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STAGNATION OF BRANCH PROFIT TAX CASE SETTLEMENT IN PRODUCTION SHARING CONTRACT IN INDONESIA (THE EXHAUSTION OF LOCAL REMEDIES CASE) WITH NETHERLANDS - INDONESIA BILATERAL INVESTMENT TREATY AS THE SAMPLING TOOLS

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Abstract

Branch Profit Tax in Production Sharing Contract is a tax case settled under the authority of the Tax Court in Indonesia. This case has a considerably complex dimension associated with taxes, business contracts, and transnational reach. The settlement of the Branch Profit Tax in the Production Sharing Contract dispute through the tax litigation system in Indonesia today has yet to succeed and give legal certainty. Such uncertainty in settling the Branch Profit Tax dispute has caused failure in the domestic dispute settlement mechanism. The failure may lead to other alternatives in the dispute settlement process, namely an international arbitration mechanism within the investment dispute framework as regulated in Bilateral Investment Treaty Indonesia – the Netherlands base.

Keywords: Production Sharing Contract, Branch Profit Tax, Dispute Settlement, International Investment Law, Bilateral Investment Treaty

1. INTRODUCTION

Branch Profit Tax ("BPT") in Production Sharing Contract ("PSC") is a tax case that is under the authority of Tax Court[1] in Indonesia. This case has a considerably complex dimension associated with taxes, business contracts and transnational reach (Case Number 506. Premier Oil Natuna Sea Bv Vs Tax Office).[2] this complexity has prevented the case from obtaining optimal and final resolution from the domestic judiciary in Indonesia[3]. For instance, at least 30 Supreme Court verdicts are researched with different and inconsistent considerations. There have been gaps and inconsistencies in the verdicts of the Supreme Court for this case[4] which was researched that cause to uncertainty (Weiss, Uri., 2019).[5] The uncertainty and the transnational dimension of the case can affect the dispute not only resolved domestically but also increase the possibility of it being resolved based on international investment law (Howard Mann., 2013). The Calvo Doctrine in international law prohibits the diplomatic intervention or filing proceedings under international law in enforcing personal claims before domestic remedies are exhausted (Brauch, Martin Dietrich., 2017). Therefore, disputes related to transnational investment systems could only be proceeded to the international dispute forum after domestic remedies become exhausted (Brauch, Martin Dietrich., 2017). In regards BPT

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in PSC, the prolonged disputes may fulfil the criteria of The Calvo Doctrine due to factual uncertainty that potentially leads to legal uncertainty (Weiss, Uri., 2019) since:

(i). the decisions or the legal outcome are unpredictable; and/or

(ii). There are risks and ambiguities.

These 2 (two) conditions may cause domestic remedies to exhaust as explained in Calvo Doctrine (Brauch, Martin Dietrich., 2017). The inadequate domestic dispute resolution mechanism has prompted the need to apply the international mechanisms. One of the possible approaches is using an international mechanism by assessing whether there is violation pursuant international investment law instruments such as the Bilateral Investment Treaty ("BIT") (Brauch, Martin Dietrich., 2017). In BIT, it usually regulates the categorizations in investment including the limitations whether taxation matters are within the scope that may be resolved under the mechanism contained therein.

The research found that taxation matters in BIT between Indonesia-Netherlands are not exempted from the scope of investment. The dispute of BPT in PSC constitutes the breach of Article 3[6] and/or Article 5[7] in the BIT between Indonesia and Netherlands which implies that the case can be proceeded through international arbitration mechanism as stipulated in Article 9 of the BIT.

2. METHOD

This study's analysis method was based on juridical-qualitative methods. This study is carried out with a descriptive, juridical, and case study approach. Through a juridical descriptive approach, a description of actual legal issues related to the concept and system of tax dispute resolution in Indonesia will be presented and how the law related to tax disputes, especially in the oil and gas sector, can be used as a tool to achieve justice and legal certainty. The comparative study includes a review of international tax law instruments relating to the tax and investment dispute resolution relating to the protection of taxpayer rights. Meanwhile, the case study in this research is to examine and analyze cases decided by the tax court to the Supreme Court, in relation to the problem under study with the aim of knowing how the judiciary acts in applying or developing a provision (law or treaty) in practice and whether the implementation has achieved the objectives of justice and certainty.

3. RESULT AND DISCUSSION

3.1 BPT dispute under PSC in Indonesia

Taxation in the Indonesian oil and gas industry has its own unique specialty as reflected in the provisions of Law Number 22 Year 2001 regarding Oil and Gas (“Oil and Gas Law”), the PSC and other detailed tax regulations. In substance, the complexity of implementing taxation in oil and gas industry does not only involve the tax regulations but also the design of the contract, namely PSC with complicated legal dimension whether it is public or private that although it mainly sets the commitment of production sharing however technically and economically has

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its own uniqueness (Lubiantara, Benny ., 2012)[8].

PSC cost recovery model (Nasir,Ali and Tambunan, Marlina.,2021)[9] is PSC related to this BPT cases. In PSC, it is regulated that the profit share for Contractors is imposed income tax consisting of corporate income tax and BPT (Article V) [10] since 2011, there are different views between the Indonesian tax authority and Contractors on the BPT tariff. Tax Office views that the BPT tariff shall be under Article 26 Income Tax Law, which is 20%, while Contractors believe that the tariff is 10% according to a tax treaty. The difference has caused Tax Office to audit the Contractors[11] which then the issue emerged into a tax dispute (Tax Court Law).[12] The disputes were settled through administrative law mechanism[13] with the following flows (Supreme Court Decision Number 3338: Bp Berau Ltd. Vs Tax Office)[14]:

From the characteristic of the dispute elaborated above, structurally, BPT in the PSC is viewed as the set of regulations that regulate beyond the administration of tax but also include several aspects as follows:

(i) From the point of view of the object, it is evident that BPT in the PSC relates to the tax law because the dispute's object is Tax Assessment Letter;

(ii) The role of the Tax Office relates to administrative law because it relates to the government's action and the authority issue between the Tax Office and SKK Migas as the representative of the state;

(iii) In substance, BPT in the PSC dispute is in connection with the tariff in Tax Treaty, which belongs to international tax law; and

(iv) The subjects of the BPT in the PSC dispute relate to international contract which is a concept recognized in international investment law.

3.2 BPT Case in PSC as A Tax Dispute and As A Treaty Dispute

3.2.1 BPT Case as A Tax Dispute in Which The Authority of Settlement Belongs to Local Indonesian Tax Court

The obligation to taxation of the Contractor is based on the clause in Section V of the Production Sharing Contract which essentially stipulates 'Rights and Obligations of the Parties' that the Contractors shall pay the income tax, including the final tax on profits after tax deduction or known as "Branch Profit Tax". This type of tax is imposed by Tax Office to the Contractors by issuing Tax Assessment Letter in the following conditions[15]:

1) If based on the audit result or other information the tax owed is not paid or underpayment.

2) If the Tax Returns are not submitted within the period stipulated in Article 3 (3) and after been sent written warning still such documentation is not submitted on the time stated in warning letter;

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3) If the audit result or other information of Value Added Tax and Sales Tax on Luxurious Goods find that the difference of overpaid tax is not to be compensated or not to be imposed the tariff of 0% (zero percent);

4) If the obligations stated in Article 28 or Article 29 are not fulfilled therefore the amount of owed tax remain unknown; or

5) If Taxpayer Identification Number is issued to the Taxpayer or when it is ratified as entrepreneur.

Within the context of BPT, the Tax Office issues Tax Assessment Letter of Income Tax Article 26 (4) / Branch Profit Tax on the Contractor based on proposition that such Contractor applies the tariff of Income Tax Article 26 (4) less than the one agreed in the PSC. According to the Tax Office, BPT tariff imposed towards the Contractor is 20% (twenty percent) pursuant to Article 26 (4) Income Tax Law however the Contractor pays BPT with the tariff stipulated in the Tax Treaty which is 10% (ten percent). Consequently, the Tax Office assumes that there is underpayment of BPT's of the Contractor therefore it issues Tax Assessment Letter. Then, the Contractor submits an Objection to the letter as part of its right pursuant to Article 15 (1) General Provisions and Tax Procedures Law, as follows:

"Taxpayer may submit an objection to Directorate General of Taxation on:

a. Tax Underpayment Assessment Letter;

b. Additional Tax Underpayment Assessment Letter;

c. Tax Nil Assessment Letter;

d. Tax Overpayment Assessment Letter; or

e. Tax withholding or imposition by the third party based on the provisions in taxation regulations."

Over the objection submitted by the Contractor then Directorate General of Taxation shall issue a decree as regulated in Article 26 (1) General Provisions and Tax Procedures Law. Since the issued decree rejects the objection made by the Contractor, then it proceeds to submit an appeal at the Tax Court on such rejection letter.

Indonesian law regulates that the issue of BPT is part of administrative dispute since the object is a decree issued by a government official. Pursuant to Article 1 number 7 Government Administration Law, a decree is a written decision issued by a Governmental Body and/or Official in running the government. It has connection with tax dispute as defined in Article 1 number 5 of Tax Court Law. Tax dispute occurs because there is different perception or different opinion between the Taxpayer and the tax official on the owed tax decided or collected by Directorate General of Taxation by issuing Tax Assessment Letter or Tax Collection Warrant. Then against the Tax Assessment Letter or the Tax Collection Warrant, the Taxpayer has the right to pursue legal actions namely an Appeal or a Lawsuit. Article 27 (1) General Provisions and Tax Procedures Law states that the Taxpayer may submit an Appeal to Tax Court on Objection Decision Letter as mentioned in Article 26 (1), which is a decision on objection

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submitted by the Taxpayer issued by Directorate General of Taxation. Since tax dispute has strong connection with the decision issued by Directorate General of Taxation which is governmental official therefore it is part of an administrative dispute. Besides that, tax dispute is settled in the Tax Court which is a body under administrative judiciary and is a pure administrative court because it has fulfilled all the elements of a judiciary body especially the ones that make it eligible to be a part of administrative judiciary.[16]

3.2.2 BPT Case as a Treaty Dispute

The main issue in the BPT dispute is how much the BPT tariff shall be paid by Contractors domiciling in the treaty country. (Tax Treaty between Indonesia and UK)[17] In regard to the existence of the Tax Treaty[18] on this BPT dispute, there is a procedure that can be pursued by the parties known as Mutual Agreement Procedure ("MAP") through the tax authorities from their countries (Tax Treaty Indonesia – Netherlands).[19] For instance, tax authorities of the Netherlands had submitted the MAP mechanism to the Indonesian tax authority. The MAP mechanism was discontinued (Supreme Court Decision Number 2323) [20]because the Indonesian tax authority thought that the BPT case was a contractual issue. The argument held by the Indonesian tax authority is not valid because, on the other hand, the tax authority itself is using tax instruments to settle the BPT issue.[21] Such invalid argument becomes clearer when Supreme Court in its decisions recognizes that the subject of BPT dispute is related to which legal basis shall be used in determining BPT tariff, whether it is Article 26 Income Tax Law or Tax Treaty. Thus, by referring to the facts, settling the dispute through the MAP mechanism shall be the strong legal basis.[22] The argument is strengthened with the Supreme Court decision stating in its consideration that tax obligation does not relate to oil and gas profit share commitment case[23] and the nature of Tax Treaty being lex specialis. However, unfortunately, there is ambiguity since there are also decisions issued by Supreme Court stating that BPT is related to oil and gas profit share commitment under PSC.[24] This condition is the reason why the BPT dispute is not settled thoroughly.[25]

3.3 Uncertainty and Stagnation in Settling BPT Disputes Based on PSC in Local Judicial Bodies

The structure of the dispute shows that the matter of BPT in the PSC has a complicated dimension because substantially it involves taxation and business contract. Such complexity becomes one of the reasons why Indonesian local courts have not optimally and finally settled the dispute which causes stagnation in the settlement. This condition is indicated by the facts that the tax audits on BPT in the PSC are still going on since 2011 until present for different fiscal years. Besides the stagnation, there were also an inconsistency by the Supreme Court in deciding the BPT cases with similar objects. From the perspective of investment (Demirkol, Bark., 2015).[26] and the objective of the law such inconsistency raises uncertainty (Radbruch, Gustav., 1950).[27]

The settlement of BPT in the PSC cases does not indicate a condition where the right and obligation of each party can be understood certainly. Rabruch views certainty as a practical knowledge related to the knowing on what is obligated, prohibited, and allowed, moreover

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those who are good and bad and may be legally known in all disputes with scientific sensibility. Based on those criteria, a certainty in law shall fulfil the following items (Radbruch, Gustav., 1950):

(1) There is a clarity on how the process of the rights and obligations fulfilment is exercised; and

(2) There is a clarity on what is obligated, prohibited and allowed and what is good and bad;

In which those criteria shall be known and understood legally in all cases with scientific sensibility.

The result of the research is pictured in the table consisting of the court verdicts on the cases of BPT in the PSC which finds the following facts:

(1) There is no consistency in implementing the verdicts on the cases with similar objects within a very long period of time;

(2) There is no clarity in deciding the legal considerations then causing obscurity on how the law views the taxation rights and obligations of either the Taxpayer or the Tax Office concerning BPT in the PSC; and

(3) The verdicts on the cases of BPT in the PSC lead to a hesitation and an obscurity on what action to be taken and is prohibited in implementing BPT in the PSC.

The phenomenon on how BPT in the PSC disputes are settled as the main result of the research then compared to the theories and criteria of legal certainty. The result shows that it can be proven the current settlement of BPT in the PSC disputes have not fulfilled the elements of legal certainty which is part of the objective of the law and taxation principle. In other words, the settlement of BPT in the PSC in Indonesia still remains uncertain (Weiss, Uri., 2019).

3.4 The Mechanism of BPT in PSC Dispute Settlement in Indonesia Through International Investment Law

3.4.1 BPT Case as an investment dispute

The main issue of BPT dispute concerns on the tariff of BPT in the PSC that shall be paid by the Contractor domiciling in the country that has a Tax Treaty with Indonesia. Since the dispute is connected to the Tax Treaty, the tax authority in the Netherlands and in the UK have proposed the MAP mechanism to Indonesian tax authority however such means is discontinued. One of the reasons of its discontinuation is Indonesian tax authority views BPT in the PSC dispute as a contractual one. The position of Indonesian tax authority proves an ambiguity since they reject the MAP mechanism by claiming the dispute is a contractual instead of a taxation one but on the other hand, they use taxation instrument to settle BPT (Weiss, Uri., 2019).

Apart from the fact there were rejections to settle BPT in the PSC dispute through MAP, Supreme Court in its verdicts had acknowledged that the substance of the dispute is regarding the legal basis that shall be implemented in calculating BPT in the PSC, whether using Article

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26 (4) Income Tax Law or the tariff in the Tax Treaty or leading it to treaty dispute. By referring to that reality, the argumentation to settle the dispute by the means of MAP is strong enough (Article 27)[28]. However then, the other verdicts stipulate the Court's considerations that state there is a connection between the tariff of BPT in the PSC with oil and gas production sharing that is based on the PSC[29]. The ambiguity rising from these 2 (two) kinds of considerations by the Supreme Court over the BPT in the PSC dispute then leads to the concerned cases remain unsettled. Since more than 10 (ten) years ago to present time, the Tax Office still perceive that the Contractor cannot obtain treaty benefit meanwhile the Contractor itself believes that they deserve the tariff in the Tax Treaty.

This BPT issue is also associated with commitment in agreement with the transnational element.[30] the existence of transnational elements may impact dispute settlement mechanisms that are not only involving domestic mechanisms but also dispute settlement mechanisms recognized in international investment law (Howard Mann ., 2013). The Calvo Doctrine in international investment law prohibits the use of diplomatic intervention or proposes a process in international law as the method to enforce personal claims before domestic legal remedies are exhausted (Brauch, Martin Dietrich., 2017). The doctrine indicates that although a dispute involves an investment system that has transnational nature however such a dispute cannot be automatically brought to an international dispute settlement forum until it has fulfilled certain conditions (Brauch, Martin Dietrich., 2017). The lingering settlement of the BPT dispute may emerge a view that such a certain condition has been fulfilled. Consequently, this domestic tax litigation as a dispute settlement mechanism for the BPT case can be considered exhausted. Therefore, with such an approach, this BPT case may be analyzed according to the international investment law regime to see whether the dispute can be settled with other dispute settlement concepts other than domestic administrative procedures in Indonesia.

3.4.2 Exhausted Local Legal Remedy ("ERL") in Settling the Dispute Based on Domestic Law Mechanism in BPT Case Has Been Satisfied

ELR rule requires foreigners that are alleged to be injured by a state shall firstly fix such allegation before the administrative and judicial system within that state up until a decision is made prior seeking for diplomatic protection or beginning to take any international action directly to the said state (Brauch,Martin Dietrich.,2017). It means that before proceeding to any international legal remedy against a state, a foreigner or a foreign company who is allegedly injured by that state, there is an ERL which rules that such injury shall be previously fixed through the local administrative or judicial process in that state (Newcombe, A. P. & Paradell, L., 2009). This ERL Concept is relevant to be a basis in analysing the potential legal remedies in settling BPT in the PSC dispute since the reality indicates that the settlement through the local Tax Court impedes the social economic development based on these following conditions (Suparman,Eman., 2012):

(i) Potential in drowning out the truth and justice;

(ii) The constant uncertainty between the disputing parties; and

(iii) Economic loss of the Contractor.

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Since the study finds there is a hindrance if the settlement of BPT in the PSC dispute is conducted through the arbitration as the choice of forum in the contract itself, then the next study will elaborate the role of the international investment law instruments as the Contractor's effort in receiving certainty in the dispute after the stagnation found in the local means. BPT is regulated in the PSC as an international agreement (Chandrawulan, An an.,2015) therefore one of the means to observe how international law system works is by looking whether there are international instruments, both theories or agreements to become the basis to entry the settlement of the dispute.

3.5 Indonesia - the Netherlands Bilateral Investment Treaty as Relevant International Investment Law Instruments

Bilateral Investment Treaty or BIT is a form of an international agreement entered by two countries that are willing to build bilateral cooperation in the field of investment (Rihwanto, Yacob.,2016). The objective of BIT is to encourage and protect investment activity in both countries if BIT is made. The protection has been regulated in many forms of instruments even all agreements and draft agreements have a clause on indirect expropriation or acts that are equal to expropriation. BIT itself contains brief and general clauses related to indirect expropriation which focus on the effects of an act of government (OECD,. 2009). Those clauses also include the condition on the regulatory measure that when it has the same effects as expropriation and leads to "substantial deprivation" on investment by the claiming investor under BIT (De Luca, Anna., 2014).

BIT between Indonesia and the Netherlands was signed on 6 April 1994. Then, the agreement was ratified by the Indonesian government with Presidential Decree Number 58 the Year 1994. And it's Protocol on 2 August 1994. The agreement was terminated on 30 June 2015.[31] Given that some contractors are based in the Netherlands and the extent of their cooperation falls under the definition of investment as per the Netherlands-Indonesia BIT[32], the Netherlands-Indonesia BIT is a pertinent treaty in relation to the BPT Dispute Resolution in PSC. The Netherlands-Indonesia BIT's inclusion of taxation problems in its scope is another factor indicating its applicability to this BPT issue.

3.6 BPT Dispute and BIT

This article is not intended to analyze whether the considerations in the researched BPT decisions by Supreme Court are correct or not. The analysis has emphasized the fact of the lingering BPT dispute settlement without any certainty and the possibility the dispute may be brought to a dispute settlement mechanism outside the Indonesian domestic court (Radbruch, Gustav., 1950). This alternative may be exercised because up until now Supreme Court is unable to decide on what is the true legal basis that can be used by the disputing parties. The fact that describing the settlement of the BPT dispute that has been going on for more than 10 (ten) years may be considered to have reached the exhausted phase (Brauch, Martin Dietrich., 2017). This exhausted phase can be a door for the party in the BPT dispute to look for another alternative dispute settlement including the mechanism that regulated in BIT between Indonesia and the Netherlands.

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In this case Supreme Court decisions cannot be used as the legal basis to attain certainty.[33] The uncertainty may add an economic burden to Contractors outside their calculation when deciding to invest. That thing may happen because there is a huge possibility that the reason Contractors decided to invest in the oil and gas industry through PSC is the reduction in BPT tariff as regulated in the Tax Treaty (Lubiantara, Benny., 2012).[34]

The conditions that occur in BPT cases for more than 10 years include:

(i) The discontinued MAP procedure becomes one of the reasons because the Indonesian tax authority views the dispute as a contractual one;[35]

(ii) Indonesian tax authority issues Tax Assessment with BPT tariff amounting 20% each year; and

(iii) The dispute settlement is taken through tax litigation in the administrative domestic court that keeps on lingering and remains unsettled until today.

The uncertainty in settling the BPT dispute may encourage the stakeholder to take another alternative settlement outside the domestic court. Because the MAP mechanism in the Tax Treaty can no longer be exercised therefore another gap that can be taken is to settle the BPT dispute using the instrument in international investment law including BIT.

The act of government that keeps on implementing inconsistent BPT tariff from Tax Treaty and the non-uniformity in Supreme Court decisions in deciding which legal basis shall be referred to in determining BPT tariff can be interpreted as a condition of factual uncertainty that may lead to legal uncertainty because they fulfill this criterion as follows (Kevin E. Davis.,2011):

(i) There is no prediction of legal outcome; and/or

(ii) There are risks and ambiguity.

The uncertainty may constitute a condition categorized as exhausted which is in line with the Calvo Doctrine (Brauch, Martin Dietrich., 2017). A condition where the domestic dispute settlement mechanism cannot be effectively performed, according to the doctrine, causes an international mechanism may be applied. The way that can be exercised concerning that mechanism is to compare the decisions of BPT tariff until today with the criteria and the fulfilment of violation element in BIT between Indonesia and the states where Contractors are domiciling which in this case is the UK and/or the Netherlands. The result of the research shows that the scope in BIT Indonesia – the Netherlands is firmer in covering Contractors as the subject that can use the mechanism in BIT.[36] Therefore, for this reason, BIT Indonesia – the Netherlands can be used as the basis to determine whether there is a possible violation towards Contractors in the BPT case. Article 5 BIT Indonesia – the Netherlands states that investment cannot be subject to nationalization, expropriation, or other measures having an effect equivalent to nationalization or expropriation. The BPT case that keeps on being unsettled for years may put the Contractors asset at risk. One of the actual risks for Contractors is the imposed tax that is higher than what is in the Tax Treaty and cannot be credited to the home state. In the model BIT Indonesia – the Netherlands, taxation is not excluded from the scope of investment [37], therefore, the BPT tariff to Contractors which is higher than what is in the Tax

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Treaty can be considered a measure that deprives economic value and asset value[38] of the investor and then can be categorized as indirect expropriation that is provisioned in Article 5 BIT Indonesia – the Netherlands with legal constructions as follows:

(i). Contractors are the party that can be categorized as investors having assets or rights in accordance with PSC; [39]

(ii). There is a condition where Contractors feel like they should add an extra 10% (ten percent) for BPT tariff outside what is being regulated in the law especially the Tax Treaty between Indonesia and the Netherlands;

(iii). Such "addition" to the tax burden leads to dispute in domestic court that remains ongoing for more than 10 (ten) years and the Supreme Court issues inconsistent decisions; [40]

(iv). MAP mechanism is discontinued as one of the reasons that the Indonesian tax authority views the case as a contractual issue;

(v). To avoid being imposed interest and penalty, each year Contractors must set payment for an additional 10% (ten percent) BPT tariff higher than what is regulated in the Tax Treaty;[41]

(vi). The legal uncertainty in settling BPT case at the domestic level and the MAP mechanism being discontinued, for Contractors to obtain legal certainty may find the solution through a mechanism known in international investment law including the mechanism in BIT;

(vii). In BIT Indonesia – the Netherlands, there is a clause that prohibits the host State to exercise nationalization that will reduce the economic and asset value of the investors.[42]

The facts mentioned above do not rule out the possibility of investors raising the BPT dispute to dispute settlement mechanism regulated in Article 9 BIT Indonesia – the Netherlands with the basis for violating Article 5 BIT Indonesia – the Netherlands.[43]

Referring to BIT Indonesia – the Netherlands clause, beside the argument of allegation of indirect nationalization, it can be seen on another provision, for example related to fair and equitable treatment ("FET") of the investment as in Article 3 BIT Indonesia – the Netherlands. International investment law recognizes the connection between tax and FET (Cairn Energy vs India) [44]. This standard FET issue can also be related to the issue of legal certainty and the rule of law where in this case when an administrative organ deliberately refuses to act in accordance with the existing legal regime, the principle of legality and the rule of law are implicated, and the conduct can be found to constitute a Treaty violation (Horthel System V Poland). In relation to the BPT case in the PSC, there are at least two facts related to this, namely the existence of legal uncertainty and the actions of the tax office which has rejected the application of Tax Treaty as part of tax law in Indonesia.

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4. CONCLUSION

The domestic tax dispute settlement system for BPT cases in PSC in Indonesia has led to legal uncertainty. Such uncertainty occurs because the tax litigation system in Indonesia has failed in settling the BPT disputes which then may cause investors who invest in oil and gas business through PSC in Indonesia to suffer from loss. This tax dispute then becomes a complex issue because it involves multi aspects, namely taxation, PSC, Tax Treaty, BIT including other aspects of international investment business. This complexity causes the BPT issue to be seen not only from a domestic taxation context only but also as a legal situation that is transnational since the object of the dispute relates to the Tax Treaty that is part of the international tax instrument. The substance of BPT is also related to PSC, a contract between the Government of the Republic of Indonesia and Contractors as foreign legal entities with PE status. Moreover, this BPT issue may also be analysed from a transnational legal approach including BIT. The settlement of the dispute through the tax litigation system in Indonesia until today has not succeeded and has not given legal certainty. Such uncertainty in settling the BPT dispute has caused failure in the domestic dispute settlement mechanism. The failure may lead to other alternatives in the dispute settlement process namely an international arbitration mechanism within the investment dispute framework as regulated in Article 9 BIT Indonesia – the Netherlands with the basis for violating of Article 3 and Article 5 BIT Indonesia – the Netherlands.

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Notes

1) Article 1 Number 5 of the Tax Court law, as follows: *"Tax disputes refer to disputes that emerge in the field of taxation between taxpayers or tax bearers and authorized officials due to decisions that can be appealed to the Tax Court based on taxation law, including lawsuits over forced collection actions."*

2) The multifaceted nature of the dispute *BPT* in *PSC* is reflected in the content of the consideration issued by the Supreme Court that is not exclusively related to tax issues but also other legal aspects, namely international treaties and agreements.

3) From 2011 to date, the *Branch Profit Tax* in *Production Sharing Contract* remains unresolved, see https://setpp.kemenkeu.go.id/D_RUS/Details/19793?jenis=0. Disputes of *branch profit tax* between the Tax Office and Batavi Oil Kakap BV still occur.

4) Out of 30 (thirty) case researched, there are 16 Supreme Court verdicts stating that Tax Office opinions on the 20% BPT tariff are under the law but, on the other hand, there are 14 verdicts from which Supreme Court stating that the BPT rate shall be 10% by referring to a tax treaty. with the following category: **Rejected**: 1. Verdict NoVerdict3335: 3338/B/Pjk/2019: BUT BP BERAU LTD. Vs Tax Office; 2. Verdict No: 3335/B/Pjk/2019: BUT KUFPEC INDONESIA (NATUNA) BV vs Tax Office; 3. Verdict No: 3814/B/Pjk/2019 : BUT BV MUTURI HOLDINGS BV vs Tax Office; 4. Verdict No: 2696/B/PK/Pjk/2020 :

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BUT EXXON MOBIL OIL INDONESIA INC. vs Tax Office; 5. Verdict No: 417/B/PK/Pjk/2018 : BUT MI BERAU BV vs Tax Office; 6. Verdict No: 427/B/PK/Pjk/2018: BUT MI BERAU BV vs Tax Office; 7. Verdict No: 1850/B/PK/PJK/2017: BUT CNOOC SES Ltd. Vs Tax Office; 8. Verdict No: 1827/B/PK/PJK/2017: BUT CNOOC SES LTD. Vs Tax Office; 9. Verdict No: 1851/B/PK/PJK/2017; BUT CNOOC SES Ltd vs Tax Office; 10. Verdict No: 1828/B/PK/PJK/2017: BUT CNOOC SES LTD; 11. Verdict No: 1829/B/PK/PJK/2017: BUT CNOOC SES LTD vs Tax Office; 12. Verdict No: 1831/B/PK/PJK/2017: BUT CNOOC SES, LTD vs Tax Office; 13. Verdict No: 4376/B/PK/Pjk/2020: BUT Premier Oil Natuna Sea BV vs Tax Offices; 14. Verdict No: 4562/B/PK/Pjk/2020: BUT Premier Oil Natuna Sea BV vs Tax Office; 15. Verdict No: 2076/B/PK/Pjk/2021: BUTSAKA ENERGI SANGA-SANGA, Ltd (d/H BUT BP EAST KALIMANTAN, Ltd) vs Tax Office. **Accepted**: 1. Verdict No: 506/B/PK/Pjk/2019: BUT PREMIER OIL NATUNA SEA BV vs Tax Offices; 2. Verdict No: 1696/B/PK/pjk/2019: BUT NATUNA 1 BV vs Tax Office; 3. Verdict No: 1106/B/PK/Pjk/2019: BUT NATUNA 1 BV vs Tax Office; 4. Verdict No: 2034/B/PK/Pjk/2019: BUT NATUNA 1 BV vs Tax Office; 5. Verdict No: 1993/PK/Pjk/2019: BUT NATUNA UK (KAKAP 2) LIMITED vs Tax Office; 6. Verdict No: 1992/B/PK/Ojk/2019: BUT NATUNA UK (KAKAP 2) LIMITED vs Tax Office; 7. Verdict No: 3080/B/PK/Pjk/2018: BUT NATUNA 2 BV vs Tax Office; 8. Verdict No: 1733/B/PK/Pjk/2018: BUT PREMIER OIL NATUNA SEA BV vs Tax Office; 9. Verdict No: 1732/B/PK/Pjk/2018: BUT PREMIER OIL KAKAP BV vs Tax Office; 10. Verdict No: 1881/B/PK/Pjk/2018: BUT PREMIER OIL KAKAP BV vs Tax Office; 11. Verdict No: 1794/B/PK/Pjk/2018: BUT PREMIER OIL KAKAP BV vs Tax Office; 12. Verdict No: 2025/B/PK/Pjk/2018: BUT KUFPEC INDONESIA (NATUNA) BV vs Tax Office; 13. Verdict No: 1542/B/PK/Pjk/2018: BUT NATUNA 1 BV vs Tax Office; 14. Verdict No: 1617/B/PK/Pjk/2018: BUT NATUNA 1 BV vs Tax Office; 15. Verdict No: 2747/B/PK/Pjk/2018: BUT FORTUNA RESOURCES (SUNDA) LIMITED vs Tax Office; 16. 2755/B/PK/Pjk/2018: BUT FORTUNA RESOURCES (SUNDA) LIMITED vs Tax Offices.

5) Legal uncertainty relates to the inconsistent judgments that the court should later decide. Legal uncertainty may follow what law the court will apply, how the court will interpret the law, how the court will apply the law it prefers and the factual judgment of the court. The degree of legal uncertainty can be assessed based on parameters that include strength of legal rules in a system, clarity in legislation, laws governing evidence, and even the number of judges who will adjudicate a case. The society define the legal uncertainty based on some factors that include clarity in legislation, the method used to interpret the law, the status of precedents, laws governing the interpretation of contracts, and decisions to choose between legislative standards and legislative regulations.

6) *Fair and equitable treatment* ("FET”) *of the investments* as set out in Article 3 BIT Indonesia Netherlands.

7) The clause on expropriation is on Article 5 BIT Indonesia – the Netherlands.

8) From the investor's perspective, there are three important objects termed the "three pillars" concerning the design of oil and gas contracts, namely: the investor's right in the event of a finding to be able to make a profitable investment (right to monetize), contract stabilization (stability), and the right to obtain access to international arbitration (enforceable international arbitration) in the event of a dispute.

9) Under the cost recovery system of Indonesia PSC, the contractor’s entitlement consists of cost recovery or cost oil, investment credit (if applicable) and its equity shares or profit oil. While in grosssplit PSC cost recovery or cost oil is not recognized.

10) Article V PSC as stated in case Number 506/B/PK/Pjk/2019 dated 21 February 2019.

11) Tax audit is based on tax office authority based on Article 13 Tax Provisions and Procedures Law.

12) Law Number 14 Year 2002 on Tax Court (Tax Court Law) juncto Tax Provisions and Procedures Law regulates that tax dispute in Indonesia is achieved through mechanisms which consist of objection to Tax Office, Appeal to Tax Court and Case Review at Supreme Court.

13) The position of the Tax Court under Law Number 48 Year 2009 on Judicial Authority Article 27 paragraph

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(1) juncto Law Number 51 Year 2009 on Administrative Court state that Tax Court is a special court under the Administrative Court environment.

14) The case flow is based on the case in Supreme Court Decision Number 3338/B/PK/Pjk/2019 dated 3 October 2019.

15) General Provisions and Tax Procedures Law

16) Article 27 paragraph (2) General Tax Provision Law

17) For example, for Contractors who domicile in UK, there is Tax Treaty between Indonesia and UK which regulates as follows: Article 10 paragraph (7): "*Notwithstanding the other provisions of this Agreement, where a company which is a resident of a Contracting State, having a permanent establishment, such profits may be taxed (in addition to the tax which would be chargeable on those profits if they were the profits of a company which was a resident of that other Contracting State) in accordance with the laws of the other Contracting State but the rate of tax so imposed shall not exceed 10 per cent of the profits of the permanent establishment after payment of the income tax on those profits.*"

18) See Article 10 paragraph (7) jo. Article 10 paragraph (8) Tax Treaty Indonesia – UK and Article 10 paragraph (8) Tax Treaty Indonesia – Netherlands.

19) In Tax Treaty between Indonesia and the Netherlands, MAP is as stipulated on Article 27.

20) Supreme Court Decision Number 2323/B/PK/Pjk/2021 dated 18 August 2021 juncto Tax Court Decision Number PUT-007237.36/2018/PP/M.IIIB Year 2020 dated 23 June 2020 which present the fact that tax authority in the Netherlands had submitted MAP mechanism but remained unfinished.

21) in Supreme Court Decision Number 2323/B/PK/Pjk/2021 dated 18 August 2021 stated that the object of dispute is Tax Assessment Letter.

22) Article 27 BIT Indonesia – the Netherlands.

23) see Tax Court Decision Number PUT-87543/PP/M.VIIIA/2017 dated 17 June 2019.

24) Compare the considerations of Panel of Judges in Supreme Court on Case Number No. 506/B/PK/Pjk/2019 dated 21 February 2019 with Case Number. 3335/B/PK/Pjk/2019 dated 3 October 2019.

25) The fact that there is still ongoing BPT dispute in Tax Court shows that despite the existence of Supreme Court decisions, however, each party namely Tax Office and Contractors still hold onto their views and Supreme Court Decisions still cannot be references for the parties.

26) Even though the investment concept is not defined in ICSID Convention nor in international investment agreement because investment is ruled as a series of certain rights or not clearing the idea of investment itself, however, as long as an activity or an asset variedly is naturally economic, then such activity or asset is classified as investment pursuant to Article 25 ICSID Convention, therefore the approach that is appropriate to determine the main elements of investment is by referring to the meaning of that term economically and also adopting the common meaning so that 'investment' shall be meaning for the purpose of ICSID Convention and international investment agreement.

27) The law is a reality which means that providing the value of law and the idea of law in the context of his view such idea is not only referring to justice but also include other further elements that are expediency and legal certainty.

28) Article 27 Tax Treaty Indonesia – Netherlands

29) There are two different considerations of the Supreme Court Judges in deciding Case No. 506/B/PK/Pjk/2019 dated February 21, 2019 compared to Case No. 3335/B/PK/Pjk/2019 dated October 3, 2019.

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30) Verdict Number 2323/B/PK/Pjk/2021 dated 18 August 2021: There is a foreign element in the BPT case which is indicated by the contractor's status as a foreign legal entity and the existence of a tax treaty.

31) Although BIT Indonesia – the Netherlands is already terminated, there is surviving clause in Article 15 on Entry into Force, Duration and Termination stating that the investment made before BIT, is protected by BIT up until 15 years after the termination.

32) Article 1 point 1 part e Netherland- Indonesia BIT

33) Kelsen, Hans (1967), The Pure Theory of Law, Translation from the 2nd Ed. By Max Knight, 5th Ed. 2008, The Lawbook Exchange Lt, 351).

34) Commercial structure from PSC contains tax element.

35) Op. Cit., Supreme Court Decision Number 2323/B/PK/Pjk/2021 dated 18 August 2021 juncto Tax Court Decision Number PUT-007237.36/2018/PP/M.IIIB Year 2020 Dated 23 June 2020.

36) Article 1 paragraph 1 (c) BIT Indonesia – Netherlands.

37) Article 4 BIT Indonesia – the Netherlands is an imperative clause except regulated specifically, namely with Tax Treaty so that the taxation treatment for investors from the country party and investors from third country is equal.

38) Tax tariff in Tax Treaty is 10% (ten percent) meanwhile the decided tax tariff is 20% (twenty percent).

39) Article 1 paragraph 1 (c) BIT Indonesia – the Netherlands.

40) See Calvo Doctrine.

41) See in Tax Court Decision Number PUT-000882.99/2019/PP/M.XVIB year 2019 with Nil Tax Assessment Letter as the object.

42) Op.cit UNCTAD, *Expropriation: UNCTAD Series*, p. 12, the condition is in line with criterion of expropriation according to UNCTAD.

43) If referring to BIT Indonesia – the Netherlands, beside the argument of allegation of indirect nationalization, it can be seen on another provision, for example related to fair and equitable treatment ("FET") of the investment as in Article BIT Indonesia – the Netherlands. Related to tax and FET, the case between Cairn Energy vs India as uploaded on https://www.ejiltalk.org/cairn-energy-v-india-retroactive-taxation-fair-and-equitable-treatment-and-the-general-principles-method can be a reference because the Arbitration Panel views that tax issue can be settled according to mechanism in BIT.

44) Regarding taxes and FET's case *Cairn Energy vs India*, see https://www.ejiltalk.org/cairn-energy-v-india-retroactive-taxation-fair-and-equitable-treatment-and-the-general-principles-method This can be set as a reference because the Arbitral Tribunal vies that tax issues can be resolved based on the appropriate BIT mechanism.

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