

CIL Participates in National Seminar on Settlement of Investment Disputes: Indonesia, ASEAN, International

Following the publication of their article in the *Jakarta Post* entitled “Indonesia should not withdraw from ICSID”, **CIL Head of Trade and Investment Law and Policy, Prof Michael Ewing-Chow**, and **CIL Research Associate, Junianto James Losari** were invited by the University of Indonesia to the National Seminar on Settlement of Investment Disputes: Indonesia, ASEAN, International, held on 6 June 2014 in Jakarta, Indonesia. More than 300 participants attended the seminar, including government officials from various institutions in Indonesia, academics, and members of the media and business community.

Other speakers at the seminar included: Mr Mahendra Siregar, Chairman of the Indonesian Investment Coordinating Board (BKPM), Mr Abdulkadir Jailani, Director for of the Ministry of Foreign Affairs, Mr Iswahjudi Karim (Karimsyah), and Prof Hikmahanto Juwana.

The speakers discussed Indonesia’s policy on discontinuing or terminating its Bilateral Investment Treaties (BITs) regime. It was argued that when Indonesia concluded its first BITs in the 1970s, Indonesia desperately needed foreign direct investment (FDI), but now that foreign investors need Indonesia, the BITs regime is no longer needed.

Most speakers disagreed with that proposition. While it is recognised that Indonesia has developed rapidly, it has also become a capital exporting country. It is precisely for this reason that BITs are still needed to protect Indonesian investors going abroad. In addition, it was argued that BITs can potentially contribute to better governance domestically. Prof. Ewing-Chow shared his perspectives on this matter, citing the experience of Costa Rica and Mexico whose governments used the awards of international tribunals to ensure that their regional governments acted in compliance with the countries’ international commitments. This can improve the rule of law in the countries and create an environment that is more conducive to investment.

It was, however, agreed that Indonesia’s BITs, particularly those concluded during the 1970s to the late 1990s, are outdated and lack clarity. Thus, improvement is needed. The following suggestions were given to improve them: 1) drafting the standards of protection clauses more precisely, such as including indirect expropriation, fair and equitable treatment, and most-favoured nation treatment; 2) including treaty exception clauses that balance investment protection and the government’s right to regulate; and 3) improving the investor-state dispute settlement mechanism (e.g., including a mechanism in the BITs for selection of qualified arbitrators in international economic law).

At the domestic level, the speakers also urged the government to take certain actions, such as 1) creating an independent ombudsman office or system to deal with investment conflicts before they arise to the level of disputes (e.g., Korea and Peru), as well as 2) building domestic capacity of international economic law practitioners and arbitrators to handle investor-state disputes.

Although there was a clear impression that Indonesia still wants to retain its BITs regime, there was a sense that the government felt an urgency to improve the existing BITs by renegotiating them with clearer terms to protect foreign investors (both Indonesians going abroad to invest, as well as foreign investors investing in Indonesia), while ensuring sufficient policy space to allow the government’s ability to pass regulations for public purposes.