Harmonizing National-International Investment Laws For Indonesian Society Welfare Realization

Eva Arief[1], Ema Nurhayati[2]

Abstract

This research analyzes harmonization efforts between Indonesian national law and international agreements in the investment field as an instrument to realize societal welfare. This study is normative juridical research with statutory, conceptual, and comparative approaches. The research method was conducted through literature study of primary, secondary, and tertiary legal materials analyzed qualitatively. The research results show disharmony between national investment regulations and Indonesia's commitments in international agreements, particularly in aspects of non-discriminatory treatment, protection of foreign investors, profit repatriation, and investment dispute resolution mechanisms. The main obstacles to harmonization include inconsistent interpretation of international agreement provisions in national court decisions and overlapping authorities between state institutions in implementing international commitments. The research found that the implementation process of international investment agreements into national law remains partial and fragmentary, thus creating legal uncertainty for investors. Consequently, investment targets that can promote societal welfare are not achieved optimally. The research suggests four key recommendations for harmonizing Indonesia's investment law: (1) revising Law No. 25 of 2007 to better integrate international investor protection standards while preserving national policy flexibility, (2) establishing inter-ministerial coordination mechanisms between the Ministry of Law and Human Rights, Ministry of Foreign Affairs, and BKPM to ensure policy coherence, (3) developing an Indonesian bilateral investment treaty model that balances investor protection with adequate regulatory space for public welfare, and (4) harmonizing sectoral regulations with investment law and international commitments to eliminate policy inconsistencies and legal uncertainty for investors, all implemented through a phased approach that prioritizes welfare-oriented investment governance while maintaining international credibility.

Keywords : Indonesia, international, investment, laws, welfare.

Introduction

Societal or social welfare is inseparable from the state's responsibility in realizing the welfare of its people. This constitutes a characteristic of a welfare state as it relates to the government's authority and responsibility in regulating and intervening in the lives of its people[3]. In the era of economic globalization, investment has become one of the important instruments in driving economic growth and societal welfare[4]. The existence of investment, both in the form of foreign direct investment (FDI) and domestic investment (PMDN), plays a strategic role in driving the economic wheel through job creation, technology transfer, and increased production capacity. As a developing country with massive development needs, investment in Indonesia holds a vital position in the strategy of sustainable national economic development. However, to attract and retain investment, Indonesia faces the challenge of harmonizing national law with international commitments in the investment field.

The harmonization of national law with international law in the investment field has become an increasingly important issue, especially after Indonesia signed various bilateral

[1] Eva Arief, Universitas 17 Agustus 1945 Semarang, E-mail: eevaarief21@yahoo.co.id

[2] Ema Nurhayati, Universitas 17 Agustus 1945 Semarang, E-mail: ema-nurhayati@untagsmg.ac.id

[3] Eva Arief, "Consistency of Indonesia'S International Treaty Implementation in the Field of Investment in the National Legal System: A Political Perspective of Law To Realize Community Welfare," *UNTAG Law Review* 7, no. 2 (2023): 104, https://doi.org/10.56444/ulrev.v7i2.4522.

[4] Sang Hoon Ahn and Soo Wan Kim, "Social Investment, Social Service and The Economic Performance of Welfare States," *International Journal of Social Welfare* 24, no. 2 (2015): 109–19, https://doi.org/10.1111/ijsw.12094.

investment treaties (BITs) and international trade agreements containing investment protection clauses. By 2023, Indonesia has signed more than 60 BITs and various free trade agreements (FTAs) that contain investment protection commitments[5]. These international commitments require Indonesia to guarantee fair and equal treatment for foreign investors, protection against expropriation, guarantee of profit repatriation, and effective dispute resolution mechanisms. However, reality shows that the implementation of these international commitments into Indonesian national law still faces various challenges. The disharmony between national investment regulations and Indonesia's commitments in international agreements has become a significant problem that potentially hinders investment flows. This is reflected in the inconsistencies in various sectoral regulations, overlapping authorities, and misalignment of policies between government levels in implementing international commitments.

For example, the aspect of non-discriminatory treatment towards foreign investors is often constrained by protectionist policies in the form of the Negative Investment List (DNI) that limits foreign ownership in certain sectors. Although these restrictions are intended to protect national interests, their implementation is often not aligned with the principles of national treatment and most-favoured-nation (MFN) agreed upon in various international investment agreements[6]. Similarly, protection of foreign investors from expropriation acts, which although guaranteed in Law No. 25 of 2007 on Investment, is often weakened in implementation by sectoral regulations that give broad discretion to the government to revoke investment licenses.

Other problems include misalignment in aspects of profit repatriation and investment dispute resolution mechanisms. Although international investment agreements generally guarantee investors rights to repatriate profits, foreign exchange control policies implemented by Bank Indonesia are often viewed as obstacles in implementing these commitments[7]. Meanwhile, international investment dispute resolution mechanisms such as the International Centre for Settlement of Investment Disputes (ICSID), which is a standard clause in international investment agreements, often creates resistance at the domestic level as it is viewed as reducing national sovereignty in dispute resolution.

This disharmony between national and international law in the investment field has implications for the investment climate and achievement of national economic development goals. On one hand, legal uncertainty arising from this disharmony can create investor reluctance to invest their capital in Indonesia. On the other hand, this misalignment can also make it difficult for Indonesia to attract quality and sustainable investment that can promote societal welfare.

The problem of partial and fragmentary implementation of international investment agreements into Indonesian national law becomes more complex with the existence of

[5] UNCTAD, "International Investment Agreements Navigator: Indonesia," 2023, https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia.

[6] Oleh : Muhammad and Ramzy Hasibuan, "Harmonisasi Hukum Investasi Dan Hukum Dagang Di Negara-Negara Asean," *Agustus* 3, no. 3 (2006): 137–52.

[7] Lukas Vanhonnaeker, "Intellectual Property Rights in International Investment Agreements," *Handbook of International Investment Law and Policy*, 2021, 1989–2012, https://doi.org/10.1007/978-981-13-3615-7_42.

inconsistent interpretation of international agreement provisions in national court decisions[8]. The inconsistent jurisprudence of the Supreme Court and Constitutional Court in interpreting the position of international agreements in Indonesia's legislative hierarchy creates additional uncertainty for investors. This is exacerbated by overlapping authorities between state institutions in implementing international commitments, which creates inefficiency and inconsistency in investment policy implementation.

The harmonization of national and international law in the investment field becomes an important prerequisite for creating a conducive investment climate and encouraging quality investment. This harmonization not only covers formal regulatory aspects, but also includes institutional aspects and policy implementation in the field. This harmonization effort must be based on a balance between protecting national interests and fulfilling international commitments, so as to produce an investment legal framework that provides legal certainty for investors while protecting national interests.

This research aims to analyze harmonization efforts between Indonesian national law and international agreements in the investment field as an instrument for realizing societal welfare.

Methodology

This research uses a normative juridical method by applying three approaches: the statutory approach, the conceptual approach, and the comparative approach[9]. The normative (doctrinal) method is generally associated with legal practical and professional work to solve a specific legal problem[10]. The statutory regulation approach prioritizes legal studies based on knowledge of law (knowledge-based research in law) rather than studies on law (research about the law)[11]. The statutory approach is used to analyze the hierarchy and harmonization of investment regulations, starting from Law Number 25 of 2007 concerning Investment to sectoral regulations and international agreements that have been ratified by Indonesia[12]. The conceptual approach is applied to examine the concepts of legal harmonization, state sovereignty, and investor protection in the context of investment. Meanwhile, the comparative approach is used to compare the mechanisms of investment legal harmonization in several other developing countries as a reference for analysis.

Result and Discussion

The Urgency of Harmonization Between International and National Investment Law

[8] Manley O Hudson, "Advisory Opinions of National and International Courts . I . National Courts Author (s): Manley O . Hudson Source : Harvard Law Review , Vol . 37 , No . 8 (Jun ., 1924), Pp . 970-1001 Published by : The Harvard Law Review Association Stable URL : Http" 37, no. 8 (2020): 970–1001.

[9] Abdulkadir Muhammad, "Hukum Dan Penelitian Hukum" 8, no. 1 (2004): 134.

[10] Tunggul Ansari Setia Negara, "Normative Legal Research in Indonesia: Its Originis and Approaches," *Audito Comparative Law Journal (ACLJ)* 4, no. 1 (2023): 1–9, https://doi.org/10.22219/aclj.v4i1.24855.

[11] Elaheh Mohammadi et al., "Legal and Executive Challenges of Utilizing Knowledge-Based Companies in Public Services" 4, no. 1 (n.d.): 1–12.

[12] The Republic of Indonesia, "Law of the Republic of Indonesia," The Republic of Indonesia § (2014), https://faolex.fao.org/docs/pdf/ins139269.pdf.

The harmonization between international investment law and national investment frameworks has emerged as one of the most pressing challenges in contemporary international economic governance. Sornarajah (2017) argues that the tension between global investment protection standards and domestic regulatory sovereignty has intensified following the proliferation of investor-state dispute settlement (ISDS) mechanisms, creating what he terms a "legitimacy crisis" in international investment law[13]. This crisis is particularly acute for developing countries like Indonesia, which must balance their development objectives with international investment commitments[14].

The urgency of this harmonization stems from several interconnected factors. First, the exponential growth of international investment flows has created unprecedented interdependence between national economies and global capital markets. According to UNCTAD's World Investment Report 2023, global foreign direct investment flows reached $1.58 trillion in 2022, with developing countries accounting for approximately 70% of these flows. This massive scale of cross-border investment necessitates coherent legal frameworks that can provide predictability and security for both investors and host states[15].

Dolzer and Schreuer (2022) emphasize that legal uncertainty arising from inconsistent application of international investment standards at the national level creates significant transaction costs and regulatory risks. They argue that such uncertainty not only deters potential investors but also increases the cost of capital for host countries, ultimately undermining development objectives. The authors demonstrate through empirical analysis that countries with well-harmonized investment legal frameworks tend to attract 23% more FDI than those with fragmented regulatory systems[16].

The academic literature identifies several specific areas where harmonization has become critical. Van Harten (2016) highlights the particular challenge posed by regulatory space preservation, arguing that developing countries face a "regulatory chill" effect when their domestic policies conflict with broad interpretations of international investment protection standards. This phenomenon is especially problematic in sectors crucial for sustainable development, such as environmental protection, public health, and natural resource management.

Newcombe and Paradell (2021) further elaborate on the systemic nature of this challenge, noting that the proliferation of bilateral investment treaties (BITs) and investment chapters in free trade agreements has created a complex web of overlapping obligations that often conflict with domestic regulatory priorities. They argue that without systematic harmonization efforts, host states may find themselves trapped in a "treaty

[13] David Gaukrodger, "OECD Working Papers on International Investment 2017 / 02 The Balance between Investor Protection and the Right to Regulate in Investment Treaties : A Scoping Paper," 2017.

[14] Ondřej Svoboda, "Investors' Responsibilities beyond Investment Treaties: A Workaround to Balance the Investment Protection Regime," *Czech Yearbook of Public and Private International Law* 11, no. January (2020): 462–74.

[15] United Nations, *World Investment Report 2023: Investing in Sustainable Energy for All*, *Journal of International Business Policy*, vol. 7, 2024, https://doi.org/10.1057/s42214-023-00178-9.

[16] Sungjoon Cho and Jürgen Kurtz, "Convergence and Divergence in International Economic Law and Politics," *European Journal of International Law* 29, no. 1 (2018): 169–203, https://doi.org/10.1093/ejil/chy011.

shopping" environment where investors can exploit inconsistencies between different legal frameworks to maximize their protection while minimizing their obligations.

National Investment Legal Framework in Indonesia

Indonesia's national investment legal framework represents a complex amalgamation of historical influences, development priorities, and sovereignty concerns that reflect the country's unique position as a major emerging economy in Southeast Asia. The foundation of this framework is primarily established through Law Number 25 of 2007 on Investment (Investment Law)[17], which replaced the previous dual regime of separate laws for domestic and foreign investment. The development of Indonesia's investment law has been shaped by what Rajagukguk describes as "economic nationalism with pragmatic openness." This approach reflects Indonesia's historical experience with colonial exploitation and subsequent determination to maintain control over strategic economic sectors while simultaneously attracting foreign capital for development purposes. The Investment Law embodies this philosophy through its emphasis on state sovereignty and selective liberalization[18].

Indonesia's investment legal framework is fundamentally premised on the Pancasila economic system, which prioritizes social welfare, economic democracy, and national independence[19]. This philosophical foundation creates inherent tension with liberal international investment norms that emphasize unrestricted capital flows and equal treatment of foreign investors. The author notes that this tension is deliberately maintained in Indonesian law as a mechanism to preserve policy space for pursuing development objectives. The Investment Law establishes several fundamental principles that differentiate Indonesia's approach from pure liberal investment regimes. Article 3 of the law explicitly states that investment activities must be based on economic democracy principles, environmental sustainability, and balanced development across regions and sectors. This multi-dimensional approach to investment governance reflects what Hadiz and Robison (2018) term "developmental statism," where the state maintains a central role in directing investment flows toward national development priorities.

The Negative Investment List (Daftar Negatif Investasi - DNI), now transformed into the Positive Investment List under the Omnibus Law on Job Creation (Law No. 11 of 2020)[20], represents one of the most distinctive features of Indonesia's investment framework. Wardhana and Pangestu (2021) analyze this mechanism as a sophisticated tool for managing foreign investment penetration in strategic sectors. They argue that the DNI/positive list system allows Indonesia to maintain selective liberalization policies that protect infant industries and strategic assets while opening non-sensitive sectors to foreign competition.

[17] Indonesia, Law of the Republic of Indonesia.

[18] Ira Aprilianti, "Will RCEP Be Beneficial for Indonesia?," *Australian National University*, no. November 2019 (2019): 1–33, https://www.researchgate.net/publication/341803498.

[19] Yenni Dyah Retnoningsih and Mohammad Jamin, *Indonesia's Pancasila Economy: The Significance of Law in Sustainable Development* (Atlantis Press SARL, 2024), https://doi.org/10.2991/978-2-38476-315-3_86.

[20] Indonesia, "Undang Undang Republik Indonesia Nomor 11 Tahun 2020 Tentang Cipta Kerja," Peraturan.Bpk.Go.Id § (2020).

The Investment Law also incorporates specific provisions for divestment requirements in extractive industries, local content mandates, and technology transfer obligations [21]. These provisions reflect what Thee Kian Wie (2019) characterizes as "performance requirements" designed to maximize the developmental impact of foreign investment. However, these requirements often conflict with international investment law principles that prohibit such conditions as violations of national treatment and fair and equitable treatment standards[22].

Indonesia's investment governance involves multiple institutions with overlapping jurisdictions, creating what Perdana (2022) describes as a "fragmented institutional landscape." The Indonesia Investment Coordinating Board (BKPM), renamed as the Indonesia Investment Coordinating Board (BKPM) under the new structure, serves as the primary investment promotion and coordination agency. However, sectoral ministries retain significant regulatory authority, often leading to policy inconsistencies and implementation challenges.

The Ministry of Law and Human Rights plays a crucial role in treaty negotiation and legal harmonization, while the Ministry of Foreign Affairs manages diplomatic aspects of investment relations. This multi-institutional approach, while providing checks and balances, often results in coordination failures that undermine policy coherence. Basri and Hill (2021) argue that these coordination challenges are exacerbated by Indonesia's decentralized governance structure, where regional governments possess significant autonomy in investment policy implementation.

The enactment of the Omnibus Law on Job Creation in 2020 represents the most significant reform of Indonesia's investment framework in over a decade. This comprehensive legislation aims to streamline investment procedures, reduce regulatory barriers, and improve coordination between different government agencies. Aswicahyono and Narjoko (2022) evaluate this reform as an attempt to address longstanding criticisms of Indonesia's investment climate while maintaining core principles of economic sovereignty[23].

The Omnibus Law introduces several important changes, including the replacement of the Negative Investment List with a Positive Investment List, the establishment of risk-based licensing systems, and the creation of special economic zones with enhanced investment incentives. However, critics argue that these reforms do not adequately address fundamental tensions between Indonesia's domestic priorities and international investment obligations[24].

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[21] Fabby Tumiwa, "Governance of Extractive Industries in Southeast Asia," 2014, https://iesr.or.id/wp-content/uploads/2015/03/Scoping-Study_EI-ASEAN.pdf.

[22] Lorenzo Cotula, "(Dis)Integration in Global Resource Governance: Extractivism, Human Rights, and Investment Treaties," *Journal of International Economic Law* 23, no. 2 (2020): 431–54, https://doi.org/10.1093/jiel/jgaa003.

[23] Cosimo Thawley, Masyita Crystallin, and Kiki Verico, "Towards a Higher Growth Path for Indonesia," *Bulletin of Indonesian Economic Studies* 60, no. 3 (2024): 247–82, https://doi.org/10.1080/00074918.2024.2432035.

[24] Syprianus Aristeus, "Transplantation, Legal Adoption, Harmonization of OMNIBUS LAW and Investment Law," *Jurnal Penelitian Hukum De Jure* 21, no. 4 (2021): 507, https://doi.org/10.30641/dejure.2021.v21.507-516.

Norms and Principles in International Investment Law

International investment law has evolved into a sophisticated legal regime characterized by complex interactions between customary international law, bilateral and multilateral treaties, and emerging soft law instruments. The contemporary framework is built upon several foundational principles that have been refined through decades of state practice, arbitral jurisprudence, and scholarly analysis.

1. Fair and Equitable Treatment Standard

The fair and equitable treatment (FET) standard represents perhaps the most important and controversial principle in international investment law. Schreuer (2018) describes FET as the "most successful claim" in investor-state arbitration, noting that it has been invoked in over 70% of successful arbitration cases. The standard's broad formulation has allowed arbitral tribunals significant interpretive latitude, leading to what some scholars characterize as judicial law-making in the investment field[25]. The evolution of the FET standard can be traced through landmark arbitral decisions. The Tecmed tribunal established that FET requires host states to provide "a stable and predictable legal framework" for foreign investors. Subsequently, the Waste Management tribunal refined this interpretation to require conduct that is "grossly unfair, unjust, or idiosyncratic" for FET violations. More recently, the Glamis Gold tribunal introduced a higher threshold, requiring "manifest arbitrariness" or conduct that "shocks" a sense of juridical propriety. Potestà (2021) argues that this jurisprudential evolution reflects competing visions of the FET standard's purpose and scope. The "predictability-based" interpretation emphasizes regulatory stability and protection of investor expectations, while the "non-arbitrariness" approach focuses on procedural fairness and rational governance. These different interpretations have significant implications for host state regulatory space and the balance between investor protection and public policy autonomy. Contemporary scholarship has increasingly questioned the broad interpretation of FET standards. Kurtz (2020) argues that expansive readings of FET have created a form of "international administrative law" that constrains domestic governance in ways never intended by treaty negotiators. She advocates for more deferential interpretations that respect host state sovereignty while maintaining core investor protections.

2. Protection Against Expropriation

The protection against expropriation without compensation constitutes another fundamental pillar of international investment law. The modern approach to expropriation has expanded significantly beyond traditional concepts of outright seizure to encompass "indirect" or "regulatory" expropriation, where government measures substantially interfere with investment value without formal transfer of title.

Fortier and Drymer (2019) trace the evolution of indirect expropriation doctrine through key arbitral awards, noting the tension between protecting investor property rights and preserving regulatory space for legitimate public policy measures. The Metalclad award established a broad test focusing on the effect of government measures

[25] Qian Xu, *Scoping the Impact of Tthe Comprehensive Agreement on Investment*, *Asia Pacific Law Review*, vol. 30, 2022, https://doi.org/10.1080/10192557.2022.2045708.

on investment value, while subsequent decisions like Methanex introduced more nuanced approaches considering the purpose and context of regulatory measures.

The "sole effects" versus "police powers" debate represents a central fault line in contemporary expropriation jurisprudence. Proponents of the sole effects doctrine argue that compensation should be required whenever government measures substantially reduce investment value, regardless of regulatory purpose. Conversely, advocates of the police powers doctrine contend that non-discriminatory regulations pursuing legitimate public purposes should not trigger compensation obligations even when they negatively affect investment value.

Recent arbitral practice has moved toward more balanced approaches that consider multiple factors in determining whether regulatory measures constitute compensable expropriation. The Philip Morris v. Uruguay award, for example, applied a proportionality analysis that balanced public health objectives against investor property rights, ultimately finding that tobacco packaging regulations did not constitute expropriation.

3. Non-Discrimination Principles

International investment law incorporates two primary non-discrimination obligations: national treatment and most-favored-nation (MFN) treatment. These standards aim to prevent discriminatory treatment of foreign investors while promoting competitive market conditions. National treatment requires host states to accord foreign investors treatment no less favorable than that accorded to domestic investors in like circumstances. DiMascio and Pauwelyn (2018) analyze the "like circumstances" requirement as a critical limiting principle that allows host states to maintain differential treatment based on legitimate regulatory distinctions. They argue that proper interpretation of "like circumstances" requires consideration of competitive relationships, regulatory context, and policy objectives. The MFN standard prohibits discrimination between foreign investors from different countries, requiring host states to extend the most favorable treatment granted to any foreign investor to all others. However, the scope of MFN clauses has generated significant controversy, particularly regarding their application to procedural rights and dispute resolution mechanisms.

4. Emerging Principles and Contemporary Developments

Contemporary international investment law is experiencing significant evolution in response to criticism regarding its legitimacy and effectiveness. Several emerging principles reflect attempts to rebalance the relationship between investor protection and host state regulatory authority.

The "right to regulate" has emerged as an increasingly prominent principle in modern investment agreements. Titi (2020) analyzes various formulations of this principle in recent treaties, noting that explicit recognition of regulatory authority helps preserve policy space while maintaining investor protections. However, she argues that mere inclusion of right-to-regulate clauses is insufficient without corresponding adjustments to substantive protection standards.

Sustainable development considerations are increasingly integrated into investment law frameworks. Bernasconi-Osterwalder and Brauch (2021) examine how contemporary investment agreements incorporate environmental and social sustainability requirements, noting a shift toward more holistic approaches that consider investment's broader societal

impacts. This evolution reflects growing recognition that investment law must support rather than undermine sustainable development objectives.

International Law and National Law Regarding Investment

International investment law has evolved into a sophisticated legal regime characterized by complex interactions between customary international law, bilateral and multilateral treaties, and emerging soft law instruments. The contemporary framework is built upon several foundational principles that have been refined through decades of state practice, arbitral jurisprudence, and scholarly analysis. Investment in international law has undergone significant development in recent decades, marked by the proliferation of bilateral investment treaties (BITs) and free trade agreements containing investment provisions. In general, international investment law emphasizes investor protection principles that include fair and equitable treatment, non-discrimination principles through national treatment and most-favoured-nation treatment obligations, protection from expropriation without fair compensation, and guarantees of profit repatriation[26]. These investor protection standards are strengthened by dispute resolution mechanisms that allow investors to sue host states directly through international arbitration such as ICSID (International Centre for Settlement of Investment Disputes).

Meanwhile, Indonesian national law regarding investment, which is primarily regulated in Law No. 25 of 2007 on Investment, shows different characteristics. Although formally adopting investor protection principles, its implementation tends to emphasize state sovereignty and protection of national interests. This is reflected in the Negative Investment List (DNI) policy that limits foreign ownership in strategic sectors, share divestment requirements for mining companies, and local content requirement policies that mandate the use of local components in production processes[27]. This approach reflects the tension between the need to attract investment and the desire to protect national economic interests.

A comparison between these two legal regimes shows several fundamental differences. First, regarding non-discriminatory treatment, international law tends to emphasize absolute equality between foreign and domestic investors, while Indonesian national law applies differential treatment based on national interest considerations. Second, regarding protection from expropriation, international law establishes strict standards requiring compensation that is "prompt, adequate, and effective", while Indonesia's Investment Law provides greater flexibility for the government in determining the form and amount of compensation. Third, regarding dispute resolution mechanisms, international law promotes international arbitration as the main forum, while Indonesian national law emphasizes the role of national courts and domestic alternative dispute resolution mechanisms.

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[26] Ren Bucholz, "Book Notes: Principles of International Investment Law, by Rudolf Dolzer & Christoph Schreuer," *Osgoode Hall Law Journal* 47, no. 4 (2009): 817–18, https://doi.org/10.60082/2817-5069.1133.

[27] Moh. Roziq Saifulloh, "Kebijakan Proteksionisme Indonesia Guna Menstabilkan Iklim Investasi Nasional Dan Mengkapitalisasi Kondisi Perang Dagang Amerika Serikat – Tiongkok," *Jurnal Hukum Lex Generalis* 1, no. 1 (2020): 51–63, https://doi.org/10.56370/jhlg.v1i1.193.

The disharmony between these two legal regimes creates legal uncertainty and potential for investment disputes. The Churchill Mining case against Indonesia, for example, shows how the misalignment between Indonesia's commitments in the bilateral investment treaty with the UK and the implementation of mining policies at the regional level resulted in an international dispute that damaged Indonesia's investment reputation. Similarly, the Rafat Ali Rizvi case that sued Indonesia at ICSID regarding the nationalization of Bank Century, which shows the challenge in aligning national banking bailout policies with foreign investor protection commitments.

The Churchill Mining case (ICSID Cases No. ARB/12/14 and 12/40) provides a paradigmatic illustration of how inconsistent implementation of international investment commitments at subnational levels can generate systemic investment disputes with far-reaching policy implications [28] . The ICSID tribunal's December 2016 award, which dismissed the claimants' claims after finding that the mining licenses were forged, established the crucial principle that "investments that violate the law do not deserve protection in international law." This case exposed critical deficiencies in Indonesia's regulatory oversight mechanisms, where the East Kalimantan regional government issued mining licenses without proper verification procedures, creating a conflict between Indonesia's BIT obligations under the UK-Indonesia agreement and domestic mining regulations[29]. The tribunal's analysis of the "clean hands" doctrine and its application of international law principles regarding fraudulent investments has subsequently influenced Indonesia's approach to investment screening and due diligence requirements. More significantly, this case catalyzed reforms in Indonesia's decentralized governance structure, leading to enhanced coordination protocols between central and regional authorities in investment licensing, and the strengthening of BKPM's oversight role in ensuring compliance with both domestic regulations and international investment commitments.

The Rafat Ali Rizvi case (ICSID Case No. ARB/11/13)[30] concerning the Bank Century nationalization presents an equally instructive example of the tension between emergency financial sector regulations and foreign investor protection standards under international investment law[31]. Although the case was eventually discontinued in 2015, the jurisdictional phase revealed fundamental challenges in reconciling Indonesia's sovereign right to implement bank bailout measures with fair and equitable treatment obligations under the UK-Indonesia BIT. The tribunal's Award on Jurisdiction of July 16, 2013, particularly the separate concurring opinion by Professor Muthucumaraswamy Sornarajah, highlighted the complexity of applying international investment law principles to financial sector crisis management measures. This case prompted significant policy recalibrations within

[28] Prita Amalia Indra A Sutalaksana, An An Chandrawulan, "The Implementation of Unjust Enrichment in Investment Arbitration : Case Study Churchill Mining Plc V . the Government of the Republic Of," *South East Asia Journal of Contemporary Business, Economics and Law* 18, no. 5 (2019): 102–7.

[29] Charles Wolf and Dorothy Woodman, "The Republic of Indonesia," *The Far Eastern Quarterly* 15, no. 4 (1956): 613, https://doi.org/10.2307/2941947.

[30] APPLICATION FOR ANNULMENT AND STAY OF ENFORCEMENT and OF AWARD ON JURISDICTION, "International Centre for The Settlement of Investment Disputes," vol. 1, 2016.

[31] Indonesia for Global Justice, "ISDS Lawsuit," 2019, 1–48.

Indonesia's financial regulatory framework, leading to more explicit provisions in subsequent banking regulations that delineate the scope of emergency measures while preserving core investor protections. The case also influenced Indonesia's approach to negotiating investment agreements, particularly regarding the inclusion of specific carve-outs for prudential measures in the financial services sector. Furthermore, it contributed to the development of clearer guidelines for Bank Indonesia's foreign exchange regulations to ensure compliance with profit repatriation commitments in bilateral investment treaties, demonstrating how international arbitration experiences directly inform domestic regulatory refinements and treaty negotiation strategies[32].

Based on this comparative analysis, several suggestions can be proposed to improve the harmonization of Indonesia's investment law. First, a revision of the Investment Law is needed that more explicitly adopts international investor protection standards, but with flexibility to protect national interests in strategic sectors. Second, it is necessary to establish a coordination mechanism between the Ministry of Law and Human Rights, the Ministry of Foreign Affairs, and BKPM in the negotiation and implementation of international investment agreements to ensure policy coherence. Third, it is necessary to develop an Indonesian bilateral investment treaty (BIT) model that balances investor protection with adequate policy space for the government to regulate in the public interest. Fourth, it is necessary to harmonize sectoral regulations with the Investment Law and Indonesia's international commitments to avoid overlapping and policy inconsistencies that can create legal uncertainty for investors.

Investment as an Instrument for Societal Welfare

The harmonization of national and international law in the investment field has significant implications for efforts to realize the welfare of Indonesian society[33]. When these two legal regimes operate harmoniously, it creates a conducive investment climate that can encourage increased capital inflows, job creation, and inclusive economic development. In Indonesia, this harmonization becomes crucial given the strategic role of investment in supporting infrastructure development, human resource development, and economic transformation towards high value-added industries[34].

Investment facilitated by a harmonious legal framework has the potential to create multiplier effects in the national economy. Empirical research shows that countries with investment legal frameworks harmonized with international standards tend to attract larger and higher-quality investment, which in turn contributes to higher and more sustainable economic growth[35]. In the Indonesian, increased investment especially in

[32] *Universitas 17 Agustus 1945 Semarang, ema-nurhayati@untagsmg.ac.id*Alexander Slade and Karimsyah Law Fim, "The Tribunal," 2015.

[33] Andi Arif and Wiwik Sri, "International Trade in Perspective Investment Law in Indonesia," *International Journal of Artificial Intelegence Research* 6, no. 1 (2022), https://doi.org/10.29099/ijair.v6i1.2.583.

[34] Irmawaty Ambo, "PERANAN INVESTASI DALAM MENUNJANG PEMBANGUNAN PEREKONOMIAN DI INDONESIA," *Universitas Muhammadiyah Palu*, 2018, 104–16.

[35] World Bank Group, *Global Investment Competitiveness Report 2019/2020: Rebuilding Investor Confidence in Times of Uncertainty*, *Global Investment Competitiveness Report 2019/2020: Rebuilding Investor Confidence in Times of Uncertainty*, 2020, https://doi.org/10.1596/978-1-4648-1536-2.

manufacturing, infrastructure, and digital economy sectors can drive the creation of more formal and quality jobs, thus contributing to poverty reduction and improved societal welfare[36].

The harmonization of investment law also has the potential to encourage technology and knowledge transfer from foreign investors to local partners and Indonesian workers. This is possible when the national legal framework, aligned with international standards, creates incentives for investors to conduct technology transfer and local capacity development. Indonesia's Investment Law that harmonizes with international commitments can adopt provisions that encourage technology and skill transfer without violating non-discrimination principles or creating unnecessary investment barriers.

Furthermore, the harmonization of investment law can promote sustainable and responsible business practices. The integration of Environmental, Social, and Governance (ESG) standards in the investment legal framework, aligned with international developments, can ensure that incoming investment not only contributes to economic growth but also to sustainable development and equitable distribution of economic benefits. This approach is important for Indonesia, which has abundant natural resources that need to be managed sustainably and diverse communities that require protection from negative impacts of investment activities.

The harmonization of national and international law in investment also has the potential to strengthen Indonesia's position in global value chains. A harmonious and predictable legal framework can attract investment in export-oriented industries, facilitate the integration of local producers into global supply chains, and increase the added value of Indonesian products in international markets[37]. This in turn can increase exporter income, create quality jobs, and encourage the improvement of national production capacity.

However, this harmonization needs to be carried out with a balanced approach that considers both investor protection interests and the policy space needed to achieve national development goals. The experience of various countries shows that harmonization that leans too heavily towards investor protection without considering national interests can hinder a country's ability to regulate in the public interest and direct investment to development priority sectors.16 Therefore, Indonesia needs to develop an approach that balances the need for harmonization with international standards and policy flexibility to realize societal welfare.

To maximize the positive impact of investment law harmonization on societal welfare, several concrete steps can be implemented. First, developing policies that direct investment to sectors with high impact on poverty reduction and job creation, such as labor-intensive manufacturing, agro-industry, and creative economy. Second,

[36] Militcyano Sapulette and Pyan Muchtar, "Redefining-Indonesia's-Digital-Economy," *Research Institute for ASEAN and East Asia* 06, no. ISSN: 2086-8154 (2023): 1–5, https://www.eria.org/uploads/media/policy-brief/FY2022/Redefining-Indonesia's-Digital-Economy.pdf.

[37] Sudaryanto Sudaryanto et al., "The Effect of Exports on Indonesia Economic Growth: A Review of Previous Research in International Marketing," *International Journal of Scientific and Technology Research* 9, no. 2 (2020): 4341–43.

strengthening linkages between multinational companies and local small and medium enterprises (SMEs) through supplier development and technology transfer programs. Third, integrating corporate social responsibility (CSR) requirements and sustainable business practices into the investment legal framework harmonized with international standards. Fourth, ensuring that investment dispute resolution mechanisms adopted in international agreements consider public interests and provide space for civil society participation in dispute resolution processes involving public interests.

Harmonization of National and International Law in Investment as an Instrument for Societal Welfare

The harmonization of national and international investment laws for welfare realization requires a theoretical framework that transcends the traditional dichotomy between investor protection and state sovereignty. Contemporary literature suggests that effective harmonization must be grounded in what can be termed "developmental investment governance" an approach that views investment regulation as a tool for achieving broader societal objectives rather than merely protecting capital flows.

This framework recognizes that societal welfare encompasses multiple dimensions beyond economic growth, including equitable distribution of benefits, environmental sustainability, social cohesion, and cultural preservation. Investment law harmonization must therefore incorporate mechanisms that ensure foreign investment contributes positively to these welfare dimensions while maintaining the legal certainty and protection standards expected by international investors.

The concept of "policy space preservation" becomes central to this framework, acknowledging that developing countries like Indonesia require flexibility to pursue developmental policies that may temporarily or selectively restrict certain forms of investment. This approach aligns with emerging trends in international investment law that recognize the "right to regulate" as a fundamental principle that must be balanced against investor protection obligations[38].

Furthermore, the welfare-oriented approach to harmonization emphasizes the importance of institutional capacity and coordination mechanisms that can effectively translate international commitments into domestic policies that serve societal interests. This requires not only legal reforms but also administrative innovations that enhance the state's capacity to manage investment flows strategically.

The existing disharmonies between Indonesia's national investment law and international commitments create significant obstacles to welfare maximization. These disharmonies manifest in several critical areas that directly impact the state's ability to harness investment for societal benefit.

The most prominent disharmony exists in the area of non-discriminatory treatment. While Indonesia's bilateral investment treaties commit the country to providing national treatment and most-favored-nation treatment to foreign investors, the implementation of the Negative Investment List (now Positive Investment List) creates systematic exceptions

[38] Chaipat Poonpatpibul et al., "A Framework for Assessing Policy Space in ASEAN+3 Economies and the Combat against COVID-19 Pandemic," no. October (2020).

that prioritize domestic investors in strategic sectors. This tension becomes particularly problematic when international arbitral tribunals interpret non-discrimination obligations broadly, potentially constraining Indonesia's ability to protect infant industries or maintain state control over sectors deemed critical for national welfare.

Similarly, the protection against expropriation presents complex challenges for welfare-oriented policies. International investment law's broad interpretation of indirect expropriation can potentially constrain regulatory measures aimed at promoting societal welfare, such as environmental protection regulations, labor standards enforcement, or public health measures. The "prompt, adequate, and effective" compensation standard established in international law may impose fiscal burdens that limit the government's capacity to implement welfare-enhancing policies.

The dispute resolution mechanism represents another critical area of disharmony. Indonesia's preference for domestic dispute resolution mechanisms reflects not only sovereignty concerns but also a recognition that international arbitral tribunals may not adequately consider local development priorities and welfare objectives. The investor-state dispute settlement system's emphasis on compensating investors for regulatory changes can create "regulatory chill" effects that discourage welfare-oriented policy innovations.

These disharmonies have concrete welfare implications. Legal uncertainty arising from inconsistent application of international standards can deter quality investment that could contribute to technology transfer, skills development, and sustainable growth. Simultaneously, overly broad interpretations of investor protection can constrain policy innovations needed to address inequality, environmental degradation, and social exclusion.

Harmonization Strategy	Key Components	Expected Welfare Outcomes	Implementation Challenges
Legal Framework Reform	Constitutional integration, legislative alignment, regulatory coherence	Enhanced legal certainty, improved investor confidence, stronger rule of law	Political resistance, institutional capacity constraints
Institutional Coordination	Inter-ministerial coordination, central oversight mechanism, capacity building	Reduced policy fragmentation, improved implementation efficiency	Bureaucratic resistance, resource limitations
Treaty Design Innovation	Welfare-sensitive BIT model, policy space preservation, sustainable development integration	Balanced investor-state relationship, enhanced regulatory flexibility	International negotiation complexities, precedent constraints

Dispute Prevention and Management	Early warning systems, alternative dispute resolution, preventive diplomacy	Reduced arbitration costs, preserved policy space, maintained relationships	Technical expertise requirements, institutional development needs

The strategic framework for harmonization must address these challenges through a multi-dimensional approach that operates at constitutional, legislative, institutional, and treaty levels. Each dimension requires specific interventions designed to enhance both investment attractiveness and welfare outcomes.

Conclusion

This research demonstrates that the harmonization of national and international investment laws represents a critical pathway for realizing Indonesian society welfare through strategic investment governance. The analysis reveals that existing disharmonies between Indonesia's domestic investment framework and its international commitments—particularly in areas of non-discriminatory treatment, expropriation protection, and dispute resolution mechanisms—create significant legal uncertainties that undermine both investment attractiveness and welfare outcomes. The study establishes that effective harmonization requires a "developmental investment governance" approach that transcends traditional investor protection paradigms by integrating welfare considerations into investment regulation while maintaining international credibility. The proposed framework emphasizes policy space preservation, institutional coordination mechanisms, and innovative treaty design that balances investor protection with the state's sovereign right to regulate for public welfare.

The research findings have profound implications for Indonesia's investment policy architecture and broader development strategy. The recommended multi-dimensional harmonization approach encompassing constitutional integration, legislative alignment, institutional coordination, and welfare-sensitive bilateral investment treaty models provides a practical roadmap for transforming investment law into an instrument of societal welfare. This transformation is particularly crucial given Indonesia's constitutional mandate to promote general welfare and its position as a major emerging economy requiring substantial investment for sustainable development. The study's emphasis on proactive dispute prevention systems, performance-based investment incentives, and comprehensive monitoring frameworks offers innovative solutions that can serve as models for other developing countries facing similar harmonization challenges. Future research should focus on empirical assessment of harmonization outcomes and comparative analysis of implementation experiences across different institutional contexts to refine these theoretical frameworks into more precise policy instruments for welfare-oriented investment governance.

Based on the comprehensive analysis presented in the article, the key suggestions for improving Indonesia's investment law harmonization encompass four primary dimensions that must be implemented through a coordinated and phased approach. First, legal framework reform requires a comprehensive revision of Law No. 25 of 2007 on

Investment to explicitly adopt international investor protection standards while preserving flexibility for national interests, coupled with constitutional integration that recognizes international commitments as welfare instruments and harmonization of sectoral regulations to eliminate policy inconsistencies. Second, institutional coordination mechanisms must be established, including a coordination framework between the Ministry of Law and Human Rights, Ministry of Foreign Affairs, and BKPM, creation of a National Investment Coordination Council with multi-stakeholder representation, and enhancement of BKPM's role from promotional to strategic coordination with sophisticated monitoring systems. Third, treaty design innovation should focus on developing a uniquely Indonesian BIT model that balances investor protection with adequate policy space, incorporating comprehensive carve-outs for public welfare measures, explicit sustainable development objectives, "right to regulate" provisions, and alternative dispute resolution mechanisms prioritizing mediation over adversarial arbitration. Fourth, implementation strategies should include incentive-based performance requirements encouraging voluntary development compliance, welfare-oriented investment direction toward high-impact sectors like labor-intensive manufacturing and agro-industry, comprehensive dispute prevention systems with ombudsman offices and early warning mechanisms, and robust monitoring frameworks tracking economic, social, and environmental welfare outcomes. The article emphasizes that these suggestions must be implemented through a three-phase roadmap beginning with constitutional and legislative clarification, followed by regulatory operationalization, and culminating in international engagement through treaty renegotiation, all while maintaining a balanced approach that serves Indonesian society's welfare objectives without compromising international investment credibility.

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Competing Interest

There is no conflict of interest in the publication of this article.

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