4 Investment protection and dispute resolution

This chapter examines the legal frameworks for investment protection and dispute resolution that apply to investors in Indonesia. It focuses on several core investment policy issues – the non-discrimination principle, protections for investors' property rights and mechanisms for resolving investment disputes – under Indonesian law and Indonesia's investment treaties. It also addresses the government's recent policy approaches to data protection and cybersecurity, tackling corruption and public sector reforms. It takes stock of recent achievements, identifies key remaining challenges and proposes recommendations to address them. In terms of investment treaty policy, this chapter provides an overview of Indonesia's investment treaties, analyses the main substantive protections and investor-state dispute settlement provisions in these treaties and identifies considerations for possible policy reforms.

Summary and main recommendations

Rules that create restrictions on establishing and operating a business in Indonesia, discussed in Chapter 3, are an important part of the broader legal framework affecting investors. Protections for property rights, contractual rights and other legal guarantees, as well as efficient enforcement and dispute resolution mechanisms, are equally important elements.

Indonesian law provides a number of core protections to investors relating to non-discrimination, expropriation and free transfer of funds. Most of them are found in Law 25/2007 concerning Investment (the Investment Law) and have not changed significantly in recent years. These protections are generally in line with similar provisions found in other regional investment laws and provide clear rights that should instil investor confidence to the extent that enforcement mechanisms are also seen to be robust. Some incremental improvements may be possible to bring these provisions closer in line with international good practices, including further specification of the provisions on expropriation.

Clarifications may also improve the existing legal frameworks to protect investors' intellectual property and land tenure rights, which are comprehensive in many respects. The government has not made significant updates to land laws in Indonesia in several decades. While foreigners are now able to own land, these rights are relatively limited and interactions between formal land laws and customary land rights remain complex and subject to interpretation. Initiatives to accelerate land registration and the use of electronic databases for land administration have yielded promising initial results but sustained momentum is needed for these changes to be durable in the long term. Investors also report some issues with the legal framework for intellectual property rights, notably with respect to restrictive patentability criteria, but in the main these laws are well-developed, have been periodically improved through amendments and comply with international standards in five core areas: trademarks, patents, industrial designs, copyrights and trade secrets. Some problems nonetheless persist in practice. Online piracy and counterfeiting are widespread, and efforts to implement and enforce laws is poor or inconsistent in several areas. The government is pursuing a range of different initiatives that seek to address these well-known shortcomings.

In terms of dispute resolution, the Indonesian courts have a reasonable record concerning the rule of law and contract enforcement when compared to similar economies. Despite important reforms to establish an independent judiciary and improve court services, however, some stakeholders still cite concerns with the lack of transparent and fair treatment in the Indonesian court system. The effectiveness of the courts is hampered by some long-standing negative perceptions. For these reasons, many firms prefer to use alternative dispute resolution rather than litigation to settle their disputes. Law 30/1999 on Arbitration and Alternative Dispute Resolution provides a solid framework to support arbitration in Indonesia and works reasonably well in practice. The government is not considering any major reform proposals in this area but it may wish to investigate amending some provisions of the law to improve legal certainty.

Other areas attracting attention from the top levels of government are data protection and cybersecurity, the fight against corruption and public sector reforms. The government has taken significant strides towards making cybersecurity a national policy priority. It established a national cybersecurity agency in 2017 and stepped up its international engagement on these issues, but there is still no overarching regulatory framework in Indonesia for cybersecurity or data protection. Fighting corruption in all levels of society has also been a top priority for many years. The Corruption Eradication Commission (KPK) has played a major role in building public awareness and trust through impressive results. A wide range of public sector reforms introduced in recent years to improve transparency, reduce bureaucracy, and encourage public engagement in the policy cycle will also contribute to strengthening public integrity. Enduring concerns regarding corruption are deep-rooted, however, and may only be overcome in the long term, which the government recognises and seeks to address.

The government has also substantially revised its investment treaty policies in recent years. Indonesia's investment treaties grant protections to certain foreign investors in addition to and independently from protections available under domestic law to all investors. Domestic investors are generally not covered by these treaties. Indonesia is a party to 37 investment treaties in force today. Like investment treaties signed by many other countries, these treaties typically protect investments made by treaty-covered investors against expropriation and discrimination. Provisions requiring “fair and equitable treatment” (FET) are also common, providing a floor below which government behaviour should not fall. While there are some significant recent exceptions, investment treaties often enforce these provisions through access to investor-state dispute settlement (ISDS) mechanisms that allow covered investors access to impartial international arbitration that awards monetary damages in an effort to depoliticise such disputes.

Investment protection provided under investment treaties can play an important role in fostering a healthy regulatory climate for investment. Expropriation or discrimination by governments does occur. Investors need some assurance that any dispute with the government will be dealt with fairly and swiftly, particularly in countries where investors have concerns about the reliability and independence of domestic courts. Government acceptance of legitimate constraints on policies can provide investors with greater certainty and predictability, lowering unwarranted risk and the cost of capital. Investment treaties are also frequently promoted as a method of attracting FDI which is an important goal for many governments. Despite many studies, however, it has been difficult to establish strong evidence of impact in this regard (Pohl, 2018). Some studies suggest that treaties or instruments that reduce barriers and restrictions to foreign investments have more impact on FDI flows than bilateral investment treaties (BITs) focused only on post-establishment protection (Mistura et al., 2019). These assumptions continue to be investigated by a growing strand of empirical literature on the purposes of investment treaties and how well they are being achieved.

The government’s comprehensive review of its investment treaties in 2014-16 led to the termination of at least 23 of its older investment treaties. But like many other countries, Indonesia still has a significant number of older investment treaties in force with vague investment protections that may create unintended consequences. Many countries, including Indonesia, have substantially revised their investment treaty policies in recent years in response to these concerns as well as increased public questioning about the appropriate balance between investment protection and sovereign rights to regulate in the public interest and the costs and outcomes of ISDS. The government is well aware of these ongoing challenges. It is taking a leading role in multilateral discussions on ISDS reform in UNCITRAL’s Working Group III and updating its model investment treaty in light of recent treaty practices. Experiences with the COVID-19 pandemic may further shape how the government views key treaty provisions or interpretations and how it assesses the appropriate balance in investment treaties.

Notwithstanding the potential benefits of having signed international investment agreements, they should not be considered as a substitute for long-term improvements in the domestic business environment. Any active approach to international treaty making should be accompanied by measures to improve the capacity, efficiency and independence of the domestic court system, the quality of a country’s legal framework, and the strength of national institutions responsible for implementing and enforcing such legislation.

Main policy recommendations for the domestic legal framework

- Amend Article 7 of the Investment Law to provide further specification on investor rights to protection from unlawful expropriation and the government’s right to regulate. Issues for possible clarification include whether investors are protected from indirect expropriation, exceptions to protect the government’s right to regulate in the public interest, and the valuation methodology for determining market value of expropriated property. This is not necessarily urgent but the government may wish to identify an appropriate opportunity to propose incremental improvements to this and other aspects of the Investment Law.

- Consider updating and modernising existing land laws. Land policy is one of the few areas affecting investors where the government has not enacted significant new legislation in recent decades. The existing system for land tenure is based primarily on legislation enacted in 1960. New laws could clarify existing categories of land tenure rights and reduce conflicts between customary and formal laws. Efficient land administration services go hand-in-hand with clear legal rights. The government should also allocate sufficient funds, institutional capacity and political backing to consolidate on early successes for ongoing initiatives to achieve universal land registration, improve the quality of land data and expand digital solutions and online accessibility for land administration.
- Continue to prioritise efforts to improve the regime for intellectual property (IP) rights, especially enforcement measures. Investors continue to report concerns with widespread online piracy and counterfeiting, long-standing market access issues for IP intensive sectors, high numbers of bad faith registrations of foreign trademarks by local companies and restrictive patentability criteria that make effective patent protection particularly challenging. The government is well aware of these concerns and designs initiatives to address them. Improvements in implementation and IP enforcement measures will help to build overall investor confidence in this area.
- Rethink existing approaches to reforming the court system. The government and the Supreme Court have taken significant strides towards ensuring judicial independence, creating specialised courts and judges, establishing a system for legal aid and expanding e-court services. Bold thinking may be required to dismantle certain negative perceptions regarding the effectiveness of the courts and revitalise the core institutions. The government may wish to consider commissioning a thorough review of the existing civil procedure rules, redesigning the system for judicial appointments to ensure integrity and encouraging the Supreme Court to propose, in consultation with civil society organisations and other stakeholders, more wide-ranging initiatives to promote transparency and greater public scrutiny of court functions.
- Evaluate potential amendments to Law 30/1999 on Arbitration and Alternative Dispute Resolution. It may be prudent for the government to take stock of court decisions and user experiences under the law over the past two decades to assess the merits of potential amendments to improve legal certainty, user experiences and the attractiveness of arbitration in Indonesia. Areas for possible legislative clarification include the scope of the law vis-à-vis international arbitrations conducted in Indonesia, whether contract disputes involving claims based on tort or fraud are arbitrable and the public policy ground for refusing enforcement of an arbitral award under Article 66 of the law.
- Maintain data protection and cybersecurity as a national policy priority. Comprehensive laws that draw on international good practices need to be enacted and effectively implemented in these areas. As with all legislation, the government should consult widely on the existing drafts of these laws and encourage input from business and civil society organisations. The government should also account for considerable, additional work once laws are in place to raise awareness among the private sector and other users, and nurture effective mechanisms to deal with security and data breaches.
- Sustain momentum for building a culture of integrity in the public sector and throughout all levels of society. Among other initiatives, the KPK has made significant inroads into concerns regarding corruption through some impressive results, which have transformed it into an important symbol of the government's commitment to fighting corruption. The government should continue to allocate sufficient resources to the KPK and other anti-corruption institutions and vigorously defend their independence.

Main policy recommendations for investment treaty policy

- Continue to reassess and update priorities with respect to investment treaty policy. An important issue for period reassessment is how the government evaluates the appropriate balance between investor protections and the government's right to regulate, and how to achieve that balance in practice. Indonesia's model BIT, which the government is currently updating, should reflect the government's current assessment of the appropriate balance and inform negotiations for new investment treaties. It is more difficult for governments to update their existing treaties to reflect current priorities. Depending on whether the parties wish to clarify original intent or revise a provision, it may be possible to clarify language through joint interpretations agreed with treaty partners. If revisions, rather than clarifications of original intent are desired, then treaty amendments may be required. Replacement of older investment treaties by consent – which appears to be the approach Indonesia has taken in respect of its newest BIT with Singapore – may also be appropriate in some cases.

- Continue to participate actively in inter-governmental discussions on investment treaty reforms at the OECD and at UNCITRAL. Many governments, including major capital exporters, have substantially revised their policies in recent years to protect policy space or to ensure that their investment treaties create desirable incentives. Consideration of reforms and policy discussions on frequently-invoked provisions such as FET are of particular importance in current investment treaty policy. Emerging issues such as the possible role for trade and investment treaties in fostering responsible business conduct as well as ongoing discussions about treaties and sustainable development also merit close attention and consideration.
- Conduct a gap analysis between Indonesia's domestic laws and its obligations under investment treaties with respect to investment protections. There are differences between the Investment Law and Indonesia's investment treaties in some areas. Identifying these differences and assessing their potential impact may allow policymakers to ensure that Indonesia's investment treaties are consistent with domestic priorities.
- Continue to develop ISDS dispute prevention and case management tools. Whatever approach the government adopts towards international investment agreements, complementary measures can help to ensure that treaties are consistent with domestic priorities and reduce the risk of disputes leading to international arbitration. The government should continue to participate actively in the work of UNCITRAL's Working Group III, the OECD and other multilateral fora on these topics. It may also wish to consider ways to promote awareness-raising and inter-ministerial co-operation regarding the government's investment treaty policy and the significance of investment treaty obligations for the day-to-day functions of line agencies. Developing written guidance manuals or handbooks for line agencies on these topics could encourage continuity of institutional knowledge as personnel changes occur over time.

Investor protections under the Investment Law

Indonesian law provides a number of core protections to investors in relation to expropriation, non-discrimination and free transfer of funds that have not changed significantly since the first OECD *Investment Policy Review* (2010). Most of these protections appear in Law 25/2007 concerning Investment (the Investment Law) which has since been supplemented by regulations issued at various levels of government including BKPM. These protections are generally in line with similar provisions found in other regional investment laws and provide clear rights that should instil investor confidence to the extent that enforcement mechanisms are also seen to be robust. The government proposed a number of amendments relating to investment liberalisation as part of the new Omnibus Law on Job Creation but none of these proposals affect the existing provisions on investment protection.

Like many other countries, Indonesia has enshrined in its domestic law a principle of non-discriminatory treatment as between foreign and domestic investors. The Investment Law establishes ten key principles that underpin the government's objectives for the investment climate (Article 3) including legal certainty through the rule of law, transparency and non-discriminatory treatment as between foreign and domestic investors. In designing investment policies, the government is "to provide the same treatment to any domestic and foreign investors, by continuously considering the national interest" (Article 4(2)). Article 6 provides an express guarantee of "equitable treatment to all investors of any countries that carry out investment activities in Indonesia in accordance with provisions of laws and regulations." These provisions establish Indonesia's commitment to a level playing field for all investors and contribute to positive signals regarding an open investment policy, without prejudice to the possibility for the government to preserve its right to implement certain policies that are exempted from this broad equality guarantee.

Despite formal guarantees of non-discrimination, some stakeholders have reported concerns of *de facto* discrimination against foreign investors linked to economic protectionism (EuroCham, 2019b; US Department of State, 2019). These stakeholders indicate that economic nationalism and an oft-stated desire for self-sufficiency by the government continues to manifest itself through negotiations, policies, regulations and laws in ways that companies consider as eroding investor value. These include local content requirements, requirements to divest equity shares to Indonesian stakeholders and requirements to establish manufacturing or processing facilities in Indonesia. Political forces favouring the protection of certain segments of the local economy from foreign competition have been effective in countering those supporting more in-depth FDI reforms (discussed further in Chapter 3). Some foreign companies operating natural resources projects in Indonesia report growing sentiments that domestic interests should not have to pay prevailing market prices for domestic resources, which some fear may lead to adverse impacts for foreign investors established in this sector (US Department of State, 2019).

Another important legal protection for investors is the government's guarantee of freedom from unlawful nationalisation or expropriation in Article 7 of the Investment Law. This provision requires the government to provide compensation to investors if it expropriates their property. Compensation should reflect the market value of the property. Disagreements regarding the valuation of expropriated property may be settled through arbitration, if the parties agree, or through domestic courts. While these provisions encapsulate the core building blocks for investor protection from expropriation, they are relatively simplistic alongside the expropriation regimes that Indonesia provides to some foreign investors under its investment treaties and expropriation regimes under investment laws in other countries. For example, Indonesia's new trade and investment treaty with Australia, which entered into force in July 2020, contains a detailed set of provisions on expropriation including an annex on the interpretation of those provisions. This creates scope for amendments to Article 7 to provide further specification. Issues for possible clarification include:

- whether investors are protected from indirect expropriation in the form of government measures that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure and, if so, how indirect expropriation is defined and whether there are any exceptions (e.g. for non-discriminatory regulatory actions designed to achieve legitimate public welfare objectives);
- general exceptions such as the government's right to nationalise or expropriate property for public interest purposes in certain situations;
- the valuation methodology for determining market value, including the valuation date, and whether any specific factors should be taken into account when determining this value such as the investor's conduct, the reason for the expropriation or the profits made by the investor during the lifetime of investment;
- whether compensation for expropriation includes interest and, if so, how that interest should be calculated; and
- the distinction between compensable and non-compensable expropriations, if appropriate, to establish a minimum level of policy space for the government to implement public policy objectives without being constrained by obligations to compensate affected investors.

Aside from expropriation and non-discrimination, the Investment Law also guarantees that investors may freely transfer and repatriate in foreign currency funds associated with their investment activities including profits, interest, dividends and proceeds from the sale of their assets (Article 8). Repatriation is subject to reporting requirements and obligations to pay taxes, royalties and other government income associated with investment activities. The government and local courts may defer repatriation rights if there are pending claims against the investor (Article 9). Regulations issued by the central bank in recent years impose special reporting requirements on non-bank companies in Indonesia that borrow offshore in foreign currency and mandate the use of rupiah for domestic transactions in Indonesia with only a few limited exceptions, notably international commercial transactions.[1]

A range of investor obligations accompany the protections offered in the Investment Law. Investors must give precedence to Indonesian nationals wherever possible when addressing their labour needs even if foreign nationals are required for special expertise or management positions (Article 8). Investors must provide training for their local workforce and allow technology transfers to take place between foreign and Indonesian employees, the merits of which are discussed in Chapters 2 and 3 above. Investors are required to follow good practices on corporate governance and corporate social responsibility, fulfil certain reporting requirements, respect local cultural and business traditions and comply with domestic laws and regulations that apply to their activities (Article 15). The Investment Law also identifies a range of more general investor responsibilities regarding contributions to environmental sustainability, fair competition and workers' rights (Article 16). It envisages further environmental recovery obligations in sectoral laws applicable to non-renewable mining and extractive industries (Article 17). Similar obligations appear in investment laws in other ASEAN countries (see e.g., Myanmar's Investment Law No. 40/2016, Articles 65-72). Although these efforts may have been limited by implementation challenges and some opposing views about their efficiency, they are a marker of Indonesia's commitment to responsible business conduct and provide a good basis for continued efforts by the government in this area (see Chapter 5 on responsible business conduct).

Significant strides towards a reliable land administration system but more could be done to clarify ambiguities in land tenure rules

Secure rights for land tenure and an efficient, reliable system for land administration are indispensable for investors in many countries, including Indonesia. This requires a clear legal framework for acquiring, registering and disposing of land rights, as well as proactive land use plans at all levels of government.

Land tenure rules

The first *OECD Investment Policy Review* (2010) noted that land policy was one of the few areas of the investment climate where new legislation had not been drafted over the past decade, although a number of regulations had been enacted. This situation has not changed significantly since the first *Review*. While a new land law had been under preparation in 2010, the government has not enacted any significant new laws relating to land tenure and other land rights since the first *Review*. Renewed support from the highest levels of government may be needed to consolidate and clarify the system of land rights for investors that is still based primarily on a law enacted in 1960.

The two main laws dealing with land ownership in Indonesia are the Constitution and Law 5/1960 concerning the Basic Provisions concerning the Fundamentals of Agrarian Affairs (the BAL). The Constitution recognises that the state has the right to bestow rights to land. The BAL divides all land into either state land or certified land owned exclusively by natural persons with Indonesian citizenship. It envisages several types of land rights, including rights for ownership, use, construction, management and cultivation. The most extensive right to land in Indonesia is the *Hak Milik* (right of ownership) which is only available to Indonesian citizens, state companies, religious bodies recognised by the National Land Agency (the BPN) and social organisations recognised by the BPN. With the exception of forestry and mining, the BPN is responsible for all matters relating to Agrarian Law.

It was not possible for foreigners to own land in Indonesia until Government Regulation 41/1996 came into effect in 1996. This regulation introduced new rights for foreign nationals domiciled in Indonesia to own individual apartments or condominiums as strata title units. It also allowed foreign nationals to hold permits for secondary rights to use or develop land where the state holds the primary ownership right. The relevant permits include *Hak Guna Bangunan* (building rights for up to 50 years) and *Hak Pakai* (right of use for up to 70 years). These secondary rights can only be granted in relation to state-owned land. Foreigners wishing to acquire rights over privately-owned land must first negotiate with the land owner to relinquish its ownership rights to the state. Government Regulation 103/2015 updated these rules in 2015. The new regulation introduces a precondition for foreigners to hold a residential visa, removes a previous limit on the number of land rights that could be held simultaneously by foreigners and clarified the rights of Indonesian nationals married to foreigners. Article 144 of the Omnibus Law on Job Creation passed by parliament in October 2020 confirms these rights for foreigners. Ordinary long-term lease arrangements of up to 95 years are also possible for foreigners under Indonesian law. Nominee ownership structures, whereby an Indonesian national owns land on behalf of a foreign national, are illegal.

While the legal regime for land ownership is gradually becoming more transparent and liberal, some concerns remain. Many of these concerns stem from the complex system of land rights in the BAL, which sought to merge land rights granted during the Dutch colonial era, customary rights under Indonesia law (*adat*) and a new system for statutory land rights into a single legal regime that still applies today. The government's commitment in Article 22 of the Investment Law to simplifying certain land acquisition procedures for investors has done little in practice to improve the situation. The complexity of the BAL continues to create problems for consistent interpretation. While *adat,* or Indonesian customary law, is declared a primary source of land law, it is simultaneously subjected to all restrictions of formal land law (Article 5 of the BAL). In practice, the implementation of the BAL regime has not always managed to resolve ambiguities in the interaction between customary *adat*, which varies widely across the archipelago, and new statutory rights. Some stakeholders have consistently urged the government to propose new land legislation to clarify existing categories of land tenure rights and reduce conflicts between customary and formal laws (USAID, 2013, 2019). Others have noted that administrative controls to protect public interests, including proper public announcement of land rights, community participation, protection of occupiers' interests, and thorough examination of evidence to protect these rights are often bypassed in practice.

Land titling and administration

In order to provide for secure land tenure rights, land administration should be accessible, reliable and transparent. If properly undertaken, land rights registration can enhance land tenure security by recording individual and collective land tenure rights, thereby facilitating the transfer of land tenure rights and allowing investors to seek legal redress in cases of violation of their tenure rights.

As described in the first *OECD Investment Policy Review* (2010), a fragmented and incomplete land administration system has long hindered the management and governance of land and natural resources in Indonesia. The government has nevertheless taken significant strides towards improving the system for land registration. Since 1997, land holders have been required to register their land. Government Regulation 24/1997 concerning Land Registration identified ways to accelerate land registration, improve legal certainty and conduct programmes to raise public awareness about land laws and land registration. The government also established in 2006 a new Deputy for Land Dispute Resolution Affairs to improve the speedy resolution of land disputes.

Only around 35% of land in Indonesia has been registered to date, most of it in urban areas. Current estimates indicate that there are around 126 million available parcels of land in Indonesia, of which approximately 42 million were registered between 1960 and 2016. BPN statistics available on its website and updated regularly indicate as of May 2020 that this equates to nearly 40 million hectares of land that have been registered and almost 68 million land rights certificates issued. The number of land titles issued each year is also rising, which is a promising sign. Between 2010 and 2016, BPN registered between one and two million new titles annually, while this number has jumped to over eight million titles per year since 2018.

Problems still persist, however, in terms of the time and number of procedures needed to register property. Indonesia ranks 106 out of 190 countries in terms of registering property according to the 2020 edition of the *Doing Business* indicators, which suggests that there is still room for sustained, longer-term improvement. These indicators are based on firms operating in the Jakarta and Surabaya regions and hence may not be fully representative of the rest of the country. Other than the average time needed to register a land deed (28 days in Jakarta and 40 days in Surabaya), these regions rank below the average for countries in East Asia & Pacific regarding the number of procedures, the cost of registering and the quality of the land administration. Indonesia also ranks 76th out of 141 countries in terms of quality of land administration in the World Economic Forum's 2019 Global Competitiveness Report.

Other concerns relate to the time, resources and data still needed to register all available land parcels in Indonesia. The BPN is able to register around one million new (i.e. previously unregistered) parcels of land each year. A study published in 2019 by the Ministry of Agrarian Affairs and Spatial Planning estimates that it would take another 85 years to record all unregistered land parcels at this rate (Wibowo, 2019). Data quality is another issue. Among the 42 million parcels that have been registered to date, the same study estimates that only 20 million of these parcels have been verified by a chartered surveyor and correctly plotted. These issues contribute to a lack of access to reliable land records and spatial data at the local government level where many resource planning and land registration functions are carried out under the current model for decentralised land administration. This can, in turn, inhibit infrastructure investments and create a lack of clarity and transparency in decision-making, spatial planning and resource allocation (World Bank, 2018b).

Stakeholders have also identified concerns with respect to the prevalence of land disputes between communities and large-scale land users, particularly on environmental matters (see Chapter 5 on responsible business conduct); a lack of clarity in relevant laws and regulations to support land authorities at the provincial level, particularly in relation to settling land conflicts (see Chapter 7 on investment policy and regional development); rising land prices and the effects of increased speculation for land acquisitions, including in relation to proposals to relocate the country's capital to East Kalimantan; disempowerment of local landowners facing threats of displacement due to unclear land tenure arrangements and the ongoing gaps in registered land rights in some regions; and the disproportionate impacts for women as compared to men of land use conversion, industrial expansion and deforestation (World Bank, 2018b).

The government is aware of these various concerns and seeks to address them. Many initiatives in the past decade have prioritised efforts to register all available parcels of land. The 2011 Geospatial Information Law and the One Map Project (OMP) aim to establish a unified base set of geospatial data (i.e., topography, land use, and tenure) and the National Spatial Data Infrastructure to inform decision-making by land authorities (see Chapter 7 on investment policy and regional development for more information on the OMP). Efforts to accelerate the registration of unregistered land have been redoubled under the Regulation of the Minister of Agrarian and Spatial Planning and the Head of the National Land Agency 12/2017 concerning the Complete Systematic Land Registration Acceleration. This programme enjoys support from the highest levels of government. Under Presidential Instruction 2/2018, President Jokowi instructed relevant ministries to take all steps to achieve universal land registration by 2025. Promising results since 2018, whereby 8-10 million new parcels of land have been registered annually, indicate that the achievement of this goal is increasingly likely if the current momentum is sustained. Another positive development relates to funding. The government secured USD 200 million in funding between 2018 and 2023 from the World Bank to help to realise this project (World Bank, 2018b). All steps that can be taken to improve the quality of data collected in the national Electronic Land Administration System (eLand) during this project should be encouraged. In particular, the government should encourage BPN to explore digital solutions and online accessibility options that would increase transparency for land information, including through the development of web-based applications to record and publish land information online and improve the efficiency of data collection.

The Omnibus Law on Job Creation, passed by parliament in October 2020, seeks to simplify some land administration procedures and redefine the central government's role in land policy. Chapter VIII of the law amends several existing laws to ease the requirements for public procurement of small land parcels, clarify procedures for compensation in cases of public land procurement and strengthen protections for land designated as sustainable agricultural land. The law also envisages a more prominent role for the central government in land policy. It establishes a Land Bank Agency under central government supervision to manage and distribute state-owned land and carry out a broad range of functions relating to land planning, acquisition, procurement, management, use and distribution (Article 125). The law introduces strict rules to discourage idle possession of land whereby land left unused or uncultivated for a period of at least two years can automatically revert to the Land Bank Agency (Article 180). The law also vests the central government with new powers to set spatial planning policy and determine environmental approvals under existing laws (Articles 13-20), as well as easing requirements for environmental approvals for some investment projects. It remains to be seen how these various legislative changes will impact investors on the ground. The BPN should make every effort to ensure that these proposed changes, once implemented in the future, lead to sustainable, long-term improvements for investors in their dealings with land administration authorities.

Further progress is needed to improve the protection and enforcement of intellectual property rights

An effective regime for registering, protecting and enforcing intellectual property (IP) rights is a crucial concern for many investors. Strong IP rights provide investors with an incentive to invest in research and development (R&D) for innovative products and processes. These rights also instil confidence in investors sharing new technologies, for instance through joint ventures and licensing agreements. Successful innovations may be suffused within and across economies in this way, and contribute to elevating productivity and growth. At the same time, IP rights entitle their holders to the exclusive right to market their innovation for a certain period. The protection granted to intellectual property therefore needs to strike a balance between the need to foster innovation and society's interest in having certain products, such as pharmaceutical products, priced affordably.

Indonesia has a relatively extensive legal framework for IP rights protection that generally complies with international standards in at least five main areas: trademarks, patents, industrial designs, copyrights and trade secrets. Laws in three of these areas have been amended since the first *OECD Investment Policy Review* (2010): Law 19/2014 Concerning Copyright (2014 revision); Law 13/2016 Concerning Patents (2018 and 2020 revisions); and Law 20/2016 Concerning Trademarks and Geographical Indications (2018 and 2020 revisions).

At the international level, Indonesia joined the World Intellectual Property Organization (WIPO) in 1979 and the World Trade Organisation (WTO) in 1995. Indonesia is an active participant in the WTO Council for Trade-Related Aspects of Intellectual Rights (TRIPS Council). It has also signed several key WIPO-administered IP treaties.[2]

Despite a relatively well-developed legal framework for IP rights protection in Indonesia, issues remain with the effectiveness of enforcement measures and the poor or inconsistent implementation of existing laws. Investors and other stakeholders routinely cite IP rights infringement issues as a principal problem in many ASEAN countries, including Indonesia (European Commission, 2020; EuroCham, 2019a; US Department of State, 2019; USTR, 2020b; IPR SME Helpdesk, 2016). These stakeholders report specific concerns with widespread online piracy and counterfeiting, long-standing market access issues for IP-intensive sectors, high numbers of bad faith registrations of foreign trademarks by local companies and restrictive patentability criteria that make effective patent protection particularly challenging for investors. USTR has urged the government to "develop and fully fund a robust and coordinated IP enforcement effort that includes deterrent-level penalties for IP infringement in physical markets and online" (USTR, 2020b). Many of these issues were identified as ongoing concerns and challenges for the government in the first OECD *Investment Policy Review* (2010).

These concerns are partly reflected in Indonesia's international rankings in this area. Indonesia ranks 51st out of 141 countries in terms of IP Protection in the World Economic Forum's 2019 Global Competitiveness Report; 85th out of 129 economies in the Global Innovation Index 2019 prepared by WIPO, INSEAD and Cornell University; and 46th out of 53 countries analysed in the 2020 US Chamber International IP Index, which benchmarks the IP framework in these economies on the basis of 45 different indicators. Indonesia remains a "Priority 2" country in the European Commission's annual IP rights report on third countries based on limited progress made by the government in addressing systemic IP rights protection and enforcement issues identified in the report (European Commission, 2020). It is also listed on USTR's "Priority Watch List" in its 2020 Special 301 Report (USTR, 2020b). This annual report identifies countries that the USTR considers to deny adequate and effective protection for intellectual property rights or deny fair and equitable market access for investors relying on intellectual property protection. USTR recently reiterated its concerns to the Indonesian government as part of an ongoing country review process for trade preferences that the US grants to Indonesia (USTR, 2020a).

The government is pursuing a range of different initiatives that seek to address these well-known shortcomings. European and US stakeholders have noted positive developments related to Indonesia's efforts to address online piracy, such as the Infringing Website List (European Commission, 2020; USTR, 2020b). This initiative seeks to encourage advertising brokers and networks to avoid placing advertisements on websites that infringe copyrights on a commercial scale. The government has also issued administrative orders to block over 480 copyright-infringing websites in recent years while the Ministry of Finance has issued regulations clarifying its *ex officio* authority for border enforcement against pirated and counterfeit goods. The Directorate General for Intellectual Property reports steady increases in its numbers of investigators and other staff, which saw its capacity to conduct infringement investigations double from 16 in 2017 to 36 in 2018. Stakeholders have welcomed Indonesia's accession to the Madrid Protocol for the Registration of Trademarks in 2017 and the government's implementing regulation issued in 2018, which bring Indonesia's trademarks regime closer to international standards.

The new Omnibus Law on Job Creation, which was passed by parliament in October 2020, is the government's latest effort to improve laws in certain areas. The Law amends Law 20/2016 Concerning Trademarks and Geographical Indications to introduce stricter criteria for trademark registration aimed at stamping out bad faith registrations of foreign trademarks by local companies (Article 108). It also amends Law 13/2016 Concerning Patents to limit the scope of patents subject to compulsory licencing requirements and significantly reduce wait times for decisions on simple patent applications (Article 107). It remains to be seen whether the implementation of these amendments is successful in addressing stakeholder concerns, especially regarding compulsory licensing following Ministerial Regulation 39/2018 on Procedures of Imposition of Patent Compulsory Licences.

Despite these encouraging efforts, further progress is needed. The government should continue to prioritise efforts to strengthen its system for IP rights protections and enforcement as an important part of its goal to improve the overall investment climate. IP rights commitments in trade and investment agreements such as the Regional Comprehensive Economic Partnership (RCEP) may be a way of focusing political will to improve the domestic framework. Stakeholders have also routinely encouraged the government to improve enforcement co-operation among agencies and improve the resources and capacities available to investigate IP rights infringements. The government should also develop roadmaps towards implementing additional international commitments, including the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs and the 1991 Act of the International Convention for the Protection of New Varieties of Plants. It should also recall the recommendations made in an OECD study published in 2014 on strengthening national innovation and growth through Indonesia's IP rights regime, all of which remain relevant today (Box 4.1).

Box 4.1. Improving Indonesia’s IP rights regime in terms of contributions to innovation and economic development

An OECD study published in 2014 on “National Intellectual Property Systems, Innovation and Economic Development” considered the role of national systems of IP in the socio-economic development of emerging countries, notably through their impact on innovation. It presented a framework to identify the key mechanisms that enable IP systems to support emerging countries’ innovation and development objectives. The report includes a country study of Indonesia to identify strengths and weaknesses in the IP system from the perspective of contributions to national innovation performance. This work forms part of the OECD-World Bank Innovation Policy Platform project, a web-based, interactive space that provides access to open-data, learning resources and opportunities for collective learning on innovation policy.

The report identifies five concrete policy recommendations for policy makers in Indonesia in their efforts to strengthen national innovation and growth through IP:

- Efforts aimed at standardising and automating procedures to increase the processing efficiency of IP applications should be a priority, as lengthy delays weaken incentives. Policy steps also have to be taken to avoid the potential exclusion of smaller entities, as well as businesses in remote geographic areas.
- Policies should encourage the use of IP by national actors, including the launch of IP awareness and capacity-building initiatives. Incentive schemes should give researchers a stake in the returns from their inventions, by rewarding most those who commercialise inventions with high industrial applicability. This requires resolving legal uncertainties regarding the licensing of IP generated from public funding sources.
- Embracing “new” types of IP, such as traditional knowledge, genetic resources, folklore and geographical indications, will be attractive for Indonesia, but these need to be used to generate value if they are to serve the innovation system. Indonesia’s IP policy should take further complementary steps to support commercialisation.
- To achieve these objectives, the country’s IP policy has to undertake a more coherent approach involving the various actors of Indonesia’s innovation governance system.

Source: OECD (2014), National Intellectual Property Systems, Innovation and Economic Development with perspectives on Colombia and Indonesia, OECD Publishing, Paris, https://doi.org/10.1787/9789264204485-en.

Some incremental reforms have improved the court system but bold action may be needed to address long-standing concerns

The ability to make and enforce contracts and resolve disputes efficiently is fundamental if markets are to function properly. Good enforcement procedures enhance predictability in commercial relationships by assuring investors that their contractual rights will be upheld promptly by local courts. When procedures for enforcing contracts are overly bureaucratic and cumbersome or when contract disputes cannot be resolved in a timely and cost effective manner, companies may restrict their activities. Uncertainty about the enforceability of lawful rights and obligations raises the cost of capital, thereby weakening firms’ competitiveness and reducing investment. It can also foster corruption in the court system.

The existing framework for domestic adjudication of civil disputes in Indonesia continues to suffer from a number of significant problems. Some of these issues seem to persist since the first OECD *Investment*

Policy Review (OECD, 2010). Government initiatives in the past two decades have led to some improvements. The "one-roof" reforms introduced in 1999 and implemented by 2004 re-established an independent judicial branch in Indonesia headed by the Supreme Court. These reforms largely freed the judiciary from the political interference of the Justice Ministry that was endemic under the New Order government. However, reforms since then have been gradual rather than sweeping and have encountered some resistance. Some stakeholders continue to perceive the court system as costly, cumbersome, corrupt and dominated by cronyism (US Department of State, 2020; AustCham, 2020; EuroCham, 2019b; Overseas Development Institute, 2016). Some foreign investors also cite concerns with the lack of transparent and fair treatment in Indonesian courts, with judges not bound by precedent and many laws open to various interpretations (US Department of State, 2020).

Several global indicators identify the weaknesses in the justice system. Indonesia ranks, for instance, 59th of 126 countries in the 2020 edition of the World Justice Project Rule of Law Index. While this places Indonesia 5th of 30 other lower middle-income countries covered by the indicator, Indonesia's performance is below the group median for the civil justice system indicator. When compared to 15 other countries in the East Asia & Pacific region, Indonesia ranks poorly in three indicators: civil justice, criminal justice and absence of corruption. Only Cambodia ranks lower than Indonesia among these other countries in the region in terms of absence of corruption (127th of 128). The World Bank's Doing Business 2020 indicators also point to problems in the effectiveness of contract enforcement mechanisms in Indonesia, ranking the country 139th of 190 countries covered in the indicator (using data from Jakarta and Surabaya). Indonesia scores better in several other indicators in the World Bank's report (see Chapter 6 on investment promotion and facilitation). But enforcing contracts through the courts was assessed on average as costing around 70% of the claim value, which is about 1.5 times the regional average (47.2%), taking around 14 months to complete and subject to a quality of judicial process close to the median scores for 25 countries in the East Asia & Pacific region.[3]

The government is well aware of these problems and seeks to address them. The Long-Term National Development Plan (2005-2025) (Law 17/2007), the National Medium-Term Development Plan (2015-2019) and the National Medium-Term Development Plan (2020-2024) all identify the importance of establishing criminal and civil justice systems that are efficient, effective, and accountable for justice seekers, supported by lower levels of corruption and professional law enforcement personnel with integrity and independence. The government's development plans specifically link improvements in the legal system to Indonesia's economic development challenges, acknowledging that investors and the private sector cannot operate without legal and regulatory certainty. In pursuit of this goal, three specific objectives are stated: improved transparency, accountability and speed in law enforcement; improved effectiveness or corruption prevention and eradication; and respect, protection and fulfilment of human rights.

The establishment of specialised judges and courts has improved some court services. The Supreme Court has established at least six specialised courts with dedicated judges trained in their respective fields: the Anti-Corruption Court; the Commercial Court; the Industrial Relations Court; the Fishery Court; and the Taxation Court. A large number of other courts have also been established under the supervision of the Supreme and Constitutional Courts including appeal courts (34), general courts (330), administrative courts (26), religious courts (343) and *ad hoc* military courts. A small claims court was established in 2019 to handle disputes under IDR 500 billion. Some investors have brought cases before the administrative courts with claims relating to licence revocations and other government decisions; licence disputes involving investors have also been heard in the general courts and even subject to judicial review in the Supreme Court on occasion. But this disparate system of courts with overlapping jurisdictions in some instances creates complexity for investors needing to rely on it.

Other important incremental reforms and improvements have been achieved in recent years. Law 16/2011 on Legal Aid, together with accompanying implementing regulations, established a legal framework for government funding of legal aid. Various Supreme Court regulations and circular letters have established small claims courts, a specialised chamber system within the Supreme Court, and templates for court documents and decisions that have improved efficiency. The Supreme Court has also initiated several e-court programmes to improve access to court judgments through online databases and increase the use of electronic forms of case management. If implemented effectively, the e-Court system set out in Supreme Court Regulations 3/2018 and 1/2019 has the potential to be a breakthrough reform that reduces scope for corruption, improves accuracy and processing times and increases access to the justice. As of March 2019, 36% of Indonesian courts across all jurisdictions had adopted the e-Court system and nearly 16 000 lawyers and other advocates had registered for e-Court services (Australia-Indonesia Partnership for Justice, 2019). An ethics committee within the Supreme Court has worked with the Judicial Commission on developing an Ethics Code and Judicial Conduct Guidelines and has punished many court staff for violating the code. Stakeholder contributions have been significant in achieving these reforms and increasing public pressure for better governance, including through local civil society organisations and partnerships with foreign governments such as the Australia-Indonesia Partnership for Justice since 2014.

Despite these developments, significant reforms are still needed. The Supreme Court's 2010 Blueprint for Justice Reform (2010-2035), which was developed with the help of an external consulting company and a team of civil society organisations, identifies a number of important reforms that the government should continue to support. Some stakeholders consider, however, that the government will only be able to address the systemic issues that still hamper the Indonesian court system if it is prepared to rethink the core institutions, rules and attitudes that support it (Crouch, 2019; Lev, 2004). This would include a thorough review of the existing civil procedure rules, continual improvements to the system for judicial appointments and more wide-ranging initiatives to promote transparency and greater public scrutiny of court functions. Changes to legal education and public awareness are also key determinants in the success of any legal-institutional reforms and may be the only way to invert deep-seated attitudes regarding fairness and efficiency in the Indonesian justice system for future generations of judges, prosecutors, lawyers, police officials and, in some cases, members of parliament. Ongoing efforts by the National Development Planning Agency, the National Statistical Bureau and a consortium of civil society organizations and NGOs to develop a national Access to Justice Index should also be encouraged. Resources and technical expertise to implement the government's justice reform plans is likely to be an enduring issue. The government should continue to seek opportunities to collaborate with international partners on justice reform projects and maintain ties with existing donors in this area including various United Nations agencies, USAID, the European Commission and the governments of Australia, Japan, the Netherlands and Norway.

And many investors continue to prefer arbitration and other forms of alternative dispute resolution to litigation

Commercial disputes may arise for investors with joint venture partners, employees, local suppliers or contractors, or government agencies. The cheapest and quickest way to resolve disputes is by negotiation or mediation whenever possible, but if the parties cannot reach an amicable settlement by these means, then they have no choice but to pursue the issue in the courts or arbitration. Arbitration is possible only if the parties agree to it in an underlying contract or after a dispute has arisen between them. Article 32 of the Investment Law envisages that investor can rely on court or arbitration proceedings to settle any disputes that may arise with the government. The default option for domestic investors is court proceedings while the default for foreign investors is international arbitration.

Law 30/1999 on Arbitration and Alternative Dispute Resolution (the Arbitration Law) governs domestic and international arbitrations in Indonesia as well as the enforcement of foreign arbitral awards in line with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Unlike the arbitration laws in many other countries, the Arbitration Law is not based on the Model Law published by the United Nations Commission on International Trade Law (UNCITRAL) in 1985, which is designed to assist states in reforming and modernising their arbitration laws. It nonetheless provides a comprehensive framework for commercial arbitration and addresses the core topics covered in most arbitration laws on the constitution of arbitral tribunals, the role of the courts, arbitration procedures and enforcement of arbitral awards.

Stakeholders have reported relatively positive experiences with the Arbitration Law in practice and the government is not considering any major reform proposals at this time. However, the government may wish to consider amending the Law at an appropriate time in the future to clarify certain aspects of it. The Law does not expressly state that it applies to international arbitrations conducted in Indonesia even though in practice the Indonesia courts have interpreted it as covering both domestic and international arbitrations. Clarification of whether contract disputes involving claims based on tort or fraud fall within the definition of arbitrable disputes under Article 5 of the Law may also help to avoid unnecessary litigation on this issue. Some stakeholders have also reported difficulties in enforcing foreign arbitral awards against Indonesian debtors (US Department of State, 2020). Article 66 of the Law does not provide guidance on when the court should refuse to enforce an award that "conflict[s] with public order". Guidance or clarification in the Law would help to reduce inconsistency in judicial interpretations and dissuade award debtors from filing frivolous defences to delay enforcement through costly and lengthy court procedures. Provisions allowing the enforcement of arbitral awards that grant interim relief or injunctive remedies might also be considered as the Law is silent on this issue.

A number of local institutions administer arbitrations and provide a range of alternative dispute resolution services. The Indonesian National Board of Arbitration (*Badan Arbitrase Nasional Indonesia* or BANI), established in 1977, is the oldest and most commonly used arbitration institution in Indonesia. BANI has its headquarters in Jakarta and regional offices in Bandung, Denpasar, Medan, Pontianak and Batam. It has administered more than 1000 cases to date. It maintains a roster of 150 arbitrators split equally between local and foreign arbitrators. Several other specialised arbitration institutions have also been established in recent years including the Capital Market Arbitration Board, the National Sharia Arbitration Board, the Arbitration and Mediation Board of Intellectual Property Rights and the Commodity Futures Trading Arbitration Board, among others. Many of the institutions also provide mediation and conciliation services, along with the dedicated National Mediation Centre. The Ministry of Public Works established the Construction Dispute Arbitration and Alternative Dispute Resolution Institution (BADPSKI) in August 2014 but this institution is not yet operational. Notwithstanding the growth of local arbitration institutions, many foreign investors still prefer to refer their disputes to institutions based in regional arbitration hubs like Hong Kong (China) and Singapore.

Sustained momentum is needed to improve the regulatory climate supporting the digital economy

Indonesia is home to the largest and fastest growing internet economy in the region, estimated at USD 40 billion in 2019 (Bain & Company et al., 2019; McKinsey & Company, 2018). Starting with its 14th economic package in 2016, the government has pursued a range of initiatives to promote the country's potential as a leading digital economy including the National e-Commerce Roadmap, the 2020 Go Digital Vision, the Digital Talent Scholarship programme and the Indonesia 4.0 strategy aimed at implementing new manufacturing technologies. President Jokowi's address at the Indonesia Digital Economy Summit 2020 reiterated these ambitions and noted the important challenges being tackled to achieve them (Cabinet Secretariat, 2020a, 2020b). One of these challenges is in developing and implementing a comprehensive regulatory framework for cybersecurity and data protection.

Together with a strong framework for IP rights, these aspects of the regulatory environment are of increasing importance for all investors, not just digital services and new technology firms. The Indonesia Security Incident Response Team on Internet Infrastructure recorded more than 207 million cyber attacks in Indonesia between January and October in 2018 (DetikInet, 2018). Recent high-profile examples include the WannaCry ransomware attack in May 2017 where hackers encrypted data and demanded ransoms from victims all round the world including several hospitals in Indonesia. Digital security incidents can have far-reaching economic consequences for investors in terms of disruption of operations (e.g. through inability to provide services or sabotage), direct financial loss, litigation costs, reputational damage, loss of competitiveness (e.g. in case of theft of trade secrets) and loss of trust among customers, employees, shareholders and partners. These concerns are amplified for digital and new technology firms. While investors must develop their own risk management and data integrity strategies, governments are increasingly being called upon to support investor efforts in this area with institutions to monitor and protect against cyber threats (OECD, 2012, 2015, 2018a).

The government has taken significant strides towards making cybersecurity a national policy priority. It established a National Cybersecurity Agency (BSSN) in 2017 under Presidential Regulation 53/2017 (amended by Presidential Regulation 133/2017). BSSN manages national, regional and international co-operation in cyber security affairs. It is also responsible for financing and overseeing the activities of the Security Incident Response Team on Internet Infrastructure, which was initially established in 2010 under a regulation issued by the Minister of Communication and Information Technology (16/PER/M.KOMINFO/10/2010). This team carries out a range of enforcement activities including monitoring and early detection of cybercrime incidents, responding to reports of cybercrimes by consumers and monitoring evidence of internet transactions. Security for classified government information is overseen by the National Encryption Agency (Lembaga Sandi Negara), whose functions will soon be transferred to the BSSN when it becomes fully operational. Separate cybercrime units also exist within the Ministry of Defence, national police and national armed forces to support specific operations. The government is also participating in several bilateral and multilateral co-operation efforts in this area including with ASEAN partners, the UN Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security and bilateral dialogues on cybersecurity issues with Australia and Russia in 2017.

To date, however, there is still no overarching regulatory framework to co-ordinate these *ad hoc* initiatives. An existing law on Electronic Information and Transactions (Law 11/2008, amended by Law 19/2016) and a government regulation on the Organisation of Electronic Systems and Transactions (Regulation 71/2019) currently do not address cyber security issues. BSSN is leading efforts to complete a revised draft of a proposed Law on Cyber Security and Resilience by the end of 2020. The government included this project in the National Priority Legislation Program for 2020. The House of Representatives has considered earlier drafts of this law on several occasions since 2014. Ongoing revisions will reflect these discussions and comments received during public stakeholder consultations. Some stakeholders have suggested that further clarity is needed on the proposed functions and co-ordination between interagency institutions and safeguards to ensure respect for human rights, as well as a roadmap to building adequate institutional capacity and private sector engagement to implement the law effectively. BSSN is also preparing a draft presidential regulation on the protection of national critical information infrastructure and regulations affecting security audit powers and requirements for information security management systems that will apply to companies operating in Indonesia.

Progress in relation to personal data privacy regulation has been slower. Several existing laws and regulations address specific data protection issues for the financial, health and telecommunications sectors.[4] But unlike over 120 countries around the world, including within ASEAN, Indonesia has not yet adopted comprehensive data protection and privacy laws. Such protections are becoming increasingly essential for protecting both personal and non-personal data and improving trust for consumers and investors. The government submitted a draft law to parliament in January 2020 but its progress has been hampered by the disruptions caused by the COVID-19 pandemic. The draft law is based primarily on the European Union’s General Data Protection Regulation.

Investors will no doubt follow with great interest the passage and eventual implementation of these proposed new laws, as well as provisions under the Omnibus Law on Job Creation to provide further clarity on technology transfer obligations for investors. The government should continue to prioritise these efforts and learn from recent good practices around the world to maximise the impact of these laws during the implementation phase. It should continue to engage transparently and actively with stakeholders from the private sector regarding the impacts for investors under the proposed laws. Establishing legal frameworks for cybersecurity and privacy is an essential first step but the government should also account for considerable, additional work once the laws are in place to raise awareness among the private sector and users alike and nurture effective mechanisms in practice to deal with security and data breaches. All of these efforts should be tackled with a view to increasing economic and social prosperity and not simply for furthering criminal or national security-related aspects.

Recent trade and investment treaties are another means by which the government is seeking to strengthen coherence on domestic laws affecting investors in this area. Indonesia's new trade and investment treaty with Australia, which entered into force in July 2020, is a good example.[5] It includes provisions that require the treaty parties to remove data localisation barriers, prohibit forced technology transfers, establish adequate domestic safeguards for data privacy and/or enforce online consumer protections; other provisions create general exceptions for non-discriminatory regulation in this area or exclude it from ISDS. It also expressly recognises the importance of "building and maintaining the capabilities of their national entities responsible for computer security incident response, including through exchange of best practices; and using existing collaboration mechanisms to co-operate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties" (Article 13.3). Recent trade and investment agreements concluded by other countries require the treaty parties to take into account international guidelines and standards when developing their national laws such as the OECD Recommendation concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013) and the OECD Recommendation on Digital Security Risk Management for Economic and Social Prosperity (2015).

Ongoing efforts to tackle corruption, reduce bureaucracy and improve the regulatory framework for investors

Corruption has been a long-standing concern for investors in Indonesia. Although it is more than two decades since the end of the New Order regime, which was associated with rampant corruption at the top levels of government, Indonesia still suffers from a negative international image in terms of corruption. Recent high-profile cases include criminal convictions in the United States, the United Kingdom and France relating to bribes paid to Indonesian government officials by a multinational telecommunications company, a multinational airline manufacturer and a consortium of foreign investors seeking to secure a multi-million dollar contract to develop a power plant project (US Department of Justice, 2020, 2019; UK Serious Fraud Office, 2020). Indonesian authorities have also prosecuted a range of charges in recent years against government officials who allegedly accepted bribes or kickbacks for granting permits or contracts to investors and, in some cases, judges who accepted bribes to fix court rulings. If prosecution efforts are unable to keep pace with the extent of the offences, however, firms that refuse to make such payments can be placed at a competitive disadvantage when compared to firms in the same field that engage in such practices.

International indicators in this area attest to the problem. Indonesia ranked 85th out of 198 countries surveyed for the perceived levels of public sector corruption in Transparency International's 2019 Corruption Perceptions Index. Transparency International Indonesia, the national chapter of the international anti-corruption civil society organisation Transparency International, conducts the annual survey upon which Indonesia's assessment in the Index is based. The Index is one of the official key indicators for the Long-Term 2012-25 National Strategy on Prevention and Eradication Corruption, and has therefore become one of the most important governance indicators used by policy makers and the private sector in Indonesia to inform their decisions. Transparency International reports that nearly 700 out of 1000 Indonesian nationals that took part in a 2016 survey said they thought that the level of corruption had worsened in the last 12 months (Transparency International, 2017). Aside from the Index, Indonesia ranks 77th out of 141 countries for corruption indicators in WEF's 2019 Global Competitiveness Report. Foreign investors also routinely cite corruption among their top problems in others surveys about doing business in Indonesia (US Department of State, 2020; AustCham, 2020; EuroCham, 2019b; Overseas Development Institute, 2016).

The first *OECD Investment Policy Review* (2010) noted that the government had made fighting corruption a top priority. The government's Long-Term National Development Plan (2005-2025) (Law No. 17 of 2007) identifies "abuse of power in the form of corruption, collusion, and nepotism" as among the key challenges for reforming the government bureaucracy. The first *Review* addressed in detail the policies, laws and institutions that the government had established by 2010 to promote integrity within government, investigate and prosecute corruption offences, raise public awareness and assess continuously the impact of anti-corruption strategies. These efforts have led to significant progress. Transparency International reports that 64% of Indonesian national that took part in a 206 survey considered that the government was doing well in terms of fighting corruption (Transparency International, 2017). Public optimism may be due to the government's promotion of open government practices, improvement of institutional co-ordination for corruption prevention and empowerment of ombudspersons to investigate corruption, including at the subnational level.

Recent developments are also encouraging. The National Strategy of Corruption Prevention & Eradication Long-Term (2012-2025) provides a solid multi-stakeholder framework for monitoring and advancing integrity in government and society. It recognises that corruption is an important component of building the enabling environment for quality investment and responsible business conduct (see Chapter 5 on responsible business conduct). The Corruption Eradication Commission (KPK) plays a major role in building public awareness and confidence by steadfastly pursuing graft cases despite political backlashes. Many observers see KPK as a model of good practice by many countries, in particular because it does not shy away from difficult or sensitive cases (OECD, 2015b). The work of the KPK and the national anti-corruption courts has brought to light many high-profile cases, and they boast an impressive conviction rate – between 2003 and 2018, the KPK prosecuted and achieved a 100-percent conviction rate in 86 cases of bribery and graft related to government procurements and budgets. Presidential Regulation Nos. 13 and 54 of 2018 adopted the 2019-2020 Corruption Prevention Action Plan (which focuses on three areas – licenses, state finances and law enforcement reform) and introduced requirements for Indonesian companies in certain sectors to report beneficial ownership information as part of efforts to fight corruption and tax evasion. This information will be published in an electronic database accessible to the public by the end of 2020, which is hoped will improve transparency and encourage further policy input from civil society organisations and other stakeholders. This initiative is in line with the G20 Anti-Corruption Open Data Principles adopted in 2015.

The challenge for the government is to sustain momentum for building a culture of integrity in the public sector and throughout all levels of society. The National Strategy of Corruption Prevention & Eradication Long-Term (2012-2025) acknowledges that "[c]orruption is still massive and systematic". Unseating corrupt schemes and changing deep-rooted attitudes may involve taking brave stances against incumbent elites in public and private spheres, which can be a tricky and incremental process. In this context, the government should continue to allocate sufficient resources to the KPK and vigorously defend its independence. However, a new law passed in October 2019 (Law No. 19 of 2019) raises serious concerns about KPK's future (also discussed in Chapter 5 on responsible business conduct). Among other things, the new law creates a government committee to oversee KPK's activities, revokes KPK's authority to carry out independent audio surveillance of suspects, allows the government to place civil servants within KPK's staff and requires KPK to discontinue investigations and prosecutions that have lapsed for more than two years. It remains to be seen whether these changes will affect the KPK's effectiveness but investors are no doubt following these developments closely as a marker of the government's commitment to eradicate corruption. Aside from the KPK, the government should consider reinforcing funding and capacity needed for other anti-corruption institutions like the national police and Attorney General’s Office that do not have the same resources or track-record as the KPK.

The government should also continue to engage with international partners, local businesses and civil society organisations in all aspects of the anti-corruption policy cycle (agenda setting, policy development, monitoring and evaluation). Indonesia ratified the UN Convention against Corruption in September 2006. The government attends some meetings of the OECD Anti-Corruption Working Group but it has not yet acceded to the OECD Anti-Bribery Convention. It also has not introduced criminal sanctions for bribery in international business and corporate liability for corruption offences as a signatory to UNCAC and a G20 member. Some action has been taken in line with the G20 Anti-Corruption Open Data Principles but more is needed, especially in terms of accessible datasets for lobbying registers, government spending, political financing, voting records and land registers. Government policy makers and the KPK should also continue to seek input from civil society organisations such as Transparency International Indonesia and Indonesia Corruption Watch throughout the policy cycle but perhaps most importantly in corruption investigations and agenda setting for law reforms.

The government has partnered with the OECD to develop recommendations for wider public sector reforms, including in relation to public integrity (Box 3.2. below). As a founding member of the Open Government Partnership (OGP) and a leading member of ASEAN, Indonesia has played a key role in disseminating open government principles and practices. Trust in government by Indonesian citizens is among the highest levels observed in OECD and strategic partner countries (OECD, 2019) but some indicators suggest that corruption and government effectiveness are clearly areas for improvement when compared to other ASEAN countries (OECD, 2016b). Government bureaucracy and unfair business practices are among the most pressing issues for foreign businesses operating in Indonesia (AustCham, 2020). Investors have also expressed concerns regarding inconsistent levels of stakeholder consultation in law making, the costs of bureaucratic red tape due linked to decentralisation of government services and a lack of coordination between central and local governments even after reforms introduced in November 2017 to address this issue (US Department of State, 2019).

The government has pursued a number of initiatives to address these challenges in line with the Presidential Priorities for 2019-2024, National Development Plans, OGP National Action Plan 2018-2020 and the Bureaucratic Reform Roadmap, including:

- establishing a centralised complaint mechanism for all government services, managed by the Ministry of Administrative and Bureaucratic Reform;
- identifying opportunities to reduce unnecessary burdens on business by repealing some government regulations and seeking to simplify others;
- improving coordination among ministries in the policy-making process;
- establishing a public consultation forum for discussion and exchange between public service administrators and civil society organisations;
- launching a web-based business licensing system in July 2018 known as the Online Single Submission (OSS), and periodically updating it, to simplify and expedite applications for business licences and permits;
- expanding e-government services and requiring all levels of government to implement online governance tools (e-budgeting, e-procurement, e-planning) to improve budget efficiency, government transparency, and the provision of public services; and
- various measures to improve access, management and quality of data collected by government ministries and institutions.

Chapter 6 discusses some of these initiatives, including the OSS, in detail and provides recommendations in relation to them. An OECD study published in 2016 on public governance in Indonesia also provides a comprehensive set of recommendations for public sector reforms (Box 4.2). The ongoing challenge will be for the government to ensure that its promising initiatives translate into better public services throughout the country, which may be easier said than done. The scale and complexity of regulatory and licensing reform efforts alone should not be underestimated: the government identified over 3 000 regulations to revoke as part of reforms in 2016 while a further 79 laws and 1194 articles have been identified under the Omnibus Law on Job Creation.

Box 4.2. OECD recommendations to strengthen open government in Indonesia

In order to support ongoing efforts to broaden and deepen the impact of its government reform initiatives, Indonesia requested the OECD conduct an Open Government Review (OG Review) to highlight its achievements in these areas and identify potential improvements. The OG Review, launched in 2016, provides a comprehensive, evidence-based assessment of Indonesia's open government reforms, with a focus on co-ordination, citizen engagement, integrity, digital government, budget transparency and innovation in the public sector.

The key finding of the OG Review was that Indonesia's policy and legal frameworks offer sound support for open government, though challenges remain to ensure that the various ongoing initiatives are implemented completely and effectively. To build a truly transparent and participative public administration, Indonesia will need to continue to promote a greater understanding of the value and importance of open government reforms within the public administration. It will also need to ensure that public officials have the necessary capacity to implement the reforms, both at national and local levels of government. For Indonesia to be successful in these efforts, it will have to rely more on its well-established civil society and encourage the emergence of more non-governmental actors capable of playing a positive role in the country's open government agenda. It must also continue to support the links between its open government reform efforts and other multilateral reform efforts, such as the United Nations Sustainable Development Goals (SDGs), to ensure that the various initiatives are mainstreamed into the country's national development processes.

The OG Review made a wide range of other specific recommendations, including:

- Strengthen the connections across, and mutual reinforcement of, different governance agendas, including the Presidential Priorities; Annual, Medium- and Long-term National Development Plans; OGP Action Plans; and other reform agendas such as the Bureaucratic Reform Roadmap;
- Improve co-ordination horizontally (between the central government and line ministries) and vertically (between central government and decentralised levels of government);
- Develop a more structured and consistent whole-of-government policy to streamline open government and civic engagement, including by clarifying guidelines for citizen participation;
- Continue to involve civil society organisations throughout the anti-corruption policy cycle, explore ways to make corruption reporting mechanisms more effective and improve the legal protections for whistleblowers;
- Recognise data as a strategic asset; develop governance frameworks, infrastructure and institutional capacities to support the strategic use of government data for decision making; and establish a dynamic open government data ecosystem;
- Improve the quality and quantity of data and information accessible for the public throughout the budget cycle; and strengthen public participation in the budget cycle.

- Take a coordinated approach to identifying and tackling the barriers to innovation creation and diffusion in the public sector; and insulate innovation efforts from changes in the policy cycle by, for example, identifying formal structures for ensuring coordination at the central government level.
- Continue to develop the links between open government reform efforts and the design and implementation of the SDGs.

Source: OECD (2016b), "Open Government in Indonesia", OECD Public Governance Reviews, OECD Publishing, Paris, https://doi.org/10.1787/9789264265905-en.

Indonesia's investment treaties

Indonesia is a party to 36 investments treaties that are in force today. These include 26 bilateral investment treaties (BITs), two bilateral trade and investment agreements,[6] six trade and investment agreements in the context of ASEAN and two multilateral investment agreements: the ASEAN Comprehensive Investment Agreement (ACIA) and the Organisation of the Islamic Conference (OIC) Investment Agreement (see summary table in Annex 4.A.).

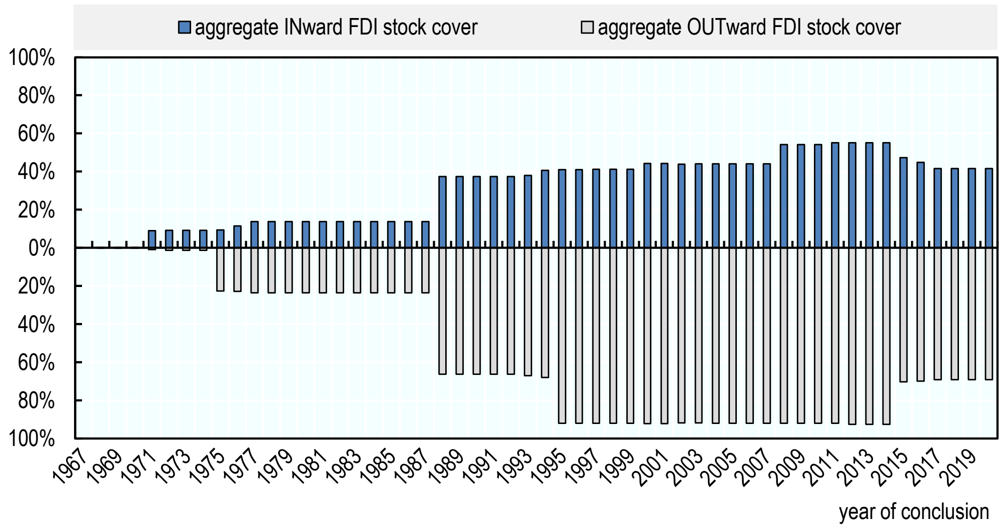
At a regional level, Indonesia is a party to seven investment agreements through its membership of ASEAN. ACIA is the foundational investment instrument that applies between the ASEAN member states. The ASEAN community has also signed six agreements concerning investment with third states (ASEAN+ agreements). ASEAN+ agreements with Australia/New Zealand (2009), Korea (2009), China (2009), India (2014) and Hong Kong, China (2017) all contain investment protections. The Indonesian government has not ratified the ASEAN+ agreements with China, India or Hong Kong (China). These agreements are therefore not currently in force for Indonesia even though they are in force for other treaty partners that have ratified them. An ASEAN+ trade agreement in force with Japan since 2008 did not originally contain investment protections or ISDS but an amending protocol signed in March 2019 adds these elements to the agreement. The amending protocol came into force on 1 August 2020 for Japan, Lao PDR, Myanmar, Singapore, Thailand and Viet Nam but Indonesia has not yet completed the ratification procedures as of October 2020.

At a global level, Indonesia has signed and ratified two important multilateral treaties related to enforcement of arbitral awards, including in ISDS cases under investment treaties – the New York Convention (in 1981) and the Washington Convention (in 1968). Indonesia is also a party to the OIC Investment Agreement (1981), which contains investor protections and provides for ISDS through investor-state arbitration. Investor claimants have invoked the OIC Investment Agreement in at least twelve ISDS disputes since 2011[7] (one of which involved Indonesia as a respondent) despite uncertainties in the agreement's appointing authority mechanism. OIC governments are currently discussing proposals to replace investor-state arbitration under that treaty.

Treaty coverage for Indonesia's inward and outward FDI stock

Indonesia has treaty protection in force for significant portions of its inward FDI stock (41%) and outward FDI stock (69%) (Figure 4.1).[8] FDI trends are discussed in further detail in Chapter 2, but for current purposes it is notable that these portions have fluctuated in recent years as treaties have entered and exited from force. Indonesia's treaty relationship with Singapore under ACIA (2009) covers the vast majority of total outward FDI stock (42%) and the largest portion of total inward FDI stock of any treaty partner (18%). This relationship may soon be covered by two investment treaties, with the Indonesia-Singapore BIT (2018) signed in October 2018 expected to be ratified and come into force in the near future.

Figure 4.1. Approximate evolution of Indonesia's inward and outward FDI stock coverage from investment treaties in force



Note*:* Percentages are based on matching aggregate immediate bilateral FDI data and treaty relationships as of October 2020.
Source: OECD calculations based on OECD investment treaty database. FDI data was taken from the OECD FDI database and IMF Direct Investment Positions reflecting FDI stock as of 2018 rather than historical values.

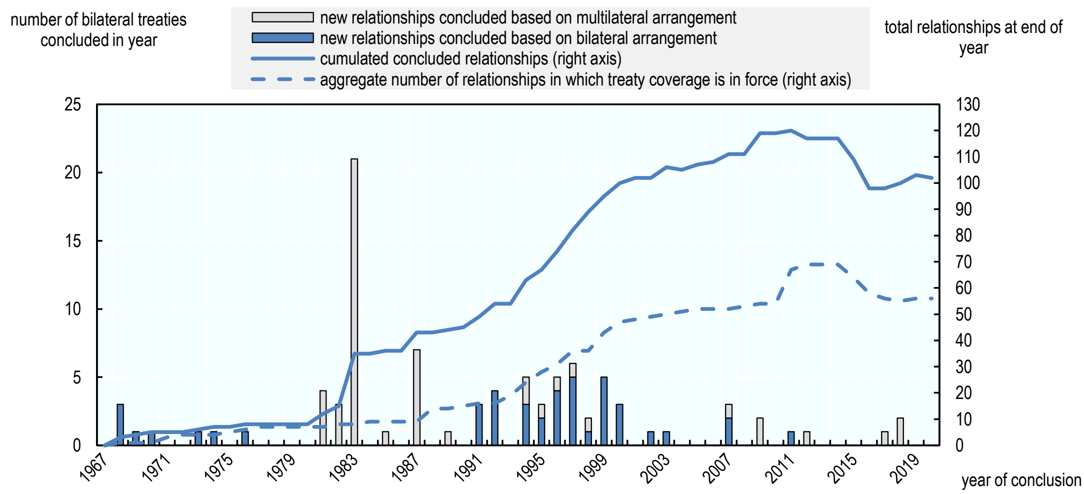
Three other treaty relationships – with Hong Kong (China) Japan, the Netherlands – account for significant portions of Indonesia's inward FDI stock. Many Indonesian investment treaties in force today cover none of Indonesia's FDI stock (inward or outward) or only negligible portions of it. This is a common phenomenon in many countries' treaty samples (Pohl, 2018). Significant inward FDI stock in Indonesia from Bermuda, Canada, Luxembourg, Seychelles and the British Virgin Islands, for example, is not covered by an investment treaty.

Developments since the first OECD Investment Policy Review

In the ten years since the first OECD *Investment Policy Review* (OECD, 2010), Indonesia has signed six new investment agreements: two BITs with Serbia (2011) and Singapore (2018); two ASEAN+ trade and investment agreements with India (2014) and Hong Kong (China) (2017); an investment-related amending protocol to the ASEAN+ agreement with Japan in 2019; and the Australia-Indonesia Comprehensive Economic Partnership Agreement (2019) (AI-CEPA). Only the AI-CEPA has been ratified by the government and entered into force (in July 2020).

In the same ten-year period, the government ratified and brought into force one previously-unratified treaty: the Indonesia-Qatar BIT (2000). Sixteen BITs have been signed but remain unratified and therefore not in force. A timeline of Indonesia's investment treaties appears in Figure 4.2.

Figure 4.2. Evolution of Indonesia's investment treaty relations (signed relationships shown with the dashed line; in-force relationships shown with the dark blue line)



Source: OECD calculations based on OECD investment treaty database.

In March 2014, the Ministry of Foreign Affairs and BKPM began a review of Indonesia's investment treaties. The review was intended "to evaluate the impact of existing IIAs on Indonesia's rights to regulate and pursue legitimate public policy objectives, as well as to modernise IIAs to include principles and provisions that strike a more equitable balance between the objectives of foreign investors and the host state" (Government of Indonesia, 2018). The government indicated publicly at the time that it considered many of Indonesia's existing treaties to be "outdated" and identified concerns regarding the unspecific scope of protections and ISDS (Amianti, 2015). It noted that while "Indonesia has not lost faith in IIAs in general […] [it] intends to modernize and to renegotiate its IIAs with a view to providing greater capacity to regulate in the public interest" (Ministry of Foreign Affairs, 2015). The Minister for Foreign Affairs noted during a press statement in 2015 that her intention was "to create a new regime for investment agreements between Indonesia and other countries" (Minister of Foreign Affairs, 2015). The government consulted widely during the review process, inviting contributions from academics, arbitration lawyers, non-governmental organisations (NGOs), inter-governmental organisations and business groups.

The review process involved three main work streams (Ministry of Foreign Affairs, 2015). A comprehensive assessment of investment protections and ISDS provisions was launched in order to compare the scope and different formulations of these provisions across all of Indonesia's investment treaties. The government established an inter-ministerial taskforce coordinated by BKPM to carry out this work. This taskforce was also responsible for updating Indonesia's model investment treaty to reflect the government's new priorities. As of May 2020, the new model investment treaty is not publicly available. A third line of work involved identifying existing treaties that could be allowed to lapse when they became due to expire under their validity provisions or, alternatively, where treaty partners should be approached regarding termination.

Following this review process, at least 23 Indonesian BITs were terminated between 2014 and 2020 (see summary table in Annex 4.A.). The immediate impact of this development remains somewhat limited. Most of these treaties contain provisions that guarantee the continuing application of protections and other provisions for investors with existing investments for 10 or 15 years after the termination date. Investors with existing investments in Indonesia may therefore still be able to bring ISDS claims against the government under recently terminated treaties until the expiry of the post-termination validity periods even if these treaties will not cover new investments made after the terminations took effect. The main exception is the Argentina-Indonesia BIT (1995), where the treaty partners agreed mutually to terminate the treaty, effective as of 19 October 2016, in such a way that the post-termination validity provisions no longer apply.

The government is currently negotiating or considering some new investment-related agreements. The Ministry of Foreign Affairs and BKPM are responsible for conducting investment treaty negotiations under the supervision of the Coordinating Economic Minister; negotiations regarding trade and investment agreements are undertaken in conjunction with the Ministry of Trade. Negotiations with the European Union regarding a comprehensive economic partnership agreement commenced in 2016. A tenth round of negotiations scheduled for March 2020 was postponed due to the COVID-19 pandemic. Following more than eight years of negotiations, ASEAN member states and five other Asia-Pacific countries (Australia, China, Japan, Korea and New Zealand) concluded the Regional Comprehensive Economic Partnership (RCEP) in November 2020. RCEP includes rules and disciplines on investment, while ISDS provisions are planned for future negotiations. A bilateral trade agreement signed with Chile in 2017 does not contain an investment chapter but the parties agreed to continue negotiations regarding a future possible investment chapter. The government is also assessing the merits of joining the Comprehensive and Progressive Trans-Pacific Partnership Agreement (2018); a detailed gap analysis between Indonesia's existing treaties and the CPTPP was published in 2018 (World Bank, 2018a). The Minister for Foreign Affairs announced in a press statement in January 2020 that the government intends to intensify its economic diplomacy efforts in 2020 (Minister of Foreign Affairs, 2020).

Treaty use: ISDS claims under Indonesia's investment treaties

Indonesia has had several first-hand experiences with defending legal claims by investors brought in formal proceedings under investment treaties. Based on publicly available information, foreign investors have filed at least eight treaty-based claims against Indonesia.[9] The first of these cases was commenced in 2004. The other seven cases were filed in a five-year period between 2011 and 2016. Six claims were filed under BITs and two were filed under multilateral treaties: the 1981 OIC Investment Agreement and the 1987 ASEAN Investment Agreement. Only two of these treaties (the Australia-Indonesia BIT (1992) and the OIC Investment Agreement) are still in force today.

Indonesia's ISDS disputes have primarily concerned investments in the banking, mining, construction and agriculture sectors. Some of the recent disputes involved claims relating to a failed palm oil and oleochemical project, the government's financial bailout of a local bank, the introduction of export restrictions on copper and alleged government interference in coal mining projects.

Aside from treaty-based claims, at least two contract-based claims have been brought against Indonesia relating to investments made in a hotel construction project.[10] As of October 2020, there were no publicly-known treaty-based investment claims brought against Indonesia's treaty partners by Indonesian investors operating abroad.

Indonesia's investment treaty policy

Many of Indonesia's investment treaties still in force today reflect the features often associated with older-style investment treaties concluded in great numbers in the 1990s and early 2000s. Such treaties are generally characterised by a lack of specificity of the meaning of key provisions and extensive protections for covered investors. ACIA, the ASEAN+ investment agreements and some of Indonesia's most recent BITs contain more precise approaches in some areas. However, a significant number of Indonesia's older BITs remain in force alongside these newer agreements despite the government's moves to terminate more 20 such BITs since 2014.

This scenario may expose Indonesia to a range of unintended consequences, especially given the potential scope for ISDS claims under older investment treaties. The balance of this section examines four key aspects of possible reform – the scope of three frequently-invoked protections (FET, MFN and indirect expropriation) as well as dispute settlement mechanisms and ISDS. It then briefly outlines some other possible aspects of investment treaty reform.

Vague provisions referring generally to "fair and equitable treatment" generate serious risks and costs, and should be addressed where possible

All but one of Indonesia's investment treaties currently in force contain provisions that require Indonesia to provide covered investors and their investments with FET.[11] Since the early 2000s, the FET standard has become the most-frequent basis for claims in ISDS. Most FET provisions were agreed before the rise of ISDS claims related to this treatment standard. Starting around 2000, broad theories for the interpretation of FET provisions by arbitral tribunals emerged as the number of ISDS cases increased markedly. While information on some cases remains confidential, investors in at least four of the eight ISDS cases brought against Indonesia are known to have invoked the FET standard.

Most FET provisions in investment treaties do not provide specific guidance on what treatment should be considered fair and equitable. Arbitral tribunals in ISDS cases under investment treaties have taken different approaches to interpreting such "bare" FET provisions. This creates considerable uncertainty and high litigation costs for governments and investors alike. It has also resulted in some broad interpretations of bare FET provisions that go beyond the standards of investor protection in some advanced economies. Governments have reacted to these developments in various ways, including by adopting more precise or restrictive approaches to FET or excluding FET in recent treaties (Box 4.3). Indonesia's varying approaches to FET in its existing treaties can usefully be compared with these recent approaches in broader treaty practice.

Box 4.3. Recent approaches to the FET provision and ISDS for FET claims

States are becoming more active in the ways in which they specify, address or exclude FET-type obligations in their treaties and submissions in ISDS. Dissatisfaction with and uncertainties about FET and its scope have also led some governments to exclude it from their treaties or from the scope of ISDS. Some important recent approaches are outlined below.

The MST-FET approach – express limitation of FET to the minimum standard of treatment under customary international law (MST). This approach has been used in a growing number of recent treaties, especially in treaties involving states from the Americas and Asia (Gaukrodger, 2017). In addition to using MST-FET, the CPTPP clarifies that the claimant must establish any asserted rule of MST-FET by demonstrating widespread state practice and opinio juris (see Article 9.6 (3)-(5), Annex 9A). Evidence of these two components has rarely been provided by claimants or arbitrators in ISDS cases. This approach has since been replicated by other states (e.g., Australia-Indonesia CEPA (2019), Article 14.7). The NAFTA governments have further reformed their approach to MST-FET claims in the USMCA (see below).

The definition approach – stating what FET means or listing its element(s). Recent treaties negotiated by the European Union, China, France and Slovakia contain defined lists for the elements of FET. This approach can vary greatly depending on the nature of the list. Some lists include elements such as a denial of justice, manifest arbitrariness, fundamental breach of due process, targeted discrimination on manifestly wrongful grounds, and/or abusive treatment of investors. This approach likely results in a broader concept of FET than MST-FET, especially if state practice and opinio juris must be demonstrated to establish rules under MST-FET.

Exclusion of FET from ISDS, investment arbitration or from treaties. The recently-concluded USMCA (replacing NAFTA) includes MST-FET but generally excludes it from the scope of ISDS (except for a narrow class of cases involving certain government contracts) (Article 14.D.3). ISDS under the USMCA generally applies only to claims of direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for MST-FET claims. India's Model BIT does not refer to FET and instead identifies specific elements; Brazil's model treaty and recent treaties also exclude FET.

Clarifications of treatment excluded from FET. Some recent treaties have also clarified that FET does not protect investors from certain types of treatment. Starting with the Australia-Singapore free trade agreement (FTA) as revised in 2016, and followed by the CPTPP signed in March 2018 and the Korea-United States FTA as revised in 2018, several treaties now exclude government measures that may be inconsistent with an investor's expectations concerning its investment from giving rise to a breach of the FET provision. Several recent treaties concluded by Australia clarify that the modification of government subsidies or grants is not protected under the FET provision.*

* Australia-Singapore FTA (2003), as amended in 2016, Article 6(5); Australia-Peru FTA (2018), Article 8.6(5); Australia-Uruguay BIT (2019), Article 4(5).

Several Indonesian investment treaties adopt some of these more precise or restrictive approaches to FET. The FET provisions in ACIA and all of the ASEAN+ treaties state that FET requires the treaty partners "not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law", which is generally understood to be a high standard. All of these treaties except ACIA (2009) and the China-ASEAN Investment Agreement (2009) also expressly limit FET to the customary international law standard for the treatment of aliens and clarify that it does not create additional substantive rights.[12]

Curiously, however, footnotes to the FET provisions in the ASEAN-Australia-New Zealand Free Trade Agreement (2009) (AANZFTA) and the ASEAN-Hong Kong Investment Agreement (2018) exclude these additional clarifications from applying where Indonesia is concerned. Indonesia's most recently-concluded investment treaty – the AI-CEPA (2019) with Australia – is the only Indonesian treaty that refers expressly to MST-FET and clarifies that breaches of an investor's expectations regarding its investment are not covered by the FET provision.

FET provisions in other Indonesian investment treaties may leave scope for broad interpretations by arbitral tribunals. Most of Indonesia's BITs still in force refer to "bare" FET without any further specific guidance on its meaning. Some contain several different references to "bare" FET in the same treaty.[13] The prevalence of "bare" FET provisions and of varying approaches more generally creates uncertainty as to the scope of these FET obligations and exposure to expansive interpretations by arbitral tribunals in ISDS cases. More specific approaches to FET provisions could improve predictability for the government, investors and arbitrators alike. They could also potentially contribute to preserving the government's right to regulate in the context of investment treaties (Gaukrodger, 2017a, 2017b). In some cases, agreement on new treaty language may be required to reflect government intent and preclude undesirable interpretations. In other cases, governments may be able to achieve greater clarity on the scope of FET by agreeing on joint government interpretations of provisions in existing investment treaties with treaty partners.[14]

Most-Favoured Nation treatment provisions in Indonesia's investment treaties may have a range of unintended consequences

Many of Indonesia's investment treaties provide for MFN treatment. Like national treatment provisions, MFN clauses establish a relative standard: they require Indonesia to treat covered investments at least as favourably as it treats comparable investments by investors from third countries. As with its FET provisions, most of the MFN obligations in Indonesia's investment treaties are vague with little guidance on how they are to be interpreted or applied. More specific approaches to MFN provisions could improve predictability for the government, investors and arbitrators alike (Box 4.4).

Box 4.4. Recent approaches to MFN treatment provisions and ISDS for MFN treatment

Recent investment treaty policies and debates over MFN have centred on three key issues outlined below.

MFN clauses and treaty shopping. ISDS arbitral tribunals have frequently interpreted MFN provisions to allow claimants in ISDS cases to engage in "treaty shopping".[15] These interpretations allow claimants to use MFN provisions to "import" provisions from other investment treaties that they consider more favourable than the provision in the treaty under which their case is filed.[16] This can create uncertainty and also dilute the effect of investment treaty reforms. While MFN claims in trade law have centred on domestic law treatment of traders from different countries, most claimant attempts to use MFN in ISDS have sought to use the clause to access other treaty provisions.

Some governments have clarified in recent treaties that MFN provisions cannot be used to engage in treaty shopping at all. Others have limited treaty shopping to the importation of substantive provisions or limited the application of MFN clauses to cases where government measures have been adopted or maintained under the third country treaty. Article 8.7(4) of the Comprehensive Economic and Trade Agreement (CETA) between Canada, the EU and EU Member States, for example, clarifies that "substantive obligations in other international investment treaties do not in themselves constitute 'treatment', and thus cannot give rise to a breach of [the MFN provision], absent measures adopted or maintained by a Party pursuant to those obligations". The CETA also prohibits "treaty shopping" for procedural provisions. The USMCA similarly clarifies that treaty shopping is excluded under its MFN clause for both substantive and procedural matters (Article 14.D.3(1)(a)(i)(A), footnote 22): "For the purposes of this paragraph […] the "treatment" referred to in Article 14.5 (Most-Favoured-Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations".

Comparison criteria in MFN treatment provisions. A second area of interest and government action with regard to MFN treatment provisions involves the determination of what investments or investors are comparable. Many older-style treaties do not provide any specificity on this issue, leaving it to arbitral interpretations in ISDS. Some recent treaties provide that comparability requires "like circumstances". Further clarifications have also been added. For example, some recent clarifications have stated that deciding on whether there are "like circumstances" requires, among other things, consideration of whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.*

Negative lists, carve-outs or conditions. A third area of interest and government action with regard to MFN treatment provisions involves exclusions or limitations. Some recent treaties include negative lists of exclusions from MFN clauses in their investment chapters. Thus, a schedule may specify exceptions to MFN treatment for existing benefits granted under customs unions, other international treaties or specific domestic law schemes.

* See, for example, United States-Mexico-Canada Agreement (2018), Article 14.5(4) ("For greater certainty, whether treatment is accorded in 'like circumstances' under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives"); CPTPP (2018), "Note on Interpretation of 'In Like Circumstances'", https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Other-documents/Interpretation-of-In-Like-Circumstances.pdf (accessed 28 May 2020).

Indonesia has had first-hand experience of treaty shopping using MFN in at least one ISDS case where an arbitral tribunal allowed the claimant to rely on an MFN provision to import a FET provision into the obligations owed by Indonesia under the OIC Investment Agreement (1981) – the only Indonesian investment treaty that does not contain a FET provision.[17]

Some of Indonesia's investment treaties include specifications or restrictions on MFN provisions that reflect these recent treaty practices and debates. ACIA (2009), the ASEAN-China Investment Agreement (2009), the ASEAN-Hong Kong Investment Agreement (2017) and the IA-CEPA (2019) clarify that MFN treatment does not extend to the ISDS provisions in other investment treaties but only the IA-CEPA (2019) expressly addresses the issue of "imports" of substantive clauses from other treaties rather than leaving the issue to arbitral interpretation. Benefits granted under existing customs, economic or monetary unions, double taxation agreements and multilateral investment agreements are excluded from MFN treatment in most Indonesian investment treaties. The Indonesia-Japan Economic Partnership Agreement (EPA) (2007), the ASEAN-Korea Investment Agreement (2009) and the IA-CEPA (2019) are among the few examples of Indonesian treaties that contain negative lists of sectoral exclusions from MFN treatment for investments. Only a few Indonesian treaties require MFN treatment to be assessed with respect to comparable investments, including the OIC Investment Agreement (1981), the Indonesia-Iran BIT (1994) and the Indonesia-Japan EPA (2007), but they do not clarify how this should be done.

At least four of Indonesian investment treaties do not contain an MFN provision: BITs with Tunisia (1992) and Qatar (2000); AANZFTA (2009); and the ASEAN-India Investment Agreement (2014). Some governments have decided to remove MFN provisions from their investment treaties to avoid unintended interpretations of these clauses by arbitral tribunals in ISDS cases.[18]

Indonesian treaties generally do not clarify the notion of indirect expropriation

All of Indonesia's investment treaties contain provisions that protect covered investments from expropriation without compensation. Many of these provisions refer to direct takings of investor property by the government (direct expropriation) as well as other government measures that have effects equivalent to a direct taking without a formal transfer or outright seizure (widely referred to as indirect expropriation). Provisions on indirect expropriation have become the second most frequently invoked basis for claims in ISDS cases after provisions on FET. As with FET and MFN treatment provisions, most of these provisions in Indonesia's treaties and the global sample of investment treaties are vague with little guidance on how to interpret or apply them.

Some governments have begun to introduce a range of clarifications on the scope of indirect expropriation provisions in investment treaties. The first example of such clarifications in the global treaty sample appears in an Exchange of Letters on Expropriation to the Singapore-United States FTA (2003). Clarifications in treaty practice since 2003 fall into four broad categories.

- **Positive definitions** of the concept of "indirect expropriation" that seek to define the treaty parties' understanding of the scope of this concept.[19]
- **Exclusive definitions** for measures that satisfy two of the four classic criteria of direct expropriation, namely non-discriminatory measures adopted in the pursuit of public welfare objectives. Some government have, for example, clarified that certain regulatory measures do not constitute indirect expropriation.[20]
- **Specifications on how the presence of an indirect expropriation is to be determined**. Some government have clarified the factors that should be considered when assessing whether an indirect expropriation has occurred or not.[21]
- **Restrictive provisions regarding assets covered**. Some governments have limited expressly the types of assets that may be subject to indirect expropriation, which in some cases are different from those that may comprise covered "investments" as defined elsewhere in the treaty.[22]

At least one government excludes indirect expropriation altogether from its investment treaties concluded since 2015 through clear language to that effect. This approach remains marginal as of August 2020, however, and limited to Brazil's treaty practice.

None of Indonesia's BITs in force today clarify the scope of indirect expropriation but clarifications appear in several of Indonesia's trade and investment treaties. ACIA (2009) and four ASEAN+ agreements – with Japan (as amended in 2019); Australia/New Zealand (2009), India (2014) and Hong Kong, China (2017) – contain clarifications in each of the four categories mentioned above.[23] The IA-CEPA (2019) also contains clarifications in each of these areas.

Clarifications such as these are likely to improve predictability as to the scope of indirect expropriation and reduce the possibility for unintended interpretations in ISDS cases. They are also likely to continue to feature in debates regarding the balance between investment protections and governments' rights to regulate in investment treaties, including as part of ongoing discussions in the OECD's Investment Committee in this area. The impact of these clarifications may depend, however, on the scope of other provisions in the same treaty such as FET that have often been invoked in ISDS cases as a substitute basis for indirect expropriation claims. It also remains to be seen how arbitrators interpret such provisions as very few investor-state arbitrations have been brought under treaties that contain these features. Diversity in the language used to express these clarifications across the global treaty sample but also in country-specific treaty samples may also affect the way arbitrators interpret these clarifications. Indonesia's trade and investment agreements, for example, address restrictive provisions regarding assets covered in different ways.[24]

There are relatively few specifications or clarifications for investor-state dispute settlement (ISDS) provisions in Indonesia's investment treaties

Many investment treaties allow covered foreign investors to bring claims against host states in investor-state arbitration, in addition or as an alternative to domestic remedies. Investor-state arbitration currently generally involves *ad hoc* arbitration tribunals that adjudicate disputes in an approach derived from international commercial arbitration. ISDS is included in all of Indonesia's BITs in force today, as well as in the OIC Investment Agreement (1981), ACIA (2009) and all of the ASEAN+ agreements.[25]

Recent treaty practice has seen both greater specification of ISDS and, in some cases, replacement of investor-state arbitration with more court-like systems. Treaties like the CPTPP and the EU-Canada CETA are among some recent treaties that have included investor-state arbitration reforms to reduce possible exposure to unintended consequences of ISDS. Common features in these treaties include time limits for claims, possibilities for summary dismissal of unmeritorious claims, mandatory transparency requirements, provisions for non-disputing party participation and the possibility for joint interpretations of the treaty by the state parties that are binding on the arbitral tribunal. The USMCA contains many similar investor-state arbitration reforms but has reduced the scope for ISDS claims to direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for claims under other provisions, such as MST-FET claims. The European Union, which supports the concept of a multilateral investment court, has included court-like dispute settlement in its all its recent investment protection treaties.[26] Brazil's treaties omit ISDS and designate domestic entities ("National Focal Points") to act as an ombudsperson by evaluating investor grievances and proposing solutions to a Joint Committee comprised of government representatives from both states.[27] Under this model, state-state dispute settlement is also available if necessary. South Africa has terminated its BITs with European countries. Domestic legislation governs the claims of foreign investors against the government in domestic courts and provides for the possibility of case-by-case agreement to arbitration.

Indonesia's bilateral trade and investment agreements with Japan and Australia as well as the three ASEAN treaties in force for Indonesia containing ISDS – ACIA, AANZFTA and the ASEAN-Korea Investment Agreement – include some specifications of ISDS reflecting recent treaty practices that address investor-state arbitration reforms. It is understood that Indonesia's most recent BITs concluded in 2018 with Singapore and the United Arab Emirates will also contain similar features in its ISDS provisions, but this BIT is not yet in force and their texts remain confidential as of September 2020.

By contrast, most of Indonesia's BITs in force today regulate ISDS provisions very lightly. Many of Indonesia's investment treaties therefore give claimants and their counsel substantial power over key procedural issues in addition to allowing them to choose when to claim. For example, in ISDS, the appointing authority in a case plays a key role notably because it chooses or influences the choice of the important chair of the typical three-person tribunal (Gaukrodger, 2018). Following NAFTA, many recent treaties provide for a single appointing authority for all cases. Only one Indonesian investment treaty – the Australia-Indonesia BIT (1992) – removes this choice by providing for a single forum for investor-state arbitration. Many other Indonesian treaties give claimants and their counsel a choice between different arbitration institutions at the time they file a claim. This allows them to choose or influence the choice of appointing authority and exacerbates the competition for cases between arbitration institutions (Gaukrodger, 2018). Even under ACIA, investors may decide whether to submit their dispute to domestic courts or tribunals, four arbitration fora specified in the treaty, "any other regional centre for arbitration in ASEAN" or any other arbitration institution that may be agreed by the disputing parties (Article 33(1)).

Multilateral reform efforts for ISDS are underway in the UNCITRAL Commission's Working Group III. Indonesia's written submissions in this process outline the government's main concerns with ISDS including frivolous claims, the threat of claims causing "regulatory chill", inconsistent arbitral interpretations and the overall credibility of the current system for investor-state arbitration (Government of Indonesia, 2018). The government supports a wide range of reforms including the introduction of safeguards to protect the right to regulate in the public interest, mandatory pre-arbitration mediation, establishing guidelines on how arbitrators should assess damages claims and requiring investors to exhaust local remedies. Other possible reforms under consideration (no decisions have yet been reached) include both structural type reforms (a permanent multilateral investment court with government-selected judges or a permanent appellate tribunal) as well as more incremental reforms such as a code of conduct for arbitrators or adjudicators.

Other possible aspects of investment treaty reform

Clearer specification of investment protection provisions would help to reflect government intent and ensure policy space for government regulation

Specifications on key provisions in investment treaties play an important role calibrating the balance between investor protection and governments' right to regulate. In its recent submissions to UNCITRAL Working Group III and after its treaty review process in 2014-2016, the government expressed its desire to identify "a more balanced approach" to BITs in particular and to modernise its existing investment treaties "to include more safeguards in both substantive and ISDS provisions" (Government of Indonesia, 2018; Ministry of Foreign Affairs, 2015). Specifications should reflect policy choices informed by Indonesia's priorities. Policy-makers need to consider the costs and benefits of these choices and their potential impact on foreign and domestic investors, together with Indonesia's legitimate regulatory interests and potential exposure to ISDS claims and damages.

There are a range of techniques that governments can use to affect the balance between the right to regulate and investor protections under investment treaties (Gaukrodger, 2017a). The most obvious technique involves decisions about whether to include or exclude particular provisions, whether to draft them narrowly or broadly, precisely or in vague terms. The most important provisions in this regard are likely to be those most often the focus of alleged breach in investor claims such as the FET provision.

Depending on whether the parties wish to clarify original intent or revise a provision, it may be possible to clarify language through joint interpretations agreed with treaty partners. If revisions, rather than clarifications of original intent is desired, then treaty amendments may be required. These types of government action have been relatively rare in recent years, however, and can require significant time and resources to engage with individual treaty partners. Replacement of older investment treaties by consent – which appears to be the approach Indonesia has taken in respect of its newest BIT with Singapore – may also be appropriate in some cases.

The government's experiences with the COVID-19 pandemic may cause it to recalibrate the appropriate balance between investor protections and the right to regulate. Measures taken by governments to protect their societies and economies during the pandemic affect companies and investors. Investment treaties should be drafted with sufficient precision to provide flexibility for governments to respond effectively to the crisis and to take vital measures such as securing quick access to essential goods and services. While it may be too early to assess the consequences of the pandemic for investment treaty makers, it is likely that experiences with the crisis may refocus government attention on the balance between investor protection and governments' right to regulate, especially in times of crisis (OECD, 2020). Governments have been addressing the balance between investment protection and the right to regulate in investment treaties through analysis and discussion at the OECD (Gaukrodger, 2017a, 2017b).

Investment treaties can be used as tools to liberalise domestic investment regimes

While liberalisation provisions are common features of international trade agreements, they have been much less common in BITs. They have become more frequent components of investment chapters in broader trade and investment treaties like ACIA, the ASEAN+ treaties and Indonesia's bilateral trade and investment agreements. Investment treaties can be used to liberalise investment policy by facilitating the making or establishment of new investments (Pohl, 2018). This can be achieved by extending the national treatment (NT) and MFN treatment standards to investors seeking to make investments (i.e. the pre-establishment phase of an investment) or by expressly prohibiting measures that block or impede market access.[28]

Two BITs and five trade and investment treaties in force for Indonesia today grant so-called pre-establishment NT or MFN treatment, or both, to investors.[29] The provisions are subject to SSDS, like in trade agreements; only two treaties would allow an investor to bring an ISDS claim.[30] Some of the market access obligations in these five treaties are accompanied by certain exclusions and reservations (Box 4.5). Indonesia may wish to consider whether entering into liberalisation obligations aligns with its policy goals when signing new investment treaties in the future.

Box 4.5. Negative and positive list-approaches to NT and MFN exceptions

When countries grant national and/or most-favoured nation treatment, whether pre- or post-establishment, they typically do so subject to exceptions or reservations adopted under one of two different approaches.

A *negative list-approach* typically provides that MFN and NT are granted subject to specific exceptions or reservations (negative lists) that are often contained in detailed annexes to the treaty. Article 9 of the ASEAN-Korea Investment Agreement, for example, provides that the governments may adopt and maintain measures in certain sectors that do not confirm with the MFN and NT provisions and identify sectors in a Schedule of Reservations for which they wish to reserve full policy space.

A *positive-list approach* involves limiting the application of MFN and NT liberalisation provisions to specific identified sectors (positive lists). Article 3(3) of ACIA is an example of a positive list. Generally, the negative list-approach is seen as more conducive to investment liberalisation particularly over time. New areas of economic activity are not covered by negative lists.

Addressing the unique approach to claims for reflective loss in ISDS

Indonesia should continue to engage in multilateral fora such as at the OECD and UNCITRAL to develop proposals to address the unique approach to claims for shareholders' reflective loss in ISDS. Shareholders incur reflective loss if a company in which they hold shares suffers a loss that results, in turn, in the shareholders suffering a commensurate loss, typically a loss in value of the shares. In contrast to the approach of domestic laws in many countries, many investment treaties have been interpreted to allow ISDS claims by covered shareholders for losses incurred by companies in which they own shares.

Governments have been considering these issues at the OECD since 2013 (OECD, 2016; Gaukrodger, 2014a, 2014b, 2013; Summary of 19th FOI Roundtable, October 2013, pp. 12-19; Summary of 18th FOI Roundtable, March 2013, pp. 4-9). Ongoing discussions at UNCITRAL's Working Group III on ISDS Reform are considering possible reforms to address these issues, which were underlined in a recent UNCITRAL Secretariat note (UNCITRAL, 2019d). At the request of the Working Group, these discussions are being conducted jointly with the OECD. Given that the current approach towards reflective loss in ISDS provides claimants with exceptional benefits and greatly expands the number of actual and potential ISDS cases, however, only government-led reform is likely to address the issues.

Opportunities for investment treaties to address investor responsibilities

The OECD Investment Committee is currently considering how trade and investment treaties can affect business responsibilities including through their impact on policy space for governments, their provisions that buttress domestic law or its enforcement, or their provisions that directly address business by, for example, encouraging observance of responsible business conduct (RBC) standards (Gaukrodger, 2020). Ongoing work will take account of input received during an OECD public consultation on this topic in January-February 2020.

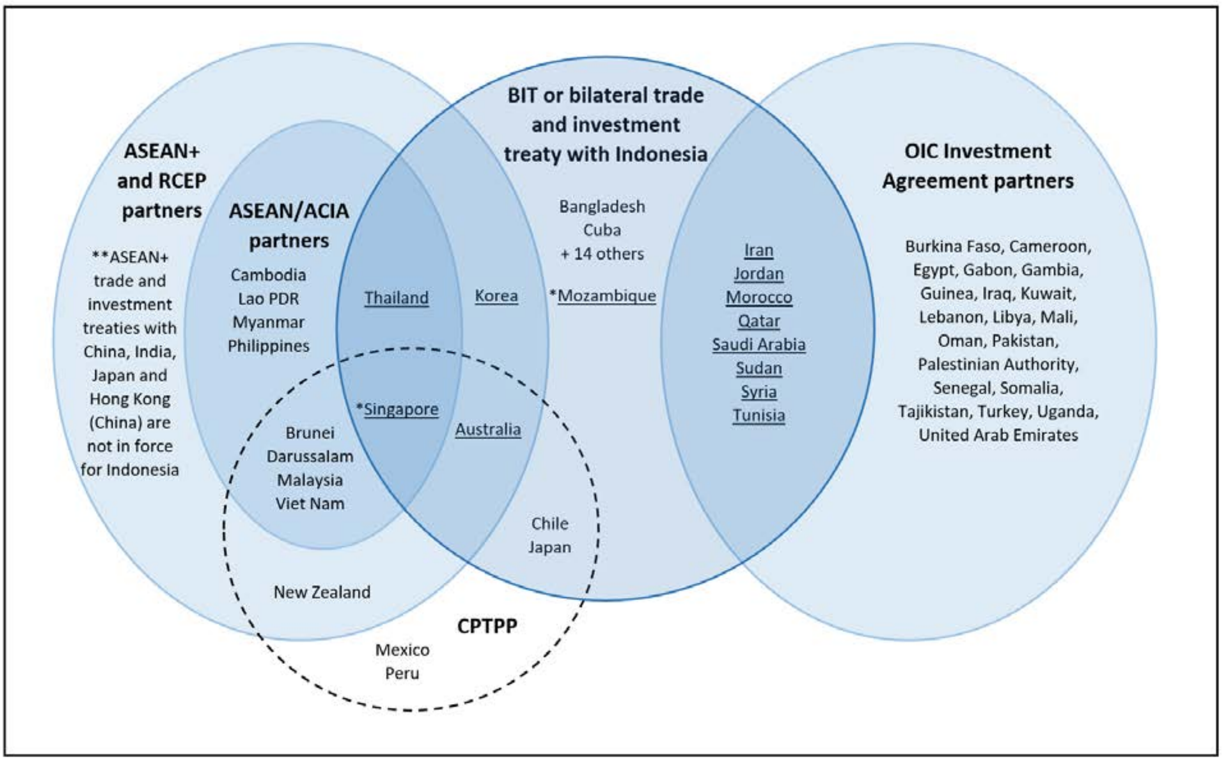
None of Indonesia's BITs in force makes express references to business and human rights or RBC-related objectives but several references appear in its trade and investment treaties. Some of these treaties contain language establishing that non-discriminatory environmental measures taken in order to protect public welfare objectives do not constitute indirect expropriation or language aimed at preserving space for policy-making in areas important to RBC.[31] Others clarify the parties' understanding that it is inappropriate to encourage investment by relaxing environmental or health measures,[32] reaffirm the importance of encouraging companies to respect corporate social responsibility norms,[33] or exclude investments procured by corruption from the scope of ISDS.[34] These provisions vary in terms of scope and level of generality; some are binding on arbitral tribunals in ISDS or SSDS but others may not be. Indonesia's recent trade agreements, including with Chile (2017), contain other provisions regarding inter-governmental cooperation on issues relating to global value chains as well as environmental and labour issues.

Investment treaties concluded by some other governments impose obligations on investors to uphold human rights and maintain an environmental management system;[35] exclude the possibility for ISDS in relation to government measures relating to the treaty's environmental and labour provisions;[36] refer to the parties' commitments to implement international standards related to RBC;[37] and recognise that investments should contribute to the economic development of the host state[38] (Gordon et. al., 2014). Some of Indonesia's treaties also stipulate expressly that only investments made in accordance with host state laws will be protected under the treaty (see, e.g., Denmark-Indonesia BIT (2007), Article 1(1)). Such requirements may incentivise investors to respect domestic law obligations by conditioning access to treaty protections on compliance.

Evaluating overlaps between investment treaties

Indonesia has two or more investment treaties in force with eleven countries – eight of its OIC partners (Iran, Jordan, Morocco, Qatar, Saudi Arabia, Sudan, Syria and Tunisia), two ASEAN+ partners (Australia and Korea) and one ASEAN partner (Thailand). This list may soon include Singapore and Mozambique if the government ratifies new treaties with these partners signed in 2018 and 2019, respectively. ASEAN countries and five ASEAN+ partners are also part of RCEP (see Figure 4.3).

Figure 4.3. Overview of Indonesia's overlapping investment treaty relationships in force today



Note: This figure includes the Parties to the Comprehensive and Progressive Trans-Pacific Partnership Agreement (2018) (CPTPP), which is marked with the dashed line for illustrative purposes only. As of October 2020, Indonesia is not a party to the CPTPP but the government has expressed interest in becoming a party in the future. Underlined text in this figure denotes countries that have two or more investment treaties in force with Indonesia. Only OIC counties that have signed and ratified the OIC Investment Agreement (1981) based on publicly available information are included in this figure.
*If Indonesia ratifies the Indonesia-Singapore BIT (2018) and Indonesia-Mozambique Free Trade Agreement (2019) as expected in the near future.
Source: OECD Secretariat based on OECD investment treaty database.

Overlapping investment treaties that apply to investments by investors from the same country may raise some policy concerns. As a general matter, Indonesia should strive to minimise inefficient inconsistencies between international obligations entered into with different countries. Investors from countries with two or more treaties in force may be able to rely on more favourably-worded provisions in Indonesia's older BITs in their dealings with the government or in ISDS disputes. This approach could also potentially undermine reform efforts in some of Indonesia's newer treaties if investors can circumvent newer, more nuanced investment treaties by relying on older BITs that are still in force.

Any significant differences between Indonesia's BITs, ACIA and the ASEAN+ agreements are also unlikely to contribute to the goals of ASEAN member states in strengthening common rules on investment protection and liberalisation at a regional level. While Indonesia recently terminated older BITs with Cambodia, Lao PDR, Malaysia and Viet Nam, an older BIT with Thailand is still in force concurrently with ACIA and a new BIT concluded with Singapore may soon be in force. Indonesia may wish to engage with these treaty partners to review whether their respective international obligations reflect current priorities.

Depending on whether the parties wish to clarify original intent or revise a provision, it may be possible to clarify language through joint interpretations agreed with treaty partners. If revisions, rather than clarifications of original intent are desired, then treaty amendments may be required. Where new treaties are concluded, some governments have included provisions in new treaties regarding the replacement of older treaties in force between them and transitional arrangements (see, e.g., USMCA, preamble, Annex 14-C, Article 34.1; EU-Canada CETA, Article 30.8, Annex 30-A). Others have exchanged side letters alongside the new treaty to replace or clarify the status of the older treaty (see, e.g. side letters between Indonesia and Australia in February 2020 regarding the replacement of their BIT with the AI-CEPA and side letters between various parties to the CPTPP). Relationship clauses such as Article 1.3 of the IA-CEPA (2019), which envisage consultations between the treaty parties where one of them considers that the new treaty is inconsistent with an existing treaty commitment between them, may help to clarify some issues with overlapping treaties. However, they do not preclude covered investors from relying on provisions in older BITs that remain in force concurrently with newer treaties.

Despite the concerns that may arise with overlapping treaties, some governments may consider that they need to provide certain extra incentives or guarantees to some treaty partners over others in order to attract FDI. This may be because they expect that investors from those countries are less likely to invest their capital in the absence of such treatment or assess that the broader benefits associated with attracting FDI from those countries are particularly lucrative. Some governments may also consider that similar provisions in different treaties, while framed differently, are likely to be interpreted in a consistent way. The balance between these interests and assessments is a delicate one and may evolve over time.

Evaluating overlaps between investment treaties and domestic law

The scope of investor protections and obligations under Indonesia's domestic laws and its investment treaties overlap in some respects. Some overlaps appear to give rise to inconsistencies in approach. The 2007 Investment Law does not contain guarantees of post-establishment non-discrimination and FET that appear in Indonesia's investment treaties. Likewise, the protection from expropriation is narrower under domestic law than under many of Indonesia's investment treaties. In terms of dispute resolution, many of Indonesia's investment treaties provide the government's consent to investor-state arbitration which is not provided under domestic laws. Investment contracts that the government enters into with specific investors could create an additional layer of contractual rights and obligations for specific investors.

Differences between the domestic laws on investor protection and investment treaties may create more favourable legal regimes that apply to some investors and not others based on their nationality. It may also prompt some investors to structure their investments through a company in one of Indonesia's treaty partner countries to seek to benefit from treaty protections and/or treaty-based ISDS if they perceive these to be more favourable than protections and dispute resolution options under domestic laws. The government may therefore wish to conduct a gap analysis between domestic laws on investor protection and investment treaty provisions to consider the implications of any differences and ensure that these different regimes continue to reflect the government's current priorities.

Developing approaches to prevention of ISDS claims and ISDS case management

Indonesia may wish to prioritise the development of strategies for prevention and early settlement of investment-related disputes and its approach to case management of ISDS cases. Whatever approach the government adopts towards international investment agreements, complementary measures can help to ensure that treaties are consistent with domestic priorities and reduce the risk of disputes leading to international arbitration. The government has recently proposed that UNCITRAL's Working Group III should consider reforms relating to mandatory pre-arbitration mediation as a means to prevent investment disputes from escalating into a costly and unnecessary legal dispute (Government of Indonesia, 2018).

Aside from participating in inter-governmental fora on these topics, the government may wish to consider taking certain steps at a domestic level. In terms of dispute prevention, it may be worth exploring options to build awareness within government ministries, agencies and local or sub-national government entities regarding Indonesia's obligations under investment treaties and the potential impact that government decisions may have on investor rights under these treaties. Internal written guidelines or a handbook could be a useful way to disseminate this information and encourage continuity of institutional knowledge as personnel changes occur over time.

Indonesia may also wish to consider drawing on examples of institutional frameworks for the prevention of investment disputes in other countries. At a domestic level, some countries, such as Colombia and Peru, have adopted comprehensive legislative and regulatory frameworks to encourage the early detection and resolution of investment disputes (OECD, 2018b; Joubin-Bret, 2015). Other countries, such as Chile, have opted for an informal prevention system where sectoral agencies directly manage disputes with investors. Some governments have reported successful outcomes with inter-ministerial committees established to advise line agencies on investor grievances, propose strategies for reforming investment treaty policy and domestic legal frameworks for investment protection, and supervise the government's defence of ISDS cases. As noted above, Brazil does not include ISDS in its investment treaties but instead establishes with each treaty partner a Focal Point or ombudsman within each government to address investor grievances, with a Joint Committee of government representatives to oversee the administration of the agreement. Korea has also had a successful track-record of early dispute resolution with its Foreign Investment Ombudsman since it was established in 1999 (Nicolas, Thomsen and Bang, 2013).

The government may also wish to explore ways to share and learn from its experiences with ISDS and those of other governments. Several states that have been frequent respondents in ISDS cases – including Argentina, Spain, the United States, Canada and Mexico – have developed dedicated teams of government lawyers to advise the government on investment disputes and investment treaty policy. Nurturing an internal expertise to evaluate investor claims candidly before a legal dispute arises can be an important step in preventing a protracted and costly legal process.

Procedural considerations: exit and renegotiation

A growing number of countries like Indonesia are considering ways to replace, update or exit older investment treaties that no longer reflect governments' current priorities. Review and renegotiation of investment treaties takes time, however, and the option to terminate a treaty is not necessarily available at any moment, as the relevant provisions on temporal validity in the treaty may place limits on exit options (Box 4.6). The government assessed a number of issues related to temporal validity as part of its review of existing BITs in 2014-2016 (Ministry of Foreign Affairs, 2015).

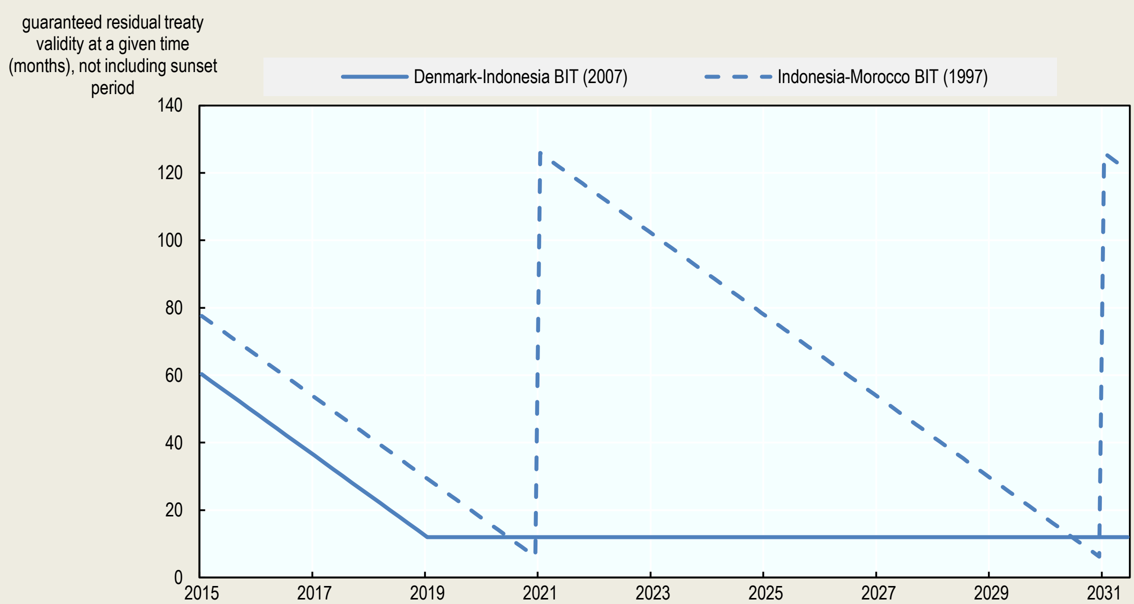
Many Indonesian investment treaties in force today contain temporal validity provisions that will operate to delay possibilities for unilateral exit from the treaty. Most of Indonesia's investment treaties contain an initial validity period of between five and 15 years; eight treaties have no initial validity period. Nineteen of Indonesia's investment treaties in force today provide for an automatic renewal period after the period of initial validity and allow either treaty party to denounce the treaty within 6 or 12 months (depending on the treaty) of the expiry of the renewed period. Treaties that renew for fixed terms require more monitoring, as they limit the possibilities to update or unilaterally end the agreement. If no termination occurs in the defined notice period, the treaty automatically renews for the agreed period, thereby committing Indonesia to these treaties for a further 15 years in some cases before the next opportunity to terminate the treaty will arise.

Box 4.6. Designs of temporal validity provisions in investment treaties

Unlike most international treaties, which can be denounced at relatively short notice, investment treaties typically contain clauses that extend their temporal validity for significant periods of time. Three designs can be found, often cumulatively in the same agreement: First, most investment treaties set and initial validity period of often 10 years or more, counting from the treaty's entry into force; after that period, many treaties only allow states parties to denounce the treaty at the end of specific intervals of often 10 years or more; finally, treaty obligations almost universally continue to apply for a sunset period after the termination of the treaty, again for periods of typically 10 years or more. Many treaties thus bind the states parties for at least two decades, and in some extreme cases for up to 50 years.

Treaty designs that automatically extend the validity of the treaty for fixed terms are included in around 30% of the global treaty stock, but this design is used less frequently in recent times. This design tends to prolong the period for which states parties are bound without granting additional benefits in terms of predictability for investors: on the contrary, the oscillating residual treaty validity is hard to predict without detailed study (see illustrative comparison in the figure below).

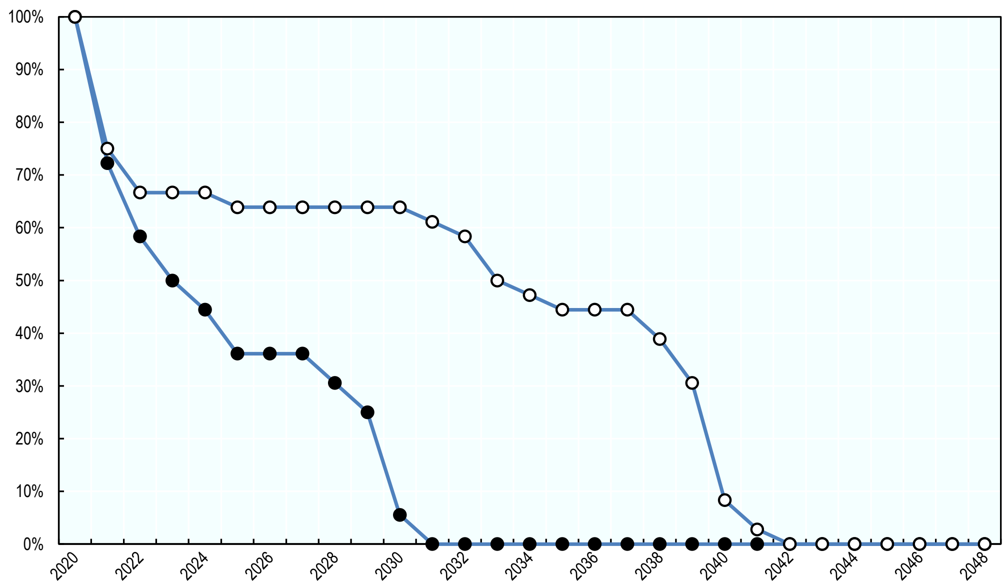
Figure 4.4. Different approaches to residual treaty validity



Note: Adapted from OECD work on temporal validity of investment treaties (Pohl, 2013).
Source: Calculations based on OECD investment treaty database.

Even if Indonesia were to terminate unilaterally some or all of its treaties, almost all will continue to apply for a survival period of at least 10 years or more in the majority of cases. These provisions are often intended to provide a measure of legal certainty for investors who frequently make long-term capital commitments in the host country. This situation may leave the government potentially exposed to ISDS claims for alleged breaches of obligations far beyond the termination date. As a hypothetical example to illustrate the possible effects of these clauses, as of October 2020 the earliest occasion that Indonesia could unilaterally withdraw from all of its investment treaties is 2030 (taking into account the automatic renewal periods in some treaties) and the effects of post-termination sunset periods could last under 2041 even if appropriate actions were started today (Figure 4.5). Treaty partners may be able to agree mutually to replace or exit an older treaty in such a way that the survival provisions no longer apply, as happened for the Argentina-Indonesia BIT (1995).

Figure 4.5. Projection of the temporal validity of Indonesia's investment treaties



Note: Projections based on a hypothetical scenario of unilateral denunciation of all treaties in the available sample at the earliest possible occasion as of October 2020.
Source: Calculations based on OECD investment treaty database.

Unilateral action is not the only option to update or address older investment treaties but the impact of temporal validity provisions may influence how treaty amendments or agreed exits can be negotiated with treaty partners, especially if the renewal period is imminent. Indonesia may therefore wish to consider whether the current design of its temporal validity provisions can serve its interests in discussions with treaty partners. The process of updating Indonesia's model BIT may also be an appropriate place to reassess the government's approach to temporal validity in its investment treaties.

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Annex 4.A. Summary of Indonesia's investment treaties

Annex Table 4.A.1. Bilateral investment treaties – in force

No	Treaty partner	Date of signature	Date of entry into force
1	Bangladesh	09/02/1998	22/04/1999
2	Cuba	19/09/1997	29/09/1999
3	Czech Republic	17/09/1998	21/06/1999
4	Denmark	22/01/2007	15/10/2009
5	Finland	12/09/2006	02/08/2008
6	Iran	22/06/2005	28/03/2009
7	Jordan	12/11/1996	09/02/1999
8	Korea	16/02/1991	10/03/1994
9	Mauritius	05/03/1997	28/03/2000
10	Mongolia	04/03/1997	13/04/1999
11	Morocco	14/03/1997	20/03/2002
12	Mozambique	26/03/1999	25/07/2000
13	Poland	07/10/1992	01/07/1993
14	Qatar	18/04/2000	17/02/2018
15	Russian Federation	06/09/2007	15/10/2009
16	Saudi Arabia	15/09/2003	05/07/2004
17	Sri Lanka	10/06/1996	21/07/1997
18	Sudan	10/02/1998	17/08/2002
19	Sweden	17/09/1992	18/02/1993
20	Syria	27/06/1997	20/02/1999
21	Thailand	17/02/1998	30/10/1998 or 05/11/1988[39]
22	Tunisia	13/05/1992	04/06/1993 or 12/09/1992
23	Turkmenistan	02/06/1994	20/10/1999
24	Ukraine	11/04/1996	22/06/1997
25	Uzbekistan	27/08/1996	27/04/1997
26	Venezuela	18/12/2000	23/03/2003

Annex Table 4.A.2. Bilateral investment treaties – terminated

No	Treaty partner	Date of signature	Date of entry into force	Effective date of termination	Type of termination
1	Argentina	07/11/1995	01/03/2001	19/10/2016	Mutual consent
2	Australia	17/11/1992	29/07/1993	06/08/2020	Replaced by new treaty
3	Belgium	15/01/1970	17/06/1972	16/06/2002	Expired
4	Bulgaria	13/09/2003	23/01/2005	25/01/2015	Unilaterally denounced
5	Cambodia	16/03/1999	21/09/2000	07/01/2016	Unilaterally denounced
6	China	18/11/1994	01/04/1995	31/03/2015	Unilaterally denounced
7	Denmark	30/01/1968	02/07/1968	15/10/2009	Replaced by new treaty
8	Egypt	19/01/1994	29/11/1994	30/11/2014	Unilaterally denounced

No	Treaty partner	Date of signature	Date of entry into force	Effective date of termination	Type of termination
9	Finland	13/03/1996	07/06/1997	02/08/2008	Replaced by new treaty
10	France	14/06/1973	29/04/1975	25/04/2015	Unilaterally denounced
11	Germany	08/11/1968	19/04/1971	02/06/2007	Replaced by new treaty
12	Germany	14/05/2003	02/06/2007	01/06/2017	Unilaterally denounced by Indonesia
13	Hungary	20/05/1992	13/02/1996	12/02/2016	Unilaterally denounced
14	India	08/02/1999	22/01/2004	22/03/2017[40]	Unilaterally denounced
15	Italy	25/04/1991	25/06/1995	23/06/2015	Unilaterally denounced
16	Kyrgyzstan	19/07/1995	23/04/1997	18/02/2018	Unilaterally terminated
17	Lao PDR	18/10/1994	14/10/1995	13/10/2015	Unilaterally denounced
18	Malaysia	22/01/1994	27/10/1999	20/06/2015	Unilaterally denounced
19	Netherlands	07/07/1968	17/07/1971	01/07/1995	Replaced by new treaty
20	Netherlands	06/04/1994	01/07/1995	30/06/2015	Unilaterally denounced
21	Norway	26/11/1969	-	01/10/1994	Replaced by new treaty
22	Norway	26/11/1991	01/10/1994	30/09/2004	Unilaterally denounced
23	Pakistan	08/03/1996	03/12/1996	02/12/2016	Unilaterally denounced
24	Romania[41]	27/06/1997	21/08/1999	07/01/2016	Unilaterally denounced
25	Singapore	28/08/1990	28/08/1990	20/06/2006	Replaced by new treaty
26	Singapore	16/02/2005	21/06/2006	20/06/2016	Unilaterally denounced
27	Slovakia	12/07/1994	01/03/1995	28/02/2015	Unilaterally denounced
28	Spain	30/05/1995	18/12/1996	11/11/2016[42]	Unilaterally denounced
29	Switzerland	06/06/1974	09/04/1976	08/04/2016	Unilaterally denounced
30	Turkey	25/02/1997	28/09/1998	07/01/2016	Unilaterally denounced
31	United Kingdom	27/04/1976	24/03/1977	23/03/2017	Unilaterally denounced
32	Viet Nam	25/10/1991	03/04/1994	07/01/2016	Unilaterally denounced

Annex Table 4.A.3. Bilateral investment treaties – signed but not in force

No	Treaty partner	Date of signature	Date of entry into force
1	Algeria	21/03/2000	-
2	Chile	07/04/1999	-
3	Croatia	10/09/2002	-
4	Democratic People’s Republic of Korea	21/02/2000	-
5	Guyana	30/01/2008	-
6	Jamaica	10/02/1999	-
7	Libya	04/04/2009	-
8	Philippines	12/11/2001	-
9	Serbia	06/09/2011	-
10	Singapore	11/10/2018	-
11	Sudan	10/02/1998	-
12	Suriname	28/10/1995	-
13	Tajikistan	28/10/2003	-
14	Turkmenistan	02/06/1994	-
15	Yemen	20/02/1998	-
16	Zimbabwe	08/02/1999	-

Annex Table 4.A.4. Trade agreements containing investment protections, investment liberalisation provisions and/or ISDS

No	Treaty	Date of signature for Indonesia	Date of entry into force	Date of entry into force for Indonesia
1	Regional Comprehensive Economic Partnership	15/11/2020	-	-
2	Indonesia-Mozambique Free Trade Agreement	27/08/2019	-	-
3	Australia-Indonesia Comprehensive Economic Partnership Agreement	04/03/2019	10/02/2020	05/07/2020
4	First Protocol to the ASEAN-Japan Economic Partnership Agreement (including provisions on investment protection)	27/02/2019 (Japan); March and April 2019 (ASEAN members)	01/08/2020	-
5	ASEAN-Hong Kong, China SAR Investment Agreement	18/05/2018	17/06/2019	-
6	Chile-Indonesia Comprehensive Economic Partnership Agreement	15/12/2017	10/08/2019	10/08/2019
7	ASEAN-India Investment Agreement	12/11/2014	01/07/2015	-
8	ASEAN-China Investment Agreement	15/08/2009	01/01/2010	-
9	ASEAN-Korea Investment Agreement	02/06/2009	01/09/2009	20/05/2010
10	ASEAN-Australia-New Zealand Free Trade Agreement	27/02/2009	01/01/2010	08/01/2012
11	ASEAN Comprehensive Investment Agreement	26/02/2009	24/02/2012	24/02/2012
12	ASEAN-Japan Economic Partnership Agreement	28/03/2008	01/12/2008	-
13	Indonesia-Japan Economic Partnership Agreement	20/08/2007	01/07/2008	01/07/2008
14	ASEAN Investment Agreement	15/12/1987	02/08/1988 (terminated and replaced by ACIA on 24/02/2012)	02/08/1988 (terminated and replaced by ACIA on 24/02/2012)
15	Organisation of the Islamic Conference Investment Agreement	01/05/1983 (first signed by other countries on 05/06/1981)	25/02/1988	25/02/1988

Notes

1 See Bank Indonesia Regulation No. 16/21/PBI/2014 on the Implementation of Prudential Principles in Managing Offshore Borrowings by Non-Bank Corporations (Regulation 16/21); Bank Indonesia Regulation No. 16/22/PBI/2014 on the Reports of Foreign Exchange Traffic Activities and the Prudential Principles Implementation Report in Managing Offshore Loan for Non-Bank Corporation (as amended) (Regulation 16/22); Bank Indonesia Circular Letter 17/18/DKEM of 2015 on the Implementation of Prudential Principles in Managing Offshore Borrowings by Non-Bank Corporations; Bank Indonesia Regulation No. 17/3/PBI/2015 on Mandatory Use of Rupiah Within the Territory of the Republic of Indonesia (PBI 17/2015).

2 These treaties include the Berne Convention for the Protection of Literary and Artistic Works (in 1997), the Paris Convention for the Protection of Industrial Property (in 1950), the Patent Cooperation Treaty (in 1997), the Patent Co-operation Treaty (in 1997), the Trademark Law Treaty (in 1994), the WIPO Copyright treaty (in 1996), the WIPO Performances and Phonograms Treaty (in 1996), the Nairobi Treaty on the Protection of the Olympic Symbol (in 1981), the Madrid Protocol Concerning the International Registration

of Marks (in 2017) and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (in 2013).

3 The cost dimension of the indicator on contract enforcement refers to average cost of court fees, attorney fees (where the use of attorneys is mandatory or common) and enforcement fees expressed as a percentage of the claim value. The time take to resolve a dispute is counted from the moment the plaintiff decides to file the lawsuit in court until payment, and covers both the days when actions take place and the waiting periods in between. The quality of judicial processes index measures whether each economy has adopted a series of good practices in its court system in four areas: court structure and proceedings, case management, court automation and alternative dispute resolution. For more information on the methodology, please refer to the World Bank's Doing Business website at: https://www.doingbusiness.org/.

4 Financial Services Authority (OJK) Regulation 1/POJK.07/2013, Article 31; Bank Indonesia Regulation 18/40/PBI/2016, Article 25; Law 36/2009 Concerning Health, Article 57; Law 36/1999 Concerning Telecommunications, Article 40.

5 See, for other recent examples, EU-Canada CETA, Articles 13.15(2), 28.3(2); CPTPP, Chapter 14; IA-CEPA, Chapter 13, Article 17.2(3); USMCA, Chapter 19, Article 32.8. The EU's proposals in May 2020 for the modernisation of the Energy Charter Treaty (available at https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf) include a proposal to exclude non-discriminatory regulation in the area of "privacy and data protection" from the scope of indirect expropriation.

6 Indonesia-Japan Economic Partnership Agreement (2007); Australia-Indonesia Comprehensive Economic Partnership Agreement (2019). A bilateral trade agreement with Chile (2017) does not contain an investment chapter but the parties agreed to continue their negotiations regarding a future possible investment chapter. Similarly, the Indonesia-EFTA Comprehensive Economic Partnership Agreement (2018) and the Indonesia-Pakistan Preferential Trade Agreement (2012) do not contain investment provisions. The text of a trade agreement signed between Indonesia and Mozambique in August 2019 is not publicly available as of May 2020; it is unknown whether this treaty addresses investment issues. Indonesia has signed several other bilateral treaties relating to investment cooperation that do not contain investment protections or ISDS. These include an Economic Partnership Agreement between Indonesia and the EFTA States (2018); various framework agreements, including with the European Economic Community (1980) and several ASEAN+ partners; memoranda of understanding on investment cooperation and/or promotion, including with Australia, Belgium, Brazil, China, Ecuador, Korea, Malaysia, Mongolia, Morocco, Philippines, Poland, Portugal, Qatar, Russia, Saudi Arabia, Turkey, the United Arab Emirates and the United Kingdom; a foreign investment insurance agreement with Canada (1973); and an investment support agreement with the United States (2010).

7 Hashem Al Mehdar (1), Mohamed Al Mehdar (2), Badr Al Mehdar (3) and Betoul Al Mehdar (4) v Egypt (ad hoc, four separate cases filed in 2014); Hesham Talaat M. Al-Warraq v Republic of Indonesia (ad hoc, UNCITRAL, final award rendered in December 2014); Kontinental Conseil Ingénierie v. Gabonese Republic (ad hoc, UNCITRAL, final award rendered in 2017); D.S. Construction FZCO v Libya (ad hoc, UNCITRAL, claim filed in October 2016); Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v Republic of Iraq (ICSID Case No. ARB/17/10, final award rendered in April 2020); Omar Bin Sulaiman v Sultanate of Oman (ad hoc, UNCITRAL, claim filed in 2017); beIN Corporation v Kingdom of Saudia Arabia (ad hoc, UNCITRAL, claim filed in October 2018); Trasta Energy Ltd v Libya (ad hoc, UNCITRAL, claim filed in January 2019); Members of Gargour Family v Libya (ad hoc, tribunal constituted in late 2019); Navodaya Trading DMCC v Gabonese Republic (ad hoc, UNCITRAL, claim filed in 2018); Hilal Hussain Al-Tuwairqi and other v Pakistan (ad hoc, claim filed in 2018, jurisdictional hearing held in 2019).

8 The coverage is assessed based on FDI stock data (2017 or, where 2017 data was unavailable, data of preceding years, giving preference to more recent data, based on data released by OECD and IMF) and investment treaties in force in September 2019. For several reasons, reported FDI stock data is not a valid measure for assets that benefit from treaty protections (Pohl, 2018) and available data does not allow to determine ultimate ownership of assets. The proportions of FDI stock data may nonetheless serve as a rough approximation of stock held by the immediate investing country to illustrate features and outcomes of Indonesia's past investment treaty policies.

9 See Cemex Asia Holdings Ltd. v. Republic of Indonesia (ICSID Case No. ARB/04/3); Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13); Churchill Mining Plc and Planet Mining Pty Ltd., formerly ARB/12/14 v. Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40); Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15); Oleovest Pte. Ltd. v. Republic of Indonesia (ICSID Case No. ARB/16/26); Hesham Talaat M. Al-Warraq v. The Republic of Indonesia (ad hoc, UNCITRAL); Indian Metals & Ferro Alloys Ltd. v. Republic of Indonesia (PCA Case No. 2015-40). The discussion here refers only to known claims. Under many Indonesian investment treaties, claimants can often select arbitration rules under which claims must remain confidential. Governments also can prefer individual claims to remain confidential. The number of actual ISDS claims against Indonesia may be higher on account of confidential pending cases. While there are no publicly-known ISDS cases involving Indonesian nationals investing abroad, one contract-based arbitration case is known to exist in which the provincial government of East Kalimantan brought unsuccessful claims under the ICSID Convention against Australian and British investors operating a coal mining project through an Indonesian joint venture company: see Government of the Province of East Kalimantan v. PT Kaltim Prima Coal, Rio Tinto plc, B.P. plc, Pacific ReSources Investments Limited, B.P. International Limited, Sangatta Holdings Limited and Kalimantan Coal Limited (ICSID Case No. ARB/07/3), Award on Jurisdiction, 28 December 2009.

10 Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1) (a first case was filed in 1981 followed by a resubmitted case filed in 1987 after the arbitral award in the first case was annulled by an ad hoc ICSID annulment committee in 1986).

11 The OIC Investment Agreement (1981) does not contain a FET provision.

12 Although the text is not publicly available at the time of writing, it is understood that the Indonesia-Singapore BIT (2018) will contain a similar FET provision to these ASEAN+ treaties.

13 For example, Indonesia's BITs with Bangladesh (1998), Cuba (1997), Jordan (1996) and Korea (1991).

14 Gaukrodger, D. (2016) (reviewing the applicable law on joint interpretations of investment treaties without express provisions on the issue); Gordon, K. and Pohl, J. (2015). For a recent example of a joint interpretation, see the Joint Interpretative Declaration between Columbia and India (2018) regarding the Columbia-India BIT (2009).

15 Treaty shopping is a phrase used broadly herein to describe the power for a beneficial owner of an investment to choose between investment treaties or between provisions of different investment treaties. See further detail on treaty shopping below.

16 For a recent discussion of the uncertainty surrounding the interpretation of MFN clauses in ISDS, see Batifort, S. and Benton Heath, J. (2018) "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", American Journal of International Law, Volume 111, Issue 4 (October 2017), pp. 873-913.

17 Hesham Talaat M. Al-Warraq v Republic of Indonesia (ad hoc, UNCITRAL), Final Award, 15 December 2014, paras 540-555.

18 India omitted MFN from its 2015 model BIT in response to what it considered was an unduly expansive interpretation of an MFN provision by an arbitral tribunal. In the White Industries case, the arbitral tribunal allowed the investor to import an “effective means” clause from a third-party treaty via the MFN clause in the India-Australia BIT with no analysis of how it considered the relevant MFN clause to operate: White Industries Australia Limited v. Republic of India, UNCITRAL, ad hoc, Final Award, 30 November 2011, paras 11.2.1-11.2.9.

19 See, for example, the Australia-Indonesia CEPA (2019), Annex 14-B: Expropriation and Compensation: “2. Article 14.11.1 of this Chapter addresses two situations: (…) 2. the second situation is where an action or series of related actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”

20 See, for example, the USMCA (2018), Annex 14-B: “(b) Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances”.

21 See, for example, the Canada-EU CETA (2016), Annex 8-A: “2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors: (a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (b) the duration of the measure or series of measures of a Party; (c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and (d) the character of the measure or series of measures, notably their object, context and intent”.

22 See, for example, Australia-Indonesia CEPA (2019), Annex 14-B: Expropriation and Compensation: “1. An action or a series of related actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in a covered investment”.

23 The ASEAN-Korea Investment Agreement (2009), which has been in force for Indonesia since 2010, does not contain include these clarifications although the parties agreed to conduct further negotiations regarding an additional annex on expropriation and compensation (see Article 27 of the agreement).

24 For example, the first protocol to the ASEAN-Japan EPA (as amended in 2019) and the IA-CEPA (2019) provide that indirect expropriation can only arise where “an action or a series of related actions by a Party … interferes with a tangible or intangible property right or property interest in a covered investment” (emphasis added) while the ASEAN-India Investment Agreement (2014) refers only to interference with a “tangible or intangible property right”.

25 The treaty Parties to the ASEAN-Hong Kong (China) Investment Agreement (AHKIA) have not yet agreed on an ISDS mechanism but have scheduled this item for discussion as part of their ongoing Work Programme under the treaty. See AHKIA, Article 20.

26 See EU-Canada CETA (2016); EU-Singapore Investment Protection Agreement (2018); EU-Mexico Agreement (2018); EU-Viet Nam Investment Protection Agreement (2019).

27 See, for example, Brazil-Chile FTA (2018), Article 15; Brazil-Angola BIT (2015), Article 15.

28 See, for example, EU-Canada CETA (2016), Article 8.4; EU-Vietnam FTA (2018), Article 8.4.

29 Finland-Indonesia BIT (2006), Articles 3(1), 3(2); Denmark-Indonesia BIT (2007), Articles 3(1), 3(2); Indonesia-Japan EPA (2007), Articles 58(g), 59, 60; ACIA (2009), Articles 3(3), 5, 6; ASEAN-Korea Investment Agreement (2009), Articles 3, 4; AANZFTA (2009), Chapter 11, Article 4; IA-CEPA (2019), Article 14.5.

30 Japan-Indonesia EPA (2007); IA-CEPA (2019). ACIA, AANZFTA and the ASEAN-Korea Investment Agreement exclude pre-establishment NT and MFN from the scope of the ISDS provisions in those agreements by allowing claims to be brought by investors only in relation to loss or damage suffered “with respect to the management, conduct, operation or sale or other disposition” of a covered investment (c.f. admission or establishment): see ACIA, Article 32(a); ASEAN-Korea Investment Agreement, Article 18(1); AANZFTA, Chapter 11, Article 20(a). Indonesia’s BITs with Denmark and Finland arguably exclude pre-establishment claims by limiting the scope of ISDS disputes to those “arising directly from an investment”, i.e. the post-establishment phase of an investment.

31 See, for example, AANZFTA (2009); ACIA (2009), Article 17 and Annex 2; ASEAN-Korea Investment Agreement (2009), Article 20; IA-CEPA (2019), Articles 14.6, 14.16 and Annex 14-B.

32 Indonesia-Japan EPA (2007), Article 74.

33 IA-CEPA(2019), Article 14.17.

34 IA-CEPA(2019), Article 14.21.

35 Morocco-Nigeria BIT (2016), Article 18.

36 See, e.g., Belgium/Luxembourg-Colombia BIT (2009), Articles VII(5) and VIII(4).

37 See, e.g., Chile-United States FTA (2003), Article 18.1. The trade agreement between Indonesia and the EFTA states signed in 2018 refers to the UN 2030 Agenda for Sustainable Development.

38 See, e.g. China-Peru FTA (2009), which states in the preamble that the State Parties “RECOGNIZE that this Agreement should be implemented with a view toward raising the standard of living, creating new employment opportunities, reducing poverty and […]”.

39 There is a discrepancy between the date listed in the Ministry of Foreign Affair’s treaty database (30/10/1998) and the date listed in the treaty database maintained by Thailand’s Ministry of Foreign Affairs (05/11/1988).

40 The termination date for the India-Indonesia BIT has been reported as 7 April 2016 in some third-party websites. India’s Department of Economic Affairs states that the termination date was 22 March 2017 (https://dea.gov.in/bipa?page=2, accessed on 11 May 2020).

41 The Romania-Indonesia BIT (1997) was amended by an additional protocol signed between the parties in Bucharest on 7 December 2005.

42 Third-party treaty databases list the date of termination for the Indonesia-Spain BIT as either 11 November 2016 or 18 December 2016.

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