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

By Email: BITreformsubmissions@dfat.gov.au

Dear Sir or Madam

Review of Australia's bilateral investment treaties

We welcome the review of Australia's bilateral investment treaties (***BITs***) and are grateful for the opportunity to make a submission on the subject.

This submission will respond to questions 1, 3, 6 in DFAT's Review of Australia's BITs discussion paper (***Discussion Paper***).

Of the countries with whom Australia has a BIT, we note that Allens has a long history in PNG. We practice both local and international law through our Port Moresby office and represent many Papua New Guinean, foreign and multinational companies of their investments and business interests, both in PNG and overseas. We have particular experience in the energy and resources and banking sectors, and are proud to have acted on some of PNGs most important projects and commercial transactions.

In addition to our office in PNG, we also have offices in Vietnam, and an alliance with the Linklaters network that connects our clients to legal leaders spanning 40 offices in 28 countries.

1. In your view, are the existing BITs of benefit to Australian investors operating in these overseas markets? Please comment on their utility.

We advise clients on outbound investment into other jurisdictions, and inbound investment into Australia.

When advising clients on how to structure deals, we frequently advise on investment protections through Australia's BITs and investment chapters in Australia's FTAs. This is an issue that our clients increasingly care about, and is relevant to their decision to operate in an overseas market. While our submission suggests tweaks to the existing BITs, we believe the existing BITs do benefit Australians operating in overseas markets, and parties who wish to invest in Australia. We note, however, that the number of states with which Australia has a BIT in force (or investment chapter of an FTA) is limited.

We have recently conducted a high-level analysis of ASX-listed companies in certain industries (eg mining) to determine the overlap between where companies with an Australian nexus have overseas investments, and then of those countries, in which jurisdictions Australian investors are able to avail themselves of treaty protections either under Australia's BITs or investment chapters of an FTA. We found that other than certain exceptions (eg PNG), Australian investors often do not have investment protections available to them in the jurisdictions in which they are most often investing. This is particularly true when comparing jurisdictions of Australian investor's treaty protections to a list of jurisdictions that we considered investors to be most at risk, either because of announced changes of laws, or general concerns with the rule of law, for example through growing mining nationalism.

In analyzing the most recent treaty claims involving Australian investors, we have found that Australian investors turn to other treaties to try to enforce treaty rights, most often in the United Kingdom. The

consequence of this is that the Australian investors themselves (unlike their UK counterparts), may not automatically benefit from any eventual award.

3. Do you have concerns about Australia's existing BITs? If so, please comment on any specific provisions of concern.

This submission addresses some specific concerns which we have regarding provisions of a number of Australia's BITs, specifically:

- the absence of express protections against indirect or 'creeping' expropriation;
- the absence of a precise 'cooling off' or 'waiting period';
- clarity regarding the 'fork in the road' provisions.

Each of these provisions will be discussed in Parts A, B and C below.

You will see from the discussion below that our primary concern with these provisions is that their current drafting is unclear in key respects. This lack of clarity not only makes our task as advisers difficult but, more importantly, means that our clients are left in a position of uncertainty and unpredictability in relation to their rights and obligations under this agreement.

A. Indirect expropriation

The expropriation provisions of 14 of the 15 BITs identified in the Discussion Paper apply to measures that have 'equivalent 'or 'similar' effect to nationalisation or expropriation. The effect of this drafting is that Australian investors may be left unprotected in circumstances where their assets have been 'taken' by a host state in an indirect way, such as through government interference or acts over time. We acknowledge that there is recent case law under the Australia-Pakistan BIT to support the position that a host state's failure to renew a mining lease constitutes a measure having an effect 'equivalent to expropriation' (at least in certain circumstances),[1] however, the position is by no means clear or settled.

The Australia-Sri Lanka BIT protects investors expressly against indirect expropriation at Article 7(1):

> '[i]nvestments of investors of either Party shall not be subject, directly *or indirectly*, to any measure of nationalisation or expropriation in the territory of the other Party or any measure have effect equivalent to nationalisation or expropriation …'.

Article 9.8 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership also expressly provides for 'indirect expropriation' *and* measures having 'effect equivalent to nationalisation or expropriation'.

We consider the expropriation provisions of the existing BITs should be amended to align with these treaties. In our view, this dual language provides investors with protection against a wider range of measures than the language of equivalence.

B. Cooling off periods

Of the 15 BITs identified in the Discussion Paper for this review, 12 do not contain a precise term for a 'cooling off' or 'waiting period' during which parties must wait (and try to resolve their dispute amicably or by negotiation) before bringing a claim under a binding dispute resolution process. For example:

Article 13(1) and 13(2) of the *Agreement Between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments,* which entered into force on 14 October 1998 are in the following terms:

[1] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, *Award* (12 July 2019). We note that Pakistan has submitted a Request for Annulment to ICSID in relation to this award, and has also applied to stay the investor's enforcement action.

> 1. In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.
>
> 2. If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may…

While we believe that such a non-binding dispute resolution process can be beneficial to parties, by not having a time limit in place, parties are more able to drag out consultations or negotiations in an attempt to delay proceedings.

Only three of the 15 BITs identified in the Discussion Paper contain express cooling off periods – China (three months), Sri Lanka (90 days) and Turkey (six months).[2] We consider that the other 12 BITs would benefit from such an inclusion. This would give both investors and the relevant state party certainty in relation to the timing of arbitral proceedings and also encourage meaningful engagement. It would also be consistent with the general trend in this area. In 2012, the OECD conducted a survey of dispute settlement provisions in 1,660 international investment agreements and found that almost 90% of the surveyed treaties with Investor-State Dispute Settlement (***ISDS***) provisions contained a specified cooling off period.[3]

C. Fork-in-the-road provisions

Article 14(2) of the Australia-PNG BIT is in the following terms:

> If the dispute in question cannot be resolved through consultations and negotiations in accordance with paragraph (1) of this Article, either party to the dispute may:
>
> (a) in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before its competent judicial or administrative bodies;
>
> (b) if both Papua New Guinea and Australia are at that time party to the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the Convention), refer the dispute to the International Centre for the Settlement of Investment Disputes (the Centre) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;
>
> (c) if both Papua New Guinea and Australia are not at that time party to the Convention, submit the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement.

Similarly, Article 13(2) of the *Agreement between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments* (2002) (***Australia-Egypt BIT***) provides:

> If the dispute in question cannot be resolved through consultations and negotiations either party to the dispute may:
>
> (a) in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party's competent judicial or administrative bodies;
>
> (b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States ("the Convention"), refer the dispute to the International Centre for Settlement of Investment Disputes ("the Centre") for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;
>
> (c) if both Parties are not at that time party to the Convention, refer the dispute to:

[2] We note that the updated Agreement between Australia and Uruguay on the Promotion and Protection of Investments, which was signed on 5 April 2019 but has not yet entered into force, contains a six month cooling off period.
[3] J Pohl, K Mashigo and A Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey', *OECD Working Papers on International Investment* (2012/02) p 17.

(i) an Arbitral Tribunal constituted in accordance with Annex B of this Agreement, or by agreement, to any other arbitral authority; or

(ii) the Cairo Regional Centre for International Commercial Arbitration.

In cases where there is no agreement between the investor and the Party on the choice of the arbitration forum then the investor's preference would prevail.

The drafting of these provisions does not make it clear whether they constitute what is commonly known as a 'fork-in-the-road' provision. Fork-in-the-road provisions are jurisdictional provisions which typically bind an investor or a state party to its choice of dispute resolution procedure (usually domestic courts, ICSID or an ad-hoc tribunal). For example, if an investor chose to pursue its claim in the domestic courts of the state which admitted the investment, it could not later commence arbitral proceedings at ICSID.

The uncertainty arises due to the lack of a disjunctive ('or') or conjunctive ('and') between the options in sub-paragraphs (a), (b) and (c). If there was an 'or' separating the options, it would be clear that the provisions are fork-in-the-road provisions. By contrast, if there was an 'and', it would be clear that they are not fork-in-the-road provisions – meaning that an investor or a state's choice to pursue domestic litigation (for example) would not preclude them from concurrently or later bringing an ICSID claim.

On its face, both these provisions appear to give parties to a dispute the option of commencing *either* or *both* of domestic proceedings and/or an ICSID arbitration. That interpretation also follows from the use of the word 'may', without any qualification, such as 'either', in reference to the verbs 'initiate' (for court proceedings) or 'refer' (for ICSID arbitration). However, as drafted, we would be hesitant to advise a client to proceed with, for example, domestic proceedings on the basis that this would constitute a final and exclusive choice - meaning they may later be shut out from an alternative ISDS mechanism.

We are not aware of any authority or commentary discussing this aspect of the Australia-PNG BIT. We note that Australia's other 13 BITs vary in this respect. The BITs with Argentina, Sri Lanka, Turkey and Uruguay all contain clear fork-in-the-road provisions.[4] The BITs with China, the Czech Republic, Hungary and Poland, on the other hand, all contain express language which preserves an investor or state party's ability to choose a particular dispute resolution option without prejudicing its ability to concurrently or later pursue others.[5] The BITs with Laos, Lithuania, Pakistan, the Philippines and Romania are all in largely the same terms as the Australia-PNG BIT in this respect.

The effect of the uncertainty surrounding the status of Article 14(2) (and others like it) is to minimise the range of dispute resolution options available to investors and state parties and gives rise to a risk that a party will be bound to an initial choice to the exclusion of all others. This could lead to uncommercial outcomes or a denial of justice if it later turns out that the initial choice was an inappropriate one.

We consider that Article 14(2) and the other similar clauses provided for in Egypt, Laos, Lithuania, Pakistan, the Philippines and Romania BITs should be amended to align with the non-fork-in-the-road BITs mentioned above.

6. There are various models and approaches that different countries take in relation to international investment agreements. For instance, some models are concerned with investment facilitation rather than dispute resolution. In your view, is there a particular approach that is suited to meeting the interests of Australian industry and business?

In our view, it is critical for the achievement of the goals of BITs such as the Australia-PNG BIT (ie, to protect and promote foreign investment) that clear, certain and robust ISDS mechanisms are included. Otherwise, the investment protections conferred by these agreements are conferred in name only. This is especially

[4] See Australia-Argentina BIT, Article 13(1); Australia-Sri Lanka BIT, Article 13(2); Australia-Turkey BIT, Article 13(2) and (4); and Australia-Uruguay BIT, Article 13(2).
[5] See Australia-China BIT, Article XII(2); Australia-Czech Republic BIT, Article 11(3); Australia-Hungary BIT, Article 12(3) (for expropriation or nationalisation claims only); and Australia-Poland BIT, Article 13(3) (for expropriation or nationalisation claims only).

important in the case of investment in emerging markets such as Papua New Guinea, where domestic governance and capacity challenges can lead to unsatisfactory commercial and legal outcomes for foreign investors. Such provisions provide comfort to our clients in and outside of Australia, and provide necessary 'teeth' to the investment protections conferred on them.

D. Next steps

Please do not hesitate to contact us if we can be of assistance during the course of the review. We would be please to meet with DFAT to provide perspectives and information on the various issues being considered.

Yours sincerely

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