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05

Turning tides

What Indonesia's reconsideration of bilateral investment treaties means for foreign investors

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Foreign investors in Indonesia have long benefited from international investment treaties but the recent announcement to terminate the country's bilateral investment treaty with the Netherlands signals a change in approach from the Indonesian Government. Jones Day Partner, Matthew Skinner, looks at the changes ahead and how investors can ensure their Indonesian investments remain protected.

Indonesia's international investment treaties have provided a great deal of comfort for foreign investors in managing sovereign risks associated with their investment, such as unfair and inequitable conduct by the government or denials of justice by its judicial organs. Indonesia signed its first bilateral investment treaty with Denmark in 1968 and has since signed 69 others with other countries including the Netherlands, Australia, China, Singapore and the United Kingdom.

Despite Indonesia's history of embracing bilateral investment treaties, the tides have turned. In March 2014, the Indonesian Government announced that it will not renew its treaty with the Netherlands. Set to expire on July 1st 2015, the Indonesia–Netherlands investment treaty is one of the most commonly relied upon for foreign investments in Indonesia, given the breadth of its terms. Signalling further things to come, the Indonesian Government has also indicated its intention to terminate all of its remaining bilateral investment treaties.

The announcement is not all that surprising given the changing landscape for foreign investment in Indonesia. It comes at a time when Indonesia is making numerous regulatory changes in its mining, natural resources and finance sectors which may adversely affect foreign investors, such as its recent ban on raw ore exports. It also follows a recent decision on jurisdiction in a US$1 billion investment treaty arbitration claim, which went against Indonesia.

The Indonesian Government's stance is also consistent with moves by other developing countries like Venezuela and Ecuador to terminate or renegotiate investment treaties.

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This emerges amid growing global backlash against these treaties on the basis that they provide greater protection to foreign investors than benefit to host countries. While the announcement is rightly cause for concern, foreign investors can still take steps to ensure that their investments in Indonesia remain protected (see page 25).

Steps to protecting foreign investment in Indonesia

1

Make or restructure investments before the treaty terminates:

Thanks to a "sunset clause" in the Indonesia–Netherlands bilateral investment treaty, investors will still be able to access the protections available under the treaty until 2030 if their investment is made or restructured through the Netherlands before July 1st 2015.

2

ASEAN a potential safe haven:

Investors may be protected under various multilateral investment treaties and free trade agreements to which Indonesia remains a party. For example, Indonesia is party to the ASEAN Comprehensive Investment Agreement which provides a robust regime for the protection of investments.

3

Assess treaty suitability:

When considering whether to make a new investment or restructure an existing one through a jurisdiction protected by an investment treaty, investors need to carefully consider which investment treaty provides the optimal range of protections for its specific circumstances. Investors will also need to watch out for so-called "denial of benefits" provisions that may, in certain circumstances, disqualify an investor from treaty protections.

Indonesia's current global bilateral agreements

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1	Cuba	25	Turkey
2	Venezuela	26	Syria
3	Argentina	27	Egypt
4	Luxembourg	28	Jordan
5	Switzerland	29	Saudi Arabia
6	Belgium	30	Mozambique
7	United Kingdom	31	Mauritius
8	Netherlands	32	Iran
9	Germany	33	Uzbekistan
10	Czech Republic	34	Russia
11	Denmark	35	Kyrgyzstan
12	Sweden	36	Pakistan
13	Finland	37	India
14	Morocco	38	Sri Lanka
15	Spain	39	Bangladesh
16	France	40	Mongolia
17	Poland	41	Thailand
18	Tunisia	42	Laos
19	Italy	43	PRK
20	Hungary	44	Vietnam
21	Bulgaria	45	Malaysia
22	Ukraine	46	Singapore
23	Slovakia	47	Indonesia
24	Romania	48	Australia

Source: Jones Day, Risco Energy

Indonesia and the ASEAN region*

"The Indonesian Government is clearly positioning itself to minimise its exposure..."

* As a member of the ASEAN region, Indonesia has implicit bilateral agreements with other countries in the region.

Risco Energy

Source: Risco Energy

The Indonesian Government is clearly positioning itself to minimise its exposure under bilateral investment treaties and it will be interesting to see if the country's new president and incoming government take a different stance. In any event, foreign investors in Indonesia should be diligent and take steps to secure or assess their protection under investment treaties before it is too late.

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