

Comments on Professor  
Louis T. Wells, “Why do  
some Foreign Investors  
Avoid International  
Protections when their  
Investments are in  
Trouble?”

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# Background: Dilemmas for Investors and Host Countries

- ◆ Host Country: Promotion of investments v. Control over investments (nationalization, regulation)
- ◆ Investors (Multinationals): Exploitation of local opportunities (natural resources, markets) v. Adaptation to local environment (technology transfer, increase of employment opportunities)

# Host Governments

# Investors

Promotion of investments

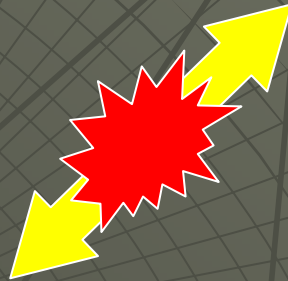


Control over investments

Exploitation of local opportunities

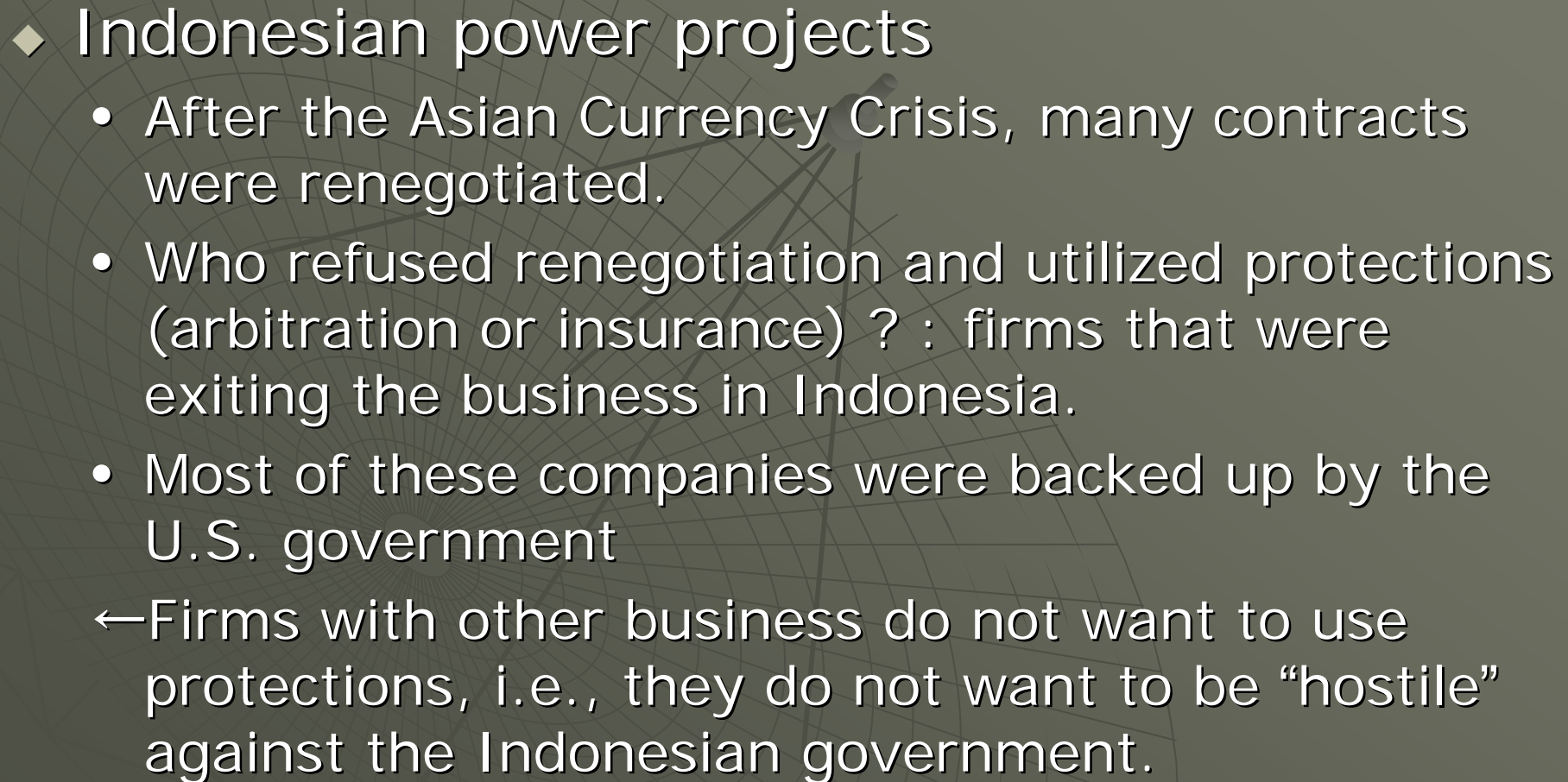


Adaptation to local environment



# A Summary of the Presentation

- ◆ External protections (new assurances)
  - Arbitration
  - Official political risk assurance
    - ◆ ex. MIGA, OPIC(U.S.), NEXI(Japan)
  - Home government intervention
- ◆ The number of arbitration cases is increasing. But do arbitration and other protection measures really useful for investors?

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- ◆ Indonesian power projects
    - After the Asian Currency Crisis, many contracts were renegotiated.
    - Who refused renegotiation and utilized protections (arbitration or insurance) ? : firms that were exiting the business in Indonesia.
    - Most of these companies were backed up by the U.S. government
    - ← Firms with other business do not want to use protections, i.e., they do not want to be “hostile” against the Indonesian government.

- ◆ Attitude of Japanese companies against arbitration: Maybe different, to some extent.
- ◆ Problems of Arbitration: Rigid interpretation of contract, inconsistent results (lack of standards), lack of consideration of national goals, asymmetric access to arbitration, damages orientation (discouraging settlement)

# Comments and Questions

- ◆ Neutrality and Predictability:
  - Some problems of arbitration seem to be related to perceived *neutrality* and *predictability* of decisions of legal procedures, i.e., arbitration proceedings and domestic judicial proceedings.
    - ◆ Host governments may think arbitration proceedings are neither neutral nor predictable.
    - ◆ Investors may think domestic judicial proceedings are neither neutral nor predictable. Even so, they may avoid using arbitration because they don't want to be hostile.

## ◆ Asymmetry:

- An investor can initiate arbitration proceedings even though the host government (and a domestic investor) cannot.
- In many BITs, investors have an option to bring a suit to a domestic court or to an arbitral tribunal (“fork in the road” clause and “No U-turn” clause). These clauses make the situation worse for host countries.
- Do we have to eliminate these clauses to alleviate this asymmetry problem?



- ◆ How can we solve the problem?
  - Improvement of arbitration
    - ◆ Neutral and predictable arbitration?
    - ◆ Appeal Process
    - ◆ Symmetric access – including abandonment of “fork in the road” clauses?
    - ◆ Encouraging settlement – It seems difficult under the Common law tradition (arbitration and mediation must be separated).

- Improvement of the domestic judicial system of host country and abandonment of arbitration.
  - ◆ There is no asymmetry regarding bringing a suit in a national court. Moreover, it can encourage settlement.
  - ◆ Shimizu (2008, in Japanese) showed arbitration is basically useful for investors, but not so useful and may be harmful when domestic judicial proceedings are neutral and predictable.
  - ◆ No arbitration in the U.S. – Australia FTA
  - ◆ Needless to say, other countries cannot intervene in the host country to remake its judicial system. These countries, however, can encourage the host country to improve neutrality and predictability of its judicial system.

## ◆ Japanese Companies

- If host countries have given better investment protection to some Japanese companies, because of their advanced technology and/or their positive attitude toward technology transfer, there was no need for these Japanese companies to use arbitration (like the old ITT in Indonesia). Is this explanation possible?