



23 October 2020

Bilateral Investment Treaty Reform Coordinator
Regional Trade Agreements Division
Department of Foreign Affairs

sent via email: BITreforms submissions@dfat.gov.au

Dear Bilateral Investment Treaty Reform Coordinator

Australia's economic prosperity has been built on openness to trade and investment: the movement of people, capital, services, and goods. Our openness to the world has delivered prosperity to Australian communities, generating more opportunities for our people, boosting living standards and transforming Australia into one of the wealthiest nations in the globe. Around one in five Australian jobs relies on trade, one in 10 on foreign direct investment.

Over the coming years that prosperity will be tested by the uncertain and complex global environment influenced by COVID-19. Investment in particular is at risk – UNCTAD estimate that global foreign direct investment flows are expected to fall by around 40 per cent this year. Australia's prosperity will depend on us remaining outward-looking and engaged in shaping the international trading system, particularly in supporting foreign investment flows.

Bilateral investment treaties (BITs) have emerged over time to play an important role in the international investment architecture, helping facilitate global investment and economic development. They provide protections and greater certainty for Australian investments abroad and foreign investors in Australia by through non-discrimination provisions, restrictions on expropriation of an investor's property, and fair and equitable treatment for investments.

The rules around the protection of investment are not static and it is therefore appropriate to seek opportunities to update and modernise existing BITs in ways that support broader policy objectives. To that end the Business Council supports efforts to update safeguards in older-style investment treaties, including investment arrangements with Indonesia, Hong Kong, Peru, Vietnam, Mexico, Uruguay and Chile through Free Trade Agreements (FTAs) or renegotiated BITs to ensure the provisions are balanced, modern and fit for purpose.

Investor-State Dispute Settlement

Investor-State Dispute Settlement (ISDS) is a feature of BITs as well as FTAs. ISDS has taken on greater importance as a result of growing global economic integration as well as attracting significant public debate.

Treaty-backed ISDS provisions provide an important avenue for Australian investors to seek remedy in the event of arbitrary, opaque or unfair decisions by foreign governments. Appropriately balanced ISDS provisions such as those in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership encourage transparency, fairness and due care in government decisions and decision-making processes. These ISDS provisions also provide appropriate safeguards to ensure that the

government's ability to regulate in areas like public health, the environment, or national security are not restricted.

ISDS provisions have rarely been used against Australia and never successfully. This is largely because Australia's governance standards and judicial systems already provide substantial confidence to foreign investors. But the standards of our legal institutions are not always reflected in foreign jurisdictions where Australian businesses may seek to invest. ISDS provides a level of assurance to Australian businesses that they can expand operations overseas with remedies available should they be needed. On balance, ISDS has been more advantageous to Australian investors abroad than it has to the (rare) ISDS litigants against Australia.

It is important to note that inclusion of ISDS in international agreements is a key element of trade policy for a great many of Australia's trade partners. A blanket exclusion of ISDS from our trade and investment arrangements (in spite of modern safeguards) would not only reduce certainty for Australian investors overseas, it could hold up conclusion of negotiations that benefit Australian producers, consumers, investors and the broader community and impose a significant limitation on the ability of Australia to unlock future trade opportunities in new markets.

Openness to, and leadership on modern, balanced ISDS provisions, affords our trade negotiators the policy flexibility needed to negotiate and win comprehensive trade deals that will set Australia up to ride the next wave of global growth.

Yours sincerely

A handwritten signature in black ink, appearing to read 'JW', followed by a horizontal line extending to the right.

Jessica Wilson
Executive Director, Policy; Company Secretary