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The Indonesia-Australia Comprehensive Economic Partnership Agreement: Repeated Debates, New Issues and Open Questions

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Last month, Australia and Indonesia signed the Indonesia-Australia Comprehensive Economic Partnership Agreement ('IA-CEPA'), containing in Chapter 14 provisions related to the protection of foreign investments. Negotiations of an IA-CEPA were initially announced in 2010, and formally began in September 2012. The negotiations were thereafter suspended, but relaunched in March 2016. Signature and ratification of the treaty have subsequently been waylaid on a number of occasions due to domestic political developments and bilateral tensions, including those stemming from Australia's announcement in 2018 that it would consider relocating its embassy in Israel to Jerusalem. Despite these delays, the treaty was finally concluded on 31 August 2018, and was then signed on 4 March 2019. This post examines some outstanding questions related to the treaty, which indicate that the IA-CEPA may still have some hurdles to conquer before its ratification.

The Inclusion of ISDS: A Settled Debate, or a Rocky Road to Ratification Ahead?

Both Indonesia and Australia have equivocated on including investor-State dispute settlement ('ISDS') provisions in their investment treaties. Some years ago, Indonesia announced its intention to review, revise and/or terminate its investment treaties. This new policy was reportedly a reaction to claims filed against Indonesia under its bilateral investment treaties with Australia and the United Kingdom. In 2011, Australia's Labor Government similarly announced that it would no longer conclude treaties with ISDS clauses. This policy was later changed by Australia's Liberal Government, which instead negotiates ISDS clauses on a case-by-case basis.

This debate about the desirability of ISDS also played out during the IA-CEPA negotiations. In June 2017 the Australian Joint Standing Committee on Trade and Investment Growth produced a report considering Australia's trade and investment relationship with Indonesia. It noted with concern the possible inclusion of ISDS provisions in a future treaty between the two States, and recommended that 'the IA-CEPA should not include…ISDS provisions' (Recommendation 4). In March 2018, the Australian Government responded to the Committee's report. While accepting some of

the Committee's recommendations, it declined to exclude ISDS from the treaty. It noted its policy of taking 'a case-by-case approach to the inclusion of ISDS commitments in international trade agreements', and undertook to ensure that any ISDS provisions in the IA-CEPA would contain 'robust safeguards to preserve the Government's right to regulate in the public interest'. Ultimately, this view of the desirability of including ISDS won the day, with the IA-CEPA containing numerous provisions concerning the procedures that will apply in future ISDS proceedings under that treaty.

Following the conclusion of IA-CEPA negotiations in 2018, Australia's Labor Opposition indicated that 'it would not ratify the deal, or any other FTA in the pipeline' unless ISDS provisions were removed. In the same month, however, Labor supported the passage of legislation necessary for the ratification of the TPP-11, despite the inclusion of ISDS provisions in that agreement. Labor has since re-iterated that it will – if elected following the May 2019 federal election – 'seek to remove ISDS provisions from existing free trade agreements'. There are already indications that this policy may be applied to the newly signed IA-CEPA. Indonesia, too, held a general election in mid-April, the results of which will not be officially announced until May. Both the IA-CEPA and ISDS have both featured in political debates in that electoral campaign. Ratification of the IA-CEPA is therefore likely to be subject to future roadblocks, and will depend upon the outcomes of these elections in both States.

Towards a Treaty Spaghetti Bowl?

In its June 2017 report, the Australian Joint Standing Committee on Trade and Investment Growth noted that the Indonesia-Australia investment treaty and the ASEAN-Australia-New Zealand free trade agreement ('AANZFTA'), meant 'there are some questions about coherence and so on' between the new IA-CEPA and the States' existing treaties (para. 3.61). Reacting to these comments, an Australian Labor MP noted that the negotiation of the IA-CEPA alongside other 'better' multilateral agreements, risked a 'spaghetti bowl effect' of trade and investment agreements. He cautioned of the need 'to tread carefully', given that 'the more trade agreements you have with the same country the more confusing it can be for business to figure out'. Unphased by such concerns, the Australian Government instead responded to calls to exclude ISDS from the IA-CEPA by noting that these existing ISDS provisions meant in any case that '[b]ilateral investment with Indonesia is already subject to ISDS'.

Prior to the Australian election being called on 11 April, the IA-CEPA was referred to Australia's Joint Standing Committee on Treaties for review. That Committee has previously raised concerns about the increasingly dense web of Australian treaties with overlapping ISDS provisions. Those concerns have, however, so far been dismissed by the Government. The Government's current policy indicates that reducing such overlaps is not a particularly pressing objective. Issues of overlap arise in part because of Australia's relatively *ad hoc* approach to the negotiation of investment agreements, including parallel negotiations of bi- and multi-lateral agreements with the same treaty partners. In fact, the Government is currently negotiating a Regional Comprehensive Economic Partnership ('RCEP') which encompasses the same States that are party to the AANZFTA, and Indonesia is slated as a possible future party of the above-mentioned TPP-11.

Unlike other recently-concluded treaties, the IA-CEPA appears not to include a clause or side letter terminating the application of clauses in other treaties providing for ISDS between Indonesia and Australia. Australia or Indonesia might in the future decide to adopt termination or side agreements to address these overlaps. For now, however, the treaty practice of both States indicates that the relationship between these treaties and their ISDS provisions is likely to become ever more complicated in the future. This reflects broader regional trends, with some commentators referring to an increasing 'Asian noodle bowl' of overlapping international investment agreements. It remains to be seen whether the impetus for decreasing such overlaps will come through the ratification process, or the decision of a new (or returned) Government. The answer to these questions is likely some way off, given that Australia's Joint Standing Committee on Treaties was dissolved when the election was called, and that any new or returning Government will likely take some time to consider and chart its course on these issues.

Indications of New Approaches?

Australia has not released a model investment treaty, and Indonesia has not released a revised version of its model for some time. The IA-CEPA therefore provides useful indications of the potential approaches of these two States to the drafting of contemporary investment treaties. A separate post on the Blog will consider the provisions of the IA-CEPA in more detail in the coming days. For now, the following paragraphs identify two particularly interesting aspects of the treaty.

Treaty Scope

Article 14.2 of the IA-CEPA delineates the treaty's 'scope', specifying that the Investment Chapter applies to measures adopted or maintained by 'any person, including a state-owned 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'. A footnote clarifies that:

For greater certainty, governmental authority is delegated under a Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority.

A similarly worded provision of the US-Oman FTA was at issue in the case of *Adel A Hamadi Al Tamimi v. Sultanate of Oman*. That tribunal held that the provision stipulated a test for attribution that was narrower than that under customary international law. This was on the basis that the treaty required the exercise of 'regulatory, administrative or governmental authority' which must also have been 'delegated…by the State' (para. 322). It held, in light of this 'specific test' that 'the ILC Articles are not directly applicable to the present case' (para. 324), instead being displaced by a narrower test of attribution. Nonetheless, the tribunal referred to Article 5 of the ILC draft articles as a 'useful guide' in applying the treaty provision. The precise impact of the provision – now reproduced in the IA-CEPA – therefore remains unclear, and it is a pity that Australia and Indonesia did not seize the opportunity to clarify the relationship between customary international law rules of attribution and their treaty text.

Alternative Approaches to Investor-State Dispute Settlement

During the drafting of the IA-CEPA, Australia conducted a number of public consultation processes, during which alternative forms of investor-State dispute settlement were raised for consideration. Some submissions, for example, recommended that the treaty be drafted to encourage disputing parties to seek the resolution of investor-State disputes through non-adversarial processes. This included suggestions that the treaty provide for investor-State mediation instead, including because this would be 'adaptable to fundamental tenets of Indonesian culture such as *"musyawarah"* – the tradition of amicable discussion and consensus among Indonesian people'. Despite this, the IA-CEPA does not adopt particularly innovative provisions on dispute settlement. The IA-CEPA subjects arbitration proceedings to a cooling off period, with options for referral to consultation or conciliation. The investor is, nevertheless, permitted to initiate investor-State arbitration where 'an investment dispute has not been resolved by consultations…or conciliation' within specified timeframes (Article 14.24).

Settled Debates or Open Questions?

Both Australia and Indonesia have previously adopted ISDS policies that indicated that they might become States to watch in respect of future reforms to the investment arbitration regime. Both States have thus-far exhibited ambivalent approaches to reform. Despite potential for new approaches, the IA-CEPA fits the mould of existing investment treaties. At various times during the drafting of the treaty, Australia and Indonesia side-stepped opportunities to adopt more innovative approaches. Whilst indicating that ISDS might be abandoned altogether or otherwise re-envisaged to incorporate alternative approaches to dispute settlement, at the key moments of negotiation, conclusion and signature both States elected not to adopt more novel approaches. Instead, the IA-CEPA adds to a web of overlapping investment treaties, without itself addressing how issues of overlap might be dealt with. It remains to be seen whether opportunities to remove or modify the treaty's ISDS provisions will be seized in the post-signature and ratification phases. The IA-CEPA thus does not represent a paradigm shift, but its future is far from certain and many open questions remain.

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