Legal Construction in Indonesia's Right to Economic Self-Determination (RESD) of the Bilateral Investment Treaty (BIT)

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<td>The study employs descriptive-analytical methods to examine the relevant laws and enforcement practices. It views the RESD as an emerging norm through a constructivist lens, influencing both the host countries and the global normative framework. The research finds a growing momentum to revise BIT clauses to better reflect dynamic RESD principles and social responsibility. This involves moving away from focusing solely on unilateral power. The study proposes a new model for RESD, aimed at promoting good governance and fairness in administrative processes. This model will be vital for renegotiating or redesigning BIT provisions, particularly for countries like Indonesia. By explaining the acronyms and simplifying the sentences, the key points become clearer: the need for a balanced approach in BIT negotiations, the role of RESD in this balance, and the potential for revised treaty clauses to better align with principles of social justice and fairness.</td>
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I. Introduction

The Right to Economic Self-Determination (RESD) is granted to a sovereign state to manage its internal economic affairs independently, without external intervention, demonstrating its ability to determine its destiny. The 1945 Constitution mandates RESD to realize economic sovereignty as mandated in Article 33 of the 1945 Constitution. Concerning the concept of a welfare state and the function of the state, RESD as a state control right stated in Article 33 of the 1945 Constitution positions the state as the regulator and guarantor of people's welfare, determining how to realize the general welfare is done and serves as a guideline in every economic policy step taken by the Indonesian state.

Indonesia prioritizes economic cooperation to achieve the goal of a welfare state, as stated in the 1945 Constitution and the National Development Goals. This cooperation involves the development of various sectors, including agriculture, forestry, fisheries, mining, industry, trade and services, through foreign investment (PMA). Foreign investment activities transform economic potential into real economic power by using capital, both

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1In the UN Charter, the term self-determination is mentioned twice, namely:
   (1)Article 1 paragraph (2) of the UN Charter states that the aim of the UN is: "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace";
   (2)Article 55 of the UN Charter. "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote." The International Court of Justice emphasized that the right of people to determine their own destiny is "one of the essential principles of contemporary international law". As a general legal principle (General Principle of Law), this principle continues to develop and in 1962 in General Assembly Resolution 1803 (XVII) concerning Permanent Sovereignty over Natural Resources, then a Declaration appeared regarding the Establishment of a New International Economic Order (New International Economic Order)-General Assembly Resolution 3201 in 1974.


3Constitutional Court of the Republic of Indonesia, 2008, Minutes of Case Session Number 21/PUU-V/2007, Case Number 22/PUU-V/2007, When interpreting Article 33 of the 1945 Constitution, which states that "Earth, Water, and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people," the Constitutional Court of Justices bases its interpretation on legal considerations. The Pronunciation of Decision (VI) Jakarta, 25 March 2008, pp. 1-92. However, the State is understood to be limited to formulating policies (beleid), enforcing laws (regelendaad), administering affairs (bestuurdad), managing affairs (beheersdaad), and supervising affairs (toezichtoudaad). Investing domestic and foreign money is one strategy to develop a country’s natural resources. Look inside https://mkri.id/public/content/persidangan/riLAH/riLAH_sidang_Perkara%2021-22.puu-2007,%2025%20maret%202008%20_Putusan_.pdf, traced on August 23, 2023

4The National Development Program seeks to achieve social justice and economic prosperity through broad-scale reform and development. Direct foreign investment made in accordance with or pursuant to the terms of Law no. 25 of 2007 governing investment is considered to be a form of foreign investment in Indonesia. In a competitive economic system, the goal is to boost national economic growth, generate employment opportunities, advance sustainable development, expand technological capability, promote growth, and improve people’s standard of living.
from within the country and from abroad. Indonesia’s economic cooperation with partner countries began after independence in 1945, encouraging mutual respect, consensus and consultation in the decision-making process. The country organizes bilateral, regional and multilateral forums.

After gaining its independence in 1945, Indonesia began fostering economic cooperation with partner countries, with an emphasis on mutual respect, consensus, and consultation. The nation hosts a variety of international conferences. The Indonesian government since January 10, 1967 has issued a policy regarding investment, and then the enactment of Law Number 1 of 1967 concerning Foreign Investment, as amended by Law Number 11 of 1970 then with the enactment of Law Number 6 of 1968 concerning Domestic Investment.

Arrangements regarding investment activities in Indonesia are regulated in Law No. 25 of 2007 concerning Investment. PMA is considered to be able to make a real contribution to increase investment and promote economic growth through bilateral agreements like the Bilateral Investment Treaty (BIT), which aim to strengthen diplomatic ties between countries and raise awareness of the importance of working together to achieve common objectives. Investment protection for investors in capital-exporting countries (home state) on the one hand, and the country’s economic growth and prosperity on the other, are central tenets of foreign direct investment (FDI) governance, and BIT serves as an international legal instrument to support FDI governance. as contrast to the host (host state).

Since foreign direct investment (FDI) has been widely viewed as a key contributor to economic progress in many countries over the past few decades, it makes perfect sense for emerging nations to sign a BIT. Foreign direct investment is boosted and economic

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7 KemluRI.
10 Ida Bagus Rahmadi Supancana, Legal Framework and Direct Investment Policy in Indonesia (Bogor: Ghalia Indonesia, 2006).
growth is spurred when a country signs a BIT. This results in more domestic production, fewer needs for foreign help, and lower overall debt levels.\textsuperscript{14} Foreign investment must be governed by clear laws and methods, which BIT aims to provide. Foreign investors are often assured a minimum level of preferential treatment under the BIT's foundational principles.\textsuperscript{15} When a country signs a BIT, it commits to following the relative treatment standards outlined in the BIT's articles.

There are six primary safeguards for investors that are generally accepted: To begin, the entitlement to NT (National Treatment). Protecting their money, property, and citizens away from home is a priority for most developed nations.\textsuperscript{16} The privilege granted to one foreign investor must be granted equally to all foreign investors in accordance with international minimum criteria believed by developed countries and the Most Favored Nation (MFN) for each investor and investment. After the investment is made, the host country promises to treat the foreign investor fairly and equally (FET) in accordance with international norms. Second, safety from expropriation with compensation that is both timely and sufficient. Third, the ability to freely move money and the profits from investments at market exchange rates; Fourth, limits on output standards such export quotas; Access to international arbitration in the event of a disagreement ranks fifth Sixth.

Signing the BIT increases foreign direct investment, encouraging economic development in developing countries. This leads to job creation, improved management practices, increased domestic production, and reduced dependence on foreign aid and foreign debt.\textsuperscript{18} Two main factors have contributed to the weakness of BIT to optimally encourage economic growth, namely;

\begin{itemize}
\item \textsuperscript{15} UNCTAD, 1999, Trends in International Investment Agreements: An Overview, United Nation, p. 44. The preferential treatment standard is that BIT is a protective instrument from all risks of political and legal uncertainty in the importing country. The provision of preferential treatment is expected to attract foreign investors to invest their capital in Indonesia. In 1968 Indonesia ratified the Washington Convention (ICSID) and the number of BITs signed provided a guarantee of full security with unclear limits, see Draft Convention on Investment Abroad, Structure and content of the majority BITs are almost the same.
\item \textsuperscript{16} Huala Adolf, \textit{Aspek-Aspek Negara Dalam Hukum Internasional} (Jakarta: Rajawali Pers, 1991).
\item \textsuperscript{18} Karl. P. Sauvant, \textit{Yearbook of International Investment Law and Policy} (New York: Oxford University Press, 2009).
\end{itemize}
1. Although the provisions of the BIT explicitly stipulate investor protection, the BIT does not contain legally binding provisions that guarantee increased FDI inflows from developed countries (investors) to host countries (developing countries).\(^\text{19}\)

2. BITs generally do not contain explicit provisions ensuring the benefits associated with increasing FDI inflows.\(^\text{20}\)

BIT on the one hand establishes rules and mechanisms to reduce risks to investors associated with FDI.\(^\text{21}\) However, the implementation of the BIT was challenged to answer serious problems faced by the host country, namely whether the implementation of the BIT guaranteed and protected the sovereignty of the host country,\(^\text{22}\) and encourage greater FDI inflows to developing countries and thereby promote economic development. This is still problematic and raises debate.\(^\text{23}\)

The existence of the BIT regime today is subject to debate and criticism. The theoretical view postulates that FDI practices regulated by BITs bring benefits to host countries because BITs should show the character of a reciprocal relationship. However, it needs to be examined carefully, that in practice, BIT is not balanced and is more profitable for developed countries.\(^\text{24}\) In addition, there are loopholes in the implementation of BITs that can erode host country sovereignty.

The implementation of the BIT regime raises debates in both national and international discourse because it can erode legislative, executive and judicial sovereignty. Legal facts show gaps in current BITs, allowing foreign investors to challenge host country policies through dispute resolution mechanisms. This lack of intervention allows foreign investors to bypass national justice systems and processes, potentially affecting national sovereignty.\(^\text{25}\) Directly to international arbitration, investors can ignore domestic laws and regulations in the host country because it is based on the results of negotiations.\(^\text{26}\)

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\(^\text{20}\) Boone, “How Developing Countries Can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies.”

\(^\text{21}\) UNCTAD, 1999, op. cit., p. 23.


\(^\text{23}\) Damon Vis Dunbar and Henrique Suzy Nikiema, loc. cit.

\(^\text{24}\) M. Sornarajah, \textit{The International Law on Foreign Investment} (Cambridge University Press, 2004).

\(^\text{25}\) M. Sornarajah, \textit{The International Law in Foreign Investment} (United Kingdom: Cambridge University Press, 2004).

Investment cases involving Indonesia in international arbitration reveal diverse dynamics in the country's investment laws and policies. Amco Asia Corporation v. The Republic of Indonesia in 1990 sided with investors who were bound by contracts, while Himpurna California Energy Ltd. and Patuha Power Ltd. towards PLN benefit investors. Contractual issues are often a weak point for the Indonesian side in arbitration. The imbalance in cases such as Nusa Tenggara Partnership BV and Hesham Al Warraq highlights the complexity of legal and geopolitical relationships. It is difficult to predict the outcome based on the law alone, as seen with Churchill Mining, where investor claims were rejected and sanctioned.

Indonesia faces challenges in international investment dispute resolution mechanisms due to ongoing cases such as Indian Metals, Ferro Alloys, and Oleovest. This decision raises questions about fairness and effectiveness for developing countries like Indonesia. Reforms in investment law and contract governance are essential. The Indonesian state has experienced an erosion of state sovereignty. In the period from 1992 to 2016, Indonesia had to face 12 lawsuits in international arbitration forums, with Indonesia losing in 5 cases and paying large amounts of compensation. Based on the filing of the lawsuit, Indonesia conducted a study of the BIT.

The imbalance in Bilateral Investment Treaties (BITs) between developed and host countries in foreign direct investment is a significant problem. The RESD principles provide an ethical and legal basis for Indonesia to negotiate more balanced conditions, requiring foreign investment to come with capital flows, a commitment to sustainable development, and respect for sovereignty. However, RESD must be implemented carefully so that it does not become an empty slogan and requires active involvement from the government, investors, and civil society. This review highlights the need for a multidisciplinary approach, drawing from international law, political science and environmental ethics, and challenging global legal and economic norms that have proven not always to be fair or sustainable.

2. Research Method
The concerns and/or themes that have been brought forward as research questions place this study in the category of normative legal research. The main characteristics of normative legal research in conducting legal studies lie in the data source, namely secondary

28 BKPM.
29 BKPM.
data sources. It consisted of primary legal materials, secondary legal materials, and tertiary legal materials. A philosophical and analytic methodology was employed, with the study culminating in a conclusion that sought to generate fresh results as an answer to the primary problem identified at the outset. The topic will be studied using descriptive-analytic techniques including a summary of relevant statutes and regulations, as well as examples of effective law enforcement policies and procedures.

This study focuses on the lack of clauses ensuring increased investment flows and the erosion of host country sovereignty. RESD plays an important role in balancing BIT negotiations and implementation. However, appropriate mechanisms and the involvement of all parties, including government, investors and civil society, are essential for effective implementation.

3. Results and Discussion

Constructivist Approach To RESD

The doctrinal debate persists on RESD principles in law and international relations, with a positivist approach within the framework of international law. The positivist legal approach defines RESD as a static principle, based on traditional principles of sovereignty. This approach differentiates material and social realities, resulting in a narrow definition of RESD.

The positivist approach to RESD was criticized by developing countries, leading to the failure of New International Economic Order (NIEO). The principle of state sovereignty is very important for developing RESD because there is no standard definition of state sovereignty that applies universally. Therefore, according to the positivist view, the

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principle of sovereignty is not the only reference, instead other views emerge. Richard Ashley expressed a different opinion from the positivist view which principles sovereignty as a static norm.\textsuperscript{39} State sovereignty is a practical category whose content is empirical but continues to evolve as a reflection of consensus among states. The same view was also put forward by Thomas Biersteker and Cynthia Weber, who in their exploration of the principle of state sovereignty stated:

\textit{the constitutive relationship between state and sovereignty; the ways the meaning of sovereignty is negotiated out of interactions within subjectively identifiable communities; and the variety of ways in which practices construct, reproduce, reconstruct, and deconstruct both state and sovereignty}.\textsuperscript{40}

Furthermore, Thomas Biersteker and Cynthia Weber elaborated on this view and concluded that sovereignty is a socially constructed legal principle whose content can change over time. They confirmed that:

\textit{Claims against states are grounded on international law's concept of sovereignty, and its breach is frequently used to justify the use of force in international relations. Therefore, sovereignty is a social term at its core. Mutual acceptance of sovereignty claims is a crucial part of the development of both individual states and the international society of states that results from the assertion of such claims}.\textsuperscript{41}

The sovereignty is the highest power within a governmental country, that is the highest power to decide the constitutional law/national law.\textsuperscript{42} Sovereignty is a social reality, as states must enforce the rules of international law through interaction and interpretation.\textsuperscript{43} The social constructivist approach, developed by Biersteker and Weber, emphasizes the dynamic nature of sovereignty, recognizing it as a product of social dynamics and cannot be defined rigidly by the historical record. This viewpoint stands in sharp contrast to the positivist legal framework typically employed in the doctrine of state sovereignty.\textsuperscript{44} Combining material and social realities, the constructivist approach


\textsuperscript{40} Thomas J. Biersteker and Cynthia Weber, \textit{State Sovereignty as a Social Construct} (United Kingdom: Cambridge University Press, n.d.).

\textsuperscript{41} Biersteker and Weber.


\textsuperscript{43} Moh Fahriyanto Marikar, “Harmonizing the National Legal System Through the Formation of Ideal Legislation,” \textit{Jurnal Legalitas} 16, no. 2 (July 4, 2023): 167-78.

maintains sovereignty by focusing on international provisions and duties.45

State sovereignty, which is represented by RESD, is a social norm susceptible to constitutive interactions. It's a living, breathing principle that reacts to shifting ideas of who has ultimate authority. The social constructivist approach to RESD aims to extend these principles by considering national interests, sovereignty, international responsibilities and global challenges. This approach is appropriate because it is dynamic and considers the relationship between national interests, sovereignty, international responsibilities and global challenges. By abstracting new principles from contemporary principles of sovereignty, RESD can be applied in contemporary contexts, ensuring relevance and relevance in the context of global interdependence and national interests.

**RESD's New Constructs: Based on a Constructivist Approach**

RESD development is closely related to a positivist approach which focuses on state sovereignty as an independent, non-interfering and absolute state. However, this approach failed, requiring new constructs that guarantee the host country’s sovereignty and protect the country's interests and foreign investments. The modern principle of sovereignty is dynamic and evolves, reducing the classical approach to absolute authority.46 To illustrate, consider a case where a country, adhering strictly to positivist principles, might reject foreign investment regulations that are perceived as infringing on its absolute sovereignty. This rigid stance can lead to missed economic opportunities or strained international relations. On the other hand, a country that completely disregards its sovereignty in favor of foreign investments may face internal political backlash or loss of control over crucial economic sectors.

These scenarios highlight the failure of the purely positivist approach. The modern principle of sovereignty is more dynamic and evolves beyond the classical notion of absolute authority. It recognizes the need for states to engage in international cooperation and adapt to global economic norms while still maintaining their autonomy and protecting national interests.

Incorporating examples like these helps to clarify how the traditional positivist approach to sovereignty is increasingly seen as inadequate in a globalized world. The RESD, with its emphasis on balancing host country sovereignty and foreign investment interests, emerges as a more fitting and dynamic approach.

Without breaking any rules, a sovereign state can enter into a legally binding connection with another state subject to international law, but it can also withdraw from such a partnership at any time. Increasing recognition of Public Service as the theoretical cornerstone of the modern state undermines the idea of sovereignty. In order to prove a country’s independence, its citizens must perform public service, which is a legally binding action that ensures public goods to society. When states’ independence is subject to international law and the freedom of other states, relative sovereignty replaces absolute sovereignty. The three pillars of state sovereignty are independence, non-interference, and parity. According to the relativity of sovereignty thesis, international law has progressed to the point where the concept of absolute sovereignty is incompatible with it. 47

According to the common interest and common good thesis, nations must put the interests of their citizens and their independence last. They ensure that all countries have the same amount of power by regulating sovereignty to meet international law. However, freedom is not unrestricted; it is constrained by the rights of other nations and by international agreements. 48 When comparing the old system of international law of coexistence to the new law of international cooperation, Friedmann draws a clear line. 49 According to Friedmann, the time between the two world wars of the 20th century marked the birth of this new international law. This change in international society, from fundamentally combative to cooperative norms, has significant implications for the foundations of international law. 50

Traditional sovereignty focuses on independence, but states recognize cooperation for societal goals and consider legitimate interests when exercising sovereignty. 51 The state is increasingly dependent on activities outside its borders, challenging traditional sovereignty as supreme authority. International law must accept restrictions from the international community because each country cannot separate itself from relations between countries. 52 The growing idea of cooperation and interdependence between countries necessitates the existence of an international community between countries. 53

47 Bartelson.
48 Bartelson.
50 Friedmann.
President Bedjaoui stated the following:\textsuperscript{54}

“The institutionalization and globalization of international society have progressed, with the proliferation of international organizations, the substitution of co-existence laws for cooperation, and the emergence of the international community. Concepts like obligations, rules of jus cogens, and the common heritage of mankind have been given more importance in international law. This objective conception seeks to reflect collective judicial conscience and address the social necessity of states organized as a community.

The modern doctrine of sovereignty that is currently developing emphasizes that the classic definition of sovereignty is no longer valid because sovereignty is relative, as emphasized by Simpson the theory of relative sovereignty is more influential today.\textsuperscript{55} The concept of international law has evolved from a pendulum to a pendulum, including principles such as non-interference and non-interference.

This principle is based on the principles of international law, which are following the principles of international law. The principle of non-interference and non-interference is a historical perspective on international economic law. Traditional paradigms and paradigms are used to represent these principles, but the question remains: Can the principles of international law be applied to all nations, regardless of their status or influence? The concept of international law has developed from traditional norms to norms based on the principles of international law. External sovereignty is a consequence of statehood\textsuperscript{56}, not the proven quality of the state but rather a state that has sovereign competence.\textsuperscript{57} Internal sovereignty is also traditionally closely tied to the state, because it is linked to state institutions (parliament, or the people, which are understood as state organs), or justifies state power based on popular sovereignty. Based on this principle of internal and external sovereignty, the state cannot be interfered with.

In contemporary international law, sovereignty is not a matter of degree, 50 per cent sovereignty or 75 per cent sovereignty. Sovereign status is understood as an all-or-nothing status, 100 per cent sovereign or not sovereign at all, meaning that what exists is either sovereign or not sovereign.\textsuperscript{58} All states under international law are legally sovereign, regardless of their political, economic, or military power. This formalistic

\textsuperscript{55} James R. Crawford, The Creation of States, 2nd Ed (Canada: Oxford University Press, 2006).
\textsuperscript{56} Crawford.
\textsuperscript{57} Crawford.
approach to sovereignty law is counterfactual because it does not translate into a distinct sovereignty. Sovereignty is essential for fulfilling internal and external functions, ensuring the availability of political and public goods, allocating competencies, and linking sovereignty, responsibility, and obligation. It is a reference point for cause-and-effect relationships linking sovereignty, responsibility, and obligation. Sovereign accountability must be proven through his actions, and not solely derived from permanent rights or statehood.

The requirement that sovereignty requires proof is nothing new. According to Rodin’s argument, sovereignty is “morally an empty vessel.” Sovereignty has to do with both the inside and the outside, and it's founded on some pretty lofty principles. When discussing a state’s authority and control over its citizens, the term "internal sovereignty" is often used. This term alludes to the state's ability to regulate and control non-governmental institutions and actors operating within its borders.

Despite the name, "external sovereignty" does not necessarily apply to issues that take place outside of a state’s territory, but rather to relations between states in their status as international legal entities vis-à-vis other states or other international legal organizations. Rights and responsibilities associated with external sovereignty. The concepts of a state's external and internal sovereignty are crucial to understanding its authority over its people and territory. It is based on the principles of non-interference and sovereign equality. External sovereignty can be enforced if the elements of internal sovereignty are fulfilled, with the state's ability to carry out its functions as a key factor. Proof of internal functions can be carried out through three main norms, namely sovereignty as responsibility, sovereignty in good governance, and the implementation of sovereignty following standards of civilization:

**Responsibility**

The concepts of a state’s external and internal sovereignty are crucial to understanding its authority over its people and territory. It is based on the principles of non-interference

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60 The state has the capacity and delegated authority to make binding decisions, to make laws relating to people and resources in a particular territory, it has competences (the legal competence to decide its own competences), and it has a monopoly on the use of force legal in its territory.
61 The rights and obligations of states are laid out in the following ways in the Declaration of Friendly Relations (UN Doc. A/RES/2625 (XV) 24 October 1970): The following are components of sovereign equality: Each State has the right to choose and develop its own political, social, economic, and cultural systems; Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with its neighbors; States are legally equal; States have the rights inherent in full sovereignty; States must respect the personalities of other States; States’ territorial integrity and political independence are inviolable; States have the right to freely choose and develop their own political, social, economic, and cultural systems; States must live in peace with their neighbors.'
and sovereign equality. External sovereignty can be upheld if the elements of internal sovereignty are fulfilled, with the ability of the state to carry out its functions as a key factor.\textsuperscript{62} 

Responsible sovereignty must fulfill certain duties or obligations. The law of state responsibility is the law regarding state obligations that arise when the state has or has not taken an action.\textsuperscript{63} To fulfill these duties and responsibilities, Chandler emphasized that the state needs to demonstrate its capacity to guarantee political good.\textsuperscript{64} The implementation of state responsibilities is closely related to the capacity, capability and accountability of the state in realizing these responsibilities.

The capacity and ability of the state in its responsibilities shows that the state is able and has the will to guarantee its existence, both internally and externally. According to Robert I. Rotberg,\textsuperscript{65} This willingness and ability can be measured from the state’s ability to guarantee political good, namely providing stability and security, guaranteeing the need to create effective political and administrative institutions as well as legitimate participatory processes and ensuring active and open participation of civil society in the formulation of government and state policies. (including holding elections that are democratic, fair and just).

The author emphasizes the importance of ensuring political and civil freedoms, creating a healthy business environment, ensuring good governance, eradicating corruption, and increasing economic stability and social welfare. They also highlight the need for effective government, democratic freedoms, respect for fundamental rights, and the general welfare. State responsibility is based on the ability to ensure political goodness, uphold the rule of law, and good governance, and eradicate corruption. When a state is responsible, it is considered externally sovereign, meaning inviolable.

\textit{Good governance}

Researchers argue that the failure of traditional sovereignty stems from the inability of the system to exercise good governance. To uphold sovereignty, the state must exercise power responsibly and exercise sovereignty following good governance.\textsuperscript{66} Weber and


\textsuperscript{66} Jackson.
Malmvig stated that "sovereignty resides on the side of the good and the normal, whereas intervention belongs to the problematic and pathological." Sovereignty is a key aspect of good governance, whereas intervention is just the opposite. The weakness of the state is a reflection of weak governance. The new paradigm of state sovereignty, sovereignty as good governance, suggests that intervention is necessary if a state fails to exercise its sovereignty effectively. Failed states and poor governance will not improve because of limited administrative capacity, and problematic societies will not meet the criteria for sovereignty. These countries are unable to prove their capacity as sovereign countries, and thus have the potential for interference. Good governance refers to the elements necessary for public welfare.

Good governance, defined by the World Bank, refers to the capacity and willingness of political authorities to govern effectively in the common interest. It originated in development to increase aid for developing countries but is still defined in various ways. International financial institutions developed restrictive definitions that focus on corruption, nepotism, bureaucracy, and mismanagement, while broader definitions include human rights, non-discriminatory laws, efficient judicial processes, transparent institutions, accountability, and citizen participation. Good governance refers to the elements necessary for public welfare.

Discussions of sovereignty and governance delve into the intrinsic relationship between state authority and the sustainability of adequate governance. According to Weber and Malmvig, sovereignty is not only about exclusive power but also about "goodness" and "normality" in the practice of government. This shows that the existence of human rights, transparency and accountability are not peripheral elements, but integral in maintaining sovereignty.

The new paradigm of "sovereignty as good governance" questions the normative essence of sovereignty itself, embedding it in a broader ethical discourse than simply sovereignty as sole and unconditional power. International financial institutions, such as the World Bank, even though they view governance through the lens of administrative efficiency, it is caught in a problematic dichotomy between ‘technocratic’ and ‘participatory’ governance models. However, in the context of fragile or failing states, governance failure cannot only be measured by the parameters of corruption or bureaucracy but also by their

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70 Weiss.
71 Helle Malmvig, Loc.cit.
inability to create inclusive structures that respect human rights and citizen participation. External interference, therefore, becomes a dilemmatic issue: an attempt to improve governance, or a violation of sovereignty that has been undermined? Viewing sovereignty as a function of good governance opens up the potential for a more complex and situational ethic of intervention.

**Standard of Civilization**

International law is based on the norms of equality between countries (sovereign equality), even the United Nations Charter is based on this principle. According to Morgenthau, equality is a logical consequence of the paradigm of traditional sovereignty,⁷² which affirms that every independent state is independent of one another and equal.

Sovereign equality is not only based on traditional principles but is enriched in its meaning today. Although formal equality is generally accepted as a rule of international law, it does not guarantee equal rights or that all states are considered equal in international law or relations. Factors such as human rights and protection of private property vary, and countries have different standards of decorum. Civilized states exercise their sovereign authority following the norms and practices of the international community.⁷³ Georg Schwarzenberger argued that equality requires a state’s membership in the international community, ensuring stability, binding commitments, and adequate protection of life and liberty.⁷⁴ Contemporary international society has developed standards of civilization, with a focus on sovereign equality, responsibility, and good governance. These standards cover basic rights such as life, dignity, property, freedom of travel, trade, religion, and property rights of foreign nationals.⁷⁵ To be considered civilized, a country must have an organized political bureaucracy and adhere to the principles of international law. David Fidler outlines new standards for global conduct, including the protection of human rights, efficient market strategies, good governance, democratic governance, and domestic laws that emphasize the rule of law.⁷⁶

Examining norms of sovereign equality in international law opens up space to consider the complex dynamics between traditional principles and normative innovations in

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global governance. Although the UN Charter and Morgenthau's thinking affirm the formal aspects of sovereign equality, the reality is much more multilevel and situational. Georg Schwarzenberger and David Fidler provide a contextual and ethical layer, linking sovereign equality to concepts of good governance and standards of civilization. Fidler even broadens the scope of the debate to include factors such as market efficiency and the rule of law. What is highlighted is the inherent conflict between normative aspirations such as human rights and democracy and geopolitical realities that emphasize inequalities of power between states. Therefore, The term "civilized state" may contain cultural and ideological biases, often used as a tool to justify intervention or other asymmetric actions in international relations. Given the complexity of the global system and the fact that political, economic, and cultural forces frequently undermine the application of ethical principles, the ideal of sovereign equality is not simply a matter of formal legality but also of how this principle is articulated and implemented.

The dynamic transitions between formal and factual norms, and between ethics and power, in the current geopolitical configuration, are crucial to consider in any analysis of sovereign equality. used frequently to legitimize intervention and other forms of asymmetry in international affairs. When considering the ideal of sovereign equality in this setting, it is important to consider not only the formal legality of this principle but also how it is articulated and implemented in a global system that is in constant flux and where political, economic, and cultural forces often interfere with the application of ethical principles. As a result, the dynamic shifts between formal and factual norms, as well as between ethics and power, in the present geopolitical configuration, must continually be factored into an understanding of sovereign equality. used frequently to legitimize intervention and other forms of asymmetry in international affairs.

The ideal of sovereign equality is not just an issue of formal legality but also of how this value is articulated and executed, which is especially important in light of the complexity of the global system and the reality that political, economic, and cultural forces regularly hinder the application of ethical norms. Any examination of sovereign equality must take into account the dynamic shifts between formal and

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factual norms and between ethics and power in the contemporary geopolitical context. In a globalized society where political, economic, and cultural variables regularly collide with the implementation of ethical ideals, how values are communicated and put into practice is just as important as the ideas themselves. Sovereign equality must therefore always take into account the dynamic transitions between formal and factual norms, and between ethics and power, in the current geopolitical context. In a globalized society where political, economic, and cultural variables regularly collide with the implementation of ethical ideals, how values are communicated and put into practice is just as important as the ideas themselves. Any examination of sovereign equality must take into account the ever-changing relationships between formal and factual norms and between ethics and power in the current geopolitical context.

According to the constructivist explanation, sovereignty is a fluid concept that has evolved over time. Countries as agents or identities are never the final product of a single institution or discourse; rather, they take on meaning through interactions with other countries and the international community they have formed. This, as Biersteker and Weber demonstrate, is true even as the prescriptions for sovereign recognition shift.

Alexander Wendt emphasized that this interaction creates a relationship of mutualism or mutual formation between the identity of a sovereign state and the international norms that bind this interaction. A state’s identity as a sovereign entity is recognized when it acts following the binding norms of the international community it forms. Modern state sovereignty is based on evidence justified by the state, not just the consequences of statehood. Sovereignty is dynamic and limited by the sovereignty of other states, international agreements, and global interdependence. To be fully sovereign, a country must demonstrate its willingness and ability to comply with international regulations and norms, exercise sovereignty responsibly, with good governance, and comply with international standards of etiquette. Based on this, the author initiated new construction as depicted in the picture below:

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RESD's new construction is built on the contemporary paradigm of state sovereignty. The logical consequence is that RESD claims are very dependent on the state's capacity to exercise its sovereignty in three important variables, namely responsibility, good governance and standards of civilized society. In the new construction of the RESD principle, a country has a basis for claiming RESD because the country exercises its sovereign authority responsibly by good governance and by global standards of adab (conform to the standard of civilization). The implication is that the right to determine one's fate or economic policy cannot be interfered with, and countries have equality in conducting economic negotiations and diplomacy.

In the 20th century, for instance, European nations heavily emphasized the right to self-determination, but they also demanded responsibility for the acknowledgment of sovereignty, providing historical foundation for the new design of the RESD concept based on these three principles. Self-determination must meet the standards of responsible sovereignty in order to be recognized. According to Reus Smit, an agreement to raise internal responsibility to bring about internal goodness, or good governance, legitimizes the right to self-determination and independence; hence, sovereignty has been demonstrated through political good.

RESD is very dependent on the capacity and ability of the state to exercise its sovereignty.

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responsibly in good governance and accordance with the ethical standards of the international community. RESD is the right of every country to implement national economic policies and objectives without interference from outside parties, but this right can be obtained in full if the state exercises its authority responsibly, meaning that the state is willing and able to guarantee political good in carrying out foreign investment relations.

**Political good** In the context of responsible sovereignty, good governance and international standards of etiquette are reflected in four main aspects, namely: democracy, rule of law, good governance and combating corruption. RESD claims based on the country's ability and willingness to realize these four aspects can have two important impacts for each country to protect its sovereignty from the threat of erosion, namely First: the country cannot be interfered with or at least is far from potential foreign interference and; secondly, the state has judicial equality and civil equality as an international community, so that the state has a high bargaining position in global political-economic negotiations. The country's ability to resist interference and have equality in manners based on these four aspects is the main capital or competency to compete at the global level.

**RESD Principles in BIT to Increase Bargaining Position in BIT Negotiations**

There is no overlap between the RESD principles and the Bilateral Investment Treaty. Due to differences in investor protection, regulatory power, and host nation measures, a conflict may occur between the two legal regimes. The primary purpose of a BIT is to guarantee that foreign investors are not subjected to unfair or discriminatory treatment by the host government and that the host country's legal environment is stable, predictable, transparent, consistent, and fair. The primary reason for entering into a BIT is to ensure the safety of foreign investors and to entice them to make investments in the host country.⁸³

In BIT negotiations between capital-exporting countries and capital-importing countries, the parties have demands and expectations. Exporting countries demand protection of their investments from importing countries. Exporting countries have concerns about the host country's treatment of foreign investment,⁸⁴ among others,(1) Investor concerns about risks of arbitrary and discriminatory or unfair treatment by host governments; (2) Jassurance that the host country's legal regime is stable, transparent, consistent and

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fair to foreign investors due to weakness protection for investors under the domestic laws of the host country; (3) Decline Host country incentives for foreign investors after the investment is made; (4) Lack of effectiveness, fairness and independence of host country courts; (5) As well as threats of takeover, either directly or indirectly. The hope is that BIT negotiations can protect their investments from the political risks of changes in host country regulations and measures that could change the investment climate and harm investment.

Just as capital exporting countries are worried about protecting their investments through BITs, so too are capital importing countries such as Indonesia having concerns about the existence of BITs. In particular, Indonesia has concerns about the erosion of sovereignty because there is no balance between the rights and obligations of the host country and foreign investors. Most of the BIT provisions contain maximum protection obligations by the host country to foreign investors, but on the other hand, the prerogative rights that are part of state sovereignty are very minimal. The formulation of unclear, lopsided provisions, only containing protection for investors and a very broad interpretation by arbitration makes the decision or outcome of investment dispute settlement unpredictable.

When it comes to issuing regulations that could hurt investors, like export restrictions on mineral concentrate raw materials (as in the case of Newmont Nusa Tenggara) or power of attorney/mining permits (as in the case of Churchill Mining and Planet Mining v. Government of Indonesia on December 22, 2016), BIT limits the host country's authority. The Bilateral Investment Treaty (BIT) signed between Indonesia and the United Kingdom in 1976 is at the heart of the case filed by Churchill Mining and Planet Mining. By ruling that Churchill’s case was unwarranted and excessive, the International Centre for The Settlement of Investment Disputes (ICSID) sided with the Indonesian government against Churchill Mining and Planet Mining. Churchill Mining is responsible for covering 75% of the Indonesian government’s total expenditures, amounting to US$ 8,646,528. This includes paying ICSID’s administrative fees of $200,000 and the government of Indonesia $800,000.

In the Churchill case, the Arbitration Panel ruled against Churchill because the 34 mining

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86 Ibid.
87 the International Centre for The Settlement of Investment Disputes (ICSID) ICSID is an agency created by the World Bank through the Convention called the Washington Convention or World Bank Convention, of March 18 1965 (Rohani, A.A., Fasyehhduin, m., Agus, D, Jaya, B.P.M. Perkembangan Dan Prospek Penyelesaian Sengketa Penanaman Modal Asing Serta Implementasinya Di Indonesia, Gorontalo Law Review, 7 no 1. (2024): 276-284).
88 Sigit riyanto, loc.cit
licence documents Churchill produced as evidence in the claim were deemed to be forgeries and so invalid. This is because Churchill filed the complaint in bad faith, as it was later determined that Ridlatama, Churchill’s business partner, had forged and fraudulently obtained the 34 mining permit paperwork.

The Arbitration Panel narrowed its investigation to 34 documents it believed were forged and the consequence of fraudulent actions taken by Ridlatama. The Indonesian government claimed that Ridlatama, Churchill Mining’s business partner, had falsified the signature of Awang Faroek, the then-Regent of East Kutai. The offered evidence suggests that Churchill’s mining permit document, which bears the signature and Garuda seal, may have been altered by the use of autopen.

Even while digital signatures are becoming more and more widespread, in this case, mining licenses are still granted the old fashioned way: by hand. Churchill first initiated this complaint because he was treated unfairly when the Regional Government of East Kutai, East Kalimantan, revoked his mining permission for the East Kutai Coal Project (EKCP). PT. Nusantara Group has a mining license from the East Kutai Regional Government to operate in the same area. However, it was recently uncovered that Regent Awang Faroek had signed a Mining Authorization (KP) permit paper. The results of the BPK audit suggested that Regent Awang’s signature had been faked.

However, the counterfeiting was never pursued by law enforcement. Meanwhile, Awang Faroek Ishak, the Regent of East Kutai and current Governor of East Kalimantan, confirmed that the Ridlatama Group had forged his signature. The estimated value of the East Kutai Coal Project (EKCP) is relatively high, at 2.73 billion tons of coal. One report estimates the East Kutai area’s coal reserves at $700 million to $1 billion per year for a lifespan of up to 20 years, making it the fifth largest undiscovered coal mine in the world.

In addition to the political use of BIT clauses by investors to constrain state authority, as described in the Churchill Mining case above, BITs also feature novel investment dispute resolution in the form of investor-state arbitration, a hybrid of public international law and private international law.\(^{89}\) A system for resolving disputes between investors and sovereign nations, whereby investors may bring claims against host states in international

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\(^{89}\) In its lawsuit, the government is said to have carried out indirect expropriation and the principle of fair and equitable treatment by revoking Mining Authorizations/Exploitation Mining Business Permits (KP/IUP Exploitation) of the plaintiffs' subsidiaries under the Ridlatama Group covering an area of approximately 350 square kilometers, in Busang District by the Regent of East Kutai on May 4 2010. The plaintiffs claimed that the violation had caused losses to their investments in Indonesia, and filed a lawsuit worth US$ 1.3 billion. See in the Churchill CaseNotes from International Investment & Trade Disputes From Churchill Mining to Import Cases at the WTO in the Era of Protectionism, see in http://igj.or.id/wp-content/uploads/2017/01/Akhir-dari-sengketa-Perjanjan-Internasional.pdf
arbitration venues for losses they say result from host state activity. Signing a BIT means that the host country agrees to delegate judicial sovereignty to the arbitral forum chosen by the parties. The description of the relationship between developing countries such as Indonesia and the developed countries mentioned above shows an unequal relationship between the two parties;

Another distinguishing feature of bilateral investment treaties is that they are agreed upon by two unequal parties, typically a developed state that exports a lot of people and goods and a developing country that wants to attract a lot of money from the developed state.  

This imbalance has implications for Indonesia’s weak bargaining position. The unequal bargaining position is reflected in the one-sided provisions of the BIT. BIT intends to support a mutually beneficial and equal relationship, but the facts show that this is not the case, because these provisions are not balanced and are still enforced, mutually advantageous arrangements will not be achieved. Based on the imbalance in Indonesia’s bargaining position in BIT relations with partner countries, the Indonesian government has taken steps to terminate or temporarily suspend 60 BITs to further review their existence. According to Abdulkadir Jailani, the steps to terminate and review the BIT model are because the Indonesian government is faced with the challenge of how to balance sovereignty and state policy space on the one hand, with the need to protect investment to increase the inflow of foreign investment on the other hand.

The starting point for this challenge is the provisions in the BIT itself. Based on the legal facts of foreign investors’ lawsuits against the Indonesian government in arbitration forums based on broad definitions and MFN, FET and ISDS clauses. These legal facts were corroborated by the findings of the Indonesian government in the termination and review process. Each BIT provision was dissected, and five of the most problematic provisions were found, namely among others (1) scope and definition of investment; (2) provisions regarding fair and equitable treatment (FET) which guarantees fairness and stability to investors as well as investment certainty; (3) National Treatment (NT); (4) Most Favored Nation (MFN), and (5) investor-state dispute resolution mechanism (ISDS). This analysis, based on an in-depth study of the five standard provisions in the Indonesian Bilateral Investment Treaty (BIT) model, reveals a conflict between protecting Indonesia’s state sovereignty and adhering to standard provisions agreed upon with partner countries. Studies like those conducted by Salacuse and Sullivan (2005) on BITs and national sovereignty, as well as scholarly articles in international law journals, provide insight into

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90 Sornarajah, The International Law in Foreign Investment.

91 Abdul Kadir Jailani, Indonesia’s Perspective on Review of International Investment Agreements, in Rethinking Bilateral Investment Treaties (Somo Netherlands, 2016).

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this issue. They detail how BIT provisions can limit a state’s regulatory autonomy, often prioritizing investor rights over national sovereignty.\textsuperscript{92} By delving into these sources, it becomes evident that the standard provisions in Indonesia's BIT model have not been explicitly designed to safeguard national sovereignty, leading to a tension between state interests and internationally agreed principles.

BIT is a legal instrument for the Indonesian government’s efforts to protect national interests and maximize profits in utilizing foreign capital inflows, dealing with international investment regimes that require BIT provisions that directly or indirectly undermine state sovereignty. In the context of a relationship of mutual need or interdependence between the host country and foreign investors, Sherif H. Seid’s views are very appropriate in describing the attitudes that need to be taken into account by the Indonesian government in establishing policies and regulations in the investment sector, namely:

(1) How to attract investors without causing problems that are detrimental to national interests;
(2) How to protect investors' interests and at the same time keep state dominance and negative effects to a minimum;
(3) How to regulate the law and tax system to encourage economic growth and foreign investment.\textsuperscript{93}

All FDI stakeholders, including the Indonesian government, hope that negative impacts will be minimized, and investment can provide economic growth and profits for the host country, as well as provide welfare for society while still guaranteeing the protection of the interests of foreign investors. However, the frequent clashes between the sovereignty of the Indonesian state and the interests of investors from partner countries in the implementation of basic provisions require a consistent solution to answer the hopes and interests of all parties.\textsuperscript{94} As a solution to this problem, this research offers the application of a new construction of the RESD (Right to Economic Self-Determination) principle.

Based on the new construction of RESD principles, the government of Indonesia can have a strong bargaining position to protect state sovereignty when negotiating and formulating BIT provisions, meaning that RESD claims in negotiating and formulating BIT provisions because the government can realize the implementation of state authority in

\textsuperscript{94} Muchammad Zaidun, “Penerapan Prinsip-Prinsip Hukum Internasional Penanaman Modal Asing Di Indonesia” (Airlangga University, 2005).
the field of foreign direct investment following democratic aspects, good governance, rule of law and anti-corruption. Responsible implementation of state regulatory authority can effectively guarantee the principle of protection of sovereignty and respect for the rights of investors affected by the economic impact of the implementation of state authority.

In other words, the state exercises responsible authority, following good governance and the ethical standards of the international community. At its essence, the implementation of regulations and measures based on law implies that the exercise of authority must be carried out within the framework of the rule of law. Therefore, the implementation of state sovereignty over economic policy appears as if there is no difference between the implementation of the international investment legal process or BIT and the principle of state sovereignty to determine its economic rights.

Rule of law is the idea of protecting individuals from arbitrary public power, or in this context, it is protecting investors from arbitrary regulations or policies, on the other hand, the rule of law in a general legal perspective also recognizes that there is uncertainty and the need to adapt to change.\textsuperscript{95} To bridge these two interests, the researcher proposes the application of a new RESD principle, namely the right to determine one's economic sovereignty, which is based on the realization of sovereignty that is responsible, equally fair for all parties and following good governance.

Regulations and measures taken by governments in accordance with good governance must be implemented in the general administration system based on the rule of law and justice, including through consistent rules, regulatory transparency, timely procedures, and due process. Because of this, every time the government makes a decision or imposes a policy, it is carrying out an exercise of public authority that is, in turn, carrying out an application of administrative law, which in turn is carrying out democratic governance, good governance, and the rule of law.\textsuperscript{96}

Regulations or measures issued by the host country comply with good governance standards for a public administration process. Good governance in this context is accessibility, accountability, predictability and transparency in the public administration process,\textsuperscript{97} considered as an instrument to realize RESD principles. Good governance includes administrative rules and principles that ensure predictability and transparency for investors who are influenced by state regulations and measures.

\textsuperscript{95} KomnasHAM-ELSAM, “Rencana Aksi Nasional Bisnis Dan Hak Asasi Nasional” (Jakarta, 2017).
\textsuperscript{97} Durwood Morita, Sachiko and Zaelke, “Rule of Law, Good Governance, and Sustainable Development,” Paper on the 7th International Conference on Environmental Compliance and Enforcement (Morocco, 2005).
Coherence between aspects of responsible sovereignty, good governance, and fair and equal principles, is the common basis for the relevance of the RESD principle to investment protection and protection of state sovereignty in BITs. Therefore, the construction of a new RESD as the main finding of this research is very relevant to protecting state sovereignty when the Indonesian government negotiates the formulation of BIT provisions with partner countries.

The operation of the RESD principle in negotiations and formulation of BITs between host countries and partner countries is a solution for both interests, namely to protect the sovereignty of the host country, including state authority (legislation), and domestic courts (judiciary) on the one hand and investor protection and PMA on the other hand. RESD operations in BIT negotiations and formulation with partner countries function as an approach to determining the government’s new position to protect the sovereignty of the Indonesian state.

4. Conclusion
The complexity of the Right to Economic Self-Determination (RESD) and state sovereignty is explored in this study, especially with regard to Bilateral Investment Treaties (BIT). Through the prism of constructivism, this study views RESD as an emerging norm that influences not only the host country but also forms the international normative framework. Linking the findings and additional proposals of this research, there is a need to formulate a new RESD model that facilitates good governance in administrative processes, including legal supremacy and fairness. This will be an important basis for renegotiating or redesigning the provisions of the BIT, especially for the Indonesian government. There is momentum to revise the BIT clauses so that better reflect the principles of dynamic RES and social responsibility. Thus, RESD can be a legal instrument that enables a synergy between state sovereignty and foreign investment that is more sustainable and fair, integrating aspects such as accessibility, accountability and transparency.
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