INDONESIA - AUSTRALIA COMPREHENSIVE ECONOMIC PARTNERSHIP AGREEMENT

SUBMISSION CONCERNING DISPUTE RESOLUTION PROCEDURES

One of the impediments to trade and investment in Indonesia is a perception that Indonesia has a poor investment climate and is unsafe, from a financial perspective, as a place to engage in business and invest. Whether this perception is correct or not is irrelevant to the submission. It is intentionally not the subject of comment by the writer. The important fact is that such perceptions, even if misguided, are common. The recognition of an appropriate dispute resolution procedure would be a significant encouragement to trade and investment of Australian goods and services exporters and investors in Indonesia. It would be advantageous if the existence of such a procedure was recognised in CEPA.

It would be extremely beneficial to a favourable climate for trade and investment between Australia and Indonesia if all parties to any dispute were encouraged by an appropriate mechanism in CEPA to act positively to solve or minimise the impact of any dispute immediately a dispute arises. That mechanism should encourage the parties to the dispute and both governments to recognise that it is in the best interests of everyone to confidentially, efficiently and expeditiously resolve the dispute.

The best chance of the parties themselves putting an early end to the dispute or dramatically reducing its magnitude is by utilising the assistance of a professional mediator with an understanding of the commercial and cultural issues involved. He or she will act as a strictly impartial third party. Many disputes would be resolved entirely or all significantly reduced in ambit. Even if such disputes were not so resolved, nothing would be lost by the utilisation of an early and efficient non-adversarial procedure.

While not every dispute will be resolved by mediation, any dispute, however protracted and bitter, can be so resolved. The successful mediation of the war in Aceh by Martti Ahtisaari is an example of what can be achieved.

It would be a significant benefit to trade and investment in Indonesia if a model dispute resolution procedure was prescribed within CEPA, with mediation being the first step in any such process.

A more detailed explanation of what is set out above follows in this submission.

In 2009 the writer made a brief submission to Ms Kerrie Burmeister of the Department of Foreign Affairs and Trade. In that submission, there is some material about the author's professional career as a Senior Counsel and mediator as well as his significant cultural involvement with Indonesia over many years. The previous submission can be read at:-

http://www.dfat.gov.au/fta/iacepa/submissions/Campbell_Bridge.pdf

The financially more secure would-be investors feel, the more likely they are to engage in trade or investment in Indonesia. As part of the concerns facing would-be investors is a belief among some of them that trade or commercial disputes in Indonesia are overwhelmingly likely to have an unfavourable outcome for any foreigner. There are numerous reasons for this including a belief that in the event of an adjudicated dispute the result is unlikely to favour the foreigner, and that even if it does, the legal system will not effectively permit a foreigner to get the financial result they want in a practical sense. Such concerns are not confined to foreigners. Many Indonesians share exactly the same concerns with respect to the protection of their own commercial rights and interests.

The mirror logical proposition is that the more comfortable one is with the investment climate in Indonesia, the more likely it is that one will engage in trade or investment in Indonesia. The investment climate would be very much improved by having an appropriate and effective dispute resolution procedure in place. It follows that if the procedure can be seen to be effective in some cases (even if not necessarily all cases) higher levels of investment and trade are likely to follow.

On any objective analysis, Indonesia should a much more favourable place to invest than the actual level of current investment indicates. Much has been said by many politicians and others on both sides about the necessity of improving investment record of Australia and Indonesia in each other. It was a significant theme in the speech President Susilo Bambang Yudhoyono gave to the joint sitting of the Australian Parliament.

Good business practice involves avoiding disputes in the first place or, if difficulties arise, extracting oneself and one's business from the problem with minimal cost, delay and loss of business and goodwill. It is particularly advantageous if a previously profitable and mutually beneficial business relationship can be preserved. Virtually any business dispute of any magnitude or complexity will end up sooner or later in the hands of lawyers. As soon as possible, all parties should focus on how to resolve or minimise the problem before focussing on how to fight the dispute. While mediation can be utilised at any stage, before or after the involvement of lawyers, and with or without their involvement, the immediate alternatives available are:-

- a non-adversarial solution such as negotiation or mediation;
- an adversarial solution such as litigation or commercial arbitration.

The CEPA should recognise that adversarial solutions are the least attractive option and should be regarded as a last resort in any dispute. All adversarial proceedings, whether by way of litigation or commercial arbitration have a number of common attributes. There is always at least one loser, they are very expensive, rarely expeditious, and almost invariably result in the destruction of previously profitable and mutually beneficial trade and business relationships.

For these reasons the world business community has looked for better ways to resolve disputes. One solution, exemplified by the Australian experience, has been the wide spread use of mediation conducted by experienced professional mediators. Detailed papers on the subject of the benefits of mediation of major commercial disputes in both an Indonesian and commercial context (which go far beyond the scope of this submission) were given by the writer at the Indonesia Australia Business Council conference in Jogjakarta in November 2009 and to the Indonesian Corporate Counsel Association in Jakarta in January 2010. Copies of those papers are available from the author at c.bridge@mauricebyers.com.

Significant advantages of facilitating the use of mediation as an effective dispute resolution procedure and thus providing a significant encouragement to trade and investment in Indonesia include:-

- Mediation is a completely flexible and versatile process.
- It is fast. Mediations can be arranged, prepared and conducted to a conclusion in days or weeks, not months or years as in the case of adversarial procedures.

- As a non-legal process, it is capable of crossing borders. It simply does not have the legal and jurisdictional constraints inherent in adversarial proceedings.
- The procedure is adaptable to fundamental tenets of Indonesian culture such as *"musyawarah"* - the tradition of amicable discussion and consensus among the Indonesian people. In fact culture is a good reason why mediation should be the best way of resolving disputes in Asia generally and Indonesia specifically.
- Mediation is not an *"either/or"* proposition. It is the logical first stage of any comprehensive dispute resolution procedure. It can also be used as an adjunct to any dispute resolution process at any stage of any dispute. There can be multiple mediations within the one major dispute or mediation of part only of any dispute.
- Whether a mediation is successful or not should not be determined by reference only to whether a dispute comes to a final conclusion. While finality is always the desired result, a significant narrowing of the dispute or a significant shortening of the time span of the dispute (for example, to permit a development or mining venture to take place much faster than it otherwise would) will usually be regarded as a successful outcome.
- If different sides from different backgrounds are mistrustful of each other, co-mediators can be used. For example, in a significant dispute between an Australian and an Indonesian company, it may be appropriate to have one Australian and one Indonesian mediator acting as co-mediators. It is important to keep in mind that mediators do not decide anything – they assist the parties in coming to an agreement. Co-mediators with different backgrounds but each having some understanding of the culture of both sides will facilitate this in a way that litigation or arbitration cannot.
- Because the parties control the process and reach their own agreement with in a non-judgmental environment rather than having a result imposed upon them by a third party, the process of mediation is generally perceived to be fair.
- The whole process of mediation is confidential unless the parties otherwise agree.
- There is no limit to the types of disputes which can be successfully mediated. Commercial and trade disputes are the most obvious candidates for mediation, but other examples of processes which were successfully mediated (whether so-called or not) include the war in Aceh referred to above, and even the negotiations to persuade the asylum seekers to leave the "Oceanic Viking" in Riau province in 2009.

The incorporation of a dispute resolution procedure with voluntary mediation necessarily the first step in the process would significantly improve the trade and investment climate between Australia and Indonesia.

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