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The Waiving of Jurisdictional Concerns in Arbitration: A Case Study of the IMFA v. Indonesia Arbitration

Mohamad Rafi Andiansyah[1*] Prita Amalia[2]
1.Faculty of Law, Universitas Padjadjaran, Department of Transnational Business
2.Center of Research for Regional Resources Innovation Unpad, Transnational Business Law Universitas Padjadjaran
* E-mail of the corresponding author: rafi.andiansyah@gmail.com

Abstract
As a field of law that is constantly developing, International Investment Law relies quite heavily on past arbitration awards or jurisprudence to derive the applicable laws in each respective case. This means that every new arbitration award should ideally be studied in order to identify what possible ramifications it may have for a future arbitration case. It is therefore of utmost importance that arbitral tribunals formulate and state their reasoning when they come to a conclusion regarding a disputed issue in a case. Doing this would provide insight as to the tribunal's legal reasoning and would clear up any possible issues of legal certainty for the case in question as well as be of benefit for future tribunals. This is the reason for scrutinizing the *IMFA v. Indonesia* award. The tribunal in *IMFA v. Indonesia* had decided to forego coming to a conclusion on some of the jurisdictional arguments on the grounds that the merits of the case were found to be in favor of the Respondent (as the party who challenged the tribunal's jurisdiction). This sort of waiving of Jurisdictional concerns is not advisable considering the precedent it would set, and also considering the fact that it would run counter to the Kompetenz-Kompetenz doctrine and right to present one's case. This article aims to use the *IMFA v. Indonesia* case as a study to elaborate on why such a waiving is inadvisable and would set a bad precedent.
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1. Introduction

1.1. Background

International Investment Law is part of the larger framework of public international law. This being the case, it can be said to be based primarily on fundamental ideas drawn from international treaty law, as well as customary international law and general legal principles to a lesser extent (De Brabandere, 2014). Naturally, this means that the sources of public international as well-known by all and most prominently codified in the Statute of the International Court of Justice (being treaties, customs, general principles of law, and teachings of the most highly qualified publicists and jurisprudence as subsidiary sources) are applicable sources of International Investment Law. This last source of law is quite pronounced in the landscape of International Investment Arbitration. In fact, International Investment Law is substantially derived from the jurisprudence that has accumulated over the years (Sornarajah, 2004). Such jurisprudence consists of decisions made by the ICJ and its predecessor the PCIJ, such as the Chorzow Factory, Barcelona Traction, ELSI cases among others, together with arbitral awards made by *ad hoc* and institutional tribunals in investment treaty arbitrations. These are used in order to provide evidence of possible norms from which the proper international law regarding investment may be derived (Sornarajah, 2000).

As such, any arbitral awards made for investment disputes must take care to set a proper precedent for future arbitral awards. The setting of said precedent takes place both in regards to the procedural and substantive aspects of arbitral proceedings. The purpose of this article is to prevent the possible arising of a negative precedent by which arbitral tribunals disregard the need to ponder their jurisdiction in light of conclusions they come to in the merits phase of an arbitration. This is what occurred in the *IMFA v. Indonesia* case and therefore it is the focus of this study.

Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia (or *IMFA v. Indonesia* for short), also known as PCA Case No.2015-40, is a case between an Indian company and the Indonesian Government concerning certain bureaucratic difficulties the company faced in Indonesia. The arbitration initiated in 2015 and concluded in 2019. Broadly speaking, the merits of the case concerned overlapping licenses as well as some divestment requirements in Indonesia's Government Regulation No.24 of 2012. Further details of the facts surrounding *IMFA v. Indonesia* will be covered in section 2.2 of the article, however, in short, in the jurisdictional section of the *IMFA v. Indonesia* proceedings, the Government of Indonesia's challenge of the tribunal's jurisdiction consisted of four objections: (I) The Temporal Objection, (II) the Legality Objection, (III) The No Acceptance Obligation, and (IV) The Indirect Investment Objection. After some deliberation, the Temporal Objection was refuted on several factual grounds, however when it came time to assess the other three, the tribunal found that such "*difficult jurisdictional and textual question(s) need not be decided in light of the Tribunal's conclusions*

below regarding the merits of the Claimant's case." Essentially, the tribunal had decided to refrain from coming to a decisive conclusion on one of the issues of jurisdiction. This raises some issues from both a legal and practical side of things. In arbitration in general, the issue of jurisdiction is just as important as the merits of the case, as it determines whether or not the tribunal can make a binding award. In this case not only does the finding not set a positive precedence for further cases, it could even be considered irresponsible as it calls into question whether the tribunal's findings on the merits are binding at all. This article concerns itself with the *IMFA v. Indonesia* tribunal's findings in its award and provides an analysis in regards to what should have been done.

1.2. Methodology

The method applied in this study is juridical normative. There are two types of legal materials used in the writing of this paper, namely primary legal materials and secondary legal materials. Primary legal materials refer to national laws and regulations, international treaties, and court decisions (including arbitral awards). In this article for instance, reference is made to the primary legal material known as the Agreement Between the Government of The Republic of Indonesia and The Government of The Republic of India for the Promotion and Protection of Investments (also known as the 1999 India-Indonesia Bilateral Investment Treaty). Secondary legal materials are legal materials that are not binding but can provide a further elaboration or explanation of primary legal materials. Among others this refers to textbooks or other literature, journals, papers, articles, research results, and various other sources. Reference is also made to arbitral rules, which make particular reference to jurisdiction and while such rules are only binding in arbitration in their respective forum, they are still valuable materials which purport to show the importance of jurisdiction as well as how it should be treated. The data collection technique applied in writing this paper is through the study of documents or library materials (literary research). After collection, the aforementioned legal materials are processed and analysed, resulting in this article.

The analysis in this paper is divided into three subsections. Sub-section one will examine the concept of jurisdiction and its importance in arbitral proceedings. Sub-section two lays out the details in the case relevant to the subject of the article. Sub-section three will apply the concepts outlined in sub-section one in regards to the case of *IMFA v. Indonesia* as well as an analysis of relevant jurisprudence. The conclusion will then attempt to wrap up neatly all the issues and findings in a concise manner.

2. Result and Analysis

2.1. Jurisdiction and Kompetenz-Kompetenz

An arbitral tribunal may only validly resolve disputes that the parties have agreed that it should resolve(Blackaby, 2015). It is the parties who give to a private tribunal the authority (or competence) to decide disputes between them, and the arbitral tribunal must take care to stay within the terms of its mandate, or jurisdiction. In other words, parties must consent to an arbitration in advance of any proceedings in order for the arbitral tribunal to be able to declare a binding award. Should an award be made by a tribunal without jurisdiction, it is liable to be challenged or be refused recognition and enforcement, in either case the winning party would not be able to gain the benefits of winning the arbitration in the first place (Bermann, 2017). These axioms stand true for all manner of arbitration, be it commercial or public in nature.

In commercial contracts, consent to arbitrate may take one of two forms. The first is that of an arbitration agreement, which comprises a clause in the contract between parties, which states that *should* a dispute arise between them, the parties will undertake to settle the dispute through arbitration (Onyema, 2010). The second form is that of a submission agreement, wherein the parties to an already-arisen dispute agree to settle the dispute in arbitration. The only real differences between these two methods are that an arbitration agreement refers to a dispute that may never arise, while a submission agreement refers to a dispute which has already arisen, and also that some national laws, such as the Argentinian and Brazilian arbitration laws, require the making of a submission agreement regardless of the existence of a previous arbitration agreement (United Nations Conference on Trade and Development, 2005). On the other hand, in regards to investment treaty arbitrations, a State may consent to arbitration through a dispute resolution clause in a Bilateral Investment Treaty (BIT) it is party to. An investor with a claim would then show their consent to arbitrate by submitting a claim in accordance with the dispute resolution clause in the BIT. In any case, any such agreement by parties waives their right to settle the dispute in a court of law, and also confers jurisdiction to the arbitral tribunal to settle the dispute. Such grant of jurisdiction is by no means decisive, however.

A respondent to a dispute may challenge the arbitral tribunal's jurisdiction (Singh, 2007). This challenge may range from claims that the dispute is not within the scope of the arbitration agreement, to claims that the arbitration agreement itself is invalid. If this is the case, an arbitral tribunal will be the one to determine its jurisdiction (or lack thereof) (Rosen, 1994). This is known as the doctrine of *Kompetenz-Kompetenz*. The doctrine of *Kompetenz-Kompetenz* has been incorporated into national arbitration laws (*lex arbitri*) as well as institutional arbitration rules. An example of the former would be Article 16 of the UNCITRAL Model Law on

International Commercial Arbitration (a model law that has been adopted by 85 States as of the time of writing), which states that "the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement," while an example of the latter can be seen in Article 23 of the PCA Arbitration Rules, which establishes in almost identical terms the tribunal's competence to determine its own competence. Further, while it is acknowledged that *Kompetenz-Kompetenz* is a right or power of the tribunal, a tribunal cannot simply assume that it has jurisdiction (Tang, 2014). Moreover, according to most arbitration rules (for instance the UNCITRAL or ICSID Arbitration Rules), the tribunal must state the reasons upon which any decision they make are based. All of this amounts to a doctrine which dictates that a tribunal must address or investigate any challenges to their jurisdiction in order to establish that they are qualified to make a binding award.

The arbitral tribunal's obligation to address a party's challenges to their jurisdiction also has to do with the rule that an arbitral tribunal must give each party a full opportunity to present their case. The UNCITRAL, drafters of the aforementioned widely-adopted Arbitration Model Law, has elaborated that this entails two basic obligations for the tribunal (United Nations Commission on International Trade Law, 2012). First, the tribunal must ensure the rights of both parties to give their opinions and arguments regarding the facts and the law, and that they must be informed of the opposing party/parties opinions and arguments. Second and most pertinent to this study, an arbitral tribunal must take note of parties' arguments and give them due consideration in making decisions in regards to the arbitration. This second obligation, in conjunction with the doctrine of *Kompetenz-Kompetenz*, means that when one or both parties to an arbitration express their perspective in regards to a certain aspect of the tribunal's jurisdiction, the tribunal has an obligation to dispel any concerns and clear up the law in regards to the aspect in question.

Based on the findings above, one can observe that it is problematic or at the very least irregular for a tribunal to eschew consideration of their jurisdiction when challenged. This is especially the case when the ground for such an eschewal is rooted in the merits of the case, which in theory should be considered completely separately from the jurisdiction. This disregard of procedure could even be considered grounds for challenge to the enforcement of the award, on top of the fact that the jurisdiction of the tribunal has not yet been confirmed.

In the *IMFA v. Indonesia* case, the applicable arbitration rules were the 1976 UNCITRAL Arbitration Rules, and they also integrated the concept of *Kompetenz-Kompetenz* within them. This selection was based on the applicable BIT between Indonesia and India which stated in Article 9(3)(b) that should a dispute between an investor and host state be submitted to arbitration, the investor shall be entitled to refer the dispute to an ad hoc arbitral tribunal in accordance with the aforementioned UNCITRAL Rules. These Arbitration Rules state in Article 21 (1) that "the arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement." It is further elaborated in Article 21 (4) that "the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award." Seeing all this, while it is true that the tribunal may declare their findings on jurisdiction together with the merits in the final award, it in no way means that the tribunal can choose to completely refuse coming to a conclusion on a plea concerning jurisdiction. This means that the arbitration in IMFA v. Indonesia was not conducted in accordance with the doctrine of *Kompetenz-Kompetenz*.

2.2. The Background of the *IMFA v. Indonesia* Arbitration and Subsequent Award

IMFA v. Indonesia concerned a dispute between the two parties regarding a mining permit issued by the East Barito Regency of Indonesia. The Claimant, Indian Metals & Ferro Alloys Limited ("IMFA"), filed a Request for Arbitration on July 24, 2015 in accordance with Article 9(b) of the Agreement Between the Government of The Republic of Indonesia and The Government of The Republic of India for the Promotion and Protection of Investments (also known as the India-Indonesia BIT). The dispute mainly revolved around overlapping land permits as well as certain divestment requirements in Government Regulation No. 24 of 2012 issued by the Government of Indonesia. However, this article is mainly concerned with the jurisdictional issues and arguments raised in the case.

As is the norm with investment arbitrations, the Respondent argued that the arbitral tribunal did not have jurisdiction over the case. The Respondent's objection regarding jurisdiction comprised four points, namely: (I) That the Respondent's actions which are alleged to have violated the BIT occurred before the Claimant became an investor and made his investment based on the BIT ("Temporal Objection"), (II) that the Claimant's investment has not been "established or acquired" in accordance with Indonesian law pursuant to Article 1(1) of the BIT ("Legality Objection"), (III) that the Claimant's investment has not been "accepted as an investment as stipulated in the applicable Indonesian law regarding foreign investment" in relation to Article 2 of the BIT ("No Acceptance Objection"), and (IV) that the investment claimed by the Claimant is an indirect investment, which is not covered by the BIT ("Indirect Investment Object").

Regarding the first objection, the Temporal Objection, although the Parties did not agree on the date on which the Claimant made their investment (i.e., May 12, 2011 according to the Respondent and June 7, 2010, August 10, 2010 or October 27, 2010 according to the Claimant), it is clear that the issuance of overlapping permits occurred either outside the Tribunal's scope of authority or contrary to the principle of nonretroactivity as stipulated in Article 13 of the Articles on Responsibility of States for Internationally Wrongful Acts (Award, para.70). On the other hand, the Tribunal does have the authority with respect to actions that occurred after the Claimant's investment that may have violated the BIT. These actions are: (i) the State's failure to rectify the situation of overlapping permits; and (ii) the divestment requirement in Government Regulation No. 24 of 2012. Since both actions occurred after 2 May 2011, the Tribunal did not need to decide between the Claimant's and the Respondent's submission regarding the exact date of the Claimant's investment, and thus the Temporal Objection was rejected.

The second objection, the Legality Objection, is based on Article (1)(1) of the BIT, which states that "protected investments must be established or acquired [...] in accordance with the national laws and regulations of the Contracting Party in whose territory the investment is made (Award, para.117)." Thus, if the investment is not carried out in accordance with Indonesian law, the investment is not included in the scope of the BIT. Article 2 of Law No.25 of 2007, also known as the Investment Law, states that "Provisions stipulated in this law shall apply to investment in all sectors in the territory of the Republic of Indonesia." Further, the official Elucidation of Article 2 states that "investments in all sectors in the Republic of Indonesia shall mean direct investment by excluding indirect or portfolio investment." Therefore, according to the Respondent, Indonesian Law requires the Claimant to make an investment in Indonesia in the form of a 'limited liability company' and the Claimant is required to make this investment 'directly'. However, the investment claimed by the Claimant was not made by them directly; but rather through its subsidiary, Indmet Mining Pte Ltd, a Singaporean company, by way of acquiring a 70% stake in PT SRI, a local Indonesian company. Here the tribunal chose to combine the Respondent's second and third objections (No Acceptance Objection) and consider both simultaneously as they are intertwined and the Legality Objection is in fact dependent on the No Acceptance Objection. As acknowledged even by Indonesia's counsel, both objections involve the same question: that is whether the Claimant's investment, namely the purchase of its shares in SRI, was established and accepted in Indonesia in accordance with Indonesian Law. In the end, the tribunal's conclusion in regards to the second and third objections was that "this difficult jurisdictional and textual question need not be decided in light of the Tribunal's conclusions below regarding the merits of the Claimant's case concerning the adoption of Government Regulation No. 24 of 2012 and the alleged failure to resolve the overlapping licenses (Award, para.151)." The fourth objection was also not discussed based on the same considerations, but with a note that the Tribunal did find the Respondent's argument persuasive (Award, para.177).

2.3. Case Analysis of *IMFA v. Indonesia*

It is quite interesting that the Tribunal decided to combine the most substantial of the Respondent's arguments, their second and third objections, and in the end not give a concrete decision in this matter. The Tribunal also chose not to resolve this issue despite previous jurisprudence that has raised similar issues.

In general, Tribunals which have been faced with similar situations agree that indirect investment is included in the scope of India-Indonesia BIT. This is due to the fact that in general, the Articles in BITs that define investment generally do not limit what assets can be considered as investments. For instance, the relevant BIT which applies in this case, the India-Indonesia BIT, states that "*every kind of asset established or acquired... and in particular, though not exclusively, includes: (ii) shares in and stock and debentures of a company and any other similar forms of participation in a company.*" Going by jurisprudence from previous arbitrations, based on similar wording in other BITs, other arbitral tribunals have concluded that the meaning of the word "investment" should be considered broadly.

As an example, in the case of *Mera v. Serbia*, the tribunal interpreted "investment" in the Serbian-Cyprus BIT to provide a broad understanding of investment for two reasons. First, the tribunal relied on the ordinary meaning of the terms used in the BIT, the term "every kind of asset" in the investment definition "*adopts a broad asset-based definition of investment with an open-ended illustrative list of covered assets* (Mera v. Serbia Jurisdiction Award, para.126)". Second, based on its object and purpose, the Serbia-Cyprus BIT aims to protect and promote all types of investments because the purpose of the treaty itself is to create favorable conditions for investments of investors from both parties, which supports a broad interpretation of investment protection (Mera v. Serbia Jurisdiction Award, para.122).

Another element taken into account by other Tribunals in cases related to indirect investment is the element of control. This is a question as to whether the investor making the claim actually controls and operates the investment in question. For example, in the case of *Standard Chartered v. Tanzania*, it was found by the Tribunal that investor status requires active contribution as a form of control over its investment. Active contributions require investors to have an act of contribution to their investment, not just passive ownership of

shares (SCB v. Tanzania Award, para. 260). As such, when viewed from a jurisprudential perspective, the Indirect Investment problem can be resolved, with the conclusion that in general, indirect investment is included in the scope of a BIT as long as the party submitting the claim actually controls the investment located in the host state. This method of interpretation is also applicable for the India-Indonesia BIT, and the Tribunal in *IMFA* made a reference to it in the section regarding the fourth objection, but as mentioned above was regardless inconclusive in deference to their findings on the merits.

More important than any conclusion reached in regards to Indirect Investment are the relevant provisions in Indonesian national law. Indonesian national law is important here as the India-Indonesia BIT states that "*protected investments must be established or acquired [...] in accordance with the national laws and regulations of the Contracting Party in whose territory the investment is made*." In other words, investments that are not included in the Investment Law are not automatically included in the scope of the India-Indonesia BIT. Based on Indonesian law, in this case the Elucidation of the Investment Law, *"investments in all sectors in the Republic of Indonesia shall mean direct investment by excluding indirect or portfolio investment.*" While the meaning of the term "indirect investment" in the Elucidation cannot be definitively ascertained on its own, by looking at various other BIT claims filed against Indonesia, it can be concluded that the criteria for investment in the Investment Law can only be fulfilled when foreign investors directly acquire shares in Indonesian companies. For instance, in the case of *Churchill Mining pic v Indonesia*, Churchill Mining pic, by directly acquiring 95% shares in the Indonesian PMA company 'PT Indonesia Coal Development' was acknowledged as an investor. In another case, *Planet Mining Pty Ltd v Indonesia*, the claimant, Planet Mining Pty Ltd, had to have directly acquired a stake in the Indonesian PMA Company, 'PT Indonesia Coal Development' in order for the jurisdiction of the arbitral tribunal to be established. As a final example, in the case of *Rafat Ali Rizvi v Indonesia*, the claimant had invested indirectly in several Indonesian banks through a company incorporated in the Bahamas, and the ICSID tribunal ruled that in that case they had no jurisdiction. In conclusion, based on just this limited investigation and analysis, if the Tribunal had in fact investigated their jurisdiction as is obliged by Article 21 of the Arbitration Rules (a manifestation of the doctrine of *Kompetenz-Kompetenz* and the tribunal's obligation to take note of parties' arguments into account in making decisions), it was very possible for the tribunal to find that it had no jurisdiction and consequently that any findings it had in regards to the merits would not be binding.

3. Conclusion

It is altogether not difficult to understand the rationale for the tribunal in bypassing the jurisdictional phase of the proceedings. They had simply decided that as they found in favor of the party that objected to their jurisdiction, that there would be no problems to disregard such objections. This should not be the case as it goes against the doctrine of *Kompetenz-Kompetenz,* embodied in Article 21 of the applicable arbitration rules as laid out above. Under said article, they had the obligation to address a plea concerning their jurisdiction. This is a mandatory step of an arbitration which was neglected.

There are a few conclusions to be drawn from the above analysis. First, considering the prevalence of jurisprudence in investment arbitration, a tribunal deciding to disregard jurisdictional concerns does not bode well for future investment arbitrations. Not only does this award not help to clarify the position of the law in regards to when an investment is protected under a BIT, it even sets something of a precedent for future investment arbitrators to disregard challenges to their jurisdiction based on the merits of the case. Second, the award and the findings contained within are inconsistent as some of the claims are investigated while others are not. As an example, the relatively easy question surrounding the Respondent's first argument, the Temporal Objection, was properly investigated and found to be wanting, however, as explained above, the Respondent's three other jurisdictional arguments were comparatively disregarded in favor of the merits. Finally, the fact that the tribunal forewent the proper establishment of their jurisdiction may be grounds for a challenge or refusal of recognition and enforcement. While it is impossible for a State to refuse to recognize an arbitral award which benefits them, there are still possibilities that a challenge could arise due to the failure of the tribunal to convincingly demonstrate their jurisdiction over the case.

Despite everything explained above, it naturally does not escape possibility that the "waiver" of the jurisdictional phase of the arbitration was the result of some accord understood between the parties to the case and the tribunal. As per the nature of arbitration, this would in fact be perfectly proper. However, first, there was no indication of such an accord in the award of the case, and second, regardless of such an agreement, the question of waiving jurisdictional issues based on the findings of the merits of the case still warrants study, at the very least from an academical or theoretical standpoint. While the results of this study would not affect the results of this case specifically, it could serve as a consideration for tribunals that wish to use *IMFA v. Indonesia* as a reference. To conclude, the shortcut taken for convenience by the tribunal in *IMFA* puts in question their authority to decide the case, which by extension also calls into question the award's validity. This should not only never be the case for disputes as major as Investor-State arbitrations, it also could result in negative ramifications for itself (in the form of challenges from the investor) as well as future investment arbitration

awards going forward. To prevent this from happening again, tribunals should strive to determine whether or not they have jurisdiction over a case before moving on to the merits. This is the best way to provide legal certainty as well as ensure that the award is able to be carried out without issue. Jurisdiction is an essential part of arbitration, no less important than the merits of the case, and it should be treated as such.

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