

Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?

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Abstract

This paper examines the recent decision by the Indonesian government to terminate its Bilateral Investment Treaty (BIT) with the Netherlands when it expires on 30 June 2015. It discusses the likely driving forces behind Indonesia's decision, and its alternative future strategy. In particular, it focuses upon controversial provisions on investor-state dispute settlement (ISDS) universally included in BITs. While Indonesia's termination may appear of minor consequence at first glance, it has significant implications in terms of Indonesia's obligations under international law as well its capacity to exercise its rights as a sovereign state to act domestically in the public interest. The termination of Indonesia's first investment treaty containing the ISDS mechanism is also highly symbolic because it represents the first step in a reported strategy to review all its sixty-seven BITs. Indonesia thus joins a growing number of countries concerned about perceived excessive corporate rights enshrined in investment agreements as being incompatible with national development objectives.

I. INDONESIA'S BIT CANCELLATIONS

On 23 March 2014, the Netherlands embassy in Jakarta announced that the Indonesian government had advised that it intended to terminate its Bilateral Investment Treaty (BIT) with the Netherlands, which was due to expire on 1 July 2015.¹ The act of "termination" was to be effected by the non-renewal of the BIT upon its expiry. While such an act may appear to be of minor consequence at first glance, it has significant implications in terms of Indonesia's obligations under international law, as well as its rights as a sovereign state to domestically legislate or otherwise act in the national public interest. At around the same time, the embassy further announced that the Indonesian government had advised that it intended to terminate all of its sixty-seven bilateral investment treaties.²

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1. Kingdom of the Netherlands Embassy in Jakarta, "Termination of Bilateral Investment Treaty" (undated), online: Kingdom of the Netherlands Embassy in Jakarta <<http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html>> [*Netherlands Embassy in Jakarta*].
2. "Boediono Meets with Netherlands PM" *Jakarta Post* (24 March 2014), online: Jakarta Post <<http://www.thejakartapost.com/news/2014/03/24/boediono-meets-with-netherlands-pm.html>> [*Jakarta Post*].

This paper examines the decision by the Indonesian government to not renew its BIT with the Netherlands (hereinafter Netherlands BIT) and to review its other BITs, and the likely impetus for such moves. It considers whether the action was motivated by adverse outcomes from recent international arbitration determinations on investment disputes, or by an emerging sense of strengthening economic nationalism, or a combination of factors. Through an examination of this action it considers whether the application of BITs with investor-state dispute settlement (ISDS) provisions between developed and developing country signatories are still appropriate or whether they—to paraphrase former President Yudhoyono's words—are “contracts with foreigners of 20 or 30 years ago [that] turn out to be inappropriate and unjust”.³ In particular, it focuses upon controversial provisions on ISDS that are universally included in BITs.

BITs universally include far-reaching and controversial provisions which grant a foreign investor (more often than not a transnational corporation) the right to submit a dispute with a host country government over perceived limitations to the full exploitation of its investment to binding private international arbitration (generally interpreted as investor-state dispute settlement, or ISDS). The provisions do not require the investor or corporation to use the state's domestic courts or obtain the host government's consent to submit the dispute to arbitration. According to the International Centre for Settlement of Investment Disputes (ICSID), there are some 3,000 or so BITs currently in existence globally.⁴

Indonesia's decision to not renew its Netherlands BIT, being Indonesia's first investment treaty containing the ISDS mechanism, is seen by some commentators as highly symbolic.⁵ It represents the first act in a reported strategy to terminate all of its reported sixty-seven bilateral investment treaties. In so doing, Indonesia joins a number of other countries which have expressed concern about the perceived excessive corporate rights enshrined in investment agreements. For instance, South Africa cancelled its BIT with the Netherlands in 2013 (as the initial step in a campaign to cancel all its BITs) on the grounds that it has assessed that BIT investment protection provisions were incompatible with South Africa's national development objectives.⁶ Expressing similar sentiments, then-Indonesian Vice-President Boediono declared after the BIT cancellation

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3. President Susilo Bambang YUDHOYONO, “Introductory Plenary Meeting of the Cabinet” President's Office (28 June 2012), online: President's Office <<http://www.presidentri.go.id/index.php/fokus/2012/06/28/8068.html>>.
 4. International Centre for Settlement of Investment Disputes (ICSID), “Database of Bilateral Investment Treaties” (1 August 2014), online: ICSID <<https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx>>. This may be a conservative figure if the fifty-seven BITs (as distinct from the widely reported sixty-seven BITs) which the ICSID database lists for Indonesia are an indication. Of those fifty-seven listed, twenty have not entered into force. However, ICSID cautions that its data is reliant upon information provided by governments.
 5. Transnational Institute Press Release, “After South Africa, Indonesia Takes a Brave Decision to Terminate Its Bilateral Investment Treaty with the Netherlands” (24 March 2014), online: Transnational Institute <<http://www.tni.org/pressrelease/after-south-africa-indonesia-takes-brave-decision-terminate-its-bilateral-investment>> [*Transnational Institute Press Release*].
 6. Stephen HURT, “Why South Africa has Ripped Up Foreign Investment Deals” *The Conversation* (17 December 2013), online: The Conversation <<http://theconversation.com/why-south-africa-has-ripped-up-foreign-investment-deals-20868>>.

announcement that “Indonesia will create a new bilateral investment agreement that will be adjusted to recent developments”.⁷

Indonesia’s move comes after having been confronted with a number of treaty-based investment dispute cases involving many hundreds of millions of dollars in claims and potential damages in recent years. In a recent and highly controversial ISDS-based case, UK-based mining company Churchill Mining and its junior Australian partner Planet Mining filed claims against the Indonesian government potentially amounting to almost \$2 billion in damages under the terms of Indonesian BITs with the UK and Australia respectively.

Both Indonesian and Dutch non-government organizations (NGOs) have reportedly applauded Indonesia’s move. According to Riza Damanik, executive director of Indonesia for Global Justice (IGJ), “Indonesia’s move to cancel its BIT with the Netherlands should fuel a transparent debate about the cancellation of Indonesia’s other 66 BITs in light of our country’s experience to date with debilitating investment claims”.⁸

II. THE NATURE OF BILATERAL INVESTMENT TREATIES

A. *The International Context of BITs*

In general terms, BITs are agreements between states to protect and promote investments by nationals and qualifying investors of each state in each other’s jurisdiction. They establish standards of treatment and protection for qualifying investors and for their investments to which the States Party to the BIT undertake to adhere.

While the scope of the protections differs treaty by treaty—sometimes significantly—they generally protect foreign investments from unlawful expropriation, unfair or inequitable conduct, discriminatory treatment, and arbitrary conduct by the host state. Crucially, they also contain arbitration provisions which enable the investors’ rights arising from these protections to be effectively pursued in instances of their violation; the treaties are thus more than just aspirational statements of intent.

In addition to these substantive protections, most investment treaties confer individual investors with standing to enforce the treaty directly against the host state through international arbitration, often under the auspices of ICSID and in accordance with the ICSID Convention, or under the United Nations Commission on International Trade Law (UNCITRAL) Rules. These increasingly controversial ISDS provisions allow investors—whether individuals, national companies, or multinational corporations—to directly sue sovereign states over the states’ policies and actions (including its judicial actions) that appear to the investors to adversely affect (or have the potential to so affect) the expectation of gain or the value of their investments in those states.

BITs and other trade and investment agreements are promoted by their advocates as being stepping stones towards full integration of their participants into a global free market economy, by ensuring that governments implement the liberalization,

7. *Jakarta Post*, *supra* note 2.

8. *Transnational Institute Press Release*, *supra* note 5.

privatization, and deregulation measures of the globalization agenda.⁹ They argue that the introduction of free trade and the removal of regulations on investment that the bilateral agreements generate lead to economic growth and the reduction of poverty, as well as increased living standards and employment opportunities.

Advocates maintain that BITs provide qualifying investors with the means to manage the sovereign risk associated with foreign investments in host states, which is particularly important in the case of developing and least-developed states where regulatory systems may be undeveloped or non-existent, or where judicial institutions are considered to be corrupt or incompetent.¹⁰ This ability for investors to protect themselves through means of their choice, even if the domestic institutional frameworks are capable of acting competently, has proved a significant drawcard for foreign direct investment into developing states. The ISDS mechanism was designed to depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent tribunal. It is thus a mechanism for rendering final and enforceable decisions through a swift and flexible process which disputing parties would have considerable control over.¹¹

On the other hand, critics have long argued that there is ample evidence to show that these agreements to the contrary merely allow transnational corporations more freedom to exploit workers and to shape the national and global economies of the junior partners to suit the corporations' interests.¹² Some commentators have argued at length that the self-interest mechanisms which are particular to the developed country-sponsored bilateral agreements, such as the conditions relating to their enforcement and the control or check mechanisms for managing the agreements, are tantamount to an intrusion into domestic law-making.¹³

BITs and other bilateral trade agreements have been critically painted as part of an insidious fast-expanding and bewildering web, popping up like hydra's heads throughout the world and constructing in patchwork fashion what the developed nations have not been able to impose through international forums such as the World Trade Organization (WTO) or through multilateral negotiations.¹⁴ They are also seen

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9. Organisation for Economic Co-operation and Development, Business and Investment Advisory Committee, "Investor-State Dispute Settlement: An Essential Element of Investment Protection" (January 2015), online: OECD <<http://biac.org/wp-content/uploads/2015/02/BIAC-Investor-State-Dispute-Settlement.pdf>>; see also Aziz CHOUDRY, "Bombarded by Bilateral Trade and Investment Agreements" *Bilaterals.org* (3 March 2004), online: *Bilaterals.org* <http://www.bilaterals.org/IMG/pdf/Bombarded_by_Bilatera_92909-2.pdf>.
 10. European Federation for Investment Law and Arbitration (EFILA), "A Response to the Criticism Against ISDS" (May 2015), online: EFILA <http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the_criticism_of_ISDS_final_draft.pdf>. The EFILA report also examines what it identifies as the eleven major criticisms of ISDS.
 11. United States Trade Representative (USTR), "Investor-State Dispute Settlement (ISDS)" (undated), online: USTR <<https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>>.
 12. Choudry, *supra* note 9; but see also Simon LESTER, "Responses to Some Criticisms on ISDS", *The Conversation* (20 May 2015), online: *The Conversation* <<http://www.cato-unbound.org/2015/05/20/simon-lester/responses-some-criticisms-isds>>.
 13. Choudry, *supra* note 9.
 14. Aziz CHOUDRY, "Bilateral Trade and Investment Deals a Serious Challenge to Global Justice Movements" *GRAIN* (December 2003), online: *GRAIN* <<http://www.grain.org/rights/tripsplus.cfm?id=2>>.

as insidious because they are frequently conducted in unequal contest in closed session between unequal partners—mainly a developed country and a developing or least-developed country. With the stronger partner having an established objective to protect its own economic and trade interests, and having little or no interest in making allowance for the divergent or conflicting national and developmental interests of the weaker partner, the resultant agreement is both inevitable and predictable. However, such argument ignores the fact that BITs and other bilateral and regional investment agreements also exist with similar frequency between comparatively equal partners amongst developed countries.

BITs have been described as (and have also been criticized for being) asymmetrical.¹⁵ However, this asymmetry exists more in respect of the capacity of each party to the BIT to exploit to the full the rights and opportunities for investment protection that the agreement provides than in the terms and conditions of the agreement itself. Strictly speaking, the terms apply equally to both parties to the agreement. The content of a BIT is limited only by what the parties agree to include within the realm of investor rights and generally cover procedural requirements (if any), the rights to be protected, and more specific measures such as collaboration between the parties. While BITs in their practical application may be generally manifestly asymmetrical, a well-negotiated BIT can be balanced and contain reasonable protections which can be reviewed and amended under conditions agreed to by both or all signatories.

The nature of BITs is such that the operation of BIT enforcement is inevitably supranational. The arbitration may take place in a third state and before an independent, non-judicial body. The rulings of the arbitration tribunal are binding on the State Party and often enforced through diplomatic pressure from the other State Party to the BIT. Rulings through organizations such as ICSID also have the added force of the ICSID Convention, which has comprehensive enforcement and procedural provisions.¹⁶

B. *Dispute Settlement and BITs*

Dispute settlement provisions in BITs generally take two different forms—those addressing state-state differences and those addressing investor-state disputes. In the former case, BITs commonly allow for mutual consultation under mutually agreed terms with the parties appointing their own arbitral tribunal.¹⁷ However, in the latter case, BITs universally grant the investor the right to submit the dispute with the state (over perceived limitations to the full exploitation of its investment) to binding private international arbitration. This right may co-exist with the state's domestic judicial processes also being available as an option, but the treaty does not necessarily require

15. Todd ALLEE and Clint PEINHARDT, “Evaluating Three Explanations for the Design of Bilateral Investment Treaties” (2014) 66 *World Politics* 47.

16. *Convention of Settlement of Investment Disputes Between States and Nationals of Other Countries*, 18 March 1965, 575 U.N.T.S. 159 (entered into force 14 October 1966) [IBRD].

17. See e.g. *Agreement Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia on Promotion and Protection of Investment*, 6 April 1994, 2240 U.N.T.S. 323 (entered into force 1 July 1995), art. 10.1-4 [Netherlands BIT].

the investor to use the state's domestic courts or to obtain state consent before it may submit the dispute to independent arbitration.¹⁸

According to the United Nations Conference on Trade and Development (UNCTAD) in 2013, challenges posed by the contemporary ISDS regime were creating momentum for its reform,¹⁹ although this momentum was still in a state of relative infancy. Two years later, UNCTAD continues to hold that this momentum continues to grow with a strong case for systematic reform.²⁰ However, UNCTAD's assessment would appear to be somewhat conservative, with a groundswell of support for change beyond the formal UNCTAD context, as more states reject or limit ISDS provisions in new BITs or free trade agreements (as discussed below). Concerns with the current ISDS system include a perceived deficit of legitimacy and transparency, contradictions between arbitral awards, difficulties in correcting erroneous arbitral decisions, questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures.²¹ Accordingly, while the proliferation of ISDS under international investment agreements (IIAs) shows the growing importance of this mechanism, it also reveals an increasing number of problems.

As documented by UNCTAD's annual updates, ISDS cases have proliferated in the past ten to fifteen years. The UNCTAD reports that investors initiated forty-two known treaty-based ISDS cases in 2014. Indeed, this does not include cases which were not reported to UNCTAD, so the number of actual cases brought could actually be much higher.²² Sixty percent of these new cases were brought against developing and transition economies, with the remaining forty percent against developed countries. Thirty-five of the forty-two new cases were brought by investors from developed countries, while five were brought by investors from developing countries.²³ By the end of 2014, 101 states had been respondents in a total of 608 known treaty-based cases, with claimants from the EU countries, Canada, and the US accounting for eighty percent of all cases.²⁴ In the light of the increasing number of ISDS cases, the argument for closer scrutiny and rebalancing of the ISDS mechanism has been gaining momentum, especially in states and regions which have faced investor claims that have attracted public attention (such as Indonesia).

In many cases, foreign investors have used ISDS claims to challenge measures adopted by states in the public interest (e.g. policies to promote social equity, foster environmental protection, or protect public health). Questions have been raised as to whether three individuals appointed on an ad hoc basis can be seen by the public at

18. *Ibid.*, art. 9.2-4.

19. UNCTAD, "Reform of Investor-State Dispute Settlement: In Search of a Roadmap", Issues Note No. 2, June 2013 at 1.

20. UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2014", Issues Note No. 2, May 2015 at 1 [*Investor-State Dispute Settlement*].

21. *Ibid.*

22. *Ibid.*, at 2.

23. *Ibid.*, at 3. UNCTAD states that the nationality of the remaining two investor claimants was unknown. The 2014 figures actually represent a reduction in the number of claims (fifty-nine new cases), but an increase in those against developing countries (fifty-three percent of all 2013 claims).

24. *Ibid.*

large as having sufficient legitimacy to assess the validity of states' acts and to make financial determinations on those acts. This is particularly so if the dispute involves sensitive public policy issues or if the claims are of a significant financial scale. In 2014 alone, host countries have faced a number of ISDS awards in excess of US\$100 million,²⁵ including a combined award in the vicinity of US\$50 billion in one instance.²⁶

The fundamental problem which many states are encountering with their BITs has been succinctly summarized by UNCTAD in its 2014 examination of the IIA regime, when it asserted that “today’s questions are not only about the change to one aspect in a particular agreement but about the comprehensive reorientation of the global IIA regime to balance investor protection with sustainable development considerations”.²⁷ Indonesia is one of those concerned states.

This conflict between the objectives of two parties to a BIT (or in other words, the public interest and the corporate right) is markedly demonstrated by the following three non-Indonesian disputes. While the legal claims in each case may revolve around fair and equitable treatment, they nevertheless also encompass core public interest issues, for example:

- The Swedish energy company, Vattenfall, which operates two nuclear power stations in Germany, filed a claim against the German government for €3.76 billion over the alleged potential losses flowing from Germany’s change of energy policy away from nuclear power following the disastrous Fukushima nuclear power station incident,²⁸
- The US-registered tobacco multinational Philip Morris International (PMI), lodged a claim through its subsidiary Philip Morris Asia against Australia over the latter’s tobacco products plain packaging legislation of 2012, relying on the terms of the Australia-Hong Kong BIT of 1974.²⁹ PMI is seeking damages “of the order of billions of dollars” plus interest, notwithstanding a judgment of the High Court of Australia in favour of the Australian government and the legislation; and
- Lone Pine Resources, a US corporation, filed a claim on behalf of its Canadian subsidiary (Lone Pine Resources Canada) against the Canadian government under

25. See Gus van HARTEN, “Who was Awarded Compensation in Past ISDS Awards” *Osgoode Hall Law School, University of Toronto* (28 March 2015), online: Osgoode Hall Law School, University of Toronto <<https://gusvanharten.wordpress.com/2015/03/>>.

26. *Investor-State Dispute Settlement*, *supra* note 20 at 5. The amount awarded was the aggregate of compensation to the three claimants constituting the majority shareholders of former Yukos Oil Company in ISDS proceedings against the Russian Federation. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014.

27. UNCTAD, “Reform of the IIA Regime: Four Paths of Action and a Way Forward”, Issues Note No. 3, June 2014 at 3.

28. *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (May 2012).

29. See *Philip Morris Asia Ltd and The Commonwealth of Australia: Notice of Arbitration* (21 November 2011), online: <<http://www.ag.gov.au/Internationalrelations/InternationalLaw/Documents/Philip%20Morris%20Asia%20Limited%20Notice%20of%20Arbitration%2021%20November%202011.pdf>>.

the Chapter 11 investment clauses of the North American Free Trade Agreement (NAFTA) after the Quebec provincial government called for a moratorium on the controversial process of shale gas fracking and banned drilling beneath the St Lawrence River basin.³⁰ Lone Pine is seeking damages in excess of C\$250 million plus other costs.

It is significant that these examples relate not to conflict between a multinational corporation and a developing country over “unfair and inequitable treatment” of investments, but instead to disputes over the public health policy of developed countries.

C. *The Nature of the Netherlands BIT Model*

The Netherlands has a very substantial network of BITs and other investment treaties, with almost 100 BITs in force or signed as at mid 2015.³¹ The Netherlands' approach to the promotion of BITs has attracted both positive and negative attention. A now-dated report in 2011 by Dutch non-government organization Centre for Research on Multinational Corporations (SOMO) asserted that there were some 20,000 “mailbox” companies registered in the Netherlands. These companies are attracted by the country's favourable tax regimes and generous investment protections offered by Dutch BITs, but have no employees on their payroll and do not actually conduct economic activity in the Netherlands.³²

Supporters of its BIT model would argue that the Netherlands maintains one of the most generous networks of BITs globally (although respondents of ISDS claims under Netherlands BITs would no doubt equally claim they are most draconian). The generosity applies not only to the breadth of the term “investment” but also to the terms “investor” and “national”, which allow far-reaching investment protection and “treaty shopping” (i.e. routing investments through third countries to acquire the protection of investment treaties that investors would not otherwise have in their home-state jurisdiction). This use of the Dutch BIT network through intermediary companies is apparently not considered a problem by the Dutch government. According to the SOMO report, the then Dutch trade secretary confirmed (in a 2011 parliamentary debate on BITs and free trade agreements) that the provisions of the Dutch BITs were meant to apply to each and every investor registered in the Netherlands, including mailbox companies.³³ In this context, it is suggested that “national” has not been interpreted in good faith in accordance with the ordinary meaning to be given to the term[s] of the treaty in their context and in the light of its object and purpose, as required pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT).

30. See *Lone Pine Resources Inc v. The Government of Canada: Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement* (8 November 2012), online: <<http://www.italaw.com/cases/documents/1607>>.

31. UNCTAD, “Investment Policy Hub: International Investments Agreement Navigator”, online: UNCTAD <<http://investmentpolicyhub.unctad.org/IIA/CountryBits/148>>.

32. Roeline KNOTTERUS and Roos van OSS, “The Netherlands: A Gateway to ‘Treaty Shopping’ for Investment Protection” *International Institute for Sustainable Development* (12 January 2012), online: IISD <<http://www.iisd.org/itm/2012/01/12>>.

33. *Ibid.*

Perhaps a more equitable and reasonable definition of “national” might be one along the lines of that included in the Indian draft Model BIT or the Korea-Australia Free Trade Agreement (KAFTA) (as discussed following). In these agreements, “national” is defined as persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in the home state.³⁴

III. THE INDONESIA-NETHERLANDS BIT

The current Netherlands BIT is the successor to the second oldest of Indonesia’s BITs and the oldest with ISDS provision.³⁵ It was signed by both parties in Jakarta on 6 April 1994 and came into force on 1 July the following year. The BIT arose from (but did not entirely replace) an earlier economic co-operation agreement between Indonesia and the Netherlands that was signed on 7 July 1968.³⁶ Hence, the BIT provides for the retrospective application of its provisions from its entry into force, to apply to investments made after 10 January 1967 by nationals of either party in the territory of the other party.³⁷

The BIT is rather brief and consists of only nine pages of text with just fifteen clauses. Furthermore, none of the clauses are of any significant complexity. In terms of general principles on BIT construction, the BIT is rather conventional. Article 3(1) requires that each contracting party “shall ensure fair and equitable treatment of the investments of *nationals* of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals”.³⁸ The term “national” applies to either natural persons having the nationality of either contracting party, or to legal persons constituted under the law of either contracting party,³⁹ the description of the latter being sufficiently broad to encompass the mailbox companies within the Dutch interpretation of the term as mentioned above. The description essentially gives carte blanche discretion to either contracting party to determine who or what may constitute a national.

Similarly, the scope of the term “investments” is not constrained. The definition enshrined in the BIT provides comprehensive coverage of the range of matters that enjoy protection, being every kind of asset invested by nationals of one party in the

34. See Department of Economic Affairs, Government of India, “Model Text for the Indian Bilateral Investment Treaty” (January 2015), online: Government of India <<https://mygov.in/draft-indian-model-bilateral-investment-treaty-text/>> at art. 1.2 [*Indian Model BIT*]; see also the *Free Trade Agreement Between the Government of Australia and the Government of the Republic of Korea*, 8 April 2014, [2014] A.T.S. 43 (entered into force 12 December 2014), Chapter 11 [KAFTA].

35. Indonesia’s oldest BIT-style agreement was with Denmark, which was signed on 30 January 1968 and was entered into force on 2 July 1968.

36. Specifically, the Netherlands BIT of 1996 replaced Chapter 2 (arts. 4–11) and art. 25 of the 1968 *Agreement on Economic Cooperation Between the Netherlands and Indonesia* (which came into force in 1971).

37. *Netherlands BIT*, *supra* note 17 at art. 11.

38. *Ibid.*, at art. 3(1) (emphasis added).

39. *Ibid.*, at art. 2.

territory of the other party, in conformity with the laws and regulations of the latter, including, but not exclusively:

- a) movable and immovable property as well as rights such as mortgages, privileges, and guarantees and any other rights in rem in respect of every kind of asset;
- b) rights derived from shares, bonds or any other form of interest in companies or joint-ventures of the other Contracting Party;
- c) claims to money or to any performance having a financial value;
- d) rights in the field of intellectual property, technical processes, goodwill and know how;
- e) business concessions and other rights conferred by law or under contract including concessions to natural resources such as concessions to prospect, explore, extract and win natural resources.⁴⁰

Article 9, which deals with the settlement of disputes between nationals and a contracting party, commences with the declaration that any legal disputes between one contracting party and a national of the other contracting party concerning an investment of the latter in the territory of the former shall, if possible, be settled amicably.⁴¹ However, if such a dispute cannot be so settled within three months, the national concerned may submit the dispute either to the judicial procedures provided by the contracting party concerned or to international arbitration or conciliation.⁴² With the choice between alternative options of investor enshrined in Article 9.2, the investor is not obliged to first seek state consent before submitting a specific dispute to independent arbitration.⁴³ While ICSID is designated as the forum of choice for the international arbitration or conciliation,⁴⁴ it is also given the status of what is effectively a super-judicial forum which is able to review domestic judgments, including either party's supreme or highest courts:

3) submission of a dispute to domestic judicial procedures under paragraph 2 above shall not in any way affect the right of the national concerned to submit the dispute to international arbitration or conciliation.⁴⁵

In the case of state-state differences, the Netherlands BIT limits such differences to matters of interpretation and application. It provides for such differences to be settled by diplomatic negotiation in the first instance, or subsequently by the two parties appointing their own arbitral tribunal.⁴⁶ If the parties are unable to agree on tribunal

40. *Ibid.*, at art. 1(1).

41. *Ibid.*, at art. 9(1).

42. *Ibid.*, at art. 9(2).

43. *Ibid.*

44. *Ibid.*, at art. 9(4).

45. *Ibid.*, at art. 9(3).

46. *Ibid.*, at art. 10(1).

membership and tribunal chair, appointments may be made by the president of the International Court of Justice.⁴⁷

The Netherlands BIT initially remained in force for a period of ten years. It continues to be in force by virtue of an automatic renewal provision, thereafter in force for further periods of ten years unless “denounced in writing” by either contracting state one year before its expiration.⁴⁸ Investments made prior to the date of expiry (although the BIT itself uses the term “termination” in this regard) continue to be protected for a further period of fifteen years from the date of expiry of the BIT.⁴⁹ Existing investors are thus still entitled to rely on the BIT’s protections for that further period after the BIT’s termination. Accordingly, for investments currently protected under the BIT, the immediate impact of Indonesia’s announcement is somewhat limited since protection for existing investors and investments continues until 2030. Hence, the earlier claim that the termination is largely symbolic.

Depending on one’s perspective, the Netherlands has been described as “generous” in respect of both the level of protection that it provides to foreign investors and the scope of protection arising from the broad and generalized language encompassing such terms as “investment”.⁵⁰ But Dutch BITs generally have also been described as among the “most aggressive in the world” in respect of their capacity to “significantly inhibit the ability of states to protect their environment from mining companies or shield their economies from harmful financial flows”.⁵¹ It has also been described as very harsh in terms of the restrictions upon preserving government policy space, or capacity to legislate on national imperatives or public health issues when such imperatives or issues run counter to the capacity of the foreign investor to exploit their investments to the fullest possible extent.

IV. INDONESIA’S GROUNDS FOR THE BIT TERMINATION AND REVIEWS

A. Background

Speculation abounds that Indonesia’s move to “terminate” or not renew the Netherlands BIT is (as the communique from the Netherlands embassy in Jakarta indicated⁵²) the first step in a programme of terminations. It appears that Indonesia intends to continue this path, since indications exist that it has given notice of non-renewal of BITs or BIT-style agreements that have already expired or are due to expire over the next few years. In addition to the Netherlands, Indonesia has BITs with another thirteen countries that are also due to expire during 2015 and 2016 (namely, Bulgaria, China, France, Italy, South Korea, Laos, Malaysia, and Slovakia in 2015, and

47. *Ibid.*, at art. 10(2)–(3).

48. *Ibid.*, at art. 15(1).

49. *Ibid.*, at art. 15(2)–(3).

50. Knotnerus and van Oss, *supra* note 32.

51. *Transnational Institute Press Release*, *supra* note 5.

52. *Netherlands Embassy in Jakarta*, *supra* note 1.

Hungary, Pakistan, Singapore, Spain, and Switzerland in 2016). The Indonesian government has reportedly given notice to all of these countries (with the exception of Pakistan) that their BITs with Indonesia will not be renewed when they expire.⁵³ Notice of non-renewal of its BIT-style agreement on promotion and protection on investment has reportedly also been given to Singapore, Indonesia's largest foreign direct investor by a wide margin, although a replacement agreement is apparently already under negotiation.⁵⁴ But what is confusing in respect of the Indonesian strategy on this non-renewal programme is that notice of non-renewal has apparently also been given in respect of agreements that expired in 2014 (e.g. agreements with Egypt, India, South Korea, and Vietnam), with the exception of the agreement with Saudi Arabia.⁵⁵ If these reports are accurate, it is unclear whether such notices were meant to be retrospective, the initiation of renegotiations, or long-term notice of automatic renewals.

The intention may simply be for Indonesia to negotiate a more "modern" investment treaty, providing for more clearly defined protections and dispute resolution provisions, and then individually initiate discussions with each country as the need arises. The then Indonesian vice president, Boediono, was quoted at the time of the Netherlands embassy announcement as stating that "Indonesia will create a new bilateral investment agreement that will be adjusted to recent developments".⁵⁶ His statement did not refer specifically as to what those "recent developments" might be.

Indonesia follows a growing number of countries concerned about the perceived excessive corporate rights enshrined in investment agreements. South Africa in 2013 cancelled its BIT with the Netherlands, Germany, and Switzerland as the initial step in a campaign to cancel all of its BITs because it considered that their investor protections were incompatible with South Africa's national development objectives.⁵⁷ However, their sunset clause provisions mean that South Africa is still subject to arbitration proceedings under the BIT for another ten years. At the same time, South Africa also announced plans to produce a standard investor rights framework to eliminate the variations within its current BITs.⁵⁸ It argued that this approach would give certainty and allow the South African legal system to build jurisprudence to clarify the framework. The framework would also include exceptions to investor rights for certain areas of policy interest such as health and human rights.⁵⁹

53. See Indonesia for Global Justice (IGJ), "Indonesia Already Stopping 18 BITs" (23 March 2015), online: IGJ <<http://igj.or.id/en/indonesia-sudah-menghentikan-18-bits/>> [IGJ]. IGJ reports that notice has been given to eighteen countries, namely: the Netherlands, Bulgaria, Italy, South Korea, Malaysia, Egypt, Slovakia, Spain, China, Kyrgyzstan, Laos, France, Cambodia, India, Norway, Romania, Turkey, and Vietnam.

54. See "Indonesia not Renewing 2005 Bilateral Agreement" *Bilaterals.org* (6 June 2015), online: Bilaterals.org <www.bilaterals.org/?indonesia-not-renewing-2005>; see also "Treaty Revisions will Not Deter Singapore Investment in Indonesia" *Jakarta Globe* (9 June 2015), online: Jakarta Globe <<http://jakartaglobe.beritasatu.com/business/treaty-revisions-will-not-deter-singapore-investment-indonesia-minister/>> [*Jakarta Globe*].

55. *IGJ*, *supra* note 53.

56. *Jakarta Post*, *supra* note 2.

57. Hurt, *supra* note 6.

58. *Ibid.*

59. *Ibid.*

Germany reportedly recently announced that it opposed the inclusion of any ISDS provisions in the Trans-Atlantic Trade and Investment Partnership (TTIP) trade agreement between the US and the EU, which is currently under intense (and at times contentious) negotiation.⁶⁰ It has followed this stance by rejecting the ISDS provisions in their current form in the Canada-EU Comprehensive Economic and Trade Agreement (CETA), although the Agreement was signed in principle in late 2013.⁶¹ In April 2011, the then Australian Labor government announced in a trade policy statement that it would cease including ISDS clauses in its future IIAs, since their inclusion imposed significant constraints on Australia's ability to regulate public policy matters.⁶² This stance has been softened somewhat by the current government, who will consider ISDS inclusion in future trade treaties on a case-by-case basis. Hence, the recent Korea-Australia Free Trade Agreement (signed in April 2014) and the more recent China-Australia Free Trade Agreement (signed in June 2015) both include ISDS provisions, albeit with some limitations and carve-outs. In contrast, the Australia-Japan Economic Partnership Agreement (signed in July 2014) does not.

Indonesia's action in respect of its Netherlands BIT is thus consistent with recent moves by a number of countries—both developing and developed—to terminate or renegotiate investment treaties which might be viewed as providing greater protection to foreign investors than benefits to the state.

It may well be motivated not only by the threat of significant compensation payments, but also a desire to be able to enact policy on environmental issues, health issues, and other areas of public interest without having to compensate foreign investors for the privilege. President Yudhoyono was also on record in response to *Churchill's* original notice of arbitration in 2012 stating his wishes that “I do not want those multinational companies to do anything they desire with their international backup and put pressure on developing countries such as Indonesia”.⁶³

B. *The Churchill Mining and Planet Mining v. Indonesia ICSID Cases*

There is speculation that Indonesia's actions are in response to a number of recent cases brought by foreign investors in the energy resources sector, and more specifically to an ICSID Arbitration Tribunal Decision on jurisdiction in *Churchill Mining and Planet*

60. See Shawn DONNAN and Stefan WAGSTYL, “Transatlantic Trade Talks Hit German Snag” *Financial Times* (14 March 2014), online: The Financial Times <<http://www.ft.com/intl/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html>>; see also “Germany Pledges to Stand Firm in US-EU TTIP Trade Talks” *Deutsche Welle* (21 March 2015), online: DW <<http://www.dw.com/en/germany-pledges-to-stand-firm-in-us-eu-ttip-trade-talks/a-18332349>>.

61. See Peter CLARK, “Germany Throws down Gauntlet in CETA Investor-State Negotiations” *iPolitics* (27 February 2014), online: *iPolitics* <<http://www.ipolitics.ca/2014/07/27/germany-throws-down-gauntlet-in-ceta-investor-state-negotiations/>>; see also Stefanie ROSSKOPF, “Investor-State Dispute Settlement (ISDS), Germany and the Transatlantic Relationship”, *EUSA 14th Biennial Conference* (5–7 March 2015), online: EUSA 14th Biennial Conference <<https://eustudies.org/conference/papers/download/197>>. Roskopf examines the German position on ISDS in respect of both the TTIP and the CETA.

62. “Trading Our Way to More Jobs and Prosperity” *Australian Government Trade Policy Statement* (April 2011), online: Australian Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>>.

63. “SBY Frets over Int'l Arbitration” *Jakarta Post* (29 June 2012), online: Jakarta Post <<http://www.thejakartapost.com/news/2012/06/29/sby-frets-over-int-l-arbitration.html>>.

Mining v. Indonesia in early 2014.⁶⁴ Churchill Mining PLC (*Churchill*) (a UK-listed mining company) and its wholly owned Australian subsidiary Planet Mining Pty Ltd (*Planet*) formed the East Kutai Coal Project (EKCP) with local Indonesian company Ridlatama Group (*Ridlatama*). EKCP had discovered very substantial coal deposits in territory over which *Churchill* and *Planet* held majority shares in mining licences. Another local company, Nusantra Group (*Nusantra*), which had previously held licences over substantially the same area, claimed that their licences were still valid. *Ridlatama*'s licences and the interest in those licences held by *Churchill* and *Planet* were thus revoked by the provincial government in favour of *Nusantra*. *Churchill* and *Planet* first responded through domestic judicial channels, including recourse to the Indonesian Supreme Court. However, having been unsuccessful in these domestic proceedings, they lodged (initially separate) claims with ICSID.

Churchill began arbitration before ICSID in May 2012, while *Planet* brought a separate claim on essentially the same dispute in October 2012.⁶⁵ The two companies together were reportedly claiming well in excess of US\$1 billion in damages plus interest.⁶⁶ With the agreement of all three parties, the ICSID Tribunal consolidated the *Churchill-Indonesia* arbitration (ARB/12/14) and the *Planet-Indonesia* arbitration (ARB/12/40), since the facts and the procedural history were largely identical in the two cases.⁶⁷ However, the Tribunal determined that it still lacked the power to render just one decision on jurisdiction or on awards.

Indonesia argued that the ICSID Tribunal did not have jurisdiction to hear the *Churchill* and *Planet* claims since Indonesia had not given express advance consent under the Indonesia-United Kingdom BIT (in respect of *Churchill*'s rights) of April 1976, and the separate Indonesia-Australia BIT (in respect of *Planet*'s rights) of November 1992.⁶⁸ On 24 February 2014, the ICSID Tribunal rejected Indonesia's jurisdictional challenges⁶⁹ and simultaneously issued two separate decisions in favour of the claimants, which enabled *Churchill* and *Planet* to proceed with their damages claims. The rulings, however, addressed only the issue of consent from Indonesia to enter into arbitration. It did not consider the merits of the *Churchill*'s and *Planet*'s claims.

Nevertheless, the case served as a stark reminder of the problems associated with BITs; while the Indonesian government has not confirmed that the *Churchill* case was the reason for its recent moves, President Yudhoyono's 2012 statement that he wished

64. *Churchill Mining and Planet Mining v. Republic of Indonesia*, ICSID Arbitral Tribunal Cases No. ARB/12/40 and 12/14, Decision on Jurisdiction (24 February 2014).

65. *Churchill Mining Plc v. Indonesia (Jurisdiction)*, ICSID Arbitral Tribunal, Case No ARB/12/14; *Planet Mining Pty Ltd v. Indonesia (Jurisdiction)*, ICSID Arbitral Tribunal Case No ARB/12/40.

66. Sara SCHONHARDT, "British Mining Firm Sues Indonesia for Asset Seizure" *Jakarta Globe* (8 June 2012), online: Jakarta Globe <<http://www.thejakartaglobe.com/archive/british-mining-firm-sues-indonesia-for-asset-seizure/>>.

67. Pursuant to *Churchill Mining and Planet Mining v. Republic of Indonesia*, ICSID Arbitral Tribunal Cases No. ARB/12/40 and 12/14, Tribunal Procedural Order No. 4, 18 March 2013 [*Churchill Mining*].

68. For a detailed analysis of the Tribunal's interpretation and determination on the contentious issue of Indonesia's consent to arbitration, see Luke NOTTAGE, "Do Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of *Planet Mining v. Indonesia* and Regional Implications" (January 2015) 12 *Transnational Dispute Management* 1–18.

69. *Churchill Mining*, *supra* note 59 at para. 77.

to no longer see foreign companies pressuring Indonesia can clearly be interpreted as an acknowledgement that *Churchill* was part of the reason for the shift.

The ICSID Tribunal's decision on jurisdiction on the *Churchill* and *Planet* cases appears to have caused some outrage in Indonesia. Hence, it would not be surprising if the cases have prompted more sweeping action by the Indonesian government. President Yudhoyono reportedly viewed the decision of the Tribunal as directly impacting Indonesia's sovereignty, and asked officials to immediately report on the readiness of Indonesia to respond to the merits of the case:⁷⁰

This is a lesson for us, the incident in a county and then was taken to arbitration ... The first defendant, Yes, the President. Imagine if the hundred counties doing things like that, especially when we're on the wrong side and lose, it's a remarkable implication.⁷¹

The *Churchill* and *Planet* cases are not the first instances in which Indonesia has been forced to defend its actions for alleged breaches of investment treaties through ICSID claims,⁷² or in other international arbitration forums.⁷³ As further irritation to Indonesia, US-incorporated *Newmont Mining Corporation (Newmont)*, which owned the Batu Hijau mine in Indonesia, filed for arbitration through ICSID in July 2014 after failing to resolve in its favour a six-month-long dispute with the Indonesian government over its ban in January 2014 on copper ore exports and a progressive tax on semi-processed ore concentrates. *Newmont* proceeded in its ICSID claim through its subsidiary *PT Newmont Nusa Tenggara*, a shelf company registered in the Netherlands, and a local junior partner under the provisions of Indonesia's Netherlands BIT. It sought injunctive relief to allow it to resume exports of the ore concentrate. However, in this particular instance, the government allegedly threatened to revoke the company's mining leases if it did not withdraw its claim for arbitration.

Newmont has consequently withdrawn its claim for arbitration, although at the same time the Indonesian government has permitted the company to renew limited ore exports at rates more favourable than those proposed for the industry generally.⁷⁴ It is suggested that the episode demonstrates the utilization of the BIT ISDS provisions as a

70. President Yudhoyono, *supra* note 3.

71. *Ibid.*

72. For example, *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction (16 July, 2013), in which the Indonesia-UK BIT of 1976 was again invoked; and *Cemex Asia Holdings v. Republic of Indonesia*, ICSID Case No. ARB/04/03, Award (23 February 2007), in which the ASEAN Agreement for the Promotion and Protection of Investments of 1987 was invoked.

73. See *Hesham Talaat al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) in which an UNCITRAL Tribunal ruled that foreign investors could bring an action against States Party to the Organization of Islamic Cooperation (OIC) Investment Agreement. This permitted Saudi investor al-Warraq to file a claim against the Indonesian government's actions in nationalizing the private Indonesian Bank in which he held the controlling shareholding (and his alleged wrongful conviction for fraud and money laundering). The Tribunal subsequently decided in December 2014 that Indonesia's treatment of Mr al-Warraq's investment had breached the fair and equitable treatment standard, although it declined to award damages since it also found that Mr al-Warraq had himself breached the OIC Agreement.

74. "Newmont Gets Export Permit Despite Pending Smelter Fund" *Jakarta Post* (20 September 2014), online: <http://www.thejakartapost.com/news/2014/09/20/>; see also Cecilia JAMASMIE, "Newmont Abandons Mining Arbitration Case Against Indonesia" *Mining.com* (26 August 2014), online: [Mining.com](http://www.mining.com) <<http://www.mining.com>>.

bargaining tool to bring pressure to bear upon Indonesia, rather than a genuine endeavour to amicably resolve a dispute through arbitration.

A. *Indonesia's Rising Tide of "Economic Nationalism"*

Some commentators suggest that the government's moves to cancel and/or review some or all of its BITs is also a reflection of a rising tide of economic nationalism, which is in part driven by an expanding economy and a growing consumer-oriented middle class.⁷⁵ This developing economic nationalism brings with it a reflection on exploitation by developed countries—in part through investment treaties. Foremost among those exploitative Western countries is the Netherlands, as Indonesia's former colonial overlord and second international investment treaty partner. As Neil Chatterjee asserts:

Indonesia has been plundered since the Dutch collected nutmeg and cloves from the archipelago they called the East Indies 400 years ago. With treasures strung across 17,000 islands, it is home to the world's largest gold mine and exports the most power-station coal, palm oil and tin. Indonesia's identity was forged by a half-century of sometimes savage dictatorship that sold its riches overseas. Now the country is taking steps to keep more of that wealth at home as the 10-year rule of its first freely elected president comes to an end.⁷⁶

However, Chatterjee also suggests that this rising tide of economic nationalism threatens to undo the formula that helped bring much-needed investment into Indonesia and its economy. He argues that driving away investors through such a policy could cost Indonesia dearly in terms of lost taxes and royalties, which in turn would exacerbate an economic slowdown and cripple efforts to build infrastructure.⁷⁷ Other commentators have suggested that the rising tide of nationalism (along with an allegedly corrupt legal system) has "damaged Indonesia's reputation as one of Asia's hottest investment destinations".⁷⁸

President Yudhoyono, on the other hand, made his position abundantly clear. He stressed that the attitude of the government would be to review its mining contracts that disregard the environment and are detrimental to Indonesia. Responding to the ICSID Tribunal's determination on jurisdiction in the *Churchill* and *Planet* cases, he pronounced that:

I don't want the multinational companies that do anything with its international powers to put pressure on developing countries, such as Indonesia ... If there are contracts with foreigners of 20 or 30 years ago turns out to be inappropriate and unjust, then my obligation to revisit the contract.⁷⁹

75. See Neil CHATTERJEE, "Indonesia's Nationalism" *Bloomberg News* (22 July 2014), online: Bloomberg News <<http://www.bloomberg.com/quicktake/indonesias-nationalism/>>.

76. *Ibid.*

77. *Ibid.*

78. Ben BLAND, "Indonesia's President-Elect Joko Widodo Faces Five Challenges" *Financial Times* (23 July 2014), online: Financial Times <<http://www.ft.com/intl/cms/s/0/1acb0cd6-1217-11e4-8279-00144feabdco.html#slide0>>.

79. President Yudhoyono, *supra* note 3.

Some commentators have questioned the use of the term “terminate”, as used by the Netherlands embassy in its announcement of 24 March 2014 and by the media generally.⁸⁰ They suggest that the use of “terminate” does not adequately capture the nuanced process that Indonesia is going through to review its BITs by letting the old ones lapse so that new and better ones can be renegotiated. They have suggested that an expression such as “Indonesia is letting its bilateral treaties lapse so as to negotiate better ones” would be more factually correct.⁸¹

In fact, allowing the treaty to lapse is not an option in this situation because the BIT automatically renews and continues to be in force unless specific action to terminate it is taken by one of the parties. In accordance with the provisions of Article 15(1), this BIT initially remains in force for a period of ten years and continues to be in force (i.e. automatically renews itself) thereafter for further periods of ten years “unless denounced in writing by either Contracting Party one year before its expiration”.⁸² Article 15(2) stipulates that investments made “prior to the date of termination” of the present Agreement shall continue to be effective for a further period of fifteen years “from the date of termination” of the Agreement. Hence, the BIT itself uses the term “termination”⁸³ in this regard, and the term “lapse” does not appear.⁸⁴

B. *Reaction to the Indonesian BIT Termination*

The reaction generated by Indonesia’s decision to cancel its Netherlands BIT and to review its other BITs has been strong and, not surprisingly, mixed. Amongst the investment community and advocates of treaties with strong ISDS provisions, it has apparently caused much concern and confusion.⁸⁵ The cancellation is likely to be seen as a backward step by investors already worried about weak investor protections in the country. Some critics have perceived Indonesia as becoming “not so investor friendly”⁸⁶ or engaging in “bad behaviour”.⁸⁷ For instance, it has been said:

The outright removal of any future treaty protection for investments in Indonesia would be a cause of considerable concern for existing and prospective investors, as the investment protections afforded by BITs can play a significant part in the final decision to invest, particularly in developing countries such as Indonesia.⁸⁸

80. See *Netherlands Embassy in Jakarta*, *supra* note 1.

81. See Michael EWING-CHOW and James J. LOSARL, “Indonesia is Letting Its Bilateral Treaties Lapse so as to Renegotiate Better Ones” *Financial Times* (15 April 2014), online: Financial Times <<http://www.ft.com/int/cms/s/0/20c6c518-c16c-11e3-97b2-00144feabdco.html>>.

82. *Netherlands BIT*, *supra* note 17 at art. 15(1).

83. *Ibid.*

84. *Ibid.*, at art. 15(2).

85. “Indonesia Terminates Indonesia-Netherlands BIT” *Ashurst Singapore* (April 2014), online: Ashurst <<http://www.ashurst.com>>.

86. Arif OEGROSENO, “Revamping Bilateral Treaties” *Jakarta Post* (7 July 2014), online: Jakarta Post <<http://www.thejakartapost.com/news/2014/07/07/revamping-bilateral-treaties.html>>.

87. *Ibid.*

88. “Indonesian Update: What are the Possible Consequences of Termination of Indonesia’s Bilateral Investment Treaties?” *Herbert Smith Freehills, Insights* (12 May 2014), online: Herbert Smith Freehills <<http://www.herbertsmithfreehills.com/insights/all-insights?q=indonesia%27s+bilateral+investment+treaties>>.

Other commentators have hailed the move as revolutionary because it would allow for the rebalancing of foreign investment in favour of the public interest.⁸⁹ Both Indonesian and Dutch NGOs have reportedly applauded Indonesia's decision. According to Riza Damanik, executive director of IGJ, the Indonesian government is taking an admirable and positive course of action in drafting new and more equitable investment treaties:

There is a new modus operandi of foreign investors using these treaties to threaten weak governments ... We do not want it like this. We want dignity. Indonesia is an independent country and we have the sovereignty to regulate our country including foreign investment, especially when it comes to protecting natural resources.⁹⁰

NGOs have also called on both the Indonesian and Dutch governments to review their approaches towards investment treaties so as to rebalance investor protections with wider social and environmental public interest considerations:

The cancellation of the Netherlands-Indonesia BIT by the Government of Indonesia deserves appreciation. The BIT cancellation should be followed by efforts to critically review the privileges of foreign investors in Indonesia and to promptly restore the rights of the people and the environment vis-à-vis foreign direct investment.⁹¹

Mahendra Siregar, Chairman of Indonesia's Investment Co-ordination Board (BKPM), reportedly stated that the Indonesian government's aim in respect of its new attitude towards BITs is not to weaken investor protection but to ensure there is consistency between local and international laws and regulations:

Many of these agreements were signed decades ago, while along the way many new laws and regulations have been issued related to investment ... For the time being, we are drafting the new template for the investment treaties so we can introduce it to our counterparts soon, hopefully this year.⁹²

In any case, the impact on existing investors of a decision to terminate all Indonesia's BITs (even without substituting them for alternative arrangements) would not be immediate. Under most (if not all) of its BITs, Indonesia would have to wait for the expiry of the BIT's initial term before the opportunity to terminate it arises. Furthermore, under sunset clauses, existing investors may still be entitled to rely on the BIT protections for a period—generally fifteen years—after the BIT's termination.

Interestingly, the Netherlands BIT provides another course of action (other than termination) which Indonesia might have attempted to utilize. Article 13 provides that

89. Hikmahanto JUWANA, "Indonesia Should Withdraw from the ICSID!" *Jakarta Post* (2 April 2014), online: Jakarta Post <<http://www.thejakartapost.com/news/2014/04/02/indonesia-should-withdraw-icsid.html>>.

90. *Transnational Institute Press Release*, *supra* note 5.

91. *Ibid.*

92. Quoted by Ben BLAND and Shawn DONNAN, "Indonesia to Terminate More than 60 Bilateral Investment Treaties" *Financial Times* (26 March 2014), online: Financial Times <<http://www.ft.com/intl/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdco.html#axzz39h2w282>>.

either party may request that consultations be held on any matter concerning the BIT, while the other party is required to at least give both “sympathetic consideration” and “adequate opportunity for consultations” in response to any such request.⁹³ Article 13(2) continues that the BIT may be amended at any time, if deemed necessary, by mutual consent. It is not known whether the Article 13 provisions were invoked by either party before the termination announcement was made.

V. FUTURE DIRECTIONS FOR INDONESIA’S BIT STRATEGY

A. *A New Model BIT?*

As a result, it would seem that Indonesia’s response (specifically to the *Churchill* and *Planet* cases, and generally its determination to cancel its Netherlands BIT and review others) is more of a reaction to BIT terms in practice and their application rather than to the principle of investor protection. This position is borne out by the remarks by President Yudhoyono after the *Churchill* jurisdiction decision, when he railed against the perceived greed and “plundering of foreign companies”, and not against investors’ reasonable rights.⁹⁴

Whatever may have been the actual catalyst for the cancellation and review notice, it seems clear that the Indonesian action has been driven by a number of related factors, including concerns over what it perceives as the increased exposure to investor claims in international arbitration, national legislation and domestic judicial avenues being overridden, perceived frivolous claims, and outdated IIAs. The Indonesian ambassador to Belgium, Arif Oegroseno, recently encapsulated some of these perceptions when he asserted that:

It should not come as a shock that Indonesia wants to update, modernize and balance its BITs. But it would be shocking if today there were loud protestations against changing the BITs were signed in the previous century. Or, expectations for Indonesia to continue accepting one-way BITs while at the same time pressuring the nation not to let all of its natural resources be taken away raw. Many seem to have the perspective, “If Indonesia is noisy, just label it nationalistic”. That sounds like some 18th century stuff.⁹⁵

As Anthony Crockett points out, most of Indonesia’s BITs were signed prior to the so-called “new generation” of BITs (as exemplified by the 2004 version of the US Model BIT) and would thus be viewed as representative of the “old generation BIT” and their attendant shortcomings (as demonstrated from Indonesia’s perspective by the outcome of the *Planet* jurisdiction case).⁹⁶

93. *Netherlands BIT*, *supra* note 17 at art. 13(1).

94. *Jakarta Globe*, *supra* note 54. See also John LUMBANTOBING, “Renegotiating the Bite of Our BITs” *Jakarta Post* (18 May 2015), online: <http://www.thejakartapost.com/news/2015/05/18/renegotiating-bite-our-bits.html>.

95. Oegroseno, *supra* note 86.

96. Anthony CROCKETT, “Indonesia’s Bilateral Investment Treaties” (Spring 2015) 30(2) ICSID Review 441.

The ambassador has also stated that a consistent template is required to serve as guidance for Indonesia's BIT negotiators.⁹⁷ The Indonesian government has also made it clear that its review is intended to lead to the development of a Model BIT. This raises the issue of the policy approach or direction that Indonesia might take in respect of this Model BIT, as well as the inclusion of BIT and ISDS provisions in broader trade treaties. Losari and Ewing-Chow⁹⁸ suggest that, procedurally, there are three options for Indonesia to discontinue its existing BITs, namely:

- Terminating the lapsing BIT unilaterally by way of notification (as occurred with the Netherlands-Indonesia BIT) and renegotiating a new one;
- Terminating the old BITs consensually with the other party (as seems to have occurred with the Singapore-Indonesia BIT) and renegotiating a replacement treaty; or
- Renegotiating the old BIT with a view of amending the clauses to clarify them further.

The problem with the first option is that investments made prior to the date of termination continue to enjoy protection for a further period (usually fifteen years) according to the terms of the survival clause. The second and third options may allow for the immediate conclusion of those former terms, including survival clause provisions, on mutual agreement and formalization between the two parties of the replacement treaty or amended clauses. However, as Losari and Ewing-Chow point out, the second and third options really can be taken only if Indonesia already has its Model BIT. At the same time, their success depends fully on the consent of the other party to Indonesia's proposal.⁹⁹

The Indonesian government is facing a number of major challenges in striking a reasonable balance in a text between state interests and investor protection, but the main issues which need addressing surely include:

- The definition of "investment": Should Indonesia move towards a narrow and restricted definition targeting specific investment (i.e. an enterprise-based approach) rather than the broader asset-based approach? Investment under the enterprise-based approach should contribute to national development, but should exclude portfolio investment. A directly related issue here is the definition of "qualified investor", which may require the investor (both individual and corporate) to have a physical or real presence in the host country over a considerable period of time;
- Most-favoured-nation treatment (MFN): Should Indonesia exclude from any MFN provisions pre-establishment IIA measures (that is, measures which exist

97. Oegroseno, *supra* note 86.

98. James J. LOSARI and Michael EWING-CHOW, "Pacific Rim Investment Treaty Practice: Regional Considerations-Reflective or Reactionary? Indonesia's Approaches to International Investment Agreements and Recommendations for the Future" (January 2015) 12(1) *Transnational Dispute Management* at 4.

99. *Ibid.*

before a treaty comes into force), integration of any existing or future regional economic integration and investment treaties, and any preferential treatment granted by Indonesia to a least-developed country?;

- Fair and equitable treatment: This may encompass a move away from a focus on investor rights to full and prompt access to justice in respect of criminal, civil, or administrative proceedings;
- Indirect exploitation: Direct expropriation may have a higher threshold requirement, including a public interest and due process of law requirement. Indirect expropriation, including measures equivalent to or tantamount to exclusion, might be excluded; and
- ISDS inclusion: Should Indonesia exclude ISDS provisions, or as an alternative include them on a case-by-case basis (see the following discussion on the Australian model)? This may also require that its domestic judicial processes must be used, unless it gives prior specific formal consent for the dispute to proceed to international arbitration.

Indonesia may see merit in dispensing with the current automatic renewal or extension provision that currently exists in its BITs, and rely instead on proactive action by both parties for renewal. It may also see merit in limiting any sunset provisions to terms appropriate for the reasonable exit arrangements for investments, or at least to a term not exceeding the term of the BIT itself.

The Indonesia reviewers of a possible Model BIT have been apparently examining both the South African and Indian approaches to BITs and their ISDS provisions. The South African approach is characterized by the elimination of separate individual agreements and the development of a single domestic legislative framework under which foreign and national investors will be treated equally under South African law—either through judicial processes or through arbitration. The framework may not include any ISDS provisions nor make any provision for recourse to international arbitration.

Following experiences with ISDS under its current BITs (which bear many parallels with the Indonesian experience), India has recently released a draft of its proposed Model BIT. The draft Model BIT is an extensive document (of some twenty-nine pages) of much greater breadth, detail, and definition than the conventional BIT. It addresses a number of the more contentious issues arising in the Indonesian BITs. For example, it adopts a narrow enterprise-based model of investment rather the broader asset-based model, and thus specifically excludes a number of items otherwise included in the Netherlands BIT. Items specifically excluded from being deemed as assets include interest in government-issued debt securities or loans, pre-operational investment or expenses, portfolio investments, claims arising solely from sale of goods or services contracts, or extensions of goodwill, brand value, market share or similar intangible rights, or judgments sought in any judicial, regulatory, administrative, or arbitral proceeding.¹⁰⁰

100. *Indian Model BIT*, *supra* note 34 at art. 1.7.

The Indian Model BIT restricts the definition of qualified investors, both individual and corporate, to those “conducting real and substantial business operations in the home state”, with “real and substantial” being further defined as having—without exceptions—the following:

- i. made a substantial and long term commitment of capital in the Host State;
- ii. engaged a substantial number of employees in the territory of the Host State;
- iii. assumed entrepreneurial risk;
- iv. made a substantial contribution to the development of the Host State through its operations along with transfer of technological knowhow, where applicable; and
- v. carried out all its operations in accordance with the Law of the Host State.¹⁰¹

Hence, holding companies, investment companies, or shelf companies are not considered to be an “investment” under the Indian Model BIT, nor are they considered to be protected assets of an investment.

The Indian Model BIT retains ISDS provisions, but places restrictions on both their scope and application. The BIT requires investors to exhaust all domestic remedies (judicial and administrative) before initiating international arbitration,¹⁰² but even then international arbitration jurisdiction does not extend to a re-examination of any legal issue which has been finally settled by judicial authority.¹⁰³ Article 14 of the BIT further incorporates detailed provisions concerning the conduct of tribunal proceedings, including appointment of arbitrators, transparency in proceedings, conflicts of interest, awards, and counterclaims—a level of detail that one would expect to have been left to the UNCITRAL Rules or the ICSID Rules and Regulations.

The Indian Model BIT also significantly expands the Indian government’s “policy-space” preservations, with a broad range of government measures being essentially excluded from the scope of the BIT. The treaty does not apply to government procurement or subsidies, taxation, compulsory licensing of intellectual property rights.¹⁰⁴ Furthermore, nothing in the BIT precludes the government from taking actions or measures of general application which it considers necessary in respect of protecting public morals and maintaining public order, financial systems integrity and stability, serious balance of payment and exchange rates problems, public health and safety, labour conditions, fraudulent practices, individual rights on data privacy, environmental protection, and protection of national monuments or treasures of historic, cultural, or archaeological value.¹⁰⁵

However, if neither the South African or Indian approaches suit Indonesia, then an option less drastic and politically less troublesome might be one more akin to the

101. *Ibid.*, at art. 1.2.

102. *Ibid.*, at art. 14.3.

103. *Ibid.*, at art. 14.2.

104. *Ibid.*, at art. 2.6.

105. *Ibid.*, at art. 16.1.

approach adopted by Australia in its recently concluded free trade agreement with South Korea.¹⁰⁶ However, it should be noted that KAFTA does not constitute an Australian Model BIT-style agreement, particularly in respect of the inclusion of the contentious ISDS provisions. The Australian government's stance is that ISDS inclusion shall be considered on a case-by-case basis with limitations and carve-outs to sufficiently protect its right to make decisions in the public interest.¹⁰⁷ KAFTA includes lengthy provisions (by current BIT benchmarks) controlling the investments of the two parties. The investment chapter, Chapter 11, covers essentially the same scope as a conventional BIT, including defining key terms such as "investment" and "investor", and the existence and operation of ISDS. However, it also reflects the government's cautious approach to the ISDS mechanism and only partially retracts from the previous government's refusal to include the mechanism in future trade and investment treaties (which followed claims by tobacco multinationals over Australia's tobacco plain packaging legislation of 2012). The Chapter goes some way towards controlling the ambit nature of both "covered investment" and "qualifying investor" that gives grounds for an action under a generic BIT.

KAFTA provides that one party may deny the benefits of Chapter 11 to an investor that is an enterprise of the other party and to their investments if the enterprise has no substantive business operations or is not owned or controlled in the territory of the other party.¹⁰⁸ The provision goes some way towards addressing the contentious issues of "mailbox companies" or "treaty shopping" that has been characteristic of Dutch BITs and the basis of many BIT jurisdictional claims (e.g. the *Churchill/Planet* claims and the Phillip Morris tobacco plain packaging claim against Australia).

KAFTA also contains a number of safeguards in respect of preserving governmental policy space, and thereby provides greater certainty in the exercise of governmental discretion to regulate in respect of public health and welfare objectives. Chapter 11 includes an express provision (with a list meant to be non-exhaustive) stipulating that "except in rare circumstances, non-discriminatory regulatory actions by a government that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations".¹⁰⁹

Other policy space preservations include reservations which allow each Party to adopt or enforce measures, in a manner which would not constitute "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade or investment", and which are necessary to:

- Protect human, animal or plant life or health;
- Ensure compliance with laws and regulations that are not inconsistent with KAFTA; or

106. KAFTA, *supra* note 34.

107. Hence KAFTA (signed April 2014) and the China-Australia Free Trade Agreement (ChAFTA) (signed 17 June 2015) both contain specific ISDS provisions with limitations whereas the Japan-Australia Economic Partnership Agreement (JAPEA) (signed in May 2014) does not.

108. KAFTA, *supra* note 34 at art. 11.11.2.

109. *Ibid.*, at Chapter 11, Annex B Expropriation, art. 5. Footnotes add that this list is non-exhaustive.

- Conserve living or non-living exhaustible natural resources if such measures are also applied to domestic production or consumption;¹¹⁰

Any compensation shall be limited to the equivalent to the fair market value of the expropriated investment immediately before the date during which the expropriation took place, and not be based on a speculative assessment of the potential and unrealizable value of the investment.¹¹¹

A. Indonesia's Multilateral Foreign Investment Protection

While Indonesia has already started the lengthy process of reviewing its BITs in the light of former Indonesian Vice President Boediono's aforementioned "recent developments", it has not given any indication of moving away from participation in and compliance with regional and multilateral agreements on investor rights and ISDS. Indonesia is still a party to a number of regional agreements which incorporate ISDS provisions and for which there has been no suggestion that its participation will be subject to review. These agreements include ASEAN's Comprehensive Investment Agreement (ACIA), which provides signatory states with many of the protections offered in BITs. These protections include MFN treatment, a requirement for fair and equitable treatment for investments, protection from expropriation without compensation, and the right of investors to institute arbitration proceedings against a signatory state.¹¹²

Indonesia is also a signatory to ASEAN free trade agreements with Australia, New Zealand, China, Japan, Korea, and India. In particular, the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) contains national treatment obligations, fair and equitable treatment provisions, full protection and security obligations, and provisions protecting investors from expropriation without compensation, while providing for the ability of investors to commence arbitration proceedings.¹¹³ Furthermore, it is also a member of the Organization of Islamic Cooperation (OIC), and has ratified the OIC Agreement for the Protection, Promotion and Guarantee of Investments.¹¹⁴ This Agreement contains provisions equivalent to those found in BITs.

Indonesia is also a member of the WTO and its various trade-related agreements, notably the Agreement on Trade Related Investment Measures, which provides foreign investors in Indonesia with similar "national treatment" protections on investments to those found in most BITs. Furthermore, notwithstanding the fact that some call for its withdrawal from ICSID, Indonesia remains party to the ICSID Convention and has not given any indication of a possible withdrawal.¹¹⁵

110. *Ibid.*, at art. 11.9.5.

111. *Ibid.*, at art. 11.7.2–3.

112. *ASEAN Comprehensive Investment Agreement (ACIA)*, 26 February 2009 (entered into force 29 March 2012), online: <<http://www.asean.org/resources/publications/asean-publications/item/asean-comprehensive-investment-agreement>>.

113. *Agreement Establishing The ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)*, 27 February 2009, [2010] A.T.S. 1 (entered into force on 1 January 2010) at arts. 18–28; see also Herbert Smith Freehills, *supra* note 88.

114. *Ibid.*

115. Juwana, *supra* note 89.

Accordingly, foreign investors still have recourse to international arbitration for potential breaches of Indonesia's investment obligations under relevant multilateral treaty arrangements.

Indonesia has also expressed an interest in acceding to other multilateral treaties, including the Trans-Pacific Partnership Agreement (TPPA). Although no draft texts of the TPPA have been officially released, leaked draft versions indicate that the agreement may well contain ISDS provisions, particularly if US lobbying prevails. However, ISDS provisions continue to be one of the major stumbling blocks preventing a consensus from being reached amongst negotiating states. Accordingly, any concessions made in the interests of concluding a treaty are likely to take the form of a number of "carve-out" or "policy-space" exclusions, rather than a weakening of investor protection generally.

Given the considerable overlap of investor protection provisions in BITs and regional-based free trade and economic partnership agreements (including ASEAN-based agreements), it is not surprising that Indonesia intends to seek some degree of harmonization by simplifying or at least standardizing some of these overlapping and confusing provisions.

Furthermore, in the domestic context, Indonesia's potential withdrawal from its BITs will not necessarily prevent future investors from accessing some investment protections and dispute resolution mechanisms. Indonesia's Investment Law (No. 25 of 2007) makes specific provision for investment protections such as MFN treatment, fair and equitable treatment, and protection from expropriation without compensation. However, while the law states that foreign investors may settle disputes with Indonesia by way of international arbitration, it does not provide details on the form of that arbitration or any express statement pertaining to advance consent that was central to the *Planet* case.¹¹⁶ Article 32(4) of the Law simply states that "in the event of dispute in investment sector between Government and any foreign investors, the two parties may settle it through international arbitration based on agreement between them".

B. Future Directions for BITs in the Global Context

UNCTAD noted in its 2013 World Investment Report that the proliferation of ISDSs under IIAs (encompassing BITs) shows the importance this mechanism has gained.¹¹⁷ But it also reveals that there are an increasing number of problems which have generated a growing move away from bilateral treaties towards wider, regional agreements containing investment provisions. Hence, the problems with the current ISDS regime are creating momentum for its reform. In its report a year later, UNCTAD suggested that the international investment regime (of which ISDS is a core element) is undergoing a period of reflection, review, and reform.¹¹⁸ While almost all countries are party to at least one or several IIAs, many are dissatisfied with the current regime. UNCTAD further suggests that countries' current efforts to address these challenges

116. Indonesia, *Investment Law No. 5 of 2007*, art. 32(4).

117. UNCTAD, *supra* note 19 at 2.

118. UNCTAD, *supra* note 27 at 3.

reveal four different paths of action: (i) maintaining the status quo; (ii) disengaging from the IIA, unilaterally terminating existing treaties, or denouncing multilateral arbitration conventions; (iii) implementing selective adjustments, modifying models for future treaties but leaving the treaty core and the body of existing treaties largely untouched; and (iv) systematic reform that aims to comprehensively address the IIA regime's challenges in a holistic manner.¹¹⁹ It seems that Indonesia is pursuing the third path.

However, it remains unclear how new regional agreements would interact with BITs remaining in existence, and what rules of conflict of laws would determine which treaty should prevail where inconsistencies arise and where no conflict provisions are included in the treaties. Furthermore, parallel agreements may create situations where a government could be challenged by the same investor twice, under two different legal instruments. In fact, this "double-jeopardy" scenario is demonstrated by the *Churchill* and *Planet* ICSID arbitrations, which pertained to largely identical series of events.

VI. CONCLUDING REMARKS

Indonesia can take some comfort from reports that South Africa's cancellation of its Netherlands BIT does not appear to have harmed trade relations or investment performance between the two countries, with the Dutch reportedly "unfazed" by South Africa's action.¹²⁰ According to Dutch sources, South Africa is still the main Dutch business partner in Africa, and is also regarded as the "gateway" to the African continent.¹²¹ In the broader context, it should be noted that foreign direct investment (FDI) inflows into South Africa declined by some thirty-one percent between 2013 and 2014, according to the UNCTAD World Investment Report 2015.¹²² However, the extent to which this decline may be attributable in any part to the change in South African policy towards BITs and their ISDS provisions is questionable, and beyond the scope of this paper.

Indonesia can also be encouraged by the direct foreign investment inflow figures for the fourth quarter of 2014, which were released by BKPM in January 2015. The figures reveal that direct foreign investment showed an increase of 10.5 percent over the same period for 2013.¹²³ While these figures are too recent to draw any conclusions concerning the financial impact of Indonesia's BIT "cancellation and review" strategy, it does demonstrate that the purportedly significant concern amongst investors

119. *Ibid.*

120. Mark ALLIX, "Dutch Unfazed by SA's Cancelled Trade Treaty" *Business Day* (17 July 2014), online: Business Day <<http://www.bilaterals.org/?dutch-unfazed-by-sa-s-cancelled>>.

121. *Ibid.*

122. UNCTAD, *World Investment Report 2015*, Country Fact Sheet, South Africa (24 June 2015), online: UNCTAD <http://unctad.org/sections/dite_dir/docs/wir2015/wir15_fs_za_en.pdf>.

123. Indonesia Investment Coordinating Board (BKPM), "Domestic and Foreign Direct Investment Realization Steadily Increased, Beyond the Annual Target of 2014" (25 January 2015), online: BKPM Press Release Investment Activity Report <http://www3.bkpm.go.id/contents/news_detail/221801/Press+Release%3A+2014>. (FDI into Indonesia increased from Rp71.2 trillion to Rp 78.7 trillion, exceeding Indonesian government targets for the period.)

post-announcement has not translated into investment withdrawals. In fact, the contrary situation appears to be emerging.

An unknown factor in the ongoing development and implementation of the Indonesian process of BIT renegotiation and restructure is the position that the new Indonesian President Joko Widodo will adopt as a mainstream policy initiative. While one US source suggested that foreign investors seemed pleased with the result of the Indonesian presidential elections and the Widodo victory,¹²⁴ they nevertheless had little concrete guidance on how a Widodo administration would view key investment policies of the previous administration. While President Widodo reportedly announced during the presidential campaign that he would not reverse the Yudhoyono administration's recent actions on restricting the export of mineral ores¹²⁵—a matter which had already led to notification of a BIT-based dispute under ICSID arbitration—he has not given any formal indication in respect of the future character and role of Indonesia's BITs. Following nationalistic rhetoric during the presidential campaign that “may unnerve foreign investors who have poured record amounts into Southeast Asia's biggest economy”, speculation was that a Widodo administration would take a protectionist-nationalist stance in respect of the economy and its development.¹²⁶

In the meantime, the Indonesian government appears to be continuing with the course of action sparked off by the termination of its Netherlands BIT. According to reports revealed during a meeting with IGJ in March 2015, BKPM confirmed that the government was continuing to review and reassess its IIAs with other countries.¹²⁷ BKPM advised that Indonesia had cancelled BITs with a further seventeen countries (namely Bulgaria, Cambodia, China, Egypt, France, India, Italy, Kyrgyzstan, Laos, Malaysia, Norway, Romania, Slovakia, South Korea, Spain, Turkey, and Vietnam).¹²⁸ The majority of these BITs are due to conclude in 2015, some after their second and even third iteration, with a few due to conclude in later years (Spain in 2016, Kyrgyzstan in 2017, Turkey in 2018, Malaysia in 2019, and Romania in 2019). One agreement (with Cambodia) does not appear to have proceeded beyond the signing stage and did not even come into force. BKPM also reportedly confirmed that the government's review of BITs would also encompass ISDS provisions in domestic legislation such as the Investment Law No. 25 of 2007, which currently still provides an avenue for investors to lodge investment claims against the state.

More recently, Indonesian media has reported on government agencies clearly indicating the government's intentions to continue pursuing a policy of reviewing and renegotiating its BITs. On 12 May 2015, Coordinating Economic Minister Sofyan

124. “Indonesia Election Results may Improve Opportunities for Foreign Investors” *The National Law Review* (10 July 2014), online: The National Law Review <<http://www.natlawreview.com/article/indonesia-election-results-may-improve-opportunities-foreign-investors>>.

125. See Neil CHATTERJEE, “Widodo Shows Protectionist Side as Indonesian Vote Looms” *Bloomberg News* (6 June 2014), online: Bloomberg News <<http://www.bloomberg.com/news/2014-06-05/indonesia-frontrunner-adopts-protectionist-views-as-vote-nears.html>>.

126. *Ibid.*

127. “Indonesia Terminated 18 BITs” *Indonesia for Global Justice (IGJ)* (16 March 2015), online: IGJ <<http://igj.or.id/en/indonesia-terminated-18-bits/>>.

128. *Ibid.*

Djalil was quoted by the *Jakarta Post* as stating that review of existing BITs was a crucial part of the government's commitment to provide fair and balanced protection for foreign investors as "one of the keys for a country to be successful in attracting foreign direct investment".¹²⁹ The minister added that revision of the treaties, mostly signed between the 1960s and 1990s, would bring both better protection and fair treatment to foreign investors. The minister's message was reinforced just a week later by the *Jakarta Post* when the paper declared the development as "a clear signal of the path to be taken by the government".¹³⁰ Furthermore, as a stronger indication of Indonesia's intention to continue with a "review and renegotiate" policy, the *Jakarta Globe* has reported that the Indonesian government is determined not to renew its investment treaty with Singapore after it expires in June 2016.¹³¹ Indonesia's intention in this regard has particular significance since Singapore has long been Indonesia's biggest foreign investor by a significant margin (according to BKPM statistics).

While these media reports may be indicators of the government's intentions in the long term, the short-term changes in respect of the actual operation of Indonesia's BIT treaties will probably remain largely symbolic. The direct impact of these changes will not be felt to any significant extent for the next fifteen years. Change is more likely to occur in respect of newly negotiated BITs with new partners or with current like-minded partners who might well agree to the inclusion of principles and provisions that strike a more equitable balance between the objectives of foreign investors and the state.

Even so, it must be noted that, as the Indonesian economy expands in size and complexity, Indonesia is also transforming into a foreign investor itself. It will therefore need to strike a balance between these two different and sometimes competing roles and interests in its BITs, and must take steps to ensure that its rights as a foreign investor elsewhere remain adequately protected.

129. Grace AMIANTI, "Govt Revises Investment Treaties" *Jakarta Post* (12 May 2015), online: Jakarta Post <<http://m.thejakartapost.com/news/2015/05/12/govt-revises-investment-treaties.html>>.

130. John LUMBANTOBING, "Renegotiating the Bite of Our BITs" *Jakarta Post* (18 May 2015), online: Jakarta Post <<http://m.thejakartapost.com/news/2015/05/18/renegotiating-bite-our-bits.html>>.

131. *Jakarta Globe*, *supra* note 54.