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International Investment Agreements and Investor-State Disputes: A Review and Evaluation for Indonesia

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Abstract: Foreign investors can lodge a complaint against a host country for alleged treaty violations under the Investor-State Dispute Settlement (ISDS) provisions of bilateral investment treaties (BITs). The complaints are arbitrated internationally outside the host country's domestic court, sometimes involve claims exceeding US$1 billion, and give rise to significant financial risk of international arbitration for host countries. Because of this, Indonesia has recently cancelled many of its BITs. But at the same time, Indonesia has agreed to ISDS under the ASEAN Comprehensive Investment Agreement (ACIA) and ASEAN's five agreements with Dialogue Partners. Furthermore, President Joko Widodo has expressed strong interest in joining the Trans-Pacific Partnership (TPP), which contains provisions for ISDS. ASEAN's Regional Comprehensive Economic Partnership (RCEP) will also provide for ISDS. This note reviews the status of Indonesia's international obligations with respect to ISDS, evaluates some of the benefits and costs of ISDS, and reviews the extent to which Indonesia would be undertaking new ISDS obligations under TPP. The note concludes with a discussion of ways that Indonesia can reduce the risk of international arbitration through domestic regulatory reforms.

Keywords: Foreign Direct Investment, Standards of Treatment, Bilateral Investment Treaties, Free Trade Agreements, Investor-State Disputes, Arbitration, Indonesia, ASEAN
JEL Classification:K33, F21, F53

1. Introduction

Although foreign direct investment (FDI) has been considered politically sensitive for many decades, it is now viewed favourably by most countries and is considered a 'driving force for the integration of the world economy' (Sauve, 2001). FDI is not just a replacement for trade, as when a company builds a manufacturing plant in the final consumption market in order to escape import duties. FDI is also a complement to trade, as when components are obtained from multiple sources for the production of final export products. As a result, most countries now view FDI as contributing positively to exports and growth. This is of particular relevance to Indonesia as it moves into higher value-added products by increasing its role in global production networks. FDI also represents a significant source of external financing for many developing countries (Magiera, 2013).

The trend worldwide, therefore, has been to reduce barriers to entry for FDI and to provide guarantees against measures that harm investor interests.[1]This is evidenced by the rapid growth in trade and investment agreements that are devoted specifically to investment or include chapters on investment.

In spite of the growing trend towards more liberal investment regimes, there has been limited progress on bringing investment under World Trade Organization (WTO) rules and disciplines, and even less progress on developing an 'integrated framework' of rules that comprehensively cover goods, services, and investment. Even countries in the Organisation for Economic Co-operation and Development (OECD), which are more favourably disposed towards international rule making, have been unable to conclude an agreement on investment. Instead, countries have been far more successful at introducing rules and disciplines on investment in bilateral investment treaties (BITs) and more recently, in regional trade agreements (RTAs) such as the North Atlantic Free Trade Agreement (NAFTA), the ASEAN Comprehensive Investment Agreement

[1] Most reforms pertain to FDI in goods rather than services even though services comprise a substantial share of FDI worldwide. One reason is that services tend to involve greater government regulation because of social objectives (e.g. education and health) or the inherent importance of the service (financial services). Some services also involve state-owned enterprises and sensitive infrastructure.

(ACIA), and the Trans-Pacific Partnership (TPP). BITs and RTAs involve fewer countries and therefore are easier to negotiate.

Some aspects of international investment agreements (IIAs) are extremely sensitive in Indonesia and in other countries, whether developed or developing. One of the most contentious issues pertains to investor-state dispute settlement (ISDS).Articles on ISDS are included in most BITs and RTAs such as NAFTA, ACIA, and the TPP.ISDS allows foreign investors to bypass the domestic court systems of their host country and lodge complaints with international arbitration tribunals. This is seen as a loss of national sovereignty over issues that occur within a country's borders. The financial risk from such claims may also exceed US$1 billion.

Because of such concerns, Indonesia has cancelled many of its BITs during the past 2 years. But in what seems like a contradiction, Indonesia has undertaken very similar obligations by agreeing to ISDS in ACIA and ASEAN's free trade agreements (FTAs) with dialogue partners. Furthermore, President Joko Widodo has expressed strong interest in joining TPP, which contains strong ISDS provisions. ASEAN's Regional Comprehensive Economic Partnership (RCEP) is also likely to include ISDS.

This paper reviews the current status of Indonesia's international obligations with respect to ISDS, the extent to which Indonesia would be undertaking new ISDS obligations under the TPP and RCEP, and evaluates the benefits and costs of ISDS. It concludes with several examples of regulatory reforms that would reduce Indonesia's risk of international arbitration.

2. An Overview of International Investment Agreements (IIAs) Worldwide

The term 'international investment agreements' (IIAs) covers various types of international treaties that address cross-border trade in investment[2]. Over the years, negotiations on investments have resulted in a web of such agreements and have led to

[2] Conceptually, the term 'cross-border trade in investments' is similar to terms used for other types of trade –'cross-border trade in goods' and 'cross-border trade in services'. There are several types of investments (e.g. FDI, portfolio). The exact type of investment will be defined in the agreement.

a ‘spaghetti bowl’ of investment agreements, perhaps even more complicated than goods. The most important are BITs and RTAs. The WTO’s Agreement on Trade-Related Investment Measures (TRIMs) has less comprehensive treatment of investments. As mentioned earlier, OECD countries at one time attempted, but failed, to negotiate a multilateral agreement on investment.

According to the United Nations Conference on Trade and Development (UNCTAD), a total of 2,616 IIAs were ‘in force’ as of September 2016.[3] Most of these were BITs. BITs first came into use during the 1950s and 1960s when countries were most concerned with the expropriation of investments. By 1990, there just less than 250 BITs ‘in force’. But since then, the number has grown exponentially to somewhat less than 1,000 in 2000 and 2,315 in 2016.[4]Most countries (174) are involved with at least one BIT.

The remaining 294 IIAs are other types of treaties, such as RTAs and economic partnership agreements with investment provisions. It appears that nearly all the 211 countries in the world are involved with at least one of these treaties, and the total number of countries exceeds those involved with a BIT. One reason for this is that many smaller countries (island nations, for example) may be parties to a regional treaty, but do not have the resources or need for BITs. Also, regional groupings themselves may have numerous treaties with other regions or countries. For example, the European Union (EU) has around 53 regional treaties. This exceeds the number of BITs of some EU members.

The organisation of RTA scan differ significantly. NAFTA and TPP are single undertakings (i.e. single treaties) with separate chapters on cross-border trade in goods, cross-border trade in services, movement of people, and investment.[5]As a result, most inconsistencies between the treatment of goods, services, and investment have likely been eliminated. In the case of ASEAN on the other hand, there are separate

[3] See Appendix Table 1 for the number of treaties in select countries. Source: the UNCTAD investment policy hub (http://investmentpolicyhub.unctad.org/IIA), accessed on 7 September 2016.
[4] The figures on total IIAs and BITs can vary significantly, depending on whether authors are counting the total number that has been signed even if cancelled or not in force, the total signed and not cancelled, or the total in force. For this paper, we always quote the number in force as contained in UNCTAD databases. This can be much less than the numbers given by others.
[5] A study by Kotschwar (2010) concluded that investment agreements involving NAFTA countries were the most comprehensive.

undertakings (i.e. separate agreements) on goods (ASEAN Trade in Goods Agreement [ATIGA]), services (ASEAN's Framework Agreement on Services [AFAS]) and investments (ACIA). Perhaps because these agreements were negotiated at different times, the relationship between obligations on goods, services, and investments can be very complicated.

3. Indonesia's Bilateral Investment Treaties (BITs)

Indonesia currently has 31 BITs in force. This is somewhat above the ASEAN average of 27 BITs, but there is a wide range within ASEAN. For example, Viet Nam, which is one of Indonesia's major competitors in international supply chains, has 45 while Brunei and Myanmar have five and six, respectively. Several countries in Asia have much higher numbers. India has 72, while China, with 110, has more BITs than any other country in the world (see Appendix Table 1).

Indonesia is a party to BITs with Australia, eight European countries, a few ASEAN countries, and numerous other countries around the world. As discussed below, Indonesia has also terminated 17 of its BITs during the past 2 years. This includes treaties with India, China, the Netherlands, Switzerland, France, and several ASEAN countries. When treaties were terminated in the past, Indonesia usually replaced the treaties with new ones. That is not the case with those recently terminated. Indonesia has never had a BITwith either Japan or the United States (US), but Indonesia's EPA with Japan does include investment.

4. An Overview of Key Investor Protections in IIAs

A major objective of IIAs is to guarantee investors that their overseas investments are protectedafter they have established in a country. The standards for these guarantees are listed in the agreement.If an investor feels that the host country has violated the terms of the agreement, the investor can initiate a claim for binding international arbitration under the terms laid out in the agreement.

Bilateral investment treaties tend to focus on post-establishment investor protections. Regional trade and investment agreements, on the other hand, are often more comprehensive and will provide guarantees of pre-establishment market access in addition to post-establishment investor protections. Examples of agreements with provisions for pre-establishment market access are ACIA and AFAS in ASEAN. Originally, the post-establishment protections offered by BITs focused mainly on expropriation and were thus fairly limited, whereas regional trade and investment agreements were far more comprehensive. Now, there is considerable convergence in the types of protections offered by the two types of treaties. Table 1 provides a summary of a more comprehensive investment treaty.

An agreement will often begin with a preamble that guarantees the government's continued right to regulate in certain areas such as public safety and the environment. By excluding investments in these areas from protection, the preamble represents a safeguard for the government.

The preamble is then followed by definitions of the types of investments and types of investors covered by the agreement. At minimum, IIAs will cover FDI. In order to be covered, the investment must usually be made by a company registered in a county which is a party to the agreement, or by a 'legally constituted' company with a 'substantial' presence in a party to the agreement.[6]

There are then key articles on standards of treatments that are guaranteed to investors. Most BITs now appear to contain clauses on expropriation without fair compensation, fair and equitable treatment, national treatment (similar to the national treatment clauses in AFAS), most-favoured nation (MFN), and the transfer of funds. More expansive agreements, including RTAs, also have clauses on the movement of senior personnel and that forbid performance requirements such as local content requirements. Investors are offered some guarantee that the standards will be met through provisions for Investor-State Dispute Settlement (ISDS). ISDS is discussed in more detail in the next section.

[6] The latter is the definition used by ASEAN.

Table 1: Investment Protections in a Comprehensive International Investment Treaty

Main Issues	Examples of Coverage
Preamble	Provides reference to the continued right of governments to regulate and might lay out the objectives of regulation, such as sustainable development, food safety, environmental protection.
Scope and definitions	Defines the types of investments and investors covered by the agreement, such as portfolio investment, FDI, asset or enterprise-based.
Standards of treatment	Vary by agreement and may include: 1) Protection against expropriation without fair compensation; 2) Fair and equitable treatment; 3) National treatment (pre- or post-establishment) under which foreign and domestic investors are to be treated equally; 4) Most favoured nation which ensures that investors covered by the agreement will receive no less favourable treatment than investors covered by other agreements; 5) Transfer of profits and other funds; 6) Performance requirements (e.g. local content rules); and 7) Entry of key personnel and senior management.
Other	Examples include labour issues, corporate social responsibility, corruption, investment promotion, et cetera.
Exceptions	Examples are national security, tax treaties, international agreements, and reservation lists.
State-to-State Dispute Settlement (SSDS)	Seldom included in BITs but might be included in an RTA.
Investor-to-State Dispute Settlement (ISDS)	Types of arbitration, alternatives to arbitration if any.
Institutional Issues	Mechanism for consultations, technical cooperation.
Duration of Treaty	Timeframe, renewal, amendments, and termination, including sunset provisions.

BITs = bilateral investment treaties, FDI = foreign direct investment.
Source: Classifications used by UNCTAD for the International Investment Navigator at http://investmentpolicyhub.unctad.org/IIA

Finally, all BITs have articles on the timeframe that an agreement is in effect (e.g. 10 years) and mechanisms for renewal, amendments, and termination. A sunset clause states the number of years that investor protections will remain in effect even after an agreement is cancelled. These are critically important when a country wishes to cancel or amend its BITs, as discussed in the case of Indonesia below.

The protection of investors in BITs and most RTAs appears to apply to investments in both goods and services. However, ACIA contains several exceptions (Table 2). ACIA applies to all goods and to only those services that are 'incidental to agriculture', unless they are on a country's reservation list. Economic sectors on the reservation list

are not covered by ACIA. Rules for other types of services are contained in AFAS and apply only to those services on a country's positive list.

However, there are important 'exceptions to the exceptions'. Even though ACIA is limited primarily to goods, the ISDS provisions in ACIA apply to both goods and services, including those 'non-incidental to agriculture'.

ACIA also contains other exceptions and limitations on the coverage that are not usually contained in IIAs. For example, commitments on national treatment apply to national and regional governments but not to local governments. There are also complexities in the treatment of MFN/national treatment versus other standards. These are discussed in more detail later when comparing ACIA, TPP, and other agreements.

Table 2: Coverage of a Typical BIT in Comparison with ACIA

	Typical BIT	ACIA
Standards of Treatment	All goods and services	All goods and those services that are incidental to agriculture*
ISDS	All goods and services	All goods and services
Covered Government Actions	Central, regional, and local	Central and regional

ACIA = ASEAN Comprehensive Investment Agreement, BIT = bilateral investment treaties, ISDS = Investor-State Dispute Settlement.
*The standards do not apply to goods and services on a country's reservation list.
Source: Based on the author's review.

5. The Dispute Settlement Provisions of Investment Treaties

Procedures for settling investment disputes using international arbitration are included in nearly all BITs and in recent free trade agreements (FTAs) that include investment. There are two types of dispute settlement procedures, depending on the parties concerned.[7]State-to-state disputes involve two or more countries that are parties to an agreement and occur when one country feels that the other is not abiding by the rules. Common examples are disputes under the WTO.[8]The procedures for such

[7] This paper does not review commercial disputes that arise between private companies since these are not covered by IIAs. Many arbitration centres around the world have been set up for these types of disputes.
[8]Common examples of WTO disputes are those on anti-dumping and subsidies.

disputes are normally dictated by the rules of the agreement and administrated by bodies set up by the agreement, such as the dispute settlement panels of the WTO.

The second type of dispute and the one of interest here involves disputes between foreign investors and the host state for the investment — investor-state dispute settlement or ISDS. Most BITs allow investors to take disputes to binding international arbitration under the rules that are set out in the treaty. ACIA, TPP, and ASEAN's free trade and economic partnership agreements with dialogue partners also include ISDS.

There are several sets of rules for arbitrating investor-state disputes. The most common are those of the United Nations Commission on International Trade Law (UNCITRAL) and the International Center for the Settlement of Investment Disputes (ICSID).The ICSID operates like an administrative court under the auspices of the World Bank (Hikmahanto, 2014).The international convention forming the ICSID came into effect in 1966, and some 140 countries are now members. Indonesia became a member in 1968.

'The ICSID Convention provides a self-contained system of arbitration, fully autonomous and independent of any national legal system, including the legal system at the place and seat of arbitration' (Losari and Ewing-Chow, 2015).The tribunal deciding the case usually consists of three arbitrators —one chosen by the investor, one chosen by the host state, and one chosen by both parties (or their arbitrators) to lead the case. If the tribunal decides in favour of the investor, it can award compensation to the investor. The tribunal is disbanded after the case is finished.

The TPP contains language on international arbitration that is typical of many BITs and investment treaties:

The claimant may submit a claim …under one of the following alternatives:

a) The ICSID Convention and the ICSID *Rules of Procedure for Arbitration Proceedings,* provided that both the respondent and the party of the claimant are parties to the ICSID Convention;
b) The ICSID Additional Facility Rules, provided that either the respondent or the party of the claimant is a party to the ICSID Convention;
c) The UNCITRAL Arbitration Rules; or
d) Any other arbitration institution or any other arbitration rules, if the claimant and respondent agree.

ACIA has nearly an identical language but also includes the possibility of bringing cases to the Regional Centre of Arbitration in Kuala Lumpur, any other regional centre in ASEAN, or any other arbitration institution if disputing parties agree.'[9]

Appendix Table 3 lays out the ISDS provisions of a select number of Indonesian BITs that are still in force. Except the BIT with Denmark, all of Indonesia's BITs include ISDS using the rules of ICSID or UNCITRAL.[10] Most BITs are for 10 years with automatic renewal, unless one party formally notifies the other of cancellation. Notification must usually be done at least 6 to 12 months in advance. Nearly all BITs also have sunset a clause of 10 to 20 years. Even if a BIT is terminated, investors will continue to be protected for the period laid out in the sunset clause.

6. A Profile of Investor-State Disputes

Consistent information on investor-state disputes is difficult to obtain since there are no transparency requirements on making information available to the public.[11]As a result, no singe database can be used to compile a full set of statistics on international arbitration. Instead, the discussion below is based on information from UNCTAD, academics, and law firms involved with international arbitration.[12]

How many cases have been filed for international arbitration? (Yackee, 2010).
The number of ISDS cases has increased dramatically in recent years, perhaps reflecting the rapid increase in FDIs worldwide.

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[9] Indonesia has also developed a model BIT with language that is similar to TPP on ICSID and UNCITRAL, but without the possibility of using other institutions. Indonesia's model BIT can be downloaded from UNCTAD's International Investment Navigator at: http://investmentpolicyhub. unctad.org/Download/TreatyFile /2844

[10]The BIT with Denmark was signed in the 1960s at a time when international arbitration was less common.

[11] TTP contains very strong transparency requirements that include the publication of results and the possibility of public hearings.

[12] The information made public may vary from case to case and may depend on the type of arbitration procedure. Also, information is often not available for cases that are dropped before arbitrators make a final decision. This can lead to biases in summary statistics on the cost of arbitration and claimed amounts.

- During its first 35 years beginning in 1966, the ICSID registered 35 cases. During the next 10 years, over 300 cases were registered with the ICSID.

Who brings cases? (Gaukrodger and Gordon, 2012/2013).

Large multinationals are not the predominant users of international arbitration. For 100 cases filed between 2006 and 2011:

- 48 percent were brought by medium and large enterprises, of which 8 percent were large multinationals.
- 22 percent were brought by individuals or very small corporations with only one or two foreign projects.
- There was little or no public information on the claimant in 30 percent of cases.

What are the most common reasons for disputes and in what sectors? (UNCTAD, 2014and 2015)

- The most common reasons were the cancellation or violation of contracts and concessions, and the revocation or denial of licences and permits.
- Of the new cases in 2014, 61 percent involved services (such as supply of electricity and gas, telecommunications, construction, banking), 28 percent involved primary industry, and 11 percent involved manufacturing.

Which countries are involved? (UNCTAD, 2014 and 2015).

- Of the 608 ISDS cases initiated before 2015, over half (327) were initiated by investors from an EU country, primarily the United Kingdom (UK), Germany, France, Spain, Italy and the Netherlands. In 99 of these cases, one EU country challenged another. There were 29 cases where the EU was challenged by investors from outside the EU.
- Besides the EU, countries facing a large number of challenges include both developing and developed: Argentina (56), Venezuela (36), Egypt (24), Canada (23), Mexico and Ecuador (21), India and Ukraine (16), Poland and the US (15).

How long do ICSID cases take? (Hodgson, February 2014a)[13]

- 3 years and 8 months from notice of arbitration to final award.

Who wins ISDS cases?

Of the 356 cases concluded by end 2014, UNCTAD (2015) found that:

- 37 percent were decided in favour of the state;
- 28 percent were settled;
- 25 percent were decided in favour of the investor and include compensation;
- 2 percent were decided in favour of the investor but without compensation; and
- 8 percent were discontinued.

Hodgson (February 2014a) found that:

- 41 percent were decided in favour of the investor;
- 59 percent were decided in favour of the state with 26 percent of claims dismissed.

What are the costs of lawyers, experts, and witnesses? (Hodgson, February 2014)

- Average claimant costs: US$4.4 million
- Average respondent costs: US$4.6 million

What are the costs of arbitrators and tribunals? (Hodgson, February 2014a)

- Average ICSID cost: US$769,000
- Average UNCITRAL cost: US$853,000

How much is the typical arbitration award?

Estimates of the amount claimed and awarded are not always disclosed. From the few studies available, it appears that investors are usually awarded only a small part of their original claim.

- Franck (2014) found that the average award was US$16.6 million compared with an average claim of US$622.6 million.

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[13] Hodgson's review is based on 221 cases covering the period 1990 to the end of 2012 (Hodgson, February 2014a and 2014b).The review was limited to those cases where a decision by a tribunal was publicly available. This narrowed the number of cases to 176. Estimates of costs for claimant and respondent were based on 73 and 66 cases, respectively.

- Hodgson (February 2014a) found that the average award, where the claimant succeeds, was US$76.3 million, with an average claim ofUS$491.7 million. If unsuccessful claims are included, the average award from all cases would be much lower.

Who pays the legal fees?

There is no 'hard and fast rule' on the allocation of fees. In some cases, the fees may be divided equally between the claimant (the investor) and the respondent (the host country for the investment). In other cases, the allocation fees may depend on the outcome of the case. Under UNCITRAL rules, for example, fees are in principle borne by the unsuccessful party. This is particularly the case when a claim is found to be frivolous. In such a case, a tribunal may order the investor to pay all the costs of arbitration.[14]

7. The Benefits of Investor-State Dispute Settlement (ISDS)

Investor-State Dispute Settlement (ISDS) allows investors to use international arbitration to challenge host governments for alleged treaty violations. The challenge takes place outside the host country's domestic court system, which might be considered biased against foreign investors.

If found at fault, a host government can be required to compensate the investor, which can then seek enforcement anywhere in the world. In the US, for example, there is a Supreme Court Decision that 'domestic courts must defer to arbitration decisions and cannot review them' (Tucker, 2015). In effect, ISDS provides investors a guarantee that the standards of protection laid out in a treaty will be met.

For the investor, therefore, ISDS arguably provides an unbiased mechanism to challenge the unfair practices of host states and should therefore lower the risk of investment. For host countries, including developing countries in need of foreign investment, ISDS is in theory a major tool for investment promotion.

[14]This option is specifically provided for in TPP: 'Tribunal may award the state reasonable costs and attorney's fees if it determines that the investor's claim is frivolous'.

Over the years, there have been numerous studies that attempt to prove that ISDS is a major determinant of FDI. Typically, this is done using econometric models of FDI with the number of BITs/RTAs as explanatory variables.[15] However, the link between these variables appears to be nebulous.[16] Both FDI and the number of BITS/RTAs have grown rapidly over the years. As a result, the two variables are highly correlated. But high correlation does not imply causality or that the two variables are directly linked in any way. Furthermore, high correlation can make it very difficult to determine statistically which variables truly explain investment. For example, including the gross domestic product (GDP) as an explanatory variable for FDI could drive the coefficient on BITs to zero.[17] There are some studies that show there is no relationship between the two. But again, this does not imply anything about the actual relationship between the variables.

A recent WTO Staff Paper (Berger, et al., 2009) examined the impact of two key investment guarantees over the period 1978–2004: 1) guarantees of market access during pre-establishment, and 2) credible commitments against unfair treatment through ISDS during post-establishment. The study found that guarantees of market access pre-establishment had a strong impact on FDI while ISDS appears to have a minor, ambiguous impact.

As an alternative to traditional econometric modelling of FDI, Yackee (2010) conducted three surveys. Two examined political risk as determined by business consultants and insurance companies. One examined the views of general counsels at major multinationals. His results are quoted below:

1) 'BITs are not meaningfully correlated with measures of political risk as determined by business consultants.
2) Providers of political risk insurance only inconsistently take BITs into account when making underwriting decisions.
3) In-house counsels in large corporations do not view BITs as playing a major role in their companies' foreign investment decisions.'

[15] Some analysts correct for the fact that not all BITS/RTAs include ISDS.
[16] This is not unusual in statistical analysis of macroeconomic variables such as FDI. One must have a fully specified structural model in order to have any confidence in the coefficients.
[17] GDP is sometimes used as a proxy for demand.

Yackee (2010) concludes that the statistical studies showing massive impacts of BITs are probably capturing ‘spurious correlations and that BITs are unlikely to be a significant driver of foreign investment.’

A recent US investment summit in Indonesia provides additional support for the argument that ISDS protections are not crucial to investment decisions. The summit’s final Investment Report does not mention that the US does not have a bilateral investment treaty with Indonesia. Nor does the report mention the need for investor protections or Indonesia’s cancellation of BITs (see section on International Arbitration Involving Indonesia and the Cancellation of Indonesia’s BITs). Rather, the report calls for increased interaction with the private sector on policies, market opening measures by abolishing Indonesia’s Investment Negative List, the streamlining of licences, and improved regulatory certainty (US Chamber of Commerce, 2016).

In conclusion, there does not appear to be compelling statistical evidence of a strong causal relationship between ISDS and FDI. Rather, it appears that market opening measures and a good regulatory environment are more important decision variables for investors. Most investors wish to remain on good terms with the host government. As such, ISDS is probably not an important initial determinant of investment, and becomes important only as a last resort if relationships have soured.

8. The Cost and Other Disadvantages of ISDS

The main cost of ISDS is the risk of a huge claim against the country hosting an investment. As indicated earlier, there has been a tremendous increase in the number of arbitration cases in recent years, and claims now reach well over US$1 billion. One example is the recent Indonesian case discussed below. Although actual awards average 3 percent to 6 percent, depending on the source, and are typically far less than the claimed amount, there is always some risk that a country will have to pay a much higher amount.

Furthermore, total legal costs associated with international arbitration now average overUS$5 million each for both the claimant and respondent. Hodgson (April 2014) points out that there is no ‘hard and fast rule’ about which party is responsible for legal

fees. There are examples where tribunals have made each party responsible for its own legal fees, assigned all fees to the losing party, and assigned fees in some other proportion to each party. Thus, a host country could face high legal bill even in a case that it wins.

In addition, countries are concerned about the possible loss of sovereignty over the judicial process and in their ability to pursue policies of public interest that might be considered in violation of an agreement. Such concerns have been voiced not only in developing countries such as Indonesia but also in developed countries such as the United States and Australia.

Finally, BITs and investment agreements contain clauses that are viewed by host countries as bestowing unfair advantages to investors. Below are some examples:[18]

Nationality Shopping. The definition of investor in most treaties allows companies great flexibility in using subsidiaries to take advantage of host country BITs. For example, a company that forms a 'commercial presence' or incorporates in an ASEAN country would be able to use the ISDS provisions of ACIA or any other ASEAN treaty. The United States does not have a BIT with Indonesia, but investments through US subsidiaries in Singapore would be covered by any ASEAN agreement.
A UNCTAD study commissioned by the Netherlands found that in three-fourths of all disputes introduced under Dutch BITs, the ultimate owners of the investment bringing the dispute were not Dutch. And in two-thirds, the companies involved did not even have a substantial business presence in the Netherlands. (UNCTAD/DIAE)

Treaty Shopping. Under the MFN clause of many investment treaties, investors can base their claims on the treaty offering the treatment that is most favourable to the investor's case. Thus, an Australian company could use the Australian-Indonesia BIT to establish its right to investment protection, and then base its claim on the standards contained in any of Indonesia's other investment treaties unless otherwise specified by the treaty.

[18] Most of the subheadings in this section are from (Tucker, 2015).

Stacking Standards (Tucker, 2015). BITs and other IIAs include several standards of treatment (Table 1) An investor can 'stack' its claim with violations of several standards in order to increase the odds that arbitrators will award damages, and the amount of those damages.

Enforcement Shopping. As indicated above, enforcement of awards can be done anywhere in the world where a country has assets that can be seized.

Third-Party Funding. Although we could find no examples of this, there are reports of third-party funding for international arbitration by hedge funds, private equity firms and institutional investors. By increasing the availability of finance, third-party funding might increase the number of ISDS cases.

A One-Way Street. Domestic investors, the state itself, and other interested parties are not allowed to initiate ISDS claims under IIAs.[19]

9. International Arbitration Involving Indonesia and the Cancellation of Indonesia's BITs

In March of 2014, Indonesia gave notice to the Netherlands that it did not intend to renew its BIT, which was due to expire on 1 July 2015.[20]At the same time, Indonesia announced its intent to review all of its bilateral investment treaties and that additional terminations were likely. Indeed, Indonesia subsequently cancelled some 16 treaties. Initially, Indonesia indicated that these treaties would be replaced with new treaties that would likely be based on a model BIT. Although Indonesia now has a 'model' BIT, it has not renegotiated any of the treaties.[21]

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[19] For example, Indonesian seaweed farmers have filed a class action suit in Sydney claiming damages from a 2009 oil spill in the Timor Sea (Sulistiyono, 2016).The Indonesia-Australia BIT cannot be used as a basis for a claim.

[20]http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateralinvestment-treaty.html

[21] Other developing countries are apparently considering actions similar to Indonesia's. Brazil has signed some 20 BITs since the 1990s, but these were never ratified because of concerns about national sovereignty. Meanwhile, Brazil has developed a new type of model BIT and used it as a

Since BITs have a sunset clause that is usually from 10 to 20 years, the provisions of the cancelled treaties will still apply to all investments made prior to the dates of termination. Only those investments made after termination will not be protected.

Indonesia's regional and multilateral agreements are not affected by the BIT cancellations. These include the ACIA, ASEAN's FTAs/EPAs with dialogue partners, the Investment Agreement of the Organisation of the Islamic Conference, and the WTOTRIMs Agreement. These agreements afford protections that are sometimes similar to those of BITs. As noted earlier, for example, ACIA offers ISDS to all investors that establish a 'commercial presence' in an ASEAN member state. Thus, potential investors might be able to structure their investments in order to qualify for ISDS under one of these other agreements, or any of Indonesia's remaining BITs.

The main reason for Indonesia's actions on BITs appears to be the recent arbitration cases that have been filed against it. Between the mid-1960s and 2000, Indonesia was a respondent to only one ISDS claim. Since then, there have been five cases, three of which occurred in the past 3years (Table 3).[22]The Newmont case, which involves Indonesia's Mining Law and the ban on exports of unprocessed ores, was dropped by the claimant. The arbitration tribunal declined jurisdiction in the case 'Rafat Ali versus Indonesia'. The largest case– aUS$1.4 billion claim filed by Churchill Mining in 2012– is still pending. In this case, Churchill Mining and Planet Mining claim that their coal assets in East Kalimantan were expropriated by the local government without proper compensation.[23]

basis for several agreements with developing countries. See (Muniz and Peretti, 2015) and (Morosini and Badin,n.d.).

[22] In 2009, Indonesia also had one arbitration case that was filed by a local government in East Kalimantan against a private company. As expected, the tribunal declined jurisdiction in the case since only investors can file ISDS claims.

[23] Churchill Mining is a UK company. Planet Mining is its Australian Subsidiary.

Table 3: Indonesia's International Arbitration Cases

Parties and Year of Registration	Issue	Result	Amount of Claim or Award
Amco Asia v. Indonesia (1981)	Lease and Management agreement and investor's licence	In favour of investor	Award of US$2.7 million
Cemex Asia v. Indonesia (2004)	Shares and option to purchase shares in state-owned company	Settled between parties	Settlement US$337 million
EastKalimantan v. PT Kaltim Prima Coal (2009)	Divestment requirements in a concession contract. Filed by local government.	The tribunal declined jurisdiction.	
Rafat Ali v. Indonesia (2011)	Shares, loans, and financing agreements in several banks.	The tribunal declined jurisdiction. The case is being submitted to the ICSID Annulment Committee.	Claim was for US$75 Million
Churchill Mining/Planet Mining v. Indonesia (2012)	Exploration and exploitation licences fora coal project	The tribunal found jurisdiction and case is on-going	Claim is for US$1.4 billion
Nusa Tenggara Partnership and PT Newmont v Indonesia (2014)	Regulation banning export of raw materials	Registered with ICSID in July 2014. Withdrawn in August 2014.	

ICSID = International Center for the Settlement of Investment Disputes.
Source: Losari and Ewing-Chow (2015) with information added by author.

According to *The Jakarta Post* (Cahyafitri, 2015), a new claim was filed against Indonesia by Indian Metals and Ferro Alloys Ltd (IMFA) in September 2015. The claim was filed with the Permanent Court of Arbitration in The Hague. The company claims that it has been unable to develop its mining areas because other companies have been issued overlapping mining permits for the same concession area. The claim is for US$600 million and was filed under Indonesia's BIT with India. Although this BIT has been cancelled, investor protections are still in place under the sunset clause. According to *The Jakarta Post*, the Government of Indonesia is trying to reach an out-of-court settlement with IMFA.

Both the Churchill Mining and the IMFA cases involve mining permits issued by local governments under Indonesia's laws on decentralisation. These laws give local administrations authority over licences for mining activities. In an apparent attempt to reduce the risk that these problems continue in the future, Indonesia's Ministry for Energy and Mineral Resources is currently verifying the permits issued by local administrations and will cancel permits that are not 'clean and clear' (CNC). A CNC

status requires permit holders to prove that they have fulfilled their obligations to the government and ensure that concession areas are not overlapping. Of the 10,364 coal and mineral mining permits that have been issued by local administrations, 6,403 permits have been declared non-CNC (Cahyafitri, 2015).

9.1. Arguments in Favour of Terminating Indonesia's BITs

Hikmahanto (2014) argues that Indonesia joined the ICSID in the 1960s when it was badly in need of investment. At that time, foreign investors were worried about investments being nationalised since this had occurred in many newly independent states. As a result, the Soeharto government decided that Indonesia should take part in the convention and signed many BITs with developed countries, which were the source of most FDI.

As discussed earlier, there was only one ICSID arbitration case involving Indonesia during the Soeharto Administration. Since then, there have been several cases, including the US$1.4 billion case involving Churchill Mining. The government of Susilo Bambang Yudhoyono was apparently very unhappy with the Churchill case and is quoted as saying *'Imagine if hundreds of regents (district heads) did something like that, the implications (to the state) would be enormous'* (Amcham, 2014 as quoted from official cabinet secretary website). The view at Indonesia's Investment Coordinating Board (BKPM) was that many BITs were no longer relevant. *'That's why it needs to be fixed, adjusted with the conditions and the state's interests'* (Amcham, 2014 as quoted from local media).

Hikmahanto (2014) provides several arguments in favour of Indonesia's withdrawal from the ICSID.[24]To quote:

> 1) '*Indonesia's current situation is different from that of the late 1960s and the 1990s when Indonesia badly needed investment. Today, it is investors who need Indonesia because of its huge population and growing middle class.*'
>
> 2) '*Because of regional autonomy, the central government can no longer exercise full control of regional administrations (regency, mayoralty, and*

[24]Although Hikmahanto's arguments are actually directed at the termination of Indonesia's participation in the ICSID Convention, those arguments appear to apply equally to the cancellation of BITs. Termination of Indonesia's participation in the ICSID would require a different analysis, including a comparison of ICSID with other forms of arbitration that are included in Indonesia's IIAs.

provincial) as during the centralized government system under Soeharto. Thus, it would not be fair for the central government to be brought to ICSID due to local government actions. This is because under the Convention, it is only the central government that can be sued by foreign investors, not the local government (regional administrations).

3) '*The ICSID mechanism is itself unfair since foreign investors have access to ICSID while domestic investors do not*.'

4) '*Under the Indonesian judicial system, the ICSID is similar to an administrative court, which oversees cases in which an individual or private entity is suing the government for its actions. However, unlike an administrative court, the ICSID can grant compensation to the investors as the plaintiff,....*'

5) '*The compensation of an ICSID case can amount to a huge sum of billions of dollars*.'

9.2. Arguments against Terminating Indonesia's BITs

Ewing-Chow and Losari (*The Jakarta Post*, 12 April2014) offer counter arguments to terminating Indonesia's BITs:

1) '*Being both a capital importing and exporting country, Indonesia also has an interest to protect its investors who invest abroad*.'

2) They disagree with Hikmahanto's argument that the central government should not be accountable for the actions of local governments under decentralisation. *'It is a fundamental principle of international law that all states are responsible for the actions of their local governments, otherwise local governments (and states) would be free to breach their international obligations.'*

3) Indonesia is also bound by ACIA and other ASEAN investment agreements with Australia/New Zealand, China, and Korea. '*These agreements all represent an attempt by the states to balance the interest of protecting investors while providing policy space for regulation in the public interest on issues such as health, the environment, or to deal with financial crises.*'

4) They agree that ICSID does not provide a level playing field for both domestic and foreign investors, '*but this is not necessarily problematic. Foreign investors have many choices about where to invest. By providing an investor with a transnational system, ICSID reduces the concerns about the legal risks.'*

9.3.An Alternative for a Model BIT – the Brazilian Model

As indicated earlier, other countries are also concerned with the implications of ISDS as contained in investment agreements. Brazil has responded by developing its own model BIT, the Agreement on Cooperation and Facilitation of Investments (ACFI).Since 2015, Brazil has signed six ACFIs with countries in South America and Africa, and is now negotiating several more.

The Brazilian model BIT includes clauses on expropriation without compensation, national treatment, and freedom to transfer funds. The treaty also includes requirements that investors support public values such as protection of the environment, training for local communities, public health, etc. The Brazilian BIT differs most from traditional BITS in terms of the enforcement mechanism. The treaty does not allow investors to pursue binding arbitration through ISDS or other means. The only formal dispute mechanism is through state-state arbitration which can be used when a dispute cannot be resolved.[25]

10.The Case of Churchill Mining

Churchill Mining of the UK and Planet Mining, its Australian subsidiary, discovered a major coal depositon the Island of Kalimantan. A feasibility study was completed in September 2010 and the project was valued at US$1.8 billion, with Churchill/Planet's share at 75 percent. The deposit is claimed to be the seventh largest in the world.

According to Churchill, licences for the project were granted and then later revoked by the East Kalimantan regional government. Churchill filed several appeals, including one to the Indonesian Supreme Court, but all were rejected. Subsequently, Churchill filed a claim for breach of Indonesia's investment obligations under BITs with the UK and Australia. The claim was filed in June 2012 with the ICSID in Washington DC. In June 2014, lawyers for Churchill filed damage estimates of US$1.3 billion including interest. Estimates were based on a 'discounted cash flow analysis' of the project value.

[25] See Morosini/Badin and Muniz/Peretti (2015) for a discussion of Brazil's new model BIT. The EU has also been considering an alternative mechanism for handling disputes, including the establishment of an appellate system and alternative types of tribunals (Schill, 2016).

Both Churchill Mining and the Indonesian Government have retained international laws firms to represent them in the case. Indonesia is also supported by law firms located in Jakarta.

Status of the Churchill Claim

Since the original filing, the ICSID Tribunal has issued 20 procedural orders and rulings. Many of these are administrative, covering document production, document inspections, and meetings. Others are responses to motions and filings by both Churchill and the Indonesian Government.

Box 1: Who is Churchill Mining?

Churchill Mining is a listed company on the Alternative Investment Market of the London Stock Exchange. It appears that the company's only business, or potential business, is the Kalimantan coal mine in Indonesia. The company's financial statement indicates that it lost US$2.8 million during the 12 months ending 31 December 2015. With no income from the Kalimantan coal mine, the losses were apparently due entirely to expenses for staff salaries ($739,000) and legal fees ($1,176,000) for the arbitration case with Indonesia and a complaint filed against the company by the London Stock Exchange.

The company appears to cover staff and legal expenses related to ICSID by issuing ordinary shares and warrants. For example, the company raised £1.55 million in this fashion during the second half of 2015 and first half of 2016. In July of 2016, the company announced the sale of 517,425 ordinary shares to the Directors and Company Secretary 'in lieu of cash fees payable for the period 1 January to 30 June 2016'. The shares were called 'remuneration shares'.

Sources: Churchill Mining PLC, 'Share Issue', 1 July 2016.
Churchill Mining, 'Interim Report for the Period 1July 2015 to 31 December 2015', March 2016.

- Indonesia argued that the ICSID Tribunal did not have jurisdiction over the claim. In February 2014, the Tribunal rejected Indonesia's challenge to the Tribunal's jurisdiction;
- Indonesia filed a request that Churchill refrain from publicising the case because it was giving Indonesia a bad image with foreign investors. The Tribunal denied Indonesia's request.

- Indonesia claimed that Churchill's licences were obtained fraudulently, and that the case should therefore be dropped. Indonesia also opened up a criminal investigation against the company's President. The Tribunal denied Churchill's request that Indonesia drop the criminal investigation. The Tribunal has not yet ruled on whether licences were obtained fraudulently.
- Churchill claimed that Indonesia failed to produce a key witness involved with its licence and that the Tribunal should therefore rule in favour of Churchill.

In December 2016, the Tribunal ruled in favour of Indonesia and also ordered Churchill to reimburse Indonesia 75% of the US$12.3 million in legal costs incurred by Indonesia (Easterman, 2016). However, Churchill's ability to pay these fees is doubtful. As indicated earlier, Churchill appears to have no assets and financed the arbitration case against Indonesia through the sale of shares. After the Tribunal ruled on the case, trading in Churchill's shares was suspended by the London Stock Exchange. In any case, those shares likely have little or no value.

11. The Implications of TPP for the ISDS Commitments of Indonesia

The TPP includes a full chapter on investment with commitments on ISDS. This is one of the more sensitive areas of the TPP. All international trade agreements require countries to give up some domestic sovereignty over issues that were previously under domestic control. An example is tariffs under the WTO. Not only does a participating government lose some control over tariffs, but disputes over tariff obligations are handled by special panels set up by the WTO rather than by domestic courts. The TPP, as well as other IIAs, take this further and impinge on national sovereignty over issues occurring within a country's borders. Disputes under the investment chapter of the TPP are handled by international tribunals and can be initiated by private companies outside the domestic court systems of host countries.

The ISDS component of the TPP is of political and economic concern not only in Indonesia but also in developed countries such as the US. Developed countries are among the largest users of international arbitration. They are also the largest foreign

investors. These countries commonly have BITs or other treaties that allow international arbitration for investments in developing countries. But it is less common to have such agreements with other developed countries. Thus, for example, Australia and the US have an FTA, but the FTA does not include ISDS. Australia and New Zealand agreed bilaterally to 'carve out' ISDS from the ASEAN-Australia-New Zealand FTA (AANZFTA). In other words, they agreed among themselves not to take investment disputes to international arbitration (Nottage, 2016a). Finally, neither Australia nor the US has an agreement with Japan that includes ISDS.[26]

11.1. TPP and the Risk from Expanding Indonesia's Commitments on ISDS to More Countries

The impact on Indonesia of joining the TPP is muted by the fact that Indonesia and TPP countries already have IIAs with many TPP partners. This is illustrated in Appendix Table 4.Each of these IIAs contains provisions for ISDS.

The first column of Appendix Table 4 shows Indonesia's agreements with TPP countries. ACIA includes ISDS for ASEAN member states (shown in green) of which Brunei, Malaysia, Singapore, and Viet Nam are TPP countries. Other Indonesian agreements with ISDS are shown in yellow. The AANZFTA extends ISDS to Australia and New Zealand; the Japan-Indonesia Economic Partnership Agreement extends ISDS to Japan. As a result, the only TPP countries that do not already have an IIA with Indonesia are the North and South American countries of the US, Canada, Mexico, Chile, and Peru.

Although the TPP would extend Indonesia's commitments on ISDS to additional countries, the impact would be further muted by the fact that investments from these countries are already covered by ISDS if they are channelled through ASEAN or other countries that have an existing IIA with Indonesia. For example, a US investor could channel an investment through a subsidiary in Singapore or Australia.

[26]One exception to the above is the North American Free Trade Agreement (NAFTA) which includes ISDS for the three parties to the agreement – the US, Canada, and Mexico.

11.2. TPP and the Risk from Expanding Indonesia's Commitments on Investment Guarantees

The second major issue for Indonesia is the extent to which the TPP would expand the types of guarantees that Indonesia must provide foreign investors and thereby increase the risk of arbitration. In order to analyse this question, one would need to compare the standards in TPP with all of Indonesia's other IIAs.[27]Given the web of such agreements, this would be a complex undertaking that would require an evaluation of the many nuances of TPP. But it is probably the case that Indonesia's exposure to the risk arbitration would indeed increase. Most commentators seem to view the investment chapter of TPP as based on the BIT model of the US and being pro-investor. For our purposes, we compare the investment chapter of the TPP with ACIA.

1) The TPP and ACIA provide a broad definition of investment and 'illustrative lists' of the investments that could be covered – including "enterprises, shares and securities, turnkey operations, and intellectual property rights, bonds and other debt instruments as well as revenue-sharing contracts, licences, permits, and other similar rights (Boscariol and Glasglow, 2015). Key characteristics of investment include commitment of capital, expectation of gain or profit, and the assumption of risk. While there is not a one-one correspondence in the language of the two agreements, the intent of the agreements appears to be quite similar, if not identical.

2) ACIA includes a provision that investments must be 'admitted according to the laws, regulations, and policies of a host state in order to benefit from investor protections. This provision is not included in the TPP. Kawharu (2015) apparently feels that this could be an issue for a country like Indonesia which has 'relatively weak regulatory systems where compliance with legal requirements can be an issue.'[28]

[27] There seem to be very few in-depth evaluations of the investment chapter of TPP. One is by Kawharu (2015), who compares the TPP investment chapter with New Zealand's obligations under other IIAs.

[28]Kawharu (2015) refers to Indonesia's Churchill arbitration case as an example.

3) Under both TPP and ACIA, MFN appears to apply to investments under both previous and subsequent treaties, but not to dispute settlement procedures.[29]

4) The TPP allows for both direct and indirect expropriation where the latter includes 'regulatory expropriation'. A TPP annex specifies several factors that need to be examined when considering indirect expropriation, including the economic impact of regulation, investors' reasonable expectations, and the nature of the government action. ACIA mentions measures that are 'equivalent to' expropriation but does not provide guidance on the meaning of 'equivalent'. Nor does ACIA mention 'regulatory expropriation.'

5) The TPP provides a comprehensive list of performance requirements that are not permitted, including export and local content requirements. ACIA only mentions performance requirements as contained in WTO TRIMs Agreement. This could be problematic for Indonesia, which has introduced performance requirements in several sectors.

6) Both the TPP and ACIA cover measures initiated by national and regional governments, but exclude certain measures of local governments. In the case of ACIA, articles on national treatment and senior management do not apply to measures imposed by local governments (See Appendix 1). The TPP also excludes MFN and performance requirements at the local level.

7) Exceptions to national treatment, MFN, performance requirements, and other aspects of the TPP are contained in two annexes on 'non-conforming measures'. The annexes include those sectors and measures that are excluded from the agreement. The TPP appears to follow a 'negative list' approach to exclusions. In the case of services, ASEAN countries would need to convert the 'positive lists' of AFAS to the 'negative lists' of the TPP.

[29] New Zealand has negotiated an exception which states that the MFN clause of TPP does not apply to earlier treaties (Kawhuru, 2016). In the case of ASEAN, MFN does not apply to sub-regional agreements.

12. The Implications of RCEP for the ISDS Commitments of Indonesia

There is now very real possibility that the new US Administration will not approve the TPP. As a result, negotiations on the ASEAN RCEP have taken on increasing relevance as a possible alternative. RCEP would include ASEAN and all of ASEAN's dialogue partners. Each dialogue partner already has an FTA or Comprehensive Partnership Agreement with ASEAN (See Table 4).

Table 4: ASEAN's Agreements with Dialogue Partners

Dialogue Partner	Type of Agreement	Year Agreement Came in Force	Investor-State Disputes
Australia and New Zealand	Investment Chapter 11 of the FTA	2010	Yes, Section B, Articles 18–28
People's Republic of China	Investment Agreement of the Comprehensive Partnership	2010	Yes, Article 14
India	Investment Agreement of the Comprehensive Partnership	Signed 2014, not enforced yet	Yes, Articles 19–20
Japan	Investment Chapter 7 of the FTA	2008 or later, depending on the country	No, but in Japan-Indonesia EPA,Article 69
Republic of Korea	Investment Agreement of the Comprehensive Partnership	2009	Yes, Article18

ASEAN – Association of Southeast Asian Nations, EPA = economic partnership agreement, FTA –free trade agreement
Source: UNCTAD IIA Navigator.http://investmentpolicyhub.unctad.org/IIA/CountryGroupingDetails/ 15#iiaInnerMenu (accessed 6 December 2006).

Including ISDS in RCEP would likely have little impact on the risk faced by Indonesia from international arbitration. First, there would be no additions to country coverage since each of ASEAN's FTA/EPA with dialogue partners already contains provisions for ISDS. The one exception is the FTA with Japan. However, ISDS is included in Japan's bilateral FTA with Indonesia. Under each of these agreements, investors have the option of filing claims using the rules of ICSID, UNCITRAL, and sometimes, other alternatives.

Second, the standards of protection in the ASEAN FTAs/EPAs with dialogue partners seem to be very much in line with those of ACIA and would seem to entail

fewer obligations than TPP. For example, local government regulations are not covered by the agreements and restrictions on performance requirements are limited to those of the WTO TRIMs Agreement.

13. Conclusions and Recommendations

By 2014, Indonesia was a signatory to over 50 BITs. Nearly all of these treaties had provisions on ISDS. As a result, Indonesia was exposed to significant risk of international arbitration; and since 2010, several high profile cases were filed against Indonesia. These include a US$1.4 billion claim filed by Churchill Mining, a US$600 million claim filed by an Indian mining company, and a claim filed by Newmont Mining that was later withdrawn.

Indonesia's increasing exposure to international arbitration most likely explains why Indonesia began to cancel all BITs that became due after June 2014.To date, this amounts to 17 treaties. However, cancelling BITs will only have minimal impact on Indonesia's risk of international arbitration in the short run. The main reason is that nearly all BITs have sunset clauses of 10 to 20 years. As result, investors will continue to be protected for 10 to 20 years following cancellation. Only those investments made after cancelation will not be covered.

Other factors will also mitigate the impact of BIT cancellation. Indonesia still has many BITs outstanding and is also a party to several regional trade and investment treaties, including ACIA, FTAs, and EPAs with ASEAN's dialogue partners. All these agreements have provisions for ISDS. Any investor that forms a 'substantial' presence in a country that is a party to one of these agreements could avail itself of the investor protections contained in the agreement. Thus, a Dutch company could file for arbitration through Singapore under ACIA, even though the Indonesia-Netherlands BIT has been cancelled. Furthermore, covered investors could use the MFN clauses of the treaties to choose the one that provides the best protection.[30] For example, the Dutch

[30] The MFN clauses of some treaties with dialogue partners are limited, e.g. China and South Korea.

company above could use the standards of AANZFTA if it provides better protection than ACIA.

The general consensus among arbitration legal experts seems to be that ISDS is crucial to ensuring credible commitments on investor protections by developing countries. This is especially the case with developing countries that have weak legal systems and that might be biased when protecting investments. In other words, ISDS is a major tool for investment promotion.

However, the empirical evidence showing that ISDS promotes investment is weak. The few surveys that have been done show that BITs have little impact on a country's risk ranking or corporate investment decisions. Furthermore, recommendations by foreign chambers of commerce and their investor members never mention the need for TPP or other agreements with ISDS. *With little benefit but high exposure to arbitration risk, the decision by Indonesia to cancel its BITs is probably in the country's best interest*.

Indonesia has also shown interest in joining the TPP with its very strong investment protections. If Indonesia joins the partnership, it will likely be exposed to additional risk of international arbitration. The TPP will expand the number of countries for which Indonesia provides investor protection.[31]It will also likely increase the standards of protection that Indonesia must meet, particularly in the case of performance requirements. Given the increased financial risk, Indonesia's decision on the TPP may depend on the benefits of the other aspects of the agreement, including the cost of trade diversion from not joining the agreement.

In the case of RCEP, on the other hand, the risk of international arbitration is unlikely to increase since investor protections are already contained in ASEAN's FTAs and EPAs with dialogue partners. Furthermore, the guaranteed protections in these FTAs and EPAs appear similar to those in ACIA. Thus, including them in RCEP would likely have little impact. At the same time, RCEP would allow ASEAN to consolidate its various agreements into a single agreement and thereby improve regulatory transparency. This in and of itself would be beneficial to investors.

[31]As noted elsewhere, the increase in risk is mitigated by the fact that investors from these countries are already protected through subsidiaries established in any country with which Indonesia continues to have an IIA with ISDS.

As indicated above, Indonesia will continue to be subject to significant risk of international arbitration in spite of the cancellation of many BITs and regardless of what happens with TPP and RCEP. One way to reduce this risk would be to identify the major sources of risk, and then take concurrent domestic actions on regulatory reform. Examples are:

1) The Investment Law of 2007 states that all restrictions on investment are to be listed in the Indonesia Investment Negative List as contained in a Presidential Regulation. Previous implementing regulations also contained a 'grandfather' clause that exempted existing investors from new restrictions on investment. Grandfathering was based on the foreign equity stated in the investor's approval letter from Indonesia's Investment Coordinating Board (Magiera, 2011). Since 2007, however, there have been several examples of new restrictions where the grandfather clause was not applied. Examples are a ministerial decree with divestiture requirements for foreign owners of cell towers and the Mining Law of 2009 which introduced new performance requirements for the domestic processing of raw minerals.

   Indonesia could enhance legal certainty by ensuring that international obligations are taken into account when considering new legislation and by strictly enforcing the 'grandfather' clause.

2) Under Indonesia's laws on decentralisation, local governments are responsible for business licensing. This includes 'core' licences that allow a company to operate in its primary field of business. Business licensing by local governments has been at the heart of several of Indonesia's arbitration cases.

   Indonesia could enhance legal certainty by inventorying core business licences and providing additional central government oversight over those licences where the risk of arbitration is highest, including those issued by local governments. One example is the reviews of coal and mining permits issued by

local governments that are now being undertaken by the Ministry of Energy and Mineral Resources.

The TPP includes country annexes with exceptions to the investment chapter. RCEP is almost certain to contain such annexes as well since ACIA and ASEAN's agreements allow for exceptions to the agreements. These annexes expand the regulatory space of countries and lower the risk of arbitration. In order to take advantage of the annexes, Indonesia must clearly identify all non-conforming measures for which exceptions are sought. This includes pre-establishment restrictions on investment as contained in the Investment Negative List, performance requirements, other restrictions contained in existing laws and regulations at the local level, and any exclusions on the types of investment covered by the agreements.

APPENDIX 1: An Overview of the ASEAN Comprehensive Investment Agreement (ACIA)[32]

The ASEAN Comprehensive Investment Agreement (ACIA), signed in 2009 replaces ASEAN's previous agreements on investment. The Agreement aims to create a free and open investment regime in ASEAN and has the following main features:

i. Progressive liberalisation of the investment regimes in member states;
ii. Enhanced protection for investors from member states and ISDS;
iii. Improved transparency and predictability of investment rules, regulations, and procedures in member states; and
iv. Joint promotion of ASEAN as an investment region.

Some of the most important articles of the Agreement are as follows:

Coverage of Agreement and Definition of Investment

- **Article 3**– lays out the coverage of the Agreement. ACIA applies to investment in manufacturing, agriculture, fisheries, forestry, mining and quarrying, and services incidental to these sectors.[33] Certain measures are excluded from the Agreement. These include taxes, subsidies, government procurement, services provided in the exercise of government authority, and measures affecting trade in services under AFAS.
- **Article 4**– defines investment to include establishment, acquired or expanded investments that have been admitted under laws and regulations of member states, including FDI and portfolio investment.

National Treatment and Access

- **Article 5**–pre- and post-establishment of national treatment. Member states shall accord investors and investments of other member states no less favourable treatment than their own investors with respect to admission, establishment, acquisition, expansion, management, conduct, operation, and sale or disposition of assets.
- **Article 6**– accords MFN treatment to all ASEAN investors. Each member state must accord treatment to member states which is equal or better to that offered to any other member and also to non-members in other agreements, exceptions being sub regional ASEAN agreements or agreements that had previously been signed and notified to ASEAN.

[32]This Appendix is based on information that was available through 2012. Some of the discussion needs updating, particularly that on ASEAN reservation lists. See Magiera (2012).
[33]Paragraph 2 of the annex on domestic regulation of financial services of the General Agreement on Trade in Services (GATS) is automatically incorporated in ACIA.

- **Article 7**– incorporates the WTO Trims Agreement into ACIA. Under TRIMS, certain performance requirements are forbidden. ASEAN will undertake an assessment to determine whether additional commitments are needed.
- **Article 8**–member states cannot impose national requirements on senior management. Countries can impose national requirements on the board of directors provided that this does not impair the ability of the investor to control the investment.
- **Articles 9 and 10** –reservations under which Article 5 on national treatment and Article 8 on nationality requirements do not apply to measures of local governments or to measures applied by any level of government as set out in reservations lists. Article 10 lays out rules for modifying commitments on reservations lists. One important commitment is that member states cannot require an investor to sell or otherwise dispose of an investment unless specified in the initial approval.
- **Article 17**– general exceptions for the protection of public morals, human, animal and plant life, and health, etc.
- **Article 22**– allowing temporary work stays for key investor personnel, subject to labour and immigration laws, and any restriction that might be listed in AFAS.

There are several exceptions and qualifications to the national treatment and access clauses:

- Article 5on national treatment, Article 8 on senior management, and MFN do not apply to measures on the reservations list attached to the agreement;
- Article 5 on national treatment and Article 8 on senior management apply to measures imposed by national and regional governments, but not by local governments;
- Under Articles 5 and 6, member states may maintain formalities for investments, such as requiring that they be legally constituted under a certain legal form and in compliance with registration requirements, provided that this does not materially impair the rights of members.
- Articles 5 and 6 do not apply to exceptions under the WTO TRIMs Agreement.

Investor Transfers and Protections

- **Article 11** –providing fair and equitable treatment and full protection and security for investments;
- **Article 12**– providing non-discriminatory treatment when there is compensation because of civil strife, armed conflict, etcetera;
- **Article 13**– transfers into and out of a member state can be made freely;
- **Article14** –prohibiting expropriation without compensation except in certain circumstances;

- **Article 15–** subrogation of rights and claims;
- **Article 19 –** conditions under which benefits of the Agreement can be denied, such as when an investor has no substantive business operations in the territory of member states.
- **Article 21 –** requires member states to comply with notification requirements and to establish enquiry points on laws, regulations, and administrative guidelines that significantly affect investment or commitments under ACIA.
- **Article 20** – national treatment does not prevent countries from requiring that investors be legally constituted and in compliance with registration requirements.

Investor Disputes

- **Article 27 –** adopts the ASEAN Protocol on Enhanced Dispute Settlement Mechanisms, signed in Laos in 2004. The Protocol covers losses incurred by investors from an alleged breach of rights conferred by the Agreement and lays out rules for settling disputes, including international arbitration.
- **Section B: Articles 28-41–** international arbitration and disputes between investors and a member state.

A key feature of the Agreement is that even though national treatment and MFN do not apply to sectors covered by AFAS, the Agreement does provide protections on commercial presence to all investors and in all sectors, whether or not they are scheduled in AFAS (see Article 3). Articles that apply generally to all investors, including services, are Articles 11 to 15 on investor protection and Appendix B on dispute resolution.

Although reservations lists were to be submitted within six months of signing of the Agreement, it appears that they are still in process. Within 12 months of the finalisation of the reservations list, members cannot modify lists if this will adversely affect existing investments. Modification requires approval by other members and may also result in compensatory adjustments with respect to other sectors. *A key clause is Article 10(4) which states that a member state cannot require any type of divestment of an investment unless specified in the investor's initial approval (i.e. a standstill for existing ASEAN investors).*

The ASEAN Economic Community Blueprint lays out a roadmap for achieving the objectives of the Agreement by 2015.In the case of progressive liberalisation, for example, each member is to reduce restrictions according to the strategic schedule of

Article 46 of the Blueprint, leading to free and open investment with minimal restrictions by 2015. Other targets are less specific. For example, enhancing ASEAN integration (Article 25) includes harmonisation of investment measures. Investment facilitation (Article 25) includes streamlining of regulations and one-stop shops. Transparency (Article 21) includes dissemination of statistics and investment reports, consultations with private sector, and websites on investment. Promotion (Article 24) includes the organisation of promotion missions for the region.

APPENDIX 2: Decentralisation and Indonesia’s Mining Law

In the late 1990s, Indonesia initiated a major effort to decentralise economic decision-making. Parliament passed laws on financial and administrative decentralisation in 1999, amended the laws in 2004, and there are now discussions of revising the laws again. These laws grant regional and local governments’ greater authority over local economic policies while maintaining central government authority over national issues such as international affairs, defence, justice, national monetary and fiscal policy, religion, and national standards, etc. The laws also led to a substantial increase in the number of districts and cities with law making authority.

The Churchill mining case must be considered against the backdrop of Indonesia’s laws on decentralisation and fundamental changes in the legal framework for mining. Under the Indonesian Constitution, Indonesia’s natural resources are controlled by the state for the benefit of the Indonesian people. Control is typically interpreted as meaning ‘ownership’ by the state. In the case of mining, therefore, Indonesia has developed licensing systems that grant the private sector the rights to exploit and sell mining resources, rather than own resources. The terms under which licences can be granted fall under Indonesia’s laws on mining – the first in 1997 and then revised substantially in 2009.

Law No. 11 of 1997 on Mining and the Contract of Work (CoW) System

The Mining Law of 1997 establishes a dual licensing system for domestic and foreign investors.

Domestic investors can operate mines after obtaining a mining licence (Kuasa Pertambangan, KP). There are six types of KPs. They cover general survey, exploration, exploitation, refining and processing, transportation, and marketing. If a KP is transferred to a foreign investment company, the KP must be converted into a CoW as discussed below.

Authority over the issuance of KPs depends on the location of the mining area. If the mining area falls within one local area, the licence is issued by the head of the local government. If the area crosses local area boundaries, the licence is issued by the governor of the province. If the area crosses provinces, the licence is issued by the Minister of Energy and Mineral Resources.

Foreign investors, on the other hand, can engage in mining by obtaining a concession under a CoW Agreementor Kontrak Karya (KK). CoWs are contracts between foreign companies and the Indonesian Government. They allow foreign companies (PMA) to mine in Indonesia. Key features of the system are:

1) A foreign investment company that plans to engage in mining must first obtain a CoW. A single CoW covers each of the mining areas needing KPs. The contracts are normally effective for 30 years, and are extendable for 10 more years.

2) Foreign investment in mining is regulated by the CoW, which overrides Indonesia's investment laws as well as other laws such as those on taxation.

3) Investors are granted:

- Security of Tenure (*Conjunctive Title),*which empowers the investor to proceed from general survey through exploration through mine development, production, processing, and marketing; and
- Security of Investment (*Lex Specialist*) which assures that the investment is not subject to changes in government laws or policies for the period in force.

4) The transfer of shares of a foreign mining company requires approval by Indonesia's Investment Coordinating Board (BKPM).

Law No. 4 of 2009 on Mineral and Coal Mining
The Mining Law of 2009 established an entirely new system for granting rights to mining. The major objectives of the Law are the creation of added-value via the onshore processing of mining raw materials, and the increased retention of mining benefits by Indonesians. According to commentators, it also brings the regulatory framework for mining into compliance with Indonesia's laws on fiscal decentralisation and regional autonomy. Key features of the Law and its implementing regulations are:

Mining Licences – The Law unifies the licensing system for mining by establishing a single licence for foreign and domestic investors – the 'mining operation permit' (Izin Usaha Pertambanga, IUP). IUPs are non-transferable, except to a majority-owned subsidiary of the original licence holder. The Law does not place a limit on the duration of mining permits.

Foreign Investment – There is no restriction on foreign investment,[34] but foreign investors are subject to divestment requirements of at least 20percent and 51 percent by the 5thand 10thyear of production, respectively. Offers must be made first to the national

[34] If an existing domestic company converts to a foreign company, the foreign company is limited to 75 percent ownership for an exploration IUP and 49 percent ownership for a production IUP.

government, then provincial/local governments, then state/region-owned enterprises, and finally the private sector. Selling of shares on the Jakarta stock exchange does not satisfy divestment requirements.

Mining Operations – The stages of mining have been simplified from six to two:

- The explorations stage (Exploration IUP) includes a general survey and feasibility study; and
- The operations stage (Exploitation or Production IUP) includes construction, mining operation, refining, processing, transportation, and marketing.

Refining and Processing – All refining and processing must be done within Indonesia as indicated by separate implementing regulations.

Decentralised Authority over Licensing – The Mining Law grants local administrations the authority over permits for mining, and reduces the central government's role to policy and management oversight. However, a 2014 Law on Provincial Administration transfers control back into the hands of central and provincial governments. In addition, implementing regulations indicate that IUPs for foreign companies are to be issued by the central government.

Grandfathering – The new Mining Law does not contain a grandfather clause. Existing permits (KPs) held by domestic companies must be modified to make them compliant with the new Law within one year. CoWs will remain valid for their stated period but must be adjusted to the new Law. It is unclear how this will be done and press reports indicate that there is resistance by foreign companies to renegotiate CoWs, which are deemed legally binding contracts with the government.[35]

Regulatory Risk in Mining

In surveys of mining companies conducted by the Fraser Institute, Indonesia has consistently ranked in the bottom 10 percent of mining regions worldwide for its policy environment, even after the passage of the Mining Law of 2009.[36]The main concern of foreign investors remains the lack of a clear legal framework. A further complication is that the Court could use the Constitution as a legal basis for further restricting or eliminating foreign investment in mining.

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[35]As indicated earlier, Newmont Mining filed an arbitration claim with the ICSID over the export provisions of the mining law. Newmont later dropped the claim and re-entered negotiations with the government.

[36]See: www.fraserinstitute.org/studies/annual-survey-of-mining-companies-2015.

APPENDIX Tables

Appendix Table 1: Number of BITs and TIPs in Selected Countries[37]

Region/Country	Total BITs	Total TIPs
ASEAN		
Brunei	8 (5 in force)	18 (15 in force)
Cambodia	23 (11 in force)	15 (13 in force)
Indonesia	48 (31 in force)	15 (13 in force)
Laos	23 (20 in force)	16 (13 in force)
Malaysia	68 (49 in force)	23 (19 in force)
Myanmar	9 (6 in force)	15 (12 in force)
Philippines	37 (31 in force)	14 (12 in force)
Singapore	44 (37 in force)	29 (25 in force)
Thailand	39 (36 in force)	22 (19 in force)
Viet Nam	61 (45 in force)	22 (16 in force)
ASEAN AVERAGE	36 (27 in force)	19 (16 in force)
Select Other Asian Countries		
China	129 (110 in force)	19 (18 in force)
Hong Kong	18 (17 in force)	4 (4 in force)
India	82 (72 in force)	13 (9 in force)
Japan	27 (20 in force)	20 (17 in force)
Korea, Republic of	90 (85 in force)	19 (17 in force)
Taiwan	23 (16 in force)	5 (5 in force)
Select Developed Countries		
Australia	21 (21 in force)	18 (17 in force)
Canada	38 (30 in force)	19 (17 in force)
France	104 (96 in force)	64 (53 in force)
Germany	135 (132 in force)	64 (53 in force)
Italy	88 (76 in force)	64 (53 in force)
Netherlands	95 (91 in force)	64 (53 in force)
New Zealand	4 (2 in force)	14 (13 in force)
Russia	78 (59 in force)	6 (4 in force)
Spain	82 (73 in force)	64 (73 in force)
United States	46 (40 in force)	67 (49 in force)
United Kingdom	106 (96 in force)	64 (53 in force)

[37] 'TIPs' are Treaties with Investment Provisions.

Select Latin American Countries		
Argentina	56 (53 in force)	16 (11 in force)
Brazil	20 (0 in force)	17 (13 in force)
Chile	50 (37 in force)	28 (24 in force)
Columbia	16 (6 in force)	19 (13 in force)
Venezuela	28 (27 in force)	5 (5 in force)

Select Other Countries		
Egypt	100 (73 in force)	13 (11 in force)
Turkey	94 (75 in force)	21 (16 in force)

BITs = Bilateral Investment Treaties, TIPS = Treaties with Investment Provisions.
Source: UNCTAD database on International Investment Agreements,
http://investmentpolicyhub.unctad.org/IIA (accessed 8 September 2016).

Appendix Table 2: Indonesia's Bilateral Investment Treaties and their Status

No.	Parties	Status	Date of signature	Date of entry/in force	Date of termination	Type of termination
1	Algeria	Signed	21/03/2000	Not in force		
2	Argentina	In force	07/11/1995	01/03/2001		
3	Australia	In force	17/11/1992	29/07/1993		
4	Bangladesh	In force	09/02/1998	22/04/1999		
5	Belgium-Luxembourg	In force	15/01/1970	17/06/1972		
6	Bulgaria	Terminated	13/09/2003	23/01/2005	25/01/2015	Unilateral
7	Cambodia	Terminated	16/03/1999	Not in force	07/01/2016	Unilateral
8	Chile	Signed	07/04/1999	Not in force		
9	China	Terminated	18/11/1994	01/04/1995	31/03/2015	Unilateral
10	Croatia	Signed	10/09/2002	Not in force		
11	Cuba	In force	19/09/1997	29/09/1999		
12	Czech Republic	In force	17/09/1998	21/06/1999		
13	Denmark	In force	30/01/1968	02/07/1968		
14	Denmark	Signed	22/01/2007	Not in force		
15	Egypt	Terminated	19/01/1994	29/11/1994	30/11/2014	Unilateral
16	Finland	Terminated	13/03/1996	07/06/1997	02/08/2008	Replaced
17	Finland	In force	12/09/2006	02/08/2008		
18	France	Terminated	14/06/1973	29/04/1975	28/04/2015	Unilateral
19	Germany	Terminated	08/11/1968	19/04/1971	02/06/2007	Replaced
20	Germany	In force	14/05/2003	02/06/2007		
21	Guyana	Signed	30/01/2008	Not in force		
22	Hungary	Terminated	20/05/1992	13/02/1996	12/02/2016	Unilateral
23	India	Terminated	10/02/1999	22/01/2004	07/04/2016	Unilateral
24	Iran	In force	22/06/2005	28/03/2009		
25	Italy	Terminated	25/04/1991	25/06/1995	23/06/2015	Unilateral
26	Jamaica	Signed	10/02/1999	Not in force		
27	Jordon	In force	12/11/1996	09/02/1999		
28	Korea, Dem. People's Rep.	Signed	21/02/2000	Not in force		
29	Korea, Republic of	In force	16/02/1991	10/03/1994		
a30	Kyrgyzstan	In force	19/07/1995	23/04/1997		
31	Lao PDR	Terminated	18/10/1994	14/10/1995	13/10/2015	Unilateral
32	Libya	Signed	04/04/2009	Not in force		
33	Malaysia	Terminated	22/01/1994	27/10/1999	20/06/2015	Unilateral
34	Mauritius	In force	05/03/1997	28/03/2000		
35	Mongolia	In force	04/03/1997	13/04/1999		
36	Morocco	In force	14/03/1997	21/03/2002		
37	Mozambique	In force	26/03/1999	25/07/2000		

38	Netherlands	Terminated	07/07/1968	17/07/1971	01/07/1995	Replaced
39	Netherlands	Terminated	06/04/1994	01/07/1995	30/06/2015	Unilateral
40	Norway	Terminated	26/11/1969	Not in force	01/10/1994	Replaced
41	Norway	Terminated	26/11/1991	01/10/1994	01/01/2001	Unilateral
42	Pakistan	In force	08/03/1996	03/12/1996		
43	Philippines	Signed	12/11/2001	Not in force		
44	Poland	In force	06/10/1992	01/07/1993		
45	Qatar	Signed	18/04/2000	Not in force		
46	Romania	Terminated	27/06/1997	21/08/1999	07/01/2016	Unilateral
47	Russia	In force	06/09/2007	15/10/2009		
48	Saudi Arabia	In force	15/09/2003	05/07/2004		
49	Serbia	Signed	06/09/2011	Not in force		
50	Singapore	Terminated	28/08/1990	28/08/1990	20/06/2006	Replaced
51	Singapore	Terminated	16/02/2005	21/06/2006	20/06/2016	Unilateral
52	Slovakia	Terminated	12/07/1994	01/03/1995	28/02/2015	Unilateral
53	Spain	In force	30/05/1995	18/12/1996		
54	Sri Lanka	In force	10/06/1996	21/07/1997		
55	Sudan	Signed	10/02/1998	Not in force		
56	Suriname	Signed	28/10/1995	Not in force		
57	Sweden	In force	17/09/1992	18/02/1993		
58	Switzerland	Terminated	06/06/1974	09/04/1976	08/04/2016	Unilateral
59	Syria	In force	27/06/1997	20/02/2000		
60	Tajikistan	Signed	28/10/2003	Not in force		
61	Thailand	In force	17/02/1998	05/11/1998		
62	Tunisia	In force	13/05/1992	12/09/1992		
63	Turkey	Terminated	25/02/1997	28/09/1998	07/01/2016	Unilateral
64	Turkmenistan	Signed	02/06/1994	Not in force		
65	Ukraine	In force	11/04/1996	22/06/1997		
66	United Kingdom	In force	27/04/1976	24/03/1977		
67	Uzbekistan	In force	27/08/1996	27/04/1997		
68	Venezuela, Bolivia	In force	18/12/2000	23/03/2003		
69	Viet Nam	Terminated	25/10/1991	03/04/1994	07/01/2016	Unilateral
70	Yemen	Signed	20/02/1998	Not in force		
71	Zimbabwe	Signed	10/02/1999	Not in force		

Note: Dates are in the format date/month/year following the UN convention.
Areas shaded in yellow are the 17 BITs terminated by Indonesia after June 2014.
Blanks in the termination columns indicate that the BIT has not been terminated.

Source: UNCTAD database on International Investment Agreements, downloaded from http://unctad.org/Sections/dite_pcbb/docs/bits_indonesia.pdf(8 September 2016).

Appendix Table 3: Examples of the ISDS Provisions of Selected Indonesian BITs

	Argentina	Australia	Denmark	Finland	Korea	Sweden	Thailand	United Kingdom
Investor-State Disputes								
ISDS	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
Domestic Courts	Yes	Yes	N/A	No	Yes	Yes	Yes	No Ref
ICSID	Yes	Yes	N/A	Yes	Yes	Yes	Yes	Yes
UNCITRAL	Yes	Yes	N/A	No	No	No	Yes	No
Relationship	Fork in Road*	No Ref	N/A	No Ref	Local Remedies First	Right of Arbitration	No Ref	No Ref
Alternatives to Arbitration	No	No	N/A	Voluntary ADR	No	No	Voluntary ADR	No
Renewal and Termination								
Entry in Force	2001	1993	1968	2008	1994	1993	1998	1976
Length of Agreement	10 yrs	15 yrs	10 yrs	10 yrs	10 yrs	10 yrs	10 yrs	10 yrs
Automatic Renewal	Yes for 10 yrs	Yes for 15 yrs	Yes for 10 yrs	Indefinite	Yes for 10 yrs	Yes for 10 yrs	Yes for 10 yrs	For 5 yrs
Cancellation	1 yr prior notice	Yes	6 months prior notice	1 year prior notice	Yes	1 year prior notice	Yes	6 months prior to expiry
Sunset Clause	10 yrs	15 yrs	10 yrs	10 yrs	No	15 yrs	10 yrs	20 yrs

Notes: No Ref means no reference.
* A fork-in-the-road clause would usually preclude an investor from pursuing a case in international arbitration if that investor has already brought the case before domestic courts. See Ruff (2015) for an explanation and exceptions.
ADR = alternative dispute resolution, BITs =Bilateral Investment Treaties, ICSID = International Center for the Settlement of Investment Disputes, ISDS = Investor-State Dispute Settlement, UNCITRAL =United Nations Commission on International Trade Law.
Source: UNCTAD database on International Investment Agreements, http://investmentpolicyhub.unctad.org/IIA(accessed 8 September 2016). Based on a review of each of Indonesia's agreements.

Appendix Table 4: Existing IIAs with Investor-State Dispute Settlement in Indonesia and TPP Countries

	Indonesia	Australia	Brunei	Canada	Chile	Japan	Malaysia	Mexico	New Zealand	Peru	Singapore	United States	VietNam
Indonesia		BIT/AANZF Yes				EPA Yes			AANZF Yes				
Australia	BIT/AANZF Yes		AANZF Yes	COOP No	FTA Yes	EPA No	AANZF Yes	BIT Yes	AANZF No, carve out	BIT Yes	FTA Yes	FTA No	BIT/AANZF Yes
Brunei						EPA Yes							
Canada		Coop No			FTA Yes			NAFTA Yes		BIT Yes		NAFTA Yes	
Chile				FTA Yes		EPA Yes	BIT Yes	FTA Yes		FTA Yes		FTA Yes	FTA ?
Japan	EPA Yes	EPA No	EPA Yes		EPA Yes		EPA Yes	EPA Yes		BIT Yes	EPA Yes		BIT Yes
Malaysia		FTA No			BIT Yes				FTA Yes	FTA Yes	EPA Yes		BIT Yes
Mexico		BIT Yes		NAFTA Yes	FTA Yes	EPA Yes			TIFA ?	FTA Yes	BIT Yes	NAFTA Yes	
New Zealand	AANZF Yes	Prot/AANZF No, carve out	AANZF Yes				FTA/AANZF Yes	TIFA ?			BIT/AANZF Yes	TIFA No	AANZF Yes
Peru		BIT Yes		BIT/FTA Yes	FTA Yes	BIT/FTA Yes	BIT Yes	FTA Yes			FTA Yes	FTA Yes	
Singapore		FTA Yes				EPA Yes	EPA Yes	BIT/AANZF Yes	BIT/EPA Yes	FTA Yes		FTA Yes	BIT Yes
United States		FTA No		NAFTA Yes	FTA Yes		TIFA No	NAFTA Yes	TIFA No	FTA Yes	FTA Yes		TIFA ?
Viet Nam		BIT/AANZF Yes			FTA ?	BIT Yes	BIT Yes		AANZF Yes		BIT Yes	TIFA ?	

(yellow)	The yellow sections indicate those bilateral countries that are not part of ACIA or AANZFTA, but where there is a BIT or other trade agreement that includes ISDS.
(green)	The green sections indicate ASEAN countries that are covered by the ISDS section of ACIA.
	The sections with no shading indicate those countries where there are no existing agreements that include ISDS. For these countries, TPP would represent an expansion of ISDS commitments.

Note = 'yes' indicates that the agreement includes ISDS. '?' indicates not known.
AANZF = ASEAN-Australia-New Zealand Free Trade Agreement, BITs = bilateral investment treaties, EPA =economic partnership agreement, FTA = free trade agreement, IIAs = international investment agreements, NAFTA = North Atlantic Free Trade Agreement, ISDS = Investor-State Dispute Settlement, Prot = Investment Protocol Agreement, TPP = Trans-Pacific Partnership.
Source: UNCTAD IIA Navigator.

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