

# Submission to Australian Government Department of Foreign Affairs and Trade Review of Australia's Bilateral Investment Treaties

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## 1. Scope of this Submission

This submission addresses Questions 3 and 4 raised in DFAT's discussion paper. It addresses concerns about specific provisions in Australia's existing bilateral investment treaties (BITs) and explains alternative approaches that Australia should, in my view, consider in any renegotiation of its existing BITs. The analysis in this submission would be equally relevant to any decision by Australia to agree with a particular treaty partner to amend particular provisions of an existing BIT, to adopt a joint interpretation, or to replace an existing BIT with a free trade agreement (FTA) chapter.

This submission addresses the following issues:

- Part 2 makes specific suggestions as to how Australia could further clarify the protection against indirect expropriation, if it chooses to include this protection in any renegotiated agreements. It highlights that provisions aimed at clarifying the indirect expropriation standard in Australia's more recent FTAs and BITs vary substantially, and these variations could have a significant effect on the regulatory space afforded to Australia.
- Part 3 summarizes concerns about the fair and equitable treatment (FET) provisions in Australia's older BITs, and analyses the options facing Australia in any treaty renegotiation. In summary, Australia could either shift to utilizing FET provisions that contain a closed list of the categories of conduct that violate the standard, or omit any reference to FET, and instead include an exhaustive statement of the types of conduct that are understood to violate the customary international minimum standard.
- Part 4 addresses general exceptions provisions, which are not included in Australia's older BITs. It assesses the options facing Australia in any treaty renegotiation, including whether to utilize such provisions, and if they are utilized, additional clarifications or alternative drafting approaches that should be considered, beyond Australia's practice in its most recent FTAs and BITs.
- Part 5 concerns provisions that reaffirm the treaty parties' right to regulate, which have sometimes been utilized by Australia in the investment chapters of its FTAs. It suggests that these provisions provide interpretative context that may inform how investment protection obligations are construed, and explains additional drafting options that Australia should consider, beyond its existing FTA practice, in any renegotiation of its BITs.
- Part 6 addresses provisions that exclude certain categories of public welfare measures from investor-state dispute settlement (ISDS), an area where Australia's recent treaty practice, mainly in the FTA context, has been particularly innovative. It makes recommendations as to how this aspect of Australia's treaty practice should be consolidated in any renegotiation of its BITs.

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## 2. Clarifying the Protection against Indirect Expropriation

Australia's older BITs include a protection against indirect expropriation, for example by referring to 'measures having effect equivalent to nationalisation or expropriation',<sup>2</sup> but do not provide further guidance on the meaning of this concept. Since the Australia–United States FTA (AUSFTA), signed in 2004, Australia's FTAs and BITs have almost always included language providing further guidance on what constitutes an indirect expropriation.<sup>3</sup> The use of these provisions is consistent with broader international trends: such 'expropriation annexes' were first used by the United States (US) and Canada in their model investment treaties of 2004, and have been since been consistently utilized by a wide range of states.

### 2.1 Which Model of Clarifying Indirect Expropriation to Adopt?

If, after reviewing its BITs, Australia continues to pursue a policy of including a protection against indirect expropriation, attention should be given to the possibility of adopting a more consistent approach to clarifying this standard through treaty drafting. Within Australia's FTAs and recent BITs that include language aimed at clarifying the notion of indirect expropriation, there is a substantial degree of variation. These variations could have a significant effect on the regulatory space afforded to Australia.

To illustrate these variations, it is helpful to begin with a standard example of how expropriation annexes attempt to clarify the notion of indirect expropriation. For example, the AUSFTA provides:

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.

(b) Except in rare circumstances, nondiscriminatory 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 expropriations.<sup>4</sup>

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<sup>2</sup> Eg Australia–Poland BIT Art 7(1). Australia–Hungary BIT Art 7(1); Australia–Pakistan BIT Art 7(1); Australia–Philippines BIT Art 7(1). For slightly different wording see eg Australia–China BIT Art VIII(1). Australia–Papua New Guinea BIT Art 7(1).

<sup>3</sup> Exceptions include the following agreements: Thailand–Australia FTA Art 912, Australia–Turkey BIT Art 7; Australia–Sri Lanka BIT Art 7.

<sup>4</sup> AUSFTA Annex 11-B(4).

There are two key respects in which some of Australia’s FTAs and recent BITs differ from this provision. First, some treaties differ regarding the final paragraph of the annex, which operates to remove certain kinds of regulatory conduct from constituting indirect expropriations. This paragraph is typically seen as a codification of the ‘police powers’ doctrine developed by arbitral tribunals. Second, some agreements add further guidance regarding the factors that an interpreter must consider within the case-by-case inquiry of determining whether a measure constitutes an indirect expropriation. These differences will be considered in turn.<sup>5</sup>

## **2.2 Variations in the Paragraph Clarifying that Certain Types of Non-Discriminatory Regulatory Conduct do not Constitute Indirect Expropriations**

While most of Australia’s FTAs include a clarification in identical or very similar terms to the AUSFTA, extracted above, featuring the qualification ‘except in rare circumstances’,<sup>6</sup> two other approaches have been used by Australia. A minority of Australia’s treaties omit this qualification and provide that: ‘Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations’.<sup>7</sup>

The Japan–Australia Economic Partnership Agreement (JAEPA), which does not feature investor-state arbitration, includes additional guidance concerning what constitutes the ‘rare circumstances’ in which non-discriminatory regulatory actions, designed and applied to achieve legitimate public welfare objectives, may constitute an indirect expropriation. Specifically, it provides:

*Except in rare circumstances, such as when an action or a series of actions by a Party is so severe in light of its purpose that it cannot be reasonably viewed as having been applied in good faith, non-discriminatory regulatory actions designed and applied by the Party for the purpose of legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriation.*<sup>8</sup>

The approach adopted in a minority of Australia’s FTAs and BITs, of omitting the ‘except in rare circumstances’ qualification altogether, is the option that best protects regulatory autonomy and reduces arbitral discretion.<sup>9</sup> This is because an arbitral tribunal’s inquiry would be limited to asking whether the relevant conduct constitutes a non-discriminatory regulatory

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<sup>5</sup> In addition to the issues discussed in this Part, a further issue Australia could consider in any renegotiated agreements is whether to clarify explicitly the relationship between the different parts of expropriation annexes (eg the relationship between the final paragraph and the paragraph containing the case-by-case inquiry). On this point see Federico Ortino, ‘Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership Approach and the (Elusive) Search for “Greater Certainty”’ (2016) 43 LIEI 351, 361–4.

<sup>6</sup> AUSFTA Annex 11-B(4)(b). Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) Annex 9-B para 3(b); Australia–Hong Kong Investment Agreement (2019) Annex II para 3(b). Peru–Australia FTA Annex 8-B(5). ANZCERTA Investment Protocol Art 14(1) fn 7; Australia–Chile FTA Annex 10-B(3)(b).

<sup>7</sup> Australia–Uruguay BIT (2019) Annex B (3)(b). Malaysia–Australia FTA, ch 12, Annex para 4; ASEAN–Australia–New Zealand FTA ch 11, Annex para 4. Indonesia–Australia CEPA Annex 14-B, para 3(c). Pacific Agreement on Closer Economic Relations Plus, Annex 9-C(4).

<sup>8</sup> JAEPA Annex 12(4) (emphasis added).

<sup>9</sup> Similarly: Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar Publishing 2017) 150.

action, which has a sufficient nexus to a legitimate public welfare objective to pass the ‘designed and applied’ threshold.

The approach adopted in the JAEPA expropriation annex is somewhat less clear-cut but still likely to be fairly protective of regulatory autonomy.<sup>10</sup> Essentially, the provision makes clear that a non-discriminatory regulatory action may be ‘so severe in light of its purpose that it cannot be reasonably viewed as having been applied in good faith’, and thus would constitute an indirect expropriation. This language appears to require an assessment of the impact of a measure, either on a particular investment or covered investments generally, in light of its purpose. However, the purpose of this assessment would be limited to determining whether the measure ‘cannot be reasonably viewed as having been applied in good faith’. This suggests that once the threshold of good faith application of a measure is passed, non-discriminatory regulatory actions that are designed and applied for a legitimate public welfare purpose are excluded from the concept of indirect expropriation.<sup>11</sup>

The approach adopted in the AUSFTA (extracted above) and the majority of Australia’s FTAs, of including the ‘except in rare circumstances’ qualification without further guidance, leaves the greatest degree of discretion to arbitral tribunals. Under this approach, whether a non-discriminatory regulatory measure that is designed and applied to achieve a legitimate public welfare objective may nevertheless constitute an indirect expropriation would depend on how tribunals interpret the exception for ‘rare circumstances’. From the perspective of regulatory autonomy, a concern, based on existing case law concerning indirect expropriation, is that tribunals may interpret ‘rare circumstances’ to refer to a situation where the impact of a measure on a particular investment is disproportionate to the public welfare interests secured by the measure.<sup>12</sup> If Australia does not intend to enable adjudicators to make this kind of determination, it should either omit the ‘rare circumstances’ qualification, or provide guidance on what constitutes ‘rare circumstances’ (as in the JAEPA expropriation annex).

Another development in Australia’s more recent FTAs and BITs in relation to the final paragraph of expropriation annexes, which clarifies that certain forms of legitimate regulatory conduct do not constitute indirect expropriations, concerns the reference to ‘legitimate public welfare objectives’ in such provisions. As noted above, following US treaty practice, the ‘legitimate public welfare objectives’ mentioned in these provisions typically include ‘public health, safety, and the environment’. In several recent FTAs and BITs, Australia has included a footnote that further specifies the kind of measures that fall within the reference to public health. This clarification typically provides:

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<sup>10</sup> For a similar assessment see *ibid.*

<sup>11</sup> Such an interpretation was advanced by Canada in a recent non-disputing party submission: *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada (27 February 2020) para 11.

<sup>12</sup> Arbitral tribunals, in distinguishing non-compensable exercises of a host state’s police powers from indirect expropriations that must be compensated, have increasingly referred to a requirement that, to fall within a police powers exception, a measure must be proportionate to the public interest pursued, taking account of the measure’s impact on protected investments. Among many, see eg *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Uruguay* ICSID Case No ARB/10/7, Award (8 July 2016) paras 305-6. *El Paso Energy International Co v Argentina*, ICSID Case No ARB/03/15, Award (31 October 2011) paras 241, 243. *Mohamed Abdel Raouf Bahgat v Egypt*, PCA Case No. 2012-07, Award (23 December 2019) paras 224, 226, 230-232.

For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.<sup>13</sup>

In my view, this clarification serves a useful purpose as it provides specific guidance on the types of measures that are understood by the treaty parties to fall within the reference to public health as a legitimate objective, while explicitly not limiting the scope of the paragraph that excludes certain forms of regulatory conduct from constituting indirect expropriations. Another approach to defining the ‘legitimate public welfare objectives’ mentioned in this part of expropriation annexes appears in the Korea–Australia FTA, which adds: ‘For greater certainty, the list of “legitimate public welfare objectives” ... is not exhaustive’.<sup>14</sup> Arguably this clarification is unnecessary, given the examples of legitimate objectives are prefaced by ‘such as’. However, one reason to include such a clarification is that it alerts an interpreter that measures pursuing other equivalent kinds of ‘legitimate public welfare objectives’, which are not explicitly listed, may fall within the paragraph and thus also be excluded from constituting an indirect expropriation.

### **2.3 Variations in the Factors to be Considered in the Case-by-Case Inquiry**

The expropriation annexes that have been used by Australia, and many other states, since the mid-2000s, include a provision that specifies a list of factors that must be considered in determining whether a measure constitutes an indirect expropriation. Paragraph 4(a) of the expropriation annex in the AUSFTA, extracted above, is a standard example, and the same wording appears in some of Australia’s other FTAs.<sup>15</sup>

Within the factors that must be considered in the case-by-case inquiry, a small number of Australia’s more recent treaties add further detail compared to the AUSFTA wording. The first type of variation adds further detail on what is meant by the ‘the character of the government action’. For example, the ASEAN–Australia–New Zealand FTA and the Indonesia–Australia Comprehensive Economic Partnership Agreement (CEPA) both provide guidance on what is meant by this expression by adding ‘*including, its objective and whether the action is disproportionate to the public purpose*’.<sup>16</sup> The Korea–Australia FTA refers to ‘the character of the government action, *including its objectives and context*’.<sup>17</sup> A footnote to this provision provides that ‘for Korea, a relevant consideration could include *whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest*’.<sup>18</sup> The specification ‘for Korea’ indicates the this clarification would only apply in relation to Korea’s measures.

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<sup>13</sup> CPTPP Annex 9-B(3)(b) fn 37; Australia–Hong Kong Investment Agreement (2019) Annex II(3)(b) fn 43; Australia–Uruguay BIT (2019) Annex B (3)(b) fn 4.

<sup>14</sup> Korea–Australia FTA Annex 11-B(5) fn 54.

<sup>15</sup> Eg Australia–Chile FTA Annex 10-B(3); Singapore–Australia FTA Annex 8-A(3)(a).

<sup>16</sup> ASEAN–Australia–New Zealand FTA ch 11, Annex para 4(3)(c). Indonesia–Australia CEPA Annex 14-B, para 3(c) (emphasis added).

<sup>17</sup> Korea–Australia FTA Annex 11-B(4)(c) (emphasis added).

<sup>18</sup> Korea–Australia FTA Annex 11-B(4)(c) fn 53 (emphasis added).

In principle, if Australia continues to favour a protection against indirect expropriation, providing further guidance on how tribunals should determine the character of a government action is a sound idea. However, a risk of including a reference to whether a government action ‘is disproportionate to the public purpose’ pursued, is that it may provide a basis for tribunals to weigh the importance of the public purpose served by a measure against the measure’s impact on a particular protected investment.<sup>19</sup> This sort of balancing exercise is directly invited by the language included, only in relation to Korea’s measures, in the Korea–Australia FTA, referring to ‘whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest’. Within such a balancing exercise, a tribunal might find that an investor bears a disproportionate burden, thus suggesting that a measure constitutes an indirect expropriation, even where a state has selected the means for achieving a permissible policy aim that involves the least possible burden on protected investments.<sup>20</sup>

An alternative option for Australia may be to include a clarification that, in considering the ‘character of the government action’, an interpreter should ask whether there was an alternative measure, reasonably available to the respondent treaty party, which would have achieved the relevant public welfare objectives to the same degree, but involved a lesser burden on protected investments. Within this approach, Australia could also provide that the burden on protected investments should be considered in an overall sense, rather than from the perspective of a particular complainant investor. The intention of such an alternative approach would be to limit an adjudicator’s task, in assessing the ‘character’ of a government action, to determining whether the relevant measure pursued a permissible public purpose, and whether there were other, alternative means of securing the same level of achievement of the relevant public interest, with a lesser impact on protected investments.

Within more recent FTAs and BITs, Australia has sometimes included one other notable clarification to the factors listed in the case-by-case inquiry. Specifically, in relation to the factor of ‘the extent to which the government action interferes with distinct, reasonable investment-backed expectations’, a footnote is sometimes included that specifies the kind of considerations that determine whether an investor’s expectations are reasonable. For example, the CPTPP, Peru–Australia FTA, and Australia–Hong Investment Agreement provide: ‘For greater certainty, whether an investor’s investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector’.<sup>21</sup> While some arbitral awards have considered such factors in determining whether a measure

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<sup>19</sup> In this regard, note that the other factors that a tribunal must consider as part of the case-by-case inquiry, to determine whether a measure constitutes an indirect expropriation, include the economic impact of a measure, and the extent to which it interferes with distinct, reasonable investment-backed expectations: eg AUSFTA Annex 11-B(4)(a), extracted above text at n 4.

<sup>20</sup> Other commentators have made similar observations in relation to a reference in recent EU treaties, within the final paragraph of expropriation annexes, which defines the ‘rare circumstance’ in which a non-discriminatory regulatory measure may constitute an indirect expropriation as ‘when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive’: Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA) Annex 8-A(3). Caroline Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP’ (2016) 19 JIEL 27, 43. Ortino (n 5) 361–3.

<sup>21</sup> CPTPP Annex 9-B(3)(a)(ii) fn 36; Peru–Australia FTA Annex 8-B(4)(2) fn 20; Australia–Hong Kong Investment Agreement (2019) Agreement, Annex II (3)(a)(ii) fn 42; For somewhat different language see Korea–Australia FTA, Annex 11-B(4)(b) fn 52.

constitutes an indirect expropriation, in my view Australia should continue to include this clarification in its treaties. The reason is that the clarification provides greater guidance to adjudicators, and suggests that certain kinds of investor expectations will not be reasonable, for example because of the potential for government regulation within a sector.

### 3 Fair and Equitable Treatment (FET) Provisions

#### 3.1 Australia's Existing Treaty Practice

Australia's older BITs include what is sometimes referred to as an 'unrestricted' FET provision, whereby the treaty parties agree to provide covered investments fair and equitable treatment, without further clarification as to what this protection entails.<sup>22</sup> Although common lines of jurisprudence concerning the content of FET have emerged over the last twenty years, a persistent concern in relation to FET has been the standard's vagueness.<sup>23</sup> This vagueness has two key implications: it confers substantial discretion on arbitral tribunals; and has the potential to be very intrusive in terms of policy space, depending on the particular approach adopted by a tribunal.

Since the mid-2000s, within the investment chapters of its FTAs, Australia has consistently included clarifications that seek to provide further guidance on the content of the FET standard and place limits on what this standard requires of the treaty parties. These clarifications follow US and Canadian treaty practice, which emerged in the early 2000s, given concerns over expansive interpretations of FET in early jurisprudence under the North American Free Trade Agreement (NAFTA).<sup>24</sup>

A standard example of the clarifications used by Australia comes from the AUSFTA, which provides:

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
2. For greater certainty, the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
  - (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; ...

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<sup>22</sup> Eg Australia–China BIT Art III(a); Australia–Papua New Guinea BIT Art 3(3); Australia–Poland BIT Art 3(2). Australia–Turkey BIT Art 3(2); Australia–Sri Lanka BIT Art 3(2).

<sup>23</sup> For taxonomies of the key strands of FET jurisprudence see eg Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) 161-228; Marc Jacob and Stephan W Schill, 'Fair and Equitable Treatment: Content, Practice, Method' in Marc Bungenberg et al (ed), *International Investment Law: A Handbook* (Hart Publishing 2015) 700, paras 38-109. August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (CUP 2020) ch 2.

<sup>24</sup> NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) para B; 2004 US Model BIT Art 5.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.<sup>25</sup>

Additionally, in the last five years or so Australia has utilized two further clarifications to the FET standard. These provide that:

4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.<sup>26</sup>

The above clarifications place certain limits on the FET standard. For example, they clarify that FET does not require treatment above the international minimum standard. They also codify part of arbitral tribunals' typical approach to the protection of legitimate expectations, whereby a breach of the FET standard would not be established merely by the fact that a state acts inconsistently with an investor's expectations.<sup>27</sup> However, fundamentally the above clarifications do not provide a great deal of guidance on what the FET standard requires. A possibility, illustrated by experience under NAFTA, is that despite the FET standard being limited to the customary international minimum standard, arbitral tribunals may adopt an expansive view of what is required by the international minimum standard.<sup>28</sup>

### **3.2 Australia's Policy Options regarding FET and International Minimum Standard Provisions**

A fundamental policy choice for Australia in relation to FET is whether to include this standard in any renegotiated agreements, and if so, whether to specify in an exhaustive manner the categories of conduct that breach this standard. Some states, as well as the European Union (EU), have in recent years, used an approach of specifying the categories of conduct that breach the FET standard in an exhaustive manner.<sup>29</sup> The intention behind this drafting strategy is to reduce the scope for arbitral discretion, and for interpretations of the standard that may affect domestic policy space in unexpected ways. The EU's recent

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<sup>25</sup> AUSFTA Art 11.5. Annex 11-A further clarifies what is meant by the reference to 'customary international law'.

<sup>26</sup> Singapore–Australia FTA (as amended) ch 8 Arts 6(4)-(5). Peru–Australia FTA Art 8.6(4)-(5). CPTPP Art 9.6(4)-(5). Australia–Uruguay BIT (2019) Art 4(4)-(5); Indonesia–Australia CEPA Art 14.7(4). Australia–Hong Kong Investment Agreement (2019), art 8(4).

<sup>27</sup> For example, jurisprudence generally considers, among other factors, whether an investor's expectations were objectively reasonable in the totality of the circumstances and whether there were countervailing legitimate policy reasons that would justify a host state's changes to its regulatory system: see eg Joshua Paine, 'On Investment Law and Questions of Change' (2018) 19 JWIT 173, 188-194.

<sup>28</sup> See eg *Merrill & Ring Forestry LP v Canada*, Award (31 March 2010) paras 205-213 (holding that the FET standard had become custom and the broader modern customary minimum standard 'protects against all such acts or behaviour that might infringe a sense of fairness, equity and reasonableness'). For similar assessments of this aspect of NAFTA case law see eg Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013) 107-8; Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 274-75.

<sup>29</sup> For examples beyond the EU treaties cited next, see eg Colombia–United Arab Emirates BIT (2017) Art 5(2); Rwanda–United Arab Emirates (2017) art 4(2).



investment treaties typically include a dedicated paragraph, within the FET provision, which specifies the types of conduct that breach this standard. For example, the Comprehensive Economic and Trade Agreement Between Canada and the European Union (CETA) provides:

A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

- (a) denial of justice in criminal, civil or administrative proceedings;
- (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- (c) manifest arbitrariness;
- (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- (e) abusive treatment of investors, such as coercion, duress and harassment;<sup>30</sup>

The same approach, with minor variations in the grounds specified to constitute a breach of the FET standard, is found in other recent EU investment agreements.<sup>31</sup> Notably, these agreements do not include the protection of legitimate expectations, or a guarantee concerning stability of the host state's legal system, as grounds that are sufficient, of themselves, to establish a breach of the FET standard.<sup>32</sup> Nevertheless, a concern that has been expressed by commentators is that even within exhaustive FET provisions, such as those included in recent EU treaties, some of the elements of the FET standard are open-ended and evaluative (eg what constitutes 'manifest arbitrariness' or a 'fundamental' breach of due process), meaning it is difficult to predict how the standard may be interpreted.<sup>33</sup> One option may be to provide further guidance on what the treaty parties understand to fall within these categories, as well as to provide greater guidance on conduct that does not breach the FET standard (the latter point is discussed further below).<sup>34</sup> For example, a footnote in the FET provision of the updated EU–Mexico Global Agreement sets out issues that a tribunal must consider in determining whether a measure breaches the different (exhaustive) sub-elements of the FET standard.<sup>35</sup>

A different strategy, utilized, for example, by India and sometimes Brazil in their recent investment treaties, is to omit any reference to FET from the treaty, and to include a reference to the customary international minimum standard, along with an exhaustive statement of the categories of conduct that are understood to violate that standard. For example, several recent investment treaties, or joint interpretations of existing treaties, concluded by India contain the following provision (or very similar wording):

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<sup>30</sup> CETA Art 8.10(2).

<sup>31</sup> EU–Vietnam Investment Protection Agreement Art 2.5(2); EU–Singapore Investment Protection Agreement Art 2.4(2). EU–Mexico Global Agreement (as updated) ch 17 Art 15(2).

<sup>32</sup> These agreements specify that 'When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated': CETA Art 8.10(4). The EU–Singapore Investment Protection Agreement includes a further clarification that 'the frustration of legitimate expectations ... does not, by itself, amount to a breach of' the FET provision and 'such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of' the FET provision: Art 2.4(3) fn 11.

<sup>33</sup> Eg Henckels, 'Greater Precision' (n 20) 37, 40.

<sup>34</sup> Eg *ibid* 37–40.

<sup>35</sup> EU–Mexico Global Agreement (as updated) ch 17 Art 15(2) fn 16.

No Party shall subject investments made by investors of the other Party to measures which constitute a violation of customary international law through:

- (i) Denial of justice in any judicial or administrative proceedings; or
- (ii) fundamental breach of due process; or
- (iii) targeted discrimination on manifestly unjustified grounds, such as gender, race or religious belief; or
- (iv) manifestly abusive treatment, such as coercion, duress and harassment.<sup>36</sup>

By removing any reference to FET, this approach may remove the basis for this provision to be interpreted in light of existing jurisprudence on the FET standard, or at least significant parts of that jurisprudence.<sup>37</sup> Nevertheless, existing case law concerning the customary minimum standard of treatment would likely still be relevant to interpreting and applying this provision, subject to the provision's particular wording. Again, it should be noted that some of the grounds for breach set out in this provision do not have an established technical meaning (eg what makes a breach of due process 'fundamental'), and treaty drafters could provide guidance on this issue, if the intention is to minimize arbitral discretion.<sup>38</sup>

If Australia continues to include a reference to FET or the customary international minimum standard in its investment treaties, a good practice, illustrated by recent EU treaties, would be to introduce a clarification that 'the fact that a measure breaches domestic law does not, in and of itself, establish a breach of' the FET standard or the customary international minimum standard.<sup>39</sup> Such a clarification should further provide that to ascertain whether a measure breaches the FET or international minimum standard provision, a tribunal must consider whether a measure falls within one of the exhaustive grounds of breach set out in the provision.<sup>40</sup> While arbitral tribunals have often recognized the point that a breach of domestic law does not, of itself, establish a breach of the FET standard or the international minimum standard, the aim of this drafting approach would be to codify this proposition, and to give greater guidance on the additional element that is required to establish a breach of the treaty standard.

Another option Australia should consider in any treaty renegotiation is whether to introduce an additional clarification internal to an FET or international minimum standard provision, which would provide guidance on certain forms of conduct that do not violate the standard. For example, the 2018 Argentina–United Arab Emirates BIT includes the following clarification within the provision requiring investments are treated in accordance with the customary international minimum standard (including FET):

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<sup>36</sup> Belarus–India BIT (2018) Art 3.1. Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (2017) Note on Article 3(2) para 1. Joint Interpretative Declaration between India and Colombia regarding the Agreement for the Promotion and Protection of Investments between India and Colombia, Signed On November 10th 2009 (2018) Note 4(1). The wording comes from the India Model BIT 2015 Art 3.1.

<sup>37</sup> Note that Brazil in its recent investment treaties sometimes includes a clarification that: 'For greater certainty, the standards of "fair and equitable treatment" and "full protection and security" are not covered by this Agreement and shall not be used as interpretative standards in investment dispute settlement procedures': eg Brazil–United Arab Emirates BIT (2019) Art 4(3).

<sup>38</sup> Henckels, 'Greater Precision' (n 20) 40.

<sup>39</sup> CETA Art 8.10(7). Making the same suggestion: Mitchell, Sheargold and Voon (n 9) 137.

<sup>40</sup> See eg CETA Art 8.10(7).

Non-discriminatory and non-arbitrary legislative or regulatory measures adopted by either Party to protect general welfare objectives, such as public order, public health, public security, environmental protection and economic policy, and which give an investor of the other Party the same treatment as that accorded to its own investors or to investors of third States in like circumstances, shall not be deemed to breach the minimum standard of treatment.<sup>41</sup>

Barnali Choudhury has also suggested that FET provisions could borrow from the clarification typically contained in expropriation annexes (considered above), and state ‘that nondiscriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives do not constitute a breach of fair and equitable treatment’.<sup>42</sup> Such a clarification internal to an FET or international minimum standard provision would provide guidance when interpreting and applying the provision, including any exhaustive grounds of breach. It would send an important *ex ante* signal concerning the extent to which certain categories of legitimate regulatory conduct are understood by the treaty parties not to violate the FET standard or international minimum standard. If such a clarification internal to an FET or international minimum standard provision were introduced, it would be important to consider, and probably clarify, its interaction with any general exceptions provision also applicable to this standard. This issue is considered in the next Part, which addresses general exceptions provisions.

## **4 General Exceptions Provisions**

### **4.1 Australia’s Existing Treaty Practice**

Australia’s older BITs do not include general exceptions provisions, unlike modern investment treaties that increasingly feature such provisions (including, for example, the Australia–Uruguay and Australia–Hong Kong Investment Agreements).<sup>43</sup> Many of Australia’s FTAs include general exceptions provisions that apply to the investment chapters of these agreements, although, as will be explained, there is significant variation in this aspect of Australia’s treaty practice. Typically, general exceptions provisions are modelled on Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the General Agreement on Trade in Services (GATS), with some adjustment for the investment context, however there are a variety of approaches.

Within Australia’s FTAs and recent BITs, there is significant variation regarding whether and how general exceptions provisions are included. In short:

- Some agreements do not include any general exceptions provision in relation to the investment obligations in the treaty (eg CPTPP, Peru–Australia FTA, Australia–Chile FTA; AUSFTA);
- Some agreements include a general exceptions provision that only applies to certain investment obligations. These general exceptions provisions apply to the national treatment and most-favoured-nation standards, and obligations concerning performance

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<sup>41</sup> Argentina–United Arab Emirates BIT Art 5(4).

<sup>42</sup> Barnali Choudhury, ‘International Investment Law and Noneconomic Issues’ (2020) 53 Vand. J. Transnat’l L. 1, 49.

<sup>43</sup> Australia–Uruguay BIT (2019) Art 15. Australia–Hong Kong Investment Agreement (2019) Art 18.

requirements, but do not apply to the FET standard or the protection against expropriation.<sup>44</sup>

- Some agreements include general exceptions provisions that apply to all of the investment-related standards in the treaty, including the commonly invoked FET and expropriation obligations. Within these agreements there is a distinction between those treaties that are broadly modelled on World Trade Organization (WTO)-style exceptions, with wording changes to reflect the investment context,<sup>45</sup> and agreements that incorporate general exceptions from WTO agreements by reference.<sup>46</sup>

## 4.2 Australia's Policy Options

If Australia engages in renegotiating existing BITs, the choices facing Australia would include:

- Whether to favour inclusion of general exceptions provisions in relation to investment protection and liberalization obligations;
- Whether to favour inclusion of such provisions in relation to all investment protection and liberalization obligations, or only some obligations;
- Which specific drafting options to adopt within any general exceptions provisions;
- Whether to clarify the relationship between general exceptions provisions and other flexibilities contained in a treaty, also aimed at protecting regulatory space (eg expropriation annexes, right to regulate provisions).

The basic argument in favour of including general exceptions provisions in investment treaties is that, if well drafted, they may provide an additional safety net to protect legitimate regulatory measures from incurring liability, in addition to flexibilities that are contained within particular investment treaty obligations.<sup>47</sup> The latter include, for example, the common clarification in expropriation annexes excluding certain kinds of regulatory measures from the scope of indirect expropriation (discussed above). On the other hand, commentators have highlighted that a risk of including general exceptions provisions in investment treaties, is that, if their drafting and interaction with other investment treaty provisions is not carefully considered, they may, contrary to the typical intention behind including such provisions, limit rather than expand regulatory space. One reason for this is that the conditions for the application of a general exceptions provision, such as having to prove that a measure is 'necessary' to secure a particular policy aim, may be more difficult to satisfy than tests developed by arbitral tribunals when interpreting investment treaty obligations, which often include significant flexibility for regulatory measures.<sup>48</sup> Additionally, an interpreter could take the view that a general exceptions provision is intended to codify any flexibility

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<sup>44</sup> JAEPA Art 14.15. ANZCERTA Investment Protocol Art 19.

<sup>45</sup> Indonesia–Australia CEPA Art 17.2(3). Singapore–Australia FTA ch 8 Art 19. Korea–Australia FTA Art 22.1(3). Malaysia–Australia FTA Art 12.18.

<sup>46</sup> Thailand–Australia FTA, Art 1601(2)-(3). ASEAN–Australia–New Zealand FTA ch 15, Art 1(2).

<sup>47</sup> See eg Andrew D 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 and Policy 2017* (OUP 2019) 350-351, 355. Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59 B.C.L. Rev. 2825, 2843–44.

<sup>48</sup> Eg Céline Lévesque, 'The Inclusion of GATT Article XX Exceptions in IIAs: A Potentially Risky Policy' in Roberto Echandi and Pierre Sauve (eds), *Prospects in International Investment Law and Policy* (CUP 2013) 365–6. Andrew Newcombe, 'General Exceptions in International Investment Agreements' in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011) 356-7, 367-369.

available for regulatory measures, meaning other flexibilities (eg within an expropriation annex, or under arbitral jurisprudence concerning a particular standard of treatment) do not apply.<sup>49</sup> The latter issue is particularly relevant where general exceptions provisions are included for some investment treaty obligations but not others.<sup>50</sup>

If Australia includes general exceptions provisions in any renegotiated BITs, it should consider whether to clarify the relationship between such provisions and other regulatory flexibilities that may be available under other provisions of the treaty.<sup>51</sup> For example, Australia could specify an order of analysis between general exceptions and other provisions. One option may be to clarify that flexibilities within particular standards of treatment, such as the typical provision in an expropriation annex aimed at excluding certain regulatory measures from constituting indirect expropriations, are without prejudice to the potential application of a general exceptions provision, if a measure is found *prima facie* to violate the treaty.<sup>52</sup> An alternative approach, developed by Caroline Henckels, is to view general exceptions provisions as limitations on the scope of application of an investment treaty. If Australia were to adopt this view, it could, for example, provide that a tribunal must first consider whether a general exception provision applies. If so, the measure would not be covered by the treaty. If not, a tribunal would proceed to apply the relevant investment treaty obligations, which may include their own flexibilities for regulatory measures.<sup>53</sup>

If Australia pursues the inclusion of general exceptions provisions in any renegotiation of existing BITs, a further issue it should consider is whether to maintain or relax the nexus requirements that originate in GATT Article XX and GATS Article XIV. Most general exceptions provisions that apply to investment obligations, including those used by Australia to date, adopt the nexus requirements from the WTO context. These require, for example, that a measure must be ‘necessary’ to protect public morals, or to protect human, animal or plant life or health. Necessity in the context of the WTO covered agreements amounts to a well-established, relatively demanding test under WTO jurisprudence, which requires use of the least trade restrictive means reasonably available to achieve a permissible policy aim.<sup>54</sup> In contrast, some states in recent investment treaties have used alternative, less demanding, nexus requirements, from example requiring that a measure must be ‘designed and applied’ for the protection of human, animal or plant life or health.<sup>55</sup> Use of this language would mean

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<sup>49</sup> Eg Mitchell, Sheargold and Voon (n 9) 160–161. *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) paras 471-478.

<sup>50</sup> Mitchell, Sheargold and Voon (n 9) 160.

<sup>51</sup> For a similar perspective see Wolfgang Alschner and Kun Hui, ‘Missing in Action: General Public Policy Exceptions in Investment Treaties’ in Lisa Sachs, Jesse Coleman and Lise Johnson (eds), *Yearbook on International Investment Law and Policy 2018* (OUP 2019) 392.

<sup>52</sup> This position was adopted by Canada in *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No. ARB/16/41, Non-Disputing Party Submission of Canada (27 February 2020) paras 19-23.

<sup>53</sup> Caroline Henckels, ‘Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law’ (2020) 69 ICLQ 557, esp. 558, 579-580, 584. If Australia took the view that general exceptions provisions operate as limitations on the scope of application of investment treaties, it could also provide that a claimant investor would bear the burden of proving that a measure did not fall within such exceptions: see Henckels, ‘Should Investment Treaties Contain Public Policy Exceptions?’ (n 47) 2842.

<sup>54</sup> See eg Andrew D Mitchell and Caroline Henckels, ‘Variations on a Theme: Comparing the Concept of “Necessity” in International Investment Law and WTO Law’ (2013) 14 *Chicago Journal of International Law* 93, 126–137.

<sup>55</sup> For example, Turkey has consistently used this wording in a general exceptions provision in its recent investment treaties. From many see eg Cambodia–Turkey BIT (2018) Art 4(1)(a). Uzbekistan–Turkey BIT (2017) Art 5(1)(a); Ghana–Turkey BIT (2016) Art 7(1)(a); Kenya–Turkey BIT (2014) Art 4(1)(a).

that a wider range of measures may fall within a general exceptions provision, including measures that do not satisfy a necessity or ‘least restrictive means’ test.

## 5 Provisions Reaffirming the Treaty Parties’ Right to Regulate

Australia’s older BITs do not include a provision reaffirming the treaty parties’ right to regulate. In contrast, the investment chapters in some (but not all) of Australia’s FTAs, as well as the Australia–Hong Kong Investment Agreement, include this type of provision. If Australia were to renegotiate its BITs, it would face a choice of whether to include this type of provision, and if so, the form in which to do so.

To provide a context for the following discussion, it is helpful to begin by reviewing two different ways in which Australia has previously utilized this kind of provision. The AUSFTA contains a right to regulate provision that has been common in US treaty practice since NAFTA.<sup>56</sup> Specifically, it provides:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.<sup>57</sup>

In contrast, where right to regulate provisions have been utilized in Australia’s more recent agreements, they extend beyond the environmental regulation of investment activity, to cover a broader range of policy areas.<sup>58</sup> For example, the Indonesia–Australia CEPA provides:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, public morals, social welfare, consumer protection or the promotion and protection of cultural diversity or other regulatory objectives.<sup>59</sup>

The above provisions contain a qualification that they only apply to measures ‘otherwise consistent’ with the relevant agreement. Accordingly, these provisions would not provide a defence where a state’s conduct is inconsistent with other provisions of the agreement. For this reason, commentators have often suggested that such ‘right to regulate’ provisions are ‘self-cancelling’.<sup>60</sup> However, recent case law in relation to equivalent provisions, also containing the ‘otherwise consistent’ qualification, highlights that such provisions can provide interpretative context, which informs how a tribunal will interpret and apply investment protection obligations contained in a treaty. Specifically, this case law suggests

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<sup>56</sup> NAFTA Art 1114(1).

<sup>57</sup> AUSFTA Art 11.11. Identical: ANCERTA Protocol on Investment Art 24.

<sup>58</sup> See eg CPTPP Art 9.16. Peru–Australia FTA Art 8.16. Singapore–Australia FTA ch 8 Art 20.

<sup>59</sup> Indonesia–Australia CEPA Art 14.16.

<sup>60</sup> Eg Lise Johnson, Lisa Sachs and Nathan Lobel, ‘Aligning International Investment Agreements with the Sustainable Development Goals’ (2019) 58 Colum. J. Transnat’l L. 58, 101. Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 508.

that such provisions may widen the deference afforded to a state when scrutinizing regulatory conduct under the investment protection obligations in the treaty.<sup>61</sup>

If Australia decides to include a right to regulate provision in any renegotiated treaties, it should consider whether to omit the ‘otherwise consistent’ qualification. For example, recent treaties concluded by the EU include the following provision:

the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.<sup>62</sup>

Variations on this kind of provision are found in recent investment treaties concluded by Argentina, Hungary, and the 2019 Netherlands Model BIT.<sup>63</sup> By omitting the ‘otherwise consistent with this agreement’ qualifier, these provisions would likely provide a stronger interpretative gloss on the investment protection obligations contained in the treaty. Nevertheless, such provisions appear to remain limited to functioning as interpretative context. They would not provide a basis for the treaty parties to adopt measures that are inconsistent with other obligations contained in the treaty.<sup>64</sup>

If Australia includes a right to regulate provision in any renegotiated agreements, it should also consider whether to provide interpreters with guidance on how these provisions are intended to interact with general exceptions provisions, or with flexibilities contained in specific standards of treatment (eg the paragraph in expropriation annexes concerning regulatory measures, considered above). For example, if the intention behind including right to regulate provisions is that they will provide interpretative context, which would inform how investment treaty protections are interpreted and applied, but would not provide an affirmative defence for states, that could be made clear.

## **6 Carve-Outs of Certain Categories of Public Interest Measures from ISDS**

### **6.1 Variations in Australia’s Recent Treaty Practice concerning Carve-Outs from ISDS**

Australia’s recent FTAs and BITs are notable for containing carve-outs that exclude certain categories of public welfare measures from being subject to claims under the ISDS mechanism contained in the treaty. In any renegotiation of its existing BITs, Australia would need to decide whether to favour inclusion of similar carve-outs from ISDS, and, if so, on what terms. While this aspect of Australia’s recent treaty practice is innovative, it is not

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<sup>61</sup> See *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award (3 November 2015) paras 387-390, 445-446, 458. *David R. Aven and Others v Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award (18 September 2018) paras 412, 743. See also *SD Myers, Inc v Canada*, Separate Opinion by Dr Bryan Schwartz (12 November 2000) paras 117-118.

<sup>62</sup> CETA Art 8.9(1). EU-Vietnam Investment Protection Agreement 2019 Art 2.2(1); EU–Singapore Investment Protection Agreement Art 2.2(1); EU–Mexico Global Agreement (as updated) ch 17, Art 1.

<sup>63</sup> Argentina–United Arab Emirates BIT (2018) Art 11. Argentina–Qatar BIT (2016) Art 10. Hungary–Cabo Verde BIT (2019) Art 3(1). Hungary–Belarus BIT (2019) Art 3(1). 2019 Netherlands Model BIT Art 2(2).

<sup>64</sup> For a similar assessment see Catharine Titi, ‘The Right to Regulate’ in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer 2019) 170–171 (suggesting the equivalent provision in CETA ‘serves as an interpretive statement ... it does not appear to provide a concrete actionable right’). See also Johnson, Sachs and Lobel (n 60) 101 (suggesting the effect of provisions without the ‘otherwise consistent’ qualifier remains ambiguous).

entirely consistent. It is helpful to review the different ways in which Australia has utilized carve-outs from ISDS in recent agreements, as an initial step in explaining the policy options facing Australia in any treaty renegotiation.

Among treaties that include carve-outs of public interest measures from ISDS, Australia's existing practice can be divided as follows:

- the Indonesia–Australia CEPA and the Peru–Australia FTA prevent an ISDS claim being brought ‘in relation to a measure that is designed and implemented to protect or promote public health’.<sup>65</sup> These provisions elaborate, non-exhaustively, on the kinds of measures that are understood by the treaty parties to fall within this exclusion, highlighting, in relation to Australia, measures relating to the Pharmaceutical Benefits Scheme and Medicare, among other items.<sup>66</sup>
- The Australia-Hong Kong Investment Agreement and the Singapore–Australia FTA contain similar but not identical carve-outs, covering, for Australia, the Pharmaceutical Benefits Scheme and Medicare, although without the general reference to public health measures. These agreements also exclude from ISDS claims in relation to a Party's tobacco control measures.<sup>67</sup>
- The China–Australia FTA (ChAFTA), where the investment chapter only includes limited non-discrimination obligations, contains a much broader carve-out. It provides: ‘Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under’ the ISDS Mechanism in the treaty.<sup>68</sup>

Despite these provisions, it is likely that claims may still be brought that a respondent treaty party views as falling within a carve-out from ISDS. In this situation, the respondent treaty party could utilize mechanisms in these treaties that provide for a respondent's preliminary objections to jurisdiction be determined on an expedited basis.<sup>69</sup> The Indonesia–Australia CEPA differs slightly from Australia's other agreements, as it explicitly provides that where a respondent treaty party considers a claim is covered by one of the carve-outs from ISDS, it can submit the issue as a preliminary objection to jurisdiction under the expedited procedure.<sup>70</sup>

In addition to the possibility of raising a preliminary objection that a claim is excluded from the scope of ISDS, the ChAFTA contains a unique mechanism that gives the treaty parties joint control over whether the carve-out for public welfare measures (extracted above) applies in a particular case. In short, if a respondent receives a request for consultations that it views as involving a measure covered by the carve-out, it can issue a ‘public welfare notice’.<sup>71</sup> The issuing of such a notice triggers a 90-day period of consultations between the treaty parties, during which the ISDS procedure is suspended.<sup>72</sup> If the treaty parties agree that a measure falls within the carve-out from ISDS for legitimate public welfare measures, that decision is

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<sup>65</sup> Indonesia–Australia CEPA Art 14.21(1)(b). Peru–Australia FTA ch 8 Section B fn 17.

<sup>66</sup> Indonesia–Australia CEPA Art 14.21(1)(b) fn 21. Peru–Australia FTA ch 8 Section B fn 17.

<sup>67</sup> Australia– Hong Kong Investment Agreement (2019) Section C, fns 13-14. Singapore–Australia FTA ch 8, Section B fn 18, and Art 22 fn 19.

<sup>68</sup> ChAFTA Art 9.11(4).

<sup>69</sup> Singapore–Australia FTA, ch 8 Art 28(5); Australia–Hong Kong Investment Agreement (2019) art 29(5). Peru–Australia FTA Art 8.24(5). ChAFTA Art 9.16(6).

<sup>70</sup> Indonesia–Australia CEPA Arts 14.21(2), 14.30.

<sup>71</sup> ChAFTA Art 9.11(5).

<sup>72</sup> ChAFTA Art 9.11(6).



binding on an arbitral tribunal, and any decision or award has to be consistent with the treaty parties' determination.<sup>73</sup> If the treaty parties do not reach an agreement that a measure falls within the carve-out, the question would be determined by an arbitral tribunal. A tribunal is not permitted to draw any adverse inference from the non-issuance of a public welfare notice by the respondent, or from the absence of a decision between the treaty parties as to whether a measure falls within the carve-out.<sup>74</sup>

## **6.2 Specific Recommendations regarding Carve-Outs of Public Interest Measures from ISDS in any Renegotiated BITs**

In my view, in any renegotiation of its existing BITs, Australia should seek to include carve-outs from ISDS that combine several different aspects of its recent FTA practice. The key advantage of utilizing care-outs from ISDS is that certain categories of public interest measures can be insulated from ISDS, and, if a claim is nevertheless brought, the matter can be dealt with as a preliminary objection. In contrast, by itself, a strategy of protecting public interest measures through clarifications to substantive standards of treatment, or exceptions within a treaty, would mean that a case would likely proceed to a merits phase (with consequent cost implications).

My specific suggestions on carve-outs from ISDS for public interest measures are as follows. First, the nexus requirements included in such carve-outs should be carefully considered. In this regard, the nexus requirement in the public health carve-out in the Indonesia–Australia CEPA and Peru–Australia FTA, excluding claims ‘in relation to a measure that is *designed and implemented* to protect or promote public health’, may represent a good compromise. This wording would prevent the carve-out from covering situations where a measure, or its implementation, is predominantly motivated by some other, perhaps discriminatory, purpose. Second, Australia should consider whether any carve-out from ISDS should be extended beyond public health measures, to cover measures that are designed and implemented to secure equivalent kinds of public welfare objectives, such as those listed in the ChAFTA carve-out.

Third, Australia should consider whether the mechanism contained in ChAFTA (outlined above), which gives the treaty parties joint control over whether the carve-out from ISDS for public welfare measures applies to a particular claim, could be included in any renegotiated BITs. The advantage of this mechanism is that it creates a clear procedure that is specific to this particular type of carve-out from ISDS, which gives the treaty parties joint control over the application of the carve-out to investor claims that are filed. The fact that a determination that the carve-out applies to a particular investor claim must be made jointly, by both treaty parties, and within a 90-day period for consultations, means it would only be likely to be utilized for relatively clear-cut cases.<sup>75</sup> Although Australia's other FTAs and recent BITs provide that a joint determination of the treaty parties concerning the interpretation of the agreement is binding on an investor-state tribunal,<sup>76</sup> it is unlikely that this mechanism would

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<sup>73</sup> ChAFTA Art 9.19(3).

<sup>74</sup> ChAFTA Art 9.11(8).

<sup>75</sup> Anthea Roberts and Richard Braddock, ‘Protecting Public Welfare Regulation Through Joint Treaty Party Control: A ChAFTA Innovation’, Columbia FDI Perspectives No 176 (20 June 2016).

<sup>76</sup> Eg Indonesia–Australia CEPA Art 14.33(3). Australia–Hong Kong Investment Agreement (2019) Art 31(2). Peru–Australia FTA Art 8.26(2).

cover the distinct issue of joint determinations concerning the *application* of a treaty provision, namely the public welfare carve-out, to specific investor claims.<sup>77</sup>

Finally, a good practice, included in the Indonesia–Australia CEPA, is to state that any exclusion of certain categories of claims from ISDS is ‘[w]ithout prejudice to the scope of any applicable exceptions, non-conforming measures, or principles of international law’ that may be relied on by the disputing treaty party during the proceedings.<sup>78</sup> This language means that even if a preliminary objection based on a carve-out from ISDS fails, it may be possible to rely on a clarification or exception in the treaty, or some other principle of international law, at the merits phase.

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<sup>77</sup> Elsewhere I have analysed how treaty parties generally enjoy ultimate control over the interpretation of investment treaties, but a greater degree of control is delegated to investor-state arbitral tribunals in relation to issues of treaty application: see Paine (n 27) 179-183.

<sup>78</sup> Indonesia–Australia CEPA Art 14.21(1).