

**National Interest Analysis [2020] ATNIA 2
with attachment on consultation**

**Exchange of letters terminating the Agreement between the Government of Australia
and the Government of the Republic of Indonesia concerning the Promotion and
Protection of Investments**

(Jakarta, 6 February 2020)

[2020] ATNIF 3

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

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Nature and timing of proposed treaty action

1. The proposed treaty action is entry into force of the *Exchange of letters terminating the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments* (the proposed Agreement), which was signed on 6 February 2020 in Jakarta.
2. The proposed Agreement will terminate the *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Protection and Promotion of Investments, and Exchange of Letters*, done at Jakarta on 17 November 1992 (the IPPA). The proposed Agreement will also have the effect of terminating the IPPA's 15 year survival clause.
3. The proposed Agreement will enter into force following both the entry into force of the *Indonesia-Australia Comprehensive Economic Partnership Agreement* (IA-CEPA) and notification that both Parties have completed their respective domestic procedures.

Overview and national interest summary

4. IA-CEPA will play an important role in expanding bilateral economic relations with Indonesia. One aspect of this high quality comprehensive free trade agreement (FTA) is a modern investment chapter that will promote further two-way investment. Given the inclusion of such a chapter in IA-CEPA, with a range of investment protections and explicit safeguards, there is no need for the IPPA to continue to operate.
5. Terminating the IPPA is also in line with the work the Government is undertaking on international investment treaty reform.

Reasons for Australia to take the proposed treaty action

6. The IPPA has provided protection to Australian investors investing in Indonesia, and vice-versa, since it entered into force in July 1993 by creating a framework of investment obligations. The IPPA also contains an Investor-State Dispute Settlement (ISDS) mechanism, which provides investors from both countries with access to an independent international arbitral tribunal to resolve disputes concerning investment covered by the agreement.

7. Upon entry into force of IA-CEPA, it will no longer be necessary for the IPPA to remain in force. This is because the IA-CEPA investment chapter contains a set of high-quality rules governing the treatment of investors and their investments, balanced with explicit safeguards reaffirming the right of both Parties to regulate in the public interest. These detailed modern investment provisions will usefully update and replace the older-style IPPA in regulating bilateral investment between Australia and Indonesia. The IA-CEPA investment chapter also contains an ISDS mechanism with appropriate procedural and substantive safeguards. Terminating the IPPA, and the associated 15 year survival clause, ensures a smooth transition to the IA-CEPA investment chapter.
8. Terminating the IPPA is in keeping with Australia's approach of replacing older-style bilateral investment treaties with modern FTA investment chapters, such as the IA-CEPA investment chapter.
9. Termination of the IPPA (and its survival clause) will also implement the recommendation on this issue by the Joint Standing Committee on Treaties in its Report 186 (9 October 2019) following its inquiry into IA-CEPA.

Obligations

10. The proposed Agreement provides a framework for terminating the IPPA.
11. Paragraph (a) clarifies that the IPPA will terminate on the date both the IA-CEPA and the proposed Agreement enter into force (the date of termination). The proposed Agreement will enter into force when the IA-CEPA has entered into force and the Parties have notified each other by an exchange of notes they have each completed their respective domestic processes necessary to terminate the IPPA.
12. Paragraph (b) provides that from the date of termination, all of the provisions contained in the IPPA, and any rights or obligations arising from those provisions, shall cease to have legal effect and the Parties to the IPPA shall be released from any obligation to further perform the IPPA. Paragraph (b) also clarifies that the proposed Agreement will terminate the IPPA's 15 year survival clause which is set out at paragraphs 1 and 2 of Article XV of the IPPA (Entry into force, duration and termination).
13. The purpose of paragraph (c) is to ensure that a dispute that has already been submitted to a court/tribunal in accordance with the provisions of the IPPA, before termination of the IPPA, is able to continue to conclusion of the dispute.
14. Subparagraph (c)(i) provides that with respect to an investor-State dispute, the dispute is deemed to have been submitted under the IPPA upon the investor submitting the dispute either to the competent judicial or administrative bodies of the other Party, to the International Centre for the Settlement of Investment Disputes, or to a settlement procedure agreed between the Parties. Subparagraph (c)(ii) provides that with respect to a State-to-State dispute, the dispute is deemed to have been submitted under the IPPA where either Australia or Indonesia has made a written request to submit the dispute to an arbitral tribunal.

15. Paragraph (d) provides that, notwithstanding the 15 year survival clause contained in paragraphs 1 and 2 of Article XV of the IPPA (Entry into force, duration and termination), the provisions in the proposed Agreement will supersede those provisions in the IPPA and will therefore be effective to terminate the IPPA.

Implementation

16. No legislative changes are required for the proposed Agreement to enter into force.

17. The proposed Agreement is in line with Australia's recent FTA practice.

Costs

18. The proposed Agreement will not affect regulatory costs.

19. The Department of Foreign Affairs and Trade has advised the Office of Best Practice Regulation that the Analysis of Regulatory Impact on Australia prepared in relation to the IA-CEPA is equivalent to a Regulatory Impact Statement for the purposes of the proposed Agreement.¹

Future treaty action

20. The proposed Agreement does not provide for any future treaty action.

Termination

21. As the purpose of the proposed agreement is to terminate the IPPA, there was no need to include termination provisions.

Contact details

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¹ Analysis of Regulatory Impact on Australia attached to the National Interest Analysis for the IA-CEPA, [2019] ATNIA 12.

ATTACHMENT ON CONSULTATION

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CONSULTATION

22. Throughout the IA-CEPA negotiations, the Department of Foreign Affairs and Trade (DFAT) consulted widely with industry and other stakeholders. A list of stakeholders who were consulted is set out at Attachment I of the IA-CEPA National Interest Analysis.²
23. External stakeholders, including the Australian Council of Trade Unions, the Minerals Council of Australia and the Australian Fair Trade & Investment Network, were informed of the proposed treaty action at a recent stakeholder outreach event organised by DFAT.
24. DFAT also wrote to States and Territory governments to advise that the Government was in the process of terminating the IPPA. No concerns were raised by State and Territory Governments.

² National Interest Analysis for the IA-CEPA, [2019] ATNIA 12.