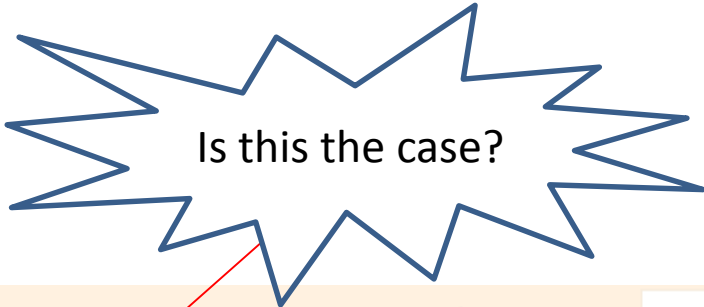


“Indonesia’s IIAs Post-BITs Termination: Recalibration and Renegotiation”

World Congress on International Law
New Delhi, 10 January 2015

Junianto James Losari
Research Fellow





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Indonesia to terminate more than 60 bilateral investment treaties

By Ben Bland in Jakarta and Shawn Donnan in London

Indonesia is planning to terminate more than 60 bilateral investment treaties that allow disgruntled foreign investors to bypass local courts and seek compensation in international tribunals, amid a growing global backlash against such provisions.

Development campaigners say that some multinational companies are exploiting bilateral investment treaties, which are meant to protect foreign investors, to circumvent national regulations and bully developing countries. South Africa started to cancel some of its bilateral investment treaties last year.

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International Rescue Committee

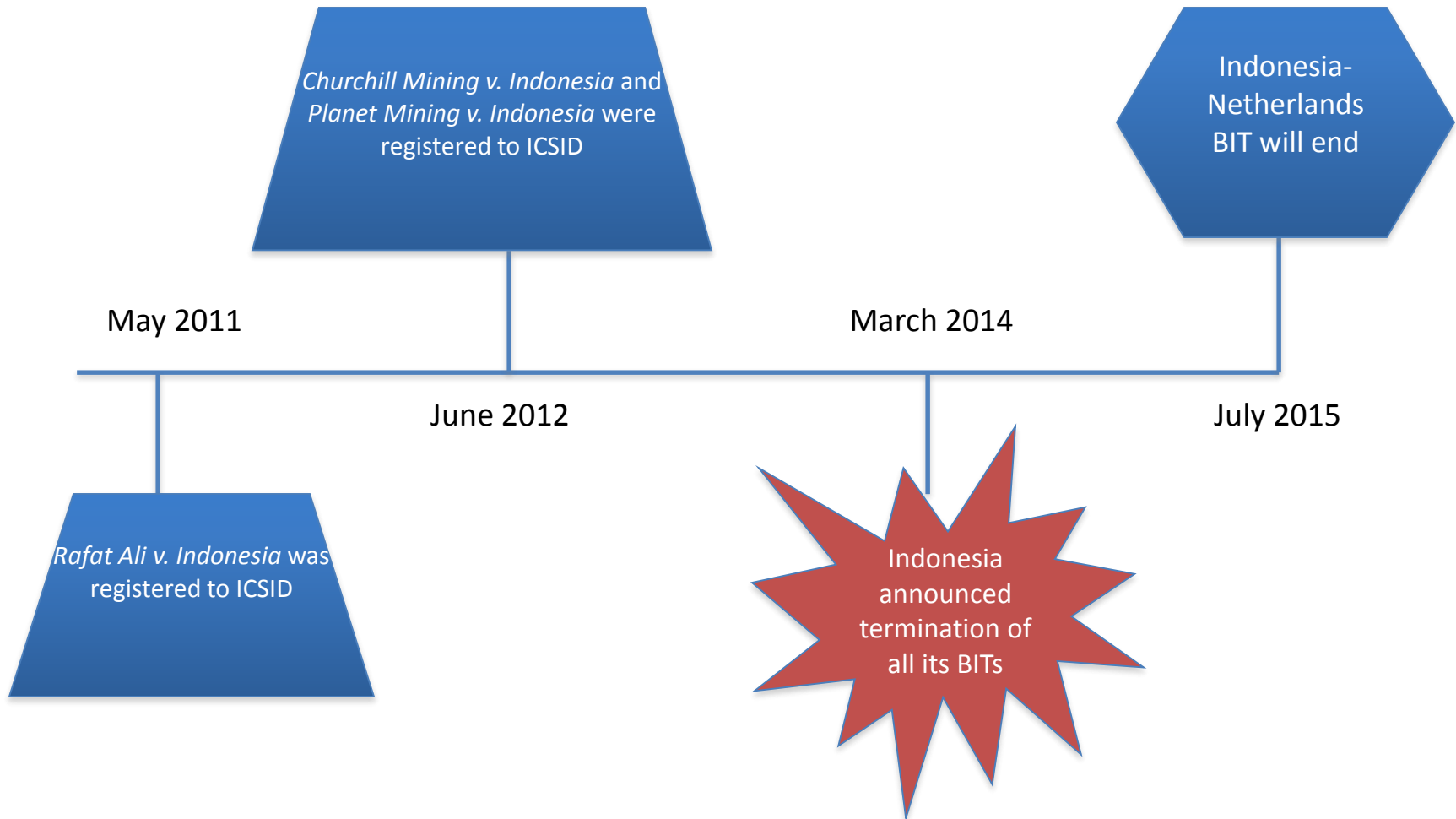
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Reaction v. Reflection?



Other potential reasons?

| | Early 1990s – early 2000s | 2013 |
|--------------------------------------|---------------------------------|--|
| Main sectors | Extraction of natural resources | Diversified, incl. manufacturing and services. |
| GDP per capita (current US\$) | Average of below 1,000 | 3,475 |
| Annual FDI inflow | Average of US\$1 billion | US\$18 billion |

Yet...

**FDI remains important, thus
Indonesia seeks to renegotiate
new IIAs to replace the old ones**

Issues affecting Indonesia's Investment Climate

- *Desentralisasi*
- Rule of Law
 - Corruption
 - Due Process
 - Judicial impartiality

Indonesia Rule of Law Index 2014

| | 2014 Rank (out of 99) |
|---------------------------------|-----------------------|
| Overall Score/ Rank | 46 |
| Constraint on Government Powers | 31 |
| Absence of Corruption | 80 |
| Open Government | 29 |
| Fundamental Rights | 65 |
| Order and Security | 42 |
| Regulatory Enforcement | 46 |
| Civil Justice | 67 |
| Criminal Justice | 71 |

Source: World Justice Project

Southeast Asian Nations CPI 2014

| Rank in ASEAN | Countries | CPI Global Ranking |
|---------------|-------------------|--------------------|
| 1 | Singapore | 7 |
| 2 | Brunei Darussalam | - |
| 3 | Malaysia | 50 |
| 4 | Thailand | 85 |
| 5 | Philippines | 85 |
| 6 | Indonesia | 107 |
| 7 | Vietnam | 119 |
| 8 | Laos | 145 |
| 9 | Cambodia | 156 |
| 10 | Myanmar | 156 |

Source: Transparency International

HOW TO DEAL WITH THESE ISSUES?

Proposed Solutions

- Recalibration and renegotiation of new IIAs.
- Dealing with Investor-State Arbitration Mechanism
- Capacity building and increasing coordination

New IIAs

- Opportunity to consolidate BITs into Regional Investment Agreements.
- Adding clarity and refining the provisions on standard of protection, among others:
 - expropriation;
 - fair and equitable treatment;
 - most-favored nation.

Investor-State Arbitration Mechanism

- Maintain as an independent third-party dispute resolution mechanism, but modify and complement:
 - rules about qualification of arbitrators;
 - rules about frivolous claims; and
 - create a conflict management system at domestic level.

Capacity Building and Increasing Coordination

- Train government officials about the legal ramifications of signing to IIAs;
- Provide examples of measures that could amount to breach of IIAs;
- Public consultation prior to implementation of a measure affecting foreign investors;
- Coordination among ministries and between central and local governments.

Conclusions

- Termination of old BITs is timely.
- While one is yet to see the new model IIA, some domestic reforms are definitely required.