30 September 2020

Bilateral Investment Treaty Reform Coordinator
Regional Trade Agreements Division
Department of Foreign Affairs and Trade ('DFAT')
RG Casey Building, John McEwen Crescent
Barton ACT 0221

By email: BITreformsubmissions@dfat.gov.au

Dear Sir/Madam

Submission: Review of Australia's Bilateral Investment Treaties

Below I attach my submission as invited by the *Discussion Paper: Review of Australia's Bilateral Investment Treaties* (2020). I would be happy to provide you with a final published copy of any of the publications I have referenced in my submission.

Please do not hesitate to contact me should you have any queries.

Yours faithfully

Professor Tania Voon
tania.voon@unimelb.edu.au

Professor Tania Voon
PhD (Cambridge); LLM (Harvard); Grad Dip Intl L, LLB (Hons), BSc (Melbourne), AMusA

Melbourne Law School
The University of Melbourne, Victoria 3010 Australia

Disclosure and Acknowledgments

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- WTI Advisors Ltd under a European Union ('EU')-funded project supporting negotiations on the EU–Australia Free Trade Agreement;
- Government bodies and NGOs on tobacco plain packaging, from the perspective of public health;
- Telstra on various telecommunications matters; and
- the Digital Industry Group Inc on digital taxes.

I gratefully acknowledge valuable comments received from Dr Jarrod Hepburn in preparing this submission. The opinions expressed here, and any errors, are mine alone as an academic.

Summary of Recommendations

1. Clarify national treatment and most-favoured nation ('MFN') treatment obligations to show that 'like circumstances' are to be assessed taking account of regulatory distinctions between investors/investments based on legitimate public welfare objectives.
2. Make clear that the MFN provision cannot be used to invoke more favourable dispute settlement provisions from other international investment agreements ('IIAs').[1]
3. Connect the fair and equitable treatment ('FET') obligation to customary international law, with additional clarifications.
4. Provide further clarity on the factors used to determine indirect expropriation, such as consideration of whether a measure is disproportionate to its public purpose, and reference to public welfare regulation.
5. Include general exceptions applicable to investment obligations but only alongside more targeted clarifications of particular obligations, with express consideration of the relationship between the exceptions and the clarifications.
6. Consider including a stronger taxation exception, to remedy misalignment between international law and Australian law on this issue.
7. Modify clauses in relevant bilateral investment treaties ('BITs') to make clear that advance consent is given to arbitration pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ('ICSID Convention'),[2] if that is the intention.
8. Rather than exempting from investor–State dispute settlement ('ISDS') tobacco control measures or public health measures, exclude public welfare measures as determined by the States parties (as in the *China–Australia Free Trade Agreement* ('ChAFTA')).[3]
9. When agreeing a newer IIA, to the extent possible, seek to terminate the original BIT and its survival clause.

Clarifications to Substantive Obligations

Several clarifications to substantive obligations that have been used in more modern Australian IIAs should be applied to older-style BITs, when they are renegotiated, replaced or supplemented (eg with a joint interpretation). These clarifications are important in ensuring sufficient policy space for host States and in enhancing predictability in ISDS proceedings.

In relation to national treatment and MFN treatment, the meaning of 'like circumstances' should be explicitly clarified to refer to 'the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.'[4] This clarification provides a means for examining the regulatory purpose of a challenged measure in assessing alleged discrimination, without having to rely on later exceptions as is the case for national treatment and MFN treatment under the World Trade Organization's *General Agreement on Tariffs and Trade 1994* ('GATT 1994').[5] Also in relation to MFN treatment, to avoid uncertainty, a clarification should be included that the MFN provision cannot be used to invoke more favourable dispute settlement provisions from another IIA.[6]

The FET obligation should be explicitly connected to the minimum standard of treatment under customary international law.[7] This standard provides sufficient protection for Australian outbound investors while preserving policy space for Australia to regulate inbound investors. As Australia recognised in the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* ('CPTPP'), the minimum standard is to be elaborated according to the long-standing methodology for determining customary international law, being 'a general and consistent practice of States that they follow from a sense of legal obligation'.[8] Clarifications on the relationship between FET and breaches of other obligations, investors' expectations, and subsidies should also be included.[9]

In relation to expropriation, many of Australia's recent IIAs have included additional information in an annex, setting out (amongst other matters) factors for determining whether an indirect expropriation has occurred.[10] One factor typically included is the 'character of the government action'. To enhance predictability for adjudicators in ISDS proceedings, drafters should provide further clarity on this phrase. Australia's IIAs with ASEAN/New Zealand and with Indonesia ('IA–CEPA') offer a model for this, in indicating that the phrase includes consideration of 'whether the action is disproportionate to the public purpose'.[11] These two IIAs also helpfully state (without reference to 'rare circumstances' as in most other Australian IIAs) that '[n]on-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment' do not constitute indirect expropriation.[12] Wording of this kind helps to incorporate the police powers doctrine and reduce uncertainty in connection with the impact of general exceptions, as discussed below.

General Exceptions

General exceptions along the lines of Article XX of the GATT 1994 are becoming more common in IIAs and may provide some protection for host State policy space in the investment context. However, relying solely on general exceptions *without* using clarifications to substantive investment obligations as suggested above may have the unintended effect of restricting flexibilities inherent in such obligations or developed through customary international law, such as the police powers doctrine.[13] One of the reasons for this result is that the general exceptions may be seen as constituting relevant context for interpreting substantive investment obligations, pursuant to Article 31(1) of the *Vienna Convention on the Law of Treaties*.[14] Thus, for example, in *Bear Creek Mining v Peru*, the tribunal found that the existence of general exceptions applying to the investment chapter of the IIA between Canada and Peru[15] meant that no other flexibilities such as police powers applied in assessing claims of expropriation.[16] Accordingly, general exceptions should be used and drafted with care, with an eye towards the potential impact on flexibilities in other provisions. Drafters should also consider detailing explicitly the relationship between a general exceptions provision applicable to investment obligations and any clarifications to such obligations such as an expropriations annex.[17]

Meanwhile, Australia has included specific taxation exceptions in recent agreements.[18] These exceptions have typically been drafted to allow an investor to bring a claim that a taxation measure constitutes an expropriation, provided that the home and host states do not jointly veto the claim (by jointly agreeing that the taxation measure is not an expropriation). Thus, despite the exception, a foreign investor could bring ISDS proceedings alleging that a taxation measure of Australia constitutes an expropriation, in circumstances where the investor's home state does not agree with Australia that the measure is not an expropriation. This is likely to provide protection to foreign investors in Australia going beyond the protection available in Australia's *Constitution*, given that the High Court of Australia has constructed a near-automatic exclusion of tax measures from the scope of the *Constitution*'s provision on acquisition of property.[19] It is not clear that offering such stronger protections to foreign investors is in Australia's interest. Drafters should therefore consider including a stronger taxation exception.[20]

ISDS Mechanisms

In *Planet Mining v Indonesia*,[21] the tribunal read the words 'shall consent in writing … within forty-five days' in Australia's BIT with Indonesia (now terminated)[22] as not providing immediate consent to ICSID arbitration. To avoid uncertainty, Australia should in reviewing its BITs modify the consent to arbitration in treaties that use similar words to ensure that the States parties have provided advance consent,[23] if that is what is intended.

Several of Australia's recent IIAs include a 'carve-out' or exemption from ISDS for tobacco control measures. In the case of the CPTPP,[24] this exemption applies at the election of the host State. In the case of the amended IIA with Singapore[25] and the new investment agreement with Hong Kong,[26] it applies automatically. Product-specific carve-outs are not ideal, doing nothing to protect other public welfare measures and potentially complicating the interpretation of the treaty with respect to such other measures.[27] Perhaps recognising this difficulty, Australia's IIA with Peru ('PAFTA')[28] and IA–CEPA[29] include a broader exemption from ISDS for public health measures. While this approach solves the problem of an overly narrow exemption, it may create later difficulties in interpreting what constitutes a public health measure,[30] even though this concept is defined to include (for Australia) the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration, Office of the Gene Technology Regulator and (in the case of PAFTA) successor programs. A preferable approach would be to follow ChAFTA[31] in allowing for the exclusion of 'public welfare' measures from ISDS (broadening beyond the sphere of public health), with provision for the States parties to come to a binding decision on whether a challenged measure falls within that category.

Overlapping Treaties, Termination and Survival

Where new treaties are concluded, to avoid uncertainty and overlapping or inconsistent obligations, earlier treaties should be terminated. Australia is well-versed in this approach. As indicated in the Discussion Paper, Australia has by mutual agreement terminated pre-existing BITs on several occasions in recent years when entering a new IIA. Australia and Chile agreed to terminate their 1999 BIT[32] upon entry into force of their 2009 IIA.[33] Australia agreed to terminate its BITs with Mexico[34] and Viet Nam[35] upon entry into force of the CPTPP. Australia agreed to terminate its 1997 BIT with Peru[36] upon entry into force of PAFTA.[37] Australia and Hong Kong agreed to terminate their 1993 BIT[38] upon entry into force of a new IIA.[39] Australia and Uruguay agreed to terminate their 2002 BIT[40] upon entry into force of an updated BIT.[41] Consistent with a recommendation by the Joint Standing Committee on Treaties,[42] Australia agreed to terminate its 1993 BIT with Indonesia[43] after the entry into force of IA–CEPA,[44] pursuant to a separate exchange of letters.

Despite these multiple experiences with treaty termination in the context of BITs/IIAs, Australia has not always been consistent in this approach. In one unusual instance, an original BIT and newer IIA co-exist. ChAFTA co-exists with the 1998 BIT between Australia and China.[45] The 1998 BIT is a traditional treaty containing broad investment obligations without the kinds of clarifications promoted above. ChAFTA contains certain protections for domestic policy space but only minimal substantive obligations regarding investment, centred on national treatment and MFN treatment. In my view, the modern clarifications in ChAFTA are unlikely to affect the interpretation or application of the 'old style' BIT. Moreover, while ChAFTA allows for ISDS only with respect to breach of national treatment (and with a carve-out for review by Australia's Foreign Investment Review Board), the original BIT can be understood as allowing ISDS with respect to compensation payable for expropriation and also (against Australia) for other disputes under the ICSID Convention.[46] This unbalanced and unpredictable treaty scenario provides an example of the dangers of overlapping treaties. To remedy this problem, ChAFTA's investment chapter should be completed and the original BIT terminated.

When terminating a treaty, I urge Australia to pursue explicit termination of the survival clause as well.[47] Australia has done this in only some of its recent terminations: with Hong Kong and Indonesia. I propose also an agreement whereby ISDS and State–State claims under the 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. This approach will allow for claims that have not yet been made regarding things that have already happened, sufficiently protecting investors' rights.[48]

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[1] The term IIA covers both bilateral investment treaties and preferential trade agreements that include an investment chapter.

[2] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965 (entered into force 14 October 1966).

[3] *Free Trade Agreement between Australia and the People's Republic of China*, signed 17 June 2015 (entered into force 20 December 2015).

[4] See, eg, *Investment Agreement between Australia and Hong Kong*, signed 26 March 2019 (entered into force 17 January 2020) n 3. See also, eg, *Indonesia–Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019 (entered into force 5 July 2020) ('IA–CEPA') ch 14 n 9; *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018 (entered into force for Australia 30 December 2018) ('CPTPP') ch 9 n 14.

[5] GATT Doc LT/UR/A-1/A/1/GATT/2, signed 30 October 1947, as incorporated in the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') arts I, III, XX. See, eg, Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (circulated 22 May 2014, adopted 18 June 2014) [5.93], [5.105]. Cf *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') art 2.1; Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (circulated 4 April 2012, adopted 24 April 2012) [174].

[6] See, eg, IA–CEPA art 14.5.3; CPTPP art 9.5.3.

[7] For models in this regard, see CPTPP art 9.6.1, and art 4.1 of the *Agreement between Australia and Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019 (not yet in force) ('2019 Uruguay–Australia BIT').

[8] CPTPP annex 9–A.

[9] See CPTPP arts 9.6.3, 9.6.4 and 9.6.5, and the 2019 Uruguay-Australia BIT arts 4.3, 4.4 and 4.5 for examples.

[10] See, eg, *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009 (entered into force 1 January 2010), as amended by the *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) ('AANZFTA') ch 11, Annex on Expropriation and Compensation; CPTPP Annex 9–B; 2019 Uruguay–Australia BIT annex B.

[11] AANZFTA ch 11, Annex on Expropriation and Compensation, para 3(c); IA–CEPA annex 14–B, para 3(c).

[12] AANZFTA ch 11, Annex on Expropriation and Compensation; IA–CEPA annex 14–B, para 4.

[13] Andrew Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths, and Risks' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2017* (Oxford University Press, 2019) 305. See <https://ssrn.com/abstract=3084663>.

[14] *Vienna Convention on the Law of Treaties*, opened for signature 22 May 1969 (entered into force 27 January 1980).

[15] *Canada–Peru Free Trade Agreement*, signed 29 May 2008 (entered into force 1 August 2009) art 2201.1.

[16] *Bear Creek Mining Corporation v Peru (Award)* (ICSID Case No ARB/14/21, 30 November 2017) [473]–[474].

[17] See Joshua Paine, '*Bear Creek Mining Corporation v Republic of Peru*: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties' (2018) 33(2) *ICSID Review: Foreign Investment Law Journal* 340, 346. See also Caroline Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford University Press, 2020) 363.

[18] See, eg, IA–CEPA art 17.4; 2019 Uruguay–Australia BIT art 16; CPTPP art 29.4.

[19] Jarrod Hepburn, 'Remedying Misaligned Norms in International and Constitutional Law: Investment Treaties, Property Rights and Proportionality' (2020) 43(4) *University of New South Wales Law Journal* (forthcoming).

[20] India's 2016 model investment treaty provides one example. See *Model Text for the Indian Bilateral Investment Treaty* (2016), art 2.4(ii) <https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf>.

[21] *Planet Mining Pty Ltd v Indonesia (Decision on Jurisdiction)*, ICSID Case No ARB/12/14, ARB/12/40 (24 February 2014).

[22] See below n 43 and surrounding text.

[23] 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. See also Luke Nottage, 'The Limits of Legalization in Asia-Pacific Investment Treaty Arbitration' in Julien Chaisse and Tsai-yu Lin (eds), *International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita* (Oxford University Press, 2016) 153.

[24] CPTPP art 29.5.

[25] *Singapore–Australia Free Trade Agreement*, as amended from 13 October 2016 (entered into force 1 December 2017) ch 8 art 22.

[26] *Investment Agreement between Australia and Hong Kong*, signed 26 March 2019 (entered into force 17 January 2020) n 14.

[27] See, eg, Andrew Mitchell, Tania Voon and Devon Whittle, 'Public Health and the Trans-Pacific Partnership Agreement' (2015) 5(2) *Asian Journal of International Law* 279, 290–293. See <http://ssrn.com/abstract=2393670>.

[28] *Peru–Australia Free Trade Agreement*, signed 12 February 2018 (entered into force 11 February 2020) ('PAFTA') ch 8 n 17.

[29] IA–CEPA art 14.21.1(b).

[30] See Tania Voon, 'Tobacco, Health and Investor–State Dispute Settlement: Australia's Recent Treaty Practice' (2020) 37 *Australian Year Book of International Law* 89. <http://ssrn.com/abstract=2393670>.

[31] ChAFTA arts 9.11.4–9.11.8, 9.18.3.

[32] *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).

[33] *Australia–Chile Free Trade Agreement*, signed 30 July 2008 (entered into force 6 March 2009).

[34] *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).

[35] *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).

[36] *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, terminated 11 February 2020).

[37] Australia and Peru had also agreed to terminate their BIT upon entry into force of the CPTPP, but the CPTPP has not yet entered into force for Peru.

[38] *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, terminated 17 January 2020).

[39] *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, entered into force 17 January 2020 with the *Australia–Hong Kong Free Trade Agreement*).

[40] *Agreement between Australia and Uruguay on the Promotion and Protection of Investments*, signed 3 September 2001 (entered into force 12 December 2002).

[41] *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*, signed 5 April 2019 (not yet in force).

[42] Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, *Report 186: IA–CEPA and A–HKFTA* (3 October 2019) [7.22] (Recommendation 4). See submission 2 by Andrew Mitchell and Tania Voon (2 August 2019). See also Australian Government, *Australian Government Response to the Joint Standing Committee on Treaties Report 186* (January 2020).

[43] *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, terminated 6 August 2020).

[44] *Indonesia–Australia Comprehensive Economic Partnership Agreement*, signed 4 March 2019 (entered into force 5 July 2020).

[45] *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).

[46] 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. See <https://ssrn.com/abstract=2905516>.

[47] See Tania Voon and Andrew 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 <http://ssrn.com/abstract=2735974>.

[48] See Tania Voon, Andrew 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. See <http://papers.ssrn.com/abstract=2365996>.