3-2022

Indonesia's termination of bilateral investment treaties

Lucas Jun Hao WONG
Singapore Management University

INDONESIA'S TERMINATION OF BILATERAL INVESTMENT TREATIES

LUCAS JUN HAO WONG*

I. INTRODUCTION

Indonesia holds a vast source of untapped potential in terms of its ability to influence global trade. While Indonesia has been a member of the World Trade Organization (WTO) since 1 January 1995,[1] its integration into global value chains remains relatively weak, with the ratio of its trade in goods and services to GDP falling from 48.6% in 2013 to below 40% in 2019.[2] Nonetheless, as Southeast Asia's largest economy[3] and a member of the G20, Indonesia possesses the capacity to become a key player on the world stage.

Indonesia has long had extensive trade and investment links to countries across the globe. As at December 2021, Indonesia had 12 free trade agreements (FTAs)[4] and 26 bilateral investment treaties (BITs) that were in force.[5] However, one wonders if this will remain the case for long. Recently, Indonesia has begun to terminate many of its BITs in light of concerns over how these were being used against it, possibly evincing a shift in its attitude towards trade.

This paper thus seeks to shed some light on Indonesia's termination of its BITs and the potential ramifications. Further, many Indonesian agreements overlap with ASEAN due to Indonesia's membership in ASEAN. Hence, this paper may also enrich one's understanding of ASEAN law. We will assess the rationale behind Indonesia's actions, before evaluating how this may affect its future trade arrangements.

II. RECENT DEVELOPMENTS

In March 2014, Indonesia revealed its intention to terminate all 67 of its BITs when they were due for renewal.[6] Since then, it has terminated BITs with 25 countries. These countries are Argentina, Australia, Belgium, Bulgaria, Cambodia, China, Denmark, Egypt, France, Germany, Hungary, India, Italy, Kyrgyzstan, Lao People's Democratic Republic, Malaysia, the Netherlands, Pakistan, Romania, Singapore, Slovakia, Spain, Switzerland, Turkey and Vietnam.[7]

---

* LL.B. Candidate (4th year), Yong Pung How School of Law, Singapore Management University. The author expresses his thanks to Associate Professor Pasha L. Hsieh for his supervision and guidance on this paper.

1 World Trade Organization, "Indonesia and the WTO", available at https://www.wto.org/english/thewto_e/countries_e/indonesia_e.htm#statistics (last accessed 2 December 2021).

2 World Trade Organization, "Trade Policy Review – Report by the Secretariat: Indonesia" (WT/TPR/S/401; 4 November 2020), para. 4.

3 International Trade Administration, "Indonesia - Country Commercial Guide", available at https://www.trade.gov/country-commercial-guides/indonesia-market-overview (last accessed 2 December 2021).

4 Asia Regional Integration Center, "Free Trade Agreements", available at https://aric.adb.org/fta-country (last accessed 2 December 2021).

5 United Nations Conference on Trade and Development, "International Investment Agreements Navigator", available at https://investmentpolicy.unctad.org/international-investment-agreements/countries/97/indonesia (last accessed 2 December 2021).

6 Ben Bland and Shawn Donnan, "Indonesia to terminate more than 60 bilateral investment treaties" (Financial Times, 26 March 2014).

7 United Nations Conference on Trade and Development, "International Investment Agreements Navigator".

It appears that the key reason for Indonesia's decision was its discontent over how the investor-state dispute settlement (ISDS) provisions under the BITs were being used against it. In particular, it was thought that foreign companies were using the ISDS provisions to threaten Indonesia with arbitration proceedings and pressure it into granting the companies concessions.[8] This will be discussed further below.

However, it has also been argued that Indonesia is not against ISDS *per se*; rather, what it seeks is a *fair* ISDS mechanism that "strike[s] the appropriate balance between protection of foreign investors and protection of its own sovereignty".[9]

III. How Have Indonesia's Actions Affected its Future Trade Arrangements?

A. Free Trade Agreements / BITs

Since Indonesia announced its intention to terminate all its BITs, it has been involved in negotiations on three major trade arrangements besides the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP).

1. Indonesia-Singapore BIT (2018)

The strongest evidence in the Indonesia-Singapore BIT of Indonesia's stricter approach is found in Article 17(1) thereof. This extends the cooling-off period in which parties must attempt to settle their disputes through consultations from six months to a year.[10] Given that this is considerably longer than the three- to six-month cooling-off period usually found in other BITs,[11] the change may be reflective of Indonesia's intention to compel foreign investors to treat consultations seriously, as opposed to that merely being a necessary step to proceed to arbitration, which investors perceive as a bargaining chip against the government.[12]

2. First Protocol to amend the ASEAN-Japan Comprehensive Economic Partnership Agreement (AJ-CEPA) (2019)

The amendments to the AJ-CEPA, introduced under the First Protocol, reflect Indonesia's discomfort with ISDS clauses. Previously, the ISDS provisions in the AJ-CEPA made no distinction between Indonesia and other ASEAN states.[13] However, the First Protocol introduces a new Article 51.13(9) into the AJ-CEPA, which provides that,

---

[8] David Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?" (2017) 7 Asian J. Int. L. 124, 136-39.

[9] Antony Crockett, "The Termination of Indonesia's BITs: Changing the Bathwater, But Keeping the Baby?" (2017) 18 J.W.I.T. 836, 854.

[10] Indonesia-Singapore Bilateral Investment Treaty (16 February 2005), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1634/download (last accessed 3 January 2022), art. 5; Indonesia-Singapore Bilateral Investment Treaty (11 October 2018), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6179/download (last accessed 3 January 2022), art. 17(1).

[11] "The new Singapore-Indonesia investment treaty and what it means for your business" (Drew Network Update, 23 April 2021), available at https://www.drewnetworkasia.com/media/awpjnyd0/apr2021_the-new-singapore-indonesia-investment-treaty-and-what-it-means-for-your-business_23april2021.pdf (last accessed 13 May 2021), 9.

[12] Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties", 138-39.

[13] ASEAN-Japan Comprehensive Economic Partnership (14 April 2008), available at https://www.mofa.go.jp/policy/economy/fta/asean/agreement.pdf (last accessed 3 January 2022), art. 51.

in the event of a dispute between Indonesia and an investor of another Contracting State, a further written consent is required from Indonesia before the matter may proceed to ICSID arbitration.[14] Apart from the Philippines, no other Contracting State is subject to this requirement.[15] Nor is a separate written agreement required if an investor desires arbitration under the UNCITRAL rules.[16]

In requiring further written consent from the Respondent State, Indonesia may be taking a leaf out of the Philippines' book, albeit for different reasons. In the case of the Philippines, Article 33(1)(b) of the ASEAN Comprehensive Investment Agreement (ACIA) imposes an *additional* requirement for the submission of a claim to ICSID where the Philippines is the Respondent State (see footnote 14 of the ACIA).[17] It thus appears that Indonesia's move *vis-à-vis* the AJ-CEPA was inspired by this.

Indonesia's desire for the requirement of further written consent may also be attributable to its rocky history with ICSID arbitration. Indeed, the two landmark cases which reportedly brought about Indonesia's decision to terminate all its BITs both involved ICSID arbitration.[18] The *Churchill* and *Planet Mining* cases (which were later consolidated) originated out of an Indonesian provincial government's decision to revoke mining licenses granted to Churchill (a UK-listed company) and Planet (an Australian subsidiary).[19] The two foreign companies thus sought more than US$1 billion in damages for alleged breaches of obligations under the Indonesia-UK BIT and Indonesia-Australia BIT, and requested for arbitration with ICSID pursuant to the ISDS clauses in their respective BITs.[20]

For its part, Indonesia objected to the jurisdiction of the arbitral tribunal, arguing that: (1) it had not furnished its consent in writing to submit the dispute to arbitration (which was required under the BITs); and (2) in any case, the alleged investments did not fall within the scope of investments protected under the BITs, because the investments were made in violation of Indonesia's investment laws.[21] The ICSID tribunal rejected both arguments and took jurisdiction over the dispute, allowing the foreign companies to proceed with their claims.[22]

The ICSID decision incurred the wrath of the Indonesian President at the time, and affirmed a growing belief that the ISDS provisions were merely being used by foreign companies as a bargaining tool to obtain concessions from states.[23] After the ICSID tribunal handed down its decision, the President said:

> I don't want the multinational companies that do anything with its international powers to *put pressure on developing countries, such as Indonesia* … If there are contracts

[14] First Protocol to amend the Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations (26 February 2019), available at https://www.mofa.go.jp/files/000480152.pdf (last accessed 3 January 2022), art. 6. See especially Note 1 of the new Article 51.13(9)(a) of the AJ-CEPA.

[15] Ibid.

[16] "The First Amendment to the Japan-ASEAN EPA and Why It Matters" (Clifford Chance, August 2020), available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/08/The-First-Amendment-to-the-Japan-ASEAN-EPA-and-Why-It-Matters.pdf (last accessed 3 January 2022).

[17] ASEAN Comprehensive Investment Agreement (26 February 2009), available at http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf (last accessed 3 January 2022), art. 33(1)(b), fn. 14.

[18] Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties", 136.

[19] *Churchill Mining and Planet Mining v Republic of Indonesia* (ICSID Arbitral Tribunal Cases No. ARB/12/40 and ARB/12/14; Decision on Jurisdiction (24 February 2014)).

[20] Ibid, at [51].

[21] Ibid, at [77].

[22] Ibid, at [298].

[23] Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties", 138-39.

> with foreigners of 20 or 30 years ago [which turn] out to be inappropriate and unjust, then [it is] my obligation to revisit the contract.[24]

Therefore, it is arguable that Indonesia's turbulent history with ICSID arbitration contributed to its decision to terminate its BITs, as well as its unwillingness to assent to ICSID arbitration under the AJ-CEPA.

3. *Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) (2019)*

As regards the IA-CEPA, it is more difficult to conclude that the ISDS provisions were drafted in that way solely due to Indonesia. This is because Australia, too, is not unequivocal in its support for ISDS provisions.[25] Rather, the government of the day, controlled by the Liberals, takes a "case-by-case approach to the inclusion of ISDS commitments in international trade agreements".[26] Any ISDS provisions would thus need to contain "robust safeguards to preserve the Government's right to regulate in the public interest".[27]

Nevertheless, the introduction of two new provisions in the IA-CEPA may have been due, at least partially, to Indonesia's stricter approach to ISDS.

First, if a dispute arises as to the interpretation of any provision of the IA-CEPA, Article 14.33 thereof provides that the arbitral tribunal must request a joint interpretation of that provision. Further, that interpretation will be *binding* upon the tribunal.[28] Previously, the tribunal merely had to consult the parties on such matters, and even then, the parties' interpretations were not binding and the tribunal could arrive at its own determination.[29] This issue had reared its head in the *Churchill* arbitration, where Churchill and Indonesia were at odds as to whether Article XI(4)(a) of the Australia-Indonesia BIT contained Indonesia's consent to ICSID proceedings.[30]

Second, Article 14.21 excludes claims "in relation to an investment that has been established through illegal conduct including fraudulent misrepresentation, concealment or corruption". The majority of international investment agreements concluded before 2018 did not contain such restrictions on their scope.[31] In the

---

[24] See Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties", 139, citing Susilo Bambang Yudhoyono, "Introductory Plenary Meeting of the Cabinet" (President's Office, 28 June 2012) (emphasis added).

[25] See generally Esmé Shirlow, "2018 in Review: Australia and New Zealand" (Kluwer Arbitration Blog, 21 January 2019), available at http://arbitrationblog.kluwerarbitration.com/2019/01/21/2018-in-review-australia-and-new-zealand (last accessed 30 May 2021); "Australia and Indonesia Sign Comprehensive Economic Partnership Agreement" (Herbert Smith Freehills, 29 March 2019), available at https://hsfnotes.com/arbitration/2019/03/29/australia-and-indonesia-sign-comprehensive-economic-partnership-agreement (last accessed 30 May 2021); Australian Department of Foreign Affairs and Trade, "Investor-state dispute settlement (ISDS)", available at https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement (last accessed 30 May 2021) ("The Government considers ISDS provisions in FTAs on a case-by-case basis in light of the national interest").

[26] Australian Government, "Response to the Joint Standing Committee on Trade and Investment Growth Report", available at https://www.dfat.gov.au/sites/default/files/aus-gov-response-to-the-joint-standing-committee-on-trade-investment-growth-report-leveraging-our-advantages.pdf (last accessed 3 January 2022), Response 2 to Recommendation 4.

[27] Ibid.

[28] Indonesia-Australia Comprehensive Economic Partnership Agreement (4 March 2019), available at https://www.dfat.gov.au/trade/agreements/in-force/iacepa/iacepa-text/Pages/default (last accessed 3 January 2022), art 14.33(3).

[29] "Australia-Indonesia Bilateral Investment Treaty" (17 November 1992), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/155/download (last accessed 3 January 2022), art. XIV(1).

[30] *Churchill Mining and Planet Mining v Republic of Indonesia*, at [199]-[200].

[31] World Bank Group, "Comparative gap analysis: Indonesia's current obligations under international investment agreements (IIAs) vs. the obligations under the investment chapter of the Trans Pacific Partnership Agreement (TPP)", available at http://documents1.worldbank.org/curated/en/202111540822026864/pdf/Comparative-Gap-Analysis-

Churchill case, the ICSID tribunal had limited itself to considering the jurisdictional issue, and "[did] not prejudge any alleged wrongdoing by [Churchill] during the operation of the investment, which is a matter for the merits".[32] It is arguable that this will be a relevant consideration in a tribunal's determination on whether it has jurisdiction in future disputes as a result of the presence of Article 14.21.

Therefore, one may surmise that Indonesia's stricter approach to ISDS has led it to become more meticulous in devising safeguards to "limit the degree of discretion arbitral tribunals have in deciding how to conduct the arbitration proceedings, making the process more predictable".[33]

B. CPTPP

The CPTPP has been signed by 11 countries, and has entered into force in eight of them.[34] Indonesia is not a signatory to the CPTPP. However, any state may accede to the agreement following its entry into force,[35] although it requires a consensus among the existing signatories.[36] Currently, eight countries have "telegraphed some kind of interest in joining the CPTPP", including the United Kingdom and China.[37]

Indonesia has expressed its interest in the past to enter the CPTPP.[38] However, it remains a non-signatory to the agreement. The fact that the CPTPP contains a mammoth chapter on ISDS does not seem to be the most significant reason for its reluctance. Assessing which country would be the most likely to join the CPTPP next, Hayley Channer and Jeffrey Wilson write that:

> … the bar required for CPTPP accession will be high for [the] developing economies. It would demand *very extensive economic reforms – particularly around labour standards, state-owned enterprises and services – that would affect many sensitive industries*. When the stresses of the pandemic and its recovery are also considered, there is arguably very little headroom in Southeast Asia for an ambitious tilt at the CPTPP just yet.[39]

Assuming, then, that ISDS is the only obstacle preventing Indonesia from joining the CPTPP, this may be quickly addressed. First, the CPTPP has already narrowed the scope for investors to use ISDS against states.[40] For example, private companies who

---

Indonesia-s-Current-Obligations-Under-International-Investment-Agreements-IIAs-vs-The-Obligations-Under-the-Investment-Chapter-of-the-Trans-Pacific-Partnership-Agreement-TPP.pdf (last accessed 3 January 2022), 18.

[32] *Churchill Mining and Planet Mining v Republic of Indonesia*, at [294].

[33] World Bank Group, "Comparative Gap Analysis", 17.

[34] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), available at https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership (last accessed 2 December 2021).

[35] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (8 March 2018), available at https://www.dfat.gov.au/sites/default/files/tpp-11-treaty-text.pdf (last accessed 3 January 2022), art. 5.

[36] Jeffrey J. Schott, "Joining the CPTPP is a long process and needs consensus among existing members", available at https://www.piie.com/research/piie-charts/joining-cptpp-long-process-and-needs-consensus-among-existing-members (last accessed 2 December 2021).

[37] Hayley Channer and Jeffrey Wilson, "Expanding the CPTPP: A form guide to prospective members", available at https://www.lowyinstitute.org/the-interpreter/expanding-cptpp-form-guide-prospective-members (last accessed 13 May 2021).

[38] Bernadette Christina Munthe, "Indonesia urges Southeast Asian economies to bargain together on TPP" (Reuters, 20 April 2018), available at https://www.reuters.com/article/us-trade-tpp-indonesia-idINKBN1HR14D (last accessed 13 May 2021).

[39] Channer and Wilson, "Expanding the CPTPP" (emphasis added).

[40] New Zealand Parliament, "Report of the Foreign Affairs, Defence and Trade Committee: International treaty examination of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)" (Chairperson: Simon O'Connor; May 2018)), 3. See also Annex B, p. 38 of the Report.

enter into an investment contract with a government cannot use ISDS clauses to settle disputes about that contract.[41]

Second, the CPTPP excludes certain types of disputes from its protection. For instance, Article 9.16 thereof provides that it does not "prevent a Party from adopting, maintaining or enforcing any measure" intended to "ensure that investment[s] … [are] undertaken in a manner sensitive to environmental, health or other regulatory objectives". This will likely alleviate Indonesian concerns about a repeat of the *Churchill* case, where its revocation of the mining contracts was ostensibly due to its disinclination to support contracts which are "detrimental to the environment".[42]

Therefore, the presence of an ISDS chapter in the CPTPP, and Indonesia's discomfort with ISDS, should not prevent it from joining the CPTPP.

C. RCEP

The RCEP came into force on 1 January 2022, after Australia and New Zealand ratified the world's largest trade agreement on 3 November 2021.[43] Following this milestone, the current members may consider applications from other countries to join the agreement after 18 months.[44] Currently, 15 countries are signatories to the RCEP, 10 of which have ratified the agreement.[45] Indonesia has signed, but not yet ratified, the RCEP.[46]

In contrast to the CPTPP, the RCEP has no ISDS mechanism.[47] ISDS is also excluded from the scope of the RCEP's most-favoured nation clause,[48] preventing investors from attempting to access ISDS clauses in other investment agreements.[49]

However, Article 10.18 requires states to enter into discussions on the settlement of investment disputes between a Party and an investor of another Party no later than two years after the RCEP enters into force. While this may suggest that the question is when, rather than if, the RCEP will contain ISDS, the views expressed by some of its signatories indicate otherwise. For example, Malaysia's trade minister Datuk Darell Leiking said:

> Once the agreement is in force, which is within two years, the member states will relook into it and *see whether or not we are going to have the ISDS*. But it must be an agreement made by all countries. For now, there is no ISDS.[50]

---

41 Ibid.
42 Price, "Indonesia's Bold Strategy on Bilateral Investment Treaties", 139.
43 Yen Nee Lee, "World's largest trade deal will come into force in January. The U.S. won't be part of it" (CNBC, 3 November 2021), available at https://www.cnbc.com/2021/11/03/worlds-largest-trade-deal-rcep-to-come-into-force-in-january-2022.html (last accessed 2 December 2021).
44 Regional Comprehensive Economic Partnership (15 November 2020), available at https://rcepsec.org/wp-content/uploads/2020/11/Chapter-20.pdf (last accessed 3 January 2022), art 20.9(1).
45 Lee, "World's largest trade deal will come into force in January".
46 Ibid.
47 Michael Ewing-Chow and Junianto James Losari, "The RCEP Investment Chapter: A State-to-State WTO Style System For Now" (Kluwer Arbitration Blog, 8 December 2020), available at http://arbitrationblog.kluwerarbitration.com/2020/12/08/the-rcep-investment-chapter-a-state-to-state-wto-style-system-for-now/ (last accessed 13 May 2021).
48 Regional Comprehensive Economic Partnership (15 November 2020), available at https://rcepsec.org/wp-content/uploads/2020/11/Chapter-10.pdf (last accessed 3 January 2022), art. 10.4(3).
49 Ewing-Chow and Losari, "The RCEP Investment Chapter".
50 Rahimi Yunus, "RCEP talks to proceed without ISDS" (The Malaysian Reserve, 13 September 2019), available at https://themalaysianreserve.com/2019/09/13/rcep-talks-to-proceed-without-isds/ (last accessed 13 May 2021) (emphasis added).

Therefore, it is not a certainty that ISDS will return, and indeed, Leiking averred that this would depend on whether circumstances change.[51] A further indictment against ISDS is that *all* the RCEP member states had agreed to drop it during the negotiations.[52] One wonders what the odds are of ISDS returning, considering Malaysia, India, Indonesia and New Zealand are all officially opposed to ISDS.[53] Australia, too, is relatively equivocal on ISDS.[54]

On that note, it seems unlikely that Indonesia's position *vis-à-vis* ISDS will be a significant hindrance to its participation in the RCEP.

IV. Conclusion

In conclusion, Indonesia's decision to terminate its BITs will be key to shaping the landscape of ASEAN law. As a major stakeholder in ASEAN, Indonesia's actions could potentially ripple across the entire grouping, and affect not just ties between ASEAN members, but also ASEAN's ties with other countries. It is thus hoped that this paper will contribute to the field of ASEAN research and how ASEAN law is understood.

[51] Ibid.
[52] Ibid.
[53] Patricia Ranald, "Suddenly, the world's biggest trade agreement won't allow corporations to sue governments" (The Conversation, 16 September 2019), available at https://theconversation.com/suddenly-the-worlds-biggest-trade-agreement-wont-allow-corporations-to-sue-governments-123582 (last accessed 13 May 2021).
[54] Australian Government, "Response to the Joint Standing Committee on Trade and Investment Growth Report".