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Inordinate Chill: Bits, Non-NAFTA MITs, and Host-State Regulatory Freedom- An Indonesian Case Study

Stuart G. Gross
University of Michigan Law School

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STUDENT NOTE

INORDINATE CHILL: BITS, NON-NAFTA MITS, AND HOST-STATE REGULATORY FREEDOM— AN INDONESIAN CASE STUDY

*Stuart G. Gross**

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INTRODUCTION

On April 3, 2002, the Indonesian national newspaper, *Tempo*, reported that a group of mainly foreign-owned mining companies had threatened to launch international arbitration against the government of Indonesia (GOI).¹ The article reported that the threat was in reaction to a ban on the practice of open-pit mining in protected forests (*hutan lindung*) and listed twenty-three of the approximately one hundred and fifty mining companies with operations and/or undeveloped mining exploration contracts or “Contracts of Work” (CoWs) in protected forests.² Six months later, on October 7, the *Jakarta Post* reported that the Indonesian House of Representatives (DPR) and Ministry of Forestry had “agreed in principle” to change the forest designation in the locations of three of twenty-three companies listed in the April 3 article from “protected” to “production” forests (thereby exempting them from the ban); had clarified that three more companies’ operations had never been located within a “protection forest”; and assured the remaining fifteen companies that their situation would be assessed in due time.³ On October 10, the Minister of Forestry went further and expressed his willingness to reconsider the ban altogether.⁴

1. *Hutan Lindung Ancam Indonesia ke Arbitrase Internasional*, KORAN TEMPO, Apr. 3, 2002, available at http://www.pili.or.id/news/2002/indonesia/incl5_14b.html#Hutan_Lindung (last visited Apr. 7, 2003) [hereinafter *Hutan Lindung*]. The law in question is Undang-Undang No. 41 Tahun 1999 Tentang Kehutanan (Law No. 41, b1999 Regarding Forestry), available at http://www.menlh.go.id/berita/f_berita.htm (official) (last visited Apr. 7, 2003) [hereinafter BFL of 1999]. The offending provision is Passal (art.) 38(4), which states simply “Pada kawasan hutan lindung dilarang melakukan penambangan dengan pola pertambangan terbuka.” (“Open-pit mining is forbidden within the borders of protected forests.”) (unofficial translation by author).

2. *Hutan Lindung*, *supra* note 1.

3. Rendi A. Witular, *6 Mining Firms Can Resume Operations in Forest Areas*, JAKARTA POST, Oct. 7, 2002, available at <http://www.thejakartapost.com/Archives/Archives2.asp> (last visited Nov. 7, 2002). The article relates comments by a GOI official that one operation in dispute, Citra Palu, owned by Australian mining company Rio Tinto was denied approval to resume on the basis of local opposition. However, the article goes on to relate comments by Rio Tinto to the effect that it was no longer interested in continuing the operation anyway.

4. Moch N. Kurniawan, *Review of Mining Ban in Protected Forests Possible: Minister*, JAKARTA POST, Oct. 10, 2002, available at <http://www.thejakartapost.com/Archives/Archives2.asp> (last visited Nov. 3, 2002).

The exact relationship between mining companies' threats of international arbitration and the GOI's decision to repeal the ban cannot be conclusively determined. However, GOI statements issued directly following the threat indicate a causal connection. On June 14, 2002, the GOI Environmental Minister stated, "[t]here were investment activities before the Forestry Act was effective. If shut down, investors demand compensation and Indonesia cannot pay [sic]."⁵ He further stated that the Indonesian government had two options, allow the mining to go ahead or pay a fine.⁶ One month later, at a special hearing on the issue at the DPR only the Minister of Forestry remained firm on the ban.⁷ The other four ministers present all voiced support for allowing mining to continue in protected forests, stating their fears of international arbitration by mining companies if they did not.⁸ In addition, several other factors connect the threat to the GOI's ultimate decision.⁹

This series of events raises a number of questions and concerns. However, the most fundamental question, and the one which underlies this Note's various discussions, regards the basis of the mining companies' threat. An article by a foreign consultant in the Indonesian mining industry, Clive Aspinall, presents the best indication of an answer.¹⁰ According to Aspinall, the very low mineral discovery ratio in an average

5. *Nabiel Makarim Agrees with Mining in Protected Forests*, KORAN TEMPO, June 14, 2002 (Jaringan Advokasi Tambang (JATAM) transl.), available at <http://www.minesandcommunities.org/Action/press46.htm> (last visited Apr. 7, 2003).

6. *Id.*

7. JATAM, *Update on Indonesian Government Positions on Mining in Protected Areas 15 July 2002*, JATAM e-mail newsletter received by author July 15, 2002 (based on a report prepared by Aminuddin, a JATAM member who attended the meeting) (on file with author).

8. Those voicing support for repealing the ban were the Coordinating Minister of the Economy, the Minister of the Environment, the Minister of Energy and Natural Resources, and the Minister of Acceleration of Development of Eastern Areas. *Id.*

9. Additional elements connecting the threat and the GOI's decision include: the unprecedented speed at which the government took action on the issue after two years of inaction in the face of mining company complaints regarding the law; the exact coincidence between the companies listed in the article reporting the threat and those which have already been granted relief or which will be soon; and the timing of the reversal all weigh heavily toward the conclusion that the threat plays a significant role in the process. One of the instruments on which the threat was likely based, the ASEAN MIT, allows qualified investors to bring international arbitration if, after six months of negotiation, an agreement with the host-State has not been reached. Agreement Among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, *entered into force* Dec. 14–15, 1987, art. X(2), 27 I.L.M. 596 (1988) [hereinafter ASEAN MIT]. The time between the first report of the threat on April 3, see *Hutan Lindung*, *supra* note 1, and the report of the deal on October 7, see Witar, *supra* note 3, was just over six months.

10. See Clive Aspinall, *Indonesian Mining Risk Analysis: The Realities of Forestry Law 41/1999, Protected Forests, and Downsizing of the Regulated Mining Industry*, CLIVE ASPINALL REP. (English ed.) No. IMRA 4/2001, May 20, 2001, available at <http://www.minergynews.com/opinion/aspinal28mei01.shtml> (last visited Nov. 9, 2002).

CoW requires the holder of a CoW to invest millions to search for minerals, which can only then be recouped by employing open-pit mining techniques to extract the minerals discovered.¹¹ Thus, Aspinal continues, the ban effectively cancels the affected CoWs, by making their performance economically unfeasible for their holders.¹² Aspinal further complains that the GOI imposed the ban unilaterally without negotiating with affected companies, and that protected forest boundaries are uncertain.¹³

All CoWs concluded since the mid-1970s contain arbitration clauses. However, neither of the two claims suggested by Aspinal's comments above could have been successfully maintained on the basis of such clauses.¹⁴ These clauses refer to disputes arising out of the respective CoW, but the ban on open-pit mining in no way arises out of the CoW; it is perfectly distinct from the CoW.¹⁵ Only if CoWs contained what are known as "stabilization clauses," guaranteeing that the GOI would not enact environmental regulations which affect the mining companies' operations, could these claims have arisen out of the contract.¹⁶ In fact, however, the exact opposite is true.¹⁷ Since 1974 all CoWs have included clauses explicitly requiring that mining companies *obey* and modify their operations *so as to obey* all applicable environmental regulations.¹⁸

11. *Id.*

12. Aspinal analogizes the ban on open-pit mining to a situation where commercial fishermen are only allowed to fish in the ocean using one centimeter hooks rather than the standard five, ten, or twenty-five centimeter hooks needed to catch the "big fish," and asks "[h]ave these [CoWs] now been broken by the Republic of Indonesia? If so, is the government going to reimburse regulated CoW companies?" *Id.*

13. *Id.*

14. See Hoediatmo Hoed, Legal Aspects of Contract of Work 122-23, Presented at Indonesian Mining Conference, Jakarta, Nov. 1997, reproduced in *INDONESIAN MINING: INTO THE NEW MILLENNIUM* 115 (Indonesian Mining Ass'n 1997); see also, e.g., Contract of Work concluded December 22, 1995 between GOI and Pt. International Nickel Indonesia, art. 17 (copy in Bahasa, Indonesia, on file with author) [hereinafter Inco CoW]; Aspinal, *supra* note 10.

15. See Inco CoW, *supra* note 14, art. 17.

16. See Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 *TEX. INT'L L.J.* 215, 220 (1996).

17. CoWs do contain stabilization clauses. However, these clauses apply only to the financial terms of the contract rather than to applicable environmental regulation. See Hoed, *supra* note 14, at 125.

18. MARGUERITE MARIOUN MANSHRECK, *TRANSNATIONAL MINERAL AGREEMENTS IN THE THIRD WORLD, WITH SPECIAL REFERENCE TO INDONESIA* 31 (Menoire pour Institut Universitaire de Hautes Etudes Internationales, Geneva 1982); see also, e.g., Inco CoW, *supra* note 14, art. 22 ("Perusahaan wajib sesuai dengan undang-undang dan peraturan-peraturan lingkungan hidup . . ." [Operations must conform to environmental protection laws and regulations . . .]). As will be discussed below this clause also creates serious problems for any expropriation claim that the mining companies might mount.

The Indonesian Foreign Investment Law of 1967 (FIL of 1967), which regulates the admission and operation of all foreign investment in Indonesia, provides an even weaker basis for such a claim.¹⁹ The law gives foreign investors only a very limited right to compel arbitration to determine appropriate levels of compensation for “total nationalization/revocation of ownership rights of foreign capital enterprises.”²⁰ Under even the most liberal interpretation, the actions by the GOI do not rise to such a level. Rather, Aspinal’s comments suggest a claim alleging what has come to be known as “indirect expropriation” and a breach of fair and equitable treatment guarantees.²¹

The exact constitution of a compensible indirect expropriation or a breach of a guarantee of fair and equitable treatment resists easy or short definition and thus is discussed in detail below.²² However, at their most basic level, indirect expropriation and breaches of fair and equitable treatment claims involve an allegation of improper interference with a foreign investment by the host-States, which negatively affect the investment’s value.²³ The most likely basis for these types of claims is provisions contained in modern international investment agreements (IIAs), both multilateral investment treaties (MITs) and bilateral investment treaties (BITs). In light of the “nationalities” of the investors who most immediately benefited from the GOI’s decisions related above,²⁴ the

19. Undang-Undang No. 1 Tahun 1967 Tentang Penanaman Modal Asing (Law No. 1 of 1967 Concerning Foreign Investment) arts. 21–22 [hereinafter FIL of 1967], available at http://www.bkpm.go.id/bkpm/laws_uu1_1967.php?mode=baca&catinfo_id=1 (official) (last visited Apr. 4, 2003) (official English translation available at http://www.bkpm.go.id/bkpm/govreg_1_1967.php?mode=baca&catinfo_id=1).

20. *Id.*

21. See, e.g., RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 98–102 (1995); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 282–83 (1994); see also Aspinal, *supra* note 10.

22. See *infra* Parts III and IV.

23. For competing definitions see SORNARAJAH, *supra* note 21, at 282; DOLZER & STEVENS, *supra* note 21, at 98–102.

24. See Witular, *supra* note 3. The applicable nationality of ownership in those operations is as follows: PT Weda Bay Nikel (Maluku): majority, Weda Bay Minerals Pty Ltd (Australian) wholly owned subsidiary of Weda Bay Minerals (Canadian); PT Nusa Halmahera (Maluku): majority, Newcrest (Australian); PT Gag Nikel (Papua): majority, BHP Billiton (Australian); PT Galuh Cempaka (South Kalimantan): 40 percent, Ashton MMC (Singapore) recently sold to Rio Tinto (Australian/British); PT Jorong Barutama (Papua): majority, Banpu (Thai); PT Barisan Tropical Mining (South Sumatra): majority, Laverton Gold NL (Australian). It is also interesting to note that the four other operations specifically mentioned by name in the article as being under consideration for a similar waiver also have investors protected by the BITs or MIT in question: PT Westralian Atan Minerals (E. Kalimantan): majority, Westralian (Australian); PT Kelian Equatorial Mining (E Kalimantan): majority, Rio Tinto (Australian/British); PT Meares Soputan Mining (North Sulawesi): majority, Aurora Gold (Australian); PT Arutmin Indonesia (South Kalimantan): majority, BHP Billiton (Australian). Information gathered from the various websites of the listed companies.

specific instruments, on which the threat was based, are most likely the Australia and Indonesia Bilateral Investment Treaty (Aus-Indo BIT),²⁵ the United Kingdom and Indonesia Bilateral Investment Treaty (UK-Indo BIT),²⁶ and the ASEAN MIT.²⁷

In recent years Canadian and U.S. investors have brought a series of such claims against the North American Free Trade Agreement (NAFTA) State parties under article 1105 (fair and equitable treatment) and article 1110 (expropriation) of the NAFTA Chapter 11 investor provisions.²⁸ A number of claims brought under these provisions have demanded compensation for losses allegedly suffered by investors as the result of host-State environmental regulation, including a ban on the importation and interprovincial transport of certain types of gasoline additives,²⁹ a licensing refusal for a toxic waste dump and subsequent establishment of a nature reserve,³⁰ an export ban on PCB tainted waste,³¹ and a ban on the use of the chemical gas additive MBTE.³²

While not all of these claims have been completely successful,³³ other claimants have received significant awards on their basis either at settlement or at the hands of an arbitral panel.³⁴ The success of these

25. Agreement Concerning the Promotion and Protection of Investments, Nov. 17, 1992, Austl.-Indon., 1770 U.N.T.S. 301 (1994) [hereinafter Aus-Indo BIT].

26. Agreement for the Promotion and Protection of Investments, Apr. 27, 1976, U.K.-N.Ir.-Indon., 1074 U.N.T.S. 195 (1978) [hereinafter UK-Indo BIT].

27. ASEAN MIT, *supra* note 9, 27 I.L.M. 596. For a complete list of BITs to which Indonesia is a party, see <http://www.worldbank.org/icsid/treaties/indonesia.htm>.

28. The North American Free Trade Agreement, Dec. 17, 1993, Can.-Mex.-U.S., arts. 1105, 1110, 32 I.L.M. 605 (1993) [hereinafter NAFTA]. *See, e.g.*, Feldman v. Mexico, Award, Int'l Centre for Settlement of Inv. Disputes, ARB(AF)/99/1 (Dec. 16, 2002) [hereinafter Feldman Award]; Methanex Corp. v. United States of America, Award on Jurisdiction, UNCITRAL/NAFTA (Aug. 7, 2002) [hereinafter Methanex Award on Jurisdiction]; Pope & Talbot, Inc. v. Canada, Award on the Merits, UNCITRAL/NAFTA (Apr. 10, 2001) [hereinafter Pope & Talbot Award on Merits]; S.D. Myers, Inc. v. Canada, Award on the Merits, UNCITRAL/NAFTA (Nov. 13, 2000) [hereinafter S.D. Myers Award on Merits]; Metalclad Corp. v. United Mexican States, Award, Int'l Centre for Settlement of Inv. Disputes, ARB(AF)/97/1 (Sept. 2, 2000) [hereinafter Metalclad Award] (partially annulled in United States of Mexico v. Metalclad Corp., 2001 B.C.S.C. 0664); Pope & Talbot, Inc. v. Canada, Interim Award, UNCITRAL/NAFTA (June 26, 2000) [hereinafter Pope & Talbot Interim Award]; Ethyl Corp. v. Canada, Award on Jurisdiction, UNCITRAL/NAFTA (June 24, 1998) [hereinafter Ethyl Award on Jurisdiction]. The text of all of the NAFTA Chapter 11 decisions mentioned in this Note as well as supporting documents and similar for other Chapter 11 claims, are available at www.naftalaw.org (last visited Apr. 7, 2003).

29. *See* Ethyl Award on Jurisdiction, *supra* note 28, para. 5.

30. *See* Metalclad Award, *supra* note 28, para. 1.

31. *See* S.D. Myers Award on Merits, *supra* note 28, para. 123.

32. *See* Methanex Award on Jurisdiction, *supra* note 28, para. 22.

33. *See, e.g.*, S.D. Myers Award on Merits, *supra* note 28, para. 288; Methanex Award on Jurisdiction, *supra* note 28, para. 172.

34. *See, e.g.*, Ethyl Corp. v. Canada, Notice of Settlement, Int'l Centre for Settlement of Inv. Disputes (Sept. 10, 1997); Metalclad Award, *supra* note 28, para. 131.

claims is quite worrying to some observers, who believe that they contradict the widely held and long-standing “polluter pays” principle in international environmental law.³⁵ In addition to the strong normative objections which such people would have to this kind of reversal, many worry that just the threat of such liability will lead countries to forego needed environmental and social legislation that might negatively affect the value of foreign investment, rather than risk potential liability, which is sometimes referred to as “regulatory chill.”³⁶ In fact, such worries were among the reasons why the Multilateral Agreement on Investment (MAI) negotiations at the Organisation for Economic Cooperation and Development (OECD) ended in failure.³⁷

However, the potential for such claims, and their implications for host-State regulatory freedom are not isolated to claims under NAFTA Chapter 11 or any renewed effort to negotiate the MAI. The provisions of Chapter 11 were drawn directly from the U.S. Model BIT.³⁸ The terms of the U.S. Model BIT in turn closely parallel provisions in each of the three instruments referenced above, as well as provisions contained in over eighteen hundred BITs and another handful of MITs in force in nations all over the world.³⁹ In addition to substantive provisions, the instruments also often mirror provisions in NAFTA Chapter 11 which

35. See, e.g., INT'L INST. FOR SUSTAINABLE DEV., PRIVATE RIGHTS, PUBLIC PROBLEMS: A GUIDE TO NAFTA'S CONTROVERSIAL CHAPTER ON INVESTMENT RIGHTS 31 (2001).

36. See *id.* at 32. Developing countries like Indonesia are the most vulnerable to such claims (or threats based upon them) and have the most to lose from them. This is due to the fact that many indirect expropriation and fair and equitable treatment claims grow out of investor expectations which have been allegedly violated by changes in the host country regulatory environment. Thus, if, as is often the case in the developing world, a country has a weak regulatory environment the baseline of investor expectations will be quite low and easily violated. Of course, this same regulatory weakness creates the greatest need for new regulations. Ctr. for Int'l Envtl. Law (CIEL), *The Multilateral Agreement on Investment's Potential Impact on Environmental Law in Developing Countries* 10 (1998) (discussion draft on file with author); see also U.N. CONFERENCE ON TRADE & DEV. (UNCTAD), *TAKING OF PROPERTY* 15 (2000) (discussing the potential for governments to forego environmental regulation due to the threat of challenge by investors).

37. See, e.g., Special Comm. on the Multilateral Agreement on Inv., 1998 Leg. Sess., 3d Sess., 36th Parliament (B.C.) at 381, 388, 389, 395, 415, 424 (Oct. 15, 1998), available at http://www.legis.gov.bc.ca/cmt/36thParl/mai/hansard/t12_1015.htm (last visited Apr. 4, 2003).

38. See Charles N. Brower & Lee A. Stevens, *Who Then Should Judge?: Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHI. J. INT'L L. 193, 194 (2001); *supra* notes 28–37 and accompanying text; see also United States of America—Model Agreement, in DOLZER & STEVENS, *supra* note 21, at 241.

39. The applicable provisions in each of the three instruments closely parallel the formulation used in the U.K. Model BIT, which differs only slightly from the U.S. Model BIT. See, e.g., Great Britain—Model Agreement, arts. 2(2), 5(1), in DOLZER & STEVENS, *supra* note 21, at 228; Aus-Indo BIT, *supra* note 25, arts. II(2), VI; ASEAN MIT, *supra* note 9, arts. IV(3), VI(1); UK-Indo BIT, *supra* note 26, arts. 3, 5(1). See Int'l Centre for Settlement of Inv. Disputes website, available at <http://www.worldbank.org/icsid/treaties/treaties.htm>, for a complete list by country of concluded BITs.

provide for arbitration of disputes between investors and host-States at the International Centre for Settlement of Investment Disputes (ICSID), an autonomous international organization established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention (ICSID)).⁴⁰ Filings at ICSID have increased from a level of approximately one per year in the 1980s to one or two per month in 2001.⁴¹ Given secrecy rules governing filings and proceedings, it is difficult to know the precise nature of these claims.⁴² However, anecdotal evidence points to claims based upon BITs, alleging expropriation and/or breaches of fair and equitable treatment, with a preponderance of the latter.⁴³ Thus, it may be that we are witnessing the beginning of what William D. Rogers, senior trade and arbitration partner at Arnold & Porter, predicted would be “a flood of litigation under the BITs.”⁴⁴

A number of structural factors, which are beyond the immediate scope of this Note, may influence less wealthy countries to cave in to investor threats of arbitration, as Indonesia appears to have done here.⁴⁵

40. See NAFTA, *supra* note 28, art. 1120; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (1966) [hereinafter Washington Convention (ICSID)]. Investors and governments from States that are not party to the Washington Convention (ICSID) are still able to bring claims at ICSID under what is known as the Additional Facility. As neither Mexico nor Canada are parties to the Washington Convention (ICSID), it is under that facility that all NAFTA Chapter 11 claims heard at ICSID are brought. However, being a party to the Washington Convention (ICSID) has advantages (or disadvantages, depending on your perspective) independent of access to ICSID arbitration, particularly internalized system award review which excludes domestic court involvement, *id.* art. 52, as well as similar provisions regarding enforcement, *id.* art. 54.

41. Luke Peterson, *Change Investment Litigation, Bit by BIT*, in BRIDGES BETWEEN TRADE AND SUSTAINABLE DEVELOPMENT 5 (May 2001) (quoting speech by William D. Rogers, at the Inter-American Development Bank Conference, Oct. 26–27, 2000), available at http://www.iisd.org/pdf/2001/trade_inv_litigation.pdf (last visited Apr. 6, 2003).

42. *Id.* (stating, however, that most information points to claims that “target key areas of public policy such as water, energy, environment, and health.”)

43. In the 2002 Yearbook of International Arbitration alone, five ICSID decisions were reported. Four were based on BIT claims, of which three alleged breaches of fair and equitable treatment provisions. *Maffenzini v. Kingdom of Spain*, Award, Int’l Centre for Settlement of Inv. Disputes, ARB/97/7 (Nov. 13, 2000), reported in 27 Y.B. COM. ARB. 13 (2002) [hereinafter *Maffenzini Award*]; *A.S. Genin v. Estonia*, Award, Int’l Centre for Settlement of Inv. Disputes, ARB/99/2 (June 25, 2001), reported in 27 Y.B. COM. ARB. 61 (2002) [hereinafter *Genin Award*]; *Mihaly v. Sri Lanka*, Award, Int’l Centre for Settlement of Inv. Disputes, ARB/00/2 (Mar. 15, 2002), reported in 27 Y.B. COM. ARB. 84 (2002) [hereinafter *Mihaly Award*]. The other alleged expropriation: *Olguin v. Paraguay*, Award, Int’l Centre for Settlement of Inv. Disputes, ARB/98/5 (Aug. 8, 2000), reported in 27 Y.B. COM. ARB. 48 (2002) [hereinafter *Olguin Award*]. Compare that with just five years before when not a single ICSID case was reported in that year’s Yearbook.

44. Peterson, *supra* note 41 (quoting comments made at a conference of attorneys practicing in international arbitration).

45. Briefly, these factors include the disproportionate impact of potential multimillion dollar awards resulting from such claims, a lack of capacity among developing countries to

However, their hesitancy to fight may also be based, in part, on an inadequate understanding of the applicable law, which allows investors to inordinately influence host-State decisions through threats of arbitration that have little or no chance of success. In regard to the mining companies' threat, this at least appears to be the case. As this Note will demonstrate, the GOI could have likely beaten the mining companies' claims at a preliminary/jurisdictional phase, and certainly on the merits.

In order to show this, the Note first places the mining companies' claim in context, both to give the reader a sense of what is at stake as well to establish the basic facts necessary for the arguments which follow. The Note next discusses the object and purpose of the three instruments, distinguishing them from the object and purpose which tribunals commonly ascribe to NAFTA Chapter 11. Following this discussion, the Note examines each of the arguments which the GOI could raise to defeat the claim at a preliminary/jurisdictional level and on the merits, respectively Part III and Part IV. The Note concludes with a discussion of various treaty mechanisms which the GOI could employ proactively to lessen the potential impact of any subsequent similar threats by investors. It is hoped that this discussion will provide a guide for groups, individuals, and governments which find themselves opposing these sorts of threats, and possibly in the process contribute in a small way to dispelling some of their inordinate strength.⁴⁶

fight well-financed claimants, and structural elements like the lack of an effective appeal and predictability in adjudication. *See infra* notes 361–66.

46. It should be noted at the outset that the GOI may not be inclined to raise some of the arguments suggested, particularly those related to aspects of official corruption by GOI officials. However, the opportunity may well exist for interested individuals and organizations to participate as friends of the court or *amici*. While there has not yet been a BIT or non-NAFTA arbitration proceeding at which non-parties were allowed as friends of the court to submit briefs *amicus curiae*, or give oral evidence, the power of an arbitral tribunal to accept such briefs has recently been affirmed in the context of NAFTA Chapter 11 claims. *Methanex, Inc. v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," UNCITRAL/NAFTA, para. 47 (Jan. 15, 2001) [hereinafter *Methanex Amicus Award*]. The tribunal in this case based its ruling in large part on the absence of any provision either in NAFTA Chapter 11 or the UNCITRAL Rules which forbade them from accepting such submission, *id.* para. 24, and the grant of broad discretionary powers to the tribunal over the procedures by UNCITRAL Arbitration Rules art. 15 (1), *id.* para. 26. There is similarly no provision in any of the instant three instruments which forbids such actions by the tribunal. While all but the ASEAN MIT, which gives the parties a choice of rules to apply at arbitration, ASEAN MIT, *supra* note 9, art. X(2), require that ICSID Rules of Procedure apply rather than UNCITRAL rules, Aus-Indo BIT, *supra* note 25, art. XI(2)(b); UK-Indo BIT, *supra* note 26, art. 7(1), ICSID Rules of Procedure give as much or more discretion to an arbitral panel constituted under it. *See* ICSID BASIC DOCUMENTS: RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS, ICSID Doc./15, R. 19 (1995) [hereinafter ICSID ARBITRATION RULES] ("The Tribunal shall make orders for the conduct of the proceedings."), available at www.worldbank.org/ICSID. In the context of other international economic adjudication, the Appellate Body of the WTO has also now strongly affirmed the authority of

I. THE INDONESIAN ENVIRONMENT

The conflict between mining companies and the current GOI can be understood in some ways as a political hangover from the natural resource policies of the Suharto administration. Diplomatic estimations of the Suharto regime's natural resource policies describe it as top-down, benefiting a small group of elite in the nation's capital while routinely denying the rights and concerns of those living closest to the resources exploited.⁴⁷ The least diplomatic (or most honest, depending on your perspective) describe the system as rife with official corruption, rule breaking, and illegality which benefited a tiny minority of well-connected elite while causing enormous ecological and social disruption in resource rich areas.⁴⁸

During this period the GOI paid lip service to environmental concerns and their social implications, creating a system of regulations which looked quite impressive on paper but which were routinely ig-

WTO panels and appellate bodies to accept *amicus curiae* submissions from the general public. *See, e.g.*, WTO Appellate Body Report, Hot-Rolled Lead and Carbon Steel, WT/DS183/AB/R, para. 41 (2000). The authority to choose to hear oral submissions has not yet been affirmed in the context of NAFTA Chapter 11 or WTO dispute resolution, and it may be more difficult in light of secrecy rules which pertain to both settings. *See* UNCITRAL Arbitration Rules, art. 25(4); Agreement Establishing the Multilateral Trade Organization, Dec. 15, 1993, annex 2, Understanding on the Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 13 (1994). However, many of the same issues regarding democratic legitimacy which informed the decisions in both contexts to accept written submissions apply to oral submissions, especially in a situation like the instant one where many of the interested parties cannot be legitimately assumed to have functional literacy in any of the ICSID's official languages and for whom the issue of open-pit mining pollution is quite serious. In addition, certain aspects of the ICSID Arbitration Rules differing from the UNCITRAL or the WTO Dispute Settlement Understanding suggest the discretionary authority of a tribunal organized under them to allow such oral evidence. *See* ICSID ARBITRATION RULES, *supra*, R. 15(1) (requiring the "deliberations" of the tribunal remain secret, with no explicit similar requirement regarding *proceedings*) (emphasis added); *id.* R. 34(2) (giving the tribunal the authority at any point in the proceeding to call upon the parties to produce witnesses and experts); *id.* R. 34(1) (giving the tribunal the general authority to "judge the admissibility of any evidence adduced and of its probative value."). *But see id.* R. 32(2) (making tribunals' decisions regarding the attendance of hearings by third parties subject to the consent of both parties).

47. *See, e.g.*, WORLD BANK, INDONESIA: ENVIRONMENT AND NATURAL RESOURCE MANAGEMENT IN A TIME OF TRANSITION, at ii, 1, 24. (2001), available at [http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/Indonesia+Environmental+Report/\\$File/Indonesia+ENVNRM+Transition-entire.pdf](http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/Indonesia+Environmental+Report/$File/Indonesia+ENVNRM+Transition-entire.pdf) (last visited Apr. 7, 2003).

48. *See, e.g.*, INT'L CRISIS GROUP (ICG), INDONESIA NATURAL RESOURCES AND LAW ENFORCEMENT, ASIA REPORT NO. 29, at i-3, 22 (2000) [hereinafter ICG REPORT], available at <http://www.intl-crisis-group.org/projects/showreport.cfm?reportid=517> (last visited Apr. 7, 2003); FOREST WATCH INDONESIA-WORLD RES. INST.-GLOBAL FOREST WATCH, THE STATE OF THE FOREST: INDONESIA 23 (2002) [hereinafter STATE OF THE FOREST].

nored and/or left unenforced on the ground.⁴⁹ It also maintained strict control over the admission of foreign capital and its conduct once admitted, especially in the area of mining. The GOI's motions in the direction of environmental conservation were likely done mainly in order to appease donor demands.⁵⁰ However, the government's strict control over investment and mining reflected a concern for the maintenance of sovereignty and control over its natural wealth which has informed Indonesian natural resource policy since its creation as an independent nation state.⁵¹

Foreign mining companies were able to operate in this environment to their great benefit.⁵² Internal contradictions that permeated the system were dealt with through close relationships with central power brokers who prioritized the development of the Indonesian mining industry over all other concerns and who often had a personal stake in its success.⁵³ However, an "endemic" conflict between protection forestry and mining operations in Indonesia existed.⁵⁴ After the overthrow of the Suharto regime the forces of reform attempted to begin resolving this conflict through measures such as the ban on open-pit mining. As will be shown, the mining companies' investments were always subject to this eventuality, and by the terms of the instruments on which those investments were based, as well as laws governing all foreign investment in Indonesia, it was a risk they were forced to bear.

A. *Environmental and Social Concerns*

Indonesian forests currently are the third largest expanse in the world⁵⁵ and are home to 10 percent of the world's flowering plants, 12 percent of its mammal species, 16 percent of its reptiles and amphibians, and 17 percent of its birds.⁵⁶ In addition, estimates of the number of people depending upon them range as high as 65 million.⁵⁷ At the current rate of deforestation, 1.7 million hectares a year, all lowland forests on

49. See WORLD BANK, *supra* note 47, at 23–26, 33, 38, 44; STATE OF THE FOREST, *supra* note 48, at 27–29, 66–67.

50. See STATE OF THE FOREST, *supra* note 48, at 66.

51. See *infra* Section I.B.

52. For example, in 2001 Rio Tinto shareholders realized a net income of \$127.1 million on operations of the Grasberg mine alone. See <http://www.fcx.com/ir/index.htm> (last visited Apr. 4, 2003).

53. See WORLD BANK, *supra* note 47, at vi.

54. See *id.* at 76.

55. ICG REPORT, *supra* note 48, at 3.

56. WILLIAM THIESENHUESEN ET AL., SOURCES OF LAND TENURE CONFLICT IN INDONESIA 4 (Report commissioned by USAID-Indonesia 1997) (citing World Bank statistics).

57. STATE OF THE FOREST, *supra* note 48, at 3.

the island of Sumatra will be lost by 2005 and all lowland forests in Kalimantan by 2010, leaving only the lowland forests of Papua.⁵⁸

In open-pit mining, enormous pits, sometimes encompassing an entire mountain, are excavated to remove subsurface minerals. The process involves "massive land clearings" which usually displace and/or destroy large quantities of flora and fauna.⁵⁹ Once established, such mines create long-term, high risks for the local environment and downstream communities of severe water resource poisoning and pollution from spills, erosion, and what is known as acid rock drainage (ARD).⁶⁰ ARD is a highly toxic by-product of open-pit mining, which is created when mine tailings oxidize in holding ponds, resulting in a highly acidic solution that is deadly to all living things and virtually impossible to prevent from escaping into local watersheds.⁶¹ According to the World Bank the effects of ARD in an area "can last for decades or even for centuries."⁶²

B. Forestry Law

The source of the endemic conflict between open-pit mining and protection forestry, is the complete incompatibility of the two activities. Pursuant to the Spatial Planning Law of 1992 and Law No. 41, b1999 Regarding Forestry (BFL of 1999) forest areas in Indonesia are divided into three functional zones: conservation, production, and protected for-

58. WORLD BANK, *supra* note 47, at ii.

59. Dadan Wijaksan & Musthofid, *Open-Pit Mines Endanger Lives, Nature*, JAKARTA POST, Sept. 21, 2002, available at <http://www.thejakartapost.com/Archives/Archives2.asp> (last visited Nov. 7, 2002).

60. See WORLD BANK, *supra* note 47, at 53-79. In areas downriver from the Barisan gold and silver mine in South Sumatra, one of the six mines recently granted a waiver from the open-pit mining ban, indigenous communities and OXFAM investigators have documented an almost complete destruction of their local river environments since the mine opened in 1986. The community formerly counted on the river for a number of purposes including commercial and subsistence fishing, cooking, drinking, washing, and small-scale pan mining activities. Since the mine opened however there has been a steady drop off in the fish population of local waterways punctuated by frequent large-scale fish kills. In addition, due to mining pollution the river is now not only unsuitable for human consumption, but in fact is so toxic that it leads to severe skin rashes in people who come in contact with its water, and has even been blamed for the death of one young girl. Oxfam Community Aid Abroad, *Case 3: Barsian Gold Mine*, available at www.caa.org.au/campaigns/mining/ombudsman/2001/barisan.html (last visited Apr. 7, 2003); see also OWEN LYNCH, WHOSE RESOURCES? WHOSE COMMON GOOD? TOWARDS A NEW PARADIGM OF ENVIRONMENTAL JUSTICE AND THE NATIONAL INTEREST IN INDONESIA 40 (2002) (describing the safety hazards to local communities created by the tailings of the Freeport McMoRan Mine and the U.S. government's decision to cancel the project's political risk insurance as a result); *id.* at 68 (describing the effects on communities downstream from the Kelian Gold mine, including, elimination of drinking water source, elimination of fish production, and skin lesions, rashes, and stomach aches experienced by those who bathed in the river).

61. See WORLD BANK, *supra* note 47, at 56.

62. *Id.*

ests.⁶³ According to their functional definition, “protected forests are forests with the main function of protecting life-supporting systems for hydrology, preventing floods, controlling erosion, preventing sea water intrusion and maintaining soil fertility.”⁶⁴ The environmental risks of open-pit mining directly implicate these functions of protected forests.⁶⁵

During the Suharto regime this contradiction was dealt with essentially through a wink and a nod, whereby lands designated as protected forests were “loaned for use” (*pinjam pakai*) as mining areas with the “promise” that they would be restored and returned after their use as the location of a mine was complete.⁶⁶ The record of successful reclamations is very poor.⁶⁷ However, even if reclamation consistently occurred, the marine polluting characteristics of open-pit mining would still directly implicate the functional definitions of protected forests during their operation and afterwards.⁶⁸

In light of these dire ecological consequences, the total ban on open-pit mining in protected forests was an appropriate and logical solution to the problem. It grew out of, and reflects, the unprecedented political freedom which accompanied the fall of the Suharto regime and the corollary effort by the Indonesian people to align their country’s natural resource policies more rationally and equitably.⁶⁹ It also is directly in line with Indonesia’s international obligations,⁷⁰ and within the body of risks that foreign mining companies not only should have expected as

63. Undang-Undang No. 24 Tahun 1992 Tentang Penataan Ruang (Law No. 24 of 1992 Concerning Spatial Use Management) art. 7, available at <http://www.menlh.go.id/peraturan/uu/uu2492/> (official) (last visited Apr. 4, 2003); BFL of 1999, *supra* note 1, art. 6(1)(a)–(c).

64. BFL of 1999, *supra* note 1, art. 1(8) (translation by author).

65. See *supra* notes 59–62 and accompanying text.

66. See WORLD BANK, *supra* note 47, at 76.

67. See *id.*

68. See *id.* at 53–79.

69. See JUAN SEVE, A REVIEW OF FOREST SECTOR POLICY ISSUES IN INDONESIA 2 (July 1999) (Technical Report produced for the USAID-Indonesia and GOI collaboration, Natural Resource Management Program); STATE OF THE FOREST, *supra* note 48, at 66.

70. See U.N. Conference on Environment and Development: Convention on Biological Diversity (CBD), arts. 8, 10(d), June 1992, 31 I.L.M. 818 (1992) [hereinafter CBD] (obligation to take efforts to protect the natural environments of endangered and threatened species through the creation and maintenance of protected areas; and obligations to protect and encourage customary uses of natural resources by local communities, respectively); International Covenant on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195 (1969) [hereinafter CERD]; Committee on the Elimination of Racial Discrimination, General Recommendation XXIII: Indigenous Peoples, annex V, U.N.Doc. A/52/18 (1997) (obligations to protect the traditional land and other natural resources of indigenous minorities from environmental destruction); Convention on the Rights of the Child (CRC), Nov. 20, 1989, art. 24, 1577 U.N.T.S. 3 (1990) (obligations to protect the health of children from risks caused by environmental pollution).

operators in a heavily regulated industry, but which they in fact contracted to assume.⁷¹

C. Mining and Investment Law

Mining by foreign entities in Indonesia is a tightly regulated industry, specifically controlled by article 33 of the 1945 Constitution of Indonesia, article 8 of the FIL of 1967, and the Basic Mining Law of 1967 (BML).⁷² These various provisions reflect the GOI's jealous concern for sovereignty over its natural resources, its long-standing policy of conditional admittance and tight control of foreign investment, and explicitly assign the environmental costs and risks to mine operators. The standard terms contained in every CoW embody this.⁷³

Article 33(3) of the 1945 Constitution states that "[t]he land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people."⁷⁴ As two commentators in the mining industry observed, "this formulation goes beyond traditional affirmation," articulating, rather, a fundamental, inviolable precept of Indonesian constitutional law.⁷⁵ Thus, CoWs resemble traditional concession contracts only in some ways, such as the manner in which revenue is transferred back to the State in the form of taxation and royalties, and the level of control holders of CoWs have over operations.⁷⁶ However, in other important ways foreign mining companies act not as concessionaires but as contractors for the Republic of Indonesia (RI), which retains title to unextracted minerals, and for whom the mining companies work.⁷⁷

The BML contains basic provisions which give the Ministry of Mines the authority to regulate mining and specific provisions regarding the responsibility for CoW holders' responsibilities to compensate anyone whose resource rights they disturb or destroy. However, the basic rights and obligations of CoW holders as contractors for the State are

71. See, e.g., MANSHRECK, *supra* note 18, at 31; Inco CoW, *supra* note 14, art. 22.

72. Hoed, *supra* note 14, at 120.

73. See *id.* The basic model has been changed seven times since the first was drafted in 1967; each model is referred to by the number of its generation (1st generation, 2nd generation, and so forth). WORLD BANK, *supra* note 47, at 53.

74. Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 [Constitution of the Republic of Indonesia (1945)] art. 33(3) (unofficial translation by author) [hereinafter *INDON. CONST.*], available at <http://www.lin.go.id/detail.asp?idartcl=1311026XZA0001&by=HukReg> (official) (last visited Apr. 7, 2003).

75. MIRIAN K. OMALU & JESUS A. ZAMORA AGUIRRE, KEY ISSUES IN MINING POLICY: A BRIEF COMPARATIVE SURVEY AS A BACKGROUND STUDY ON THE REFORM OF MINING LAW 26 (1998).

76. TENGKU NATHAN MACHMUD, THE INDONESIAN PRODUCTION SHARING CONTRACT 50 (2000).

77. *Id.*

contained within the standard terms of the CoWs.⁷⁸ Since 1974 those terms have included an explicit requirement that foreign mining companies “conform” their operations to all applicable environmental regulation and conduct themselves in the manner least destructive to the environment.⁷⁹ The plain meaning of “must conform to” or “*wajib sesuai*” is prospective and it is apparent that CoW holders have understood it this way.⁸⁰ As new environmental regulations have been enacted CoW holders have conformed their conduct accordingly, at times explicitly articulating their legal responsibility to do so.⁸¹ The ban on open-pit mining was in this context simply another environmental regulation to which the CoW holders were required to conform.

This maintenance of control by the GOI and conscious assignment of risk and responsibility to the foreign investor, while particularly pronounced in the context of mining, is common to all foreign investment in Indonesia. The FIL of 1967 makes the establishment of any foreign

78. See Undang-Undang No. 11 Tahun 1967 Tentang Ketentuan-Ketentuan Pokok Pertambangan (Law No. 11 of 1967 Concerning the Basic Provisions of Mining), arts. 29, 25(1), 27(1), available at <http://www.djgsm.esdm.go.id/peraturan/uu/11,20,in,1.html> (official) (last visited Apr. 7, 2003) [hereinafter BML]. Article 29 provides: “The administration, supervision of mining activities . . . are centralized with the Minister and further regulated by Government Regulation . . . mainly involves labor safety, the supervision of the production and other activities in mining related with the public interest.” *Id.* art. 29 (unofficial translation by author, emphasis added); see FIL of 1967, *supra* note 19, art. 8(1) (requiring all mining operations by foreign entities be done in cooperation with the government “on the basis of a work contract [CoW] . . . or other form in accordance with prevailing regulations.”) (emphasis added).

79. MANSHRECK, *supra* note 18, at 31; see also, e.g., Inco CoW, *supra* note 14, art. 22. (“Perusahaan wajib sesuai dengan undang-undang dan peraturan-peraturan lingkungan hidup”) [Operations must conform to environmental protection laws and regulations]. It is important to note that while many commentators refer to the provision of *lex specialis* by CoWs which guarantee a level of stability of terms to the contract, see, e.g., Hoed, *supra* note 14, at 121; Soetaryo Sigit, *Mining Indonesia 1945–1995*, in *INDONESIAN MINING ASS’N, MINING INDONESIA: FIFTY YEARS OF DEVELOPMENT, 1945–1995* (1996), these clauses do not cancel the mining companies’ obligation to conform to environmental regulations required elsewhere by the CoW but rather protect them from changes in the financial terms of the contract. See Hoed, *supra* note 14, at 121.

80. See WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 132 (1975) (“2. to bring into agreement.”).

81. See, e.g., O. Samosir & Susanto Basu, *Challenges in Environmental Management in P.T. Inco*, in *ENVIRONMENTAL ASPECTS OF MINING IN INDONESIA* 66, 71 (Marangin Simatupang & Beni N. Wahju eds., 1994) (party to 1974 CoW describing efforts to comply with provincial waste water regulations enacted in 1990); W.M. McIntosh & D. Michaelson, *Environmental Management at PT Kaltim Prima Coal-An Overview*, in *ENVIRONMENTAL ASPECTS OF MINING IN INDONESIA*, *supra*, at 77, 82 (party to 1982 CoW stating that they were “required to comply with a range of statutory environmental requirements” followed by a list of regulations enacted in 1986, 1989, and 1990); Bruce E. Marsh, *Environmental Planning, Monitoring and Management P.T. Freeport Indonesia*, in *ENVIRONMENTAL ASPECTS OF MINING IN INDONESIA*, *supra*, at 97, 97 (P.T. Freeport Indonesia Environmental Manager, party to 1967 CoW, stating that environmental assessment documents were submitted in 1984 “to ensure compliance with these new requirements” contained in laws enacted in 1982 and 1986).

investment in Indonesia subject to specific approval by the GOI, according to the conditions it sees fit, making clear “that the *owner of the capital directly bears the risk* of the investment.”⁸² Once approved, the investment is granted a license according to a number of conditions, the license is revocable if the investment fails to comply with any of the conditions.⁸³

As Sornarajah has noted, Indonesia’s foreign investment law and others like it do not so much create a right in the host-State to regulate the establishment and conduct of foreign investment once established, but rather affirm a right that already existed.⁸⁴ According to rules of customary international law, all nations have the authority to regulate the entrance of foreign individuals into their country and to regulate the conduct of such individuals once admitted; and a similar right to regulate exists with regard to the establishment and conduct of foreign investment.⁸⁵ Thus investments made in that territory and the rights of which they consist are always subject to the right of the State to regulate their operation.⁸⁶ A law like Indonesia’s simply reaffirms these rights. Thus, even if specific terms of the CoWs, the BML, and the FIL of 1967 did not give the GOI the authority to regulate the operation of foreign mining companies in Indonesia, and in particular, the right to regulate their

82. FIL of 1967, *supra* note 19, art. 1 (assigning risk to the investor); *id.* art. 4 (giving GOI authority to determine operating area); *id.* art. 5 (giving GOI general authority to determine fields of activity open to investors and conditions which must be met for each investment admitted). This tight control over establishment, the explicit assignment of risk, and the conditionality of admission arguably reflect a more general ambivalence in the Indonesian attitude toward foreign investment that at times has viewed foreign investment as almost a necessary evil. *See* HAL HILL, FOREIGN INVESTMENT AND INDUSTRIALIZATION IN INDONESIA 28 (1988). Such ambivalence is apparent in the preamble of the FIL of 1967:

Considering . . . that efforts to overcome economic decline and further develop our economic potential should be based on the capabilities and capacities of the Indonesian people themselves; that *nevertheless* this principle of relying on our own capacity should not lead to reluctance to make use of foreign capital, technology and skill, *so long as* these are truly devoted to serving the economic interests of the people *without causing dependence on foreign countries.*

FIL of 1967, *supra* note 19, pmb1. (emphasis added).

83. *See* FIL of 1967, *supra* note 19, arts. 4, 5; *id.* art. 8 (establishing the CoW system for foreign mining); *id.* art. 18 (granting GOI authority to set duration of license); *id.* art. 26 (requiring that foreign enterprises “manage and control their enterprises in accordance with the principles of good business without harming the interests of the state.”); *see also id.* arts. 12, 18, 26, 30 (specific requirements regarding such things as manpower and participation of local capital); M. Sornarajah, *ICSID Involvement in Asian Foreign Investment Disputes*, 4 *ASIAN Y.B. INT’L L.* 69, 79–80 (1995) [hereinafter Sornarajah, *ICSID*] (specifically discussing the public law function and conditionality of Indonesian regulation of investment admission). *See generally* SORNARAJAH, *supra* note 21, at 311.

84. *See* SORNARAJAH, *supra* note 21, at 83–86.

85. SORNARAJAH, *supra* note 21, at 83–85.

86. *Id.* at 299.

environmental conduct, the GOI would still maintain this authority and the mining companies' rights would still have been subject to it.⁸⁷ Nothing in the CoWs changes that situation; rather they explicitly maintain it.⁸⁸

II. THE INTERNATIONAL ENVIRONMENT

As the foregoing discussion demonstrated, under their respective CoWs, the mining companies did not have any rights that were violated by the change in forestry law and thus it would seem no basis for their threat of arbitration against the GOI. Under Indonesian contract law, which governs CoWs, this is certainly the case.⁸⁹ On the basis of provisions contained in the UK-Indo BIT, the Aus-Indo BIT, and the ASEAN MIT, it is as well. The following Sections will attempt to show this, demonstrating not only how the GOI could have beaten any claim by the mining companies on the merits, but also how it could have sought to disqualify some or all of the six claims at a preliminary/ jurisdictional phase. Prior to this discussion, however, the Note will examine the "object and purpose" of the three treaties in order to place the subsequent discussions of each instrument's provisions, the occasional vague wording of which may sometimes suggest a more teleological approach.⁹⁰

A. Controlling Purpose

It is common for NAFTA Chapter 11 tribunals to begin their analysis with a citation to NAFTA article 102, which directs parties to interpret and apply NAFTA's provisions in light of its objectives, including, *inter alia*, "increas[ing] substantially investment opportunities

87. See *supra* notes 78–80 and accompanying text (discussing the specific provisions through which the GOI retained this right).

88. See MANSHRECK, *supra* note 18, at 31; see also, *e.g.*, Inco CoW, *supra* note 14, arts. 22–23.

89. See Hoed, *supra* note 14, at 120; see also Inco CoW, *supra* note 14, art. 27.

90. See DOLZER & STEVENS, *supra* note 21, at 99 (discussing the intentionally vague wording of BIT expropriation clauses); see also Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331 (1980), art. 31(1) [hereinafter VCLT]. The VCLT is generally considered to embody customary international law rules of treaty interpretation. See, *e.g.*, Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS/SB/R, WT/DS11/AB/R, at 10–11 (adopted Nov. 1, 1996). Thus, while not all the parties to the instant three instruments are party to the VCLT, it forms an authoritative source of interpretive guidelines for any tribunal constituted to adjudicate a dispute based on these instruments. See Washington Convention (ICSID), *supra* note 40, art. 42(1) (requiring ICSID tribunals to apply international law where applicable to decide disputes before them).

in the territories of the parties.”⁹¹ These tribunals self-consciously do so in order to follow the Vienna Convention on the Law of Treaties (VCLT) article 31 directions to interpret a treaty’s terms in “their context and in light of its object and purpose” as well as specific provisions of NAFTA article 102 directing them to do so.⁹² These decisions play an important part in the subsequent discussions of expropriation and fair and equitable treatment guarantees contained in the instant three treaties. While, as will be demonstrated below, the mining companies’ claims would fail even under the rules articulated in this context, it is important to distinguish the foregoing object and purpose ascribed by tribunals to NAFTA Chapter 11 from the object and purpose of the instant three treaties.⁹³ It will be shown that in contrast to NAFTA Chapter 11, the instant three instruments embody an object and purpose beyond simply encouraging and protecting foreign investment for its own sake. Rather, the object and purpose of the instant three instruments is to encourage and protect foreign investment *so as to* increase each country’s prosperity. In the case of Indonesia, this involves a strong retention of control over the admission and conduct of foreign investment once within its territory.⁹⁴

Unlike the NAFTA, none of the three instruments contain provisions explicitly directing interpreters to certain objects and purposes.⁹⁵ It is, therefore, appropriate to determine the object and purpose of each instrument through an independent examination of the each instrument’s respective terms.⁹⁶ Dolzer and Stevens suggest focusing on the

91. NAFTA, *supra* note 28, art. 102; *see, e.g.*, S.D. Myers Award on Merits, *supra* note 28, paras. 197–98; Metalclad Award, *supra* note 28, para. 70; Ethyl Award on Jurisdiction, *supra* note 28, para. 56.

92. VCLT, *supra* note 90, art. 31(1); NAFTA, *supra* note 28, art. 102; *see, e.g.*, S.D. Myers Award on Merits, *supra* note 28, paras. 201–02; Metalclad Award, *supra* note 28, para. 70; Ethyl Award on Jurisdiction, *supra* note 28, para. 56.

93. Whether or not the emphasis on this provision is well placed is certainly subject to debate. Other provisions in the preamble to the NAFTA, for example, speak of encouragement of workers’ rights and environmental protection. NAFTA, *supra* note 28, pmb1. *See also infra* Part IV, for a discussion of the decisions by NAFTA Chapter 11 tribunals.

94. *See* Sornarajah, *ICSID*, *supra* note 83, at 79 (discussing the object and purpose of the FIL of 1967: “It acts in the public interest to ensure that foreign investment is attracted to Indonesia but that the foreign investment so attracted is of the right variety and would mesh with the development goals of the Indonesian state.”).

95. *See* NAFTA, *supra* note 28, art. 102. *But see* Aus-Indo BIT, *supra* note 25; ASEAN MIT, *supra* note 9; UK-Indo BIT, *supra* note 26.

96. *See* VCLT, *supra* note 90, art. 31. Article 31 provides: “1. A treaty shall be interpreted in good faith in accordance with the meaning to be given to the terms of the treaty in their context and in light of its object and purpose. 2. The context for the purposes of the interpretation shall comprise . . . the text, including its preamble and annexes . . .” *Id.* art. 31.

terms of a BIT's preamble to fulfill this inquiry.⁹⁷ However, the standardization of many of the terms of these instruments, including the terms of their preambles, suggests a more nuanced interpretation, one which examines the text as a whole, paying particular attention to the terms which vary from standard formulations.⁹⁸ It is not suggested that these boilerplate recitations do nothing to elucidate the object and purpose of the treaties. However, as Sornarajah points out, such standardized prefatory statements may fail to capture the true nature of the deal they preface, and possibly may even obscure it.⁹⁹ Unique terms, on the other hand, show a particular, shared object and purpose powerful enough to cause unprecedented derivation. Therefore, prior to analyzing each treaty's respective preambles, the Note will examine the unique provisions by which each treaty limits the scope of their respective provisions.

97. See DOLZER & STEVENS, *supra* note 21, at 20.

98. See, e.g., KENNETH J. VANDELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 32 (1992) (discussing the strict standardization of terms with which more wealthy countries demanded negotiation of BITs with their less wealthy trading partners). Compare UK-Indo BIT, *supra* note 26, pmb., with Great Britain—Model Agreement, pmb., available in DOLZER & STEVENS, *supra* note 21, at 228. Excluding the addition of the "Republic of Indonesia" in the former, the terms are exactly the same.

99. SORNARAJAH, *supra* note 21. Sornarajah suggests that the deal they obscure is of essence an inequitable sacrifice of sovereignty by the less wealthy State party to the agreement who will generally occupy the position of capital importer. *Id.* He further points out the asymmetry of the circumstances that often accompanied the conclusion of BITs, mentioning even instances where "bilateral investment treaties are secured by . . . threats of trade sanctions." *Id.* at 238; see also VANDELDE, *supra* note 98, at 32–33 (describing the differences in intended purposes between the U.S. and its less wealthy treaty partners, the former disavowing any purpose to promote investment which the latter usually saw as the chief reason for concluding them.) It is interesting to note that Indonesia does not have a BIT with the United States. See <http://www.worldbank.org/icsid/treaties/indonesia.htm> (last visited June 9, 2003) (listing Indonesia's bilateral treaties). For an interesting analysis of why developing countries may have agreed to inequitable agreements see Andrew Guzman, *Explaining The Popularity of Bilateral Investment Treaties: Why LDCs Sign Treaties that Hurt Them*, 38 VA. J. INT'L L. 639 (1997), available at <http://www.jeanmonnetprogram.org/papers/97/97-12.html> (describing the process in terms of what is known in economic literature as a "prisoner's dilemma"). But see, e.g., Mark S. Bergman, *Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty*, 16 N.Y.U. J. INT'L L. & POL. 1, 3 (1983) (suggesting somewhat paradoxically, that poorer countries conclude BITs containing provisions at odds with their multilateral declarations in support of the New International Economic Order in order to assist developed countries in creating stronger international law protections of foreign investment which the New International Economic Order threatened).

1. Scope of the Agreements

In contrast to most or all U.S. BITs and the NAFTA Chapter 11,¹⁰⁰ the instant three treaties do not provide investors national treatment regarding the establishment of investments.¹⁰¹ Rather, provisions in all three explicitly maintain the authority of the Indonesian government to grant, deny, and/or condition the entrance of foreign investments and limit the scope of their respective protections to investments so admitted.¹⁰²

In the case of the Aus-Indo BIT and UK-Indo BIT, this is done by specifically limiting the scope of the respective protections to investments that "have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it."¹⁰³ The Aus-Indo BIT goes one step further, actually limiting the definition of covered investments to those which are "admitted . . . in conformity with the laws, regulations and investment policies of the [host-State] applicable from time to time."¹⁰⁴ As U.N. Conference on Trade and Development (UNCTAD) noted, speaking specifically about these provisions of the Aus-Indo BIT, "[t]his formula ensures that full play is given to the regulatory laws of a host-state despite the treaty so that only foreign investment which conforms with legislation is entitled to protection."¹⁰⁵

The significance of these limitations of scope is increased when viewed in light of the respective BIT practices of the U.K. and Australia. While virtually all of the provisions contained within the Aus-Indo BIT and UK-Indo BIT are exactly the same as, or contain only minor difference from, other BITs concluded by each respectively, the scope provisions differ significantly.¹⁰⁶ Most other BITs concluded by the UK

100. See VANDEVELDE, *supra* note 98, at 71-72; see also NAFTA, *supra* note 28, art. 1102; United States—Model Agreement, art. II(1), *supra* note 38, at 240.

101. Aus-Indo BIT, *supra* note 25; ASEAN MIT, *supra* note 9; UK-Indo BIT, *supra* note 26.

102. Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1).

103. The specific formulation quoted is from the UK-Indo BIT, *supra* note 26, art. 2(1). However the language of the Aus-Indo BIT is almost exactly the same. Aus-Indo BIT, *supra* note 25, art. III(1)(a) (limiting protection to investments "which have been granted admission in accordance with the Law No. 1 of 1967 concerning Foreign Investment or with any law amending or replacing it").

104. Aus-Indo BIT, *supra* note 25, art. I(1)(a).

105. UNCTAD, *supra* note 36, at 36; see also Somarajah, *ICSID*, *supra* note 83, at 79.

106. See, e.g., Aus-Indo BIT, *supra* note 25; UK-Indo BIT, *supra* note 26; Great Britain—Model Agreement, *supra* note 39; Australia and Philippines Agreement on the Reciprocal Promotion and Protection of Investments, Nov. 5, 1996, 1945 U.N.T.S. 143; Aus-

or Australia not only lack a clause as particular as that contained in their respective agreements with Indonesia, but in fact do not limit the scope of their protections at all beyond a broad definition of investment which is common to most BITs.¹⁰⁷ It thus seems likely that the inclusion of these provisions was a condition of Indonesia's consent. They also seem to embody the parties' purpose to craft a deal which, while protecting and encouraging investment, would do so in a manner that allowed Indonesia to tightly control the establishment and conduct of foreign investment to ensure that admitted investment furthered rather than frustrated its greater goals, such as the maintenance of a healthy environment for its people.¹⁰⁸ Various provisions in each treaty which make clear that the operation of investments once established would be regulated by Indonesian law further this conclusion.¹⁰⁹

The ASEAN MIT goes even further. Article II(1) requires specific approval in writing by the host-State of individual investments in order for it to be covered by the treaty's provisions.¹¹⁰ To quote UNCTAD again, "[t]his formula ensures that a State decides on an *ad hoc* basis whether foreign investment is so desirable that it be given treaty protection."¹¹¹ Treaty protection is thereby made expressly conditional and thus instrumental. Even if Indonesia granted the investment in question admission under the FIL of 1967, it could use the possibility of protection under the ASEAN MIT as a bargaining chip with foreign investors to extract additional concessions from them. The text of the treaty, in

tralia and Viet Nam Agreement on the Reciprocal Promotion and Protection of Investments, Mar. 5, 1991, 1661 U.N.T.S. 226; Australia and Romania Agreement on the Reciprocal Promotion and Protection of Investments, June 21, 1993, 1819 U.N.T.S. 413; Australia and China Agreement on the Reciprocal Encouragement and Protection of Investments, Sept. 26, 1988, 1514 U.N.T.S. 81.

107. See references cited *supra* note 106.

108. See Sornarajah, *ICSID*, *supra* note 83, at 79–80.

109. See, e.g., Aus-Indo BIT, *supra* note 25, art. II(3) ("A party shall, *subject to its laws*, accord within its territory protection and security to investments") (emphasis added); *id.* art. X ("Each party shall, with a view to promoting the understanding of its laws that pertain to or affect investments in its territory by investors of the other Party, make such laws public and readily accessible."). As Robert Thompson, former Secretary General of the International Chamber of Commerce Court of Arbitration, observed, article X "shows that those who drafted the Treaty had already thought that subsequent laws might at any time incidentally affect in many ways the actual operation of investment activity by the investors." E-mail from Robert Thompson, Former Secretary General of International Chamber of Commerce Court of Arbitration, to Stuart Gross (July 30, 2002, 11:43 AM EST) (on file with author). There would be no need to include a guarantee of transparency of host country laws that affect investment if the parties to the treaty did not intend to guarantee the host country's authority to enact such laws. *Id.*

110. ASEAN MIT, *supra* note 9, art II(1).

111. UNCTAD, *supra* note 36, at 36.

fact, makes this explicit, allowing the host-State the authority to grant or deny an investment protection “upon such conditions as it deems fit for the purposes of this Agreement.”¹¹² As this formula and other provisions suggest, the “purpose of this agreement” was to enable host countries to retain control over foreign investment, encouraging only investment which fulfilled its specific goals of increased prosperity and development, and controlling its conduct to make sure it does so.¹¹³ As in the case of the Aus-Indo BIT and the UK-Indo BIT this conclusion is reinforced by provisions elsewhere in the agreements which state that all admitted investments “shall . . . be governed by the laws and regulations of the host country.”¹¹⁴

2. The Preambles

The respective preambles of the three instruments differ from one another to greater and lesser extents, but have in common an overriding instrumental approach to the promotion and protection of investment.¹¹⁵ Each lists investment promotion and protection of investment as underlying principles, but in wording that expressly confirms the instrumental role of these “principles” in the pursuit of larger “objectives,” including the increased “prosperity” of the respective parties.¹¹⁶ The Supreme Court of British Columbia, in a review of a NAFTA Chapter 11 tribunal decision, recently emphasized the importance of this distinction.¹¹⁷ The Court annulled a portion of the tribunal’s holding which was based on a misinterpretation of the “principle” of transparency in NAFTA as rather an “object” of NAFTA in and of itself.¹¹⁸ The court made clear that as a principle, transparency

112. ASEAN MIT, *supra* note 9, art. II(1).

113. *Id.* art. II(1); *see also id.* pmb.

114. *Id.* art. III(1).

115. Aus-Indo BIT, *supra* note 25, pmb.; ASEAN MIT, *supra* note 9, pmb.; UK-Indo BIT, *supra* note 26, pmb.

116. Aus-Indo BIT, *supra* note 25, pmb. (recognizing that “pursuit of these objectives [which include ‘fostering of prosperity in both countries’] *would be facilitated by* a clear statement of principles and measures relating to the promotion and protection of investments . . .”) (emphasis added); ASEAN MIT, *supra* note 9, pmb. (“Recognizing that an agreement on the promotion and protection of such investment *will contribute to the furtherance* of the above mentioned purposes” which include “to increase prosperity in their respective territories”) (emphasis added); UK-Indo BIT, *supra* note 26, pmb. (“Recognising that the encouragement and reciprocal protection under international agreement of such investments . . . *will increase* prosperity in both states”) (emphasis added).

117. United Mexican States v. Metalclad Corp., 2001 B.C.S.C. 0664, paras. 70–71 (2001).

118. *Id.*

was only a means by which the parties were to seek the achievement of actual objectives and so could not be employed by tribunals seeking to interpret the agreement's object and purpose.¹¹⁹

Similarly, it would be a mischaracterization to state that the object and purpose of the instant three treaties is to promote and protect investment. Their purpose rather is to increase the mutual prosperity of the parties, and investment protection and encouragement is a principle meant to achieve this goal.¹²⁰ The Aus-Indo BIT and UK-Indo BIT phrase these objectives in only very general terms.¹²¹ The ASEAN MIT's preamble, on the other hand, goes into greater detail, emphasizing not only the increased flow of financial capital, but also intellectual capital between the countries and the greater goal of increasing industrialization in the countries party to the instrument.¹²²

Neither the UK-Indo BIT preamble nor the ASEAN MIT preamble contain much beyond this articulation of the principle of investment protection and promotion in order to achieve the goal of greater mutual prosperity.¹²³ The preamble of the Aus-Indo BIT, however, contains two additional provisions which reinforce its object to retain host-State authority over the establishment and control of foreign investment.¹²⁴ It states that the creation of "favorable conditions for investments by the investors of one Party in the territory of the other Party" is to be accomplished "on the basis of sovereign equality," further acknowledging that investments "would be made within the framework of the laws of the [host-State]."¹²⁵ Both of these statements strongly evince an object and purpose to maintain the sovereign control of host-States over the establishment and conduct of foreign investment so as to assure their compatibility with its goals of increased prosperity.¹²⁶ This underlying object and purpose underlies all three treaties and should therefore inform any interpretation of their respective terms.¹²⁷

119. *Id.*

120. See SORNARAJAH, *supra* note 21, at 238 (raising the possibility that on the basis of such provisions, only investments which actually increased the prosperity or "economic development of the capital-receiving state" should be eligible for protection).

121. See Aus-Indo BIT, *supra* note 25, pmb.; UK-Indo BIT, *supra* note 26, pmb.

122. See ASEAN MIT, *supra* note 9, pmb.

123. See *id.*; UK-Indo BIT, *supra* note 26, pmb.

124. See Aus-Indo BIT, *supra* note 25, pmb.

125. *Id.*

126. *Id.*

127. VCLT, *supra* note 90, art. 31(1).

III. JURISDICTIONAL ISSUES—*RATIONE MATERIAE* AND *RATIONE PERSONAE*¹²⁸

The jurisdiction of an ICSID tribunal to hear a claim by an investor under any of the three instruments (and thus the mining companies' rights to bring that claim) is conditioned on the consent of both parties and the fulfillment of two categories of fundamental requirements, *ratione personae* and *ratione materiae*.¹²⁹ The provisions of the Washington

128. The following Part will draw distinctions between the respective procedural rights that investors have under each of the three instruments, demonstrating the additional difficulties investors might face depending on which instrument was utilized to invoke arbitration. It might be argued that these distinctions are irrelevant in light of the Most Favored Nation (MFN) clauses contained in each treaty, which an investor might attempt to invoke as a basis for claiming rights to the more favorable procedural treatment contained in another BIT. See Aus-Indo BIT, *supra* note 25, art. IV; ASEAN MIT, *supra* note 9, art. IV(2); UK-Indo BIT, *supra* note 26, art. 4. A recent ICSID tribunal has, in fact, held that an MFN clause contained in the BIT at issue granted the investor the right to the greater procedural rights contained in another BIT concluded by the host country. *Maffenzini Award*, *supra* note 43. However, the MFN clause at issue in *Maffenzini* referred to "all matters subject to this Agreement." *Id.* para. 50. The tribunal distinguished this formulation from those in the other BITs concluded by Spain, which, like the MFN clauses of each of the instant three instruments, refer to MFN in the *treatment* of investors and investments. *Id.*; see Aus-Indo BIT, *supra* note 25, art. IV; ASEAN MIT, *supra* note 9, art. IV(2); UK-Indo BIT, *supra* note 26, art. 4. Such clauses, according to the *Maffenzini* tribunal, manifested "of course a narrower formulation." *Maffenzini Award*, *supra* note 43, para. 50. The plain meaning of these terms read in light of the instruments' object and purpose, described *supra* Part II, to encourage and protect certain types of investment, while maintaining tight government control over the types of investments and investors which are admitted, militates toward a "narrower formulation." *Id.* Thus they guarantee MFN treatment only in regard to the substantive treatment of investments and investors, not the procedural rights which determine the manner in which those rights are invoked. The *Maffenzini* tribunal, in fact, intimated as much, holding that, even in the context of a broadly formulated clause like the one before it, certain public policy grounds would restrict the freedom of the tribunal to extend MFN to procedural rights, particularly if it appeared that the provisions that would thereby be substituted were fundamental to the consent of the State against whom its replacement would be enforced. *Id.* at 52. In the instant situation the provisions which would most likely be affected relate to the determination of whether or not Indonesia has preemptively consented to arbitration through the provisions in the agreement, see *infra* notes 210–30, and the definition of an investor covered by the agreement, see *infra* notes 139–52 and accompanying text. Both sets of provisions go to the heart of the extent of the obligations for which Indonesia has bargained, while the second additionally implicates the instruments' object and purpose of controlled investment admission and protection. See *supra* Part II. Thus, both were undoubtedly material to Indonesia's respective decisions to consent to the agreements, and so under even a broad formulation should not be subject to MFN treatment.

129. See CHRISTOPHER H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, at 89, para. 3 (2001); see also Washington Convention (ICSID), *supra* note 40, art. 25(1) ("The Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."); *Goetz v. Rep. of Burundi*, Award, Int'l Centre for Settlement of Inv. Disputes, ARB/95/3 (Feb. 10, 1999), reported in 26 Y.B. COM. ARB. 24, para. 30 (2001) [hereinafter *Goetz Award*] (quoting Executive Directors of

Convention (ICSID) in combination with the specific terms of the applicable instrument determine the constitution of these requirements.¹³⁰ *Ratione personae* is roughly equivalent to personal jurisdiction, and requires that the State party be an ICSID Contracting Party and that the investor qualify as a “national” of a non-host-State ICSID Contracting Party.¹³¹ *Ratione materiae* refers basically to the subject matter jurisdiction of the tribunal and can be broken down into two categories: qualification of the investment to which the claim relates and qualification of the dispute on which the claim is based.¹³² The final and fundamental condition is that parties have consented to arbitration.¹³³ If any of these conditions are unmet, the jurisdiction of the tribunal will be inadequate and the complaint dismissed.¹³⁴

In terms of the mining companies’ claims, *ratione personae* would not be an issue regarding Indonesia, because it is an ICSID Contracting Party.¹³⁵ However, with regard to investor qualification, issues of *ratione*

the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, para. 23, Doc. ICSID/2). Paragraph 23 provides:

The consent of both parties is an essential condition for the jurisdiction of the Centre, but it is insufficient on its own to place a dispute under the jurisdiction of the Centre. In conformity with the aims of the [Washington] Convention [(ICSID)], the jurisdiction of the Centre is further limited by the nature of the dispute and the parties.

Id.; Mihaly Award, *supra* note 43, para. 14 (parsing the first clause of article 25(1) into, “(i) that there was a *dispute*; (ii) that the dispute was a *legal* one; (iii) that the dispute *arises directly* and not indirectly out of an investment; and (iv) that there was an *investment* out of which a legal dispute has directly arisen.”). Note that both the Aus-Indo BIT, *supra* note 25, art. XI(2)(a), and the ASEAN MIT, *supra* note 9, art. X(2), provide for options of dispute settlement in addition to ICSID arbitration. In the case of the Aus-Indo BIT, this consists of a right to submit to the host-State’s judicial system, Aus-Indo BIT, *supra* note 25, art. XI(2)(a), while the ASEAN MIT provides for a range of alternative arbitration mechanisms. ASEAN MIT, *supra* note 9, art. X(2). As a thorough survey of all the eventualities which could result in this context is beyond the scope of this Note, I will not address them except where it is necessary for the arguments raised.

130. See Washington Convention (ICSID), *supra* note 40, art. 25(1); Aus-Indo BIT, *supra* note 25, arts. I(1)(a), III(1)(a), III, XI(1)-(2); ASEAN MIT, *supra* note 9, arts. I(3), II, X(1)-(2); UK-Indo BIT, *supra* note 26, arts. 1(a), 2, 7(1).

131. SCHREUER, *supra* note 129, at 89, para. 3.

132. *Id.*

133. *Id.*

134. See Goetz Award, *supra* note 129, para. 30; Mihaly Award, *supra* note 43, para. 13. Note, however, that under limited circumstances parties and or claims which do not meet these requirements (except of course the consent requirement) can bring a claim under what is known as the “Additional Facility” of ICSID. See SCHREUER, *supra* note 129, at 92–94, paras. 10–14. Because neither Mexico nor Canada are parties to the Washington Convention (ICSID), it is under the Additional Facility that NAFTA Chapter 11 claims are brought. See ICSID website, at <http://www.worldbank.org/ICSID/constate/constate.htm>, for a list of contracting parties.

135. See ICSID website, at <http://www.worldbank.org/icsid> (last visited June 9, 2003).

personae could be dispositive in two of the six investors' claims. Regarding *ratione materiae*, a similarly mixed bag exists. The investment qualification leg provides a potential basis for dismissal of all six claims; the other leg, qualification of the dispute, likely would not be an issue. Finally, in light of the respective wording of the three instruments, Indonesia's consent would only be an issue regarding the UK-Indo BIT, but in cases brought under it the issue would be dispositive.¹³⁶

A. *Ratione Personae*

1. Investor Qualification

All three treaties make the provision of their respective protections and the procedural mechanisms for their enforcement available only to qualified investors of the other State parties.¹³⁷ However, significant differences in the manner in which each instrument defines qualified juridical persons has important implications for which of the mining companies will be able to invoke their respective provisions, and under what conditions.¹³⁸

a. UK-Indo BIT

The UK-Indo BIT defines juridical persons in accordance with traditional rules of customary international law, looking only to the place of a company's legal incorporation or constitution for definition of its nationality.¹³⁹ Thus, in our situation Rio Tinto plc, the British incorporated

136. See UK-Indo BIT, *supra* note 26, art. 7(1).

137. See Aus-Indo BIT, *supra* note 25, art. III; ASEAN MIT, *supra* note 9, art. II; UK-Indo BIT, *supra* note 26, art. 2.

138. See Aus-Indo BIT, *supra* note 25, art. I(b)(ii)(B), ASEAN MIT, *supra* note 9, art. I(1)-(2); UK-Indo BIT, *supra* note 26, art. 1(c)-(d). Of the six companies, one—Banpu, majority owner of PT Jorong Barutama—directly qualifies as an investor under the ASEAN MIT. See ASEAN MIT, *supra* note 9, art. I(2). Three companies—Newcrest, majority owner of PT Nusa Halmahera, BHP Billiton, majority owner of PT Gag Nikle, and Laverton Gold NL, majority owner of PT Jorong Barutama—directly qualify under the Aus-Indo BIT. See Aus-Indo BIT, *supra* note 25, art. I(1)(b)(ii). One company, Rio Tinto plc indirectly the 40 percent owner of PT Galuh Cempaka, qualifies under the UK-Indo BIT. See UK-Indo BIT, *supra* note 26, art. 1(d)(i). However, due to other jurisdictional/preliminary issues Rio Tinto plc likely would not be able to claim the UK-Indo BIT's protections for the investment in question. See *infra* notes 193–94, 228–30 and accompanying text. Two companies—Rio Tinto LTD, forty percent owner of PT Galuh Cempaka and the wholly owned Australian subsidiary of British Rio Tinto plc, and Weda Bay Pty LTD, majority owner of PT Weda Bay Nikel and the wholly owned Australian subsidiary of Canadian Weda Bay Minerals—provisionally qualify as investors under the Aus-Indo BIT. Such protection is subject to GOI and the Australian government consultation “with a view to deciding not to extend the rights and benefits of this Agreement to such investor.” See Aus-Indo BIT, *supra* note 25, art. I(1)(b)(ii)(B), III(3); see also *infra* notes 148–52 (discussing this provision and its potential effect on the latter two investors' claims).

139. UK-Indo BIT, *supra* note 26, art. 1(d); see SORNARAJAH, *supra* note 21, at 246.

parent company of the Australian company Rio Tinto LTD (40 percent owner PT Galuh Cempaka) qualifies as an investor under the UK-Indo BIT.¹⁴⁰

b. ASEAN MIT

The ASEAN MIT, on the other hand, requires both legal incorporation in a State party to the convention and that the place of incorporation be "wherein . . . effective management is located."¹⁴¹ Thus, only Banpu, a company incorporated and headquartered in Thailand, qualifies under the ASEAN MIT.¹⁴² None of the other six companies, even if they established a subsidiary in an ASEAN State, would qualify unless they also transferred effective management of the operations of the subsidiary to the State of incorporation as well. This more restrictive formulation was likely chosen to protect ASEAN MIT State parties from claims by investors attempting to qualify for protection by merely establishing a shell corporation in a signatory State. A technique Robert Thompson accurately described as the "corporate equivalent of 'flags of convenience.'"¹⁴³

140. Note, however, significant obstacles exist regarding any claim by Rio Tinto plc, both with regard to investment qualification, and the GOI's consent. *See infra* Sections III.B.1, III.C.

141. ASEAN MIT, *supra* note 9, art. I(2).

142. *See id.*

143. E-mail from Robert Thompson, Former Secretary General of International Chamber of Commerce Court of Arbitration, to Stuart Gross (July 17, 2002, 5:27 A.M. EST) (on file with author). An informative example of this sort of strategy is provided by current efforts by Bechtel to hold the Bolivian government liable for losses sustained when a week of pitched street battles brought on by the company's decision to raise municipal water prices forced the company to withdraw from a concession contract to run the municipal water system of Cochabamba, Bolivia. Bechtel is a major infrastructure company incorporated in the United States, headquartered in San Francisco with operations all over the world. The United States does not have a BIT with Bolivia. The operations in Chobamba were not, however, directly controlled by Bechtel but rather were operated by a company named Aguas del Tunari, which at the time of the contract was incorporated in the Cayman Islands and was 55 percent owned by a wholly owned subsidiary of Bechtel. However, one month later Bechtel sold half of its share to another party, and Aguas del Tunari changed its place of incorporation to Holland, becoming part of a Dutch shell company named International Water Holding B.V. The extent of the company's presence in Holland is a postbox. As a result of the many maneuvers and the wording of the Bolivian-Dutch BIT (which is similar to that of the UK-Indo BIT article 1(d)(i)), Bechtel, which is now a minority but still controlling shareholder in the concern, is able to employ in its claim against the government of Bolivia a BIT concluded between Bolivia and the Netherlands even though its connections to the Netherlands are purely pro forma. *See Bechtel vs. Bolivia: Bechtel's Legal Action Against Bolivia*, PAC. NEWS SERV., Dec. 19, 2001, available at <http://www.democracyctr.org/bechtel/index.htm> (last visited Apr. 4, 2003).

c. Aus-Indo BIT

The Aus-Indo BIT takes a mixed and rather complicated approach. Qualified Australian juridical persons are defined both in terms of place of incorporation as well as in terms of ownership and control, with (possibly impotent) qualifications placed on the former.¹⁴⁴ Under article I(1)(b)(ii)(B)(ii), if a juridical person is owned and controlled by an Australian individual or another Australian juridical person, it qualifies as an Australian investor, irrespective of the laws under which it is incorporated.¹⁴⁵ Under article I(1)(b)(ii)(B)(i), a juridical person can qualify solely on the basis of incorporation under the laws of Australia; however, this is qualified by article III(3) which states that when a juridical person incorporated in Australia “is owned or controlled by a citizen or entity of any third country the parties may consult with a view to deciding not to extend the rights and benefits of this Agreement to such investor.”¹⁴⁶

The effect of this very unusual wording is difficult to determine exactly. While the phrase “with a view to deciding not to extend” seems to create a presumption against the extension, it is arguable that in the absence of any decision by the parties to the contrary, the investor would remain provisionally qualified.¹⁴⁷ This may be the result of sloppy (or clever) drafting, but it seems to allow Australia to stonewall any attempt by Indonesia to deny protection to non-Australian investors employing Australian “flags of convenience.”¹⁴⁸ This could have immediate implications for the current situation.

Newcrest of Australia, BHP Billiton of Australia, and Laverton Gold NL of Australia all easily qualify under either formulation as they are all incorporated in Australia and are owned and controlled by Australians.¹⁴⁹ However, Weda Bay Minerals Pty. Ltd. and Rio Tinto LTD are both wholly owned Australian subsidiaries of non-Australian companies, respectively the Canadian firm Weda Bay Minerals and the British firm Rio Tinto plc. Canada does not have an investment agreement with Indonesia and the UK-Indo BIT, as will be discussed below, likely does not provide its investors with an automatic right to arbitration.¹⁵⁰ Thus, a “decision not to extend the rights and benefits” of the Aus-Indo BIT by

144. Aus-Indo BIT, *supra* note 25, art. I(1)(b)(ii)(B).

145. *Id.* art. I(1)(b)(ii)(B)(ii).

146. *Id.* art. III(3).

147. *See id.*

148. E-mail from Robert Thompson, *supra* note 143.

149. *See* Aus-Indo BIT, *supra* note 25, art. I(1)(b)(ii)(B).

150. For a list of States with whom Indonesia has concluded BITs, see the ICSID website, at <http://www.worldbank.org/icsid/treaties/indonesia.htm>. See *infra* notes 228–30 and accompanying text for a discussion of Indonesia’s manifestation of consent (or lack thereof) to arbitrate in the UK-Indo BIT.

the GOI and Australia would effectively preclude both of their claims.¹⁵¹ While, on the other hand, a refusal by Australia to agree to such a decision might allow both parties to invoke the protections of a treaty from which they were arguably not meant to benefit.¹⁵²

B. *Ratione Materiae*

Even assuming that the mining companies qualified as investors they would still need to meet the criteria for *ratione materiae*. In other words, they must show that the investment on which the claim is based qualifies for protection and that there exists a legal dispute between the investor and the GOI which is related to that investment.¹⁵³

1. Investment Qualification

Qualification of the mining companies' investments depends on two things. First, it must qualify as an "investment" under the respective definitions laid out in the three treaties.¹⁵⁴ Second, it must be in conformity with the conditions for protection each treaty lays out, namely compliance with the FIL of 1967.¹⁵⁵ The first condition is unmet if the CoWs, the basis of the mining companies' claims, are shown to be void as a matter of law.¹⁵⁶ The second condition is unmet if it can be shown that the investment was not admitted or conducted in compliance with the FIL of 1967.¹⁵⁷ It is potentially arguable that none of the companies meet either of these criteria.

a. Provisional Qualification

The Washington Convention (ICSID) leaves the definition of a covered investment to the discretion of the parties.¹⁵⁸ Thus, qualification of an investment under all three instruments depends upon their respective definitions of investment, which in language common to most IIAs,

151. Aus-Indo BIT, *supra* note 25, art. III(3).

152. *See id.* art. I(1)(b)(ii)(B)(i).

153. *See* SCHREUER, *supra* note 129, at 89, para. 3.

154. *See* Aus-Indo BIT, *supra* note 25, arts. I(1)(a), III(1)(a); ASEAN MIT, *supra* note 9, arts. I(3), (II)(1); UK-Indo BIT, *supra* note 26, arts. 1(a), 2(1).

155. *See* Aus-Indo BIT, *supra* note 25, pmb., art. III(1)(a); ASEAN MIT, *supra* note 9, arts. (II)(1), III(1); UK-Indo BIT, *supra* note 26, art. 2(1).

156. *See* Aus-Indo BIT, *supra* note 25, art. I(1)(a); ASEAN MIT, *supra* note 9, art. I(3); UK-Indo BIT, *supra* note 26, art. 1(a).

157. *See* Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1).

158. SCHREUER, *supra* note 129, at 124, para. 88; *see also* Washington Convention (ICSID), *supra* note 40, art. 25(1) (leaving the definition of "investment" undefined).

define investment “as broadly as possible.”¹⁵⁹ The definitions include “business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources”¹⁶⁰ and shares, stocks, or debentures in a qualified investment.¹⁶¹ The Aus-Indo BIT definition of investment goes one step further and includes “activities associated with investments.”¹⁶² Thus, it seems clear that mining companies’ respective CoWs would provisionally qualify as investments under whichever of the three instruments is applicable. Provisional qualification is, however, just that—provisional.

159. SORNARAJAH, *supra* note 21, at 240; For the instrument’s respective definition of investment see Aus-Indo BIT, *supra* note 25, art. I(1)(a); ASEAN MIT, *supra* note 9, art. I(3); UK-Indo BIT, *supra* note 26, art. 1(a).

160. UK-Indo BIT, *supra* note 26, art. 1(a)(v); ASEAN MIT, *supra* note 9, art. 1(3)(e); Aus-Indo BIT, *supra* note 25, art. I(1)(a)(v). According to Sornarajah, in the case of most BITs and MITs, these sorts of provisions have the effect of transforming what is essentially a license to explore for natural resources into a property right, highly restricting the host-State’s authority to cancel such licenses. He therefore questions whether developing States could fully have contemplated at the time of conclusion the freezing of their formerly discretionary powers that these instruments effect and still have agreed to them. Such provisions, he states, are contrary to the notion of permanent national sovereignty over natural resources, “which some authorities regard as *jus cogens*,” in which case such an agreement would be held to be void as a matter of international law. SORNARAJAH, *supra* note 21, at 242–43. However, as is discussed below, the explicit requirements in all three instruments that the investment be made in compliance with the FIL of 1967 and other laws which govern its operation do not effect a similar indefeasible transformation, but work to retain the “licensed” character of these rights.

161. UK-Indo BIT, *supra* note 26, art. 1(a)(ii); ASEAN MIT, *supra* note 9, art. 1(3)(b); Aus-Indo BIT, *supra* note 25, art. I(1)(a)(ii). It is important to note that tribunals have now, at least twice, held that such wording allows even minority shareholders to claim damages in proportion to their ownership for actions of host-States in violation of treaty provisions. See *Lanco Int’l Inc. v. Arg. Rep.*, Preliminary Decision on Jurisdiction, Int’l Centre for Settlement of Inv. Disputes, ARB/97/6 (Dec. 8, 1998), reported in 40 I.L.M. 457, 461, para. 10 (2001) (holding that the “definition of [an investment in the applicable BIT] is very broad and allows for many meanings,” including an 18.3 percent share of “capital stock of the Grantee”); *AAPL v. Sri Lanka*, Award, Int’l Centre for Settlement of Inv. Disputes, ARB/87/3 (June, 17 1990), reported in 17 Y.B. COM. ARB. 106 (1992). According to Sornarajah, this represents a significant departure from traditional customary international law whereby a State’s protection of corporate entities was strictly limited to those entities incorporated in that State. SORNARAJAH, *supra* note 21, at 246

162. Aus-Indo BIT, *supra* note 25, art. I(1)(a)(vi). While this may reflect a broader definition of property rights that can be infringed upon and thus a larger scope for damages under this instrument than the others, it is clear that if the underlying investment with which the activities are associated itself does not qualify for protection, neither do the activities associated with it. The NAFTA Chapter 11 tribunal in *Pope & Talbot Inc. v. Canada* gave substance to one interpretation of this type of provision, holding that the claimants’ ability to sell lumber was an “investment” protected under NAFTA Chapter 11 because it was a very important part of the business of the claimant and this affected his investment, “the true interests at stake [being] the Investment’s asset base.” See *Pope & Talbot Interim Award*, *supra* note 28, para. 98. It follows that in order for the business activity to be covered under this provision it must be the type of activity such that interference with it would affect the very assets of the physical investment itself.

b. Illegality-Voided Right

Irrespective of the provisional qualification of the mining companies' investments under the treaties' investment definition, if the CoWs are shown to be void as a matter of law, "there is by definition no contract to be expropriated" or denied fair and equitable treatment, and so no basis for a tribunal's jurisdiction.¹⁶³ The bases for any finding that the rights are void arise out of the CoWs' contractual quality. Though CoWs are in important ways licenses, they are also fundamentally contracts between the GOI as the sole owner of the minerals and the foreign company or joint venture that extracts the minerals as a contractor for the government.¹⁶⁴ According to the choice of law clauses contained within each CoW, Indonesian law governs interpretation of their validity and performance.¹⁶⁵ Indonesian contract law is based on the Old Dutch Civil Code and remains essentially unchanged. The conditions for validity, embodied in the Third Book of the Indonesian Civil Code (*KUHPPerdata*), are consent of the parties, capacity of the parties, a certain subject, and a lawful purpose.¹⁶⁶ An unlawful purpose is defined broadly to include causes which are unlawful as well as contrary to good morals and public policy; a contract found to involve such a cause is void as matter of law.¹⁶⁷

Various international commercial arbitration tribunals have addressed the issue of contracts with unlawful causes, or "illegality," in recent years, particularly with regard to contracts which purported to create obligations in one of the parties to bribe government officials.¹⁶⁸ The bulk of these cases have dealt mainly with conflict of laws issues which are not applicable here. However, they also all stand for the

163. *Azinian v. Mexico (DESONA)*, Award, Int'l Centre for Settlement of Inv. Disputes (Add'l Facility), ARB(AF)/97/2 (Nov. 1, 1999), reported in 25 Y.B. COM. ARB. 262, para. 273 (2000). Note the argument in this context gets very close to discussion of the merits and could be raised at that point. It is dealt with here partly for the sake of convenient organization and partly because success on this issue at a jurisdictional phase would eliminate the need to get to the merits.

164. See Hoed, *supra* note 14, at 120; see also Inco CoW, *supra* note 14, art. 27.

165. Hoed, *supra* note 14, at 20.

166. Kitab Undang-Undang Hukum Perdata Buku Ketiga Tentang Perikatan, art. 1320 [hereinafter *KUHPPerdata*], available at <http://www.asiamaya.com/undang-undang/perdata/home3.htm> (unofficial) (last visited Apr. 8, 2003).

167. *Id.* arts. 1335-37; see also, R. SUBEKTI, THE LAW OF CONTRACTS IN INDONESIA 5 (1989) (Subekti is a former Chief Justice of the Indonesian Supreme Court).

168. See, e.g., *Himpurna Cal. Energy Ltd. v. PT Perusahaan Listrik Negara, Ad Hoc Arbitration under UNCITRAL Rules*, Jakarta (May 4, 1999), reported in 25 Y.B. COM. ARB. 13, para. 118 (2000) [hereinafter *Himpurna Award*]; *Consultant (State Y) v. State Agency (State Y)*, Final Award, Int'l Chamber of Commerce, No. 7047 (1994), reported in 21 Y.B. INT'L ARB. 79, para. 41 (1996) [hereinafter *Consultant (State Y) Award*]; *Argentine Engineer v. British Co.*, Int'l Chamber of Commerce, Award, No. 1110 (1963), reported in 21 Y.B. INT'L ARB. 47, para. 16 (1996) [hereinafter *Argentine Engineer Award*].

proposition that a contract which involves an unlawful cause is void and thus incapable of protection.¹⁶⁹ Thus, if evidence was adduced showing the formation or performance of a CoW involved an unlawful purpose it would be void and thus cease to be an investment covered by the treaties.¹⁷⁰

i. Corruption in Formation and Performance

Many have alleged that during the Suharto period, when most of the six companies concluded CoWs and began operations, foreign mining projects in Indonesia involved high levels of official corruption.¹⁷¹ Corruption, as professor Gary Bell, an expert on Indonesian contract law, states, “[c]ertainly . . . is against public order.”¹⁷² It was also against the law at the time of the CoWs’ formations and performances.¹⁷³ Thus, if it could be shown that the formation or performance of any of the six CoWs involved corruption, the CoWs would be void and their rights extinguished and incapable of protection.¹⁷⁴ An *ad hoc* tribunal organized under United Nations Commission on International Trade Law (UNCITRAL) rules to hear a claim against an organ of the Indonesian government recently intimated as much, stating that “[a]rbitrators . . .

169. Himpurna Award, *supra* note 168, para. 116; Consultant (State Y) Award, *supra* note 168, para. 41; Argentine Engineer Award, *supra* note 168, para. 16. The choice-of-law issues are not applicable here because the CoWs’ choice-of-law clause designates Indonesian law to govern performance and validity of the contract creating no possible conflicts with the law of place of performance, which is also Indonesia. *See supra* note 166 and accompanying text.

170. *See* SUBEKTI, *supra* note 167, at 5; Aus-Indo BIT, *supra* note 25, art. I(1)(a)(v); ASEAN MIT, *supra* note 9, art. I(3)(e); UK-Indo BIT, *supra* note 26, art. 1(a)(v).

171. *See, e.g.*, ICG REPORT, *supra* note 48, at 1 (“[E]xploitation of resources like timber and minerals during the rule of President Soeharto was dominated by companies connected to the regime elite. Though formally legal, this exploitation was often heedless of local communities and the environment and permeated by official corruption and rule-breaking . . .”); STATE OF THE FOREST, *supra* note 48, at 23.

172. Gary F. Bell, Professor, Singapore National University, to Stuart Gross (Aug. 20, 2002, 3:46 A.M. EST) (on file with author).

173. Undang-Undang No. 3 Tahun 1971 Tentang Pemberantasan Tindak Pidana Korupsi (Law No. 3 of 1971 Concerning the Prevention of Criminal Corruption); Undang-Undang No. 28 Tahun 1999 Tentang Penyelenggaraan Negara Yang Bersih Dan Bebas Dari Korupsi, Kolusi, Dan Nepotisme (Law No. 28 of 1999 Concerning the Creation of a Nation that is Clean and Free From Corruption, Collusion and Nepotism), *available at* http://www.asiamaya.com/undang-undang/uu_penyelenggaraan_negara/uu_penyelenggaraan_negara_index.htm (unofficial) (last visited Apr. 8, 2003); Undang-Undang No. 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi (Law No. 31 of 1999 Concerning the Prevention of Criminal Corruption), *available at* http://www.asiamaya.com/undang-undang/uu_korupsi/uu_korupsi_index.htm (unofficial) (last visited Apr. 8, 2003).

174. *See* SUBEKTI, *supra* note 167, at 5; *see also* Aus-Indo BIT, *supra* note 25, art. I(1)(a)(v); ASEAN MIT, *supra* note 9, art. I(3)(e); UK-Indo BIT, *supra* note 26, art. 1(a)(v).

would rigorously oppose any attempt to use the arbitral process to give effect to contracts contaminated by corruption."¹⁷⁵

ii. Violation of Mandatory Rules of Law—Compensation
to Traditional Rights Holders

The CoWs would also be invalid if they authorized either of the parties to take actions which were in violation of mandatory rules of Indonesian law. The Indonesian Supreme Court has found in cases involving foreign investment and trade that the laws which govern those activities are mandatory and any contract whose performance contravenes those laws are void.¹⁷⁶ This might be particularly relevant in our case in regard to laws regulating the manner in which mining companies are required to compensate those whose resource rights holders are negatively affected by the establishment or operation of mining activities.

175. Himpurna Award, *supra* note 168, para. 118. The tribunal, however, qualified this statement, stating "such grave accusations must be proven." *Id.* According to the many rumors that circulated regarding this case and other similar cases brought by investors against Indonesia at around the same time, the counsel for the Indonesian State party was hindered in his ability to present evidence regarding corruption, because of the continued influence of many who have been so implicated, including children of the former President Suharto and current government officials. Thus, while the tribunal was certainly correct that any such accusation must be proved, one can question its other statements voicing a strong public policy preference for sustaining the validity of contracts in these settings, and questioning why the GOI had neither communicated their claim of invalidity to the other party earlier nor attempted to cancel the contract rather than simply modify it now through arbitration. *Id.* paras. 114–116. It seems clear that whatever general public policy favoring contractual viability has to give way when there is a strong possibility that contract in question was concluded under corrupt terms. That possibility certainly does not prove corruption, but it certainly implicates a presumption that the parties freely and legally entered into a consensual agreement that should be protected. In this context, public policy militates rather for increased scrutiny. The fact that the GOI had not previously attempted to cancel the contract and was now seeking only to modify its terms is clearly explicable by the nature of the transaction at issue, i.e., a power plant construction and operation contract. A country such as Indonesia, with over 80 million people living on the main island of Java (approximately the size of New York state), a growing energy thirst and limited foreign reserves, cannot lightly take power plants off the grid. Further, under the applicable rules of civil contract law, a contract with an unlawful subject, such as one tainted by corruption, is *void not voidable*. See SUBEKTI, *supra* note 167, at 5. Therefore, as a matter of law, it is of no significance what the GOI did or did not do, the contract is void. See also Thomas Wälde, *Treaties and Regulatory Risk in Infrastructure Investment—The Effectiveness of International Law Disciplines Versus Sanction by Global Markets in Reducing the Political and Regulatory Risk for Private Investment*, J. WORLD TRADE (Apr. 2000), at 1, 28 (noting the weakness of any investor's claim, where the subject of the suit was tainted with corruption).

176. See, e.g., ED and F Man (Sugar) Ltd. v. Yani Haryanto, Supreme Court Reg. No. 1205K/Pdt/1990, summarized in SUDARGO GAUTAMA, *INDONESIAN BUSINESS LAW* § 3-088 (Jack Teo Cheng Chuah ed., 1997) (finding that a contract which provided for private importation of sugar was in contradiction with Indonesian law which provided for a state monopoly of sugar imports, and so was void as a matter of law).

All mining in Indonesia is governed by the BML, which contains mandatory terms for all mine operators.¹⁷⁷ The law requires mine operators to compensate any holder of rights to land which has been appropriated for the mining activity.¹⁷⁸ It also requires them to compensate any holder of rights to land, whether inside or outside the mining area, whose rights have been disturbed by the mine operations, whether or not such damage was foreseeable or intentional.¹⁷⁹ Pursuant to article 18(B)(2) of the Indonesian Constitution, as well as articles 3 and 5 of the Basic Agrarian Law, various rights to the land under *adat* (traditional law) are recognized.¹⁸⁰ However, the World Bank and others have found that resource extractive industries in Indonesia commonly fail to pay compensation payments to indigenous and other local communities whose traditional land rights have been negatively affected or destroyed.¹⁸¹ If it can be proven that any of the six mining companies failed to pay such compensation and that such a failure was authorized in the deal embodied in their respective CoWs, that CoW would be void as matter of Indonesian law, and ineligible for protection under any of the three instruments.¹⁸²

c. Investment Not Within the Scope of the Treaties

In addition to these general conditions, which are likely applicable in one form or another to a claim under any IIA, an additional hurdle exists regarding protection under the instant three treaties. All three instruments require that investments be specifically approved in order to qualify for protection, and do so in a manner that makes continued protection conditional on compliance with the terms of their approval.¹⁸³ If any of the six investors can be shown to have failed to comply with these conditions either initially or during the life of their investment, the investment would not qualify for protection under the respective instruments.

Both the Aus-Indo BIT and the UK-Indo BIT establish this conditionality by explicitly limiting the scope of their respective treaty

177. BML, *supra* note 78, art. 15

178. *Id.* art. 27(1).

179. *Id.* art. 25(1).

180. INDON. CONST. art. 18(B)(2); Undang-Undang Pokok Agraria Tahun 1967 (Basic Agrarian Law 1967), arts. 3, 5, available at <http://www.menlh.go.id/peraturan/uu/uu1174/> (official) (last visited Apr. 7, 2003).

181. See, e.g., WORLD BANK, *supra* note 47, at 24; LYNCH, *supra* note 60, at xxvii, 31, 89, 65–66, 67–69, 126. ICG REPORT, *supra* note 48, at 16.

182. See SUBEKTI, *supra* note 167, at 5; see also Aus-Indo BIT, *supra* note 25, art. I(1)(a)(v); ASEAN MIT, *supra* note 9, art. I(3)(e); UK-Indo BIT, *supra* note 26, art. 1(a)(v).

183. See Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1).

protections to investments which have been granted admission in accordance with the FIL of 1967 or any law amending or replacing it.¹⁸⁴ But as noted above, the FIL of 1967 does not simply govern the admission of foreign investment but also regulates the conduct of foreign investment through a system of licensing, which makes continued admission conditional on fulfillment of various requirements.¹⁸⁵ By directly referencing the FIL of 1967, the Aus-Indo BIT and UK-Indo BIT incorporate the same conditionality in terms of protection.¹⁸⁶ An investment that has failed to conform to the conditions of the FIL of 1967, either at admission or during its operation, is not an investment “in accordance with” the FIL of 1967 and, thus, is outside the scope of either treaty.¹⁸⁷

The ASEAN MIT also requires that all investments for which its protections are sought comply with the host country’s laws regarding its admission and operation, but adds the additional requirement that the investment be specifically approved for protection “upon such conditions as [the host country] deems fit for the purpose of [the] agreement.”¹⁸⁸ Thus, a company, such as Banpu of Thailand, which is seeking protection under the ASEAN MIT has four initial hurdles. In addition to conforming to the conditions of FIL of 1967 both at its admission and once established, the investment must have been specifically granted coverage by the treaty in writing and have complied with the conditions on which that coverage was based.¹⁸⁹

i. Initial Admission Under the FIL of 1967

For most of the six investments we can assume that they have complied at least initially with the requirement that they were admitted in accordance with the FIL of 1967.¹⁹⁰ In fact, the very existence of the CoW proves at least initial compliance with the FIL of 1967.¹⁹¹ However, in the case of an equity investment, such as that of Rio Tinto plc, whose investment is not directly in a mining operation in Indonesia but rather in its Australian subsidiary, Rio Tinto LTD, which holds the mining investment, a finding of compliance is not automatic. While the UK-Indo

184. Aus-Indo BIT, *supra* note 25, art. III(1)(a); UK-Indo BIT, *supra* note 26, art. 2(1).

185. See FIL of 1967, *supra* note 19, arts. 10 *et seq.*; see also Sornarajah, *ICSID*, *supra* note 83, at 69, 79–80 (discussing the conditionality of admission of investment under the FIL of 1967); *supra* Section II.A.1.

186. Aus-Indo BIT, *supra* note 25, art. III(1)(a); UK-Indo BIT, *supra* note 26, art. 2(1).

187. See Aus-Indo BIT, *supra* note 25, art. III(1)(a); UK-Indo BIT, *supra* note 26, art. 2(1).

188. ASEAN MIT, *supra* note 9, arts. II(1), III(1).

189. *Id.*

190. See Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1).

191. See FIL of 1967, *supra* note 19, art. 8 (establishing the CoW system).

BIT recognizes equity investments, according to a plain reading of provisions governing its scope, such an equity investment must have been specifically admitted into Indonesia under the FIL of 1967 to be eligible for protection.¹⁹² Thus, any attempt by Rio Tinto plc to invoke the protections of the UK-Indo BIT could be challenged on the grounds that Rio Tinto plc's investment was never admitted to Indonesia under the FIL of 1967 but was admitted into, and made in, Australia, and therefore is not eligible for protection.¹⁹³

ii. General Conditions Once Admitted

Article 26 of the FIL of 1967 provides as a general matter that "[f]oreign capital enterprises are obligated to manage and control their enterprise. . . without harming the interests of the state."¹⁹⁴ Therefore, it is arguable that if the operation of the mines has harmed the interest of the State of Indonesia, the mining companies' investments are no longer in accordance with the FIL of 1967 and so are outside the scope of the three instruments.¹⁹⁵ The GOI could argue, for example, that mining companies which insist on employing open-pit mining procedures in protected forests are managing their enterprises in a way that harms the interest of the State. According to their functional definition, protected forests are meant to protect local hydrology and the life-support systems which depend upon it.¹⁹⁶ Open-pit mining creates both systemic and dramatic incidental risks of major marine pollution.¹⁹⁷ Therefore, insisting on employing open-pit mining in protected forests directly harms the Indonesian State's interest as articulated in the BFL of 1999.¹⁹⁸ Thus, such an investment is no longer in accord with the FIL of 1967 and is outside the three instruments' respective scopes of protection.¹⁹⁹

192. See UK-Indo BIT, *supra* note 26, art. 1(a)(ii), 2(1).

193. It is important also to distinguish this situation from those involving the right of a parent company to participate in arbitration under an agreement concluded between its subsidiary and the host-State. See SCHREUER, *supra* note 129, at 174, para. 209. In the latter cases the issue concerns *ratione personae*, while the instant case concerns *ratione materiae*, and thus the reasoning of one does not apply to the other. It is one thing for an ICSID tribunal to conclude that the parent company was always a party to the agreement, which provided for arbitration, it is another to allow companies to skirt the requirements of host-States regarding the definition of investments, the constitution of which was left completely to the State's discretion. See *id.* at 124, para. 88.

194. FIL of 1967, *supra* note 19, art. 26.

195. See Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1); see also FIL of 1967, *supra* note 19, art. 26.

196. BFL of 1999, *supra* note 1, art. 1(8).

197. See *supra* notes 59–62 and accompanying text for a discussion of the environmental effects of open-pit mining.

198. See BFL of 1999, *supra* note 1, art. 1(8).

199. See FIL of 1967, *supra* note 19, art. 26; Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1).

iii. Specific Conditions Once Admitted— Compliance with CoW Terms

In addition to the general requirements, with which all foreign investment admitted into Indonesia must comply,²⁰⁰ the FIL of 1967 specifically requires foreign mining to be done in Indonesia, “on the basis of,” viz. in compliance with, a CoW concluded with the GOI.²⁰¹ Compliance with the terms of the CoW, therefore, is necessary in order for a foreign mining operation to be in accordance with the FIL of 1967 and thus within the scope of the three treaties’ protections.²⁰²

All CoWs concluded since 1974 require the holder of a CoW to conform its operation to all applicable environmental regulations as well as employ the most advanced environmental technologies available.²⁰³ Therefore, failure by the mining companies to comply with all applicable environmental regulations and employ the most advanced environmental technologies would constitute a violation of this requirement.²⁰⁴ This by extension would violate article 8 of the FIL of 1967 and so the terms of the investment’s admission, thereby removing the investment from the scope of any of the three treaties.²⁰⁵

2. Qualification of the Dispute

Assuming that their investments qualify for protection, the mining companies would also be required to show that they have a legal dispute with the GOI and that the dispute related directly to the qualified investment.²⁰⁶ The requirement that the dispute be “legal” in nature is fairly self-explanatory and rarely is an issue in jurisdictional challenges.²⁰⁷ The required relationship between the dispute and the investment, however, has been more contentious. In fact, a recent ruling on a similar issue in a

200. See, e.g., FIL of 1967, *supra* note 19, art. 26.

201. *Id.* art. 8.

202. See Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. II(1); UK-Indo BIT, *supra* note 26, art. 2(1).

203. See MANSHRECK, *supra* note 18, at 31; see also, e.g., Inco CoW, *supra* note 14, arts. 22–23.

204. See MANSHRECK, *supra* note 18, at 31; see also, e.g., Inco CoW, *supra* note 14, arts. 22–23.

205. See FIL of 1967, *supra* note 19, art. 8; Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, arts. II(1), III(1); UK-Indo BIT, *supra* note 26, art. 2(1).

206. See Washington Convention (ICSID), *supra* note 40, art. 25(1) (“legal disputes arising directly out of an investment”); Aus-Indo BIT, *supra* note 25, art. XI(1) (“a dispute between a Party and an investor of the other Party relating to an investment”); ASEAN MIT, *supra* note 9, art. X(1) (“[a]ny legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties”); UK-Indo BIT, *supra* note 26, art. 7(1) (“any dispute that may arise in connection with the investment”).

207. See SCHREUER, *supra* note 129, at 106, para. 46.

NAFTA Chapter 11 claim shows the possible efficacy of this requirement in the context of some more attenuated regulatory expropriation claims by investors.²⁰⁸ However, in light of the fact that the ban on open-pit mining directly relates to the manner in which the investment in question is allowed to operate, it is not likely that the GOI would have much success arguing this point.²⁰⁹

C. The GOI's Consent

The final hurdle, and the “cornerstone” of international commercial arbitration, and arbitration at ICSID in particular, is consent to the jurisdiction of the tribunal by both parties to the dispute.²¹⁰ In traditional commercial arbitration the consent of both parties is generally embodied in an arbitration clause contained either in a more general contract governing the transaction between parties, or more rarely in a contract dealing solely with dispute resolution.²¹¹ There is, however, no requirement that the consent of both parties be embodied in a single document, thus, it is possible for a State to preemptively consent to arbitrate a wide range of disputes through a provision contained in an IIA.²¹² However,

208. Methanex Award on Jurisdiction, *supra* note 28, para. 147. The tribunal held that NAFTA article 1101(1), which limits the jurisdiction of Chapter 11 tribunals to claims based on host country measures “relating to” investors or investments, “signifies something more than the mere effect of a measure on an investor on an investment and that it requires a legally significant connection between them.” *Id.* Thus, standing alone, a regulation which banned the gasoline additive MBTE had a legally insignificant connection to the claimant, which did not manufacture MBTE itself but rather a component of it. *Id.* para. 150. The exact contours of this holding are difficult to state with certainty. However, according to one observer close to the case, its outer boundaries are defined by measures directly regulating “what the investor can do with its investment,” on the one hand, and “a measure of general application that has no legal application to an investor but may have an incidental economic impact” on the other. HOWARD MANN, REVIEW OF THE DECISION ON JURISDICTION OF THE METHANEX TRIBUNAL (AUG. 5, 2002) 4 (Int’l Inst. for Sustainable Dev., 2002), available at http://www.iisd.org/pdf/2002/trade_methanex_analysis.pdf (last visited Apr. 7, 2003).

209. It might seem tempting to argue in the case of Rio Tinto plc that any effect on its investment was indirect, due to the fact that its investment was actually in Rio Tinto LTD and the ban directly affected the investment of Rio Tinto LTD rather than Rio Tinto plc. However, it is now well established that “[t]he requirement of directness relates to the dispute in relation to the investment. It does not relate to the investment as such.” SCHREUER, *supra* note 129, at 113, para. 63; see also Fedax v. Rep. of Venez., Decision of Objections to Jurisdiction, Int’l Centre for Settlement of Inv. Disputes, ARB/96/3 (July 11, 1997), reported in 24A Y.B. COM. ARB. 23, para. 10 (1999).

210. DOLZER & STEVENS, *supra* note 21, at 131; see also Washington Convention (ICSID), *supra* note 40, art. 25 (“The jurisdiction of the Centre shall extend to any legal dispute . . . which the parties to the dispute consent in writing to submit to the Centre.”).

211. DOLZER & STEVENS, *supra* note 21, at 132.

212. *Id.*

whether or not it will have this effect will depend a great deal upon the wording of the provision.²¹³

At one end of the spectrum are arbitration provisions, requiring the host-State to give favorable consideration to a request by an investor for the host country to submit to arbitration, which essentially leaves the host country's decision whether to consent to arbitration up to its own discretion.²¹⁴ At the other end of the spectrum are clauses which explicitly or implicitly embody the host country's consent to arbitrate, giving the tribunal automatic jurisdiction.²¹⁵ In the middle are clauses providing that the host country "shall assent to any demand" or some other such wording, which do not give the investor an immediate right to compel arbitration, but rather create an "international obligation" in the host-State to grant its consent.²¹⁶

None of the three treaties leave the GOI's decision whether to consent purely up to its own discretion.²¹⁷ However, only the Aus-Indo BIT gives an investor an immediate right to ICSID arbitration on demand.²¹⁸ The ASEAN MIT grants an investor an immediate right to arbitration, but only to *ad hoc* arbitration.²¹⁹ Access to other more formal arbitration bodies, including arbitration under ICSID, is dependent on mutual agreement, which the GOI is free to withhold.²²⁰ The UK-Indo BIT, goes one step further (or shorter), creating only an "international obligation" in the GOI to consent to an investor's request to arbitration at ICSID.²²¹

1. Aus-Indo BIT

The Aus-Indo BIT states that if a dispute between an investor and host-State cannot be reconciled through negotiation and consultation, the investor "may submit the dispute, for settlement" to either the

213. *Id.* It is interesting to note that Sornarajah disputes the ability of even the strongest language contained in an IIA to create personal jurisdiction for the tribunal in the absence of an arbitration clause in the original contract between the investor and the government. "What the treaty seeks to protect is the obligation to arbitrate, undertaken in the contract between the foreign investor and the host-state." SORNARAJAH, *supra* note 21, at 267. While this is an interesting argument it is unclear from the case law what its chances of success are before a tribunal. However, given the existence of arbitration clauses in all CoWs it is not necessary here to examine this question. *See* Hoed, *supra* note 14, at 222.

214. DOLZER & STEVENS, *supra* note 21, at 133; SORNARAJAH, *supra* note 21, at 268.

215. DOLZER & STEVENS, *supra* note 21, at 134. Subject possibly to the limitation described by Sornarajah. *See supra* note 213.

216. SORNARAJAH, *supra* note 21, at 268; DOLZER & STEVENS, *supra* note 21, at 134.

217. *See* Aus-Indo BIT, *supra* note 25, art. XI(2); ASEAN MIT, *supra* note 9, art. X(2); UK-Indo BIT, *supra* note 26, art. 7(1).

218. *See* Aus-Indo BIT, *supra* note 25, art. XI(2).

219. *See* ASEAN MIT, *supra* note 9, art. X(4).

220. *See id.* arts. X(2)-(3).

221. UK-Indo BIT, *supra* note 26, art. 7(1).

host-State's domestic courts or to ICSID arbitration.²²² Wording of this kind, which gives the investor a unilateral right to submit the dispute, embodies the implicit consent of the host-State to the arbitration.²²³ Thus, assuming no problems related to investment qualification issues discussed above, any of the mining companies which manage to qualify as Australian investors have an immediate right to arbitration.

2. ASEAN MIT

The ASEAN MIT similarly requires that the disputing parties first attempt to resolve the dispute amicably. If agreement cannot be reached after six months, "either party may submit the dispute for conciliation or arbitration and such election shall be binding on the other party."²²⁴ However, the treaty requires further agreement between the parties regarding the choice of an arbitration institution.²²⁵ Failing such an agreement after three months (on top of the six month initial waiting period), the President of the International Court of Justice (ICJ) will appoint an *ad hoc* panel.²²⁶ The GOI, therefore, if it believed that its chances might be negatively affected by arbitration at the ICSID tribunal or before another listed arbitral institution,²²⁷ could stonewall for up to nine months before the President of the ICJ would step in and establish a panel.²²⁸ While the GOI would thereby lose its ability to shape the constitution of the arbi-

222. *Id.* art. XI(1)-(2). By phrasing remedy to domestic courts or ICSID arbitration as mutually exclusive options, the Aus-Indo BIT appears to foreclose any argument that exhaustion of local remedies is a precondition of submission to international arbitration. *See* SORNARAJAH, *supra* note 21, at 269-71.

223. *See* SCHREUER, *supra* note 129, at 213, para. 292; *see also* E-mail from Robert Thompson, Former Secretary General of International Chamber of Commerce Court of Arbitration, to Stuart Gross (Dec. 30, 2002, 11:05 A.M. EST) (on file with author).

224. ASEAN MIT, *supra* note 9, art. X(2). It is interesting to note that this clause allows "either party" to submit the dispute. *Id.* (emphasis added). Though there may well be issues regarding the investor's consent to such arbitration, this clause raises the possibility that the GOI could, for example, preemptively launch a claim against the Thai mining company Banpu for their failure to desist from utilizing open-pit mining in protected forests in contravention of the conditions of their investment's admittance, including the responsibility to obey all environmental regulations and to manage their enterprise in a manner which is in the interest of the State. *See* ASEAN MIT, *supra* note 9, art. II(1); *see also* SORNARAJAH, *supra* note 21, at 269 (discussing this possibility). The Aus-Indo BIT, like the UK-Indo BIT, prevents against this possibility by vesting the right to launch arbitration proceedings firmly in the investor alone. *See* Aus-Indo BIT, *supra* note 25, art. XI(2); UK-Indo BIT, *supra* note 26, art. 7(1). The control of the investor over the process is further reinforced in Aus-Indo BIT article XI(5)(b), which grants the investor the right to choose between conciliation or arbitration if the investor and host-State cannot agree on either. *Id.* art. XI(5)(b).

225. *See* ASEAN MIT, *supra* note 9, art. X(2).

226. *Id.*

227. Sornarajah, *ICSID*, *supra* note 83, at 94 (discussing the perception of the GOI and other governments in the developing world that ICSID tribunals have a pro-business bias).

228. *See* ASEAN MIT, *supra* note 9, art. X(4).

tral tribunal and likely risk subjecting itself to a less well-structured procedure, the strategy could also work to its advantage. The delay could compel the investor to drop the claim or settle for less than was initially demanded, and a tribunal constituted by the president of the ICJ would likely have a strong public law flavor that might be more sympathetic to Indonesia's cause.²²⁹ Thus, in the case of Banpu, it may be in the GOI's interest to simply ignore any requests for arbitration until Banpu either gives up or goes to the ICJ.

3. UK-Indo BIT

The UK-Indo BIT contains the least effective consent to arbitration; it states that the host country "shall assent to any request on the part of" an investor from the other contracting party for submission of a dispute for conciliation or arbitration at ICSID.²³⁰ According to almost all authorities, this creates only an "international obligation" in the GOI to consent rather than actually embodying that consent itself.²³¹ Thus, assuming that the GOI was not inclined on its own to consent to jurisdiction, Rio Tinto plc would have to depend upon the diplomatic pressure of the British government in order to convince the GOI to consent to arbitration. Without such consent an ICSID tribunal would not have jurisdiction to hear the case.²³²

IV. ADJUDICATION ON THE MERITS

If the mining companies' claims were able to survive the many jurisdictional hurdles described above, they would fail at adjudication on the merits.²³³ In light of statements by mining industry insiders as well as the general tendency among investor suits of this kind, it appears that the mining companies would most likely base their claims on guarantees of fair and equitable treatment and expropriation provisions contained in each treaty.²³⁴ Neither of these claims would prevail.

229. Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L & COMP. L. Q. 811, 823 (2001) (discussing the likely difference in interpretations reached by "commercial arbitrators" as opposed to those reached by "a court composed of more statist or environmentalist members" on, particularly, the issue of indirect expropriation).

230. UK-Indo BIT, *supra* note 26, art. 7(1).

231. See, e.g., DOLZER & STEVENS, *supra* note 21, at 134; SORNARAJAH, *supra* note 21, at 268; SCHREUER, *supra* note 129, at 216, para. 297.

232. See Washington Convention (ICSID), *supra* note 40, art. 25.

233. See *supra* Part III.

234. Aus-Indo BIT, *supra* note 25, art. II(2), VI; ASEAN MIT, *supra* note 9, arts. IV(3), VI; UK-Indo BIT, *supra* note 26, arts. 3, 5. See Aspinal, *supra* note 10; see also, e.g., Methanex Award on Jurisdiction, *supra* note 28; Pope & Talbot Award on Merits, *supra* note

A. Fair and Equitable Treatment

Like virtually all IIAs, the three instruments guarantee “fair and equitable treatment” of covered investments.²³⁵ These vaguely worded provisions have been described as the “alpha and omega of investor-state arbitration.”²³⁶ Every pending and decided NAFTA Chapter 11 claim is, or was, based in part on a claimed breach of this guarantee, and a similar trend is apparent among BIT claims.²³⁷ The reasons for this trend are likely twofold. First, such an inherently vague concept allows, as one commentator put it, “virtually any government action [to] be called unfair or inequitable.”²³⁸ Second, as will be discussed in detail in Section B below, NAFTA, BIT, and other tribunals, have consistently rejected broadly phrased claims of indirect expropriation, refusing to extend the protection to incidental, incomplete interference with investment value.²³⁹ Thus, investors who feel that they have been in some way “wronged” by a host-State and suffered a decrease in the value of their investment as a result, predictably articulate their claims under the rubric of unfair and inequitable treatment.

The mining companies’ fair and equitable claim would most likely be phrased in three ways. First, they would likely complain that it was unfair and inequitable for the GOI to unilaterally and completely ban open-pit mining in protected forests without first consulting with the companies and/or the GOI should have enforced the ban in stages to allow mining companies to recoup some of their investments.²⁴⁰ Second, the determination of protected forest boundaries is arbitrary in light of the already denuded quality of some such areas, and so it is unfair and inequitable to restrict mining companies’ procedures on this basis.²⁴¹ Third, in light of uncertain boundaries of some protected forests, it is unfair and inequitable to base restrictions on mining companies’ procedures upon them.²⁴² As will be shown below, given the GOI’s solid statutory and contractual basis for its actions and the deference which

28; S. D. Myers Award, *supra* note 28; Metalclad Award, *supra* note 28; Pope & Talbot Interim Award, *supra* note 28; Ethyl Award on Jurisdiction, *supra* note 28.

235. See Aus-Indo BIT, *supra* note 25, art. II(2); ASEAN MIT, *supra* note 9, art. IV(3); UK-Indo BIT, *supra* note 26, art. 3.

236. *Fair and Equitable Treatment Under NAFTA’s Investment Chapter 11*, 96 AM. SOC’Y OF INT’L L. PROC. 9, 9 (2002) (remarks of Charles H. Bower speaking particularly about claims under NAFTA Chapter 11).

237. *Id.*; see *supra* note 43.

238. *Fair and Equitable Treatment Under NAFTA’s Investment Chapter 11*, *supra* note 233, at 16 (remarks of J.C. Thomas).

239. See *infra* Section IV.B.

240. See Aspinal, *supra* note 10.

241. *Id.*

242. *Id.*

tribunals grant such actions, these claims could only be successful if evidence was presented that the government was motivated by a discriminatory or bad faith purposes; there is no such evidence.

1. The Standard

Significant disagreement exists as to whether treaty guarantees of fair and equitable treatment guarantee a minimum international standard of treatment or something higher. To complicate matters further, disagreement also exists regarding exact definition of a minimum international standard. As one treatise, quoted recently by a tribunal, put it, adjudicating a claim under the U.S.-Estonia BIT, "[t]he basic point would seem to be that there is no single standard."²⁴³ That said, on the basis of a plain reading of the provisions themselves and the decisions of tribunals which have interpreted them so far, one can conclude that these provisions guarantee investors basic rights of fairness and due process, both administratively and judicially, which are rarely implicated when a State acts within its statutory authority. Before getting to this, however, it is necessary to first air the persistent conflict between the two standards.

It is par for the course for those arguing for a higher standard of treatment to quote the following passage by F.A. Mann.²⁴⁴

The terms 'fair and equitable treatment' envisage conduct far beyond a minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously.²⁴⁵

243. Genin Award, *supra* note 43, n.15.

244. This short passage contained in a brief note preceding the text of the then-recently concluded BIT between the Philippines and the United Kingdom, has had a disproportionate impact on the thinking of commentators and tribunals, which often quote the above passage verbatim as the basis for a concurring conclusion. *See, e.g.*, Pope & Talbot Award on Merits, *supra* note 28, n.105; S.D. Myers Merits, *supra* note 28, para. 265 (noting, but rejecting the conclusion); DOLZER & STEVENS, *supra* note 21, at 59; *Fair and Equitable Treatment Under NAFTA's Investment Chapter 11*, *supra* note 233, at 17 (Jack C. Cole remarks in Annual Meeting).

245. F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 244 (1981).

According to Mann these clauses must be additive, because otherwise “nothing is gained by introducing” them.²⁴⁶ In all due respect, however, this logic is flawed.

Quite often treaties reiterate rules of customary international law without supposing to add to their content, particularly in instances where there exists disagreement over the existence of such a rule or its exact composition.²⁴⁷ In the case of a minimum international standard of “fair and equitable” treatment, competing understandings have existed as to whether that standard is relative or absolute.²⁴⁸ Some States, particularly in Latin America, have argued that the standard only requires national treatment, while others, traditionally capital-exporting countries, have argued that the standard is independent.²⁴⁹ It may be, as some claim, that the independent standard has won out.²⁵⁰ However, if this is so, it is only a recent occurrence,²⁵¹ and likely caused in large part by the efforts of capital-exporting States to establish it as such through means such as the inclusion of absolute guarantees of treatment in IIAs.

At the other end of the spectrum are those who claim that these provisions embody a minimum international standard that is only violated by “egregious” conduct by the State.²⁵² The classic formulation of this standard was issued by the General Claims Commission of the United States and Mexico in the *Neer Claim*,²⁵³ which stated

the treatment of an alien, in order to constitute international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so

246. *Id.* at 244.

247. The compensation provisions of BITs are a perfect example of this. According to Vandevelde, one of the main purposes behind the U.S. effort to conclude BITs was to reassert its understanding of customary international law, requiring full compensation for expropriation, in the face of competing understandings, suggesting only “appropriate” compensation was required. *See* VANDELDELDE, *supra* note 98, at 21.

248. *See* MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 90 (6th ed. 1992); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 525 (4th ed. 1990).

249. *See* AKEHURST, *supra* note 248, at 90; BROWNLIE, *supra* note 248, at 525.

250. *See, e.g.*, OPPENHEIM’S *INTERNATIONAL LAW* 931 (Robert Jennings & Author Watts eds., 9th ed. 1992); DOLZER & STEVENS, *supra* note 21, at 58.

251. It is interesting in this regard to note the statement in the seventh edition of Oppenheim’s treatise published in 1948, that “[i]ndividuals who enter foreign territory submit themselves to the law of the land, and their home state has *no right to request that they should be treated otherwise than as the law of the land authorises a state to treat its own subjects.*” L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 329–30 (7th ed. 1948) (emphasis added).

252. *See* Pope & Talbot Award on Merits, *supra* note 28, para. 109 (reiterating Canada’s claim in this regard).

253. *See* AKEHURST, *supra* note 248, at 91; BROWNLIE, *supra* note 248, at 525.

far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.²⁵⁴

More contemporarily, an ICSID tribunal recently stated that “in order to amount to a violation of [a] BIT [guarantee of fair and equitable treatment] any procedural irregularity would have to amount to bad faith, willful disregard of due process of law or an extreme insufficiency of action,” such that the act in question amounted to “an arbitrary act that violates the tribunal’s ‘sense of juridical propriety.’”²⁵⁵ While some tribunals might not take a position quite as extreme, it does appear that something close to this standard is generally applied.

2. Cases Applying It

While tribunals differ as to whether they refer to a minimum international standard, the bulk of the BIT and NAFTA cases which have dealt with the issue, appear to apply a standard close to a minimum international standard. In the situations where a violation was found, evidence was presented showing bad faith, discriminatory intent, and/or *ultra vires* actions on the part of host-State government officials. In all other instances, including instances where host-State actions were not the model of clarity or fairness but which were legally justified and non-discriminatory, no violation was found.

In *Genin v. Estonia*, a case decided recently under the U.S.-Estonia BIT, the tribunal chose explicitly to apply the minimum international standard, stating that only acts which amounted to “bad faith, a willful disregard of due process of law or an extreme insufficiency of action” would rise to the level of violation, while simple procedural irregularities would not.²⁵⁶ On this basis the tribunal found that the government’s decision to revoke the investor’s banking license for seemingly technical reasons and without prior notice was not a breach of its BIT obligations.²⁵⁷ Chief among the factors leading to this conclusion was that Estonia’s actions were within its statutory authority, according to applicable procedural rules, and within reason under the circumstances.²⁵⁸ Thus, its actions “cannot be said to have been arbitrary or discriminatory against the foreign investors in the sense which those words are used in the BIT.”²⁵⁹ Therefore, while the tribunal found that the government’s

254. Neer Claim, 4 R. I. A. A. 60 (U.S.-Mex. Gen. Claims Comm’n 1926).

255. Genin Award, *supra* note 43, para. 54 (quoting ELSI Case (U.S. v. Italy), 1989 ICJ 15, 73-77).

256. Genin Award, *supra* note 43, para. 54.

257. *Id.* para. 48.

258. *Id.* paras. 46, 47.

259. *Id.* paras. 46, 47.

decision “invites criticism, it does not rise to the violation of any provision of the BIT.”²⁶⁰

In the *Maffenzini v. Spain* case, brought under the Argentine-Spain BIT, the tribunal, while not explicitly adopting the minimum international standard, expressed a similar deference to the decisions by State officials made pursuant to statutory authority as well as a limitation on the sorts of responsibilities that may be imputed to States. The tribunal first dismissed the investor’s claim that he was misled by faulty feasibility studies by Spanish authorities which allegedly underestimated the cost of the project’s completion.²⁶¹ It “emphasize[d] that Bilateral Investment Treaties are not insurance policies against bad business judgments,” and that while the study may have been faulty the State had no more responsibility in this regard than would a similarly placed private actor.²⁶² Second, the tribunal rejected the investor’s claim that the State should pay for the cost of the Environmental Impact Assessment (EIA) it conducted, noting the deep statutory authority for requiring an EIA and the fact that the applicable BIT “calls for the promotion of investments *in compliance with national legislation*.”²⁶³ The tribunal found for the investor on only one issue, an unauthorized transfer of funds made by the State authorities from the investor’s bank account.²⁶⁴ While the tribunal articulated the violation in terms of a “lack of transparency,”²⁶⁵ elsewhere it stated “the lack of prior or later legally binding contract formalizing the transaction compels the conclusion that this de facto arrangement cannot be opposed to the claimant against his consent.”²⁶⁶ Thus, it appears that what bothered the tribunal was the *ultra vires* nature of the government’s actions, rather than some general lack of transparency.

The better known decisions of ICSID tribunals constituted to hear NAFTA Chapter 11 claims under NAFTA’s article 1105 generally, evince a similar “deference that international law generally extends to the right of domestic authorities to regulate matters within their borders,” finding violations only when evidence is presented showing an intent by government officials to discriminate or otherwise disadvantage the investor.²⁶⁷ Thus, the *S.D. Myers v. Canada* tribunal found that while an

260. *Id.* para. 48.

261. *Maffenzini Award*, *supra* note 43, para. 90.

262. *Id.* para. 90.

263. *Id.* para. 96 (emphasis added).

264. *Id.* para. 103.

265. *Id.*

266. *Id.* para. 99.

267. *S.D. Myers Award on Merits*, *supra* note 28, para. 263. Note the slightly unique language of the applicable NAFTA provision. *See* NAFTA, *supra* note 28, art. 1105 (“Each

investor could not claim to have been treated unfairly and inequitably simply on the grounds that the government enacted possibly misguided environmental regulation which affected the investor negatively, but a claim by an investor that such regulation was not enacted on the basis of a good faith belief in its efficacy but rather to protect local industry to the detriment of the claimant could be sustained.²⁶⁸ Similarly, the *Pope & Talbot v. Canada* tribunal rejected a number of claims such as the lack of an appeal in certain administrative contexts and other regulatory lacunae and fees which the investor claimed affected its investments' profitability unfairly.²⁶⁹ Only a series of actions taken by government personnel after the investor filed its Chapter 11 complaint, which evinced an almost in-vective intent to harm the investor, violated article 1105.²⁷⁰

The only major outlier in this regard might appear to be *Metalclad v. Mexico*.²⁷¹ In *Metalclad*, the tribunal extrapolated from a distinct provision of the NAFTA regarding transparency to find that a government violated fair and equitable treatment guarantees when it failed to assure that "all affected investors of another party" are aware of "all relevant legal requirements for the purpose of initiating, completing, and successfully operating investments made, or intended to be made."²⁷² However, on challenge by Mexico, a Canadian court annulled this part of the decision, on the grounds that there was no basis in the NAFTA article 1105 for such a transparency requirement.²⁷³ It is interesting also to note that, in addition to these transparency concerns, the tribunal's decision was based on a determination that the municipal authority had acted *ultra vires* in its decisions regarding the investor and with the intent to obstruct the investment.²⁷⁴

Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.")

268. *Id.* paras. 162, 195, 268.

269. *Pope & Talbot Award on Merits, supra* note 28, paras. 120–65, 182.

270. *Id.* para. 181. (these actions included making intentional misstatements regarding the claimant's operations and conduct, threatening the claimant, and denying the claimant's requests for information).

271. *See Metalclad Award, supra* note 28.

272. *Id.*

273. *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 0664, para. 70 (2001) (the exact grounds were that in so doing the tribunal had exceeded its terms of reference and so acting *ultra vires*). This clearly belies Mann's statement that "other provisions of the Agreements affording substantive protection are no more than examples of specific instances of this overriding duty" of fair and equitable treatment. *See Mann, supra* note 245, at 243; *see also S.D. Myers Award on Merits, supra* note 28, para. 267 ("The language of the NAFTA does not support the notion espoused by Dr. Mann insofar as it is considered to support a breach of Article 1105 that is based on a violation of another provision of Chapter 11.").

274. *Metalclad Award, supra* note 28, para. 106; Todd Weiler, Assistant Professor, University of Windsor Law School, Lecture at the University of Michigan Law School (Feb. 6, 2003).

3. Application to Our Facts

Under the standard articulated by these cases, the mining companies' fair and equitable claims would fail. This is principally because the enactment of a ban on open-pit mining was firmly within the authority of the Indonesian Congress, and was enacted for reasonable nondiscriminatory purposes.²⁷⁵ The principle function of protected forests is the protection of hydrology, and open-pit mining presents an almost uncontrollable risk of marine pollution.²⁷⁶ Thus, unless some evidence surfaced showing intent to discriminate against the mining companies, this would appear to be just the kind of government regulation to which international law traditionally gives deference.²⁷⁷ Even if an area was already denuded, the ban still is not arbitrary considering the impact of open-pit mining on downstream communities and the ban's function, *inter alia*, to protect these communities.²⁷⁸

In light of this almost unimpeachable statutory authority, it seems unlikely that a tribunal would even inquire as to whether any effort was taken to notify the mining companies prior to the measure's enactment. However, if a tribunal did so, the measure would withstand the inquiry. The mining companies were notified at the conclusion of their respective CoWs by terms of the CoWs themselves that their operations would be subject to restrictive environmental regulations.²⁷⁹ In addition to casting doubt on whether any right of the mining companies was being interfered with or diminished at all, let alone unfairly or inequitably, these clauses put mining companies on notice from the start that they would be subject to changing environmental regulation.²⁸⁰ That risk was clearly spelled out and accepted by the mining companies, the three instruments in no way "insured" them against it.²⁸¹ Finally, it is arguable that by virtue of operating in a heavily regulated industry, the companies were on constructive notice that they would be subject to significant regulation at any time.²⁸² The fact that the measure was enforced all at once rather than

275. INDON. CONST. art. 20.

276. BFL of 1999, *supra* note 1, art. 1(8); *see supra* notes 59–62 and accompanying text.

277. S.D. Myers Award on Merits, *supra* note 28, para. 263.

278. BFL of 1999, *supra* note 1, art. 1(8); *see supra* notes 59–62 and accompanying text.

279. *See* MANSHRECK, *supra* note 18, at 31; *see also, e.g.*, Inco CoW, *supra* note 14, arts. 22–23.

280. *See infra* Sections IV.B.1.

281. Maffenzini Award, *supra* note 43, art. 90; *see also* FIL of 1967, *supra* note 19, art. 1 (explicitly assigning the investor the risk of investment).

282. According to the heavily regulated industry doctrine of U.S. jurisprudence, persons operating in industries which are routinely subject to very high levels of government regulation, such as mining or nuclear power, operate with the expectation of such regulation. *See, e.g.*, Allied-General Nuclear Servs. v. United States, 488 U.S. 819 (1988); Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41 (1986).

in stages may possibly “invite[] criticism [but] . . . does not rise to the violation of any provision of the BIT.”²⁸³

The only possible leg the claim could stand on is that regarding shifting protected forest borders.²⁸⁴ It would not appear from the cases discussed above that mere uncertainty regarding these borders and nothing more would rise to the level of unfair and inequitable treatment. However, if it was shown that government officials intentionally shifted borders as a means to extort bribes or otherwise disadvantage the mining companies, such behavior would likely qualify. However, such action would need to have been taken after the enactment of the ban, otherwise there would be no basis for extortion. There is no evidence of that fact.²⁸⁵

All told, on the basis of the information available, and in the absence of any extraordinary revelations of extortion or the like, there is no basis for the mining companies’ fair and equitable claim. The way in which the ban was enacted could have been done in a manner that was less disruptive to the mining companies’ operations, and it is likely that in a developing nation consisting of over 14,000 inhabited islands that administrative procedures and border demarcations sometimes are not the model of clarity. But this does not make the GOI’s actions unfair or inequitable. Certain risks attach to doing business in developing countries, especially business that traditionally involves heavy government regulation, and the mining companies were aware of this risk. It was, in fact, spelled out to them in the contract they made with the GOI, and in the FIL of 1967.²⁸⁶ As the ICSID tribunal in *Maffenzini* stated, “Bilateral Investment Treaties are not insurance policies against bad business judgments . . . [and][w]hile it is probably true that there were shortcomings in the policies and practices” of the GOI, “they cannot be deemed to relieve the investors of the business risk inherent in any investment.”²⁸⁷

B. *Indirect Expropriation*

The most prominent (and controversial) provisions in the short tradition of investor-State dispute resolution under IIAs have been those guaranteeing investors compensation for not only direct expropriation,

283. Genin Award, *supra* note 43, para. 48.

284. See *Aspinal*, *supra* note 10.

285. In addition, if the companies in fact gave in to such demands, there may be issues regarding their qualification for protection under the instruments. See *supra* Section III.B.1.b.i (discussing the potential effect of evidence of corruption on the mining companies’ efforts to qualify their investment for protection).

286. See *MANSHRECK*, *supra* note 18, at 31; see also, e.g., *Inco CoW*, *supra* note 14, arts. 22–23; FIL of 1967, *supra* note 19, art. 1.

287. *Maffenzini Award*, *supra* note 43, para. 90.

but also for measures claimed to be “equivalent to expropriation.”²⁸⁸ While, as intimated above, anecdotal evidence suggests a movement favoring claims based on fair and equitable treatment provisions rather than expropriation, it certainly would be premature to write them off.²⁸⁹ The instant situation is no exception.

The mining companies would likely articulate a claim under the indirect expropriation provisions contained in the three treaties on the basis that the ban on open-pit mining makes exploration and extraction economically unfeasible and so is equivalent to, or has the equivalent effect of, an expropriation of their rights embodied in the CoWs.²⁹⁰ Aspinal intimates as much when he asks rhetorically regarding the ban, “Have these contracts now been broken by the Republic of Indonesia? If so, is the government going to reimburse regulated companies?”²⁹¹ He argues that the low discovery rate of mineral deposits makes exploration costly, and can only be recovered through utilization of open-pit mining patterns.²⁹² Thus, the ban is equivalent to canceling the contracts of the “regulated companies.”²⁹³

The problem with this argument is apparent both in his phrase, “regulated companies” and the analogy he makes.²⁹⁴ As regulated companies, the rights companies attained under their respective CoWs, were always subject to GOI authority to regulate their conduct, particularly regarding environmental concerns. Thus, no right has been expropriated when they are in fact regulated. However, even if that were not the case, the ban on open-pit mining does not eliminate the mining companies’ rights to extract minerals, but restricts the manner in which that right can be invoked. A smaller fishhook is not the same thing as no fishhook at all. As the discussion below will show, an analysis of the decisions by various tribunals which have addressed the issue of indirect expropriation demonstrate that an investor must show: 1) that he had a right to something, 2) that right was completely or almost completely frustrated by the actions of the host-State, and possibly 3) that the action complained of involved a transfer of a benefit to the State or a third party. The mining companies’ claim satisfies none of these conditions.

288. ASEAN MIT, *supra* note 9, art. VI(1).

289. *See supra* note 43.

290. *See* Aus-Indo BIT, *supra* note 25, art. IV(1); ASEAN MIT, *supra* note 9, art. IV(1); UK-Indo BIT, *supra* note 26, art. 5(1); *see also* Aspinal, *supra* note 10.

291. Aspinal, *supra* note 10.

292. *See id.* (claiming that the discovery ratio is only about 1:1000 which forces a company to invest millions to search for minerals that they may or may not find).

293. *Id.* (likening the ban on open-pit mining to requiring fishermen to “only use one-centimeter fishhooks (instead of five, ten or twenty-five centimeter fishhooks)”).

294. *See id.*

1. A Right to Expropriate

The mining companies' indirect expropriation claim should fail in the first instance, because the right which they allege has been expropriated—the right to employ open-pit patterns in protected forests—never existed. Their right to mine was always subject to environmental regulation both as a matter of general principles and pursuant to the specific legal arrangement under which that right was created. Thus, when environmental regulation, such as the ban on open-pit mining in protected forests, affects the operation of that right, it has not been infringed, nor have the mining companies' good faith expectations been violated.

The right to operate a business is always subject to a number of conditions, implicit and explicit, which define the boundaries of that right.²⁹⁵ The most general of those boundaries constrains a business from operating in a manner that endangers the public. It simply has no right to do so; and when such action is prohibited, no right has been infringed. The situation does not change when that business is operated by a foreign investor. By establishing an investment in a State, the investor becomes subject to that State's laws, and thereby its rights are defined.²⁹⁶

Nor is this situation greatly altered by the conclusion of a typical BIT.²⁹⁷ As each of the three instruments make clear, the host-State's duty to promote and protect investment, and the rights of investors to enter and operate investments, are "subject to [the host-State's] laws."²⁹⁸ In *Maffenzini v. Spain* the tribunal pointed to similar provisions in the applicable BIT in dismissing an investor's demand that the government compensate him for the costs of a required Environmental Impact Assessment (EIA).²⁹⁹ Though the project did not come to fruition, the

295. See SORNARAJAH, *supra* note 21, at 83–84.

296. See *id.* (quoting Judge Oda's separate opinion in the *ELSI Case*). Judge Oda's opinion reads:

It is a great privilege to be able to engage in business in a country other than one's own. By being permitted to undertake commercial or manufacturing activities or transactions through businesses incorporated in another country, nationals of a foreign country will obtain further benefits. Yet these local companies, as legal entities of that country, are subject to local laws and regulations; so that foreigners may have to accept a number of restrictions in return for the advantages of doing business through such local companies.

ELSI Case (U.S. v. Italy), 1989 I.C.J. 15, 90 (July 20) (emphasis added).

297. See, e.g., *Maffenzini Award*, *supra* note 43, para. 96.

298. Aus-Indo BIT, *supra* note 25, art. II(3); see also ASEAN MIT, *supra* note 9, art. III(1) ("All investments to which this Agreement relates shall, subject to this agreement, be governed by the laws and regulations of the host country . . ."); UK-Indo BIT, *supra* note 26, art. 3(1) ("Each party shall encourage [investment] . . . and, subject to its right to exercise powers conferred by its laws, shall admit such capital.").

299. *Maffenzini Award*, *supra* note 43, para. 96 (emphasis added).

tribunal cited the thorough Spanish and EEC legislative authority on which the requirement was based, and found that the investor's right to proceed with the development in question was always subject to the requirement of an EIA and thus no rights of his were infringed when the government required him to conduct one.³⁰⁰

While the *Maffenzini* tribunal's formulation was somewhat unique, it is closely analogous to the distinction tribunals and commentators often make "between 'normal regulation' expressing the State's police powers and 'regulation' amounting to a 'taking.'"³⁰¹ A recent Chapter 11 tribunal in *Feldman v. Mexico* held that it was necessary to distinguish between legitimate exercises of police powers by a host-State and expropriatory exercises, on the grounds that

governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff level, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.³⁰²

300. *Id.*

301. Waelde & Kolo, *supra* note 229, at 821.

302. *Id.* para. 103; *see also* S.D. Myers Award on Merits, *supra* note 28, para. 281 ("[t]he general body of precedent usually does not treat regulatory action as amounting to expropriation"); *id.* para. 282 ("governments [should not] be subject to claims as they go about their business of managing public affairs"); Interlocutory Award No. ITL 55-129-3 (Oct. 28, 1995), *reprinted in* 9 IRAN-U.S. C.T.R. 248, 275 ("It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police power of states."); *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 0664, para. 99 (referring to the Metalclad tribunal's formulation of indirect expropriation, which included the incidental effects of bona fide regulations, as "extremely broad," but refusing to strike it down on the grounds that questions of law are not grounds for striking down an arbitration award under the applicable statute). Arguably the *Pope & Talbot* tribunal rejected a regulation/police powers-based exception to compensable expropriations. *See Pope & Talbot Interim Award*, *supra* note 28, para. 99. However, elsewhere the opinion quotes at length the Third Restatement of Foreign Relations (Restatement) "unreasonable interference" and "confiscatory" standard of review. *Id.* para. 99 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712, cmt. g (1987)). Implicit in a standard of "unreasonable interference," are questions regarding the legitimacy of the interference, i.e., whether there was a bona fide reason for it. This is simply another way to ask whether the interference related to an exercise of traditional police powers to protect the health, welfare, and safety of a country's people. On the other hand, an action which is "confiscatory" implies a purpose to "seize (private property) for the public treasury," WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 383 (2d ed. 1983), which would not be a legitimate exercise of police powers. This is further supported by the opinion's quotation of Restatement § 712 which describes indirect expropriation in the following purpose-based terms, "a state may seek to achieve the same result [as outright expropriation] by taxation and regulatory measures

Thus, the tribunal dismissed the investor's claim that restrictions by the Mexican government on the gray market for cigarettes in the country had indirectly expropriated his investment, holding that nothing in NAFTA or Mexican law guaranteed access to such a market and therefore the claimant had no right which was deprived when its access was foreclosed by legitimate government regulation.³⁰³ Implicit in this formulation is that governments have a right to regulate for bona fide reasons, and thus, the rights of investors are logically subject to, and limited by, that right.³⁰⁴

Few would argue that the GOI does not have the right to enact regulation to protect its people from the highly toxic marine pollution caused by open-pit mining, especially when the activity is conducted in areas which are functionally designated to protect water quality.³⁰⁵ The mining companies' right to mine was created in this context and thus was always subject to the rights of the GOI.³⁰⁶ Nothing in any of the three instruments nor in Indonesian law required the GOI to allow open-pit mining in protected forests, thus mining companies had no right which was

designed to make continued operation of the project uneconomical." Pope & Talbot Interim Award, *supra* note 28, n.87 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra*, § 712 n.7) (emphasis added).

303. Feldman Award, *supra* note 28, paras. 113, 135–36.

304. *See id.*; *see also id.* para. 152 ("[I]t may be questioned as to whether the Claimant ever possessed a 'right' to export that has been 'taken' by the Mexican government."). It is arguable that language in some awards that emphasizes "reasonably-to-be-expected . . . benefit[s]" reflects this formula as well. *See, e.g.,* Metalclad Award, *supra* note 28, para. 103 (finding that on the basis of the tribunal's determination of the legal limits of the municipality's regulatory authority that the municipality had acted *ultra vires* in the requirements it imposed on the investor and thus denied the investor the reasonably-to-be-expected benefit of its investment). The converse of this is that if the government has the legal authority to limit an investor's rights in certain ways, it has not denied any reasonably-to-be-expected benefit when it does so. Rather it would be unreasonable for the investor to expect otherwise.

305. *See supra* notes 59–62 and accompanying text.

306. The FIL of 1967 essentially verbalizes this general authority, obliging "[f]oreign capital enterprises . . . to manage and control their enterprises in accordance with the principles of good business administration and without harming the interests of the state." FIL of 1967, *supra* note 19, art. 26. It is important in this context to note, again, provisions of the three instruments which explicitly make investments subject not only to host-State laws, Aus-Indo BIT, *supra* note 25, art. III(1)(a); ASEAN MIT, *supra* note 9, art. III(1); UK-Indo BIT, *supra* note 26, art. 3(1), but in the case of the Aus-Indo BIT and the UK-Indo BIT, subject to the FIL of 1967. Aus-Indo BIT, *supra* note 25, art. III(1)(a); UK-Indo BIT, *supra* note 26, art. 2(1). Finally, mining and resource extraction is what is sometimes termed a "heavily regulated industry." According to U.S. jurisprudence rights in such industries are subject to exceptional levels of government control and regulation, and thus rarely will a court find a taking when such a right is infringed by such regulation. *See, e.g.,* Allied-General Nuclear Servs. v. United States, 488 U.S. 819 (1988) (holding that the plaintiff, who was forced to cease operating a plutonium recycling plant after the government denied it an operating permit, could not assert a takings claim because its property right had always been subject to government regulation of nuclear facilities).

deprived when the GOI enacted, for legitimate reasons, measures forbidding it.

The only possible way that the mining companies could claim that they had such a right is if their respective CoWs specifically granted it to them. However, the opposite is true. Every CoW concluded since the mid-seventies has included provisions specifically requiring that mining companies conform their conduct to environmental regulations as a continuing condition of their right to mine.³⁰⁷ In *Tradex v. Albania*, an ICSID tribunal organized to hear an indirect expropriation claim brought under provisions of Albania's foreign investment law, addressed an analogous clause in a joint venture contract which stated, "[t]he joint venture will be also conformed to the necessary addendum will taken place to the albanian legislation concerning the land (sic the official translation provided to the Tribunal)."³⁰⁸ The tribunal held that this provision made it "quite clear" to the investor that "the investment was subject to future applications of the Land Law, in other words: subject to future privatizations," which formed the basis of the complaint.³⁰⁹ Thus, the tribunal stated that if any actions by the Albanian government were found to be expropriatory, "it would have to examine whether such rights were indeed acquired by Tradex or were covered by the reference to the Land Law and thus from the very beginning *subject to possible privatization measures*."³¹⁰ The mining companies' rights to mine were unquestionably subject to possible environmental measures, which indisputably included the ban.³¹¹ Thus a right to employ open-pit mining patterns in protected forests free from environmental regulation restricting or eliminating that right, was never "indeed acquired by" the mining companies and so cannot be said to have been expropriated when it is forbidden for legitimate environmental reasons.³¹²

307. See MANSHRECK, *supra* note 18, at 31; *see also, e.g.,* Inco CoW, *supra* note 14, art. 22 ("[o]perations must conform to environmental protection laws and regulations"). See *supra* notes 77–80 and accompanying text for a more detailed description of this requirement and in particular actions and statements by mining companies evincing their understanding of this provision's prospective effect.

308. *Tradex v. Rep. of Alb.*, Award, Int'l Centre for Settlement of Inv. Disputes, ARB/94/2 (Apr. 29, 1999), *reported in* 25 Y.B. COM. ARB. 221, para. 100 (2000) [hereinafter *Tradex Award*].

309. *Id.* para. 101.

310. *Id.* para. 102 (emphasis added); *see also* Feldman Award, *supra* note 28, para. 128 (finding that the claimant could not prove expropriation when enforcement of a provision in the law which had been in effect for at least three years prior to the establishment of the investment resulted in a prohibition of its export business); *id.* para. 152 ("[I]t may be questioned as to whether the Claimant ever possessed a 'right' to export that has been 'taken' by the Mexican government.").

311. See MANSHRECK, *supra* note 18, at 31; *see also, e.g.,* Inco CoW, *supra* note 14, art. 22. See *supra* notes 77–80 and accompanying text.

312. *Tradex Award*, *supra* note 308, para. 102.

2. Equivalent: "equal in quantity, value, force, meaning, etc."³¹³

If a tribunal decided that the mining companies had a right to mine, defined in such a way that it could theoretically be expropriated through environmental regulation (or more likely, if they did not address the issue at all), the mining companies' claim would still fail. While some have suggested that indirect expropriation may encompass *any* impairment in an investment's economic value, either incidental or direct,³¹⁴ decisions by tribunals which have addressed the issue suggest otherwise. A survey of the decisions by various ICSID tribunals addressing the issue in the context of claims based on NAFTA Chapter 11, BITs, and foreign investment legislation as well as decisions by the European Court of Human Rights, make clear that partial interference cannot be termed equivalent to, or tantamount to, expropriation and thus is not compensable under these provisions. The ban on open-pit mining only partially interferes with the manner in which mining companies can mine and only in particular locations. It therefore is not "a measure equivalent to expropriation"³¹⁵ nor does it have "an effect equivalent to expropriation."³¹⁶

Webster's Dictionary defines "equivalent" as "equal in quantity, value, force, meaning, etc."³¹⁷ Thus, the plain meaning of "measures equivalent to expropriation" is measures that have the same force or value as an expropriation, while "measures having the equivalent effect to expropriation" means measures having an effect equal in quantity to the effect of expropriation.³¹⁸ Tribunals' decisions accord with these formulations, generally holding that "[s]omething that is equivalent to something else cannot logically encompass more,"³¹⁹ and so require an investor to show not only that he had a right but that his ability to use

313. WEBSTER'S NEW WORLD DICTIONARY 474 (2d College ed. 1980).

314. See DOLZER & STEVENS, *supra* note 21, at 102. Dolzer and Stevens continue that "it could be argued that the state is prevented from taking any measures where it cannot be covered by public financial resources." *Id.* at 99-100.

315. ASEAN MIT, *supra* note 9, art. VI(1).

316. Aus-Indo BIT, *supra* note 25, art. VI(1); UK-Indo BIT, *supra* note 26, art. 5(1).

317. WEBSTER'S NEW WORLD DICTIONARY 474.

318. See VCLT, *supra* note 90, art. 31; ASEAN MIT, *supra* note 9, art. VI(1); Aus-Indo BIT, *supra* note 25, art. VI(1); UK-Indo BIT, *supra* note 26, art. 5(1).

319. Pope & Talbot Interim Award, *supra* note 28, para. 104 (cited with approval in S.D. Myers Award on Merits, *supra* note 28, para. 286). It is interesting to note that while *Pope & Talbot* intimated the *possibility* that "in some contexts and circumstances" a less than complete and permanent deprivation might rise to the level of expropriation, S.D. Myers Award on Merits, *supra* note 28, para. 283, it also intimated a requirement that a benefit accrue to the State or a third party. *Id.* para. 287. In combination, these holdings suggest that those "contexts and circumstances" might be when the State has taken for itself, or granted to another, part of what the investor had a right to, keeping in mind the definition of "right" discussed above.

and enjoy that right was completely or almost completely frustrated by the actions of the host-State such that the effect was equivalent to expropriation.

a. BIT Cases

Claims of indirect expropriation in violation of BIT guarantees have been raised in two published ICSID decisions; and in both, the tribunals emphasized that in order to prove an indirect expropriation, the investor must show that some act by the State caused a deprivation of the investment in question.³²⁰ In *Goetz v. Republic of Burundi*, the case most closely on point, the tribunal found that the revocation of a free trade zone (FTZ) license, which granted certain incentives and exceptions to a mineral mining enterprise, constituted an indirect expropriation.³²¹ Essential to this holding was the fact that “the revocation of their FTZ license forced [the complainants] to stop all activity . . . thereby making their investment *completely useless* and depriving them of the benefits they could expect therefrom.”³²² Thus, the measure, in the tribunal’s opinion, had a “‘similar effect’” to expropriation.³²³

b. NAFTA Chapter 11 Cases

As the *Feldman* tribunal noted, though a number of indirect expropriation claims have been brought under NAFTA Chapter 11, only one has succeeded, *Metalclad v. Mexico*, and “the principle rationale for that decision was substantially overturned by the reviewing court.”³²⁴ Excluding *Feldman*, which dismissed the complaint mainly on the basis of the absence of a right,³²⁵ all, including the unannulled grounds of *Metalclad*, are based upon findings of significant or complete interference (or the lack thereof) with ownership and control.³²⁶ Even the *Feldman* tribunal,

320. Olguin Award, *supra* note 43, paras. 26, 47 (ultimately dismissing the claim on the grounds that the State could not be held responsible for losses caused by a financial crisis); Goetz Award, *supra* note 129, para. 63.

321. Goetz Award, *supra* note 129, para. 63.

322. *Id.*

323. *Id.* Note also that the applicable convention, the Belgium and Luxemburg Union-Burundi BIT, contained much broader language than the instant three BITs, protecting against “measures depriving of, or restricting property rights, or any other measure having similar effect.” *Id.* para. 62 (emphasis added).

324. Feldman Award, *supra* note 28, para. 107.

325. See *supra* Section IV.B.1, describing both the “lack of right” formulation and *inter alia* the *Feldman* Award.

326. See *Metalclad* Award, *supra* note 28, para. 109; *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 0664, para. 97 (2001); *Pope & Talbot Interim Award*, *supra* note 28, para. 102; *S. D. Myers Award on Merits*, *supra* note 28, paras. 282–83.

though making clear it was not the principle basis for its decision, noted this factor.³²⁷

According to the tribunal in *Pope & Talbot*, when determining “whether a particular interference with business activities amounts to expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.”³²⁸ It further refined the standard as one where the interference in question “would ‘justify an inference that the owner . . . [sic] will not be able to use, enjoy, or dispose of the property . . . [sic].’”³²⁹ The tribunal then dismissed the complaint, noting that the investor had remained at all times in full ownership and control of its investment and had alleged only a partial “interference” with its export business which it was still able to continue.³³⁰ According to the tribunal this “degree of interference with the Investment’s operations . . . does not rise to an expropriation (creeping or otherwise).”³³¹

In *S.D. Myers* the tribunal similarly emphasized the “deprivation of ownership rights,” which generally accompanies measures equivalent to expropriation.³³² It noted that “[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights.”³³³ Thus, the tribunal held that a Canadian export ban, which the plaintiffs alleged “eliminat[ed] [their] competitive advantage” could not, in light of the temporary nature of the effect which it had on the complaint’s investment, be termed tantamount to expropriation.³³⁴

Finally, even the unannulled grounds of the *Metalclad* decision support this distinction. The tribunal found that the establishment of a cacti reserve, which encompassed the location of the complainant’s toxic waste dump, “had the effect of barring forever the operation of the landfill.”³³⁵ This is in line with statements elsewhere in the opinion that indirect expropriation involves “interference with the use of property which has the effect of depriving the owner, in whole or significant part,

327. Feldman Award, *supra* note 28, para. 142 (“Although the Tribunal does not consider this a controlling argument, the regulatory action has not deprived the Claimant of control of his company, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder.”).

328. Pope & Talbot Interim Award, *supra* note 28, para. 102.

329. *Id.* (quoting the Draft Convention on the International Responsibility of States for Injuries to Aliens, art. 10(3)).

330. *Id.* paras. 100–01.

331. *Id.* para. 102.

332. S.D. Myers Award on Merits, *supra* note 28, para. 282.

333. *Id.* para. 283.

334. *Id.* para. 284.

335. Metalclad Award, *supra* note 28, para. 109.

of the use or the reasonably-to-be expected economic benefit of property.”³³⁶

c. European Court of Human Rights and Foreign Investment Law Decisions

In addition to these decisions under BITs and NAFTA Chapter 11, various decisions by the European Court of Human Rights, adjudicating claims under the European Convention on Human Rights, and ICSID tribunals organized to hear claims under foreign investment laws, have addressed similar issues and made similar distinctions based on the extent of the interference complained of.

As Thomas Waelde and Abba Kolo point out, the European Court of Justice, in adjudications of complaints of property owners under the European Convention on Human Rights, “have been reluctant to award compensation unless the State measure destroyed all economic value of the property.”³³⁷ This reluctance was best summed up by the court in *Kate v. Italy*, which stated

[w]here, following an administrative decision concerning specific property, the owner retains the ownership subject to restrictions which reduce to virtually nothing the economic value of the use or exchange of the property, this is known as ‘value expropriation’ and it gives rise to an entitlement to compensation. This situation arises where the restriction is very severe—absolute prohibition—and where it is imposed for an indefinite period of time or remains in force for longer than is reasonable. On the other hand, *there is no entitlement to compensation for damage resulting from a restriction which although imposed for an indefinite period does not have such a profound effect on the right, or a restriction which is due to cease within a reasonable time even though it is a very severe one.*³³⁸

The court went on to hold that even though the designation of a park on land owned by the complainant-developer had dramatically reduced its value, it did not count as a compensable denial of the owner’s property rights.³³⁹

336. *Id.* para. 103.

337. Waelde & Kolo, *supra* note 229, at 824.

338. *Kate v. Italy*, 19 Eur. H.R. Rep. 368, para. 26 (1995) (emphasis added).

339. *Id.* para. 29; *see also* Matos E. Silva v. Portugal, 24 Eur. H.R. Rep. 573, para. 85 (1997) (holding that a law which created a nature reserve on land including the complainant’s did not amount to expropriation, because while the complainant’s right to construct or sell the land was thereby restricted, the complainant’s rights to the land had not disappeared as it

The most applicable ICSID decision regarding the application of indirect expropriation provisions contained within a country's foreign investment laws came in *Tradex v. Albania*.³⁴⁰ The claim in *Tradex* was brought under Albania's Foreign Investment Law which provided for compulsory arbitration at ICSID, and protection against, inter alia, measures with effect tantamount to expropriation.³⁴¹ After first prefacing its discussion in the manner related above,³⁴² the tribunal expressed approval for a standard of expropriation based on whether an investor's ability to use and enjoy its property had been substantially interfered with.³⁴³ It then found that a number of actions by the State, which had the potential to deprive the investor of its right to use the property in question in fact never did so, and thus could not be termed tantamount to expropriation.³⁴⁴ While possibly preventing the investor from using its property, other actions complained of had not been proved to be attributable to the State and so could not qualify for protection under the law.³⁴⁵ Thus the tribunal found that while a number of factors had interfered with the investor's use and enjoyment of its investment, they could not properly be termed tantamount to expropriation by the government, noting further that inquiries recently made by the investor regarding loans to invest

could still work the land productively); *Fredin v. Sweden*, 13 Eur. H.R. Rep. 784, para. 43 (1991) (holding that the decision to revoke complainant's gravel mining license had to be viewed in relation to its other properties which were not similarly affected); *Pine Valley v. Ireland*, 14 Eur. H.R. Rep. 319 (1992); *Padea v. Italy*, 21 Eur. H.R. Rep. 482 (1996). *But see* *Papamichalopoulos v. Greece*, 16 Eur. H.R. Rep. 440 (1993) (holding that the physical occupation by the army of the claimant's property had rendered the owner unable to use or enjoy the property and so amounted to expropriation).

340. *Tradex Award*, *supra* note 308; *see also* *S. Pac. Props. v. Egypt (Pyramids)*, Award, Int'l Centre for Settlement of Inv. Disputes, ARB/84/3 (May 20, 1992), *reported in* 19 Y.B. COM. ARB. 51, para. 169 (1994) (finding that the government's withdrawal of its contribution to the project, its blocking of the claimant's bank accounts, placement of claimant in receivership, and sequestration of its assets "rendered impossible and impracticable the continuation of a joint venture between" the claimant and the government instrumentality); *Marine Drive Complex v. Ghana*, Award on Jurisdiction and Liability, *Ad Hoc UNCITRAL* (Oct. 27, 1989), *reported in* 19 Y.B. COM. ARB. 11, para. 26 ("What is clear is that the conjunction of the stop work order, the demolition [of parts of the investor's property], the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of [the investor] without possible re-entry had the effect of causing the irreparable cessation of work on the project . . . constitut[ing] a constructive expropriation of MDCL's contractual rights in the project and accordingly, the expropriation of the value of [the investor's] interest in MDCL . . .").

341. *Tradex Award*, *supra* note 308.

342. *Id.* paras. 100-02. *See* notes 308-12 and accompanying text for a more complete discussion of this issue.

343. *Id.* para. 103.

344. *Id.* paras. 150-53.

345. *Id.* para. 158.

further in the property made it difficult to believe that the property had been "expropriated."³⁴⁶

d. Application to the Facts at Hand

Aspinal stated that the ban on open-pit mining was equivalent to a fisherman being forced to fish with a much smaller hook.³⁴⁷ It is not equivalent to a fisherman not being allowed to fish at all. Nor is it equivalent to expropriation. The mining companies' rights to search for and extract minerals have not been extinguished but restricted in the manner of their operation. The mining companies may still extract minerals from areas that are within protected forests using different means, while those whose CoW includes both protected forest and nonprotected forest areas may continue to utilize open-pit mining patterns in nonprotected areas. As the foregoing survey of cases show, no major international tribunal under any analogous law has found such partial restrictions equivalent to expropriation.³⁴⁸ It is unlikely that the mining companies would find the first.

3. No Transfer of Benefits

If the mining companies' indirect expropriation claim has not failed already on the above grounds, it would likely finally fail on the grounds that no benefit was transferred through the ban to the government or a third party. Many, but not all, tribunals adjudicating indirect expropriation claims, have included in their analysis whether, as a result of the alleged interference, a benefit was transferred from the complainant to the government or to a third party.³⁴⁹ As with the complete, or almost complete, deprivation of rights standard described above, the requirement that a claimant show that a benefit was transferred from it to the State or a third party flows logically from the formulation "equivalent to expropriation."³⁵⁰ Expropriation is often defined not only in terms of dep-

346. *Id.* paras. 158–59.

347. *See* Aspinal, *supra* note 10.

348. As noted by the tribunal in *Pope & Talbot* most Iran-U.S. Claims Tribunal decisions are inapplicable in this regard as that "tribunal's mandate expressly extends beyond expropriation to include 'other measures affecting property rights.'" *Pope & Talbot Interim Award*, *supra* note 28, para. 104 (quoting Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 1 IRAN-U.S. C.T.R. 9, art. II).

349. *See, e.g.*, *Olguin Award*, *supra* note 43, paras. 26, 47; *Pope & Talbot Interim Award* *supra* note 28, para. 100; *S.D. Myers Award on Merits*, *supra* note 28, para. 287; *Tradex Award*, *supra* note 308, para. 103 (quoting *Amcoa* case, "a compulsory transfer of property rights," *Amcoa Case*, 15 IRAN-U.S. C.T.R. 220 (1997)).

350. *See supra* Section IV.B.3.

riation of benefits but of a transfer of benefits from a party to the State.³⁵¹ The reasoning of opinions which address this factor reflects this.

The most explicit formulation of this standard came in a recent BIT decision *Olguin v. Spain*. The *Olguin* tribunal rejected the idea that the State could be held liable for loss which the investor incurred when his investment failed in the context of an economic crisis—notwithstanding alleged guarantees issued by the State—and its negligent management of State instrumentality involved.³⁵² According to the tribunal

[t]he Arbitral Tribunal could give expropriation the scope alleged by *Olguin* only if it strayed from the general principles of law and from the provisions of positive law defining and regulating expropriation. There is expropriation where there are acts which can be reasonably deemed to deprive an individual of property belonging to him, in such a manner that *the doer* of such acts directly or indirectly *acquires the possession or at least the profits of the expropriated property*. Expropriation also requires the intention to expropriate; omissions, serious as they may be, do not suffice for expropriation to exist.³⁵³

The tribunal articulated a rule that not only must there be a transfer of benefits from the investor to the State, but that transfer must have been the intended effect of the action complained of by the investor.³⁵⁴

The two Chapter 11 tribunals, *Pope & Talbot* and *S.D. Myers*, which addressed the issue, did not do so in terms as strong as those of the *Olguin* tribunal, but still made clear that it was a factor in their analysis. In *Pope & Talbot*, the tribunal noted first that “there is no allegation that the Investment has been Nationalized or that the Regime is confiscatory.”³⁵⁵ The Canadian government officials had not taken over the control of any of the investor’s operations and had not taken any of the benefits of the business except through taxation.³⁵⁶ The *S.D. Myers* tribunal similarly noted that the State “realized no benefit from the measure” in dispute, and no evidence supported “a transfer of property or benefit directly to others.”³⁵⁷ In addition to the requirement of a transferred benefit which

351. See, e.g., WEBSTER’S NEW WORLD DICTIONARY 495 (“1. to take (land, property, etc.) from its owner; esp. to take for public use or in the public interest . . . 2. to transfer (property) from another to oneself . . .”).

352. *Olguin Award*, *supra* note 43, paras. 19–26.

353. *Id.* para. 47.

354. *Id.*

355. *Pope & Talbot Interim Award*, *supra* note 28, para. 100.

356. *Id.*

357. *S.D. Myers Award on Merits*, *supra* note 28, para. 287; see also *id.* para. 280 (“the term ‘expropriation’ carries with it the connotation of a ‘taking’ by a government-type authority of a person’s ‘property’ with a view to transferring ownership of that property to another

these decisions imply, the *Pope & Talbot* and *S.D. Myers* decisions also imply a narrow definition of benefit, which does not include the general increase in public good that all bona fide regulations seek to effect.³⁵⁸

The ban on open-pit mining effected no transfer of ownership rights or control to the GOI or third party. The mining companies still own and control their operations to the extent provided for in their contract. As discussed above these rights have not been deprived, or even diminished, and certainly have not been transferred to the GOI or a third party. The mining companies therefore have no legitimate claim of indirect expropriation on which to have based their threat.

V. CONCLUSION—FINAL PROACTIVE SOLUTIONS

As the foregoing demonstrated, the GOI could likely have beaten some or all of the mining companies' claims at a jurisdictional stage and almost certainly on the merits. However, in the end this did not matter; the threat was enough to compel Indonesia to backtrack on needed environmental regulation. The inordinate strength of the threat can be traced to a number of factors, including possibly, as suggested above, an inadequate understanding of the applicable law on the part of the Indonesian authorities. However, other factors which relate to structural characteristics of the dispute settlement processes under BITs and MITs may also have contributed to its inordinate strength. These include the lack of a doctrine of *stare decisis*³⁵⁹ and the *ad hoc* nature of the tribunals which limits the predictability in arbitral determinations;³⁶⁰ the high cost of defending against these suits, which results in a consistent "out-lawyering" of developing countries by well-financed investors;³⁶¹ a perceived pro-business orientation of the tribunals,³⁶² the lack of an effective

person, usually the authority that exercised its de [sic] *jure* or *de facto* power to do the 'taking.'"). Interestingly, the *S.D. Myers* tribunal was one of the only tribunals to intimate the possibility that "in some contexts and circumstances" a less than complete and permanent deprivation of rights might rise to the level of expropriation. *S.D. Myers Award on Merits*, *supra* note 28, para. 283. Given its concern regarding the transfer of benefits that often accompanies expropriations, *id.* para. 287, it may be that such "contexts and circumstances" occur when a State temporarily or partially transfers the benefits of an investor's rights to itself or a third party.

358. See *Pope & Talbot Interim Award*, *supra* note 28, para. 100; *S.D. Myers Award on Merits*, *supra* note 28, para. 287.

359. See SCHREUER, *supra* note 129, at 1082, para. 15.

360. See, e.g., Wälde, *supra* note 175, at 44.

361. Robert Howse, Professor, University of Michigan Law School, Class Lecture at University of Michigan Law School (Jan. 17, 2002) (discussing his experience working in investor-State disputes).

362. Sornarajah, *ICSID*, *supra* note 83, at 94 (referring to a perception, which Sornarajah finds justified by the situation he describes involving Indonesia, "that arbitral tribunals are

appeal,³⁶³ and the possibility of very large damage awards, the impact of which is greatly increased for a country like Indonesia without large hard currency reserves.³⁶⁴ Due to the structural quality of these factors, they resist solution by any one country, demanding comprehensive reform efforts by the various State parties to ICSID. However, there is open to Indonesia the possibility of amending, clarifying, or even nullifying the three treaties on which the threat was based and other similar treaties to which it is a party, so as to proactively diminish the effectiveness of any subsequent threats.

All three treaties provide for arbitration between the respective contracting parties should a dispute arise between them regarding the respective treaty's interpretation and/or implementation.³⁶⁵ Further, while formal amendment provisions exist in the ASEAN MIT and Aus-Indo BIT, but not the UK-Indo BIT,³⁶⁶ according to the rules of customary international law, Indonesia and the U.K. are free to amend their BIT by mutual agreement.³⁶⁷ In addition, should adequate resolution not be had through negotiated amendment or arbitrated clarification, there are also arguably sufficient grounds for the GOI to nullify and/or suspend the treaties.

prone to contort the law in order to ensure the investor comes out best, whatever the situation").

363. Under the Washington Convention (ICSID), control of ICSID arbitrations is removed completely from the courts. Washington Convention (ICSID), *supra* note 40, art. 52. Article 52 only provides for limited grounds for appeal mainly going to procedural errors and abuses, there is notably no public policy exception—not surprising given ICSID arbitration's extranational character. *See id.* art. 52(1). If the annulment panel, drawn from the general pool of arbitrators, annuls the award, a new tribunal is constituted. *Id.* art. 52(6).

364. For example in one award issued in May of 1999 the GOI was found liable for \$391,711,652 to one investor and \$180,570,322 to another, for a total of \$572,281,974. *Himpurna, Patuha Awards 'Defective,' Counsel for Indonesia Claims*, 15 MEALEY'S INT'L ARB. REP., Feb. 2000, available at LEXIS, Legal News, International Arbitration. For reference, Indonesia's total spending on education in 1999 was \$1.9 billion for a population of 206,264,595. World Bank Edstats, at <http://devdata.worldbank.org/edstats/SummaryEducationProfiles/CountryData/GetShowData.asp?sCtry=IDN,Indonesia> (last visited Apr. 7, 2003); Population of Indonesia by Province, at <http://www.bps.go.id/sector/population/table1.shtml> (last visited Apr. 10, 2003). Its total GDP in 1999 was \$141.3 billion. World Bank, *Indonesia at a Glance*, at [http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/Indonesia+-+Country+at+a+Glance/\\$File/Indonesia+-+Country+at+a+Glance.pdf](http://lnweb18.worldbank.org/eap/eap.nsf/Attachments/Indonesia+-+Country+at+a+Glance/$File/Indonesia+-+Country+at+a+Glance.pdf) (last visited Apr. 7, 2003).

365. UK-Indo BIT, *supra* note 26, art. 8; ASEAN MIT, *supra* note 9, art. IX; Aus-Indo BIT, *supra* note 25, art. XII.

366. ASEAN MIT, *supra* note 9, art. XII; Aus-Indo BIT, *supra* note 25, art. XIV; UK-Indo BIT, *supra* note 26.

367. VCLT, *supra* note 90, art. 39.

A. Arbitrated or Negotiated Clarification

The GOI should seek to clarify provisions in each treaty concerning expropriation, fair and equitable treatment, and investment definitions, either through negotiated amendment or arbitration. Sornarajah questions reducing a diplomatic dispute to a determination by a type of body more generally suited for the resolution of private commercial disputes.³⁶⁸ However, if an actual negotiated amendment cannot be reached, utilization of the arbitration option may be essential. The importance of following one of these two procedures is demonstrated by the recent controversy concerning the significance of the interpretive statement issued by NAFTA ministers regarding NAFTA article 1105's fair and equitable treatment provisions.³⁶⁹ Todd Weiler, among others, has argued that the "interpretation" was really an amendment and thus invalid for failure to utilize the procedures for amendment provided by NAFTA. It is unclear what significance Chapter 11 tribunals will assign to it.³⁷⁰ Negotiated amendment or arbitrated settlement would avoid such a possibility, both of which effect a binding resolution of the issue between the State parties.³⁷¹

368. SORNARAJAH, *supra* note 21, at 272.

369. N. Am. Free Trade Comm'n, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), available at <http://www.naftalaw.org>; see Todd Weiler, *NAFTA Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back*, 36 INT'L LAW. 345, 347 (2002); *Fair and Equitable Treatment Under NAFTA's Investment Chapter 11*, *supra* note 236.

370. Weiler, *supra* note 369, at 347.

371. See UK-Indo BIT, *supra* note 26, art. 8 (7); ASEAN MIT, *supra* note 9, art. IX(2); Aus-Indo BIT, *supra* note 25, art. XII(5). In utilizing the arbitration option the GOI should be aware of concerns raised by Robert Thompson in discussions with the author, regarding the constitution of the tribunal formed to hear the dispute. E-mail from Robert Thompson, Former Secretary General of International Chamber of Commerce Court of Arbitration, to Stuart Gross (July 30, 2002, 11:43 A.M. EST) (on file with author). The UK-Indo BIT and Aus-Indo BIT both allow for each contracting party to choose an arbitrator, and in the case of the Aus-Indo BIT, make the appointed arbitrators' choice of a chairman subject to approval by the parties. Aus-Indo BIT, *supra* note 25, art. XII(3)(a); UK-Indo BIT, *supra* note 26, art. 8(2). As Thompson observed, in this context it would be "essential that the [GOI] . . . appoint an open-minded arbitrator able to look far beyond the narrow confines of the field of investments, since this is a matter of Public Law." E-mail from Robert Thompson, *supra*. In the case of the Aus-Indo BIT provisions regarding the rights to refuse arbitrators' choice of a chairman, Thompson stated that, "[t]he Chairman should obviously be a person with a background in Public Law, and certainly not Commercial law," and, in fact, the GOI should refuse to accept anyone with such a background, allowing instead the President of the ICJ to appoint the chairman if a public law expert cannot be agreed upon. *Id.* See also, generally, Waelde & Kolo, *supra* note 229, at 823 (discussing the likely difference in interpretations reached on the issue of indirect expropriation by "commercial arbitrators" as opposed to those reached by "a court composed of more statist or environmentalist members"). The ASEAN MIT provides for disputes between contracting parties to be submitted to the ASEAN Economic Ministers, thus eliminating the GOI's ability to influence the constitution of the tribunal, as well as likely lessening its need to do so. See ASEAN MIT, *supra* note 9, art. IX(2).

Through these processes the parties should clarify three essential provisions. First, it should be made clear that the respective expropriation provisions do not provide a guarantee of compensation for reductions in economic value of investments that result from bona fide government regulation of an investment's conduct. Second, the treaties' respective fair and equitable treatment provisions should be explicitly defined in terms of an international minimum standard of treatment, which protects investors against only arbitrary and/or discriminatory host-country actions. Third, the definition of a qualified investment should be affirmed to include only those investments which are valid as matter of host-country law, both in terms of the validity of their establishment and in terms of the lawfulness of their conduct once established.³⁷² Finally, provisions in the Aus-Indo BIT—which make unclear the status of juridical persons incorporated in Australia but owned or operated by persons of third countries—should be clarified so as to make provision of protection to such individuals explicitly subject to both parties' consent.³⁷³

B. Nullification or Suspension

Should the above strategies of negotiation and arbitration be unsuccessful, the GOI would have the right to nullify or suspend the treaties, under either a theory of fundamentally changed circumstances or on grounds analogous to the lack of certain subject matter in contract law.³⁷⁴ In the case of the ASEAN MIT, this would likely only be necessary if the GOI recognized a truly imminent threat, as the instrument allows any party to withdraw upon six months notice.³⁷⁵ However, in the case of the other two instruments, significant restrictions exist regarding the timing of withdrawal, which effectively lock in the contracting States for long periods of time.³⁷⁶ Therefore, complete nullification or suspension may be the GOI's only effective method of extracting itself from these instruments should it be deemed necessary. Note that the result of either one of these arguments need not be the complete nullification of the respective instrument, but rather a suspension of it until the conditions of impossibility are remedied, viz. the treaty terms are clarified as

372. This would make clear that investments tainted by corruption are not eligible for protection and that an investor who has failed to live up to its side of the bargain in compliance with the conditions of admittance and operation cannot demand the benefits of these instruments' protections. See generally Wälde, *supra* note 174, at 28 (noting the weakness of any investor's claim where the subject of the suit was tainted with corruption).

373. See *supra* Section III.A.1.c.

374. See BROWNIE, *supra* note 248, at 616–20.

375. ASEAN MIT, *supra* note 9, art. XII(2).

376. Aus-Indo BIT, *supra* note 25, art. XV; UK-Indo BIT, *supra* note 26, art. 11(2)–(3).

described above.³⁷⁷ Thus, the possibility of such suspensions could also be effective tactics in negotiations to reach such clarifications.

1. Fundamental Change in Circumstances

Under the VCLT article 62(1), a State party may seek to suspend or terminate a treaty on the basis of a change of circumstances if an unforeseen “fundamental change of circumstances has occurred with regard to those existing at the time of the conclusion of the treaty.”³⁷⁸ This excuse is limited to situations where “the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”³⁷⁹ Accepting *arguendo* that the instruments’ expropriation provisions make the GOI liable to investors for a loss of value to their investment caused by bona fide regulation, the GOI could argue that an essential basis of Indonesia’s consent to such an arrangement was the ability of the central regime to impose its will anywhere in Indonesia. This no longer exists since the overthrow of the Suharto regime and introduction of democracy and devolution of authority to the provinces, particularly in the area of natural resource management.³⁸⁰ That this shift to democracy and devolution was unforeseen by the Suharto regime which negotiated the treaties was demonstrated by the leader’s continued efforts while still in power to choose a succeeding dictator and his decision in the twilight of his control to authorize the use of lethal military force against the students who called for his overthrow.³⁸¹ The effect of this change in governing structure fundamentally changes the nature of the obligations which the GOI agreed to, making the central government now liable for actions over which they have no control.

2. Contract Analogy

It is well established that “an international treaty . . . is ‘in the nature of a contract between nations,’ to which ‘[g]eneral rules of construction apply.’”³⁸² Thus, the GOI could argue for the nullification of the treaties

377. See VCLT, *supra* note 90, arts. 61(1), 62(3).

378. *Id.* art. 62(1); see also BROWNLIE, *supra* note 248, at 620 (affirming its general applicability as a matter of customary international law).

379. VCLT, *supra* note 90, art. 62(1)(a)-(b).

380. See, e.g., Undang-Undang No. 22 Tahun 1999 Tentang Pemerintah Daerah (Law No. 22 of 1999 Regarding Regional Governance) art. 7, 10.

381. See, e.g., *Suharto Orders Action Against Looters*, CNN INTERACTIVE, May 15, 1998, available at <http://www.cnn.com/WORLD/asiapcf/9805/14/indonesia.pm/> (last visited Apr. 6, 2003).

382. *Societe Nationale Industriale Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 107 S.Ct. 2542, 2549 (1987) (quoting *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 104 S.Ct.

on the grounds that the treaties guaranteed an impossibility and so are void.³⁸³ Under both civil and common law systems a contract is void if an essential element of its performance was impossible at the time of formation.³⁸⁴ For example, a contract requiring a human being to fly unassisted is void. Similarly a treaty containing obligations that are a practical impossibility at the time of conclusion should logically also be void.³⁸⁵

On this basis, if these three instruments required through their expropriation and fair and equitable treatment provisions a consistent application of the rule of law in Indonesia, they guaranteed what was a practical impossibility at the time of their conclusion and so are void. At the time each of these instruments was concluded there was not rule of law in Indonesia but what some have described as “bureaucratic law.”³⁸⁶ Bureaucratic law systems, unlike rule of law systems, contain a vast body of “indeterminate and often contradictory laws and regulations” that the bureaucracy “can apply as they see fit.”³⁸⁷ In this context, any treaty which guaranteed any type of regulatory stability or consistent application guaranteed an impossibility and so is void.

C. Conclusion

Excluding the negotiated or arbitrated amendment, these options are admittedly quite extreme, and ultimately might not ultimately be in Indonesia's best interest. In the context of the relative ubiquity of IIAs these days, foreign investors would likely not look kindly on a country such as Indonesia which had nullified and/or withdrawn from those IIAs to which it was a party. While it is certainly arguable that a country can survive without foreign investment and possibly even thrive, it seems

1776, 1783, 1788 (1984)); *see also, e.g.*, Aegean Sea Continental Shelf Case (Greece v. Turkey), 1978 I.C.J. 3, 68 (Sept. 11); Legal Consequences for States of the Continued Presence of S. Africa in Namibia (South West Africa) Notwithstanding Security Council Resolutions, 1971 I.C.J. 16, 131 (June 21) (Petren, J.); Southwest Africa (Ethiopia v. S. Africa), 1966 IC.J. 6, 84 (July 18); Sullivan v. Kidd, 41 S.Ct. 158, 160 (1921); Ware v. Hylton, 3 Dall. 199, 240-41, 1 L.Ed. 568 (1796); United Kingdom House of Lords: In re Al-Fawwaz, 41 I.L.M. 1224, 1231 (2002).

383. *See, e.g.*, SUBEKTI, *supra* note 167, at 4–5; RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

384. *See, e.g.*, SUBEKTI, *supra* note 167, at 4–5; RESTATEMENT (SECOND) OF CONTRACTS § 33.

385. In addition, it is contralogical to state that an impossibility existing at the time of conclusion is not grounds for termination or suspension while an impossibility resulting later is. *See supra* Section V.B.1.

386. Charles V. Barber, *The Case Study of Indonesia*, sec. IV (World Resources Institute) available at <http://www.library.utoronto.ca/pcs/state/indon/indon3.htm>.

387. *Id.*

likely that given the current structure and state of Indonesia's economy, at least some measure of foreign investment would be desirable.

However, as Indonesia's foreign investment law makes clear, it remains Indonesia's sovereign right to determine the types of foreign investment it admits and the conditions by which it allows investments to remain. The IIAs which the GOI has concluded leave this authority intact. Indonesia can still unilaterally deny access to any investment it chooses and is restricted in its conduct toward investments which have been admitted only so as to be prevented from taking arbitrary or discriminatory actions against them. The decisions of tribunals on the whole support this, even those based on instruments whose scope, object, and purpose are far more protective of investor—as opposed to host-State—rights than instruments to which Indonesia is a party.

It is hoped that this trend will continue and that those with an interest in the institution of organized international investor-State dispute resolution will work to reform some of the structural shortcomings mentioned above as well as issues going to its legitimacy like transparency and public participation. However, in the meantime, countries such as Indonesia have a difficult choice to make when faced with threats like those of the mining companies. There are quite strong incentives for them to concede. That said, when threats such as that of the mining companies, which could easily have been beaten, are allowed an inordinate effect, the incentive for companies to repeat such strategies is increased; and as a corollary, host-State regulatory freedom is diminished. Thus, though sometimes the potential risks can be quite high, it would be in the long-term interests of countries such as Indonesia to stand up to such threats and, in fact, push back. At the end of the day investor decisions are based upon business considerations, and the decision to threaten arbitration is no different. As long as it is cheap and effective to make such threats investors will do so. It is the host-State's obligation to its people to make sure that it is not.