain Theory of Efficiency developed by Richard A. Posner's Economic Analysis of Law (EAL) who mentions that efficiency will be in most meaning justice. Thus, the ISDS system can be assessed by Cost Analysis. By Cost Analysis, the Dissertation finds the expenses by Government to maintain the ISDS system are high enough

comparing global average cost, and it might be against the justice in Constitution due to lack of efficiency. In the latter part of chapter two, the conceptual framework will be explained to clarify the basic concept and definition of the terms used under this Dissertation of terms such as International Arbitration, Foreign Direct Investment, ICSID, IIA or BIT, public law, and governance.

Chapter Three describes the research methodology. In conducting research, the authors conducted the doctrinal research method. Doctrinal and non-doctrinal legal research are both attempts to find living law, even though with different approaches / analyzes. Efforts to find law (law in the books) are carried out in this doctrinal legal research. In this chapter, the procedure of Material Research that consists of Primary, Secondary and Tertiary Law Materials is explained. Then the next subchapter is discussed about the character of the analysis. The research is conducted using qualitative analysis, including the Cost Analysis of the ISDS system to measure the efficiency of the ISDS system.

Chapter Four will be the research and analysis basing on the three research questions. The first question of "How does Indonesia's international economic position impact the national investment legal framework?"is raised to clarify and confirm the international position of Indonesia at present. This research reveals the impact of Globalization and development of the legal system in Indonesia, which is substantially improved from the time of the Washington Consensus in 1998. The confirmation of the FDI policy of Indonesia is necessary for the start of the argument. The second research question "How Investor-state dispute settlement is implemented in Indonesia Legal System?" is regarding the

ISDS system itself, whether it has enough merit for Indonesia. The cost of the ISDS system and benefit is mainly analyzed from the viewpoint of risks and damages caused by such membership normatively and the cost that Indonesia is bearing for the system. The change of FDI policy of the USA regarding ISDS is a big reference also on the theme to be clarified. The third question "How alternative international dispute settlements be executed within Indonesia's legal system?" is the question in case Indonesia does not adopt ISDS. The legal needs to settle FDI disputes avoiding State responsibility on the commercial matters will be argued regarding what, how, and why. We examine the model sample of Brazil who is not a member of ICSID who put a priority on sovereignty, and India, who has a unique approach to ISDS. Both countries are similar to Indonesia as the economic position of developing countries, vast territory, significant population, with abundant natural resources.

Chapter Five is a concluding chapter that contains conclusions and summarizes the results of research. In this chapter also offers suggestions as a theoretical implication of this research. The second sub-chapter will be the recommendation for and recommendation.