BITs and Pieces: Regional Developments in Investor-State Dispute Settlement

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If you wanted to summarise the Australian Prime Minister's focus at this year's G20 summit in Brisbane, you would be justified in saying that better economic and trade relations were towards the top of his priority. Since forming government, the Coalition has concluded trade and investment agreements with Korea, Japan and recently China. One of the more controversial aspects of these agreements has been the inclusion of an investor-state dispute settlement (ISDS) provision, contained in the recent agreements with Korea and China, which will allow foreign companies to "sue" host governments by instituting arbitration proceedings directly against them.

ISDS has been a topic of some contest in recent years, notably in the Asia Pacific region. In 2011, the Gillard Government released a Trade Policy Statement, asserting that Australia would not agree to ISDS in its treaties. Australia's policy was at least in part motivated by the ISDS claim instituted by the tobacco manufacturer Philip Morris in response to legislation requiring the plain packaging of cigarettes. This was under the Australia–Hong Kong BIT.

The 2011 Policy attracted both support and criticism. Various public policy experts, academics and jurists supported the Government's decision, arguing that ISDS stifles public interest legislation, particularly in areas of health and the environment. Others commented that the decision would have detrimental effects on Australia's trade relations, abandoning vulnerable outbound investors to pursue claims in potentially unstable legal systems, and inhibiting Australia's ability to enter into investment treaties with major economic powers in the region.

In 2013, a change of government meant that Australia was poised to reconsider its position. The Coalition Government led by Tony Abbott has retracted considerably from the strict position adopted by the Gillard Government. The current Government has stated that it will consider the inclusion of ISDS on a case-by-case basis. While the Government agreed to the inclusion of ISDS in the FTA with Korea, no such regime was included in the agreement with Japan (JAEPA). It has since agreed to the inclusion of

ISDS in the recently concluded agreement with China. There is conjecture that the ISDS clause in the China agreement may cause Japan to react, as Japan had apparently stipulated that the ISDS position in the JAEPA would have to be revisited if such a clause were ultimately included the China–Australia FTA.

Against this backdrop of developments in the Asia Pacific, it is significant to note that, earlier in 2014, Indonesia indicated that it would seek to terminate its BIT with the Netherlands, from 1 July 2015, which is when the BIT expires. The Netherlands embassy in Jakarta noted that the Indonesian Government had further indicated that it intended to terminate all of its 67 BITs. There has not been an explicit statement from the Indonesian Government on the issue. Certainly, it appears that Indonesia is not satisfied with the current state of its investment agreements, and some in Indonesia have specifically expressed an aversion to the ISDS procedures contained in BITs.

There has been widespread discussion around the intentions of the Indonesian Government and what may have motivated its decision to cancel the Netherlands BIT. It has been proposed that, in part at least, the *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* case may have caused the Indonesian Government to review its current treaty portfolio. The Churchill claim, which has caused concern in Indonesia, is for over $1 billion, not including interest. Indeed there have been emphatic calls for Indonesia to immediately withdraw from the ICSID and continue to treat BITs with caution. There have also been statements that, in light of the economic power it now has, Indonesia no longer needs to forsake its regulatory autonomy to attract foreign investment. There has, however, been a tendency to exaggerate. The criticisms have drawn responses in the Indonesian press, including in favour of the ICSID and ISDS more broadly.

The recent debate has given rise to a premature view that Indonesia’s actions indicate a wholesale rejection of ISDS. There is, as yet, no basis for this. It is impossible to categorically state that Indonesia intends to withdraw from its regime of investment agreements entirely. The Indonesian Ambassador to Belgium has stated that Indonesia is seeking to “update, modernize and balance its BITs”. It is allowing its BITs to “discontinue” so that it can renegotiate them. Indonesia is now economically stable and powerful enough to assert its regulatory autonomy. It has been suggested that Indonesia intends to renegotiate its BITs to provide greater capacity to regulate in the “public interest for health, the environment or financial reasons”.

In any case, termination of its BITs by Indonesia would not mean a complete withdrawal from all investment protection obligations and mechanisms. Existing investors would continue to be protected by the “survival clauses” that have been included in many of the BITs. For example, under the Netherlands–Indonesia BIT, the investments under the BIT will be protected by a sunset period of 15 years after the BIT’s termination. Further, even if all of its BITs were terminated, Indonesia would still be subject to its obligations under the ASEAN Comprehensive Investment Agreement and the ASEAN-Australia-New Zealand Free Trade Agreement.

Further, it is important to remember that Indonesia has a newly elected President. Joko Widodo, leader of the third largest democracy in the world, is certainly likely to have a view on the issue. Overall, it appears that Widodo's stance on trade is going to be a balanced one. Some have conjectured that he may need to take a nationalist and protectionist approach, in order to alleviate a gap in his policy mandate emphasised by the presidential rival Prabowo Subianto. Others, however, have indicated that Indonesia cannot afford to slow down its economic growth, with the World Bank stating that Indonesia will only grow if it opens up trade. In this context, adopting any drastic position that threatens foreign trade would be a dangerous move.

One can understand the reasons for the caution exhibited by Australia's 2011 Policy and Indonesia's desire to reassess its treaties. Countries legitimately want to treat foreign and domestic investors equally and to resist the constraints placed on their ability to legislate in the public interest as result of having international claims lodged against them.

To an extent, Indonesia's motivations are somewhat analogous to Australia's position enunciated in its 2011 Policy Statement. The Australian Government at the time made it clear that it did not intend to confer additional benefits on foreign investors, and would not limit its ability to legislate in the public interest. The current Australian Government has retracted considerably from the policy. Over the past year, it has included ISDS regimes in the free trade agreements with Korea and China. Both regimes purport to include carve-outs to allow state parties some freedom to regulate in the public interest.

These regional developments with respect to ISDS may lead one to believe that the future of ISDS as whole is uncertain. The critics of ISDS have a tendency to spell its doom in the hope that it will disappear without a trace. Irrespective of one's views on the merits or dangers of ISDS, it is too well established to go away without a fight. There is every indication that ISDS will appear in the Trans Pacific Partnership Agreement, which represents countries cumulatively holding 38% of the world's GDP. We hope the Asia Pacific region will continue to engage in discussions around reforming ISDS, including a reassessment of its overall value. Perhaps the conclusion of considered debate will be that ISDS is not the best mechanism for resolving disputes. Until then, we should all try to avoid dangerous hyperbole and unsubstantiated rhetoric.

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