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options provide a viable and useful protection depends not only on the provisions of the treaties themselves, but also on the related tax and/or regulatory implications that arise from the strategic structuring of investments.

Predicted outcomes

Predicting Indonesia's next move – renegotiation of the IND-NL BIT, termination of other BITs, or a decision to reverse course on the mineral ore export ban – remains difficult. While growing nationalist sentiment has been evident in the months leading up to the 2014 elections, and may have contributed some of the support needed to terminate the IND-NL BIT, it is uncertain whether this trend will continue after the election season.

In the meantime, new investors may become hesitant when deciding whether to invest in Indonesia or in other nearby countries with similar resources but with a more favourable risk profile. Mahendra Siregar, chairman of Indonesia's investment coordination board, signalled that the government's aim was not to weaken investor protection but to ensure consistency between local and international regulations. However, investors might not be so easily persuaded. Though investors who have missed or will lose coverage by the termination of the IND-NL BIT may be able to obtain similar protections from ACIA or Indonesia's BITs with other countries, most would view Indonesia's threatened dismantling of its BIT framework as signalling increasing risk for foreign investors.

Note

1 Most BITs provide for a period of time during which they are in force, and at the expiry of this period either contracting party may signal to the other its intention to terminate the treaty. If no notice of termination is issued, the BIT will remain in force for a further set period.

Ivo Entchev
Holwell Shuster & Goldberg, New York
ientchev@hsgllp.com

Daniel Madison
Holwell Shuster & Goldberg, New York
dmadison@hsgllp.com

International arbitral tribunal rejects Indonesia's jurisdictional objections and agrees to hear foreign investors' claims

A tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) has accepted jurisdiction over claims against Indonesia by United Kingdom-based Churchill Mining ('Churchill') and its Australian subsidiary, Planet Mining ('Planet'), alleging damages resulting from the revocation of licences for exploration and mining of a massive coal deposit on the island of Kalimantan. The tribunal held that Indonesia had provided advance consent to arbitration of investors' claims under the terms of a bilateral investment treaty between the UK and Indonesia (the 'UK BIT'). The tribunal also accepted jurisdiction over Planet's claims on the grounds that certain regulatory actions by Indonesia constituted a separate further act of consent, which the tribunal determined was required by the Agreement concerning the Promotion and Protection of Investments between Australia and Indonesia (the 'Australia BIT').

The tribunal rejected Indonesia's additional argument that it lacked jurisdiction because the companies' investments had not been admitted in accordance with Indonesian law, as specifically required under the terms of both the Australia and UK BIT.

Background

In 2006, the Indonesian Investment Coordinating Board ('BKPM') approved

the acquisition by Churchill and Planet of a 95 per cent and five per cent stake, respectively, in PT Indonesian Coal Development (PT ICD). Churchill and Planet, through PT ICD, subsequently entered into cooperation agreements with multiple Indonesian companies which had been granted mining licences in connection with the East Kutai Coal Project (EKCP), located in an area containing the world's seventh largest coal deposit.[2] Among other things, the cooperation agreements provided that Churchill-controlled PT ICD would perform mining operations in the EKCP area in exchange for 75 per cent of the revenue generated.[3]

In May 2010, partly because permits covering overlapping areas of the EKCP had apparently already been issued to other companies, the Regent of East Kutai revoked the mining licences of Churchill's and Planet's Indonesian partner companies.

In 2012, Churchill and Planet each filed a request for arbitration with ICSID pursuant to Article 36 of the ICSID Convention, as well as the UK BIT and the Australia BIT, respectively.[4]

Analysis

Does 'shall assent' constitute advance consent?

Under Article 25(1) of the ICSID Convention, consent to arbitration by parties must be expressed in writing. Churchill argued that Indonesia had provided standing written consent to ICSID arbitration under the UK BIT, which states that:

> '[t]he Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.'[5]

The key issue regarding Churchill's claim was whether the phrase 'shall assent to any request' constituted automatic consent by Indonesia to submit to ICSID's jurisdiction. Churchill asserted that 'shall assent' is the functional equivalent of 'hereby consents'.[6] Indonesia argued that it had not provided advance consent, but that rather a separate further act, in response to an investor's specific request, was required on its part before the tribunal could obtain jurisdiction.

The tribunal emphasised that the UK BIT should be construed in accordance with the rules for treaty interpretation set forth in the Vienna Convention on the Law of Treaties (VCLT).[7] Accordingly, the tribunal first attempted to interpret 'shall assent' in accordance with the ordinary meaning of the phrase, however, it concluded that two different meanings were possible. Although 'shall' implies an obligation, the tribunal noted that it can also be understood to imply future action. The tribunal also noted that the natural meaning of the longer phrase 'shall assent to any request' provides some support for the position that the treaty contemplated a two-step process, whereby an investor must first file a request, in response to which Indonesia would subsequently 'assent'.[8]

The tribunal determined that a plain language interpretation of the phrase was inconclusive, and next examined it in relation to other provisions of the UK BIT. While it cited the lack of a specified mechanism in the treaty by which Indonesia would provide its assent in response to an investor's request, the tribunal nevertheless concluded that the context surrounding 'shall assent' did not definitively establish Indonesia's advance consent.[9] The tribunal also concluded that the object and purpose of the UK BIT did not resolve the jurisdictional question, noting that the investment treaty's preamble acknowledges both the private interests of the investor and the public interests of the state.[10]

Preparatory materials reveal standing consent

The tribunal noted that where, as in this case, attempts to interpret a term in light of its ordinary meaning leave the term 'ambiguous or obscure', the VCLT allows recourse to supplementary means of interpretation.[11] In particular, the tribunal focused on four types of materials, namely: '(i) doctrinal writings, (ii) case law, (iii) the treaty practice of Indonesia and the United Kingdom with third States, and (iv) the preparatory materials regarding the negotiation of the UK-Indonesia BIT.'[12] The tribunal concluded that doctrinal writings and third party treaty practice were insufficient to establish whether Indonesia had automatically submitted to ICSID's jurisdiction in agreeing to the 'shall assent to any request' language of the UK

BIT. The tribunal was also not persuaded by the reasoning of *Millicom*,[13] a case in which another arbitral tribunal held that a similar jurisdictional provision in the Netherlands-Senegal BIT constituted advance consent by the Netherlands. The *Churchill* tribunal suggested that it was not clear from the decision how the *Millcom* tribunal had followed the process of treaty interpretation prescribed by the VCLT.[14]

Ultimately, the tribunal analysed the treaty's preparatory materials (or *travaux préparatoires*) and determined that the treaty drafters regarded the phrase 'shall assent' as functionally equivalent to 'hereby consents'.[15] Accordingly, the tribunal held that Indonesia had in fact provided advance consent to ICSID arbitration of investment disputes pursuant to the terms of the UK BIT.[16] One reason for the holding was that during the course of treaty negotiations, one of the counterproposals by Indonesia was that '[e]ach Contracting Party hereby irrevocably and anticipatory [sic] gives its consent to submit to conciliation and arbitration.'[17] Although the final version of the treaty did not contain this 'unequivocal formula', the tribunal stated that the Indonesian negotiators' willingness to propose such language was a strong indication that Indonesia 'had no difficulty giving English investors unconditional access to ICSID arbitration'.[18] The tribunal also emphasised that the issues of contention in the drafts of the treaty did not concern the host states' consent, but rather other matters such as compulsory consent to jurisdiction by investors, and the inclusion of conciliation as a dispute settlement option.[19]

The parties did not submit the *travaux* as evidence prior to the arbitral hearing, and instead informed the tribunal that attempts to locate these materials had been unsuccessful. The preparatory materials were instead located as a result of the tribunal's request that Indonesia circulate a copy of the jurisdictional decision in *Rizvi*,[20] the first case concerning the UK-Indonesia BIT, in which it became apparent the *travaux* had been filed by the UK. Through renewed research, Churchill subsequently located this crucial piece of evidence.[21]

Advance consent not provided in the Australia-Indonesia BIT

Whereas the tribunal concluded that Indonesia automatically consented to ICSID arbitration under the UK BIT, it held that Indonesia did not provide standing consent pursuant to the terms of the Australia BIT.[22] Article XI of the treaty provides that, where an investor submits a dispute to ICSID for settlement, 'the other Party shall consent in writing to the submission of the dispute to the Centre within 45 days of receiving such a request from the investor.'[23] In accordance with the VCLT, the tribunal again focused first on interpreting this clause in accordance with its ordinary meaning. Unlike the phrase at issue in the UK BIT, the tribunal concluded that the plain language of the operative clause in the Australia BIT conclusively established that Indonesia did not thereby provide advance consent, but that rather a further act by Indonesia was contemplated by the treaty. The tribunal reasoned that '[i]f the host State "shall consent in writing within 45 days" after the investor's request, it follows that consent cannot be located in the Treaty itself and that a separate act is needed.'[24] The tribunal also noted that it was not unusual in bilateral investment treaties for states to condition the host state's consent to arbitration on the expiration of 'cooling-off periods' during which time a dispute might be resolved.[25]

Indonesia's investment approvals provided consent to arbitration

The tribunal rejected Indonesia's argument that the Australia BIT requires an investor first to submit a request for arbitration before a host state can offer its consent.[26] Construing the 45-day period as simply the latest time by which the host state 'shall' consent, the tribunal found that nothing in the BIT precluded Indonesia from furnishing written consent prior to an investor's request for arbitration. The tribunal noted that '[w]hat matters is not when the State has given its consent, but whether the State did consent.'[27]

The tribunal held that Indonesia had, in fact, previously consented to ICSID jurisdiction of Planet's claims in 2006, when BKPM's approval ('BKPM Approval') was granted to PT ICD, the Indonesian company later acquired by Churchill and Planet.[28] In particular, in the 2005 BKPM Approval, Indonesia agreed to follow the dispute settlement provisions contained in the ICSID convention.[29] Critically, following the acquisition by Churchill and Planet of PT ICD in 2006, the BKPM granted a new investment approval incorporating the content of

the 2005 BKPM Approval, including the provisions pursuant to which Indonesia consented to ICSID arbitration.[30] It should also be noted that the tribunal specifically stated that even if it had not determined that Indonesia submitted to advance ICSID jurisdiction under the UK-Indonesia BIT, it would have nevertheless found that Indonesia had consented pursuant to the BKPM Approvals.[31]

Investments within the scope of BITs

The tribunal also rejected Indonesia's second jurisdictional argument that, notwithstanding any determination that it consented to ICSID jurisdiction as a general matter, the investments of Churchill and Planet fall outside the scope of the UK BIT and the Australia BIT, respectively, and hence were not covered by the treaties. In particular, Indonesia asserted that the investments had not 'been granted admission in accordance with the Foreign Capital Investment Law No 1 of 1967 or any law amending or replacing it', as required by the treaties.[32] However, the tribunal held that the BKPM Approvals granted by Indonesia to PT ICD, in which Churchill and Planet invested, satisfied the 'admitted investment' requirement of the treaties.[33]

Conclusion

In rejecting Indonesia's jurisdictional challenges, the tribunal has allowed Churchill's and Planet's claims to proceed to the merits phase of arbitration. Churchill and Planet assert that the wrongful revocation of their Indonesian partner companies' mining licences resulted in damages exceeding US$1.315bn. Likely in reaction to the significant claims pending under the UK BIT and the Australia BIT, Indonesia recently announced that it will not renew its bilateral investment treaty with the Netherlands, and that it intends to propose an amended investment treaty framework with other nations in an effort to facilitate greater consistency between domestic and international law remedies.

Notes

1 On 24 February 2014, an ICSID tribunal issued jurisdictional decisions in the consolidated cases *Churchill Mining v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, 24 February 2014.
2 *Churchill*, pp 2, 4, 6, paras 7, 24–25.
3 *Ibid*, p 6, para 25.
4 The arbitral proceedings initiated by Churchill and Planet were consolidated in all respects, except for the fact that separate decisions/awards will be rendered, as the parties could not agree on whether the tribunal should issue a joint decision covering both companies. *Ibid*, p 17, para 58.
5 *Ibid*, pp 28–29, para 90.
6 *Ibid*, p 50, para 161.
7 Ibid, pp 46–47, paras 149–53.
8 Ibid, p 51, para 166.
9 Ibid, p 53, paras 173–75.
10 *Ibid*, p 54, para 178.
11 *Ibid*, p 54, para 180.
12 *Ibid*, p 55, para 182.
13 *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal*, ICSID Case No ARB/08/20.
14 *Churchill*, p 58, para 194.
15 *Ibid*, p 72, para 230.
16 *Ibid*, p 73, para 231.
17 *Ibid*, pp 67, 71, paras 217, 225.
18 *Ibid*, p 71, para 225.
19 *Ibid*, p 71, paras 226–27.
20 *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No ARB/11/13.
21 *Churchill*, pp 65–66, paras 208–10.
22 *Planet Mining*, p 71, para 218.
23 *Ibid*, p 27, para 90.
24 *Ibid*, p 51, para 161.
25 *Ibid*, p 50, para 158.
26 *Ibid*, p 66, para 202.
27 *Ibid*.
28 *Ibid*, p 71, para 217.
29 *Ibid*, p 66, para 203.
30 *Ibid*, p 67, para 207.
31 *Churchill*, p 73, para 232.
32 *Ibid*, p 88, para 286; *Planet Mining*, p 83, para 265.
33 *Ibid*, p 90, para 292; *Churchill*, p 94, paras 312–313.