Submission to Australian Government Department of Foreign Affairs and Trade Regarding Renegotiation of Australia's Bilateral Investment Treaties with Argentina, Pakistan, and Türkiye

[redacted]

Overview of Submission

Part A considers renegotiation of the dispute settlement provisions in the relevant bilateral investment treaties (BITs), suggesting removing the investor-state dispute settlement (ISDS) mechanisms contained in the treaties and relying on state–state dispute settlement only (section 1). If Australia were nevertheless to include ISDS mechanisms in the renegotiated treaties we provide suggestions, in light of Australia's treaty practice, of how it could limit the scope of ISDS mechanisms (section 2). Part B turns to investment cooperation, facilitation and promotion issues. It suggests that in the renegotiated treaties Australia should include a committee with a built-in agenda for future investment-related cooperation between the treaty parties (section 3), and that Australia should pursue the inclusion of state-of-the-art investment facilitation and promotion provisions (section 4). Part C provides suggestions on modernizing the investment protection obligations in the BITs. It suggests Australia should aim to clarify the content of the customary international minimum standard of treatment through a closed/exhaustive list provision and omit the fair and equipment treatment (FET) standard (section 5). Finally, we provide suggestions on how Australia should clarify and narrow the scope of the protection against indirect expropriation (section 6).

PART A: DISPUTE SETTLEMENT

1. Removal of Investor-State Dispute Settlement (ISDS)

Australia's current BITs with Argentina, Pakistan and Türkiye include ISDS mechanisms.[3] The only investor-state dispute that we are aware of which has been brought under one of these BITs is the controversial decision of *Tethyan Copper v Pakistan*,[4] in which the investor was awarded over US$4 billion in compensation, plus post-award interest, for a project that had never left the planning stages. The strongest safeguard for each treaty party's right to regulate in the public interest would be to remove the investor-state dispute settlement (ISDS) mechanisms from these BITs.

There are two main ways in which BITs may undermine the ability of states to regulate in the public interest. First, the threat of potential ISDS claims may deter states from enacting otherwise desirable policies, which is known as 'regulatory chill'.[5] Second, if a public interest

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[3] These ISDS mechanisms are found in Article 13 of each of the three BITs under consideration.

[4] *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award (12 July 2019).

[5] See, generally, Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge

regulation is challenged through ISDS, significant costs may be incurred by the state defending the claim, and if the challenge is successful, sizeable damages may be awarded to the investor. As we discuss in Part C below, modernising the drafting of key investment protection provisions can minimise the risk of successful challenges to public interest regulations. However, the removal of ISDS mechanisms is the only way to eliminate potential regulatory chill and investor challenges to public interest regulations, and to thereby avoid the costs states would otherwise incur defending those claims.

Excluding ISDS mechanisms from the three BITs under consideration would not be novel. Australia has previously concluded several free trade agreements (FTAs) with investment chapters and a BIT that do not provide ISDS mechanisms. These agreements have been made with a wide range of treaty parties, and include: the Australia–United States FTA (2004), the Investment Protocol to the Australia–New Zealand Closer Economic Relations Trade Agreement (2011), the Malaysia–Australia FTA (2012), the Japan–Australia Economic Partnership Agreement (2014), the Pacific Agreement on Closer Economic Relations (PACER) Plus (2017), the Regional Comprehensive Economic Partnership Agreement (RCEP) (2020), the Australia–United Kingdom FTA (2021) and the Australia–United Arab Emirates (UAE) BIT (2024). Many other countries have also begun to take a more cautious approach to the inclusion of ISDS mechanisms in FTAs and BITs. Notable examples of treaties with highly limited ISDS mechanisms or no ISDS mechanism include the United States – Mexico – Canada Agreement (USMCA) (2018) and the European Union – New Zealand FTA (2023).

If ISDS mechanisms are removed from the three BITs under consideration, enforcement of investment protections would still be available through state-state dispute settlement mechanisms. Each of Australia's current BITs with Argentina, Pakistan and Türkiye provide for state-state dispute resolution, including for the referral of disputes to an arbitral tribunal if necessary.[6] Similarly, while the recent Australia – UAE BIT does not include an ISDS mechanism, it allows for any dispute between the treaty parties 'connected with this Agreement' to be settled through arbitration if necessary.[7]

While these state-state disputes could still result in arbitral decisions finding host states liable for any breach of investment protections, such disputes pose less risk to the right of states to regulate in the public interest. In general, states are less likely to bring disputes against other states, to avoid disrupting the wider relationship between the parties, and due to the potential for reciprocal challenges.[8] Having a 'governmental screen' between an aggrieved investor and the initiation of a dispute would likely prevent frivolous, unmeritorious or 'overzealous' claims against legitimate public interest measures.[9] Moreover, in the current ISDS system the average amount of damages claimed by investors has grown significantly in recent years. For the 10 years from 2014 to 2023, the average amount claimed by an investor in ISDS was US$1.1billion, which was close to a three-fold increase from the average claim between 1996 and 2005, which was US$400 million.[10] Unlike investors, who are typically motivated to seek

University Press 2011); Carolina Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty' (2020) 64 International Studies Quarterly 1.

[6] See Article 12 of each of the three BITs.

[7] Australia–UAE BIT art 18.2.

[8] See Jürgen Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents' (2009) 20 European Journal of International Law 749, 757.

[9] See Sergio Puig and Gregory Shaffer, 'A Breakthrough with the TPP: The Tobacco Carve-Out' (2016) 16 Yale Journal of Health Policy, Law and Ethics 327, 332.

[10] United Nations Trade and Development (UNCTAD), *Compensation and damages in investor-state dispute settlement proceedings* (IIA Issues Note No. 1, September 2024), p. 4.

the largest possible amount of compensation, states espousing claims would have incentives not to unreasonably inflate damages claims.

If any of the three BITs renegotiations under consideration was to include removal of the ISDS mechanism, it would be important to ensure that Australia and its counterparty agree to terminate the original BIT's survival clause. Each of the three BITs under consideration contains a survival clause which specifies that if the agreement is terminated, the provisions of the BIT shall remain in force for a further period of fifteen years from the date of termination, in respect of investments made prior to termination.[11] These survival clauses could be terminated by the new / renegotiated BIT[12] or through an exchange of letters.[13] An alternative to terminating the survival clause of the original BIT that may be considered is to allow existing investors a shorter time period of time in which to bring any claims. This approach was adopted by the parties to the USMCA, which established a three-year time window for any 'legacy' claims under the previous North American Free Trade Agreement (NAFTA) to be brought.[14]

2. Limiting the Scope of ISDS

If Australia and its counterparty decide to retain ISDS in one or more of the BITs under consideration, the parties should consider including carve-outs that would prevent ISDS claims being made in relation to particularly sensitive policy areas. Many of Australia's recent FTAs and investment agreements have adopted carve-outs from ISDS in relation to tobacco control measures[15] or more broadly for measures 'designed and implemented to protect or promote public health.'[16]

In addition to considering whether to adopt a tobacco control or public health focussed ISDS carve-out, Australia should also consider whether there are other policy areas that could warrant the use of an ISDS carve-out. We have advocated for a climate carve-out from ISDS, in light of the need for urgent action to reduce greenhouse gas emissions and the increasing number of ISDS claims challenging climate-related measures.[17] A wider approach was taken in the China – Australia FTA (2015) (ChAFTA), which provides that no ISDS claims can be made in relation to '[m]easures 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'.[18]

Where a carve-out from ISDS requires a judgment to be made about whether a particular measure falls within the scope of the carve-out, it is also important to consider procedural mechanisms that should be followed to determine whether the carve-out applies. These

[11] Australia – Argentina BIT, art 15.2; Australia – Pakistan BIT, art 15.3; Australia – Turkey BIT, art 14.4.
[12] For example, see Hong Kong – Australia Investment Agreement (2019), art 40.2, which terminates the Australia – Hong Kong BIT (1993) and its fifteen-year survival clause.
[13] For example, see Exchange of letters terminating the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investment (6 February 2020, entered into force on 6 August 2020), which terminated the earlier Australia – Indonesia BIT and its fifteen-year survival clause.
[14] USMCA, Annex 14-C.
[15] See, eg, Singapore – Australia FTA (as amended in 2016), chp 8, art 22; Australia–Hong Kong Investment Agreement sec C fn 14.
[16] Indonesia–Australia CEPA art 14.21(1)(b); Peru–Australia FTA ch 8 sec B fn 17.
[17] Joshua Paine and Elizabeth Sheargold, 'A Climate Change Carve-Out for Investment Treaties' (2023) 26 Journal of International Economic Law 285.
[18] China – Australia FTA, art 9.11(4).

procedural mechanisms can ensure a swift resolution of any claims that are covered by the carve-out, and can be used to give the treaty parties greater control over the interpretation of the carve-out, including by allowing the treaty parties to make binding determinations about whether a measure falls within the scope of the carve-out.

For example, the ChAFTA exclusion from ISDS for public welfare measures is accompanied by a process where the respondent state can issue a 'public welfare notice', which triggers a 90-day period for the two treaty parties to consult as to whether the measure at issue is a public welfare measure.[19] Similar procedures are provided in many BITs and FTAs for determining whether a measure falls within the scope of an exception for prudential measures. For example, the Hong Kong – Australia Investment Agreement provides that if the respondent state invokes the prudential measures exception, the respondent shall request a joint determination by the financial services authorities of the treaty parties about the extent to which the prudential measures exception is 'a valid defence to the claim'.[20] If the parties' financial services authorities are unable to reach a joint determination within 120 days, either party may request the establishment of a state-state dispute settlement panel to determine the issue.[21] Similar mechanisms could be adapted for ISDS carve-outs for other public welfare measures.[22]

PART B: INVESTMENT COOPERATION, FACILITATION AND PROMOTION

3. Establishing Committees

In renegotiating these three BITs, Australia should consider creating a committee, composed of representatives of the treaty parties, and include a built-in agenda for the committee to address after the agreement enters into force. The essential advantage of such a committee is that it may facilitate ongoing investment-focused cooperation between officials of the treaty parties, and, where relevant, the private sector, leading to practical steps to enhance the investment relationship between the parties.

An example of such a committee from Australia's recent practice is the Australia–UAE BIT, which establishes a Council on Investment, to be convened at Ministerial or senior official level within 12 months of entry into force and thereafter at least once every two years.[23] The Council is given a wide-ranging mandate which includes 'monitoring trade and investment relations, identifying opportunities for expanding investment', 'holding consultations on specific investment policy matters of interest to the Parties', 'working toward the enhancement of investment flows under investment projects', 'identifying and working toward the removal of impediments of investment flows', 'seeking the views of the private sector', and 'establishing or maintaining contact points … to provide assistance and advisory services to investors'.[24] A Party is able to 'refer specific investment matters to the Council by delivering a written request to the other Party that includes a description of the matter concerned'.[25]

Thinking beyond the example of the Australia–UAE BIT, Australia should also consider borrowing elements from other recent investment-related international agreements that

[19] China – Australia FTA, art 9.11.5 and 9.11.6.
[20] Hong Kong – Australia Investment Agreement, art 25(2)(a).
[21] Hong Kong – Australia Investment Agreement, art 25(2)(c).
[22] For further discussion of the design of these mechanisms see Paine and Sheargold (n 17) 300–303.
[23] Australia–UAE BIT art 19.
[24] See Australia–UAE BIT art 20(1)-(2).
[25] Australia–UAE art BIT 20(3).

establish a committee to undertake investment-focused cooperation between the treaty parties. Other functions that might be given to a treaty-based committee include:

- Discussing and reviewing the implementation and operation of the agreement, including conducting a formal review of the agreement at an agreed point in the future.[26]
- Reviewing each Party's non-conforming measures 'for the purpose of contributing to the reduction or elimination of such non-conforming measures'.[27]
- Exchanging information on 'investment-related matters … that relate to the improvement of the investment environment' and on each Party's 'legislation, regulations and procedures regarding investment opportunities'[28] and disseminating such information to the private sector/potential investors.[29]
- Adopting binding interpretations of the agreement.[30]
- Identifying needs for, and overseeing the provision of, technical assistance and capacity building for the purposes of implementing the agreement.[31]
- Dispute prevention/resolution procedures which are aimed at resolving investment-related disputes before they are submitted to State–State arbitration.[32]

4. Including Commitments on Investment Facilitation and Investment Promotion

In renegotiating the three BITs under consideration, Australia should consider the inclusion of state-of-the-art commitments on investment facilitation and investment promotion.

In this regard, it should be recalled that Australia, Argentina and Pakistan are all participating in the WTO Agreement on Investment Facilitation for Development (IFDA), whereas Türkiye is still considering whether to participate. Nevertheless, Türkiye has included significant investment facilitation commitments in its most recent FTA (the Türkiye–UAE CEPA).[33]

Australia has also included commitments on investment facilitation in some of its recent bilateral agreements. For example, the Australia–UAE FTA includes chapter 11 on investment facilitation, with provisions on promotion and facilitation of investment, which applies alongside the Australia–UAE BIT.[34]

Given that Australia does not have wider FTAs with Argentina, Pakistan or Türkiye, to the extent that commitments on investment facilitation or investment promotion are desired they should be included in the renegotiated BITs. In this regard, there may be value in including state-of-the-art provisions on investment facilitation or investment promotion in the renegotiated BITs even if similar commitments have already been undertaken by the parties at the plurilateral level in the WTO IFDA.

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[26] See New Zealand–UAE BIT art 18(3)(a)(b).
[27] New Zealand–UAE BIT art 18(3)(c). This kind of obligation is common in Japan's investment treaties. See eg ASEAN–Japan EPA (as amended) art 51.22(b)(c), Japan–Angola BIT art 26(1)(b)(c).
[28] New Zealand–UAE BIT art 18(3)(d)(g).
[29] See eg Brazil–UAE CFIA art 22. Brazil–India CFIA art 17.
[30] See eg EU–Vietnam Investment Protection Agreement, art 4.1(4)(b)(c). EU–Singapore Investment Protection Agreement, art 4.1(4)(f).
[31] EU–Angola Sustainable Investment Facilitation Agreement, art 42(4).
[32] New Zealand–UAE BIT art 18(3)(f). Brazil's Investment Cooperation and Facilitation agreements are a good example of this. See eg Brazil–India CFIA art 18. Brazil–UAE CFIA art 24.
[33] See Chapter 10 'Investment Facilitation' in Türkiye–UAE CEPA.
[34] See Australia–UAE FTA arts 11.1–11.3.

For example, provisions on investment facilitation and promotion in the renegotiated BITs might focus on shared priority areas or sectors, such as encouraging/facilitating investments relevant to decarbonisation and clean energy technologies.[35] Investment facilitation/promotion provisions might also provide for cooperation between the parties' investment promotion agencies.[36] An example of such cooperation from Australia's recent practice, albeit in a non-legally binding agreement, is Annex B 6.2 to the Australia–Singapore Green Economy Agreement, which provides for cooperation between Austrade and Enterprise Singapore, eg in the form of joint promotional events and business matching activities.

PART C: MODERNISING INVESTMENT PROTECTION PROVISIONS

Australia should be cautious about relying on general exceptions clauses as a safeguard for the right to regulate in the public interest. There are only a small number of arbitral awards to date that have considered general exceptions clauses in BITs or investment chapters of FTAs, but these awards suggest that general exceptions do not necessarily remove the liability to pay compensation for measures that violate an investment protection.[37] In light of these cases, in the renegotiation of its BITs with Argentina, Pakistan and Türkiye Australia should carefully consider the drafting of substantive investment protection provisions, particularly those relating to the customary international minimum standard and indirect expropriation.

5. Clarifying the Content of the Customary International Minimum Standard

In future treaties Australia should aim to clarify the content of the customary international minimum standard of treatment through a closed/exhaustive list provision and to include this standard rather than the fair and equitable treatment (FET) standard.

An example of such an approach from Australia's recent practice is Article 3 of the Australia–UAE BIT, pursuant to which each Party is to accord to covered investments of investors of the other Party 'treatment in accordance with customary international law'.[38] Article 3(2) defines in an exhaustive/closed list the circumstances in which the obligation will be breached:

> A Party breaches this obligation only if a measure 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, such as coercion, duress and harassment; or

[35] See Australia–UAE FTA arts 11.2(1)(a) and 11.3(3).
[36] See Australia–UAE FTA art 11.2(1)(c)(d).
[37] See, in particular, *Eco Oro v Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), paras 826–37 (finding that a general exception would not operate to exclude the liability to compensation for breach of the fair and equitable treatment obligation); *Montauk Metals Inc. v Colombia*, ICSID Case No. ARB/18/13, Award (7 June 2024), paras 971–984 (finding that a general exception would not relieve the respondent state of its obligation to pay compensation for loss resulting from a treaty breach); *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017), para 477 (suggesting that the general exception 'does not offer any waiver from the [expropriation obligation] to compensate for expropriation').
[38] Australia–UAE BIT art 3(1).

(f) a failure to provide full protection and security.[39]

Australia should bear in mind that these elements (elements (a)-(e)) have been further clarified by the European Union (EU) and Canada in relation to Article 8.10 of their Comprehensive Economic and Trade Agreement (CETA) through a draft joint interpretation that was published in February 2024. This is relevant because the provision in CETA (art 8.10(2)(a)-(e)) is largely identical to Article 3(2)(a)-(e) of the Australia–UAE BIT, except that CETA refers to 'fair and equitable treatment' whereas the Australia–UAE BIT refers to 'treatment in accordance with customary international law'.

The 2024 draft joint interpretation by Canada and the EU adds significant detail regarding the circumstances in which a measure will constitute 'denial of justice', 'fundamental breach of due process', 'manifest arbitrariness', or 'abusive treatment of investors'. For instance, under the joint interpretation, a 'measure is manifestly arbitrary … when it is evident that the measure is not rationally connected to a legitimate policy objective, such as where a measure is based on prejudice or bias rather than on reason or fact'. The joint interpretation provides also that:

> For there to be a denial of justice and a fundamental breach of due process … there must be improper and egregious procedural conduct in judicial or administrative proceedings, which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises a sense of judicial propriety such as the unfounded refusal of access to courts or legal representation, failure to provide an opportunity to be heard, discriminatory treatment by the courts, clearly biased and corrupt adjudicators, or a complete or unjustifiable lack of transparency in the proceedings, such as a failure to provide notice of the proceedings or reasons for the decision.

In renegotiating the BITs under review, Australia should consider whether it agrees with, and wishes to adopt, the above clarifications, which are aimed at reducing the discretion of treaty interpreters and protecting policy space.

In future treaties Australia should aim to include reference to the customary international minimum standard, defined via a closed/exhaustive list, rather than referring to FET. This is because the former is arguably harder for investors to establish a breach of, based on exiting case law that has distinguished between the customary international minimum standard and the FET standard.[40] Australia should also consider including a clarification that, for greater certainty, the FET standard does not form part of any future treaty and is not to be used in interpreting the agreement.[41] The purpose of such a clarification would be to ensure that future treaties which refer to the customary international minimum standard, rather than FET, are not interpreted in light of existing case law on the FET standard.

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[39] Australia–UAE BIT art 3(2).

[40] Consider, for example, *Red Eagle Exploration Limited v Republic of Colombia*, ICSID Case No. ARB/18/12, Award (28 February 2024) [292]–[295] (holding that the doctrine of legitimate expectations does not form part of the customary minimum standard of treatment).

[41] Brazil has included a similar clarification in some of its investment treaties. See eg Brazil–UAE CFIA, art 4(3): 'For greater certainty, the standards of "fair and equitable treatment" … are not covered by this Agreement and shall not be used as interpretative standards in investment dispute settlement procedures'. Brazil–Suriname CFIA art 4(3).

Australia could also consider including a clarification within provisions on the customary international minimum standard which provides guidance on the forms of conduct that shall not be understood to constitute a breach of the standard. For example, the provision on the minimum standard of treatment in the Argentina–UAE BIT includes the following clarification:

> 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.[42]

In future BITs it may also be worth clarifying that 'the fact that a measure breaches domestic law does not, in and of itself, establish a breach' of the provision on the minimum standard of treatment.[43] Such a clarification can also remind tribunals that, in order to establish whether a measure breaches the minimum standard of treatment, they must 'consider whether a Party has acted inconsistently with the obligations' set out in the paragraph that exhaustively lists the kinds of conduct which breach the standard.[44]

6. Clarifying the Scope of the Expropriation Obligation

Each of the three BITs that are being considered for renegotiation contain an expropriation obligation, which extends to indirect expropriation, but without any further definition of how to identify indirect expropriation.[45] In contrast, most of Australia's modern FTAs with investment chapters and investment agreements contain an annex which clarifies the scope of the expropriation obligation, and in particular, of indirect expropriation. These annexes usually include four elements: first, a clarification that expropriation will only arise if there is an interference with a property right or interest; second, a clarification that expropriation can be direct or indirect; third, a list of factors that should be examined in the 'case-by-case, fact-based inquiry' undertaken to determine if a measure is an indirect expropriation; and fourth, a clarification that non-discriminatory regulatory measures do not constitute indirect expropriations. In this submission we do not comprehensively examine the variations in how these annexes have previously been drafted, but we highlight some notable issues.[46]

Taking the Singapore-Australia FTA (as amended in 2016) as an illustrative example, the factors for whether a measure constitutes an indirect expropriation usually include:

> (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

[42] Argentina–UAE BIT art 5(4).
[43] See eg CETA art 8.10(7), Canada–Ukraine modernised FTA art 17.9(3), Pacific Alliance–Singapore FTA art 8.7(6).
[44] See eg CETA art 8.10(7), Hungary–UAE BIT art 2(6).
[45] See art 7.1 of each of the three BITs.
[46] For further analysis of drafting variations in these provisions, including with reference to Australia's treaty practice, see Joshua Paine, 'Submission to Australian Government Department of Foreign Affairs and Trade Review of Australia's Bilateral Investment Treaties' (2020), pt. 2 pp. 2–7 and Joshua Paine, 'Autonomy to Set the Level of Regulatory Protection in International Investment Law' (2021) 70(3) *International & Comparative Law Quarterly* 696, 730–34.

> 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.[47]

In some treaties, the 'character of the government action' is elaborated to include a reference to the purpose of the measure. While providing further guidance on the 'character' of government action is useful, we would caution against the approach taken in a small number of Australia's FTAs, which goes so far as to say that the character of the government action includes 'its objective and whether the action is disproportionate to the public purpose'.[48] This language invites a tribunal to undertake a balancing exercise, weighing whether, in its view, the measure is disproportionate to its public purpose. A simpler approach is to simply note that the character of the government action includes 'its objective and context'.[49]

Taking the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as an illustrative example, the clarification regarding non-discriminatory regulatory measures reads:

> 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, except in rare circumstances.[50]

Some treaties provide guidance on what the 'rare circumstances' are in which a non-discriminatory regulation action might still constitute an indirect expropriation, such as 'when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive'.[51] While this provides more guidance to arbitrators, it again invites arbitrators to evaluate whether a measure is proportionate to its purpose. An alternative approach, adopted by Australia in some of its BITs and FTAs, is to omit the phrase 'except in rare circumstances'.[52] Removing the reference to rare circumstances strengthens the right to regulate, while the requirements for the measure to be non-discriminatory and 'designed and applied' for a legitimate public welfare objective ensure that the clarification does not become too wide of a loophole.

Typically, the clarification that non-discriminatory regulatory measures do not constitute indirect expropriations has an inclusive but not exhaustive list of the public interests that a relevant measure could pursue. The CPTPP and some other Australian BITs and FTAs include a footnote to the clarification on indirect expropriation which further defines public health:

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[47] Singapore–Australia FTA (as amended 2016), Annex 8-A, para 3(a).
[48] See, eg, AANZFTA (as amended by the Second Protocol to Amend), Annex 11B, para 3(c); IA-CEPA Annex 14-B, para 3(c).
[49] See, eg, RCEP Annex 10B, para 3(c).
[50] CPTPP Annex 9-B, para 3(b).
[51] CETA Annex 8-A, para 3. See also the 2024 draft joint interpretation between Canada and the EU, para 2(d)–(e). Japan–Australia EPA Annex 12(4).
[52] See, eg, RCEP, Annex 10B, para 4; AANZFTA (as amended by the Second Protocol to Amend), Annex 11B, para 4; Malaysia – Australia FTA, Annex on Expropriation, para 4, Australia-Uruguay BIT, Annex B (3)(b), Pacific Agreement on Closer Economic Relations Plus, Annex 9-C(4).

> 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.[53]

As long as such clarifications are phrased with inclusive language ('for greater certainty and without limiting the scope…'), these definitions may be a useful way of providing greater clarity about the sorts of measures which the parties intend to be viewed as non-discriminatory regulatory measures.

[53] CPTPP, Chapter 9, footnote 37. Singapore–Australia FTA (as amended 2016), Annex 8-A, footnote 22. Australia– Uruguay BIT Annex B (3)(b) footnote 4. Australia–Hong Kong Investment Agreement Annex II(3)(b) footnote 43.