

Question on Notice

Professor Tania Voon

28 August 2019

ISDS claim by an Australian investor in Indonesia

Facts

In *Planet Mining v Indonesia*, the claimant Planet Mining, an Australian wholly-owned subsidiary of UK company Churchill Mining, brought claims against Indonesia pursuant to the *ICSID Convention*¹ and the *Australia–Indonesia BIT*² in relation to investments in Indonesian companies in the coal mining industry. On the same facts, Churchill Mining brought an ISDS claim against Indonesia pursuant to an investment agreement between the UK and Indonesia.³ The claimants objected to revocation of certain mining licences and approvals associated with the East Kutai Coal Project on the island of Kalimantan, containing high quality coal with an alleged ‘pre-tax net present value of approximately USD 1.8 billion and pre-tax cash flows in excess of USD 500 million per year over the first 20 years of capacity production’.⁴

Jurisdiction

Indonesia argued, *inter alia*, that it had not consented to arbitration under the *ICSID Convention* in relation to this dispute. The tribunal agreed with Indonesia that Article XI of the BIT ‘contains no standing offer to arbitrate Planet’s claims before ICSID’.⁵ However, the tribunal nevertheless found that Indonesia had consented to ICSID arbitration in relation to the alleged investments because of certain separate approvals, which constituted the necessary consent in writing under the BIT.

Merits

In its award on the merits, the tribunal dismissed all the claims on the grounds of inadmissibility for unrelated reasons,⁶ namely that the claims were based on ‘documents forged to implement a fraud aimed at obtaining mining rights’.⁷

Annulment

The claimants applied unsuccessfully for annulment of the merits award.⁸

¹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

² *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments*, signed 17 November 1992 (entered into force 29 July 1993).

³ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments*, signed 27 April 1976 (entered into force 24 March 1977).

⁴ *Planet Mining Pty Ltd v Indonesia*, ICSID Case No ARB/12/14, ARB/12/40, Decision on Jurisdiction (24 February 2014) [9].

⁵ *Ibid* [198].

⁶ *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia*, ICSID Case No Arb/12/14, ARB/12/40, Award (6 December 2016) [532].

⁷ *Ibid* [528].

⁸ *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia*, ICSID Case No ARB/12/14, ARB/12/40, Decision on Annulment (18 March 2019) [266].