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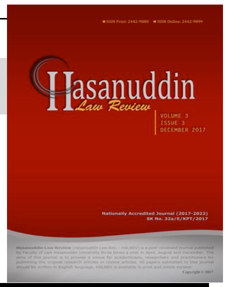

The Lack of the Environmental Concern in Indonesia's Bilateral Investment Treaties

I Gusti Ngurah Parikesit Widiatedja[1], I Gusti Ngurah Wairocana[2]

[1] *Faculty of Law, Udayana University, Indonesia. E-mail: ngurahparikesit@gmail.com*
[2] *Faculty of Law, Udayana University, Indonesia. E-mail: wairocanangurah@yahoo.co.id*

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ABSTRACT

In the modern era, Bilateral Investment Treaties (BITs) are relatively effective to attract more foreign direct investment (FDI). Many countries then eagerly concluded BITs, including Indonesia. Considering the adverse impact of FDI on the environment, most countries then start putting the environmental concern in their BITs, assisting them to prevent and mitigate any adverse impact of FDI on the environment. Indonesia, however, did not follow this measure. This paper then shows the lack of the current Indonesia's BITs in putting the environmental concern in their provisions. The fact that Indonesia has terminated some BITs becomes a right momentum to start putting the environmental concern in the updated and modified Indonesia BITs in the future. From other countries' practices, there is evidence to suggest that BITs can and do contain provisions aimed at ameliorating environmental damage caused as a result of FDI within host countries' territories.

1. Introduction

Globally, Foreign direct investment (FDI) declined 16 percent from US$1.47 trillion in 2013 to US$1.23 trillion in 2014 due to unfavorable situations, including geopolitical tension, policy uncertainty, and the brittleness of the global economy.[1] According to World Investment Report 2016, nevertheless, FDI increased significantly by 38 percent to be $1.76 trillion in 2015, recording the highest level since the global economic and financial crisis of 2008–2009.[2]

The presence of FDI has contributed huge benefits for host countries. Firstly, FDI has created job opportunities that are crucial for reducing unemployment and poverty in

1 United Nations Conference on Trade and Development. (2015). *World Investment Report 2015: Reforming International Investment Governance*. Geneva: United Nations, p. 2.
2 United Nations Conference on Trade and Development. (2016). *World Investment Report 2016: Investor Nationality: Policy Challenges*. Geneva: United Nations, p. x.

host countries. For instance, Richards and Schaefer unveiled that foreign-owned American firms employed 6.1 million people[3] and 2.4 million indirect and induced jobs, resulting a total of 8.5 million jobs in 2013.[4] Meanwhile, Lipsey and Sjoholm concluded that from 1975 to 2005, foreign-owned manufacturing plants provided more jobs compare to plants that remained under the national ownership during the same period in Indonesia.[5]

The next benefit of FDI is the increase of productivity and export capacity. Arnold and Javorcik stated that the acquisition process from local to the foreigner improved productivity in the manufacturing sector in Indonesia.[6] This progress was reached by means of technological advancement, superior know-how, managerial enhancement, marketing strategies, and motivational lesson for employees.[7] With respect to export expansion, the presence of FDI is an important source for local firms to gain information relating how to export products, and then launch distribution channels in foreign markets.[8] Specifically, Chen and Swenson summarised that FDI has contributed to the increase of transaction unit values up to 6,3 percent, assisting local firms to expand new product exports by 1.3 percent in China.[9]

Bearing in mind the benefits of FDI almost all countries then eagerly concluded Bilateral Investment Treaties to attract more FDI.[10] Medvedev analysed the impact of PTAs on the net FDI inflows of member countries, utilising a comprehensive database of PTAs in a panel setting.[11] The research found that PTA contributed a positive change in net FDI inflows.[12] To illustrate, Costa Rica can expect its net FDI inflows to rise by 11.5 percent after signing a PTAs with the U.S.[13] Neumayer and Spess that used econometric analysis, showed the participation of developing countries in BITs with capital-exporting countries could hugely increase FDI inflows up to 93%.[14]

Turning now to the discussion between FDI and environment, there have been critics from the existing Bilateral Investment Treaties (BITs) and other International Investment Agreements (IIAs) that they have not yet significantly encouraged the sustainable development principle in host countries, in particular developing

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3 Richards, J., and Schaefer, E. (2016). *Jobs Attributable to Foreign Direct Investment in the United States*, International Trade Administration. Available online at: http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_005496.pdf. [Assessed on 22 March 2017]. Indirect jobs are those created outside commercial firms, but they have strong relation with those firms. For examples, suppliers or material or independent contractor increasing the number of employees because they involve in the firm's project. Induced jobs are those that were made because of the economic impact created by the commercial firms.

4 *Ibid.*

5 Lipsey, R., and Sjöholm, F. (2010). "FDI and Growth in East Asia: Lessons for Indonesia", Working Paper No. 852, IFN, p. 20.

6 Arnold, J.M., and Javorcik, B.S. (2009). "Gifted Kids or Pushy Parents? Foreign Direct Investment and Plant Productivity in Indonesia". *Journal of International Economics*, 79: 42-48.

7 *Ibid.*

8 Chen, H., and Swenson, D.L. (2014). "Multinational Exposure and the Quality of New Chinese Exports". *Oxford Bulletin of Economics and Statistics*, 76: 41-56.

9 *Ibid.*

10 Neumayer, E., and Spess, L. (2005). "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?" *World Development*, 33: 1567-1568.

11 Medvedev, D. (2006). "Beyond Trade the Impact of Preferential Trade Agreements on Foreign Direct Investment Inflows", World Bank Policy Research Working Paper 4065, p. 3.

12 *Ibid.*

13 *Ibid.* 43.

14 Neumayer, E., and Spess, L., *Op.cit.*, 1573.

countries.[15] Evaluating the existing investment treaties, a closer look at the OECD data in 2011 reported that from 1,623 IIAs, which equal to 50 per cent of existing IIAs, only 8.2 per cent of IIAs expressly put environmental concerns in their provisions.[16] Nevertheless, this figure fairly different if a time dimension was employed.[17] There was a progressive movement, showing how the environmental concerns in IIAs began to rise since the mid 1990s.[18] Moreover, starting from 2002, nearly 89% of newly concluded investment treaties explicitly mentioned environmental concerns in their provisions.[19]

Although 89 percent of newly concluded investment treaties have accommodated the environmental concern, Indonesia did not follow this trend. Along with Egypt, Indonesia has only one treaty with the environmental concern. [20] The lack of environmental concerns in Indonesia's BITs may cause difficulties for the government to anticipate any environmental damage from FDI projects, and to impose measures if the presence of FDI within Indonesia's territory has damaged the environment.

From 2014, Indonesia has denoted a tendency that it is no longer eager joining BITs. At the time of writing, according to UNCTAD Data, Indonesia has terminated approximately 24 BITs.[21] There are several potential explanations for why Indonesia has terminated the BITs. Instead of a termination, Michael Ewing-Chow analysed this measure, arguing that "Indonesia is letting its bilateral treaties lapse so as to negotiate better ones".[22] Indonesian Ambassador to the European Union, Arif Havas Oegroseno then supported this assumption, stating that Indonesia intended to "update, modernise and balance its BITs".[23]

This paper argues that Indonesia's BITs has significant deficiencies in putting the environmental concern in its provisions. This paper then shows how other countries have expressly stated the environmental concern, assisting their governments to prevent and mitigate any adverse impact of FDI on the environment. The termination of some Indonesia's BITs will then likely be the right momentum to put any environmental concerns in the updated or modified version of Indonesia's BITs.

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15 Van Duzer, J.A. "Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?" in Steffen Hindelang and Markus Krajewski. (2016). *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*. Oxford: Oxford University Press, p. 143.

16 Gordon, K., and Pohl, J. (2011). "Environmental Concerns in International Investment Agreements: A Survey". OECD Working Papers on International Investment No. 2011/1, p. 8.

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 According to Investment Policy Hub of UNCTAD, Indonesia has terminated its BITs with Germany (signed in 1968), Norway (1969), Netherlands (1968), France (1973), Switzerland (1974), Singapore (1990), Italy (1991), Norway (1991), Viet Nam (1991), Hungary (1992), China (1994), Egypt (1994), Lao (1994), Malaysia (1994), Slovakia (1994), Netherlands (1994), Argentina (1995), Finland (1996), Romania (1997), Turkey (1997), India (1999), Cambodia (1999), Bulgaria (2003), Singapore (2005) see <*http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu*>.

22 Chow, M.E., and Losari, J.J. (2014). "Indonesia is Letting its Bilateral Treaties Lapse So as to Negotiate Better Ones". *Financial Times* (online). *http://www.ft.com/intl/cms/s/0/20c6c518-c16c-11e3-97b2-00144feabdc0.html#axzz43o1GWTNS*. [Accessed on 17 March 2017].

23 Oegroseno, A.H. "Revamping Bilateral Treaties". *The Jakarta Post* (online), 7 July 2014. *http://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html*. [Accessed on 18 March 2017].

This paper starts by showing the dynamics development of BIT, covering the period before BITs were exist, traditional BITs, and modern BITs wherein the rise of environmental concern has taken place. The dynamics development of Indonesia's BITs are the next explanation, showing how the government has developed it BITs from old order to the reformation order in which most of its BITs have not accommodated yet the environmental concern. Looking at other countries' practices, this paper will show why and how Indonesia should include the environmental concern in its future BITs.

2. The Dynamics Development of BITs

2.1. Before BITs

The history of investment treaties can be traced from the Friendship, Commerce, and Navigation (FCN) treaties before the nineteenth century, providing for the protection of property and the commercial interests of foreigners.[24] This type of protection emanated from the principle of an "international minimum standard", granting to aliens abroad.[25] Equally important, as part of customary international law "the Hull Rule" required "prompt, adequate, and effective" compensation for any expropriation of property owned by foreigners.[26] In this era, trade and property protection provisions existed in the same agreement.[27] Equally important, the establishment of commercial relations among countries was the main priority of such treaties, with protection of property a secondary matter.[28] The absence of an enforcement mechanism was a drawback of treaties in this period.[29]

2.2. Traditional BITs

After World War II, treaties typically prioritised "favourable conditions" and "non-discrimination" and required host states to pay compensation for any expropriation committed.[30] Some improvements arose in this era including provision of protection for corporate entities in addition to individuals[31] and protection against exchange controls.[32] Moreover, as an enforcement mechanism, provision for dispute resolution

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24 Chester Brown. "Introduction: The Development and Importance of the Model Bilateral Investment Treaty'in Chester Brown (ed). (2013). *Commentaries on Selected Model Investment Treaties*. Oxford: Oxford University Press, p. 6.

25 Jean d'Aspremont, "International Customary Investment Law:Story of a Paradox' in Tarcisio Gazzini and Eric De Brabandere (eds). (2012). *International Investment Law: The Sources of Rights and Obligations*. Leiden: Nijhoff, p. 10.

26 Andrew T. Guzman, "Explaining the Popularity of Bilateral Investment Treaties" in Karl P Sauvant and Lisa E Sachs (eds). (2009). *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows.* Oxford: Oxford University Press, p. 74.

27 Kenneth J. Vandevelde. "A Brief History of International Investment" in Karl P Sauvant and Lisa E. Sachs (eds). (2009). *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows.*Oxford: Oxford University Press, p. 7.

28 *Ibid.*

29 *Ibid.*

30 *Ibid.* p. 5.

31 Herman Walker Jr. (1956). "Provisions on Companies in United States Commercial Treaties," *American Journal of International Law,* 50: 373 in Kenneth J Vandevelde, *Ibid.*

32 *Treaty of Friendship, Commerce and Navigation between the United States and Japan,* signed 2 April 1953, 4 UST 2063, art XII.

before the International Court of Justice was available to resolve uncertainties regarding the interpretation or application of the treaties.[33]

Traditional BITs mainly involved developed countries and developing countries.[34] Unlike the FCN treaties, which had been focussed on economic relations,[35] BITs existed to promote and protect investment. On the one hand, developed countries intended to protect their nationals investing abroad.[36] On the other hand, developing countries intended to promote inward investment as a means of bolstering economic development.[37] Typically, a developed country drafted the agreement and then offered it to a developing country for signature, with only minor changes in the final agreement compared to the proposed draft.[38]

One important breakthrough in the mid-1960s was the adoption of Investor-State Dispute Settlement (ISDS) whereby host countries agreed in BITs to resolve their disputes with investors via arbitration.[39] This process was inspired by the conclusion of a 1965 convention establishing the International Centre for Settlement of Investment Disputes (ICSID).[40] The presence of ISDS under investment treaties denoted a considerable shift under international investment law through the recognition of non-state entities (ie investors) as subjects of international law.[41] In the past, pursuant to "diplomatic protection", an investor could only sue the state hosting its investment through its home state taking action on its behalf.[42] Through ISDS, an investor could hold the host state responsible for violation of a BIT without depending on its home state.[43] Moreover, ISDS does not generally require an investor to exhaust domestic remedies prior to submitting a claim.[44]

2.3. Modern BITs

In the late 1980s, developing countries started providing more favorable environment for foreign investment, acknowledging how hostile policies to foreign investment were no longer effective.[45] They then ignored the Calvo Doctrine and agreed to the adoption of international minimum standards for the protection of foreign investment.[46] BITs

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33 *Treaty of Friendship, Commerce and Navigation between the United States and Japan,* signed 2 April 1953, 4 UST 2063, art XXIV.

34 Kenneth J Vandevelde, *Op.cit.,* P. 7.

35 *Ibid.*

36 Chester Brown, "Introduction: The Development and Importance of the Model Bilateral Investment Treaty" in Chester Brown (ed). (2013). *Commentaries on Selected Model Investment Treaties*. Oxford: Oxford University Press, p. 6.

37 *Ibid.*

38 Kenneth J Vandevelde, *Loc.cit.*

39 *Ibid*. p.7.

40 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159, (entered into force 14 October 1966).

41 Jeswald Salacuse. (2010). *The Law of Investment Treaties*. Oxford: Oxford University Press, p. 11 in Tania Voon, Andrew Mitchell and James Munro. (2014). "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights". *ICSID Review*, 29: 454.

42 *Ibid.*

43 Stephan W Schill, "Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement" in Michael Waibel, Asha Kausal et al. (2010). *The Backlash Against Investment Arbitration*. South Holland: Kluwer, p. 30.

44 Voon, T., Mitchell, A., and Munro, J. (2014). "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights". *ICSID Review*, 29: 455.

45 Salacuse, J.W. (1999). "From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World". *International Law*, 33: 882–86 .

46 Kenneth J Vandevelde, *op.cit.*, p.7.

provided greater protection for foreign investors than the Hull Rule ever did.[47] Besides, they provided substantive protections such as national treatment, most favored nation treatment, free transfer of assets,[48] and a prohibition on performance requirements.[49] Finally, BITs adopted the Hull Rule's stipulation of prompt, adequate, and effective compensation for expropriation.[50]

While traditional BITs mainly arose between developed and developing countries, developing countries began concluding BITs with each other,[51] in view of their capital exports to each other.[52] For example, Thailand-Vietnam BIT in 1991[53] and China-Argentina BIT in 1992.[54] Next, the purpose of modern BITs is not only intended to protect investment, but also to stimulate the flow of private capital and the economic development of the parties.[55] For example USA-Uruguay BIT in 2005[56] and Norway Model BIT.[57]

In this period, some countries have expressly included environmental concerns in relation to the sustainable development in their treaties, both in the preambles and/or provisions, reflecting the balance between rights and obligations of states and investors.

From those existing treaties, Norway model BIT expressly admits how investment should be undertaken with the principle of sustainable development. It states that:

> *"...the promotion of sustainable investments is critical for the further development of national and global economies as well as for the pursuit of national and global objectives for sustainable development, and understanding that the promotion of such investments requires cooperative efforts of investors, host governments and home governments."*[58]

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47 Andrew T. Guzman, "Explaining the Popularity of Bilateral Investment Treaties" in Karl P Sauvant and Lisa E Sachs (eds). (2009). *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows.* Oxford: Oxford University Press, p. 78.

48 See, eg., *Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed 14 November 1991 (entered into force 20 October 1994) arts II, II(2a), II(2b), V ("*USA-Argentina BIT*").

49 See, eg., *Treaty Between the United States of America and the Peoples Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment,* signed 12 March 1986 (entered into force 25 July 1989) art II(6) ("*USA-Bangladesh BIT*").

50 *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments*, and Protocol, signed 23 August 1995 [1997] ATS 4 (entered into force 11 January 1997) art 7 *("Australia-Argentina BIT").*

51 Kenneth J Vandevelde, *Op.cit.*, P. 28.

52 *Ibid.*

53 *Agreement between The Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investment*, signed 30 October 1991 (entered into force 7 February 1992) *("Thailand-Vietnam BIT").*

54 *Agreement between The Government of the People's Republic of China and the Argentine Republic on the Promotion and Reciprocal Protection of Investment*, signed 5 November 1992 (entered into force 1 August 1994) *("China-Argentina BIT").*

55 Kenneth J Vandevelde, *Loc.cit.*

56 *Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment,* signed 4 November 2005 (entered into force 1 November 2006) preamble ("*USA-Uruguay BIT*").

57 Norway Model BIT, Preamble.

58 Norway Model BIT.

3. How Indonesia Has Developed Its BITs

3.1. Old Order

In the old order, Sukarno made Indonesia an inhospitable country for foreign investors through its nationalization policy. Almost all foreign enterprises were nationalized, commencing with Dutch-owned enterprises in 1957.[59] Military officers, who had no experience in business, took over all those enterprises.[60] The goal of this policy was to build a national industry organized by state-owned enterprises ('SOEs')[61] and to respond to hostile measures by the Netherlands. After invading Indonesia in 1947 and 1949, the Netherlands refused to transfer sovereignty over West Irian territory, resulting in military conflict between Indonesia and the Netherlands during 1958-1959.[62] The expropriation policy over foreign investors then resulted in dire consequences in which Indonesia did not join to any BITs in this period.

3.2. New Order

In the new order under Suharto's Administration, Indonesia experienced its golden era of investment agreements in which Indonesia had been active joining many BITs and treaties with investment provision (TIPs). Indonesia-Denmark BIT in 1968[63] was the first BIT and the last investment agreements in this period was Indonesia-Thailand BIT in February 1998, only three months before Suharto was finally resigned.[64] Some important provisions of BITs are hereby explained.

Most of Indonesia's BITs provide wide definition of investment, covering any type of assets in compliance with host state's laws and regulations. For instance, Indonesia-Jordan BIT in 1996 states:

> *The term 'investment' shall mean any kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, in conformity with the Laws and regulations of the latter, including but not exclusively:*
>
> a. *movable and immovable property as well as other rights such as mortgages, privileges, guarantees and any other similar rights;*
> b. *rights derived from shares, stocks, bonds or any form of participation in companies or joint venture in the territory of the other Contracting Party;*
> c. *claims to money or to any performance having a financial value;*
> d. *intellectual property rights, technical processes, good will and know – how;*
> e. *Business concessions conferred by law or under contract related to investment including concessions to search for, extract, or exploit natural resources.*[65]

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59 Organisation For Economic Co-operation and Development. (2010). *OECD Investment Policy Reviews Indonesia 2010*. Paris: OECD, p. 41.

60 *Ibid.*

61 *Ibid.*

62 Adrian Vickers. (2013). *A History of Modern Indonesia*. Cambridge: Cambridge University Press, p. 150.

63 *Agreement Between the Government of Denmark and The Government of the Republic of Indonesia concerning the Encouragement and the Reciprocal Protection of Investments*, signed 30 January 1968 (entered into force 2 February 1968) ("*Indonesia-Denmark BIT*").

64 *Agreement Between the Government of the Republic of Indonesia and the Government of the Kingdom of Thailand on the Promotion and Protection of Investments*, signed 17 February 1998 (entered into force 5 November 1998) ("*Indonesia-Thailand BIT*").

65 *Agreement Between the Government of the Republic of Indonesia and the Government of The Hashemite Kingdom of Jordan on the Promotion and Protection of Investments*, signed 12 November 1996 (entered into force 9 February 1999) art 1 ("*Indonesia-Jordan BIT*").

Almost all Indonesia's BIT includes provision requiring "fair and equitable treatment" and "full protection and security". Only Indonesia-Denmark BIT in 1968 did not require the host state to provide "fair and equitable treatment" and enjoy "full protection and security". For example, Indonesia-Korea BIT states that investors "shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Party".[66]

In expropriation, almost all Indonesia BIT stipulates that expropriation either directly or indirectly must only be conducted with certain strict requirements. For instance, Indonesia-Jordan BIT in 1996 explains the following requirements of expropriation:

> *The measures are taken for a lawful purpose or public purpose and under process of law; the measures are non-discriminatory; and the measures are accompanied by provision for the payment of prompt, adequate and effective compensation shall amount to the fair market value without delay before the measure of dispossession became knowledge...*[67]

Almost all Indonesia's BITs provides MFN treatment. For example, Indonesia-Malaysia BIT in 1994 explains that:

> *Investments made by investors of either Contracting Party in the territory of the other Contracting Party and/or return accrued, shall receive treatment which is fair and equitable, and not less favorable than that accorded to any third State.* [68]

Almost all Indonesian BITs require compensation for losses that has to be conducted under non-discriminatory basis. For instance, Indonesia-Australia BIT in 1992 states that:

> *When a Party, in respect of investments in its territory, adopts any measures relating to losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, riot or other similar event in its territory, it shall accord to investors of other Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which it accords to investors of any third country.*[69]

3.3. Reformation Order

Indonesia continues its participation under investment agreements. In this period, Indonesia is less active in signing BITs, but more active in signing multilateral TIPs compare to those in previous eras. Indonesia's BITs have similarities with the previous one particularly related to the definition of investment, protection of investment, treatment of investment, expropriation, compensation for loss and transfer.

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66 *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Korea for the Promotion and Protection of Investments*, signed 16 February 1991 (entered into force 10 March 1994) art 2(2) ("*Indonesia-Korea BIT*").

67 *Agreement Between the Government of the Republic of Indonesia and the Government of The Hashemite Kingdom of Jordan on the Promotion and Protection of Investments*, signed 12 November 1996 (entered into force 9 February 1999) art 4 ("*Indonesia-Jordan BIT*").

68 *Agreement Between the Government of the Republic of Indonesia and the Government of Malaysia*, signed 22 January 1994 (terminated) art 3 ("*Indonesia-Malaysia BIT*").

69 *Agreement Between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, signed 17 November 1992 (entered into force 29 July 1993`) art V ("*Indonesia-Australia BIT*").

Some differences of Indonesia's BITs in this period are hereby explained. With respect to the application of other provisions, some BITs have included the provisions that are commonly known as "umbrella clause". To illustrate, Indonesia-Germany BIT in 2003 states that: "each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party".[70]

The number of BITs that include National Treatment provision is increased, covering Indonesia's BITs with India (1999),[71] Germany (2003)[72] and Singapore (2005).[73] One TIP, that is Indonesia-Japan FTA (2007) also includes national treatment provision.[74] For instance, Indonesia-Germany BIT in 2003 indicates that:

> *Neither Contracting Party shall subject investments in its territory owned by investors of the other Contracting Party to treatment less favorable than it accords to investments of its own investors or to investments of investors of any third State.* [75]

With respect to expropriation, Indonesia-Singapore BIT in 2005 elaborated the expropriation relating to land by stating that:

> *Any measure of expropriation relating to land, which shall be as defined in its domestic legislation of each Contracting Party, shall be for a purpose and upon payment of compensation in accordance with the aforesaid legislation and any subsequent amendment thereto.* [76]

3.4. The Recent Development: Termination BIT

From 2014, Indonesia has shown a tendency that it is no longer enthusiastic joining BITs. At the time of writing, according to UNCTAD Data, Indonesia has terminated

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70 *Agreement Between the Government of the Republic of Indonesia and the Government of the Federal Republic of Germany on the Promotion and Protection of Investments*, signed 14 May 2003 (entered into force 2 June 2007) art 8(2) ("*Indonesia-Germany BIT*"), see also, *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Mozambique on the Promotion and Protection of Investments*, signed 26 March 1999 (entered into force 25 July 2000) art X ("*Indonesia-Mozambique BIT*").

71 *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of India on the Promotion and Protection of Investments*, signed 10 February 1999 (terminated) art 4(3) ("*Indonesia-India BIT*").

72 *Agreement Between the Government of the Republic of Indonesia and the Government of the Federal Republic of Germany on the Promotion and Protection of Investments*, signed 14 May 2003 (entered into force 2 June 2007) art 3 ("*Indonesia-Germany BIT*").

73 *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments*, signed 16 February 2005 (terminated) art 3 ("*Indonesia-Singapore BIT*").

74 *Agreement between the Republic of Indonesia and Japan for an Economic Partnership*, signed 20 August 2007 (entered into force 1 July 2008) art 59 *("Indonesia-Japan FTA").*

75 *Agreement Between the Government of the Republic of Indonesia and the Government of the Federal Republic of Germany on the Promotion and Protection of Investments*, signed 14 May 2003 (entered into force 2 June 2007) art 3 ("*Indonesia-Germany BIT*"), see also, *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of India on the Promotion and Protection of Investments*, signed 10 February 1999 (terminated) art 4(3) ("*Indonesia-India BIT*"); *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments*, signed 16 February 2005 (terminated) art 3 ("*Indonesia-Singapore BIT*").

76 *Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Singapore on the Promotion and Protection of Investments*, signed 16 February 2005 (terminated) art 4(3) ("*Indonesia-Singapore BIT*").

approximately 24 BITs.[77] The Netherlands embassy even revealed that the Indonesia had intended to terminate all of its BITs.[78]

There are several potential explanations for why Indonesia has terminated the BITs. Instead of a termination, Michael Ewing-Chow analysed this measure, arguing that "Indonesia is letting its bilateral treaties lapse so as to negotiate better ones".[79] Indonesian Ambassador to the European Union, Arif Havas Oegroseno then supported this assumption, stating that Indonesia intended to "update, modernise and balance its BITs".[80] Government then allowed its BITs to "discontinue" thereby providing an opportunity to renegotiate them with better terms.[81]

Some scholars then analysed how Indonesia will likely want to secure its regulatory autonomy, especially in public policy matters. For instance, Trakman (2014) stated that Indonesia, which has a better economic stability, intended to renegotiate its BITs to provide greater capacity to regulate the 'public interest for health, the environment or financial reasons'.[82] Price (2017) analysed how Indonesia will likely intend to balance investor protection with sustainable developmet issues in its new BIT model[83] because the sustainable development has been a major concern in many countries that led to the importance of reorientation of the global IIAs regime.[84]

4. The Lack of the Environmental Concern and Other Countries' Practices

Muchlinski,[85] pointed out how the rise of investment treaties tended to only focus on economic factors, ignoring the implications of certain detrimental impacts. Hence, it is important to balance the legitimate interests of investors, such as transparent and predictable investment policy and the legitimate interests of the host country to reach its development targets, including a "right to regulate" for policy goals, especially environmental concern.[86] UNCTAD (2015) stated that IIAs should not only include features of investment liberalization, protection, promotion and facilitation, but also features, enabling host countries to minimize any negative social or environmental

77 According to Investment Policy Hub of UNCTAD, Indonesia has terminated its BITs with Germany (signed in 1968), Norway (1969), Netherlands (1968), France (1973), Switzerland (1974), Singapore (1990), Italy (1991), Norway (1991), Viet Nam (1991), Hungary (1992), China (1994), Egypt (1994), Lao (1994), Malaysia (1994), Slovakia (1994), Netherlands (1994), Argentina (1995), Finland (1996), Romania (1997), Turkey (1997), India (1999), Cambodia (1999), Bulgaria (2003), Singapore (2005) see <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu>.

78 Netherlands Embassy in Indonesia, "Termination Bilateral Investment Treaty." Available online at: *https://www.netherlandsworldwide.nl/countries/indonesia*. [Accessed On 23 February 2017].

79 Chow, M.E., and Losari, J.J. (2014). *Op.cit.*

80 Oegroseno, A.H. "Revamping Bilateral Treaties". *The Jakarta Post* (online), 7 July 2014. *http://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html*. [Accessed on 18 March 2017].

81 *Ibid.*

82 Trakman, L.E., and Sharma, K. (2014). "*Indonesia's Termination of the Netherlands–Indonesia BIT: Broader Implications in the Asia-Pacific?". http://kluwerarbitrationblog.com/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/?print=print.* [Accessed on 14 April 2017].

83 Price, D. (2017). "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?" *Asian Journal of International Law*, 7: 135.

84 United Nations Conference on Trade and Development. (2014). "Reform of the IIA Regime: Four Paths of Action and a Way Forward". Issues Note No. 3, p. 3.

85 Muchlinski, P. "Policy Issues" in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds). (2008). *The Oxford Handbook of International Investment Law*. Oxford: Oxford University Press, p. 12.

86 *Ibid*, p.15.

impacts.[87] This process then can be reflected through the inclusion of environmental concern both in the preamble and provision in the current IIAs, including BITs.

A study from Gordon and Pohl (2011) revealed that 133 international investment treaties, equal to 8,2 percent of the sample, contained environmental concerns.[88] Nevertheless, from 2002 onwards, 89 percent of newly concluded agreements contained environmental concerns in their preambles and/or provisions.[89] The study also showed how 30 out of 49 countries (assessed by this study) have put environmental concerns in at least one of their treaties.[90] The following countries have a high percentage of such concern: Canada (83 percent), New Zealand (75 percent), Japan (61 percent), the United States (34 percent) and Finland (26 percent).[91] In contrast, Egypt and Indonesia have just one agreement with environmental concern out of 73 and 45 agreements in the sample, respectively.[92]

The above-mentioned study then supports the fact that Indonesia did not follow the trends of incorporating environmental concern in international investment agreements. This situation potentially contributes to the environmental damage after the presence of FDI. The lack of environmental concerns in Indonesia's agreements may cause difficulties for the government to anticipate any environmental damage from FDI projects, and to impose measures should the presence of FDI within Indonesia's territory has damaged the environment.

Some other countries have put environmental concerns in the preamble of their agreements. The US-Uruguay BIT (2005) notes that the parties desire to achieve the economic objectives *"in a manner consistent with the protection of health, safety, and the environment"*.[93] Meanwhile, the Switzerland-Kosovo BIT (2011) recognizes the need to promote and protect foreign investment with the objective to achieve the economic prosperity and sustainable development of both states.[94] Next, the preamble of the Economic Partnership Agreement between the Cariforum States and the European Community ('EC–CARIFORUM EPA') (2008) considers the need of the parties *"to promote economic and social progress for their people in a manner consistent with sustainable development by respecting basic labour rights … and by protecting the environment"*.[95]

The preambles reflected the main objective and purpose of the international investment agreements that become a vital element of their interpretation although there are no legally binding obligations imposed by the preambles.[96] If parties do not include environmental concern in their preambles, the interpreters (such as tribunals) of the

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87 United Nations Conference on Trade and Development. (2015). *Investment Policy Framework for Sustainable Development*. Geneva: United Nations, p. 30.

88 Gordon, K., and Pohl, J. (2011). *"Environmental Concerns in International Investment Agreements: A Survey"*. OECD Working Papers on International Investment, p. 9.

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment*, signed 4 November 2005 (entry into force 1 November 2006) the preamble.

94 *Treaty between the Swiss Confederation and the Republic of Kosovo concerning the Encouragement and Reciprocal Protection of Investment*, signed 27 October 2011 (entered into forced 13 June 2002) the preamble.

95 *Economic Partnership Agreement between the Cariforum States, of the one part, and the European Community and its Member States, of the other part*, signed 15 October 2008, the preamble.

96 Bonzon, A.J. (2014). "Balance Between Investment Protection and Sustainable Development in BITs: The Example of Switzerland" *The Journal of World Investment and Trade*, 15: 822.

agreements will have less guidance how their obligations should be interpreted, leaving more discretion to the interpreter.[97] Hence, putting environmental concern in the preambles can ensure that this concern is taken into account by the interpreters of the treaty.[98]

Some other countries then put provisions, emphasizing the regulatory autonomy of the host state to impose measures in relation to environmental concerns. Article XVII(2) Canada-Ecuador BIT (1996) stipulates that

> *"[n]othing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."*[99]

Article 21(2) Japan-Colombia BIT (2011) then notes:

> *"Each Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activities in its Area are undertaken in a manner not incompatible with its environmental law, provided that such measure is consistent with this Agreement."*[100]

Some countries have gone further by incorporating some additional requirements in relation to the protection of the environment in their agreements. Firstly, the provision that prohibits countries to relax environmental standards while attracting FDI. Specifically, Article 12(2) of the US Model BIT (2012) states that:

> *"[t]he Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party 'shall' ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory."*[101]

Article 3 Switzerland and Mexico BIT (1995) then shows:

> *"[t]he Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, neither Party should waive or otherwise derogate from, or offer to waive or derogate, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If either Party considers*

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97 Van Duzer, J.A., Simons, P., and Mayeda, G. (2013). *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators*. London: Commonwealth Secretariat, 2013, p. 45.

98 *Ibid.*

99 *Agreement between the Government of Canada and the Government of the Republic of Equador for the Promotion and Reciprocal Protection of Investments*, signed 29 April 1996 (entered into force 6 June 1997) art. XVII(2), See also, for example *North American Free Trade Agreement*, signed 17 December 1992 (entry into force 1 January 1994) art. 1114.

100 *Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment*, signed 12 September 2011 (not yet in force) art 21(2).

101 The United States Model BIT (2012) art. 12 (2).

> *that the other Party has offered such an encouragement, it may request consultations."*[102]

Canada-Cameroon BIT (2014) then includes the issue of corporate social responsibility by stating that:

> *"[e]ach Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principles that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anticorruption."*[103]

5. Conclusion

Considering the huge benefits of the FDI for host countries, most of countries then eagerly concluded BIT to attract more FDI. Due to the adverse impact of FDI on the environment, there have been some critics, arguing the lack of the environmental concern from BITs. Responding this issue, almost 90 percent of newly concluded BITs have included the environmental concern in their provisions. Indonesia's BITs, however, has significant drawbacks in relation to the environmental concern. Most of Indonesia's BITs have not included yet any environmental concerns in their provisions.

The fact that Indonesia has terminated its BITs becomes a good momentum to start putting the environmental concern in the future Indonesia BITs. From other countries' practices, there is evidence to suggest that BITs can and do contain provisions aimed at ameliorating environmental damage caused as a result of FDI projects, both in the preamble and the provision. For these reasons, the host country's government is more likely be able to anticipate any environmental damage from FDI projects, and to impose measures if the presence of FDI within its territory has damaged the environment.

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102 *Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments*, signed 10 July 1995 (entered into force 14 March 1996) art.3.

103 *Agreement between Canada and the Republic of Cameroon for the Promotion and Protection of Investments*, signed 3 March 2014 (entered into forced 16 December 2016) art 15(2).

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