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I have provided comments below in response to the Department of Foreign Affairs and Trade's call for submissions on its **Review of Australia's Bilateral Investment Treaties**. I have focussed my response on five of the Department's seven questions. I have also included several suggestions to minimise the risks of Australia's BITs in light of Australia's governance arrangements concerning the defence of investor-State claims.

I hope this is of assistance to the Department's review.

Thank you for providing the opportunity to input into this process.

Best wishes,

Esmé Shirlow

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

Clarifying the Purpose of Australia's Investment Treaties

1. Many of Australia's BITs emphasise the potential economic benefits of investment protection to the exclusion of any additional, or alternative, values that might be associated with the encouragement and protection of foreign investment. The preambles to Australia's existing BITs emphasise, for example, the parties' desires "to intensify economic cooperation", to stimulate "individual business initiative to the benefit of both countries", "the importance of promoting the flow of capital for economic activity and development". While there are references to "development", "sovereignty", "equality", "mutual benefit", and "non-discrimination" in each treaty, the emphasis is very much upon the link between these values and economic goals. This skews the focus of Australia's existing BITs and creates risks for the interpretation of these treaties.

2. This approach in Australia's existing BITs contrasts with the BITs and model treaties of many other States, which link a broader range of goals with the encouragement and protection of foreign investment. The Norwegian model investment treaty, for example, emphasises, *inter alia*, the desire through the BIT "to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labour rights" and "to contribute to a stable framework for investment in order to maximize effective and sustainable utilization of economic resources and improve living standards". The 2016 Morocco-Nigeria BIT similarly emphasises "the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development", and reiterates in that context the parties' aim "to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties", whilst "reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives and taking into account any asymmetries with respect to the measures in place, the particular need of developing countries to exercise this right".

3. The preambular statements in Australia's existing BITs appear out-of-step with the goals of a modern investment policy and publicly signal a particularly economic view of the potential role of investment encouragement and protection. They also create risks given the role of preambular statements to interpretation under Article 31 of the *Vienna Convention on the Law of Treaties*. Australia could adjust such preambular statements for future treaties, or otherwise provide joint interpretive statements with its treaty partners to clarify the relationship between the economic goals that underpin foreign investment promotion and protection and other, broader, values. This may also assist to redress the largely asymmetrical nature of Australia's existing BITs, which might open scope also to consider more far-reaching reforms, including provision for respondent States to make counterclaims against investors as part of any investor-State dispute settlement mechanism and/or reform to address specific issues that investment treaties pose to particular groups within the community, including Aboriginal and Torres Strait Islanders (see further below).

Clarifying the Scope and Application of Australia's Investment Treaties

4. **Investment obligations and sub-national government conduct:** Most of Australia's existing BITs reflect default rules of international law which attribute to the State the conduct of all of its organs for the purposes of assessing State responsibility, regardless of their institutional position, and regardless of whether they operate at the central or sub-national levels. The Australia-Argentina BIT, for example, binds "Each Contracting Party" to various substantive obligations vis-à-vis the treatment of foreign investment. For a federal State such as Australia, it is important to note that this creates compliance risks insofar as sub-national governments may not know about – or may otherwise not wish to comply with – Australia's obligations under its existing BITs. Yet, sub-national governments in Australia are increasingly likely to interact with (and therefore have capacity to impact) foreign investors through sub-national regulation and conduct. In my view, Australia could do more to anticipate and respond to these risks.

5. One option would be to reformulate such provisions. Australia could, for example, exempt sub-national governments from the scope of all (or some) investment treaty obligations, or negotiate specific clauses to specify how obligations apply to central or sub-national officials (as included in, for instance, the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership).* Such approaches carry their own risks, including by creating:

a. negotiating difficulties due to their creation of asymmetrical treaty obligations for central and decentralised States;
b. the risk of piecemeal or even conflicting regulatory regimes at the central and sub-national levels vis-à-vis investment protection, which in turn increase regulatory opacity and compliance costs; and
c. enforcement gaps which remove 'international accountability for local governments at the same time that local governments are increasingly exercising their authority in a way that produces international effects'.[1]

6. An alternative option would be to leave such provisions as is and to modify Australia's internal governance arrangements to redress the risks they create. This could include by developing training programs for sub-national government officials to increase their institutional knowledge and capacity to comply with their State's BIT obligations. I am currently exploring in my research, for instance, the utility of developing institutional arrangements to accommodate the participation of sub-national governments in the defence of any investor-State dispute claims concerning sub-national government measures. The latter institutional arrangements could productively focus on developing in advance of any disputes arising institutional mechanisms to support personnel exchanges/secondments, information exchanges (including for document production orders from a tribunal), and cost sharing arrangements. Other federal and decentralised States have relatively more advanced institutional arrangements than Australia in this regard, and could be looked to for inspiration. Finally, Australia could more actively involve sub-national government officials in the negotiation of future investment treaties. This would allow such officials to become acquainted with their obligations under such treaties, whilst allowing Australia to benefit from their insights and experience concerning the subjects that might increasingly generate investor-State claims under Australia's treaties as drafted (including, in particular, the likelihood of increased claims in relation to infrastructure and mining projects).

[1] Timothy Meyer, 'Local Liability in International Economic Law' (2017) 95 *North Carolina Law Review* 261.

7. (As an aside and related to the above, I note that in more recent treaties Australia has adopted various provisions relevant to the issue of attribution. Article 14.2 of the IA-CEPA, for example, specifies that the Investment Chapter applies to measures adopted or maintained by 'any person, including a state-owned enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party'. A footnote clarifies that: "For greater certainty, governmental authority is delegated under a Party's law, including through a legislative grant or a government order, directive or other action transferring or authorising the exercise of governmental authority." A similarly worded provision was at issue in the case of *Adel A Hamadi Al Tamimi v. Sultanate of Oman*. That tribunal held that the provision stipulated a test for attribution that was narrower than that under customary international law. Nonetheless, the tribunal referred to Article 5 of the ILC draft articles as a 'useful guide' in applying the treaty provision. To the extent that the purpose of these provisions is to modify the approach that is adopted under general rules of international law, Australia could more carefully specify the intended relationship between customary international law rules of attribution and the treaty text.)

8. **The link between the investor and their investment:** Many of Australia's older BITs provide protection to investments that are "owned or controlled" by the relevant investor, and define "control" to mean the holding of "a substantial interest in the … investment". Greater clarity could usefully be provided – including by means of a joint interpretive statement or an annex – concerning the threshold (quantum of interest) to establish control, including whether the test should focus on factual or legal control. Related to this, a number of Australia's earlier investment treaties do not include denial of benefits clauses. Such clauses could provide a useful further safeguard for Australia. Finally, Australia could also take steps to formalise a role for the abuse of rights doctrine and to indicate in which circumstances it will apply.

Clarifying the Substantive Obligations Contained in Australia's Investment Treaties

9. **More detailed guidance as to the content of obligations:** The main deficiency in Australia's existing BITs is the brief statement of obligations. While the obligations contained in Australia's existing treaties can be elaborated through principles of treaty interpretation (including by reference to customary international law and arbitral decisions), Australia could usefully clarify (or revise) provisions to ensure that they reflect the intended scope of each obligation. This could include clarifying the accepted elements of a fair and equitable treatment obligation, the role of the customary international law police powers doctrine, the scope of full protection and security obligations (physical or also legal protection?), the relationship between fair and equitable treatment and non-impairment obligations, the scope of the 'treatment' covered by most-favoured-nation clauses (substantive and/or procedural?), etc. The latter clarification may be particularly important to the extent that some, but not all, of Australia's treaties are updated or modified leaving others with potentially more favourable (vague) substantive and/or procedural protections that investors may seek to invoke through most-favoured-nation provisions in the reformed treaty. Several of Australia's BITs also contain 'umbrella' clauses (eg Article 11 PNG-Australia BIT, Article 11 China-Australia BIT). While these are narrowly drafted compared to the provisions included in other treaties, the Department may wish to consider whether further safeguards would be desirable and/or whether such clauses are necessary.

10. Substantive provisions could also be revised (or clarified) in some instances to confirm the role of balancing tests or exceptions in their application. Some of the 'transfers' clauses in Australia's older BITs, for example, require the parties to "grant to an investor of the other Contracting Party the unrestricted right to transfer abroad funds related to an investment"

without clarifying that such obligation is "subject to its laws and policies" (instead only providing a narrower exception related to protection of creditor rights or judgment debts).

11. **The asymmetrical nature of obligations in Australia's existing BITs:** As noted above, all of the substantive obligations under Australia's investment treaties are owed by the States party to the treaty. A more balanced approach might be to provide also for investor obligations. Australia has begun in its more recent treaties to "affirm" the importance of investors abiding by certain standards or guidelines. Such language is likely too permissive to result in a legal obligation on investors to make or operate their investment consistently with such standards. Providing binding investor obligations and/or a capacity for counterclaims and/or a capacity to raise admissibility objections or defences in relation to investor conduct might assist to rebalance the treaties whilst also encouraging investors to weigh up a claim holistically prior to filing it.

12. **Guidance on remedies:** There is further scope for Australia to consider the ramifications of any finding of breach of an investment treaty. Where (as is usual) the treaty does not provide specific guidance as to the remedies that attach to a breach, customary international law rules will apply. The Department may wish to consider whether an interpretive note (or revision) could clarify the role of such customary international law rules to investor-State claims. This could include the role (if any) of the remedy of restitution: this remedy may produce difficulties for States, particularly where it is applied outside of the context of a commercial relationship with the investor. Similarly, the Department may wish to consider recent academic work that engages with the appropriate approach to assessing compensation in this context.[2] Finally, as noted above, internal institutional arrangements could be established to stipulate how any liability to pay compensation to an investor will be distributed in the event that a sub-national government measure is at issue.

Refining Approaches to Investor-State Dispute Settlement in Australia's Existing Investment Treaties

13. If investor-State dispute settlement clauses are to be retained, Australia should either amend the treaties or negotiate new linked instruments to better regulate the procedural rules that will attach to future claims under these existing treaties. In my experience, the procedural rules attaching to an investor-State arbitration can have significant impacts on the manageability and outcome of such disputes. I have detailed some considerations in this respect below.

14. **The mode of dispute settlement provided in Australia's existing treaties:** Australia's existing treaties each provide for the arbitration of investor-State disputes, usually under the ICSID or UNCITRAL Rules. More modern investment treaties favour (or are increasingly likely to favour) alternative modes of investor-State dispute settlement. This includes investor-State mediation or settlement through a (multilateral) international investment court. The possibility of appellate mechanisms is also frequently contemplated in more recent treaty practice. To the extent that Australia adopts such alternative forms of investor-State dispute settlement in new treaties either in addition to or in place of investor-State arbitration, it may wish to revisit earlier treaties to ensure that they reflect Australia's views (and best practice) as to the modes of dispute settlement most appropriate for the resolution of investor-State disputes.

[2] Emma Aisbett and Jonathan Bonnitcha, 'Compensation Under Investment Treaties - As If Host Interests Mattered' [2018] UNSW Law Research Paper Series.

15. **Procedural transparency:** Most of Australia's early investment treaties do not contain any provisions concerning the levels of confidentiality or transparency that will apply to arbitrations conducted under them. Australia's ratification this month of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration is an important step to rectify the approach to transparency/confidentiality that might otherwise have been taken by tribunals established under these treaties.[3] However, absent specific disputing party agreement, it must be noted that – pursuant to Article 2 – the UNCITRAL Transparency Rules will only apply under the Convention to investor-State arbitrations in which "the respondent is a Party … and the claimant is of a State that is a Party that has not made a relevant reservation". None of the States party to Australia's existing BITs have signed or ratified the Convention. Australia could therefore undertake targeted diplomatic efforts to secure ratification by its treaty partners. It could otherwise seek targeted renegotiation (eg by side letter or protocol), to condition its own consent to investor-State dispute settlement under these treaties to require the application of the transparency regime set out in the Convention. ICSID is also in the process of updating its Rules, including provisions on transparency in ICSID disputes. Australia could usefully input into these processes as a party to the ICSID Convention, given that any arbitration under the ICSID Convention will use the revised version of the ICSID Rules.

16. **Costs allocations**: Most of Australia's existing BITs do not regulate the allocation of costs from investor-State dispute settlement procedures. The China-Australia BIT is one of the more specific BITs in this regard, providing that the costs of arbitrators will be borne by the disputing parties for the costs of their respective party-appointed arbitrator and split equally between them for the costs of the president. The legal (non-arbitrator) costs associated with an investor-State claim can be significant. While practice generally reflects that costs will follow the event,[4] many States – Australia included – have been required to bear the costs of claims which they ultimately succeeded in defeating. The silence in existing treaties as to the principles relevant to the allocation of costs may therefore create significant financial uncertainties and risks for Australia as a respondent State. This is particularly an issue given how Australia structures the defence of investor-State claims (which relies on a mix of in-house full-time and external as-charged legal advice).

If Australia took the approach of re-negotiating at least some of the existing BITs, do you have views on which clauses should be included in a renegotiated agreement?

17. I have noted above the various approaches that could be adopted to improve the clauses currently contained in Australia's BITs. Prior to any re-negotiation (or new negotiation), I would encourage the Department to consider the development (and public release) of a **model investment treaty**. As has been noted, the absence of a model treaty is "quite unusual",[5] model treaties being "the *sine qua non* of best practice in the formulation of international investment

[3] See, generally: Esmé Shirlow, 'Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' (2016) 31(3) ICSID Review – Foreign Investment Law Journal 622.

[4] See, more specifically, though: Susan D. Franck, Arbitration Costs: Myths and Realities in Investment Treaty Arbitration (Oxford University Press 2019).

[5] Luke Nottage, Evidence to the Foreign Affairs, Defence and Trade References Committee (2015: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/8c08e8aa-dcaa-4416-bd62-ba8bb6d6fa6b/0011%22)

policy globally".[6] A model agreement would provide greater scope for internal and external consultation on Australia's BIT policy.[7] It would also assist to harness corporate knowledge from past experiences with treaty negotiation and dispute settlement, whilst providing an opportunity for more holistic reflection on the goals of Australia's investment treaty program as well as the consistency (and impact) of particular provisions across different agreements. Related to this, to the extent that any renegotiation is undertaken, it would also be beneficial for the Department to consider the practical impact of each treaty since its adoption, including what benefits it has produced for Australia (and how). This will help to inform the Department's cost/benefit assessment of the utility of a renegotiated treaty (and its specific provisions).

18. It would also be worthwhile for the Department to specifically consider **the potential impact of investment claims on the interests and rights of Aboriginal and Torres Strait Islanders.** As drafted, Australia's existing BITs do little to accommodate or protect the interests and rights of Aboriginal and Torres Strait Islanders. In my joint submission with Emma Aisbett, Christian Downie and Lily O'Neill, we have noted that there are several procedural and substantive options to better safeguard these interests and rights. This includes better integration of Australia's foreign investment admission procedures, investor obligation clauses, the inclusion of general public purposes or specific carve-out clauses, and internal institutional arrangements for the management of claims concerning Aboriginal and Torres Strait Islander rights or interests. Other States like Canada and New Zealand have adopted various innovative approaches to these issues which could be looked to for inspiration (and which we outline in our joint submission).

In your view, would any concerns you have about any of Australia's existing BITs warrant termination of one or more BITs?

19. Any renegotiation of Australia's BITs (either on a bilateral or multilateral basis) should lead to the termination of older treaties to avoid a potential "noodle bowl effect of multiple and overlapping"[8] treaties. Note that any termination would also have to grapple with the ongoing impacts (if any) of the sunset provisions included in each of Australia's existing BITs.

[6] N. Jansen Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39(3) Legal Issues of Economic Integration 301.
[7] Senate Standing Committee on Foreign Affairs, Defence and Trade, 'Blind Agreement: Reforming Australia's Treaty-Making Process' (25 June 2015).
[8] Joint Standing Committee on Treaties, 'Aspects of the Peru-Australia Free Trade Agreement Revisited' (November 2018), citing Mr Damian Kyloh, Associate Director, Economic and Social Policy, Australian Council of Trade Unions (ACTU), Committee Hansard, Melbourne, 8 November 2018, p. 27..

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?

20. It may be possible for elements of both approaches to be used in parallel. This depends in part on the type of investment at issue.[9] In particular, where there is a pre-existing relationship between the State and the investor, further consideration could be given to the integration of alternative dispute facilitation and management techniques. Mediation could, for instance, be used by both Australia and its treaty partners to attempt to resolve disputes prior to them crystallising or otherwise escalating to arbitration (or other international procedures).[10] This could include the development of investment promotion agencies or ombudsman services with authority to detect, manage and prevent possible disputes with investors. Such 'investment aftercare' can assist States to offer 'an innovative alternative' to investor–state arbitration, 'to overcome its limitations and litigious approach by fostering a more dynamic, constructive and long-term interaction between the Parties and their investors'.[11] Such initiatives could be adopted for all investors, or otherwise on a sector- or investment-specific basis. This could include, for example, sectors that have been highly represented in investor-State arbitration claims, or for which mediation is likely to be particularly beneficial. The International Chamber of Commerce, for instance, encourages parties to medium- to long-term contracts to develop 'Dispute Boards' to assist to settle disputes as they arise over the course of a contract. Similar initiatives could be considered where Australia grants important contracts or licenses to investors. Such approaches nevertheless come with their own risks, making it necessary to thoughtfully balance them against other reform goals and options.[12] One key risk is that such procedures may hamper State efforts to regulate and create regulatory chill. Such risks could be redressed through specific guidelines to assist officials to determine which options are most appropriate in light of the specific legal issues, rights, or interests at issue. Such initiatives could also be coupled with targeted transparency measures to allow for scrutiny of outcomes or processes.

In light of the various policy options available, what approach do you consider should be taken?

21. As indicated above, renegotiation reflects a particularly useful way of redressing the existing issues in Australia's BITs. In my view, it is useful for such renegotiation to take place in the context of broader trade negotiations, given the close relationship between trade and investment and the capacity for an integrated investment chapter in a trade agreement to yield a broader view of the types of goals that warrant providing investment protection. The combination of investment with other issues may produce complexities in the negotiations, but

[9] Esmé Shirlow, 'Addressing the Problem of the 'Unknown' Claimant in Investor-State Arbitration' (25 November 2015) (http://arbitrationblog.kluwerarbitration.com/2015/11/25/addressing-the-problem-of-the-unknown-claimant-in-investor-state-arbitration/)

[10] See, generally: Esmé Shirlow, 'The Promises and Pitfalls of Investor-State Mediation' (2020, forthcoming Yearbook on International Investment Law and Policy).

[11] UNCITRAL Working Group III Secretariat, 'Possible Reform of Investor-State Dispute Settlement (ISDS) - Submission from the Government of Brazil' (11 June 2019) A/CN.9/WG.III/WP.171 5, 15.

[12] See, for an elaboration of this point vis-à-vis investor-State mediation: Esmé Shirlow, 'Investor-State Arbitration Meets Mediation: Potential Problems?' (Kluwer Arbitration Blog, 30 September 2020).

may also generate the capacity for Australia to achieve additional concessions on central issues. An internal model investment treaty that identifies a sequence of options listed in order of policy preference might assist Australia to harness this possibility.

22. Another approach would be the negotiation of multi- or bilateral amending instruments or protocols on specific issues. A useful example of a multilateral instrument to this effect is the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration. It is conceivable that groups of like-minded States could negotiate similar agreements to cover comparably discrete issues, including to provide consent to apply modernised provisions in those instruments to existing treaties.

23. A further option might be a joint, or even unilateral, interpretive statement. The utility and impact of joint statements is currently under consideration by UNCITRAL's Working Group III, and it is worth noting that such statements may themselves produce complexities (or be ignored in dispute settlement proceedings). One way around these issues might be to formalise the nature of the interpretive statement, for instance by adopting it in the form of an amending protocol. Australia could also explore incorporating through amendments, through interpretive statements, or through proposals to claimant investors references to various soft law instruments and guidelines relevant to many of the procedural issues canvassed above. This could include, for example, the IBA Rules on the Taking of Evidence in International Arbitration, the IBA Guidelines on Conflicts of Interest in International Arbitration, or the UNCITRAL/ICSID Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement.

24. Finally, Australia could do much to unilaterally improve its institutional management of investment claims. This includes through efforts to capture corporate knowledge generated through the defence of claims to date (including the processes for vetting and appointing arbitrators and managing document discovery processes). Further, in any efforts to renegotiate investment treaties, it is important to capture the negotiating records (and, where possible, seek the treaty partner's endorsement of the record as a reflection of the party's joint intentions behind the treaty).[13] Such negotiating records can be important interpretive materials for any future claim. Australia could initiate efforts to collate and organise the negotiating records for existing BITs. Given the age of many of Australia's existing BITs, steps should be taken now to preserve any negotiating records from loss or scheduled archival destruction.

[13] See, generally: Esmé Shirlow and Michael Waibel, 'Using Travaux to Interpret Treaties: A Proposed Sliding Scale (2020, forthcoming British Yearbook of International Law)