

# Could Indonesia join the TPP?

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In October 2015, during an official visit to the United States, President Joko "Jokowi" Widodo, announced that Indonesia intended to join the Trans-Pacific Partnership (TPP). Jokowi's plan immediately ran into political opposition at home, including from within the ranks of his own Indonesian Democratic Party of Struggle (PDI-P).

The Government, however, appears determined to follow through. Discussions on the law reforms that would be required are underway and the Government has now announced the establishment of a special committee to investigate the advantages and disadvantages of joining the mega-regional agreement.

Indonesia's pursuit of TPP membership confounds predictions of rising nationalism and protectionism made in the wake of the Government's recent moves to terminate the country's existing bilateral investment treaties (BITs). It is a positive signal for foreign investors. At the same time, there are many reasons to doubt that the process of accession will be straightforward.

### **Out with the old (BITs), in with the new (Mega-regionals)?**

In March 2014, the Dutch embassy in Jakarta announced that Indonesia had 'decided to terminate' the Indonesia-Netherlands BIT and, further, that Indonesia intended to terminate all of its other existing BITs. On its face, this was an alarming announcement for foreign investors in the country, though Government figures promptly moved to clarify that Indonesia's intention was to allow its older BITs to lapse in order to negotiate new treaties based on a more modern template.

Late last year *IA Reporter* broke the news that Indonesia had so far given notice to terminate 20 BITs, and that termination had become effective in the case of Indonesia's treaties with China, Laos, Malaysia, Netherlands, Italy, France, Slovakia, Bulgaria and Egypt. In the meantime, no new BITs, or negotiations for new BITs, have been announced.

At the same time that it has been taking steps to terminate its BITs, Indonesia has continued to participate in the negotiations for a number of multilateral agreements. In particular, Indonesia continues to be involved in the negotiations for the Regional Comprehensive Economic Partnership (RCEP), a new FTA between the 10 ASEAN Member States,<sup>29</sup> together with ASEAN's existing FTA partners (Australia, China, India, Japan, Korea and New Zealand). And Indonesia continues to discuss a comprehensive economic partnership agreement with the EU.

Like the TPP, these new treaties are expected to include investment protection chapters, including Investor-State Dispute Settlement (ISDS) provisions. Together with the existing ASEAN Comprehensive Investment Agreement, the coverage provided by the TPP and an agreement with the

EU would largely obviate the need for Indonesia to negotiate new BITs with the majority of its existing bilateral partners.

### **Indonesian accession to the TPP; easier said than done**

The TPP will come into force after all the original 12 signatories ratify the agreement or provided that at least six countries representing at least 85 percent of the total GDP of the original 12 have ratified it within two years. At this point, it is widely expected that the second route is the more likely one given significant political opposition to the TPP in a number of the signatory States. This may be convenient for Indonesia given the need for extensive reforms before Indonesia will be in a position to accede to the agreement.

Article 30.4 of the TPP provides that the agreement is open to accession by

“any State or customs territory that is a member of APEC ... that is prepared to comply with the obligations set out in the Agreement subject to such terms and conditions as may be agreed between the State or customs territory and the Parties and following approval in accordance with the applicable legal procedures of each Party and acceding State or customs territory.”

As a member of APEC, Indonesia is automatically entitled to apply to join the TPP. However, it is far from certain that Indonesia will be prepared to comply with all of the obligations this would entail. As a latecomer, Indonesia may also find it difficult to negotiate exceptions to the obligations that in the TPP. For example, it has already been suggested that Indonesia would seek to negotiate exceptions from the national treatment and non-discrimination disciplines of the TPP in order to preserve local content requirements in a range of sectors.

The provisions of the TPP regarding State-owned enterprises (SOEs) are likely to be especially problematic for Indonesia. More than 100 SOEs dominate key sectors and enjoy a range of formal and informal legal and economic advantages relative to the private sector. Unless Indonesia could negotiate exceptions, it would need to ensure, among other things, that its SOEs make commercial purchases and sales on the basis of commercial considerations, that SOEs do not discriminate against the enterprises, goods, and services of other Parties and that administrative bodies regulating both SOEs and private companies do so in an impartial manner.

The TPP would impose obligations on Indonesia to effectively enforce its anti-corruption laws. Recent proposals to curtail the powers of Indonesia's Anti-Corruption Eradication Commission (KPK) have led to suggestions that Indonesia is backsliding in this area, despite a modest improvement in the country's Corruption Perception Index ranking in 2015. Anti-corruption is likely to be a key issue in any accession negotiations.

The TPP's investment chapter likewise presents challenges for Indonesia. In particular, the obligation to accord national treatment, including in relation to establishment, will require Indonesia to review its existing restrictions on foreign investment, in particular the 'negative list' of sectors which are closed to foreign investment, subject to foreign ownership limits or where other special conditions apply.

TPP Article 9.2 – which clarifies that the investment obligations apply “to measures adopted or maintained by: (a) the central, regional or local governments or authorities of that Party; and (b) any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party” – points to more

headaches for the Government. As Professor Simon Butt has written, the post-Suharto era in Indonesia has seen a significant decentralisation of political power, which has led to a “drastic proliferation of lawmaking bodies” and, in turn, to an even more drastic increase in the number of laws and regulations, many of which are extremely unclear or overlap in highly problematic ways.

At least two pending BIT claims against Indonesia, including ICSID Case No. ARB/12/14 and 12/40 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, involve complaints arising in relation to laws or measures adopted by local lawmakers. Not only is Indonesia at the risk of claims based on actions taken by these local lawmakers, it would also be obliged under the TPP to take steps to improve regulatory coherence. This would be a good thing for local and foreign investors alike, but it presents a huge political challenge.