Submission to the Department of Foreign Affairs and Trade Review of Australia's Bilateral Investment Treaties

30 September 2020

King & Wood Mallesons is grateful for the opportunity to contribute this submission to the Department of Foreign Affairs and Trade (the **Department**) as part of its review of Australia's Bilateral Investment Treaties.

King & Wood Mallesons is a leading international law firm, and one of the only major international law firms headquartered in Asia, with a team of over 2400 lawyers in 28 locations around the world. King & Wood Mallesons is a full service firm with deep experience advising clients in respect of the making of investments in Australia and other States around the world, as well as advising and representing clients – both investors and sovereign States – in dispute resolution proceedings arising under various international instruments, including Bilateral Investment Treaties (**BITs**), Free Trade Agreements (**FTAs**) and other treaties with investment related provisions.

We set out below our comments and observations in respect of each of the questions set out in the Department's call for submissions:

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

Comments

In our experience, Australian investors and potential investors do consider the overarching treaty framework in place when considering whether to make an investment in a foreign State and how that investment ought to be structured. This extends to the availability of double taxation treaties, as well as the availability of any BITs or FTAs between Australia and the host State. The existence of a robust network of treaties dealing, *inter alia*, with double taxation and investment protection encourage Australian investors to make their investment directly from Australia, rather than through an intermediary State with whom the host State has a more favourable treaty infrastructure.

From a strictly legal perspective, the substantive and procedural protections commonly included in BITs and FTAs, including investor-State dispute settlement provisions, are of a significant benefit to Australian investors operating (or considering operating) in foreign States. Indeed, Australian investors have relied on the BITs the subject of this review on at least two occasions in bringing investment disputes against a foreign State: *Emerge Gaming and Tantalum International v Arab Republic of Egypt* (ICSID Case No. ARB/18/22); and *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1) and have relied on Australia's BITs and FTAs in at least three other cases against foreign States: *White Industries Australia Limited v The Republic of India* (UNCITRAL); *Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40); *Kingsgate Consolidated Limited v Kingdom of Thailand* (UNCITRAL). In the case of the *Tethyan* arbitration, the Australian investor was awarded approximately $6 billion following treatment by Pakistan which an international tribunal determined amounted to a breach of the Fair and Equitable Treatment and Expropriation standards set out under the Australia-Pakistan BIT: a remedy which would not have been available to the investor had the BIT not existed.

Conversely, to the best of our knowledge, Australia has not faced any claims from foreign investors under any of the BITs subject to this review and, to date, has only faced two investment cases in total: the well-known *Philip Morris* case which Australia successfully defended on jurisdictional grounds citing abuse of process by the investor, and the *APR Energy* case under the Australia-US FTA, whose current status is unknown.

Accordingly, we consider that Australia's network of BITs and FTAs offers significant benefits to Australian investors operating in overseas markets while posing little risk to Australia's sovereignty and legislative process (which will be discussed in further detail below).

2 In your view, does the existence of a BIT impact on the flow of foreign direct investment and /or portfolio investment? Please comment, if possible, both generally and with reference to specific existing BITs.

Comments

Yes. In principle, we believe that the existence of a BIT or FTA would have a positive impact on the flow of foreign direct investment. We also expect BITs and FTAs to be of further relevance in the future as Australian enterprises seek to diversify their supply chains and explore business opportunities in new jurisdictions.

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

Comments

We do not have any specific concerns in respect of Australia's BITs but note that the BITs the subject of this review could be described as belonging to the "old generation" of investment treaties and, should Australia's treaty partners be amenable, could be modernised so as to reflect contemporary treaty practice, including Australia's current treaty practice.

In this regard, we note that whereas the "old generation" of investment treaties included reasonably broad and undefined substantive protections, the modern treaty practice of a number of States, including Australia, favours, *inter alia*: clarifying or limiting the definition of a qualifying investor and qualifying investment, requiring, for example, that an investor have a substantial presence in or real connection to the host State; clarifying the meaning and scope of the "fair and equitable treatment" standard; removing or limiting the scope of most favoured nation protections; and expressly reserving to the State the right to regulate in respect of public health and the environment.

We consider Australia's current treaty practice and its modern generation of investment treaties to be a positive for investors as it provides greater clarity and certainty regarding the regulatory landscape in which the investor will be operating.

4 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?

Comments

As set out below in respect of question 7, we consider renegotiation of BITs or conclusion of FTAs with investment chapters as being the best policy options set out in the Department's call for submissions.

Accordingly, it is our view that Australia should include common substantive treaty protections, including guarantees in respect of:

- fair and equitable treatment (which Australia's current treaty practice defines as being equivalent to the international minimum standard of treatment);
- protection against unlawful expropriation;
- protection against discriminatory treatment;
- provision of full protection and security by the host State;
- repatriation of funds to the home State;
- access to justice in the host State and protection against denial of justice / effective means of enforcement of legal rights; and

- State compliance with agreements between the State and the investor.

We also suggest that Australia include investor-State dispute settlement (**ISDS**) provisions in its future BITs or FTAs. As discussed in respect of Question 1 above, ISDS provisions in Australia's BITs and FTAs have, in practice, provided Australian investors with an effective method of enforcing their rights against foreign States, frequently in circumstances where but-for the BIT, the investor would have no other effective remedy available to it for the allegedly wrongful acts of the host State. Conversely, Australia's successful record of defending investment treaty claims highlights the efficacy of ISDS process and we expect that Australia's modern treaty practice will preclude frivolous or obviously meritless investment treaty claims in the future. We also note Australia's recent ratification of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, which is consistent with the ISDS provisions incorporated as part of Australia's modern treaty practice, as evinced by Australia's recent FTAs with Peru, Indonesia and Hong Kong.

In addition to substantive investment protections and ISDS provisions, we suggest that Australia consider including in its future FTAs provisions which:

- facilitate e-commerce and the digital economy (similar to those included in the Australia-Singapore Digital Economy Agreement), including customs procedures, technical barriers to trade and protection of data;
- assist Australian private sector companies to fulfil legal obligations which extend or have a connection with foreign jurisdictions, for example, modern slavery law compliance;
- facilitate the export of Australia services to BIT/FTA partner States (similar to the approach taken with the Indonesia-Australia Comprehensive Economic Partnership Agreement);
- assist Australian private sector companies respond to trade investigations undertaken by foreign authorities, for example, anti-dumping investigations; and
- ensure that the relevant BIT/FTA operates in a complementary manner with any other international agreements (including double taxation treaties).

5 In your view, would any concerns you have about any of Australia's existing BITs warrant termination of one or more BITs? Please comment, as relevant, both generally and with reference to specific existing BITs.

Comments

We do not have any concerns regarding Australia's existing BITs which would warrant termination.

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

Comments

As discussed above, we consider a holistic approach to Australia's future treaty practice, combining investment facilitation and dispute resolution for breach of investment protection to be the preferred model for any future international investment agreements concluded by Australia. While we acknowledge that the inclusion of ISDS provisions in international investment treaties has been the subject of debate in recent years, particularly following the initiation of the *Philip Morris* arbitration, we consider the benefit these provisions provide to Australian investors to be significant, justifying the inclusion of ISDS provisions in future BITs and FTAs.

7 In light of the various policy options available, what approach do you consider should be taken? Please comment, if possible, both generally and with reference to specific existing BITs.

Comments

For the reasons set out above, we consider that the renegotiation of BITs or conclusion of FTAs with investment chapters to be the favoured policy options out of those available. We believe that the interests of both investors and the State can be balanced and protected by concluding treaties that include modern trade facilitation provisions (such as those set out in respect of Question 4 above) and are consistent with modern treaty practice, providing investors with clear and well-defined substantive protections for their investments and an effective means of enforcing those rights, while reserving to the State a sufficiently broad regulatory space in respect of certain enumerated areas of public interest and concern.