Diplomatic Practice

Indonesia-Singapore BIT: A Narrative on What are the Features of a Modern Bilateral Investment Treaty

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I. INTRODUCTION

During 2012-2015, Indonesia reviewed its 64 Bilateral Investment Treaties ("BITs"), including the 2005 Indonesia-Singapore BIT.[1] The rationale of the review was to strike a balance between investor protection and national sovereignty, the outdated provisions of the existing BIT that limit policy space of Indonesia's development goals, Indonesia's exposure to investor claims under Investor-State Dispute Settlement, and the potential of BIT to override national legislation.[2] The review process was undertaken through three steps: discontinuing existing BITs, reassessing the provision of the existing IIAs, and developing a new treaty model.[3] The initiative taken by Indonesia is in line with the United Nations Conference on Trade and Development ("UNCTAD") for international investment reform, which focuses on *"modernizing the existing stock of old-generation treaties"*.[4]

Fast forward to 2017, due to the strong existing cooperation in investment, with Singapore being the top contributor of realized investments in Indonesia in

[1]Indonesia effectively discontinued the 2005 Indonesia – Singapore BIT on 20 June 2016 with a ten-year sunset clause.

[2]Abdulkadir Jailani, "Indonesia's Perspective on Review of International Investment Agreements," *South Centre Investment Policy Brief,* no. 1 (July 2015): 1.

[3]*Ibid.*

[4]International Institute for Sustainable Development, "Terminating a Bilateral Investment Treaty", *IISD Best Practices Series,* (March 2020): 1.

2016 amounting to US$9,2 billion, the two leaders of Indonesia and Singapore affirmed both sides' readiness to start negotiations on a new BIT which will further strengthen economic cooperation and investment flows.[5] This signals Indonesia's preparedness after the completion of the review and of its new treaty model to be used as a basis for negotiation with Singapore. On the other hand, this is a more top-to-bottom approach to negotiating the first BIT after the review undertaken by Indonesia.

Since the Indonesian government has not published its new treaty model, the final text of the 2018 Indonesia-Singapore BIT[6] is the most relevant to be looked into about Indonesia's new State practice and the result in modernizing its bilateral investment treaty practice. It is interesting to see whether a balance between investor protection and the state's policy space has been struck.

II. MODERN FEATURES OF INDONESIA-SINGAPORE BILATERAL INVESTMENT TREATY

Indonesia-Singapore BIT consists of a Preamble and 4 Chapters. Chapter I (Definitions) defines several terms used throughout the Agreement; Chapter II (Protection of Investment) contains several substantive obligations such as National Treatment, Most-Favored Nations, Treatment of Investment, and Expropriation; Chapter III (Dispute Settlement) provides for Investor-State Dispute Settlement ("ISDS") and State-to-State Dispute Settlement ("SSDS"); Chapter IV (Final Provisions) contains several exceptions clauses, final provisions, and a sunset clause.

II.1. Public Policy Clauses

One of Indonesia's salient features in its modern BIT is the provision to safeguard its policy space. Although incorporating robust clauses that may effectively serve as essential tools to safeguard public policy interest objectives would

[5] *"MFA Press Statement: Singapore-Indonesia Leaders Retreat, 7 September 2017,"* Ministry of Foreign Affairs Singapore *Press Statement*, accessed 12 September 2022, https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2017/09/MFA-Press-Statement-SingaporeIndonesia-Leaders-Retreat-7-September-2017

[6] The Agreement between the Government of the Republic of Singapore and the Government of the Republic of Indonesia on the Promotion and Protection of Investments ("2018 Indonesia – Singapore BIT") was signed on 11 October 2018 and entered into force on 9 March 2021.

provide additional comfort to the government, it comes with the possibility of abuse of such public policy clauses as they give too much power to the state.[7] As noted by many BIT drafters, drafting balanced clauses would take much work to accord policy space to the state. The most noticeable provision in the BIT relating to the policy space is the 'right to regulate', which reaffirms the state's right to regulate within their respective territories to achieve legitimate policy objectives in many areas, such as the protection of public health, social services, public education, safety, omission of the so-called umbrella clause,[8] environment or public morals, and the list goes on as this is non-exhaustive.[9]

Although the term 'right to regulate' is instead a novel term created under international investment law, the concept or provisions of preserving policy space have been reflected elsewhere in several provisions in the BIT. For example, the inclusion of denial of benefits,[10] incorporation of a general exceptions clause modelled after Article XX GATT,[11] the self-judging language of the security exceptions,[12] and an exception relating to financial services for prudential reasons,[13] as well as a reference to sustainable development in the Preamble.

The BIT also includes an article on corporate social responsibility ("CSR") affirming the importance of enterprises voluntarily incorporating internationally recognized standards, guidelines, and principles of CSR into their internal policies.[14] While it is true that BIT is intended initially for the promotion of investment without reflection as to how the investment should occur, the acknowledgement that Indonesia and Singapore are seeking to promote and facilitate investments that contribute to sustainable development is a good step forward in integrating international investment standard that promotes sustainable development.

[7]Jailani, "Indonesia's Perspective on Review," 3.

[8]An umbrella clause is a provision by which a state agrees to comply with all its obligations to foreign investors. Therefore, the investor may be able to elevate all of its disputes with the state, i.e. contractual disputes, to the international arbitration forum under the protective umbrella of the BIT.

[9]Indonesia-Singapore BIT, Art. 11 and Preamble

[10]Indonesia-Singapore BIT, Art. 36

[11]Indonesia-Singapore BIT, Art. 39

[12]Indonesia-Singapore BIT, Art. 40

[13]Indonesia-Singapore BIT, Art. 41

[14]Indonesia-Singapore BIT, Art. 12

Another critical issue regarding the public policy clause is the provision on measures against corruption, which contains the reaffirmation from both sides that bribery and other forms of corruption in any investment can undermine democracy, discourage foreign investment, and adversely affect economic development.[15] Anti-corruption provisions can also contribute to balancing interests between foreign investors and host States. This can be achieved from the investor's perspective, imposing obligations on investors to promote responsible investment while preserving the government's integrity and governance. Consequently, reflecting a state's commitment to anti-corruption measures to ensure a preferable investment environment will contribute to the attractiveness of this state's FDI.[16]

II.2. Substantive Obligations

II.2.A. Definitions of Investment and Investor

Indonesia's previous practice adopted both enterprise-based and asset-based definitions of investment. After the review, Indonesia took a broader approach in using an asset-based, followed by a non-exhaustive list of examples and required characteristics of the so-called Salini[17] test for an investment to be protected. The approach accommodates a wide range of investment instruments and structures. The characteristics, especially the element of a certain duration, guide the arbitral tribunals to reject a speculative or short-term portfolio investment, thus preventing the protection of an investment that does not contribute to the economic development of the host State.

Investment must also have a substantial business operation as a safeguard to letter-box company investment, which has no contribution to the economic development of the host State of the investment.[18] Furthermore, the BIT would only apply to investment that has been admitted according to the laws,

[15]Indonesia-Singapore BIT, Art. 13

[16]Yueming Yan, "The Inclusion of Anti-Corruption Clauses in International Investment Agreements and Its Possible Systemic Implications", *Asian Journal of WTO & International Health Law and Policy*, Vol. 17, No. 1 (2022): 141-173.

[17]Named after the decision rendered in 2001 in the case of *Salini v Morocco*, it laid down (i) contribution, (ii) a certain duration of performance of the contract, (iii) participation in the risks of the transaction, and (iv) the contribution to the economic development of the host State of the investment., See *Salini v Morocco https://www.italaw.com/sites/default/files/case-documents/ita0738.pdf*

[18]Indonesia-Singapore BIT, Art. 36 and preamble

regulations, and national policies of the host State[19], as this would avoid the protection of illegal investment.

Like any other BITs, the investor is differentiated between a natural person and an enterprise. The new BIT addresses the problem of dual citizenship, treating dual citizens as citizens of that party's dominant or effective nationality.[20] It also extends the protection for permanent residence, provided that both parties recognize permanent residence. Although Indonesia now does not recognize the concept of permanent residence, it shows flexibility in accommodating Singapore's permanent residence should Indonesia adopt such a concept in the future.

II.2.B. Substantive Protection of Investment

National Treatment and Most-Favored Nation ("MFN") have become integral to investment protection treatment in investment treaty practice. Indonesia-Singapore BIT follows the majority view in investment arbitration jurisprudence and investment treaties drafting practice in the inclusion of expression *"in like circumstances"*. [21] Such explicit reference would remind arbitral tribunals that there must be a comparative context in an objectively similar situation when assessing an alleged breach.[22]

Another necessary modernization in this BIT is that it excludes some sectors, such as the distribution of water, real estate, and a national public health service scheme, from National Treatment obligation,[23] thus giving more space to the government to put forward state-owned enterprises or local investors' interest in this area. A modification in the MFN provision is that it does not oblige a State to extend any benefit resulting from any other existing BITs to which that state is a party.[24] And in the aftermath of *Maffezini v. Spain,*[25] this BIT includes clarification to exclude ISDS to avoid treaty shopping.[26] Another

[19]Indonesia-Singapore BIT, Art. 2 (1).
[20]Indonesia-Singapore BIT, footnote 7.
[21]Indonesia-Singapore BIT, Article 4 and Article 5.
[22]UNCTAD, "Most-Favoured- Nation Treatment", *UNCTAD series on Issues in International Investment Agreements II*; (New York and Geneva, 2010): 23.
[23]Indonesia-Singapore BIT, Annex I National Treatment.
[24]Indonesia-Singapore BIT, Article 5(2).
[25]See Maffezini v. Spain, ICSID, Case No. ARB/97/7, *https://www.italaw.com/sites/default/files/case-documents/ita0481.pdf*
[26]Indonesia-Singapore BIT, Article 5(4).

substantive protection of investment is 'fair and equitable treatment' ("FET") and 'full protection and security' ("FPS"). The 2018 Indonesia-Singapore BIT clarified that these concepts do not go beyond customary international law.[27]

On the issue of the expropriation clause, this BIT mirrors the customary international law standard, according to which expropriation must be for a public purpose, on a non-discriminatory basis, on prompt, adequate, and effective compensation,[28] and in accordance with due process of law. Further, the new BIT contains a more detailed definition of the 'indirect expropriation' concept in Annex II. It is viewed that the annex on expropriation has embraced a different understanding of indirect expropriation compared to the one found in the old generation of investment treaties, rather than focusing exclusively on the measure's substantial deprivation of the investment (in line with the 'sole-effect' doctrine), a finding of indirect expropriation now revolves principally around the soundness and legitimacy of the allegedly expropriatory measure, according to the 'police powers' doctrine.[29]

II.2.C. Various Balanced Safeguards

Indonesia-Singapore BIT carves out the matter of taxation,[30] which means that domestic laws and tax treaties shall govern any taxation matter concluded between the Parties. However, there are certain carve-ins about ISDS if a taxation measure constitutes expropriation. Both States have also put in procedural safeguards where they must refer to the competent tax authority before submitting a claim to the ISDS. The nexus between taxation measures and investment is still debatable and must be carefully understood; both States have cautiously drafted these provisions.

Transparency in the publication of laws, regulations, and administrative rulings for any matter related to the BIT is reinforced under this BIT. Both parties shall make those publications on the Internet to ensure that investors

[27]Indonesia-Singapore BIT, Article 3.

[28]The phrase "prompt, adequate, and effective compensation," known as the Hull Formula in public international law, was used by United States Secretary of State Cordell Hull in 1938 during the Mexican expropriations. See M Sornarajah, International Law on Foreign Investment (Cambridge University Press, 2012), 414.

[29]Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value, and Reasonableness* (Oxford Academic, 2020), 95.

[30]Indonesia-Singapore BIT, Article 2(3)(d) and Article 43

are aware of any changes in the regulations that may affect their decisions in making or expanding their investments.

Indonesia and Singapore's investments are also covered by various investment agreements under ASEAN, namely the ASEAN Comprehensive Investment Agreement (ACIA), as well as investment chapters under ASEAN-plus free trade agreements such as ASEAN – Australia and New Zealand Free Trade Agreement (AANZFTA), and Regional Comprehensive Agreement Partnership (RCEP). To give certainty to investors and their investments, Indonesia-Singapore BIT provides that if other international agreements afford investors a more favourable treatment than that contained in the BIT, such a more favourable position shall not be affected by the latter's provisions. Thus, the investor's benefit would not be impeded.

II.3. Dispute Settlement

Most investment treaties provide for two forms of dispute resolution: SSDS, where treaty parties can bring arbitral claims against each other concerning the interpretation or application of the treaty, and ISDS, where investors can bring arbitral claims against host States for an alleged breach of the host States that causes loss or damage to their investment.

As noted from Indonesia's previous approach, there might be a better approach than excluding ISDS provision altogether.[31] In the context of ISDS, Indonesia and Singapore limit the scope of ISDS provisions substantively and procedurally. The BIT places a significantly extended cooling-off period of one year, usually between three and six months. The disputing investor shall also provide notice of intent to arbitration 90 days before it submits its claim to the disputing party.[32]

Indonesia-Singapore BIT also adopted new provisions relating to third-party funding and security for costs, even before the adoption of ICSID amendment rules in 2022.[33] Only the disputing Party or the State may request the tribunal to order post security for all or a part of the cost. This derived from the experience

[31]Jailani, "Indonesia's Perspective on Review," 4.

[32]Indonesia-Singapore BIT, Art. 17

[33]ICSID Member States approved the amended rules on 21 March 2022, and the updated rules go into effect on 1 July 2022. See https://icsid.worldbank.org/resources/rules-amendments

of Indonesia in the *Churchill Mining case*[34] where the state cannot recover its legal costs against an unsuccessful investor.

States are the master of their treaties; thus, it is logical that the Parties who negotiated the treaty ensure the proper interpretation of the BIT consistent with their intent through joint interpretation as stipulated in the Indonesia-Singapore BIT.[35] A joint interpretation shall be binding on the tribunal, and any decision or award issued must be consistent with it. Here, we can see the States' dual role under investment treaties, as treaty parties are actual or potential respondents in ISDS. This comes as a challenge for both States to act legitimately as treaty parties to create an appropriate regulatory balance between investor rights and sovereign prerogatives without attempting to influence the ongoing case in which one is a respondent.[36] This issue has also been discussed as one of the reform options under the United Nations Commission on International Trade Law (UNCITRAL) Working Group III ISDS reform to ensure the party's involvement and control mechanism on treaty interpretation.[37]

For procedural limitations, it was noted that the new IIAs by Indonesia would require a special agreement between the investor and Indonesia to bring a case to international arbitration.[38] Such an agreement was not included in the 2018 Indonesia – Singapore BIT. It is suggested that the reason for this is the sufficient substantive and procedural safeguards in the said BIT. It is, therefore, interesting to see that perhaps Indonesia would include such a special agreement where there are no sufficient safeguards in the future.

II.4. Emerging New Features

Some recent BITs also reference social aspects such as human rights and labour, environmental aspects such as climate change or biodiversity, and their role in sustainable development. Likewise, non-lowering standard clauses have

[34]The Claimants (*Churchill Mining)* shall bear 75% of the Respondent's (Indonesia) costs, i.e. USD 8,646,528. See Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40 https://www.italaw.com/sites/default/files/case-documents/italaw7893.pdf

[35]Indonesia-Singapore BIT, Art. 20 Paragraphs 2 and 3

[36]Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", *American Journal of International Law, Vol. 104, No. 1,* (2010): 212

[37]See UNCITRAL Working Group III, https://uncitral.un.org/en/treatyparties

[38]Jailani, "Indonesia's Perspective on Review," 6.

increasingly been seen in BITs, and perhaps this is something that we would see in the subsequent BITs negotiated by Indonesia.

On substantive issues such as the FET clause, various characteristics warrant further discussion among scholars, where some argue that the total elimination of the FET clause is a good way forward. The alternative way to tackle the unpredictability of the FET clause is to articulate its content, and the identified customary international law subset has been primarily codified under the new wave treaties such as the Canada-European Union Comprehensive Economic and Trade Agreement. [39] Some new-generation BITs limit FPS concerns only to an investor's physical security and investment.[40]

To avoid having these modern investment treaties reproduce old interpretive outcomes, states must analyze and review how these modern features and provisions are operationalized and how investment arbitration awards are rendered regularly under such a new generation of investment treaties.

III. CONCLUSION

In light of Indonesia's effort in negotiating the new BIT for the first time after its review process, it has proven that it has not lost faith in the investment treaty. Indonesia and Singapore have successfully negotiated a modern BIT that balances investor protection and the state's policy space. As some emerging features are being developed[41], Indonesia needs to keep an eye on these and be adept at the new features by considering its national interest and adjusting its policy in the future.

[39]Güneş Ünüvar, "The Vague Meaning of the Fair and Equitable Treatment Principle in Investment Arbitration and New Generation Clarifications," in *Language and Legal Interpretation in International Law,* Anne Lise Kjaer and Joanna Lam, eds. (New York: Oxford University Press, 2022), 290.

[40]See Canada's 2021 Foreign Investment Promotion and Protection Agreement, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng

[41]Some newer-generation BITs have adopted references or obligations relating to cross-cutting issues such as environment, human rights, labour and gender to achieve deeper alignment with Agenda 2030 and the SDGs. See Jesse Coleman, *Briefing Note: Modern Provisions in Investment Treaties* (Columbia: Columbia Center on Sustainable Investment, 2020).

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