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INVESTOR STATE DISPUTE RESOLUTION AND IA CEPA – DIFFERENT TREATMENT FOR DIFFERENT STATES?[1][2][3][4][5]

INTRODUCTION

Protection for foreign investors is an important part of any investment treaty.

Essential to the protection of foreign investors is having a credible mechanism for resolving disputes between foreign investors and the host country if and when such disputes arise.

The Comprehensive Economic Partnership Agreement between Indonesia and Australia (commonly known as "**IA-CEPA**") came into force on 10 February 2020.

IA-CEPA seems to envisage potentially different dispute resolution mechanisms depending upon whether it is Indonesia or Australia which is at the centre of a dispute with investors/services providers. More particularly, it is possible to read IA-CEPA as insulating Indonesia, in most cases, from the risk of international arbitration by aggrieved Australian investors/services providers while still leaving Australia to face international arbitration by aggrieved Indonesian investors/services providers.

In this article, the writer will initially review the IA-CEPA investor-state dispute resolution mechanism and how this mechanism may differ depending upon whether it is Indonesia or Australia which is at the centre of a dispute with investors/services providers. The writer will then consider the important practical issue of whether or not insulating Indonesia, in most cases, from the risk of international arbitration by aggrieved Australian investors/services providers is likely to adversely affect the willingness of Australian investors/services providers to prioritize Indonesia as a desirable investment destination.

BACKGROUND

Australia previously had a bi-lateral investment treaty with Indonesia in the form of the 1993 Agreement between the Government of Australia and the Government of Indonesia ("**GoI**") re the Promotion and Protection of Investments ("**1993 A-I Investment Treaty**").

The 1993 A-I Investment Treaty was one of the more than sixty bi-lateral investment treaties to which Indonesia was and, in many cases, still is a party ("**Investment Treaties**").

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[5] An earlier version of this article appeared in the October - November 2020 edition of Coal Asia Magazine.

There are significant variations in wording as between the different Investment Treaties and that wording has changed over time. However, the Investment Treaties generally guarantee basic investor protections or rights of (i) fair and equitable treatment, (ii) most favored nation status, (iii) security and protection, (iv) no expropriation or nationalization without market value compensation and (v) free repatriation of capital and profits.

The Investment Treaties also invariably give a relevant investor, which believes its promised protections and rights have been denied by the host country/state, **the right to ultimately choose (in its absolute discretion)** whether to pursue **either domestic dispute resolution before the judicial or administrative bodies of the host country/state or international arbitration against the host country/state under the auspices of the International Centre for the Settlement of Investment Disputes ("ICSID")**. **No distinction is drawn between host countries/states when it comes to the right of a relevant investor to pursue international arbitration if it so chooses**.

GoI announced, in 2014, that it would terminate all the Investment Treaties at the earliest possible opportunity.

Although the 1993 A-I Investment Treaty was originally meant to remain in force until 2023, it has now been terminated by agreement between Indonesia and Australia.

GoI's objections (both stated and actual) to the Investment Treaties, including to the 1993 A-I Investment Treaty, were reviewed at length by the author in his earlier article "*No More Bi-Lateral Investment Treaties – Has the Queen of Hearts Made a Comeback?*" which appeared in the April – May 2014 issue of Coal Asia Magazine. **In essence, GoI's objections come down to it being subject to international arbitration by foreign investors, something that GoI regards, rather curiously, as being an affront to and inconsistent with Indonesian sovereignty**.

IA-CEPA is a landmark agreement which (i) goes far beyond the scope of the 1993 A-I Investment Treaty and (ii) covers numerous issues of importance for facilitating greater economic co-operation between Indonesia and Australia. Some only of the issues covered by IA-CEPA include eliminating or at least substantially reducing tariffs on goods and non-tariff measures as well as preventing the introduction of new barriers to trade, overcoming technical barriers to trade and providing various protections for investors and services providers.

Section A of Chapter 14 of IA-CEPA provides for investor/services provider protections/rights similar to but not identical with the investor protections/rights in the now terminated 1993 A-I Investment Treaty ("**IA-CEPA Investor/Services Provider Protections**").

Readers interested in knowing more about the IA-CEPA Investor/Services Provider Protections are referred to the writer's earlier article "*New Reality for Foreign Investors – Lessons from IA-CEPA*" which appeared in the April – May 2019 issue of Coal Asia Magazine.

Section B of Chapter 14 of IA-CEPA sets out the investor-host country/state dispute resolution mechanism that applies if an investor/services provider believes that it has been denied its IA-CEPA Investor/Services Provider Protections by Indonesia or Australia ("**IA-CEPA Investor-State Dispute Resolution Mechanism**").

The IA-CEPA Investor/Services Provider Protections **and the IA-CEPA Investor-State Dispute Resolution Mechanism** currently only apply to Australian investors/services providers in Indonesia and to Indonesian investors/services providers in Australia. GoI has, however, made it very clear that Indonesia will **not** renew or extend any of the Investment Treaties but, rather, will replace the same with new agreements more consistent with the "interests of Indonesia". Accordingly, it is very likely then that the IA-CEPA Investor/Services Provider Protections **and the IA-CEPA Investor-State Dispute Resolution Mechanism** will eventually become part of the "template" for the replacement agreements offered to all countries with which Indonesia currently has Investment Treaties.

Having regard to the above, the IA-CEPA Investor/Services Provider Protections **and the IA-CEPA Investor-State Dispute Resolution Mechanism** are very relevant to and should be studied closely not only by Australian investors/services providers in Indonesia but also by other foreign investors/services providers in Indonesia and which come from countries having Investment Treaties with Indonesia. This is particularly the case for foreign investors/services providers in the Indonesian energy, infrastructure and mining sectors given that these are sectors of the Indonesian economy in which foreign investors/services providers all too frequently encounter problems.

ANALYSIS AND DISCUSSION

1. IA-CEPA Investor-State Dispute Resolution Mechanism

1.1 **Overview**: A cursory review of Section B of Article 14 of IA-CEPA might suggest that the IA-CEPA Investor-State Dispute Resolution Mechanism is more or less the same as the dispute resolution mechanism in the Investment Treaties although it is "spelled out" in much greater detail in IA-CEPA than it is in the Investment Treaties. **However, a closer analysis of Section B of Article 14 of IA-CEPA reveals some very significant and potentially concerning differences between IA-CEPA and the Investment Treaties when it comes to investor – host country/state dispute settlement**.

Section B of Article 14 of IA-CEPA is also poorly drafted in places, something which can and does lead to uncertainty as to just how the IA-CEPA Investor-State Dispute Resolution Mechanism is intended to work including whether or not the IA-CEPA Investor-State Dispute Resolution Mechanism applies to investors only or to both investors and services providers. This is very much to be regretted as these drafting issues are almost certainly going to lead to problems if and when investors/services providers start to invoke the IA-CEPA Investor-State Dispute Resolution Mechanism.

For the purposes of what follows, the writer will assume that the IA-CEPA Investor-State Dispute Resolution Mechanism applies to both investors and services providers.

1.2 **Relevant Disputes**: An investor/services provider can only invoke the IA-CEPA Investor-State Dispute Resolution Mechanism in the case of a "relevant dispute" with the host country/state. A "relevant dispute" is a dispute concerning an alleged breach by the host country/state of an obligation the host country/state owes to the investor/services provider in respect of the IA-CEPA Investor/Services Provider Protections and (ii) which alleged breach has caused loss or damage to the "covered

investment" of the investor/services provider (Article 14.20 of IA-CEPA).

1.3 **Consultation**: Similar to the Investment Treaties, the first stage of the IA-CEPA Investor-State Dispute Resolution Mechanism is consultation between the investor/services provider and the host country/state (Article 14.22 of IA-CEPA).

The investor/services provider must initiate the consultation process by making a request in writing to the host country/state.

Once initiated, the investor/services provider must (i) allow the consultation process to run for at least 180 days before it can move to the next stage of submitting a claim against the host country/state and (ii) give the host country/state at least 90 days' notice of its intention to submit a claim (Article 14.26(2)(a) of IA-CEPA).

The conciliation process is the same regardless of whether it is Indonesia or Australia which is the host country/state at the centre of the dispute with an investor/services provider.

1.4 **Conciliation**: If the dispute cannot be resolved through consultation, within 180 days of the host country/state receiving a request for consultation from the investor/services provider, the host country/state may initiate a conciliation process which is mandatory for the investor/services provider to participate in (Article 14.23 of IA-CEPA).

"Conciliation" is a so-called "alternative dispute resolution process" whereby the investor/services provider and the host country/state seek to resolve the dispute with the help of a third party who has no power to decide the merits of the dispute but is simply involved to help facilitate the voluntary resolution of the dispute by the investor/services provider and the host country/state.

It is important to note that only the host country/state can initiate conciliation. Conciliation **cannot** be initiated by the investor/services provider.

The cost of the conciliation process is to be borne equally by the host country/state and the investor/services provider even though the investor/services provider has **no** right to decline conciliation.

Once initiated by the host country/state, the investor/services provider must (i) allow the conciliation process to run for at least 120 days before it can move to the next stage of submitting a claim against the host country/state and (ii) give the host country/state at least 60 days' notice of its intention to submit a claim (Article 14.26(2)(b) of IA-CEPA).

The conciliation stage is **not** part of the Investment Treaties and effectively enables the host country/state to delay the investor/services provider from proceeding to submit a claim against it for a further 120 days in addition to the minimum of 180 days that must be given over to consultation.

The conciliation process is the same regardless of whether it is Indonesia or Australia which is the host country/state at the centre of the dispute with an investor/services provider.

1.5 **Claim by Investor/Services Provider**: If the dispute has **not** been settled by consultation or conciliation, then the investor/services provider may submit a claim against the host country/state to a designated dispute resolution forum with the power to finally decide the dispute so long as the dispute relates to the alleged breach by the host country/state of **some but not all** the IA-CEPA Investor/Services Provider Protections (Article 14.24(a)(i) of IA-CEPA). It is **not** clear what is meant to happen if the unresolved dispute relates to an alleged breach of the one IA-CEPA Investor/Services Provider Protection not mentioned in Article 14.24(a)(i) of IA-CEPA.

Article 14.24(a) of IA-CEPA provides that the claim may be submitted to "arbitration". The simple reader might quite reasonably assume that this use of the word "arbitration" must mean that **all** relevant disputes will be finally resolved by an arbitrator/arbitrator panel in accordance with recognized rules of arbitration. It seems, however, this assumption is **not** necessarily correct in all cases and regardless of the identity of the host country/state at the centre of the relevant dispute. **It is at this critical juncture that the IA-CEPA Investor-State Dispute Resolution Mechanism may well differ very materially from the dispute resolution mechanism under the Investment Treaties and depending upon whether the host country/state at the centre of the dispute with an investor/services provider is Indonesia or Australia**.

1.6 **Place for Submission/Determination of Claim**: Article 14.25(1) of IA-CEPA provides that:

"*A disputing investor may submit a claim referred to in Article 14.24 to one of the following fora:*

(a) ***if Indonesia is the disputing Party****, to the* ***courts or tribunals*** *of that Party, provided that such court or tribunal has jurisdiction over such claim;*

(b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings;

(c) under the ICSID Additional Facility Rules;

(d) under the UNCITRAL Arbitration Rules; or

(e) *if the disputing parties agree, to any other arbitration institution or under any other arbitration rules*."

The writer has chosen to set out the above provision in full because this is, very arguably, the single most important provision of Section B of Article 14 of IA-CEPA and its interpretation will determine whether or not the IA-CEPA Investor-State Dispute Resolution Mechanism meets the likely minimum expectations and needs of Australian investors/services providers when it comes to how any relevant disputes they have with Indonesia will be finally resolved if consultation and conciliation otherwise fail to resolve the dispute.

It must be readily acknowledged that Article 14.25(1) of IA-CEPA is (i) particularly poorly drafted (even by the overall poor drafting standard of Section B of Article 14 of

IA-CEPA as a whole), (ii) confusing, (iii) not easy to interpret and (iv) open to different interpretations. It is also important to remember that Article 14.25(1) of IA-CEPA is meant to deal with **both** (x**)** the designated forum for finally resolving relevant disputes between Australian investors/services providers and Indonesia **and** (y) the designated forum for finally resolving relevant disputes between Indonesian investors/services providers and Australia. Accordingly, the drafters of IA-CEPA have unwisely tried to cover both situations in a single provision which was definitely the wrong approach. If, as seems to be the case, the intention is to treat different host countries/states differently, when it comes to the final resolution of relevant disputes that cannot otherwise be settled by consultation and conciliation, it would have been very much preferable for the drafters to have dealt with the designated forum for finally resolving relevant disputes between Australian investors/services providers and Indonesia in a separate provision to that dealing with the designated forum for finally resolving relevant disputes between Indonesian investors/services providers and Australia.

Subject to the above caveats, the writer would suggest that what Article 14.25(1) of IA-CEPA **probably** means is that:

(a) if the relevant dispute is between an **Australian investor/services provider and Indonesia**, then the **Australian investor/services provider may finally resolve its dispute against Indonesia by way of domestic dispute resolution in the courts or tribunals of Indonesia and according to the rules of the Indonesian courts or tribunals** provided the courts or tribunals of Indonesia have jurisdiction over the claim but, if the courts or tribunals of Indonesia do not have jurisdiction over the claim then the Australian investor/services provider may finally resolve its dispute against Indonesia by way of international arbitration pursuant to any of (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, (ii) the ICSIS Additional Facility Rules, (iii) the UNCITRAL Arbitration Rules or (iii) any other arbitration institution or under any other arbitration rules agreed by the Australian investor/services provider and Indonesia; while

(b) if the relevant dispute is between an **Indonesian investor/services provider and Australia**, then the Indonesian investor/services provider may finally resolve its dispute against Australia by way of **international arbitration** pursuant to any of (i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, (ii) the ICSIS Additional Facility Rules, (iii) the UNCITRAL Arbitration Rules or (iii) any other arbitration institution or under any other arbitration rules agreed by the Indonesian investor/services provider and Australia.

Put simply, (a) and (b) above mean that (i) unless the Indonesian courts and tribunals do not have jurisdiction over the relevant dispute, Australian investors/services providers will have to be prepared to deal with the courts and tribunals of Indonesia if they want to finally resolve their relevant disputes against Indonesia while (ii) Indonesian investors/services providers will always be free to pursue international arbitration against Australia in finally resolving their relevant disputes against Australia.

It is, of course, always possible that the Indonesian courts and tribunals might not have jurisdiction over a relevant dispute between an Australian investor/services provider and Indonesia due to the particular facts of that dispute and, in such a case, the Australian investor/services provider will be free to pursue international arbitration against Indonesia. **This, however, is a most unlikely situation**. That is because the relevant dispute must involve something that Indonesia has done or not done, which amounts to a breach of the IA-CEPA Investor/Services Provider Protections that Indonesia is obliged to provide to the relevant Australian investor/services provider and which breach has caused loss or damage to the Australian investor/services provider's covered investment in Indonesia. The writer finds it very hard to envisage a situation where this highly restrictive set of requirements for a relevant dispute to arise would **not** result in the Indonesian courts and tribunals having jurisdiction over the resulting relevant dispute.

2. Implications of Article 14.25(1) of IA-CEPA for Australian Investors/Services Providers in Indonesia

Does it really matter that the IA-CEPA Investor-State Dispute Resolution Mechanism seems to envisage an asymmetrical dispute resolution process that, in most instances, will (i) allow Indonesia to avoid final resolution of relevant disputes, with Australian investors/services providers, through international arbitration and (ii) force Australian investors/services providers to finally resolve their relevant disputes with Indonesia through the courts and tribunals of Indonesia? In answering this question, it is instructive to look at the reasoning underlying the Investment Treaties which, in the case of the 1993 A-I Investment Treaty, has now been replaced by IA-CEPA.

The Investment Treaties were originally negotiated and entered into by Indonesia with more than 60 other countries recognizing that (i) Indonesia wanted to attract foreign investment, (ii) **foreign investors needed to have a degree of confidence that, if they invested in Indonesia, their investments would enjoy adequate legal protection** and (iii) **Indonesia's legal and court systems were weak, opaque and did not otherwise inspire confidence among foreign investors** but (iv) if foreign countries wanted special protection for their investors in Indonesia, then they had to be willing to offer Indonesian investors in their countries the same special protections they were seeking from Indonesia (**i.e.**, equal treatment and reciprocity).

Given the above considerations underlying the development of the Investment Treaties, three "bedrock" principles of the Investment Treaties are/were (i) it will always be difficult for foreign investors to accept that the courts of the host country are truly impartial when it comes to deciding disputes with the host country/state, (ii) given (i), final resolution of relevant investor disputes with host countries/states should be by way of international arbitration if that is what the relevant investor wants following the failure of consultations/negotiations to achieve a satisfactory settlement of its dispute with the relevant host country/state and (iii) equal or symmetrical treatment of all investors and host countries/states is important when it comes to the dispute resolution mechanism as this avoids any suggestion of discrimination, prejudice or unfairness. These "bedrock" principles simply reflect what has long been regarded as the minimum essential for the purpose of instilling confidence in investors from both countries that the Investment Treaties create a "level playing field", with neither country or its investors being at a disadvantage compared to the other country or its investors.

Although the IA-CEPA Investor-State Dispute Resolution Mechanism is apparently asymmetrical when it comes to the final resolution of relevant disputes that cannot be otherwise settled by consultation and conciliation, this would still probably not be a serious problem for Australian investors and services providers **if the legal and court systems of Indonesia had dramatically improved over the past 30 years and since the 1993 A-I Investment Treaty was entered into**. The unfortunate reality, however, is that while Indonesia has made huge progress in numerous areas over the past 30 years and is a very different county, in many respects, to what it was in 1993, one area where very little progress has been made is in the long overdue reform of the Indonesian legal and court systems. More particularly, Indonesia's legal and court systems continue to be weak, opaque and do not otherwise inspire confidence among foreign investors. Even the most cursory reading of The Jakarta Post and other Indonesian print media, on a regular basis, provides numerous insights into why Indonesia's legal and court systems courts continue to be weak, opaque and do not otherwise inspire confidence among foreign investors.

When it comes to disputes between foreign parties and Indonesia/GoI, the writer would suggest it is difficult to identify many (or perhaps, indeed, any) previous cases where (i) such disputes have been ultimately resolved **by the courts and tribunals of Indonesia** in favour of the foreign party and (ii) the foreign party has actually succeeded in collecting from Indonesia/GoI the damages or other compensation awarded to it. Various reasons can be advanced in order to explain the exceedingly poor "track record" of foreign parties in disputes before the courts and tribunals of Indonesia generally and, more particularly, in disputes with Indonesia/GoI. None of these reasons, however, are likely to do much to change the perception of foreign investors that they would be very well advised indeed to stay as far away as possible from the courts and tribunals of Indonesia.

By obliging Australian investors/services providers to, in most instances, finally resolve their relevant disputes with Indonesia in the courts and tribunals of Indonesia, Article 14.25(1) of IA-CEPA arguably places Australian investors/services providers in a much worse position procedurally than it does Indonesian investors/services providers when it comes to resolving their relevant disputes with Australia. Consequently, Article 14.25(1) of IA-CEPA must be regarded as inconsistent with the "bedrock" principles of the Investment Treaties and the considerations underlying the formulation of those "bedrock" principles, which principles and underlying considerations are just as relevant today as they were when the 1993 A-I Investment Treaty was signed. As such, the asymmetrical nature of the IA-CEPA Investor-State Dispute Resolution Mechanism should be a source of material concern for prudent Australian investors/services providers and their professional advisers.

It can only be expected that Article 14.25(1) of IA-CEPA will discourage at least some Australian investors/services providers from prioritizing Indonesia as an investment destination any time soon. This negative impact will, most likely, be greatest in the case of large capital investments that might otherwise have been made in those sectors of the Indonesian economy that are known for being particularly "problematic" as far as foreign investors/services providers are concerned. The Indonesian energy, infrastructure and mining sectors fall very much into this category.

3. Possible Alternative to Article 14.25(1) of IA-CEPA

3.1 **Preliminary Remarks**: Assuming the writer's interpretation of Article 14.25(1) of IA-CEPA is substantially correct, most Australian investors/services providers are likely to decide that, if they have a relevant dispute with Indonesia that cannot be resolved through consultation and conciliation, it will be a waste of very substantial time and money for them to try, in their individual capacities, to finally resolve that dispute directly with Indonesia through the courts and tribunals of Indonesia. This leads inevitably to the issue of whether or not there are any other IA-CEPA dispute resolution mechanisms that Australian investors/services providers may be able to take advantage of when otherwise faced with the singularly uninviting prospect of litigation against Indonesia in the courts and tribunals of Indonesia.

3.2 **Action by Australia**: Chapter 20 of IA-CEPA ("**Chapter 20**") provides a detailed mechanism for consultation and dispute settlement between Australia and Indonesia in the case of "certain disputes" arising under IA-CEPA.

The "certain disputes" arising under IA-CEPA and covered by Chapter 20 relate to a failure of Australia or Indonesia to carry out its obligations under IA-CEPA, which failure results in any benefit accruing to the other country/state, directly or indirectly, under IA-CEPA being nullified or impaired **or the attainment of any objective of IA-CEPA being impeded** ("**Chapter 20 Dispute**") (Article 20.1 of IA-CEPA).

To the extent that the encouragement of Australian investors/services providers to invest in Indonesia/carry on business in Indonesia can be properly described as an objective of IA-CEPA, it is possible that the failure of Indonesia to discharge its obligation to provide Australian investors/services providers with the IA-CEPA Investor/Services Provider Protections could be characterized as impeding that objective and, therefore, become a Chapter 20 Dispute. If this is the case, then Chapter 20 might be thought by some to provide an alternative means for Australian investors/services providers to **indirectly** pursue relief against Indonesia for its failure to provide them with the IA-CEPA Investor/Services Provider Protections.

3.3 **Limitations of Chapter 20**: It is very important to understand the considerable limitations of Chapter 20 as a possible **indirect** means for Australian investors/services providers to pursue relief against Indonesia for its failure to provide them with the IA-CEPA Investor/Services Provider Protections.

First, only Australia (**not** an individual Australian investor/services provider) can file a complaint against Indonesia in respect of a Chapter 20 Dispute (Article 20.1 of IA-CEPA). Accordingly, the Australian government will have to be convinced that it is in the interests of Australia to trigger a Chapter 20 Dispute. Given the complex and multi-faceted nature of the relationship between Australia and Indonesia, it is by **no** means certain that the Australian government will accept that it is in the interests of Australia to trigger a Chapter 20 Dispute merely because one or more Australian investors/services providers have been denied their IA-CEPA Investor/Services Provider Protections by Indonesia.

Second, the mechanism for dealing with Chapter 20 Disputes is closely modelled on the mechanism for resolving trade disputes under the 1994 General Agreement on

Trade & Tariffs ("**GATT**") as administered by the World Trade Organization. Consequently and as with GATT, the procedures for resolving Chapter 20 Disputes are directed at getting Indonesia (in the case of a complaint by Australia at the behest of an Australian investor/services provider) to **voluntarily** bring itself into conformity with its IA-CEPA obligations (Article 20.12(1) of IA-CEPA). If an Australian investor/services provider considers it has suffered damage or loss as a result of Indonesia's failure to provide the IA-CEPA Investor/Services Provider Protections, it may well be **too late**, as far as that particular Australian investor/services provider is concerned, for Indonesia to belatedly start providing the IA-CEPA Investor/Services Provider Protections and after being "called to account" by Australia.

Third and closely related to the second limitation, if Indonesia (in the case of a complaint by Australia at the behest of an Australian investor/services provider) indicates that it does not intend to comply with its obligations and provide the IA-CEPA Investor/Services Provider Protections, Australia may request Indonesia to pay compensation which is **mutually acceptable** (Article 20.14(2) of IA-CEPA). In other words, the amount of the compensation payable by Indonesia has to be **agreed to by Indonesia** (Article 20.14(3) of IA-CEPA). Again, this is **not** likely to be satisfactory from the perspective of the Australian investor/services provider which considers it has suffered damage or loss as a result of Indonesia's failure to provide the IA-CEPA Investor/Services Provider Protections.

Fourth, if Indonesia (in the case of a complaint by Australia at the behest of an Australian investor/services provider) and Australia are unable to agree on the compensation payable by Indonesia, Australia's only recourse is then to **suspend the application to Indonesia of concessions or other obligations equivalent to the level of nullification or impairment of the relevant IA-CEPA objective brought about by Indonesia's failure to provide the IA-CEPA Investor/Services Provider Protections** (Article 20.14(3) and (4) of IA-CEPA). Self-evidently, this will result in **no** real benefit for the Australian investor/services provider which considers it has suffered damage or loss as a result of Indonesia's failure to provide the IA-CEPA Investor/Services Provider Protections.

3.4 **Assessment**: For all the reasons outlined in 3.3 above, having Australia pursue its rights against Indonesia under Chapter 20 is much more likely to benefit future Australian investors/services providers rather than an Australian investor/services provider which has already suffered damage or loss as a result of Indonesia's failure to provide the IA-CEPA Investor/Services Provider Protections. This, combined with the limited opportunity for compensation in the case of a Chapter 20 Dispute and the uncertainty as to whether or not the Australian government would even consider it appropriate to file a complaint against Indonesia, means that Chapter 20 is almost certainly **not** going to meet the minimum needs of an Australian investor/services provider which has already suffered damage or loss as a result of Indonesia's failure to provide the IA-CEPA Investor/Services Provider Protections but is, understandably, reluctant to try to finally resolve its relevant dispute directly with Indonesia through the courts and tribunals of Indonesia.

SUMMARY AND CONCLUSIONS

If, in fact and as appears to be the case, the IA-CEPA Investor-State Dispute Resolution Mechanism enables Indonesia to avoid international arbitration of most relevant disputes with Australian investors/services providers, this is definitely a matter for material concern as it is inconsistent with the still very relevant principles of the Investment Treaties and the underlying considerations that resulted in the development of those principles.

The IA-CEPA Investor-State Dispute Resolution Mechanism definitely does matter as it is simply unrealistic to expect that Australian investors/servicers providers will face a "level playing field" if and when they have to finally resolve relevant disputes against Indonesia in the courts and tribunals of Indonesia.

IA-CEPA provides Australian investors/services providers with no viable alternative to using the courts and tribunals of Indonesia if consultation and conciliation are unable to resolve relevant disputes.

It was always, however, going to be a herculean task for Australia to convince Indonesia that it should drop its opposition to international arbitration of relevant disputes with Australian investors/services providers given GoI's long standing and well publicized opposition to international arbitration of such disputes.

The hard working and highly professional Australian bureaucrats and diplomats, who had to negotiate IA-CPEA with their Indonesian counterparts, clearly had a very difficult choice to make. Should they risk letting the opportunity for a wide-ranging IA-CEPA "slip from Australia's grasp" by making final resolution of all relevant disputes through international arbitration a non-negotiable precondition to any agreement? Instead, should they focus on the totality of what IA-CEPA might achieve, in many different areas and to the potentially great benefit of Australian business, even if this meant accepting an asymmetrical IA-CEPA Investor-State Dispute Resolution Mechanism? For better or for worse, Australia has apparently chosen the second alternative.

Only time will tell whether or not Australia has made the right choice in accepting an asymmetrical IA-CEPA Investor-State Dispute Resolution Mechanism.

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