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NO MORE BI-LATERAL INVESTMENT TREATIES – HAS THE QUEEN OF HEARTS MADE A COMEBACK?¹²³⁴⁵

INTRODUCTION

The Government of Indonesia (“GoI”) has recently (i) informed The Netherlands that its bi-lateral investment treaty with Indonesia, for the promotion and protection of investment (“**Investment Treaty**”), will be terminated from July 2015 and (ii) indicated that it will, at the earliest possible opportunity, terminate all of its 62 Investment Treaties with other countries including Australia, China, France, Germany, India, Singapore, South Korea and the United Kingdom.

The Investment Treaties guarantee (i) basic rights for foreign investors in Indonesia and (ii) basic rights for Indonesian investors in foreign countries.

Although various justifications for the termination of the Investment Treaties have been advanced, the real objective of GoI seems to be to avoid a repeat of the ongoing Churchill Mining arbitration against Indonesia over the revocation of Churchill Mining’s Production Operation IUPs in respect of valuable mining concessions in East Kutai Regency.

The proposed termination of the Investment Treaties reflects the belief of GoI that foreign investors do not need and should not be entitled to any special protection but, rather, must be prepared to “take their chances” in the courts of Indonesia if and when disputes arise. This may be seen as an extension of GoI’s view that it is foreign investors which need Indonesia rather than Indonesia which needs foreign investors.

Foreign investors in the mining and oil & gas sectors should be particularly concerned about the termination of the Investment Treaties because it is foreign investment in these sectors that is most at risk from the resource nationalism currently dominating many aspects of GoI policy.

GoI’s position on the Investment Treaties may, unfortunately, remind many readers of Lewis Carroll’s grand fairytale “*Alice’s Adventures in Wonderland*” and, more particularly, of the mercurial character in that fairytale called the “Queen of Hearts” who has many great lines including “*Why, sometimes I have believed as many as six impossible things before breakfast*”. Readers could be forgiven for thinking that, perhaps, the Queen of Hearts has made a comeback and reinvented herself as GoI’s

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⁵ This article appeared in the April - May 2014 issue of Coal Asia Magazine.

policy adviser on foreign investment. Certainly, GoI's position on the Investment Treaties and the rights of foreign investors might be seen, by some people at least, as being an idea very worthy of the Queen of Hearts on 1 of her least rational mornings.

BACKGROUND

1. Treaty Partners

The countries with which Indonesia currently has Investment Treaties are as follows⁶:

Partner	Date of Signature	Date of entry into force
Algeria	21-Mar-00	---
Argentina	7-Nov-95	1-Mar-01
Australia	17-Nov-92	29-Jul-93
Bangladesh	9-Feb-98	22-Apr-99
Belgium and Luxembourg	15-Jan-70	17-Jun-72
Bulgaria	13-Sep-03	23-Jan-05
Cambodia	16-Mar-99	---
Chile	7-Apr-99	---
China	18-Nov-94	1-Apr-95
Croatia	20-Sep-02	---
Cuba	19-Sep-97	29-Sep-99
Czech Republic	17-Sep-98	21-Jun-99
Denmark	22-Jan-07	---
Egypt	19-Jan-94	29-Nov-94
Finland	12-Sep-06	2-Aug-08
France	14-Jun-73	29-Apr-75
Germany	14-May-03	2-Jun-07
Guyana	30-Jan-08	
Hungary	20-May-92	13-Feb-96
India	10-Feb-99	22-Jan-04
Iran, Islamic Republic	22-Jun-05	28-Mar-09
Italy	25-Apr-91	25-Jun-95
Jamaica	10-Feb-99	---
Jordan	12-Nov-96	9-Feb-99
Korea, DPR	21-Feb-00	---
Korea, Republic of	16-Feb-91	10-Mar-94
Kyrgyzstan	19-Jul-95	23-Apr-97
Lao PDR	18-Oct-94	14-Oct-95
Malaysia	22-Jan-94	27-Oct-99
Mauritius	5-Mar-97	28-Mar-00
Mongolia	4-Mar-97	13-Apr-99

⁶ United Nations Conference on Trade & Development.

Partner	Date of Signature	Date of entry into force
Morocco	14-Mar-97	21-Mar-02
Mozambique	26-Mar-99	25-Jul-00
Netherlands	6-Apr-94	1-Jul-95
Pakistan	8-Mar-96	3-Dec-96
Philippines	12-Nov-01	---
Poland	6-Oct-92	1-Jul-93
Qatar	18-Apr-00	---
Romania	27-Jun-97	21-Aug-99
Russian Federation	6-Sep-07	---
Saudi Arabia	15-Sep-03	5-Jul-04
Serbia	6-Sep-11	---
Singapore	16-Feb-05	21-Jun-06
Slovakia	12-Jul-94	1-Mar-95
Spain	30-May-95	18-Dec-96
Sri Lanka	10-Jun-96	21-Jul-97
Sudan	10-Feb-98	---
Suriname	28-Oct-95	---
Sweden	17-Sep-92	18-Feb-93
Switzerland	6-Jun-74	9-Apr-76
Syrian Arab Republic	27-Jun-97	20-Feb-00
Tajikistan	28-Oct-03	---
Thailand	17-Feb-98	5-Nov-98
Tunisia	13-May-92	12-Sep-92
Turkey	25-Feb-97	28-Sep-98
Turkmenistan	2-Jun-94	---
Ukraine	11-Apr-96	22-Jun-97
United Kingdom	27-Apr-76	24-Mar-77
Uzbekistan	27-Aug-96	27-Apr-97
Venezuela	18-Dec-00	23-Mar-03
VietNam	25-Oct-91	3-Apr-94
Yemen	20-Feb-98	---
Zimbabwe	10-Feb-99	---

Readers will note that there are no Investment Treaties between Indonesia and the United States or Japan. There are, however, Investment Treaties between Indonesia and a number of countries which, traditionally, have been or are set to become important sources of foreign investment for Indonesia including China, Australia, the United Kingdom, South Korea, Russia, The Netherlands, India and Singapore.

Although some of the Investment Treaties are of quite recent origin (**i.e.**, the Investment Treaties with Russia and Singapore), several date back to the 1970's (**i.e.**, the Investment Treaties with Belgium, Luxembourg, Switzerland and the United Kingdom) and most of the others are products of the 1980's and 1990's.

2. **Basic Rights**

- 2.1 **Overview:** There are significant variations in the wording as between different Investment Treaties and that wording has changed over time. However, the Investor Treaties generally guarantee basic investor rights of (i) fair and equitable treatment, (ii) adequate physical security and protection, (iii) most favored nation status, (iv) no expropriation or nationalization without market value compensation, (v) free repatriation of capital and profits and (vi) arbitration of disputes in Washington DC.

The 1976 Investment Treaty between the United Kingdom and Indonesia (“**UK-Indonesia Investment Treaty**”) may be seen as a good example of an early period Investment Treaty. Likewise, the 2005 Investment Treaty between Singapore and Indonesia (“**Singapore-Indonesia Investment Treaty**”) may be seen as a good example of a late period Investment Treaty.

- 2.2 **Individual Rights:** Taking the UK-Indonesia Investment as a partially representative example only of the Investment Treaties as a whole, the basic investor rights which (i) Indonesia, as a Contracting State, guarantees to United Kingdom investors in Indonesia and (ii) the United Kingdom guarantees to Indonesian investors in the United Kingdom are as follows:

- (a) **Fair & Equitable Treatment, Security & Protection:** Investments of nationals or companies of either State shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other State.

Each State shall ensure that the management, maintenance, use, enjoyment or disposal of investments, in its territory, of nationals or companies of the other State is not in any way impaired by unreasonable or discriminatory measures.

Each State shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other State (“**Fair & Equitable Treatment Right**”).

- (b) **Most Favored Nation Status:** Neither State shall, in its territory, subject investments or returns of nationals or companies of the other State to treatment less favorable than that which it accords to investments or returns of nationals or companies of any third State (“**MFN Right**”).
- (c) **No Expropriation:** Investments of nationals or companies of either State shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation in the territory of the other State except for a public purpose and against current market value compensation (“**No Expropriation Right**”).
- (d) **Freedom of Repatriation:** Each State shall, in respect of investments, grant to nationals and companies of the other State the right to the free transfer or repatriation of capital and returns subject to the right of each State, in exceptional financial or

economic circumstances, to exercise, equitably and in good faith, powers conferred by its laws existing when the Investment Treaty was signed (“**Free Repatriation Right**”).

- (e) **Reference to ICSID:** Each State shall agree to any request from a national or company of the other State, which has made or intends to make an investment in the first State, for conciliation or arbitration of any dispute in respect of that investment at the International Centre for Settlement of Investment Disputes (“**ICSID**”) in Washington DC (“**ICSID Arbitration Right**”).

It should be noted that other Investment Treaties are, in some instances, less or more generous than the UK-Indonesia Investment Treaty in terms of the individual rights accorded to foreign investors. For example, the Singapore-Indonesia Investment Treaty is both (i) less generous with regard to the scope of the Fair & Equitable Treatment Right and (ii) considerably more generous with regard to the scope of the MFN Right and the Free Repatriation Right than is the UK-Indonesia Investment Treaty. Notably, with regard to the MFN Right, the Singapore-Indonesia Investment Treaty provides that Singapore investors in Indonesia will be treated by Indonesia no less favorably than both investors from other countries **and domestic investors** (**i.e.**, Indonesian investors). Singapore accords the same expansive MFN Right to Indonesian investors in Singapore.

The ICSID Arbitration Right is, however, common to all the Investment Treaties and is the result of Indonesia’s accession, in 1968, to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”),

3. **Term and Termination**

- 3.1 **Term:** As a general rule, each Investment Treaty (i) has a specified initial term of years and (ii) is automatically extended for successive terms if it is not previously terminated by either contracting State. For example, each of the UK-Indonesia Investment Treaty and the Singapore-Indonesia Investment Treaty has a 10 year initial term while the UK-Indonesia Investment Treaty has successive terms of 5 years and the Singapore-Indonesia Investment Treaty has successive terms of 10 years.
- 3.2 **Termination:** Further, as a general rule, each Investment Treaty may be terminated by either contracting State (i) without having to give any reason for termination, (ii) by written notice and (iii) within a specified period prior to the expiry of the current term. For example, in the case of the UK-Indonesia Investment Treaty, the notice period is 6 months while in the case of the Singapore-Indonesia Investment Treaty, the notice period is 12 months.
- 3.3 **Consequences of Termination:** Finally, as a general rule, notwithstanding the termination of an Investment Treaty, its provisions continue in effect, with respect to investments made while it was in force, for a considerable period after the termination date (“**Extended Protection Period**”). For example, in the case of the UK-Indonesia Investment Treaty, the Extended Protection Period is the approved validity period of the investment admitted by the relevant State or, in the absence of the same, 20 years from the date of termination of the UK-Indonesia

Investment Treaty. In the case, however, of the Singapore-Indonesia Investment Treaty, the Extended Protection Period is 10 years from the date of termination of the Singapore-Indonesia Investment Treaty.

COMMENTARY

1. Claimed Rationale for Terminating Investment Treaties

- 1.1 **Changing Economic Times:** Various commentators have sought to rationalize GoI's decision to do away with the Investment Treaties in terms which, superficially, do not sound so unreasonable but fail to stand up to close scrutiny. For example, writing in The Jakarta Post on 2 April 2014 in respect of the more general subject of whether or not Indonesia should withdraw altogether from the ICSID Convention, Hikmahanto Juwana (a professor of law at the University of Indonesia) suggests that the Investment Treaties are really the product of an earlier and much more unstable period in the history of developing countries when foreign investors were justifiably fearful of the "rampant practices of nationalization of assets in many newly independent states." This is, of course, an oblique reference to the 1950's and 1960's in Indonesia when President Sukarno pursued many overtly nationalistic policies which were a direct threat to foreign investors in Indonesia.

Hikmahanto Juwana goes on to argue that, in the immediate post Sukarno period, Indonesia was in dire need of foreign investors for their capital, know-how and technology and, as a consequence, Indonesia had no choice but to offer foreign investors the additional rights and protections provided for in the Investment Treaties. Professor Juwana correctly identifies that:

"The government realized that decisions to invest in Indonesia did not depend only on tax facilities, natural resources or cheap labor but, most importantly, on the legal basis for investment protection."

Hikmahanto Juwana, however, suggests that Indonesia's situation is now very different saying:

"In those days, it was Indonesia which badly needed [foreign] investors. Today, it is [foreign] investors which badly need Indonesia".

It must, of course, be acknowledged that Indonesia has, indeed, come a long way since the 1960's and is now viewed, internationally, as a very significant market and promising investment destination. However, the reality is that foreign investment has always been and always will be a "2 way street", not a "1 way street", for all countries including Indonesia. In other words, not only do foreign investors need Indonesia but Indonesia also continues to need foreign investors.

The writer would suggest that the "legal basis for protection" continues to be as important today, to decisions to invest in Indonesia, as it was in the 1960's. Without the assurance of independent and reliable legal protection, foreign investors are going to have the very same reservations about investing in Indonesia today that they had in the 1960's. It would surely be

hard to find a foreign investor (or even a domestic investor for that matter) who believes that Indonesia's legal system currently offers independent and reliable legal protection. The most cursory reading of The Jakarta Post, on virtually any day, should leave no one in any doubt as to the true state of Indonesia's legal system. Accordingly, notwithstanding Indonesia's economic, political and social advances, the continuing absence of an acceptable, domestic "legal basis for protection" means that the Investment Treaties are still as necessary in 2014 as they were in the 1960's.

Perhaps the best evidence of contemporary foreign investor concern about the inadequate, domestic "legal basis for protection" in Indonesia is that countries such as Russia (in 2007), Singapore (in 2005) and Germany (in 2003) still felt there was sufficient need, to secure adequate legal protection for their companies and individuals investing in Indonesia, such as would warrant devoting the time and resources required to conclude Investment Treaties with Indonesia. It would seem that many foreign countries and important, potential sources of foreign investment for Indonesia do not, after all, share Professor Juwana's "rose-tinted" view of the sufficiency of domestic "legal basis for protection" currently available in Indonesia.

- 1.2 **Regional Autonomy:** Hikmahanto Juwana goes on to argue that, with regional autonomy, GoI is no longer able to exercise full control over what happens in the provinces and regencies and, therefore, it is unfair for GoI to be made responsible to foreign investors for the actions of provincial or regional governments. Unfortunately, this argument only serves to highlight how, in some respects, the risks facing foreign investors in Indonesia have actually increased, rather than lessened, over the past 50 years and, therefore, foreign investors' need for protection may, if anything, have increased, rather than decreased, during this period. Certainly, regional autonomy poses risks to foreign investment, in the mining and oil & gas sectors, which risks did not exist in the 1960's. Professor Juwana's argument also completely fails to address why it should be regarded as fair for foreign investors to have to effectively accept responsibility for the actions of provincial and regional governments if GoI won't do so.

"Fairness" tends to be an elusive concept at the best of times when it comes to investment related matters. Perhaps, therefore, the focus should be on "relative fairness" rather than "absolute fairness". In other words, as between GoI and foreign investors, which party is best placed to do something about the abuses of regional autonomy and, therefore, which party, as between GoI and foreign investors, should be made responsible for the abuses of regional autonomy? Looking at the mining and oil & gas sectors, there would seem to be a very strong argument that it is GoI, rather than foreign investors, which should be responsible for the abuses of regional autonomy when these abuses result in losses to foreign investors. After all, Article 33(3) of the Constitution clearly provides that it is the State which should control the exploitation of Indonesia's natural resources. If the State allows foreign investors to participate in the exploitation of Indonesia's natural resources but then does not adequately protect them from abuses by provincial and regional governments, does that not indicate a failure on the part of the State, in the form of GoI, to properly control the exploitation of Indonesia's natural resources? The fact that, notwithstanding regional autonomy, GoI retains a substantial supervisory role over what happens in the mining and oil & gas sectors, through ESDM and SKK Migas respectively, only serves to strengthen the argument that, in terms of relative fairness, responsibility for the abuses of regional autonomy, in these sectors at least, should rest

with GoI and not with foreign investors.

- 1.3 **Level Playing Field for Domestic and Foreign Investors:** Professor Juwana then goes on to argue that Indonesia's continuing accession to the ICSID Convention, and (by implication) the continuation of the Investment Treaties, which provide for the ICSID Arbitration Right, is unfair because it does not result in a "level playing field" for domestic investors and foreign investors. This is said to be because foreign investors (from countries which are parties to Investment Treaties with Indonesia) can always take their investment related disputes to ICSID, in Washington DC, whereas domestic investors have no choice but to pursue relief through Indonesia's courts or arbitration bodies. There are 2 obvious answers to this argument.

First, Professor Juwana is taking a very narrow view of what is meant by a "level playing field" and simply overlooking the fact that each of the Investment Treaties is, in fact, reciprocal. In other words, Indonesian nationals and companies, investing in a country which has an Investment Treaty with Indonesia, enjoy exactly the same rights and protections from the government of that foreign country as do nationals and companies of that foreign country, investing in Indonesia, enjoy from GoI.

Second, foreign investors in Indonesia, which are also active investors in their home countries, have no right to take their home country investment disputes to ICSID but, rather, must take their chances in the domestic courts or before the domestic arbitration bodies in their home countries. In other words, domestic investors in Indonesia are treated no worse than domestic investors in foreign countries having Investment Treaties with Indonesia. It is only foreign investors, whether they be Indonesian or non-Indonesian, which have access to ICSID and then only (i) in respect of investments made outside their home countries and (ii) if the country they are investing in is both a party to the ICSID Convention and has an Investment Treaty with the home country of that foreign investor.

- 1.4 **Demand for Compensation:** The final argument made by Hikmahanto Juwana is that:

"The demand for compensation in an ICSID case is so immense. It may amount to billions of dollars"

What Professor Juwana really seems to be saying is that GoI cannot afford to lose in an ICSID arbitration, brought as part of an Investment Treaty dispute, because the damages awarded against GoI may be very great. While this may well be true, it hardly seems like a serious and carefully thought through argument as to why there is no justification for the continuation of Investment Treaties or even as to why Indonesia should withdraw from the ICSID Convention.

Professor Juwana does not advert to the fact that the damages awarded in an ICSID arbitration are meant to be a measure of the amount required to compensate the foreign investor for the actual loss it has suffered as a result of Indonesia's failure to fulfill its obligations under the relevant Investment Treaty. Further, the burden of proof rests on the foreign investor, initiating the ICSID arbitration, to establish that (i) Indonesia has failed to fulfill its obligations under the relevant Investment Treaty and (ii) the nature and amount of the losses it has suffered as a result of Indonesia's failure to fulfill its obligations under the relevant Investment Treaty.

Assuming the foreign investor is able to discharge the burden of proof on both these counts, Indonesia should not be able to say “*the ICSID Convention and the Investment Treaty are unfair because we have to pay too much in damages*”.

2. **The Real Reason for Terminating the Investment Treaties**

Although the least developed and the most unsupportable of Professor Juwana’s arguments against the ICSID Convention and the Investment Treaties, the “too much damages” argument seems to be the real reason GoI has decided to terminate all the Investment Treaties. More particularly, it is concern over the likely outcome of the ongoing Churchill Mining arbitration, brought pursuant to the UK-Indonesia Investment Treaty, and the possibility a large damages award in favor of Churchill Mining may lead to other ICSID arbitrations against Indonesia by disgruntled foreign investors, that has motivated GoI to start the process of terminating the Investment Treaties. The writer understands from European Union sources this was made very clear to The Netherlands at the time Indonesia gave notice of termination of The Netherlands-Indonesia Investment Treaty as of July 2015. Further, independent enquires made by the writer’s staff with the Ministry of Foreign Affairs in Jakarta, as to the reason for GoI’s decision to terminate all the Investment Treaties, resulted in unequivocal confirmation of the Churchill Mining connection.

GoI may, of course, have good reason to fear the Churchill Mining arbitration could open the “floodgates” and result in any number of ICSID arbitrations under the various Investment Treaties. This is particularly likely in the case of foreign investors operating in the mining and oil & gas sectors where the overt resource nationalism, which has characterized GoI policy making in the last few years, has taken a heavy toll on foreign investors in these sectors. Any number of GoI policies, relevant to the mining and oil & gas sectors, might be viewed as infringing 1 or more of the protections and rights guaranteed by the Investment Treaties. Some examples only include:

- (a) **Compulsory divestiture of shares by foreign owned IUP holders** – Is this not a breach of (i) the Fair & Equitable Treatment Right which protects foreign investors against discrimination and (ii) the No Expropriation Right which protects foreign investors against expropriation and nationalization other than for a public purpose?
- (b) **Investment recovery price only for divested shares purchased by GoI pursuant to its first priority right** – Is this not a breach of the No Expropriation Right which mandates market value compensation for investments which are expropriated or nationalized for a public purpose?
- (c) **Renegotiation of CoWs/CCoWs** – Is this not a breach of the Fair & Equitable Treatment Right which, at least in the case of the UK-Indonesia Investment Treaty and other similarly drafted Investment Treaties, obliges Indonesia to observe any obligations it may have entered into with regard to investments of nationals or companies of the United Kingdom?
- (d) **Local Content Rules and Compulsory Preference for Local Goods & Services Providers** – Is this not a breach of (i) the Fair & Equitable Treatment Right which guarantees that foreign investors’ management, maintenance and use of their investments will not be impaired by

unreasonable or discriminatory measures and (ii) the MFN Right which, at least in the case of the Singapore-Indonesia Investment Treaty and other similarly drafted Investment Treaties, guarantees that foreign investors in Indonesia will enjoy the same treatment as domestic investors?

3. **Practicality of Terminating the Investment Treaties**

Unfortunately for GoI but fortunately for foreign investors, terminating all the Investment Treaties is an extended and time consuming process which will take much longer than the remaining few months in office of the current GoI. There are 2 aspects to this extended process.

First, as highlighted in Background 3.2 above, the Investment Treaties generally provide that the right of termination can only be exercised by a contracting State in the period immediately prior to the expiry of the current term of the relevant Investment Treaty. Accordingly, GoI cannot immediately move to terminate all the Investment Treaties in a single go but, rather, must wait until the appointed time to exercise its termination right in respect of each Investment Treaty. This means that terminating all the Investment Treaties will take many years to achieve and will have to be carried out on a piecemeal basis.

Second, as highlighted in Background 3.3 above, the Investment Treaties generally provide for an Extended Protection Period which ensures that foreign investments, made during the life of an Investment Treaty, continue to enjoy the protections of the Investment Treaty for many years after the relevant Investment Treaty is terminated. Accordingly, terminating the Investment Treaties should have no immediate effect on foreign investors in Indonesia and the protection of their existing investments. Instead, the principal impact will be on those foreign investors which make a new or additional investment in Indonesia after the relevant Investment Treaty has been terminated.

Notwithstanding the foregoing, investments in the mining and oil & gas sectors are, typically, of a very long term nature. Accordingly, it is entirely possible that existing foreign investments in Indonesia's mining and oil & gas sectors, made when the Investment Treaties were in place, will still be continuing and in need of protection even after the relevant Extended Protection Periods expire.

4. **Assessment and Evaluation**

There is nothing to indicate that GoI has any plans to (i) deliberately treat foreign investors inequitably, (ii) expropriate or nationalize foreign investments, (iii) prevent the free repatriation of capital or returns from foreign investments or (iv) deny foreign investors most favored nation status. Accordingly, the writer would not suggest, for even a moment, that the GoI's decision to terminate the Investment Treaties, as and when this becomes possible, is in any way motivated by overtly bad intentions.

Further, it has been suggested by various sources in Indonesia that Indonesia will eventually offer other countries alternative investment treaties "that are more equitable".

Notwithstanding the foregoing, Indonesia is increasingly viewed by many foreign investors as a potential investment destination which is prone to very high political risk. This is particularly the case for foreign investment in the mining and oil & gas sectors. Whether or not that view is justified is a different issue. No better evidence, however, of foreign investors' concerns, at least with regard to the mining sector, is to be found in Indonesia's rankings in the annual Fraser Institute Surveys for the last couple of years. In the 2012/2013 Fraser Institute Survey⁷, Indonesia ranked dead last out of 96 countries as the least desirable country, from a government policy perspective, in which to carry on a mining project. In the just published 2013/2014 Fraser Institute Survey⁸, Indonesia ranked 104th out of the 112 countries covered. This marginal improvement in Indonesia's ranking, from 2012/2013 to 2013/2014, seems to have almost everything to do with the expansion of the survey to cover 16 more countries in 2013/2014 than it did in 2012/2013 and virtually nothing to do with any perceived improvement in GoI policy towards the mining sector. Indeed, it can scarcely be doubted that had foreign mining companies been aware, when they were polled by the Fraser Institute, of GoI's intention to terminate all the Investment Treaties, Indonesia would have, once again, ranked dead last in 2013/2014.

Against the background of the 2013/2014 Fraser Institute Survey, foreign mining and oil & gas companies, their international financiers and ratings agencies are surely going to view the GoI decision to terminate the Investment Treaties very negatively indeed. Terminating the Investment Treaties is something that would only seem to make sense if and when foreign investors have great confidence in GoI and in the inherently equitable, fair, independent and transparent nature of its legal system. That, sadly, is most definitely not the case today, at least in the mining and oil & gas sectors.

Foreign investors are not likely to take much comfort in the vague promise of "replacement" Investment Treaties at some unspecified time in the future and which "replacement" Investment Treaties will reflect GoI's perception only of what is "fair and equitable".

It is likely to be small and medium sized foreign investors which are most immediately concerned about the GoI's decision to terminate the Investment Treaties. This is because small and medium sized foreign investors lack the economic and political clout to be able to readily enlist the proactive support of their home country governments in dealing, on an inter-governmental basis, with disputes over investments in Indonesia. Accordingly, the Investment Treaties may provide the only source of protection for such small and medium sized foreign investors. Churchill Mining is a good example of such a small or medium sized foreign investor which was faced with no other viable recovery possibilities, apart from exercising its ICSID Arbitration Right under the UK-Indonesia Investment Treaty, once its Production Operation IUPs had been cancelled.

Major multi-nationals should also be concerned, however, because of what the GoI's decision, to terminate the Investment Treaties, implies about the changing attitude of GoI to foreign investment in Indonesia. Even though major multi-nationals can and do enlist the proactive support of their home country governments in dealing, on an inter-governmental basis, with disputes over investments in

⁷ Alana Wilson, Fred McMahon and Miguel Cervantes, Fraser Institute Annual Survey of Mining Companies 2012/2013, February 2013.

⁸ Alana Wilson, Fred McMahon and Miguel Cervantes, Fraser Institute Annual Survey of Mining Companies 2013/2014, February 2014.

Indonesia, the recent experience of major multi-nationals holding CoWs, in the ongoing CoW/CCoW renegotiations, has undoubtedly laid bare the limitations of just what that proactive support can achieve in the face of a determined GoI pursuing resource nationalism policies with little regard to the ultimate cost of the same.

SUMMARY & CONCLUSIONS

The decision taken by GoI to (i) terminate The Netherlands-Indonesia Investment treaty as of July 2015 and (ii) terminate all the other 62 Investment Treaties at the earliest possible time is to be deeply regretted.

The Investment Treaties provide basic protections for foreign investors in Indonesia and for Indonesian investors in foreign countries, which protections no country should have any trouble agreeing to.

Although Indonesia has undeniably made great advances, economically, politically and socially, over the past 50 years, 1 area where the progress has been much less significant is in developing a domestic legal system which is efficient, independent and transparent. As such, Indonesia is still not able to offer foreign investors a reliable domestic legal basis for the protection of their investments in Indonesia.

Given the lack of a reliable legal basis for protection of foreign investments was the avowed rationale for Indonesia becoming a party to the ICSID Convention in 1966 and then introducing a system of Investment Treaties, which gave foreign investors the right to have their investment related disputes finally resolved by ICSID arbitration in Washington DC, this rationale continues to apply today. Unfortunately, therefore, the Investment Treaties are just as necessary today, if not more so, as they were in the 1960's.

Pointing to the great market opportunities modern Indonesia undeniably offers foreign investors, as justification for now doing away with the Investment Treaties, is entirely misconceived. As Professor Juwana himself has acknowledged it is not only tax facilities, cheap labor, abundant natural resources or promising domestic markets which are the primary requirements of foreign investors in any country. Rather, the primary requirements also include a reliable legal basis for protection of their investments in that country. Without such a reliable legal basis for protection of their investments, the other benefits of foreign investment must be heavily discounted.

GoI's concern over the possible outcome of the ongoing Churchill Mining arbitration, and the possible flood of arbitrations which could follow a substantial award in Churchill Mining's favor, seems to have caused GoI to lose sight of the inherent reasonableness of the rights and protections accorded by the Investment Treaties as well as of the, admittedly unpalatable, truth that the Investment Treaties are actually a substitute for the present lack of adequate domestic legal protection for foreign investment in Indonesia.

Foreign investors in the mining and oil & gas sectors should be particularly worried about the termination of the Investment Treaties because it is foreign investment in these sectors that is most at risk from the resource nationalism currently dominating many aspects of GoI policy.

Fortunately for foreign investors in Indonesia, the current GoI has only a short remaining time in office and the process of terminating all the Investment Treaties will take many years to accomplish.

Hopefully, the next GoI will rethink the wisdom of terminating the Investment treaties. If not, foreign investors really may come to believe that Lewis Carroll's Queen of Hearts has made a comeback and reinvented herself as GoI policy adviser on foreign investment. Actually, there is nothing particularly wrong with "*believing as many as six impossible things before breakfast*"; that is, of course, as long as those impossible beliefs are not driving a country's foreign investment policy.

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