The PCA Award that Spurred Indonesia's Mining Reformation

Over year ago, the UNCITRAL tribunal rendered a Permanent Court of Arbitration ("**PCA**") Award No. 2015-40 dated 29 March 2019 based on alleged breaches of the Indonesia-India Bilateral Investment Treaty ("**BIT**") claimed by foreign investor Indian Metals Ferro Alloys ("**IMFA**") against the Republic of Indonesia. It is no coincidence that nine months after, the Indonesian House of Representatives on 17 December 2019 initiated a proposal to amend Law No. 4 of 2009 regarding Minerals and Coal Mining, which is the backbone of Indonesia's mining regulatory framework. The amendment (Law No. 3 of 2020 regarding the Amendment of Law No. 4 of 2009) was enacted on 10 June 2020 ("**Mining Law**").

The full text of the PCA award that surfaced in the public domain during 2020 enabled us to unearth the claims and reasoning to better understand (presumably) why it acted as a catalyst to the reformation of Indonesia's mining framework.

Background

The case dates back to 31 December 2009, where the East Barito Regent issued a mining production business license (*Izin Usaha Pertambangan*) ("**Production IUP**") to PT Sumber Rahayu Indah ("**PT SRI**"), a coal mining concession/Production IUP holder, for an area of 3,674 hectares in Kalimantan, Indonesia.

IMFA came into the picture in 2010, where Indmet Mining Pte Ltd (incorporated in Singapore), entered into a share purchase agreement to acquire 70% shares in PT SRI. Indmet Mining Pte Ltd is the subsidiary of Indmet (Mauritius) Ltd that was wholly owned and controlled by IMFA (incorporated in India). Following that, PT SRI became a foreign investment company and Indmet Mining Pte Ltd was effectively recorded as its shareholder based on the executed shares transfer deeds. In 2011, the Ministry of Law and Human Rights acknowledged the amendment of PT SRI's articles of association that enabled a foreign individual/entity to hold shares in PT SRI. Against that background, IMFA claimed PT SRI and its Kalimantan mining concession as its (indirect) investments.

Around the same time in 2011, IMFA discovered that PT SRI's concession overlapped with an administrative area of another regency/province and its Production IUP overlapped with many other mining concessions. As this was indisputably a prevalent issue in Indonesia, the Minister of Energy and Mineral Resources reconciled national mining data for verification and synchronization. IUPs that are defect-free (i.e. met certain criteria, e.g. not in dispute or no overlapping issues) were labeled "Clean and Clear". Meanwhile, PT SRI's Production IUP was not, which ran the risk of being suspended or revoked. On that account, IMFA claimed that Indonesia failed to resolve its overlapping of boundaries and licensing issues.

IMFA also disputed Indonesia's Government Regulation No. 24 of 2012 regarding Mineral and Coal Mining Business Activities that came into effect on 21 February 2012 ("**GR24/2012**") for increasing the divestment requirement for foreign shareholding to 51% from previously 20%.

Based on the above conducts, IMFA claimed that Indonesia breached its obligations to protect IMFA's investments under the BIT and claimed damages of USD469 million consisting of its total investment and expected returns from the potential full operation of PT SRI's mining concession. For the purpose of this article, only Indonesia's obligation to accord fair and equitable treatment ("**FET**") and indirect expropriation will be discussed.

Jurisdiction

In deciding the jurisdiction, the Tribunal pinpointed a critical fact: Indonesia's conduct of issuing PT SRI's overlapping Production IUP occurred *before* IMFA made its investment. Thus, at that time, Indonesia did not owe any obligation to protect IMFA's investment. The fact that IMFA had taken over an investment that happened to be entangled in a pre-existing dispute does not entitle IMFA to elevate the matter to a BIT breach. The Tribunal ruled that it has no jurisdiction over this conduct, but will examine the remaining two conducts that occurred *after* IMFA made its investment (i.e. 2011 onwards).

Moreover, Indonesia objected that IMFA's investment was not established and accepted in accordance with Indonesian law and thereby cannot qualify as a protected investment under the BIT. Indonesian law only recognizes direct investment/shareholding, as also confirmed in previous BIT claims against Indonesia.[1] In contrast, IMFA was an indirect shareholder. Nonetheless, the Tribunal interpreted the definition of investment broadly; had the parties

[1] In ICSID Case No. ARB/12/14 and 12/40, Churchill Mining Plc directly owns 95% shares and Planet Mining Pty Ltd directly owns 5% shares in PT Indonesia Coal Development. In ICSID Case No. ARB/11/13, the Tribunal ruled that it had no jurisdiction because Rafat Ali Rizvi invested indirectly in an Indonesian bank via a company incorporated in Bahamas.

intended to exclude indirect investments, there would be an explicit restriction in the BIT.

Merits

The FET standard, as the name suggests, obliges a host State, Indonesia, to treat investments fairly and equitably, including by protecting the investor's legitimate expectations, act in a transparent manner and refrain from arbitrary or discriminatory conducts. Yet, the Tribunal noted that this standard could not be interpreted to oblige the host State to reconcile its internal issues. Even then, there is no Indonesian regulation that guarantees a timeframe to resolve the overlapping issues. Additionally, as the party bearing the burden of proof, IMFA could not demonstrate that PT SRI's mining concession could have obtained the Clean and Clear status.

Investors, such as IMFA, could not have legitimately expected Indonesia's regulatory climate to remain unchanged throughout the lifespan of its investments, especially in the absence of a specific commitment or assurance by Indonesia. The increased divestment requirement under GR24/2012 does not breach the FET standard because it would not reach full effect until after 10 years; it only applies after five years of coal production with a sliding scale for another five years. Subsequently, this could not have caused substantial detriments to IMFA's investment.

Indirect expropriation occurs when a host State's action causes substantial deprivation of the investment value or when the investor loses control over its investment, which is not the case here. As such, IMFA's argument that Indonesia's conducts would diminish its future investment value does not meet the threshold of expropriation. If anything, IMFA should have undertaken thorough due diligence to identify detrimental risks before investing in PT SRI's mining concession. After all, it is generally accepted that *"BITs are not insurance policies against bad business judgments."*

Conclusion

In light of the above, the Tribunal rejected IMFA's claims on Indonesia's alleged conducts and in turn dismissed IMFA's claims for damages because there was no violation of the BIT. This award offers many insightful takeaway points on investment law, particularly on jurisdictional objections relating to the qualification of investment for entitlement of substantive protections under the BIT. For Indonesia, this award could be deduced as the additional driving force behind its mining reformation of shifting back to a centralized system where the central government mainly controls and manages mining business licenses and areas. This is expected

to ensure uniformity of data and procedure. Hence, it would tackle the core issue of this claim: resolving overlapping boundaries and licenses.

Recently on 2 November 2020, Indonesia enacted Law No. 11 of 2020 regarding Job Creation that amends, among many other laws, the Mining Law. However, as significant amendments were already made just five months prior, the new changes made to the Mining Law are minor and does not alter the existing practice.

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