Melbourne Law School, Global Economic Law Network
Professor Andrew D Mitchell | Professor Tania Voon

Indonesia-Australia Comprehensive Economic Partnership Agreement

Submission to the Joint Standing Committee on Treaties

2 August 2019

Table of Contents

Disclosure and Acknowledgments

This submission arises from independent research and contains the authors' own views as academics. It does not necessarily reflect the views of any past or current employer or other entity. We thank Drs Jarrod Hepburn and Esmé Shirlow for helpful responses on Twitter. Any errors are ours.

Global Economic Law Network

This submission was prepared by members of the Global Economic Law Network ('GELN'), a Research Centre at Melbourne Law School, the University of Melbourne. GELN activities include holding workshops and seminars and encouraging research and collaboration in GELN's focus areas, which include international trade law, international investment law, international finance law, and international arbitration.

The aims and objectives of GELN are to:

- provide a venue for academics and those working in GELN's focus areas to keep abreast of new developments in their fields;
- encourage closer dialogue between academics, practitioners and government in relation to GELN's focus areas;
- provide training and capacity building services to governments and other bodies in GELN's focus areas;
- provide a regular forum for policy and scholarly discussion of GELN's focus areas; and
- facilitate research collaboration amongst academics and other interested groups on international economic law.

Executive Summary

We encourage the Australian government to reach agreement with Indonesia to terminate their pre-existing bilateral investment treaty upon entry into force of their new preferential trade agreement. We also urge the Australian government to include an explicit indication in that agreement as to the impact of the termination of the bilateral investment treaty on any rights, obligations and claims under that treaty, particularly in view of its survival clause. The preferred approach would be to agree to terminate the survival clause along with the agreement itself, reaching a new agreement on a shorter period in which final treaty claims could be made with respect to breaches arising before termination.

Treaty Termination by Agreement as a Means of Reform

1. Along with some other countries, Australia has on several occasions agreed with its treaty partners to terminate older bilateral investment treaties ('BITs') upon entry into force of newer such treaties or preferential trade agreements ('PTAs') containing investment chapters. The termination of older treaties is a valuable way of reforming investment treaty obligations, as Australia's treaty practice and drafting become more sophisticated and better aligned with public policy and the national interest. Australia has taken this approach, for example, in the following instances:

   a) Australia and Chile agreed to terminate their 1999 BIT[1] upon entry into force of their 2009 PTA.[2]

   b) Australia agreed to terminate its BITs with Mexico,[3] Peru,[4] and Viet Nam[5] upon entry into force of the 11-country *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('CPTPP'), signed in 2018.[6]

   c) Australia and Peru also agreed to terminate their 1997 BIT[7] upon entry into force of their PTA signed in 2018.[8]

   d) Australia and Hong Kong agreed to terminate their 1993 BIT[9] upon entry into force of their PTA[10] and associated investment agreement[11] (both signed in 2019).

   e) Australia and Uruguay agreed to terminate their original 2002 BIT[12] upon entry into force of an updated BIT signed in 2019.[13]

[1] *Agreement between the Government of Australia and the Government of the Republic of Chile on the Reciprocal Promotion and Protection of Investments*, signed 9 July 1996 (entered into force 18 November 1999, terminated 6 March 2009).
[2] *Australia–Chile Free Trade Agreement*, signed 30 July 2008 (entered into force 6 March 2009) annex 10–E.
[3] *Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments*, signed 23 August 2005 (entered into force 21 July 2007, terminated 30 December 2018). See exchange of letters between Australian Minister for Trade, Tourism and Investment and Mexican Secretary of Economy (8 March 2018); exchange of letters between Australian Minister for Trade and Investment and Mexican Minister of Economy (4 February 2016).
[4] *Agreement between Australia and the Republic of Peru on the Promotion and Protection of Investments*, signed 7 December 1995 (entered into force 2 February 1997). See exchange of letters between Australian Minister for Trade, Tourism and Investment and Peruvian Minister of Foreign Trade and Tourism (8 March 2018); exchange of letters between Australian Minister for Trade and Investment and Peruvian Minister of Foreign Affairs (29 January 2016/4 February 2016).
[5] *Agreement between Australia and the Socialist Republic of Vietnam on the Reciprocal Promotion and Protection of Investments*, signed 5 March 1991 (entered into force 11 September 1991, terminated 14 January 2019). See exchange of letters between Australian Minister for Trade, Tourism and Investment and Vietnamese Minister of Industry and Trade (8 March 2018); exchange of letters between Australian Minister for Trade and Investment and Vietnamese Minister of Industry and Trade (4 February 2016).
[6] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (signed 8 March 2018, entered into force for Australia, Canada, Japan, Mexico, New Zealand and Singapore on 30 December 2018 and for Viet Nam on 14 January 2019; not yet in force for Brunei Darussalam, Chile, Malaysia or Peru) ('CPTPP').
[7] Exchange of letters between Australian Minister for Trade, Tourism and Investment and Peruvian Minister of Foreign Affairs (26 January 2018/5 February 2018).
[8] *Peru–Australia Free Trade Agreement*, signed 12 February 2018 (not yet in force).
[9] *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, signed 15 September 1993 (entered into force 15 October 1993).
[10] *Australia–Hong Kong Free Trade Agreement* (signed 26 March 2019, not yet in force).
[11] *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China* (signed 26 March 2019, not yet in force) art 40.2.
[12] *Agreement between Australia and Uruguay on the Promotion and Protection of Investments*, signed 3 September 2001 (entered into force 12 December 2002).
[13] *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019 (not yet in force) art 17.5.

Importance of Terminating the Australia–Indonesia BIT

2. The negotiation of the *Indonesia–Australia Comprehensive Economic Partnership Agreement* ('IA–CEPA') provides an important opportunity to terminate the pre-existing BIT between Australia and Indonesia.[14] We encourage the Australian government to continue to pursue termination of such treaties as a means of promoting and implementing reform of the investment treaty regime in general, and in the Australian context in particular. Although the negotiations towards the IA–CEPA have concluded, Australia and Indonesia could still agree to terminate the Australia–Indonesia BIT upon entry into force of the IA–CEPA without re-opening the text of the IA–CEPA. Such an agreement could be reached, for example, by means of a 'side letter', as Australia has done in the past as indicated above, and alongside other side letters already exchanged in conjunction with the IA–CEPA.

3. The termination of the Australia–Indonesia BIT in conjunction with the IA–CEPA is particularly important for several reasons:

   a) The IA–CEPA and the Australia–Indonesia BIT both contain an investor–State dispute settlement ('ISDS') mechanism, which enables Indonesians investing in Australia to bring claims against Australia (and vice versa) with respect to the treatment of their investments.[15] For example, under either treaty, an Indonesian investor could allege that Australian government regulation has effectively expropriated[16] their investment or violated the fair and equitable treatment ('FET') standard.[17] However, the IA–CEPA contains much more modern provisions than the Australia–Indonesia BIT. For example, the IA–CEPA clarifies the scope of obligations concerning expropriation[18] and FET[19] and includes exceptions for regulation to promote non-economic objectives such as public health.[20] The Australia–Indonesia BIT is an older style treaty lacking such explicit protections for Australian policy space. ISDS reforms in the IA–CEPA—such as with respect to security for costs,[21] frivolous claims,[22] and denial of benefits[23]—may similarly provide an incentive for an investor to bring a claim under the Australia–Indonesia BIT rather than the IA–CEPA. The continued operation of the Australia–Indonesia BIT increases the risk of an ISDS claim against Australia and the risk of such a claim succeeding.

   b) Indonesia unsuccessfully complained against Australia in the World Trade Organization ('WTO') dispute settlement system with respect to Australia's tobacco plain packaging measure.[24] The tobacco industry supported and promoted this WTO complaint.[25] Tobacco control and other public health measures are examples of regulations that might be challenged by investors through ISDS claims in international investment agreements such as the Australia–Indonesia BIT. Indeed, Australia's tobacco plain packaging measure was unsuccessfully challenged by Philip Morris Asia Ltd pursuant to the ISDS mechanism in the Australia–Hong Kong BIT,[26] an 'old-style' treaty (comparable to the Australia–Indonesia BIT).

---

[14] *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments* (signed 17 November 1992, entered into force 29 July 1993) ('Australia–Indonesia BIT').
[15] Australia–Indonesia BIT art XI; IA–CEPA ch 14 s B.
[16] Australia–Indonesia BIT art VI; IA–CEPA art 14.11.
[17] Australia–Indonesia BIT art II:2; IA–CEPA art 14.7.
[18] IA–CEPA art 14.11; annex 14–B.
[19] IA–CEPA art 14.7.
[20] See, eg, IA–CEPA arts 14.6.6, 14.16, 14.21; annex 14–B, [4].
[21] IA–CEPA art 14.28.
[22] IA–CEPA art 14.21.1(d).
[23] IA–CEPA art 14.13.
[24] Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS467/R (circulated 28 June 2018, adopted 27 August 2018).
[25] See, eg, Christopher Thompson, 'Big Tobacco Backs Australian Law Opposers' (29 April 2012) *Financial Times*; Dessy Sagita, 'Indonesian Tobacco Lobby Criticized Over Australian Plain Packaging Challenge' (24 September 2013) *Jakarta Globe*.
[26] *Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments*, 15 September 1993 (entered into force 15 October 1993).

c) The States parties to a BIT can agree to terminate the BIT by agreement with each other. However, if an investor has already initiated an ISDS claim under the BIT before the termination, the treaty obligations may continue to apply with respect to that claim.[27]

d) The existence of overlapping investment treaties complicates Australia's compliance with these treaties and makes it harder to understand the nature and scope of Australia's investment obligations and harder to predict the outcome of an ISDS claim alleging breach of these obligations. For example, when Australia and China concluded a preferential trade agreement including an investment chapter,[28] the countries chose to allow their pre-existing BIT to remain in force.[29] That BIT arguably exposes Australia to a wider range of ISDS challenges than China because of the way it is drafted.[30] Like the Australia–Indonesia BIT, the Australia–China BIT contains traditional investment obligations without more modern clarifications and exceptions to enhance sovereign regulatory autonomy.

e) The overlapping nature of the IA–CEPA and the Australia–Indonesia BIT is exacerbated by the preferential trade agreement already in force between Australia, New Zealand, and the ten Member States of the Association of Southeast Asian Nations ('ASEAN'), including Indonesia.[31] This treaty, known as AANZFTA, entered into force in 2010 and was amended in 2015.[32] Although it is a relatively modern treaty, it lacks certain clarifications included in the investment provisions of the IA–CEPA, for example in relation to the national treatment obligation[33] and the FET standard.[34] AANZFTA also lacks certain procedural requirements for ISDS under IA–CEPA, for example regarding transparency of arbitral proceedings,[35] third party funding,[36] and arbitrators' conduct.[37] Unlike AANZFTA, IA–CEPA also explicitly excludes ISDS claims 'in relation to a measure that is designed and implemented to protect or promote public health', including Australia's Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration, and Office of the Gene Technology Regulator.[38]

f) This complex treaty structure allowing ISDS under the Australia–Indonesia BIT, AANZFTA and IA–CEPA may be further complicated if Indonesia joins the CPTPP, as media reports suggest it is interested in doing.[39] That agreement provides a mechanism for additional countries to accede to it[40] and also includes an ISDS mechanism,[41] except (pursuant to side letters) as between Australia and New Zealand[42] and New Zealand and Peru.[43] In addition, Indonesia and Australia are both part

[27] See Tania Voon, Andrew D Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) *ICSID Review: Foreign Investment Law Journal* 451.
[28] *Free Trade Agreement between Australia and the People's Republic of China*, signed 17 June 2015 (entered into force 20 December 2015).
[29] *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, signed 11 July 1988 (entered into force 11 July 1988).
[30] See Tania Voon and Elizabeth Sheargold, 'Australia, China, and the CoExistence of Successive International Investment Agreements' in Colin Picker, Heng Wang and Weihuan Zhou (eds), *The China Australia Free Trade Agreement: A 21st Century Model* (Hart Publishing, 2018) 215.
[31] *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009 (entered into force for Australia, New Zealand, Brunei, Burma, Malaysia, the Philippines, Singapore and Viet Nam on 1 January 2010, for Thailand on 12 March 2010, for Laos on 1 January 2011, for Cambodia on 4 January 2011, and for Indonesia on 10 January 2012).
[32] *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014 (entered into force 1 October 2015).
[33] IA–CEPA art 14.4; cf AANZFTA art 4.
[34] IA–CEPA art 14.7.4.
[35] IA–CEPA art 14.31.
[36] IA–CEPA art 14.32.
[37] IA–CEPA annex 14–A.
[38] IA–CEPA art 14.21.1(b) and n 21.
[39] See, eg, Malcolm Cook, 'The CPTPP is Looking Like Good News For East Asia' (4 January 2019) *South China Morning Post*.
[40] CPTPP art 5.
[41] CPTPP ch 9 s B.
[42] Exchange of letters between New Zealand Minister for Trade and Export Growth and Australian Minister for Trade, Tourism and Investment (8 March 2018) [3]–[4].
[43] Exchange of letters between Peruvian Minister of Foreign Trade and Tourism and New Zealand Minister for Trade and Export Growth (8 March 2018).

of the ongoing negotiations towards a *Regional Comprehensive Economic Partnership Agreement* (RCEP),[44] which is also reported to include an ISDS mechanism.

4. One arbitral tribunal hearing an Australian investor's claim under the Australia–Indonesia BIT concluded that the two States parties have not provided advance consent to arbitration pursuant to the ICSID Convention[45] under the BIT.[46] That tribunal nevertheless found jurisdiction on the basis of Indonesia's consent to arbitration through the granting of certain approvals to the investor.[47] As no binding precedent exists in ISDS, another tribunal interpreting the Australia–Indonesia BIT could reach a different conclusion, finding that Australia and Indonesia have provided advance consent to ICSID arbitration in the treaty itself. Some commentators suggest that is the correct interpretation of the wording of the treaty.[48] The tribunal's underlying decision regarding jurisdiction therefore does not mean that Australia faces no risk of a successful ISDS claim under the Australia–Indonesia BIT.

5. It is possible that some aspects of the Australia–Indonesia BIT contain greater protection to Australian investors, just as the Australia–Indonesia BIT in general may provide greater protections to investors and less scope for sovereign regulatory autonomy to the two States parties in comparison to the IA–CEPA. Specifically with respect to Australian investors, for example, the Australia–Indonesia BIT defines an Australian investor to include any permanent resident of Australia,[49] whereas the IA–CEPA protects only Australian permanent residents who have the nationality of a country that already has an investment agreement or preferential trade agreement with an investment chapter in force with Indonesia, at least with respect to the non-discrimination obligations of national treatment and most-favoured-nation treatment.[50] The potential for the Australia–Indonesia BIT to provide some additional protections to some Australian permanent residents compared to the IA–CEPA does not justify leaving both treaties in force at the same time, particularly given the substantive and procedural investment reforms contained in the later agreement. To the extent that the IA–CEPA reflects the two countries' current understanding, allowing previous outdated understandings to continue will unnecessarily increase uncertainty and risk.

Terminating the Survival Clause

6. Like many BITs, the Australia–Indonesia BIT contains a 'survival clause':

> In respect of investments made prior to the date of termination of this Agreement, the provisions of the Agreement shall continue to be effective for a further period of fifteen years from the date of termination of the Agreement.[51]

7. In the absence of amendment of this provision, an investor could arguably still bring an ISDS claim (and either State could also bring a claim against the other State) alleging breach of the original agreement for 15 years after its termination, whether by unilateral notice[52] or mutual decision to terminate. Such a claim could allege a breach occurring either before or after termination. To avoid this extension of the original agreement, Australia and Indonesia would need to clarify their intention regarding the survival clause in

[44] RCEP will cover the ten ASEAN Member States and the six additional States that have PTAs with ASEAN: Australia, China, India, Japan, New Zealand, and the Republic of Korea. See https://dfat.gov.au/trade/agreements/negotiations/rcep/Pages/regional-comprehensive-economic-partnership.aspx.
[45] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('ICSID Convention').
[46] *Planet Mining Pty Ltd v Indonesia*, ICSID Case No ARB/12/14, ARB/12/40, Decision on Jurisdiction (24 February 2014) [198].
[47] Ibid [217]–[218]. See also *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia*, ICSID Case No ARB/12/14, ARB/12/40, Award (6 December 2016); *Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia*, ICSID Case No ARB/12/14, ARB/12/40, Decision on Annulment (11 March 2019).
[48] See, eg, Luke Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor–State Arbitration? Analysis of Planet Mining v Indonesia and Regional Implications' (2015) 12(1) *Transnational Dispute Management* (online) 3, 5–6.
[49] Australia–Indonesia BIT art I:1(b)(ii)(A).
[50] IA–CEPA annex I (Indonesian schedule) s B [4].
[51] Australia–Indonesia BIT art XV:2.
[52] Australia–Indonesia BIT art XV:1.

terminating the agreement. In its previous agreements to terminate BITs, Australia has taken different approaches to this issue, as shown in the table below.

8. These different approaches to ISDS claims and survival periods have different implications for investments made before termination of the original BIT. Allowing the BIT to continue with respect to existing investments after termination means a State might bring a claim alleging a treaty breach with respect to such investments. Allowing ISDS claims to be brought after termination with respect to breaches arising before termination provides for the possibility that an investor might become aware of such a breach only after termination. If the breach occurred before entry into force of the new investment treaty, the new treaty may not provide a remedy for it.

9. The approach in the new Uruguay BIT is not ideal because it lacks clarity as to when or whether additional claims can be brought following termination of the original BIT, leaving such questions to be answered by other areas of international law[53] such as rules of customary international law, general principles of law, or the *Vienna Convention on the Law of Treaties*.[54]

10. The approach in the new Hong Kong BIT is probably the clearest, but it does not appear to allow for the possibility of an investor (or a State party) becoming aware only after termination of the original BIT of a treaty breach that arose before termination. The Hong Kong approach usefully refers to rights and obligations arising from the original BIT, rather than stating only that the new termination provisions 'supersede' the 'termination provisions' in the relevant provision of the original BIT, which might arguably not include the survival clause.

11. The approach to Australia's BITs with Chile, Peru and Viet Nam provides for the BITs to remain in force for a longer period than the period (three years from termination) in which ISDS claims may be brought. The longer period of survival is five years in the case of Peru and Viet Nam and apparently indefinite in the case of Chile. During those longer periods, State–State claims might be brought alleging breach of the original BIT before termination, with respect to investments made before termination. In comparison, the approach to the Mexico BIT is more straightforward, apparently aligning the period in which ISDS claims may be brought with the period in which State–State claims may be brought (both three years from termination).

12. As indicated in the table below, we suggest that Australia and Indonesia consider adopting an approach combining the clear termination of the survival clause (as in the Hong Kong approach) with a limited additional period (eg three years from termination) for ISDS or State–State claims to be brought with respect to alleged breaches arising before termination (as in the Mexican approach).

[53] See Tania Voon and Andrew D Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2016) 31(2) *ICSID Review: Foreign Investment Law Journal* 413. See also Tania Voon and Andrew D Mitchell, 'Ending International Investment Agreements: Russia's Withdrawal from Participation in the Energy Charter Treaty' (2017) 111 *AJIL Unbound* 461.

[54] *Vienna Convention on the Law of* Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

Original Australian BIT with …	Original Survival Clause	Reference to Survival Clause in Agreement to Terminate	Reference to Claims in Agreement to Terminate
Chile	15 years: art 12.3	Agreement to terminate amends art 12. BIT continues to apply to any investment made before entry into force of new PTA, with respect to any act, fact or situation originating before entry into force of new PTA.	ISDS claims under BIT may be made for only three years from entry into force of new PTA.
Mexico	10 years: art 24.3	Agreement to terminate supersedes 'the provisions for termination' in art 24. Survival period reduced to three years for investments made before CPTPP entry into force, with respect to any act or fact that took place or situation that existed before termination.	ISDS claims under BIT may be made for only three years from termination and only with respect to any act or fact that took place or situation that existed before termination.
Peru	15 years: art 16.3	Agreements to terminate supersede 'the provisions for termination' in art 16. Survival period reduced to five years for investments made before CPTPP/PAFTA entry into force, with respect to any act or fact that took place or situation that existed before termination.[55]	ISDS claims under BIT may be made for only three years from termination.
Viet Nam	15 years: art 15.3	Agreement to terminate supersedes 'the provisions for termination' in art 15. Survival period reduced to five years for investments made before CPTPP entry into force, with respect to any act or fact that took place or situation that existed before termination.	ISDS claims under BIT may be made for only three years from termination and only with respect to any act or fact that took place or situation that existed before termination.
Hong Kong	15 years: art 14.4	Upon termination, any rights or obligations arising from the BIT,	Termination does not affect ISDS (or State–

[55] The CPTPP side letter (of 8 March 2018) applies if PAFTA and its related side letter have not already entered into force when the CPTPP enters into force for both Australia and Peru.

		including art 14, cease to have effect.	State) claims already notified in writing.
Uruguay	15 years: art 15.3	Agreement to terminate supersedes 'the provisions for termination' in art 15.	No explicit mention.
Indonesia	15 years: art XV:2	*We propose*: Hong Kong approach above.	*We propose*: ISDS and State–State claims under BIT may be made for only [three] years from termination and only with respect to any act or fact that took place or situation that existed before termination.

Treatment of Survival Clauses and ISDS Claims in Australia's Agreements to Terminate BITs

Global Economic Law Network, Melbourne Law School, The University of Melbourne, Victoria 3010, Australia