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# The Indonesia-Australia Comprehensive Economic Partnership Agreement: the Good, the Not-So-Good and the In-Between

Kevin Elbert (TSMP Law Corporation) · Saturday, April 27th, 2019

The signing of the Indonesia-Australia Comprehensive Economic Partnership Agreement ("**IACEPA**") on 4 March 2019 marked an important milestone for both States (as covered in a post earlier this week).

Given that both Indonesia and Australia have their reservations on investor-state dispute settlement ("**ISDS**") processes, it is interesting to see that the IACEPA contains a chapter on ISDS.

It has been around 5 years since Indonesia announced its policy to "terminate" its bilateral investment treaties ("**BITs**"). This was spurred by Indonesia's concern that it has been pressured by multinational companies, which resulted in a number of billion-dollar ISDS claims, such as the *Churchill Mining plc* and *Planet Mining Pty Ltd* cases.[1)] The sentiment was so strong that there was even a call for Indonesia to withdraw from the ICSID Convention.

For Australia, the issue of ISDS has been hotly debated since the *Philip Morris* case[2)]. Since that case, the Australian government declared that it would consider ISDS provisions on a "case-by-case" basis. As a result, ISDS provisions have been included in the free trade agreement entered into with Korea in 2014 but not with Japan.

In light of the above, the investment chapter in the IACEPA seems to reflect a compromise achieved by both countries to balance between the public interest and the rights and obligations of investors.

This post seeks to briefly discuss and highlight 'the good, the not-so-good and the in-between' under Chapter 14 (Investment) of the IACEPA.

## Comments and Observations

At the outset, it is observed that the IACEPA, similar to how the more modern BITs are drafted, provides a greater clarity as to how the substantive obligations and the dispute settlement processes are to be interpreted.

Expectedly, these obligations and processes are generally more refined in comparison to the ASEAN-Australia-New Zealand Free Trade Agreement ("**AANZFTA**") (signed in 2009) which both Indonesia and Australia are parties to.

1. Section A of Chapter 14 – Substantive Obligations

The In-Between

In line with the more modern BITs, the IACEPA provides a clearer demarcation of the substantive obligations therein.

For example, Art 14.11 (Expropriation and Compensation) read together with Annex 14-B clarifies that whether expropriation is made out requires a case-by-case and fact-based inquiry considering a number of factors, e.g. the economic impact of the government action and proportionality. The use of fact-based inquiry is often employed in the modern BITs (such as the AANZFTA) and are in line with widely accepted ISDS jurisprudence.

It is worth highlighting that the IACPEA contains provisions to exclude shell companies from benefiting from the IACEPA by way of a denial of benefit clause under Art 14.13.

In light of the *Philip Morris* case (where claimant's (a Hong Kong registered company) investment in its Australian subsidiary was made only in order to be able to bring an arbitration claim under the BIT), it is unsurprising and expected that Australia would want these provisions in the IACEPA.

The Not-So-Good

There are, however, some provisions that could have been clearer and better defined.

They include Art 14.7 (Minimum Standard of Treatment), which provides for the fair and equitable treatment ("**FET**"). Considering the elusive nature of the FET obligation, Art 14.7 could have been better drafted. Currently, Art 14.7 simply states *inter alia* that FET does not require treatment in addition to standard required under customary international law; and requires the host State to not deny justice in any legal or administrative proceedings.

Further definition and limitation could have been drafted into the scope of the FET obligation. For instance, under the EU-Singapore Investment Protection Agreement ("**EUSIPA**"), Art 2.4 (Standard of Treatment) expressly states that a party breaches the FET obligation if its measure or series of measures constitutes:

- denial of justice in criminal, civil and administrative proceedings;
- a fundamental breach of due process;
- manifestly arbitrary conduct; or
- harassment, coercion, abuse of power or similar bad faith conduct

Another curious provision is Art 14.18 which establishes a Committee of Investment. This Committee's function shall be, *inter alia*, to consider and recommend any amendments to Chapter 14. However, unlike the Commission under the NAFTA or the Committee under the EUSIPA, the Committee under the IACEPA does not seem to have a more practical power, such as the power to issue a binding interpretation of the provisions under the IACEPA.

The Good

Interestingly, there are certain 'bespoke' provisions / mechanism that are introduced seemingly to address Australia and Indonesia's concerns with the ISDS regime.

One of them is the exclusion of Art 14.6 (Prohibition of Performance Requirements) from the ISDS mechanism. Art 14.6 (Prohibition of Performance Requirements) provides generally that neither Party shall enforce any requirement to, *inter alia*, to achieve a given level or percentage of domestic content. For Indonesia, this would inevitably cover vital legislation such as Indonesia's Law No. 4 of 2009 on Mineral and Coal Mining (the "**2009 Mining Law**") which requires minerals to be processed domestically. Given that minerals and coal mining is an important (yet sensitive) industry to Indonesia, and the fact that such mining laws have given rise to ISDS proceedings (*Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v Indonesia*[3]), it is not surprising that this is kept out of the ISDS regime but is left to state-state settlement.

2. Section B of Chapter 14 – Dispute Settlement

Generally, the procedures set out under Section B are in line with modern investment arbitration rules.

The In-Between

The procedures set out under Section B seem fairly typical, which require parties to first undergo consultations and conciliation (Arts 14.22 and 14.23) before claims can be submitted to a number of fora including arbitration under the ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules or such other rules that the disputing parties may agree to.

In line with the more recent innovations in the investment arbitration rules (e.g. the SIAC 2017 Investment Arbitration Rules or the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Section B also includes provisions such as

- Art 14.31 (Transparency of Arbitral Proceedings);
- Art 14.28 (Security for Costs);
- Art 14.29 (Consolidation); and
- Art 14.32 (Third Party Funding).

The Not-So-Good

That being said, there are features (normally found in the more modern BITs and/or arbitration rules) that are not found in the IACEPA. This includes provisions relating to third-party submissions or a non-disputing contracting party and interim relief.

It is also worth highlighting that Art 14.21 (Exclusion of Claims) provides that no claim may be brought *inter alia* if the claim is "frivolous or manifestly without merit".

However, it is this author's view that the IACEPA could have provided clearer guidance on the scope of that ground – for instance Rule 26 of the SIAC 2017 Investment Arbitration Rules specifies that the grounds for early dismissal includes where the claim or defence is manifestly without legal merit, outside the jurisdiction of the tribunal or inadmissible; similarly, Rule 40 of the revised draft ICSID Convention Arbitration Rules (second draft) provides that an objection that

a claim is manifestly without legal merit may relate to the substance of the claim, the jurisdiction of ICSID or the competence of the Tribunal.

That being said, the above may not be fatal considering that these matters may be further supplemented by the relevant rules of arbitration.

The Good

Similar to the substantive provisions, there are also a number of 'bespoke' processes introduced to address Australia and Indonesia's concerns with the ISDS regime.

To highlight, Art 14.21 (Exclusion of Claims) provides that no claim may be brought where the claim is brought in relation to a measure that is designed and implemented to protect or promote public health. This is presumably introduced to address measures giving rise to cases like the *Philip Morris* case (which revolves around the plain packaging rules that were implemented to protect public health by reducing tobacco consumption).

Art 14.21 (Exclusion of Claims) also clarifies that no claim may be brought where the claim is brought in relation to an investment that has been established through illegal conduct such as corruption (though, minor or technical breaches of law are excluded from this exception). This clarification is definitely welcomed in light of the issue surrounding the 'corruption defence' (as promulgated in cases such as *Metal-Tech*[4]) and the *de minimis* rules (as promulgated in cases such as *Tokios Tokeles*[5]).

## Conclusion

In conclusion, this author is of the view that, overall, the IACEPA is a balanced compromise achieved by both Indonesia and Australia. Instead of categorically dismissing ISDS, the IACEPA clarifies the protection that the States are willing to grant to investors; and procedural rules that they are willing to adopt.

Perhaps this is one solution moving forward for States (like India and Ecuador) that have similar concerns with ISDS.

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uncover potential conflicts of interest.



References

**?1** ICSID Case No. ARB/12/14 and 12/40

**?2** PCA Case No. 2012-12

**?3** ICSID Case No. ARB/14/15

**?4** *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3

**?5** *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18

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