

Indonesia terminates Indonesia-Netherlands BIT

The Dutch Ministry of Foreign Affairs has recently reported that Indonesia will not be renewing the Indonesia-Netherlands Bilateral Investment Treaty (BIT), which will now expire on 1 July 2015. In this briefing, we consider the background to that move and the implications for foreign investors.

The situation

Statements by the Dutch Ministry of Foreign Affairs have not only drawn attention to Indonesia's decision not to renew the Indonesia-Netherlands BIT, but have also indicated that Indonesia intends to terminate all of its other BITs. Indonesian authorities have not confirmed this position, however an official from Indonesia's Investment Co-ordination Agency (BKPM) has been reported by the press as stating that Indonesia is preparing a "new template" for consideration by its counterparts. The result has been a considerable degree of concern and confusion among foreign investors.

Background

Broadly, BITs are agreements between states to protect and promote investments by nationals of each state in each other's jurisdictions. BITs typically list a number of standards and protections which the state parties agree to uphold. Crucially, they also contain arbitration provisions, which mean that investors' rights arising from these protections can viably be pursued; the treaties are not simply statements of good intentions.

Indonesia's action can be interpreted as a response to the increasing number of treaty claims being brought against it by foreign investors. In particular, a tribunal has recently ruled that claims of some US\$1bn can be brought against Indonesia under its BITs with the UK and Australia.¹ There is also considerable potential for the Dutch BIT to give rise to claims, since the Netherlands is a jurisdiction through which foreign investors commonly incorporate holding companies

and structure their investments. Particularly in the context of an election year in Indonesia, termination of the Indonesia-Netherlands BIT may therefore be a popular move.

Indonesia's move also echoes steps taken by a number of developing countries who have resiled from investment treaties. Venezuela, for example, terminated its BIT with the Netherlands in 2008 and this action was followed its denouncement of the ISCID Convention in January 2012.²

Impact of termination

In the short term, the impact of termination for existing investors may be limited.

First, BITs will usually include "sunset clauses" which ensure that investment protections will continue to apply to investments made prior to termination for a defined period. For example, the Indonesia-Netherlands BIT contains a 15-year sunset clause, so investments made through the Netherlands before 1 July 2015 will in principle attract protections under that BIT through to 2030. As another example, the Indonesia-Singapore BIT contains a 10-year sunset clause.

Second, BITs may contain restrictions upon when termination rights can be exercised (generally within a defined period prior to a renewal date; for example, the Indonesia-Singapore BIT will automatically extend to June 2026 absent any notification of termination prior to June 2015). Therefore, many BITs will remain in force for some time to come.

Third, we have not identified reports that Indonesia plans to terminate any of the Economic Integration Agreements (including, say, Economic Partnership Agreements such as that between Japan and Indonesia) or Multilateral Investment Treaties (such as the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement) to which it is a party and which include certain investment protections. Indonesia also continues to participate in negotiation of the Regional Comprehensive Economic

Partnership (RCEP) agreement between ASEAN and its trading partners. Again, drafts of this agreement contain investment protections.

Considerations for investors

Nevertheless, this move is likely to impact how foreign companies assess investment risk in Indonesia in future and should prompt investors to consider the options available to them while those options still remain open.

Such options may include structuring investments to take advantage of alternative protections, including those under the ASEAN Comprehensive Investment Agreement or under BITs which are not subject to renewal in the near future and so have a long "shelf life". Depending upon the strategic importance of an investment, it may also be open for an investor to

negotiate a suitable investment agreement with the Government of Indonesia which incorporates appropriate protections and arbitration provisions. Finally, we continue to recommend the inclusion of arbitration agreements (and appropriate waivers of sovereign immunity against suit and enforcement) as routine in contracts relating to investments in Indonesia.

Meanwhile, we, like many others, will await Indonesia's next move with interest.

Notes

- 1 These were claims by UK company, Churchill Mining, and its Australian subsidiary, Planet Mining, in respect of Indonesia's alleged expropriation their assets.
- 2 Venezuela became the third country, after Bolivia (2007) and Ecuador (2009), to denounce the ICSID Convention. We have not identified any reports that Indonesia intends to do the same.

Further information

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