



## FROM OLD TO NEW: AN ANALYSIS OF CHANGES BETWEEN THE OLD AND NEW REGIME OF INDONESIAN INVESTMENT TREATIES

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### ABSTRACT

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*International Investment Law as a system relies heavily on the treaties applicable on a case-by-case basis. Most often these treaties are Bilateral Investment Treaties, treaties negotiated between States which offer to promote and protect investment in the two States Party. These treaties are responsible for promoting and protecting billions of dollars' worth of investments and as such when a country as economically involved in a large region as Indonesia discontinues its existing BITs in hopes of renegotiating a "better" treaty, the situation warrants scrutiny. In 2014, the Government of Indonesia chose to terminate many of the existing BITs, and in 2018, the first of the wave of renegotiated BITs have appeared in the form of the 2018 Indonesia-Singapore BIT. The differences between the old and new BIT must be properly analyzed in order to approximate what impact these new BITs could have on the investment regime in Indonesia.*

### INTRODUCTION

There is no one single, unanimous, source of International Investment Law that applies for all countries in the world (Tache, 2020). There is no International Investment Law equivalent of something like The United Nations Convention on the Law of the Sea (UNCLOS) for instance, and as a result more often than not interpretation of International Investment Law must rely on multiple factors which do not always work in concert, such as the national law of a state, arbitral jurisprudence, as well as the applicable Bilateral Investment Treaty ("BIT"). It is the latter of which that shall be discussed in this paper.

The first Bilateral Investment Treaty was signed in 1959 between Germany and Pakistan, but it was not until thirty years later that their popularity soared, with numbers rapidly increasing between the early 1990s and 2009, when investors began to regularly use such treaties to bring arbitration against host states. In fact, according to the United Nations Commission on Trade and Development (UNCTAD), the 1990s began with some 900 treaties and ended with over 2,900 treaties. However, in most of the cases these treaties were used to invoke arbitration, the arbitral tribunals would very broadly interpret the provisions of such BITs, as they were never perfectly unequivocal (Sharmin, 2020). This caused states to realize the risks of the treaties they had entered into, and as a result, there was a significant drop in the number of new treaties entered (Carvalho et al., 2019). For

example, whereas there were 83 BITs signed worldwide in 2008 and 108 in 2009, only 22 BITs were signed in 2015, only four of which have gone into effect; 30 in 2016, only two of which have gone into effect; and just five as of September 2017, only one of which has gone into effect. This reaction of the States is a result of growing international discontent with the way investor-state arbitrations are handled (Mossallam, 2018). Many countries have had their sovereignty and capacity to control their own economy superseded by private tribunal judgements recognizing the inviolability of contractual agreements (Crepelle, 2018).

Indonesia, as a developing country with goals to attract foreign investment just like any other, has entered into a fair amount of BITs (Pejovic & Pardede, 2019). The first one it signed was with Denmark in 1968. From then on, from 1968 to 2019, Indonesia entered into some 73 BITs in all, even though few remain in force today. These, along with other methods of encouraging foreign investment, have been generally beneficial to the State, as according to World Bank Data, foreign direct investment in Indonesia reached \$26.3 billion USD in 2014 (Ahmed, 2016). However, as a result of the aforementioned trend of backing out of BITs, the government of Indonesia in 2014 decided to refrain from renewing the existing BITs at the time. This naturally caused a drop in investment, to about \$15.5 billion USD in 2015.

Among the attempts to reinvigorate the investment climate in Indonesia after the discontinuations in 2014 is a new wave of recently negotiated BITs. As of October 2021, the known and published “new BITs” are a BIT negotiated with Singapore in 2018 and a BIT negotiated with the United Arab Emirates in 2019. As only the text of the former has been publicized, this paper will focus on the 2018 Indonesia-Singapore BIT and what differences it will result in for the investment regime in Indonesia.

## **RESEARCH METHODS**

To address the issues raised in this paper, doctrinal, historical, analytical, and comparative research approaches were taken to examine legal principles, legislation applicable to investor-state disputes, and arbitration. The active laws are declared, explained, and highlighted using this manner in a specific field or within a country's jurisdiction (Rusakova, Frolova, Zankovsky, & Kupchina, 2019). The available libraries in Indonesia were used to their full potential in this regard. As a result, library research resources, including published law reports, special volumes of journals, articles and books, legislations, and any other relevant material from internet databases, were employed to collect data for this study (Ince, Hoadley, & Kirschner, 2022).

The research method applied in the study of this paper is a normative legal research method. This is a process taken to identify the relevant rule of law, legal principles, and legal doctrines in order to answer a legal issue at hand (Spano, 2018). In connection with the normative legal research method, there are two types of legal materials used in the writing of this paper, namely primary legal materials and secondary legal materials (Siregar, Siregar, & Silaban, 2020). Primary legal materials are those obtained through national laws and regulations, international treaties, and court decisions, while secondary legal materials are legal materials that are not binding but can provide an explanation of primary legal materials. These include among others, textbooks or literature, journals, papers, articles, research results, and various other sources (Late, Tenopir, Talja, & Christian, 2019). The data collection technique applied in writing this paper is through the study of documents or (library research) (Riyanto, Marlina, & Triasih, 2019). In normative legal research, the systematic processing of data and legal materials is carried out through first collecting data and legal materials, then processing that data in such a way that it results

in coherent results to facilitate conducting the succeeding analysis. In this paper, the author uses various types of statutory approaches, conceptual approaches, and analytical approaches to analyze as well as rationalize the situation in regards to the Bilateral Investment Treaty situation in Indonesia (Wei, 2021).

## RESULTS AND DISCUSSION

In March of 2014, the Dutch embassy in Jakarta declared that Indonesia had "chosen to discontinue" its bilateral investment treaty (BIT) with the Netherlands, as well as all of Indonesia's other BITs. While there was an initial reaction of panic, a spokesman of the Indonesian government promptly stated that Indonesia was not intending to unilaterally terminate the existing BITs, but rather wanted to let them expire so that new and better BITs could be signed. While at first worrying to investors, the reality was that investments made prior to the termination of the BITs would still be protected under "sunset clauses." For instance, the Indonesian government's choice to discontinue the Indonesia-Netherlands BIT was conducted in accordance with Article 15 of said BIT, which states that "Entry into Force, Duration and Termination" (1) The present Agreement shall enter into force on the first day of the third month after the date of the latest notification by any Contracting Party of the accomplishment of the procedures constitutionally required in their respective countries. It shall remain in force for a period of ten years and shall continue to be in force thereafter for another period of ten years and so forth unless denounced in writing by either Contracting Party one year before its expiration. (2) In respect of investments made prior to the date of termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement."

So it was that Indonesia chose to denounce the treaty by writing one year before its expiration, and as can further be seen from paragraph (2), investments made prior to termination of the treaty will continue to be protected by its terms for a further period of fifteen years. This "sunset period" is the period of time in which the government will attempt to negotiate a better treaty. The reason that new, better treaties had to be negotiated were that Tribunals in certain cases involving Indonesia had construed the treaties' scope and jurisdictional clauses in ways that were never intended or even considered when they were signed. Even in the cases where Indonesia was successful on the merits, there were severe jurisdictional overreaches, which is at least part of the reason for Indonesia's withdrawal from the BITs. The reason for these problems was the unclear language of BITs leaving too much room for Tribunal misinterpretation, which results in an interpretation that differs significantly from what nations intended when they consented to enter into these BITs. For instance, it has always been Indonesia's desire to limit treaty protection to foreign investors who apply to the government and are permitted to create a "PT PMA," or Indonesian foreign investment firm. Although all of Indonesia's BITs include a reference to the Foreign Investment Law, it has been misconstrued in several cases which has resulted in a tribunal declaring jurisdiction even for investors who have not created a PT PMA.

Indonesia is not alone in wanting to negotiate newer BITs, either. Starting from 2004, there has been a movement of a so-called "new generation" of BITs based on the 2004 USA Model BIT (Sharpe, 2021). Given that most of Indonesia's BITs were signed before 2004, 63 of them to be exact, they can be considered part of the "old generation." In fact, according to the Indonesian ambassador to Belgium as of 2014, it was not surprising that the Indonesian Government would seek to update the effective BITs, as the existing ones were "exclusively designed to protect foreign investments in Indonesia and [do] not provide for the possibility of protecting Indonesian investment. There is no reciprocity, it is a one-

way street. Indonesia is considered a place to play, not a player.” This is the reason that the Indonesian Government is seeking to renegotiate new BITs, the first of which was the renegotiation of the Indonesia-Singapore BIT.

The most recent Bilateral Investment Treaty (BIT) between Indonesia and Singapore signed in 2018 entered into force on March 9, 2021, replacing the previous BIT, which was signed in June 2006 and expired in June 2016. Investors from both nations would benefit from special legal protections under the treaty, such as access to international arbitration, which will protect investments and enhance investor confidence. Indonesia and Singapore have extensive collaboration in a variety of fields, with bilateral trade expected to reach US\$36.3 billion by 2020. Moreover, despite the epidemic, Singapore remained Indonesia's top foreign investment destination in the same year, with US\$9.8 billion, up from US\$6.5 billion in 2019.

The revised BIT includes numerous new elements, including regulations on most-favored-nation (MFN) treatment, the establishment of a multi-stage dispute resolution structure, a guarantee of the state's sovereign powers and the expansion of investment protection. The BIT protects existing investments as of March 9, 2021, as well as new investments made after that date. Stocks, shares, and other forms of equity in a firm, as well as claims to money tied to a business and under contract with economic value, have been broadly characterized as these investments.

The investment, on the other hand, must have the "characteristics of an investment, such as hopes for profits, capital commitment, the assumption of risk or certain duration.” However, in order to limit the overreaching of jurisdiction as has been done in several cases, investments made through holding companies will not be protected if the holding company in question does not have a major business operation in its native state. This means that investments held in Singapore by an Indonesian-incorporated firm with no operations in Indonesia, and vice versa, will not be protected. Furthermore, investors from third countries with no diplomatic ties to either Singapore or Indonesia may be denied protection. Israeli investors, for example, who invest in Indonesia through Singapore will not be protected because Indonesia and Israel do not have diplomatic relations.

Another difference in the 2005 and 2018 Indonesia-Singapore BITs is the existence of a “Right to Regulate” clause. A major problem with BITs that have appeared in recent years is that treaties are being construed to restrict states' sovereign right to regulate their own economy and society in order to protect investors' interests. Article 11 in the new BIT rectifies this issue by stating that The Parties reaffirm their right to regulate within their respective territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, and the promotion and protection of cultural diversity. For greater certainty, the mere fact that a Party regulates, including through modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement.” Next, the new multi-stage dispute resolution structure includes mediation, consultation, and international arbitration as part of its framework. Previously, investors had only the option of resolving any issues through an external entity, such as a local court in the host nation, a regional arbitration center in ASEAN, or ICSID arbitration, while now there is an option for voluntary mediation at the expense of the parties involved. Other than that, investors now have the option of resolving disputes through arbitration administered by the International Centre for Settlement of Investment Disputes (ICSID) or any other arbitral institution or set of rules that is acceptable to all parties. Investors also have the right to request a review of the arbitral tribunal's draft award if they are the disputing investor. Finally, regarding the MFN

principle, under the new BIT, neither country is compelled to give MFN benefits or favors to the other based on BITs signed before this new BIT, or with a non-party in the same geographical region.

## CONCLUSION

If the 2018 Indonesia-Singapore BIT is to be used as a template or example for the new wave of BITs that Indonesia intends to negotiate with its other partners, then we can see from the differences with the older BITs what the priority was for the government. An issue that occurred in several investment arbitrations Indonesia was involved in was that business owners would be granted investors status even though they had neither established a “PT PMA” or gotten approval from the BKPM (Investment Coordinating Board). This is made much clearer in the 2018 BIT as opposed to the older BITs. The 2018 BIT states in Article 2(1) that: “This Agreement shall apply, with respect to a Party, to an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or made, established, acquired or expanded thereafter, and has been admitted according to the laws, regulations, and national policies of the former Party, and where applicable, specifically approved in writing by the competent authority of the former Party.”

With a footnote that states “Where specific approval in writing is required for investments by a Party's domestic laws, regulations and national policies, that Party shall take all reasonable steps to observe transparency, fairness and efficiency in processing the application.” Now if it occurs that an investor would stake a claim in an arbitration that their investment is protected, Indonesia can look to this provision in the Singapore-Indonesia BIT to ensure that their requirements have been met as opposed to rely on the interpretation of the tribunals, which historically have not been favorable to the State in terms of jurisdiction. Also important for future potential issues is the incorporation of the Right to Regulate article. While it is naturally important for the BIT to protect investors, tribunals should no longer overextend that protection as per the Right to Regulate article which guarantees that when a State exercises its sovereign powers in a legitimate manner, even if it should negatively impact the investor, such an action would not amount to a breach of the State's obligations. This means that States will have that much more protection in investment arbitrations, should any occur.

The new terms in the new BIT do not at all mean that Indonesia is forsaking ISDS as a dispute settlement mechanism. Rather, the new BIT includes a more comprehensive dispute settlement mechanism than the older BITs. For instance, investors disputing with either State may now resort to mediation, and should the investor wish to go to arbitration, such arbitration can be conducted in any arbitral institution under any arbitration rules provided that both disputing parties agree. Alongside that, the new BIT also provides more comprehensive regulations about everything from the appointment of the tribunal, to third-party funding, to even the possibility of requesting security for cost. All this is intended to make ISDS a viable forum for investors to ensure that their rights are protected. To conclude, the new Indonesia-Singapore BIT does have significant differences to the older generation of BITs, and prima facie does seem like it will improve the investment regime in terms of legal certainty, due process of law, as well as limit possible jurisdictional overreaches, however what actual effect it will have ultimately remains to be seen in cases after it has come into effect.



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