actlawsociety

2 October 2020

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

By email: BITreformsubmissions@dfat.gov.au

Dear Sir/Madam,

RE: DISCUSSION PAPER: REVIEW OF AUSTRALIA'S BILATERAL INVESTMENT TREATIES

The ACT Law Society (Society) welcomes the opportunity to comment on the Department of Foreign Affairs and Trade's Discussion Paper: Review of Australia's Bilateral Investment Treaties (the Discussion Paper).

The Society is the peak professional association that supports and represents the interests of members of the legal profession in the ACT. The Society maintains professional standards and ethics as well as providing public comment and promoting discussion regarding law reforms and issues affecting the legal profession. The Society currently represents over 2,600 legal practitioners in the ACT.

The Society's International Lawyers Committee (the Committee) has considered the Discussion Paper on behalf of the Society and this submission sets out the Committee's feedback on relevant questions of law, with particular regard to the:

- Investment Agreement (IA) linked to the Australia – Hong Kong Free Trade Agreement (Hong Kong IA);
- Bilateral Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments (Uruguay BIT); and
- Investment Chapter (chapter 8) in Peru – Australia Free Trade Agreement (Peru IC).

1. Preamble in BITs

It is suggested that the general rules of interpretation under the Vienna Convention on the Law of Treaties (VCLT) are considered for interpreting the provisions of all Bilateral Investment Agreements (BITs). Although preambular language in BITs is generally not binding on parties, it provides context for the interpretation of other concrete obligations found elsewhere in the instrument.[1]

[1] See Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(2).

the law society of the australian capital territory a member of the law council of australia
fourth floor 1 farrell place canberra act 2601
gpo box 1562 canberra act 2601
dx 5623 canberra
telephone 02 6274 0300
mail@lawsociety.asn.au www.actlawsociety.asn.au

2. Exclusion of Investor-State Dispute Settlement provisions

Investor State Dispute Settlement (ISDS) provisions provide important protections for foreign investors from arbitrary actions by host governments, particularly where domestic legal systems are weak or do not provide adequate mechanisms or remedies.[2] Therefore, appropriate ISDS mechanisms in BITs would need careful consideration, as to how the provisions are to be drafted and what matters should be included in them.

The Committee noted that there were concerns before the Joint Standing Committee on Treaties about the operation of the ISDS provisions in BITs, for example, the impact on sovereignty transparency in ISDS cases, national interest, the absence of appellate review and precedent, the issue of arbitrators' independence and *regulatory chill* (the idea that relates to governments deciding not to pursue regulation on health and environmental issues in the public or national interest, as a result of ISDS).

Recent BITs and Free Trade Agreements to which Australia is a party demonstrate that Australia has addressed these concerns to a great extent and the current agreements are compatible with the rule of law. It is evident that this approach has been necessitated after considering the inefficiencies seen in the existing BITs, such as those listed in the Discussion Paper.

The Committee has the following comments on common ISDS exempted measures:

Environmental, health and other regulatory objectives

Article 15 of the Hong Kong IA states:

> *Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure ... to ensure that investment activity ...is undertaken in a manner sensitive to environmental, health or other regulatory objectives.*

The Committee is of the view that this provision should be included in all BITs as it is not desirable for a party to restrain itself from regulating for these objectives in expectation of a challenge in an arbitral tribunal.

Protecting human, animal or plant life or health

Article 18.1(b) of the Hong Kong IA provides:

> *[n]othing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures ... necessary to protect human, animal or plant life or health.*

Providing examples of what is necessary to *protect human, animal or plant life or health* would clarify the meaning of this provision and ensure necessary environmental measures are maintained.

Securing compliance with laws and regulations

Article 18(1)(c) of the Hong Kong IA states:

> *[n]othing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures ... necessary to secure compliance with laws or regulations including those relating to the prevention of deceptive and fraudulent practices ...; the protection of privacy ... and the protection of confidentiality; or safety.*

---

[2] Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, Report 188: *Investment Uruguay, ISDS UN Convention and convention SKAO* (2019) Report 188, [2.2].

A similar provision in the Uruguay BIT, article 15 provides:

> *[n]othing in this Agreement shall be construed so as to prevent a Party from adopting or enforcing measures ... necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.*

The certainty provided by article 18 of the Hong Kong IA with regard to the excepted laws and regulations, is preferable in the commercial context in which a BIT operates, as opposed to article 15 in the Uruguay BIT.

Footnotes

The Committee noted that the exclusion of ISDS sometimes forms part of the footnotes in BITs. For instance, footnote 13 in the Hong Kong IA states:

> *No claim may be brought ... in respect of the following measures of Australia: measures ... related to the Pharmaceutical Benefits Scheme, Medicare Benefits Scheme, Therapeutic Goods Administration and Office of the Gene Technology Regulator.*

Although footnotes can be indicated to form an integral part of the agreement (see article 37 of the Hong Kong IA) the Committee is of the view that the exclusion of ISDS should form part of substantive provisions in BITs wherever possible for easy reference.

3. Challenging ISDS exceptions

Claimants are often allowed to challenge the validity of an ISDS excepted measure on the grounds that it is applied in an arbitrary or unjustifiable discriminatory manner or by way of a disguised restriction on international investment (e.g. Hong Kong IA article 18).

Consideration should be given as to whether such a challenge could raise an issue of sovereignty. If so, the tribunal may not be an appropriate forum to deal with that issue. The Committee refers to the Phillip Morris arbitration, which challenged the *Tobacco Plain Packaging Act 2011* (Cth), a public health measure in Australia. The arbitration raises the question of whether international arbitral tribunals should be prohibited from inquiring into, and deciding on the issue of the sovereign right of a state to enact and apply legislative and regulatory measures in the public interest.[3]

Moreover, application of a measure in an *unjustifiable discriminatory manner* should be clarified as to whether it refers to treatments that are contrary to common non-discrimination clauses in international treaties such as:

- Minimum Standard of Treatment: which requires that the host state treats foreign investors in accordance with an undefinable standard, such as 'fair and equitable'.[4]
- Most Favoured Nation Treatment: which requires states to not discriminate between their trading partners.[5]

The grounds for challenging ISDS excepted measures may also need to have limits for the purpose of certainty.

---

[3] *J T International SA v Commonwealth of Australia British American Tobacco Australasia Limited v The Commonwealth* [2012] HCA 43; See, Suzanne Howarth, 'Tobacco litigation, Panel Presentation' (2016) 242 *Ethos* 38.

[4] Centre for International Environmental Law, *International Law on Investment: The Minimum Standard of Treatment* (10 November 2003) (Originally presented at the World trade Organization's 5th Ministerial in August, 2003).

[5] See e.g. 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') art I.

A guiding principle could be that the regulatory interference with the investors' rights under the treaty must bear some rational connection to the public interest that has been asserted. In yet other circumstances, a BIT may have no public interest provisions, but international law may find that these policies should be applied.[6]

4. Interpretation of agreement and law

Article 31.2 of the Hong Kong IA states (article 14.22 of the Uruguay BIT is similar):

> *A joint interpretation of the Parties of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal shall be consistent with that joint interpretation.*

References to the VCLT and its rules of interpretation are important in interpreting provisions of international treaties. The VCLT provides that a treaty should be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[7] These are useful interpretation rules and guidance that should not be overlooked.

5. Arbitrator qualifications

Consideration should be given to requiring all arbitrators to have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements as provided in article 14.16 of the Uruguay BIT. This requirement should also apply to arbitrators appointed by the parties to a dispute. The independence of arbitrators should be provided as well as a code of conduct for arbitrators.

6. Arbitration timeframe

A prescribed timeframe for steps to be taken in an arbitral proceeding and for making an award would be desirable for a BIT.

7. Amicus Curiae submissions

Article 29.3 in the Hong Kong IA and 8.24(3) in the Peru IC (but not the Uruguay BIT) permit the use of written amicus curiae submissions to an arbitral tribunal regarding a matter of fact or law within the scope of the investment dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties. While appreciating the value of amicus curiae submissions in certain arbitral proceedings, the Committee is of the view that such submissions should be made within a set timeframe so that the tribunal proceedings are not delayed by them.

8. Corporate Social Responsibility

Article 16 of the Hong Kong IA provides:

> *The parties affirm the importance of each Party encouraging enterprises ... to voluntarily incorporate ... internationally recognised standards, guidelines and principles of corporate social responsibility ...*

It is recommended that consideration be given to including a provision for corporate social responsibility in all BITs.

---

[6] David Collins, *An introduction to International Investment Law* (Cambridge University Press, 2017) 282.

[7] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

The Society would be pleased to participate in further discussion about the comments and recommendations provided with this submission.

Yours sincerely,

Simone Carton

Chief Executive Officer