INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

In the matter between

Rafat Ali Rizvi

(Claimant)

and

The Republic of Indonesia

(Respondent)

(ICSID Case No. ARB/11/13)

SEPARATE CONCURRING OPINION
OF
PROFESSOR MUTHUCUMARASWAMY SORNARAJAH

Introduction

I write this Separate Opinion as I agree with the conclusions of my respected colleagues but arrive at the conclusions through different processes of reasoning on the issue of admission under Article 2(1). I agree with the reasoning and conclusions in the Award on the MFN issue. I take the contested issues presented to the Tribunal to be:

(i) Whether the Bank of Indonesia has admitted the Claimant's investment in such a manner as to satisfy the requirement in Article 2(1) of the UK-Indonesia BIT (the Treaty).

(ii) Whether the investment made by the Claimant through Chinkara Ltd is an indirect investment and whether such an indirect investment can be granted admission under Article 2(1) of the Treaty.

(iii) Whether the MFN provision in the treaty enables the Claimant to access treaties with less stringent admission procedures.

The relevant arguments made on the issues are well summarized in the Award and are not repeated in this Opinion, except to the extent necessary. This Opinion concentrates on the legal issues involved rather than the factual issues. It finds that, as a matter of law, the arguments advanced by the Claimant are not supportable. Where relevant, it is pointed out that even if supportable, the facts advanced by the Claimant do not establish a case on the basis of the interpretations advanced by him. I am in agreement with the analysis of the facts and the conclusions reached in the Award.

ISSUE 1: <u>Whether the Bank of Indonesia has admitted the Claimant's investment in such a manner as to satisfy the requirement in Article 2(1) of the UK-Indonesia BIT (referred to hereafter as the Treaty).</u>

1. The Award has reproduced Articles 1, 2, 5 and 28(1) of the FCIL. It is necessary to have regard to Article 3 of the FCIL and the structure of the whole of the FCIL. Article 1 refers to "**direct investment of foreign capital** made in accordance with or based upon the provision of this Law **for the purpose of carrying on the <u>enterprise</u> in Indonesia".** The **"<u>enterprise</u>**" or the Penanaman Modal Asing (PMA Company) is the central feature of the FCIL. Article 3 provides for the vehicle through which entry of foreign investment could be made into Indonesia. Its focus is on the **enterprise** or the PMA Company. While Article 1 refers only to direct investment in the form of foreign capital "<u>for the purpose of carrying on **the enterprise**</u>" as being permissible under the FCIL, it is Article 3 which, by prescribing the manner and form that such investment should take, makes it very evident that only direct investments made through the **enterprise** are permissible under the FCIL. Consequently, the buying of shares in existing Indonesian companies or banks will not qualify as foreign investment under the FCIL unless appropriate links are made by other legislation. It is necessary to set out the text of Articles 1, 2 and 3 to state further conclusions to be drawn as to the FCIL.

2. Article 1 of the FCIL reads as follows:[1]

   Article 1

   Investment in this Law denotes ***only direct investment of foreign capital*** *made in accordance with or based upon the provision of this Law for the purpose of carrying on* ***<u>the enterprise</u>*** *in Indonesia, with the understanding that the owner of the capital directly bears the risk of the investment.*"

   Article 2

   Foreign investment in this Law means:

   a. Foreign exchange which does not form a part the foreign exchange resources of Indonesia, and ***which with the approval of the Government is utilized to finance an enterprise in Indonesia****.*

[1] . *CIL 2*

b. Equipment for an enterprise, including rights to technological development and materials imported into Indonesia, provided the said equipment is not financed from Indonesian foreign exchange resources.

c. That part of the profits which in accordance with this Law is permitted to be transferred, but instead is utilized to finance an enterprise in Indonesia.

Article 2 clearly contemplates the establishment of a new enterprise through which foreign investment can be channelled. It does not contemplate the buying of shares in an existing venture. The Claimant's alleged investment consists entirely of shares in banks purchased largely in the stock exchange of Indonesia and from private sellers.

3. Article 3 of the FCIL reads as follows:

Article 3

An ***enterprise****, as intended by Article 2, which is operated wholly or for the greater part in Indonesia as a separate business unit, must be a legal entity organized under Indonesian Law and have its domicile in Indonesia.*

4. Read with Article 1 and Article 2, Article 3 contemplates the establishment afresh of a local enterprise with foreign capital or direct infusion of foreign capital into an existing enterprise with the aim of expanding or modernizing it.[2] Both articles speak of an "**enterprise**" which is referred to as the *Penanaman Modal Asing* (PMA company) in Indonesian and is the joint venture company through which investments are to be made. It is anticipated that the foreign investor is to participate in the running of the enterprise, precluding buyers of portfolio shares from the system. Virtually every later provision in the FCIL relates to the structure, rights and termination of the **"enterprise"**. Mr. Hiswara, the Claimant's expert agrees with this statement of the law.[3] He said:[4]

"Generally speaking, foreign investors can invest in and conduct business enterprises in Indonesia through ownership of PMA companies or any other form of entities as approved by the regulators of the relevant sectors of industry.

[2] .This appears clear from Article 29 of the FCIL: *Provision of this Law shall apply to investment of foreign capital effected after this Law comes into force, either in new enterprises or in already existing enterprises for expansion and/or modernization.* It is clear that the buying of shares in existing companies on the stock exchange or from secondary markets does not fit in with this formulation.

[3] . Expert Statement of Hiril Hiswara, 1 November, 2012.

[4] . Expert Statement of Hiril Hiswara, 1 November, 2012.

The establishment of PMA companies, including the identity of investing entities/shareholders of PMA companies, the amounts of capital to be invested, the use of the invested capital in broad terms and the proposed line of business, need prior approval from BKPM. Subsequent changes in the company, including increases in share capital and changes in shareholders, also need prior approval from BKPM. As for the banking sector, any establishment of a foreign bank would require prior approval from the MOF and/or Bank of Indonesia".

In the case of banking, Mr. Hiswara's statement emphasizes the establishment of a foreign bank or branch. Under 14/1967, the first Indonesian legislation on banking, this would have been as a company or as a branch. An operating permit had to be obtained for the commencement of such banking ventures. Such a permit was given by the Ministry of Finance at that time. Though made in the same year as the FCIL, there is no reference in the recital of Banking Law, 14/1967 to the FCIL.[5] It is implicit that where shares in banks are bought on the open markets, as became possible after the 1992 legislation, there is no strict control of the purchase of the shares by any regulatory body. What is important is that whereas the BKPM's procedures do establish a strong nexus between the state's regulatory entity and the foreign investor as every single transaction of every single share of the **enterprise** is subject to scrutiny by the BKPM, there is no nexus between a state entity and the purchaser of a bank share that arises, the Bank of Indonesia being concerned with such purchases of shares only if a threshold limit is reached. In the absence of a nexus, it is difficult to see how the purchasers of shares in banks on the open stock exchange or from other shareholders can come to be protected by the treaty. Such purchases are essentially commercial transactions, which cannot be linked with the state. As such, they are not investments that fall within the protection of an investment treaty, however worded. Such private transactions are incapable of creating responsibility in the state.

5. The later provisions of the FCIL revolve around the rights and duties of the "**<u>enterprise</u>**" such as its right to use manpower (articles 9-12) and land (article 14). Further matters stated with a focus on **<u>the enterprise</u>** are: taxation of the enterprise (articles 15-17), duration (article 18) nationalization of assets of the enterprise

[5] . In Indonesian legislative practice, a recital, with which every legislation commences, would indicate the prior legislation with which it has links. None of the Banking Laws contain references to the FCIL in their recitals.

(articles 21-22) and the responsibilities of the enterprise (articles 26 and 27). It is abundantly clear that the FCIL revolves around the **"enterprise"** and the making of foreign investment only through the **"enterprise"**. For an investment to be made in accordance with the FCIL as mandated by Article 2(1) of the Treaty, it has to be made through the **"enterprise"**. The "enterprise" constitutes the central feature of the FCIL. As Article 1 of the FCIL states, a direct investment of foreign capital is made for the purpose of carrying out the enterprise, with the owner bearing the risk of the investment. A shareholder who purchases shares in an existing bank on the stock exchange simply does not satisfy the basic premises in Article 1 of the FCIL. Neither would such person fit into the other provisions in the FCIL. The FCIL was premised on the foreign investor being a primary shareholder in the **enterprise** or on subsequent transferees of such shares with the permission of the BKPM.

6. In 1973, the *Badan Koordinasi Penanaman Modal*, (hereafter, the BKPM) was established as the administrative agency overseeing the FCIL by the Decree of the President of the Republic of Indonesia No. 20 of 1973 on the Capital Investment Coordinating Board. The Presidential Decree No. 21 of 1973 on the Capital Investment Procedure followed. It stated that the President of Indonesia would, thereafter, approve foreign investment on the recommendation of the BKPM. There were later changes but the role of the BKPM as the approving agency remained. The British Government (HMG) was aware of the existence of the procedure for entry of investment at the time it made the Treaty (1977).[6] The Presidential Decrees setting up the BKPM and the approval procedure constitute part of the laws referred to in Article 2(1) of the Treaty which confines the protection of the Treaty to foreign investments "*granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967* ***or any law amending or replacing it***". The decrees creating the BKPM and its powers are laws amending the provisions of the FCIL. They are made in pursuance of Article 28(1) of the FCIL, which provides that the FCIL shall be "implemented by coordinating among the Government agencies concerned in order to ensure harmonization of Government policies regarding foreign capital". Article 2(1) must be taken as including the approval procedure for foreign investment through the BKPM.

[6] . The notes of the British negotiators of the Treaty reveal as much. They were fully conscious of the powers of the BKPM when the Treaty was negotiated, as would appear from their notes of negotiations. The Respondent exhibited the notes of the negotiations of the treaty made by the British negotiators. Exhibit R 30.

The procedure requires that the investment must go through a regulatory procedure for admission and receive written approval from the President of Indonesia in the form of a license. In that sense the procedures are no different from other Asian investment treaties, which confine protection to those investments which are "approved in writing".[7] The requirement of the final permit containing an approval is very much in the mode of other Asian treaties, which require approval in writing. Given this limitation, it has been difficult for jurisdictional hurdles to be scaled in Asian investment arbitrations.[8] The Claimant has no written approval for his investment simply because there is no facility established for the approval of shares in banks as foreign investment. There is provision for an operating license where a foreigner establishes a branch or a bank in joint venture with an Indonesian bank.

FCIL and the Banking Laws

7. The Claimant's counsel made his arguments, on this as well as on other aspects, cogently and pleasantly. His argument was that there are other pathways to admission of foreign investment in sectors, like banking, which are permitted by the FCIL. Hence, admission through these pathways is tantamount to admission under the FCIL so as to satisfy the requirement in Article 2(1) of the Treaty that the investment must be admitted in accordance with the FCIL. Admission in the banking sector was not handed over to the BKPM as ministries in control of 15 other sectors had. The Ministry of Finance controlled the banking sector. It had not submitted the sector to the BKPM for entry into the sector to be coordinated. The banking sector is now controlled by the Bank of Indonesia (BOI), which was set up as an autonomous body. There is doubt as to whether the BOI can submit the sector to BKPM for coordination, as there is no procedure for entities other than Ministries making such submissions. The inference that the Claimant wishes the Tribunal to draw is that the Bank of Indonesia controls admission in the banking sector and that admission provided by the Bank of Indonesia is tantamount to admission under the FCIL, satisfying the requirements of the provision "granted admission in accordance with the FCIL or any

[7] . *Yaung Chi Oo v. Myanmar* (2003) ASEAN Case No. ARB/01/1, involved a refusal of jurisdiction based on the absence of written approval specifically intended for protection under the treaty. The present BIT under consideration achieves a similar effect through the requirement under a specific legislation and its amendments which require a license given by the BKPM or by the President depending on the value of the investment.

[8] . *Gruslin v Malaysia* (2000) ICSID Case ARB/99/3; *Yaung Chi Oo Ltd v Myanmar* (2003) ASEAN Case No. ARB/01/1.

law amending or replacing it" in Article 2(1) of the Treaty. The Respondent did not dispute that there are other ways of admission in other sectors but argued that the protection of the Treaty is confined, as a result of Article 2(1), to investments "granted admission in accordance with the FCIL" through BKPM procedures.

8. The Claimant sought to provide the link between the banking laws and the FCIL through Article 5 of the FCIL. Article 5 reads:

> "*(1) The government shall determine the fields of activity open to foreign investment, according* to *an order of priority, and shall decide upon the condition to be met by the investor of foreign capital in such field.*
>
> *(2) The order of priority shall be determined whenever the Government prepares medium and long-term development plans, taking into consideration developments in the economy and technology."*

9. The link between the banking laws and the FCIL appears tenuous. As pointed out, the first relevant banking law, Law 14/1967, made in the same year as the FCIL makes no reference to the FCIL in its recital. As Mr Churchill, the expert for the Respondent, explained, the practice in Indonesian legislation is punctilious in ensuring that recitals in legislation contain references to all related past legislation. Mr. Hiswara made much of the provision in the banking law of 1967, which made the provision on nationalization in the FCIL (Article 21),[9] apply to foreign banks. Such banks under Law 14/1967 could only be established as companies or as branches. Apart from this no other link existed between the FCIL and the banking laws.[10] Article 21 of the FCIL is unworkable unless foreign banks could be analogized to the PMA company on the ground that such banks had to be established as Indonesian entities, either as joint venture companies or branches. The terms of Article 21 of the FCIL are such that they have no relevance to the nationalization of shares of existing banks or shares brought on the stock exchange. It was not possible for foreigners to buy shares in Indonesian banks until after new banking laws in 1992. In 1992 and in 1998, there were amendments to the banking laws. These laws permitted foreigners (as well as locals)

[9] . Article 21 reads: "The Government shall not undertake a total nationalization/revocation of ownership right of foreign capital enterprises nor take steps to restrict the rights of control and/or management of **the enterprises** concerned, except when it shall be declared by law that the interest of the State requires such a step".

[10] . The schedules in the later foreign investment laws refer to banking.

to buy shares in existing banks from private holders of shares or on the stock exchange. Their recitals also do not contain references to earlier foreign investment laws.

10. There is substance in the view of Professor Sirait, the expert for the Respondent, that the Bank of Indonesia was an autonomous entity which could not have transferred any powers over admission in the banking sector under the terms of Article 28 of the FCIL. This undermines the possibility of any link between the Bank of Indonesia's purported powers of admission and the FCIL.

11. Both FCIL and the Banking Law, enacted in the same year (1967), excluded the possibility of indirect investments. Entry was through direct investments made through Indonesian legal entities. In that sense, it may be possible to argue that the entry under Banking Law 14/1967 could be accommodated through Article 5 of the FCIL as an admission under the FCIL that satisfies Article 2(1) of the UK-Indonesia BIT. Such entry is through the creation of a branch or the setting up of a joint venture between a foreign bank and a local bank. Both involve the setting up of Indonesian legal entities. These categories of entry continue to be preserved in the banking sector. It is not necessary to take any view as to this issue. One is concerned here only with shares bought in existing banks. The innovation that is made of entry through buying of existing shares from existing shareholders of banks or bank shares in the stock exchange are different simply because they do not involve the creation of an **"enterprise"** or alternately, an Indonesian legal entity, created for the purpose of being the vehicle for the foreign investment, in terms of the FCIL and hence cannot be accommodated within the admission procedures of the FCIL.

12. Shares in banking contemplated in the 1992/1998 amendments are purchased from existing shareholders or from the stock exchange. The process had been liberalized. In common with local persons, foreigners could also buy these shares. There is no similarity with the FCIL which is designed for the admission of foreign investment with capital assets being committed for the purpose of carrying out an **enterprise** "with the understanding that the owner of the capital directly bears the risk of the investment" (FCIL Article 1). When even one share in an "**enterprise**" subject to the FCIL is transferred, the transfer must be cleared by the BKPM. There are no such

restrictions on the transfer of banking shares to a foreigner or a local. The Claimant purchased shares in Bank CIC from a Soros fund, an existing shareholder, and some of the other shares on the stock exchange. The Claimant did not identify the precise percentage of the shares purchased on the stock exchange and those acquired from existing shareholders. The shares were in the name of Chinkara. As a matter of evidence, the relationship between the Claimant and Chinkara is a matter of doubt, as the Claimant admitted that he had relinquished legal ownership in the shares to Mr. Al Warraq. The effect of this admission has not been pursued in the current phase of the proceedings.

13. There was technically no privity created between the Government of Indonesia and the Claimant when such purchases were made. The purchases of shares in the present situation appear to be purely commercial transactions with no involvement of the Government of Indonesia or its agencies. The stock exchange is not a relevant agent of the state. One advantage of a system of confining treaty protection through entry requirements is that a state knows to whom the obligations of treaty protection are due. When shares are bought on a volatile market, the state may not have knowledge of the persons to whom obligations of protection are due. The mere recording of purchases of shares on the stock exchange can hardly create a nexus between the state and the purchaser of the shares.

14. The purchases of shares from existing shareholders were private transactions and remained so until some regulatory concern arose. Shareholdings do not attract any concern of the Bank Indonesia until they exceed a threshold. The precise issue here is whether the regulatory concern that arises when the threshold is exceeded involved the admission of investment or related to the purely prudential concerns of the Indonesian Central Bank. Prudential regulatory concern could not have satisfied any criteria of admission under the Treaty. For an admission, as the term itself suggests, the regulatory concern must be at the point of entry and not after the person had entered and accumulated a sufficient number of shares so as to excite regulatory concern. The fact that concern arises is when there has been an accumulation of shares over a prescribed amount is in itself recognition of the fact that the regulatory concern is not about admission but about control for prudential purposes. Under the Indonesian banking laws such regulatory concern arises only after 25 % of the shares

of a bank have been purchased by an individual or company or a lesser amount gives the purchaser control over a bank.

15. The law does not require any contact with the Bank of Indonesia for the mere purchase of shares. The law, which is the same for locals as well as foreigners, requires contact with the Bank of Indonesia only when a threshold of 25% of the shares is reached or where the local or foreign shareholder has controlling shares of the bank. In this case, a ‘fit and proper’ test has to be satisfied by the shareholder. The Claimant relies on this ‘fit and proper’ test to him to be a Commissioner of one of the three small banks in which he had shares as relevant to admission by the Bank of Indonesia. He suggested that the clearance given him as a fit and proper person continued as he was not asked to do a test in relation to his other dealings with the Bank. There is no proof of this assertion. There is no proof of the allegation of the Respondent that the Claimant was asked to do a fit and proper test in 2004 but did not turn up. In any event, nothing turns on the fit and proper test as it applies to the investor and not to the investment as required by BIT Article 2(1).

16. Bank Indonesia, being the Central Bank, has a multiplicity of functions, unlike the BKPM, which has the single function of admission of foreign investments. Even as it does not admit those who buy shares in Indonesian banks into Indonesia for purposes of treaty protection, so too, when Bank Indonesia sanctions mergers of existing banks it does not exercise an admission function. It oversees mergers in order to ensure that the banking sector undergoes rationalization as in fact the Bank’s policy was at the relevant time. In terms of law, the Claimant’s contention, that the approval of the merger of the three banks in which the Claimant had an interest is relevant to admission, does not hold good. The mere supervision or control over the merger cannot be taken as involving admission. The mergers are between existing banks. It is technically unsound to say that their merger amounts to admission of foreign shareholders in the merged banks.

17. As a matter of law, the merger simply was not in pursuance of the Bank Indonesia’s power of admission of investment. For admission, a relevant regulatory power must be used. An antitrust commission giving clearance to a merger of a foreign company does not perform the function of admission. Likewise, in the present case, the Bank

Indonesia does not decide on admission of foreign investment by giving clearance to a merger of banks in which the foreigner may have invested.

18. A Central Bank, having a multitude of powers, can grant admission if that specific power has been vested in it. The onus is to show that the Bank not only had powers of admission but the specific power to confer protection under the treaty. There was no clear demonstration that Bank Indonesia had any clear powers of shareholders in banks. There is no further demonstration that it had the additional power to confer protected status under the Treaty, as clearly the BKPM had.

19. The view relating to admission being possible by having regard to the cumulative effect of a course of conduct does not fit the language of BIT Article 2(1), which requires admission at the point of entry. The Claimant relied on a course of relationship with the Bank of Indonesia over a four year period to establish admission. Admission, as the normal meaning of the word indicates, is always at the point of entry. It is at the point of entry, that the legislation requires assessment of the suitability of the foreign investment, having regard to the economic policies of the host state. The BKPM is entrusted with this function. If the Bank of Indonesia does have this function, it must be performed at the point of entry. The cumulative effect of later events or "the totality" of circumstances will not suffice. The Tribunal in *Quiborax v Bolivia* made this point. It said:[11]

> *"Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments 'made' in accordance with the laws and regulations of the host state and in Spanish, 'haya efectuado'"*

20. The words of Article 2(1) of the UK-Indonesia BIT also use the past tense. The Article uses the same words "<u>made</u> in accordance with" indicating a single act of entry which had to be in accordance with the law. Cumulative acts over a course of time cannot be sufficient for admission.

[11] . (2012) at para. 266

21. On the basis of the foregoing analysis, the conclusion is that the Bank Indonesia did not adopt any procedures in connection with the activities of the Claimant or Chinkara that could amount to admission in such a manner as to satisfy the requirement in Article 2(1) of the Treaty. In terms of the law, it has not been adequately established that there could be admission of shareholders of banks for purposes of investment protection by Bank Indonesia. Consequently, the Claimant's investment was not admitted in accordance with the FCIL as required by Article 2(1). As a result, the Treaty does not protect his investment. The result that is arrived at is the same as in the Award.

ISSUE II. <u>Whether the investment made by the Claimant through Chinkara Ltd. is an indirect investment and whether such an indirect investment can be granted admission under Article 2(1) of the Treaty.</u>

22. The Claimant had argued on the basis of an "harmonization theory" he advanced that the investment made by Chinkara, the Bahamas company through which the Claimant brought his claim, qualified for protection under BIT Article 2(1) despite the fact that it was an indirect investment of the Claimant.

23. The central aspect of the Claimant's argument on whether the investment qualified as a direct investment was the "harmonization" theory. This was to look first at the definitional provision, BIT Article 1 and point out the wide definition of investment it contained. The words stressed are that investments could constitute of "every kind of assets" and include "shares ... of companies <u>wherever incorporated</u>". Where a company incorporated by a British national in any jurisdiction including the Bahamas (-<u>wherever incorporated</u>-) makes an investment in Indonesia, the investment is an indirect investment for the British national but a direct investment for the company. That being the case, BIT Article 2(1) and the FCIL, which limit admission to direct investments, must be read in a way that is harmonious with Article 1.

24. It cannot be the intention of the Contracting States that the provision on definition should have such a pervasive effect. The way the Claimant reads the definition is to invest in it a meaning far greater than what the parties had in mind.

25. The reading that is ascribed to the provisions by the Claimant sits uneasily with the understanding of it shown in the notes of the British negotiators. The conclusion that the Claimant draws is that forms of investment that are indirect, such as shares and stocks of "companies wherever incorporated" are protected if they are admitted in accordance with the FCIL. This makes the protection of the Treaty very extensive. That was not the understanding of the British negotiators who, in relation to investments from Hong Kong, to which they wished the Treaty to be extended, referred consistently to the "full power either to admit or refuse individual investments" under the FCIL and BIT Article 2(1) even after such extension.[12] It appears from the British notes of negotiations that Indonesia did not want to give protection to British investments routed through Hong Kong.

26. The British negotiators did not have an "harmonious understanding of the treaty". If they had, they would not have bothered about extending the treaty to Hong Kong as any company incorporated by a British national anywhere in the world would, on the "harmonious understanding", have been entitled to protection.

27. The Claimant stressed the fact that the shares listed in BIT Article 1 are of "companies wherever incorporated", meaning anywhere in the world, including the Bahamas. Chinkara's investment therefore qualifies as a direct investment under the FCIL. There are many reasons why this conclusion is not acceptable.

28. Firstly, it is clear that Indonesia did not want to extend the protection of the treaty to investments from Hong Kong. In relation to the inclusion of investments from Hong Kong, the British negotiators clearly indicated that Indonesia had the power to exclude investments, even if the BIT was extended to Hong Kong.[13] Had it been extended to Hong Kong, the investments made by Hong Kong incorporated companies would be direct investments but even then, the approval procedure under

[12] . Document of 11 October, 1974 (MFA/2/305/1). Exhibit R.30.

[13]. The UK- Sri Lanka treaty applied to the protectorates. In AAPL v Sri Lanka, the Claimant was a Hong Kong company.

the FCIL could be used to exclude them.[14] The assumption obviously is that if the treaty was not so extended, the Hong Kong investments would be indirect investments not eligible for protection under the Treaty. The Treaty was in fact extended by agreement to other British protected territories.

29. Secondly, if shares in companies "wherever incorporated" were direct investments protected by the BIT, as interpreted "harmoniously", no concern with the Hong Kong problem need have agitated the British negotiators as a British national could incorporate a company in Hong Kong and have the shares of the company "wherever incorporated" (here Hong Kong) be protected by the Treaty.

30. Thirdly, it would make Article 10 of the Treaty otiose.[15] Article 10 makes it possible for the protection of the treaty extended to investments controlled by British nationals or companies from a British protected area by agreement with Indonesia. Why have the treaty extended to specific British dependencies with Indonesian consent when incorporating companies in any jurisdiction anywhere in the world and investing in shares in Indonesia would enable protection as they qualify for protection as shares of "companies wherever incorporated"?

31. Quite apart from the policy reasons, the same Article of the Treaty, Article 1 contains the definition of the companies relevant to the Treaty. Companies are defined either as companies incorporated in the United Kingdom or as companies incorporated in Indonesia and other Indonesian juridical persons. When reference is made to "companies wherever incorporated", the BIT means those companies that are incorporated in either the UK or Indonesia. They are the only companies relevant to the BIT. The reason for including "wherever incorporated" is that investments in Indonesia can only be made through companies (PMAs) incorporated in Indonesia. What needs to be protected is not only the British company which invests but the Indonesian company that is the vehicle of the investment. Because of this peculiarity

[14] . The notes of the British negotiators may not be *travaux preparotoires* as both parties represented them to be. *Travaux preparatoires* usually consist of notes that both parties used in common. Yet, use of these notes may be justified by the fact that there are different interpretations placed before the tribunal. See also HICCEE v Slovakia

[15] . "At the time this Agreement comes into force or at any time thereafter, its provisions may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed upon by the Contracting Parties in an Exchange of Notes".

of the Indonesian and Thai foreign investment laws, the formula was used in the UK-Indonesia and the UK-Thailand treaties that the investment could consist of shares of companies "wherever incorporated".

32. For these reasons, the indirect investment made by the Claimant through Chinkara Ltd, a Bahamas company, is not an investment protected by the Treaty.

ISSUE III. Whether the MFN provision in the treaty enables the Claimant to access treaties with less stringent admission procedures.

33. It is unnecessary to go into the controversies regarding the use of the MFN clause in these proceedings. It is sufficient to dismiss the arguments made by Respondent for the reasons given in the Award.

Professor Muthucumaraswamy Sornarajah