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The Freeport Deal: Lessons Learned from Indonesia in Renegotiating Mining Concessions

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The Asia-Pacific region has substantial reserves of a wide variety of minerals, including gold, copper, iron and gas. The most important mineral reserve-holders and producers in the region are China, India, and Indonesia. Even so, the limited ability of exploration and exploitation had forced some states to still rely on foreign investment, one of which is Indonesia. Indonesia has been known to have a long-standing issue with their investor, Freeport McMoran Inc., the giant mining company based in the United States. Through its subsidiary, Freeport Indonesia (PTFI), Freeport then entered into a Contract of Work with the Indonesian Government in 1967, and renewed it in 1991. PTFI is given the right to conduct mining business activities for at least until the concession expires in 2021. In 2009, the Government issued a new mining regulation, which requires all mining companies, including PTFI, to convert mining concessions into a Special Mining License, along with additional requirements such as divestment, purification obligations, social and environmental responsibility. This policy totally contradicts the virtues in the contract. In December 2018, the Government of Indonesia reached a final decision on the Freeport deal, which encompasses at least 5 (five) issues, namely: (1) shifting from contract to license scheme, (2) price of the divestment, (3) building smelters, (4) taxation, and (5) environmental responsibilities. The final deal is a culmination of years of multiparty negotiations. This paper examines the 5 (five) main points concluded in the Freeport deal in light of the strategic negotiation technique, which stresses the negotiating parties' patience and ability to make take-it-or-leave-it deals. It then concludes on lessons learned from the Freeport deal for future mining concessions' renegotiation..

Key words: *Reasonableness, Indonesia, Mining Concession, International Investment Law.*

Introduction

In 21 December 2018, Indonesia marked history by concluding a deal concerning the operation of PT Freeport Indonesia ('PTFI') in Papua, which is about to mature in 2021. The multiparty agreement involved the Government of Indonesia – as represented by its state-owned enterprise PT Indonesia Asahan Aluminum ('Inalum'), PTFI, Freeport McMoran Copper & Gold Ltd ('FCX') as the majority stakeholder in PTFI, and the previously undisclosed Rio Tinto, who apparently was one of PTFI's beneficiaries. Under the said agreement, the parties agreed to a divestment scheme through which Indonesia shall now take control of 51.23% of PTFI's equity, hence it holds a majority stake in PTFI. In addition, the agreement serves as the end of FCX and Indonesia's long renegotiation of PTFI's mining concession; it was agreed therein that PTFI's mining operation will be extended for another 20 years that is up to 2041. The parties also agreed on several determinative factors concerning PTFI's future operations, such as the taxation scheme, building of refinery facilities, and environmental responsibility (Annisa, 2018).

This signing was the culmination of years of a tug-of-war negotiation process between the Indonesian government and PTFI. This shows that, in practice, renegotiation of a mining investment agreement is a complex process and may end up in an investment dispute. Renegotiations of vital investor-state agreements have at most times placed the latter at a lower position *vis-à-vis* the former; being a completely one-sided affair: the poor victimised developing country pitted against the rapacious multi-national corporation (David, n.d). During the renegotiations of mining investment agreements, there is a significant, but bridgeable, gap in the expectations of the company and the government. A company is clearly concerned with enhancing value for its own, maximising profits, and maintaining a reputation in the marketplace as a reliable supplier of mineral commodities for a further period of time, after concluding their success in the initially agreed term. Governments, on the other hand, are responsibly concerned with ensuring the best rational use of their exhaustible natural resource, which is the property of the nation, and to distributing the benefits streams in a sustainable manner to current and future citizens and constituencies within the country (Andrews, 2012).

In addition to these factors, numerous other elements may influence renegotiations, such as unanticipated changes in market conditions, and commodity prices could fundamentally change the investment landscape and the fairness of the agreed-upon terms. Furthermore, the terms of most agreements were made when there was still significant uncertainty about the geology, duration, economics, political stability and other factors that could affect the commercial viability of the project (Jeswald, 2001). Likewise, since a mining project is a long and collaborative process, the company will also have concerns on ways the government could legally impair its operations, i.e. prolong the issuance of necessary permits, and formulate ways to mitigate these issues. In contrast, the government are concerned with the continuous commercialisation of their reserves. Thereby parties are amenable to renegotiation - sitting down and discussing an alteration of the initial terms, which leads to further extension of the mining concession (Sachs et al., 2011).

This article aims to discuss the theories of negotiation in light of the renegotiation between PTFI with the Government of Indonesia concerning a mining concession, which led to the final divestment deal in 2018. Part 2 discusses the general theory of negotiation, especially with regards to investor-state mining concession renegotiations. Part 3 elaborates the requests and offers of the Government and PTFI concerning the mining operations, the results of the negotiation, and the concerns arising therefrom. Part 4 elaborates the lessons learned from the Freeport Deal, whilst basing it to the theories of negotiation, and Part 5 ends with the conclusion on the overall case and recommendations to be made with future deals.

Negotiation Theories

Negotiation is a central component of national policy-making processes from setting agendas, to determining what issues are to be addressed by policy makers, exploring options, finding solutions and securing needed support from relevant parties in order to ensure that planned policies are sustainable (Hall, 2006). Theorists have portrayed negotiations as events of diplomatic artistry, mechanical reflections of relative power, weighted interactions between personality types or rational decision-making processes (Kissinger, 1969).

While formal definitions of negotiation vary, theorists do accept certain basic common grounds, parties who negotiate agree in at least one fundamental respect. These people share a belief that their respective purposes will be better served by entering into negotiation with the other party (Ramirez, 1999). According to Zartman, negotiation comprises of five different levels of analysis or core approaches. These are the (1) structural, (2) strategic, (3) behavioural, (4) "concession-exchange, and (5) integrative approaches. It is important to acknowledge that in practice most negotiators use a combination of approaches during a negotiation (Tanya and Azeta, 2008).

The strategic approaches to negotiation have roots in the rational choice theory, and evolved into the infamous game theory, that emphasises the role of ends in determining outcomes (outcome-oriented) (Tanya and Azeta, 2008). In this paper, the author seeks to highlight a dominant negotiation theory and techniques used in the Freeport-Indonesia negotiations, which resulted with the divestment deal. Based on the definitions of each negotiation theory, the strategic approach, which is the foundation of the game theory, is seen as predominating Freeport's divestment deal.

In the rational choice model, negotiators are viewed as rational decision-makers with known alternatives who make choices guided by their calculation of which option will maximise their ends or 'gains', frequently described as 'payoffs' (Kuhn, 1962). Strategic models tend to be normative in nature because they are grounded in the belief that there is one best solution to every negotiation problem; they seek to represent "what smart and impeccably rational people should do in competitive, interactive situations" (Raiffa, 1982). This negotiation approach always seeks for 'best solutions' for all perspectives in a negotiation (Snyder, and Diesing, 1977).

Neumann first introduced the concept of game theory; (John Von and Oskar, 2007) the concept encourages negotiators to pick the strategy where the maximum advantage of their opponent is minimised (BBC, 2015). The big idea in game theory is to reduce variables for oneself in order to maximise benefits obtained from the negotiation (Greg, 2009). In practice, actors of negotiation that employ the game theory technique are fully rational (Martin, 2012), and each party recognises a set of available options and develops tangible preferences among those options to maximise its own interests (*Pareto optimal*) (Gregg, n.d).

In general, the possible outcomes of the game theory negotiation involving two parties are: (1) win-win, (2) win-lose, and (3) lose-lose (Russell, 1990). These outcomes refer to how each side perceives their outcome relative to their standings in the negotiations. Win-win outcomes occur when each side of a dispute feels they have won, or that the outcome had made everyone happy (Chris, 2018). Win-lose situations result when only one side perceives the outcome as positive, and most of the time is neither reached nor being executed voluntarily (Spangler, 2003).

According to Raeburn and Zollman, the determination on whether a party wins or loses in a negotiation is based upon 2 factors, these are: (1) patience, and (2) take-it or leave-it position (Paul and Kevin, 2017). One critical thing in winning a negotiation is to show patience, how willing a party is to stay and continue to negotiate. This is to act as if the party has less to lose from letting the negotiation drag out than does the adverse party. This is to be done by always choosing situations where one would just give out suggestions instead of demands (Presh, 2008). Another way is to imply no urgency; outcomes need not to be reached in the near future, nor would they gain losses if the negotiation is stretched out, or simply takes a long time. By doing so, negotiators create an impression that the adverse party cannot simply take advantage of their impatience (Ariel, 1979).

Another important element in negotiation that can lead to better outcomes is to aim for the position which able to offer a "take-it or leave-it" deal to the other party. Negotiators who create situations where it is a take it or leave it situation, can oftentimes improve the outcomes of the negotiation in favour of them (Harvard Law School Program on Negotiation, 2019; Robert et al. 2004).

When applying the game theory in Freeport-Indonesia's renegotiations, there are several factors that shape the parties' bargaining positions, demand and offers. The fact that renegotiation – negotiation conducted after or prior to the expiration of an agreement (Craig, 2012), is as much a political issue as a legal one (David, n.d); it invites evaluation that is heavily influenced by historical relationship, whilst balancing risks and opportunities. Finally, the willingness of the parties to reach an agreement is being influenced by the tangible and intangible investments and the extent to which the parties can use those investments advantageously in their next contractual phase. All other things being equal, the PTFI prefer to extend the existing contracts while Indonesia urges to terminate the agreement and shift to a license scheme in which PTFI seriously refused since the latter course of action would entail significant new risks. Hereforth, Part 3 will discuss the major demands of the investment negotiation, which resulted in the divestment deal. Part 4 will then conclude on the results of negotiation.

A Review of the Freeport Deal in light of the Negotiation Theory

FCX has a long-standing involvement in Indonesia's mining and economic history, having commenced resource exploration and exploitation of the substantial gold and copper reserves in West Papua since 1967 (Freeport Mc-Moran). Its project is authorised pursuant to a Contract of Work ('COW') entered into between their subsidiary, PTFI, with the Indonesian New Order Government (FCX Operation in Indonesia). Their continuous operation up to 2021 was pursuant to their second COW entered into in 1991, (Jeff Atklnson, 1998; Shawn, 2004) which granted exploration and exploitation permit in the Grasberg mine. The site is home to the largest gold reserve and second largest copper mine with a production capacity of more than 200,000 tonnes of ore per day, which forms the principle source, accounted for 47 percent, of FCX's annual revenue (Frecport-McMoRan Copper & Gold Inc, 2014). PTFI is owned and operated by FCX, which retains 81.28% shares; the Indonesian government and PT Indocopper Investama equally share the remainder (Kompas, 2019).

In 2009, the Indonesian government passed the Law No. 4 of 2009 on Coal and Mineral Mining ('Mining Law'). The Law imposes extensive range of novel obligations, namely: (1) to require all foreign mining companies to divest 51 percent of their shares to the Indonesian government, (Law No. 4 of 2009) (2) to shift the investment scheme from COW to Special Mining Licenses ('IUPK'), (Law No. 4 of 2009) and (3) to refine ores within the country through building smelters, making it a prerequisite for mineral exports (Law No. 4 of 2009). To further demand compliance, the Minister of Energy and Mineral Resources issues Regulation 1/2014 that restricts the export of mineral concentrates to certain specification and in limited amount. This policy had greatly affected PTFI's operation, as they were no longer allowed to export raw ores. As a result, PTFI took efficiency measures to reduce capital expenditure and company operating costs. Soon after, FCX came in to renegotiate ways to keep on exporting mineral ores and the government agreed to issue periodic extension to export license for raw mineral ores in return of higher export tax scheme by 20-25%. (House of Representative, Commission VII, Syaikhul Islam) This dispensation went on until 2018.

On 12 July 2018, FCX, along with the Government and Rio Tinto, signed the Heads of Agreement ('HoA') concerning PTFI's divestment; FCX agreed to divest 51.23 percent of PTFI's shares to the Government of Indonesia (Nithin Coca, 2018). The HoA includes 40% of Rio Tinto's participating right in PTFI, which is convertible to shares, with a total divestment value of US$ 3.85 billion, or equivalent to Rp 57 trillion (Stefanno Reinard Sulaiman, 2018).

After the conclusion of the HoA, and about the time the Government prepared for the final agreement, the Indonesian Supreme Audit Agency ('BPK') released a report that uncovered massive destruction of the ecosystem surrounding PTFI's area of operation. Based on their findings, PTFI was said to be responsible for excreting mining operation waste into rivers, forests, estuaries, and into the sea; this environmental damage caused a loss of Rp. 185 trillion to Indonesia.

Therefore, within its negotiation strategy, FCX seemed to aim for the following demands:

1. Extension of PTFI's mining operation by way of extending their 1991 COW for another 40 years, and should not 'unreasonably withhold'. These extension rights are pursuant to Article 31 (2) COW;
2. If the government refuses to extend their operation, it should purchase the company's assets at a 'reasonable' price pursuant to Article 22 COW. In any event, divestment is open only if the Government agrees to purchase Rio Tinto's 40% participating interest in PTFI;
3. The obligation to develop a smelter facility will be shared with the majority shareholder post-divestment;
4. A nailed-down taxation scheme; and
5. Environmental issues to be disconcerted as part of the divestment deal;

On the contrary, Indonesia seemed to aim for the following points in its negotiation strategy:

1. To end the 1991 Contract of Work, and shift to the regime of Special Mining Licenses under Indonesian Mining Law;
2. Freeport should divest 51 percent of their shares at a 'reasonable' price to the Indonesian Government, or at least at book value price;

3. To impose a prevailing taxation scheme;
4. The obligation to build smelting facilities lies with FCX as a pending obligation imposed by the 2009 Mining Law, which it had failed to complete;
5. Environmental issues to be addressed prior to concluding the divestment deal.

The HoA was then signed with the final Sales and Purchase Agreement on 21 December 2018, where Indonesia officially announced their 51.23% ownership of PTFI's shares (PT Freeport Indonesia, 2018). In the end, the multiparty agreement incorporated these consents:

1. The legal basis of PTFI's operation will be in the form of a Special Mining Business License (IUPK); thus, the COW is put to an end.
2. Divestment of 51.23% of PTFI's shares to the Government of Indonesia, *via* purchasing Rio Tinto's participating interest, through the state-owned enterprise, the Inalum.
3. PTFI (with new shareholder structure) to build processing and refining facilities or smelters in a period of 5 (five) years.
4. To imposing a nailed-down taxation scheme.
5. Upon the agreement on these points, as stipulated in their IUPK, PTFI is entitled to an extension of the maximum operating period of 2x10 years until 2041 (Freeport-McMoRan, 2018).

Despite of having the renegotiation concluded, the government had received criticisms and concerns raised by experts and non-governmental institutions over the undisbursed details in the Agreement with the United States giant mining investor, which would potentially cause new disputes (Office of Assistant to Deputy Cabinet Secretary for State Documents & Translation, 2018). This includes: (1) the determination of price related to the divestment; (2) the consequences of issuing international bonds to fund the divestment; (3) the government's final choice of nailed-down tax approach *versus* the prevailing tax scheme; (4) obligation to build ore refinery facilities; and (5) the environmental damage being left unchallenged post-divestment. The next part provides an extensive elaboration on the results of each issue, contrasting it with the negotiation game theory, that is to access the ability of being patient and to offer take-it or leave-it deals.

Patience

A review of the whole divestment process depicts the quality of both parties on being patient in the whole renegotiation psyche. This is shown by (a) several changes of regulation on divestment and the price of the deal being lower than previous bargains, even further (b) the issuance of international bonds to facilitate the deal.

a. Divestment: Regulatory Inconsistency and Price Determination

In the case of PTFI, divestment has been a long-standing obligation that both parties had failed to comply. The first record of divestment obligation was under Article 24 of the COW, where in the tenth year of the operation the company is required to divest 51% to the Indonesian Government. A similar requirement is also envisaged under Article 112 (1) of the 2009 Mining Law. The Government continues to address the divestment policy each year; in 2014 the divestment obligation was lowered to 30% under GR No. 77 of 2014, (Government Regulation No 77 of 2014) which is then reverted back to 51% under GR No. 1 of 2017 (GR No 1 of 2017). This alone had shown how the Government was impatient. Indonesia has been the one who urged for the deal since 2014. In order to lure FCX, Indonesia had lowered its demand for divestment from 51% to 30%, but later inconsistently raised it back to 51%.

Even so, the divestment deal was only finalized in 2018. Despite the euphoria over the conclusion of the deal, the public then questioned the divestment price mutually agreed upon. Oppositions argued that the agreed price of US$3.85 billion was extremely high, not to mention the fact that it was in exchange of Rio Tinto's 40% participating interest. Calculations are made through 3 ways as follows:

To this end, the divestment price at US$3.85 billion may be benefitting the Government, which was closest to Indonesia's last bargain in 2016. However, in the final deal, the parties agreed that the shares divested to the Indonesian Government are ones originating from the conversion of Rio Tinto's participating interest into the form of shares. The previously undisclosed Rio Tinto made his affiliation with PTFI since 1995, where the former had agreed to invest for the Grasberg mine for US$75 million, another US$ 100 million in 2003, and a promise of investing a total of US$20 billion by 2040, in exchange of 40% participating interest to be paid by the latter after the Grasberg had fully made profit (Gustidha Budiartie, 2018). However, until 2017, Rio Tinto had only contributed US$ 170 million to PTFI. The Indonesian government finally agrees to purchase Rio Tinto's participating interest at US$ 3.3 billion (Gustidha Budiartie, 2018).

In this regard, it is evident that the Government is the one who had urged the deal to move swiftly, and to get the issue done before 2019, whilst the 1991 COW remains effective until 2021. In fact, the government had the option to postpone the deal or delay the negotiation until 2020. This is in line with the provision of the Mining Law that provides for a sufficient time for the government to decide on the extension of mining permits up to 1 (one) year prior to its expiration, which is in 2020 ('Mining Law'). A series of bargaining and eagerness to reach the deal was evident since 2016 up to 2019 (Benn and Made, 2018).

b. Issuance of International Bonds to Facilitate the Divestment

The issuance of international bonds means the government had opted to facilitate the payment of PTFI's divestment and also shows how impatient Indonesia can be in the renegotiation. To meet the divestment needs, the Government avoids the use of the country's foreign exchange reserves on grounds that it might cause a negative impact on the State's economy which may further depress the value of the Rupiah. In that regard, Inalum issued an international bond at a total amount of US$4 million to pay for the divestment.

The problem with international bonds lies in the confidentiality of the buyer's identities; the beneficiary may not be identified. In practice, the buyers of these bonds are fund managers or banks, which manage the funds of individuals or institutions. Unfortunately, the real fund owners are not disclosed.

With this scenario, there would be 2 possibilities: *first*, Indonesia can only be said as PTFI's true shareholder once Inalum pays all the bonds it had issued, which is by 2048; or *second*, if, in the end, Inalum fails to pay the yield, then the bond owner will most likely request for its yield to be converted into shares, to which Inalum's majority shares will then decrease to compensate Inalum's inability to pay. Therefore, unless the government ensures their ability to pay back all the yields, it would only result in nothing but loss to the Government of Indonesia. In this regard, the impatience of the government is clearly evident by forcing the deal to be concluded despite risking their financial stability by issuing international bonds.

Take-it or Leave-it Deal

Another strategy in the game theory is the ability to express a take-it-or-leave-it situation. This strategy requires the negotiating party to show less desire and urgency to the outcome of the negotiation. In the Freeport deal, FCX was able to play the position to offer a take-it-or-leave-it deal to the Government of Indonesia. The situation in which the government was in a rush to reach the deal has given FCX the advantage to apply this strategy by combining all its interests into a single package deal.

There are at least 3 (three) factors in which PTFI can offer a take-it or leave-it deal, that is with regards to (a) taxation system, (b) requirement to build ore refinery facilities, and (c) PTFI's pending environmental responsibility. The next part serves as an elaboration of these factors, along with the result and challenges they entail.

a. Nailed-down Taxation Scheme

One issue raised in the shift from COW to IUPK is the taxation scheme, whether to apply the *nailed-down* or the prevailing scheme. After the signing the deal, the Indonesian Minister of Finance clarifies that the *nailed-down* system is used to govern the contract (Antara, 2018), which is contradictory to Indonesia's stance in the early stages of the renegotiation in 2014. Previously, the Indonesian Government stood for the prevailing system; payment of taxes needed to adjust with the relevant laws and regulations implemented by Indonesia, depending on the rise and fall of global mineral prices (IDN Financials, 2017). On the contrary, PTFI demands for a *nailed-down* taxation system, as employed in the COW regime. (KabarPapua, 2017) This is understandable in the realm of international investment law, that when investments are irreversible, such as in terms of investment on mineral, oil and gas, uncertainty concerning possible future tax changes may have massive disincentive effects on the investment. As such, a policy that reduces uncertainty surrounding tax variables affecting their profitability, gives a positive effect on investment (Robert MacDonald, 1986).

In the end, the Government of Indonesia accommodated PTFI's concern, and in the final deal it had consented on the nailed-down taxation system. This indicates that PTFI succeeded in persuading the Government to fulfill its demand. This, on the contrary, is a loss for the Government, as they cannot control the tax PTFI which is supposed to render for as long as the IUPK is operating, that is up to 2041.

b. Obligation to Build Smelter Facilities

The obligation for mining companies like PTFI to build a smelter has been stipulated under the Mining Law, which took effect in 2014. This law explicitly regulates the obligation to process and refine mineral ores in the country. This is to be done by building a smelter to increase the added value of mineral resources in the implementation of mining, processing, and refining and utilising minerals ('Mining Law').

PTFI states that the building of smelter requires investment up to US$20 billion, and that they will only commit on building the facility if the government guarantees the extension of their COW until 2041 (Freeport-McMoran, 2015). With the issuance of this IUPK in lieu of the COW, PTFI will obtain legal certainty in the extension of the 2x10 year operating period until 2041; thus, PTFI is required to build a processing and refining plant within a 5 year time frame.

The question remains as to the obligation of Inalum with regards to the building of smelter – whether Inalum as the majority shareholder today, should participate in financing the construction of the smelter (Safrezi Fitra). In the final deal, it is consented that since the obligation to build smelter is incumbent to PTFI until today, thus the new shareholder – Inalum – should pay its share in building the facility. This shows that, again, FCX was able to maintain its position in offering the take-it or leave-it deal by making this obligation in a single deal with the divestment.

c. Environmental Responsibility

In late 2018, PTFI's divestment process was delayed due to the discovery of BPK of massive environmental damage caused by PTFI's mining activities. The results of the 2018 audit stated that PTFI had caused destruction of ecosystems due to mining operational waste in rivers, forests, estuaries, even sea area, with an estimated loss of Rp. 185 trillion. Further, a recent survey also indicates that the Grasberg mine operation alone produces 10,000 tonnes of tailings per hour, half of which is disposed of in rivers (James & Karuni, 2018; Idris Rusadi, 2018). This was proven by the water quality that does not meet the standard; the percentage of pollution of heavy metals - mainly manganese and sulphate was at 86-99.9%. This certainly threatens the survival of freshwater organisms and people who consume water daily: using the river as a transportation route, and as a source of livelihood (Geinessa et al., 2013).

It is somewhat unfortunate is that when PTFI's divestment process was completed in December 2018, the problem of environmental damage had not been resolved. Likewise, it entails an impression that the divestment erases PTFI's responsibility for the environmental damage (Addi, 2018). This issue yet again proves FCX's upper hand in convincing the government to disconcert the issue from the divestment deal.

Lesson Learned from the Freeport Deal

Today, the negotiation has been finalised and Indonesia had 'assumed' control of one of the world's largest copper and gold mines. This marks the end of decades-old contracts, but adds concerns regarding the future of foreign mining investors in the resource-rich nation. Despite the completion of the deal, some perceive it as a political 'win' for President Joko Widodo in relation to the 2019 presidential election.

Referring back to the application of the game theory to this renegotiation, the quality of being patient is a determinative factor to the outcome of the deal. A lesson learned from Indonesia's impatience in the Freeport deal was not to place a vital investment contract renegotiation close enough to the presidential election, or else the investment deal in itself will somewhat make it into a political agenda, therefore being politicised by the presidential candidates. However, the fact that Indonesia extends the PTFI's license for 20 years up to 2041, the same dilemma will arise in 2039, which is a political year. As such, conditions during that time can be predicted to be nothing dissimilar to what Indonesia faced in 2019; all in all, this domino effect has no vivid end yet. All these components create an impression that FCX can simply take advantage of Indonesia's impatience.

The second determinative factor in winning a negotiation is to be in a position of making a take-it or leave-it deal, that is to imply no urgency to the outcome of the negotiation, and that other options remain open that would cause neither advantage nor loss for them as compared to their adversary. The fact that FCX had made all their issues into a single deal gives them a higher bargaining position to oppress Indonesia with a take-it or leave it option. A lesson learned from this Freeport deal for future investment contract renegotiation is to refuse the proposal of a single-packaged deal. Specifically, with regards to pending obligations such as the smelter and environmental responsibility, the government should have to be strict to ask Freeport to finish these first prior to committing to the deal as a whole, or in any event, the remaining obligation should have been converted into a certain nominal price to compensate the divestment price. This way, the deal will not end up as a curve ball that jeopardises Indonesia today and for the long run.

Conclusion

In conclusion, it can be said that the whole Freeport Deal seems to be more favourable for FCX than for the Indonesian Government. Practically speaking, from the 5 points or demands raised by both parties, FCX won on 4 points: allocating Rio Tinto's participating interest into the divestment shares, nailed-down taxation scheme, unsettled environmental responsibility, and to put Inalum in a position to build the refinery facilities. On the contrary, it can only be said that Indonesian Government gets its demand to dismiss the COW and shift it to IUPK, which placed its position better than PTFI.

The Freeport deal is a good example of how international investment renegotiations often placed the host state under dilemma, thus having a lower bargaining position *vis-à-vis* the investor, who had assumed control in the host state for years. Developing states generally faces a burden in making deals with major investors in vital natural resources sector, which is an issue that needs to be worked on to ensure legal certainty in international investment law. As such, there are many lessons to be learned from this case, which in its core is to know the strengths and weaknesses of one's own demands, to set the upper and lower limits in the negotiation, (Howard, 2015) to review the historical relationship between the parties, to understand thoroughly the alternatives to the deal, (David and James, 1991) to exercise due diligence and use all the situations surrounding the deal to make it in favour of them in the negotiation.

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