GAR INVESTMENT TREATY ARBITRATION

Australia

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Contents

I Overview

1 What are the key features of the investment treaties to which this country is a party?

BIT contracting party or MIT	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts[1]	Arbitration
Argentina (11 January 1997)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Chile (16 September 1999)[2]	Yes	Yes	Yes	Yes	No	3 months	Yes	Yes
China (11 July 1988)[3]	Yes	Yes	Yes	Yes	Yes	3 months	Yes	Expropriation only
Czech Republic (29 June 1994)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Egypt (5 September 2002)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Hong Kong (15 October 1993)[4]	Yes	Yes	Yes	Yes	Yes	3 months	No	Yes
Hungary (10 May 1992)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
India (4 May 2000)	Yes	Yes	Yes	Yes	No	No	Yes[5]	Yes
Indonesia (29 July 1993)[6]	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Lao People's Democratic Republic (8 April 1995)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Lithuania (10 May 2002)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Mexico (21 July 2007)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Pakistan (14 October 1998)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Papua New Guinea (20 October 1991)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Peru (2 February 1997)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Philippines (8 December 1995)	Yes	Yes	No	Yes	No	No	Yes	Yes
Poland (27 March 1992)	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Romania (22 April 1994)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Sri Lanka (14 March 2007)	Yes	Yes	Yes	Yes	No	90 days	Yes	Yes
Turkey (29 June 2009)	Yes	Yes	Yes	Yes	No	6 months	Yes	Yes
Uruguay (12 December 2002)	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Vietnam (11 September 1991)	Yes	Yes	Yes	Yes	No	No	Yes	Yes

FTAs/EPAs[7]	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts[8]	Arbitration
ASEAN-Australia-New Zealand (1 January 2010)[9]	Yes	Yes	Yes	No[10]	No	180 days	No (unless disputing party is Philippines or Vietnam)	Yes
Chile (6 March 2009)	Yes	Yes	Yes	Yes	No	6 months	No	Yes
China (not yet in force)[11]	No[12]	No[13]	No	Yes	No	120 days	No	National treatment only[14]
Japan (15 January 2015)	Yes	Yes	Yes	Yes	No	N/A	No	No
Korea (12 December 2014)	Yes	Yes	Yes	Yes	Yes[15]	6 months[16]	Yes	Yes[17]
Malaysia (1 January 2013)	Yes	Yes	Yes	Yes	No	N/A	No	No

FTAs/EPAs[7]	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts[8]	Arbitration
New Zealand (1 March 2013)	Yes	Yes	Yes	Yes	No	N/A	No	No
Singapore (28 July 2003)	Yes	Yes	Yes	No[18]	No	6 months	Yes	Yes
Thailand (1 January 2005)	Yes	Yes	Yes	Yes[19]	No	No[20]	Yes	Yes
United States (1 January 2005)	Yes	Yes	Yes	Yes	No	N/A	No	No

II Qualifying Criteria

2 Definition of investor

What are the distinguishing features of the definition of 'investor' in this country's investment treaties?

Issue	Distinguishing features in relation to the definition of 'investor'
Seat of the investor/ place of business	While most Australian investment treaties provide that a juridical person incorporated or duly organised according to the laws of a contracting party (ie, a country that is party to the treaty) is an 'investor', three treaties (Argentina, Mexico and Philippines BITs) also require that such entities have their 'substantive business operations', their 'seat' or 'place of effective management' within the territory of a contracting party. The Argentina and Philippines BITs only apply this precondition to investors from Argentina and the Philippines and not to those from Australia. The New Zealand FTA requires a juridical person to have a branch and carry out business activities in the territory of a contracting party.
Control by a non-national	The Hong Kong BIT does not protect juridical persons that are owned or controlled by investors of a non-party. Under the China BIT, both contracting parties reserve the right to refuse to admit the investments of companies who are controlled by investors of a non-party or whose seat is not within the other contracting party's territory. The remainder of Australia's BITs (excluding the India BIT) and Australia's FTAs and Japan EPA provide the contracting parties with a discretion to deny protection to investors that are juridical persons owned or controlled by investor(s) of a non-party or, in some treaties, investors that are owned or controlled by investor(s) of the denying contracting party (ie a denial of benefits clause). With an eye to investors from countries such as North Korea, the USA FTA and Japan EPA provide the contracting parties with a discretion to deny protection to juridical persons where they are owned or controlled by persons of a non-party with whom the denying party does not maintain diplomatic relations (or who is the subject of relevant sanctions: USA FTA). The China FTA, Korea FTA and Japan EPA provide the contracting parties with a discretion to deny protection to juridical persons owned or controlled by persons of a non-party where the denying party prohibits transactions with respect to the non-party that would be circumvented if the benefits were extended to the juridical person or to its investments.
Permanent residents	The term 'investor' is normally defined to include both citizens or nationals and permanent residents of a contracting party. However, only citizens are afforded protection under the Uruguay BIT. The Argentina and India BITs and Korea FTA only protect nationals (and not permanent residents).
Dual nationals	Natural persons who are dual nationals of both contracting parties are precluded from pursuing a claim under the ASEAN-ANZ FTA. Under the Chile BIT as well as the Chile, Korea, Malaysia and USA FTAs, dual nationals are only protected in respect of investments originating from the country that is their dominant and effective nationality. Australia's BITs (with the exception of those with Hong Kong and Mexico) and the Singapore FTA exclude protection to permanent residents of a contracting party who are nationals of the other contracting party. This last restriction only applies to Turkish nationals under the Turkey BIT.
Interplay with other investment treaties	Australia's BITs, other than those with Hong Kong and Mexico, deny protection to permanent residents and companies owned or controlled by investors of non-parties where they have invoked a different investment treaty in respect of the same matter. The Singapore and Thailand FTAs similarly exclude protection to permanent residents who have invoked a different investment treaty in respect of the same matter.

3 Definition of investment

What are the distinguishing features of the definition of 'investment' in this country's investment treaties?

Issue	Distinguishing features in relation to the concept of 'investment'
Assets that qualify for protection	Most Australian investment treaties define 'investment' to mean 'every kind of asset owned or controlled' by a national. Some treaties expressly include indirect investments (eg, Malaysia FTA). However, the China BIT contains an arguably more expansive definition of a protected 'investment'. It refers to 'every kind of asset, owned, controlled or contributed by nationals'. In contrast, the China, Korea and New Zealand FTAs and the Japan EPA (with minor differences) define an 'investment' in light of ICSID tribunal jurisprudence as 'every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk'.
Indirect control of assets	Five Australian investment treaties expressly include in the definition of 'investment' assets controlled indirectly by a protected investor (Mexico BIT and Chile, Thailand, Singapore and USA FTAs).
Exclusion of certain assets	Some Australian investment treaties exclude from the definition of 'investment' certain types of assets, such as loans and claims to money (Mexico BIT and ASEAN-ANZ, Korea and USA FTAs), as well as government debt instruments (China FTA, Mexico FTA and Chile FTA), government procurement (China FTA) and judgment debts (ASEAN-ANZ, Chile, New Zealand and USA FTAs).
Commencement of treaty protection	Some Australian investment treaties protect all existing investments (eg, Philippines and Sri Lanka BITs), whereas others only protect investments made after a specific date (eg, Poland and Vietnam BITs). The Korea, Malaysia and New Zealand FTAs protect investors who are seeking or attempting to make investments (ie, where the investor has taken active steps to make an investment, such as through initiating a required notification or approval process: Malaysia FTA). Some treaties (expressly) provide that they do not apply to disputes that arose prior to the treaty's entry into force (eg, Egypt and Uruguay BITs) or any act or fact that took place before the treaty's entry into force (China, Korea and New Zealand FTAs).
Admission/approval of an investment	Most Australian investment treaties expressly require investments to have been 'admitted' by a contracting party subject to that contracting party's laws. The ASEAN-ANZ FTA stipulates that protection is only afforded to those investments made in Thailand and Vietnam whose approval has been appropriately recorded.
Special formalities	The Korea, Malaysia and New Zealand FTAs and Japan EPA allow the contracting parties to prescribe special formalities in connection with covered investments and to require investors to provide information concerning the investment solely for informational or statistical purposes.

III Substantive Protections

4 Fair and equitable treatment

What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
Illustrations of the FET standard	While most Australian investment treaties simply provide that each contracting party shall ensure fair and equitable treatment to investments (eg, Hungary BIT and Indonesia BIT), eight treaties are more prescriptive. Specifically, the Chile, Japan, Korea, New Zealand, Singapore and USA FTAs provide that the fair and equitable treatment standard 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'. Similarly, the ASEAN-ANZ and Malaysia FTAs note that fair and equitable treatment requires 'each Party not to deny justice in any legal or administrative proceedings'. The China FTA is the only Australian investment treaty not to provide for the application of the fair and equitable treatment standard, though the effect of this may be somewhat limited as long as the China BIT remains in force.
Customary international law	Nine Australian investment treaties expressly equate the obligation to provide fair and equitable treatment with the concept of fair and equitable treatment under customary international law (Mexico BIT, ASEAN-ANZ, Chile, Korea, Malaysia, New Zealand, Singapore and USA FTAs and Japan EPA).

5 Expropriation

What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the 'expropriation' standard
Right to regulate for a public purpose	While all Australian investment treaties (except the China FTA) provide protection against expropriation without adequate compensation, the right to compensation under the ASEAN-ANZ, Chile, Korea, Malaysia, New Zealand, Singapore and USA FTAs is expressly excluded where the expropriation is a result of non-discriminatory regulatory actions taken by a host state that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety and the environment (although the New Zealand FTA recognises that there could still be an expropriation in 'rare circumstances').
Indirect expropriation	Ten Australian investment treaties expressly protect against indirect expropriation (Chile, Mexico and Sri Lanka BITs and ASEAN-ANZ, Chile, Korea, Malaysia, New Zealand and USA FTAs and Japan EPA). The Malaysia FTA lists factors to be considered in determining whether there has been an indirect expropriation.
Limited right to arbitration	Unlike Australia's other investment treaties, in the absence of further agreement between the parties to a dispute, the China BIT only provides a right to arbitration where the dispute 'relates to the amount of compensation payable' as a result of an expropriation of property. A number of tribunals have considered whether this merely affords investors a right to refer to arbitration disputes regarding the quantification of the value of any property that has been taken by the host state or whether the merits of the dispute (ie, whether or not an expropriation has occurred) can also be referred to arbitration.
Expropriation in accordance with the 'due process of law'	Most of Australia's investment treaties require that any expropriation of an investment must occur under 'due process of law' (eg, Indonesia BIT) or 'due process of law as embodied in the principal legal systems of the world' (eg, Korea FTA). However, the Chile, China and India BITs simply require that the expropriation occur in accordance with the laws of the expropriating state.
Taxation and expropriation	The Korea FTA lists considerations to be taken into account to determine whether a taxation measure constitutes an expropriation.

6 National treatment/most-favoured-nation treatment

What are the distinguishing features of the national treatment/most favoured nation treatment standard in this country's investment treaties?

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' (MFN) standard
Common Exceptions to MFN treatment	All Australian BITs expressly provide that the provision of 'most favoured nation' and/or 'national' treatment to an investment does not extend to the benefits of membership of a customs union, monetary union or free trade area, nor to taxation agreements and/or taxation legislation. Australia's FTAs (except the Japan EPA and Korea FTA) explicitly exclude taxation measures (but not customs unions, etc) from the ambit of the 'most favoured nation' and/or 'national' treatment provisions (the China and Malaysia FTAs more broadly exclude taxation from the scope of the investment chapter). The China FTA provides that national treatment and MFN do not apply to any measure in force prior to the entry into force of the FTA.
Scope of MFN treatment	Generally, the MFN protection contained within Australia's BITs applies to 'investments' and 'returns on investments'. Other than the Argentina, Czech Republic, Hong Kong and Romania BITs, Australia's BITs also expressly extend protection to activities associated with investments. The Chile, China, Korea, Malaysia, New Zealand, and USA FTAs extend the guarantee of MFN treatment to 'the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of the investment', whereas the Thailand FTA and Japan EPA extend protection only to 'investors' and 'investments'. The Japan EPA and the Chile, China, Korea, Malaysia and New Zealand FTAs expressly provide that MFN treatment does not extend to dispute settlement procedures. The USA FTA does not expressly preclude the extension of MFN treatment to dispute settlement procedures; no arbitral tribunal has yet been called upon to interpret the MFN clause of the USA FTA. The Thailand FTA effectively extends MFN treatment to an investor's right to choose the means of resolving a dispute, meaning that an investor may submit a claim under the ICSID Additional Facility Rules (article 917.3).
Limitation on national treatment	The obligation to provide 'national' treatment of investments is subject to the host state's laws, regulations and investment policies (eg, Argentina, India, Mexico and Turkey BITs).
National treatment only	The ASEAN-ANZ and Singapore FTAs are the only Australian investment treaties that do not guarantee investors MFN treatment. Both treaties, however, guarantee investors 'national' treatment in respect of investments. The effect of the absence of MFN treatment from the ASEAN-ANZ FTA may be limited by the fact that Australia's BITs with a number of ASEAN nations (Indonesia, Laos, the Philippines and Vietnam) do provide for MFN treatment, as does its FTA with Thailand.

Issue	Distinguishing features of the 'national treatment' and/or 'most favoured nation' (MFN) standard
Non-conforming measures	The China, Korea, Malaysia and New Zealand FTAs provide that national treatment and MFN do not apply to any existing non-conforming measure that is maintained by a contracting party at a local level of government or as set out by that party in its Schedule. National treatment and MFN also do not apply to measures adopted with respect to sectors or activities as set out in the party's Schedule. The China FTA also provides that (i) MFN does not apply to any measure (existing or otherwise) adopted or maintained by either contracting party with respect to the aviation, fisheries and maritime sectors and (ii) neither national treatment nor MFN applies to any measure (existing or otherwise) adopted or maintained by Australia with respect to the sectors or activities as set out in a Schedule to the FTA.

7 Protection and security

What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Issue	Distinguishing features of the 'protection and security' standard
Scope	The formulation of the standard varies in Australia's investment treaties. Some provide for 'full protection and security' (eg, Chile FTA, Papua New Guinea BIT and Sri Lanka BIT). Others simply require 'protection and security' (eg, China, Peru and Romania BITs). The Chile BIT only requires a contracting party to 'protect' investments. In the ASEAN-ANZ FTA, the obligation is framed as pertaining to those measures that 'may be reasonably necessary to ensure the protection and security of the… investments'. Whether or not these different formulations equate to different levels of protection is open to debate.
Customary international law on protection and security	The obligation to provide protection and security is limited in nine treaties to that required under customary international law (Mexico BIT, the ASEAN-ANZ, Chile, Korea, Malaysia, New Zealand, Singapore and USA FTAs and Japan EPA). The Korea and Singapore FTAs provide that 'full protection and security' requires each contracting party to provide the level of police protection required under customary international law, while the Malaysia and New Zealand FTAs define 'full protection and security' as requiring 'measures as may be reasonably necessary to ensure the physical protection and security of the covered investment'.

8 Umbrella clause

What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

Issue	Distinguishing features of any 'umbrella clause'
Scope	Only four of Australia's investment treaties contain an umbrella clause (China, Hong Kong, Papua New Guinea and Poland BITs). The Korea FTA allows an investor to bring an arbitration claim for a state's breach of an investment authorisation from the relevant foreign investment authority or an investment agreement.
Qualification of the obligation	In the BITs with China and Poland, the obligation to honour commitments (ie, the umbrella clause) only applies to written undertakings. The Papua New Guinea BIT limits the obligation to undertakings given by a person or body that was lawfully entitled to give the undertaking. The Poland BIT requires a contracting party to 'do all in its power to ensure that a written undertaking… is respected'.

9 Other substantive protections

What are the other most important substantive rights provided to qualifying investors in this country's investment treaties?

Issue	Other substantive protections
Free transfer of payments	All Australian investment treaties (with the exception of the China FTA) contain a provision that requires the contracting parties to permit investors to transfer investments and investment returns freely. With the exception of the India BIT, the protection is subject to the laws and policies of the host state, including those concerning bankruptcy. Under the Indonesia, Laos and Mexico BITs, and the ASEAN-ANZ, Chile, Korea, New Zealand, Singapore and Thailand FTAs and Japan EPA, the host state can suspend the obligation should it suffer serious balance of payment difficulties (for the Korea FTA, this is for a period of not more than one year subject to exceptional circumstances). The China FTA only provides, at article 8.16, that 'a Party shall not apply restrictions on international transfers and payments for current transactions relating to is specific commitments.'

Issue	Other substantive protections
Non-impairment	Other than the Mexico and Philippines BITs, Australia's BITs impose upon contracting parties an obligation not to impair the management, maintenance, use, enjoyment or disposal of investments. No similar obligation is contained in any of Australia's FTAs, although it arguably falls within the obligation to provide fair and equitable treatment.
Armed conflict/civil unrest	All of Australia's investment treaties (with the exception of the China FTA) guarantee investors of contracting parties 'most favoured nation' treatment in regards to compensation paid to other investors of other states in the case of armed conflict or civil unrest. Fourteen treaties also provide for 'national' treatment in such circumstances (Argentina, Chile, India, Mexico, Peru and Turkey BITs and ASEAN–ANZ, Chile, Korea, Malaysia, New Zealand, Singapore and USA FTAs and Japan EPA). Five Australian investment treaties also provide investors with a qualified right to receive compensation for losses caused by the host state in the event of armed conflict or civil unrest (Hong Kong BIT, Chile, Korea, New Zealand and USA FTAs).
Transparency	The Malaysia FTA provides that the contracting parties shall seek to facilitate the provision and exchange of investment information. The ASEAN–ANZ and New Zealand FTAs provide that each contracting party shall, to the maximum extent possible, publish in advance any measure that it proposes to adopt and provide interested persons of the other party with an opportunity to comment on such proposed measures.
General exceptions	The Japan EPA and the China, Malaysia and New Zealand FTAs exempt a state from liability for measures necessary for public order; to protect human, animal or plant life; to comply with laws or regulations; for the protection of national treasures; or relating to the conservation of natural resources. The Malaysia FTA requires the contracting party adopting such a measure to notify the other party of the measures. The China, Malaysia and New Zealand FTAs provide that the investment chapter does not apply to taxation.

IV Procedural Rights

10 Are there any relevant issues related to procedural rights in this country's investment treaties?

Issue	Procedural Rights
Fork-in-the-road	Nine Australian investment treaties contain fork-in-the-road provisions (Argentina, Chile, Mexico, Turkey and Uruguay BITs and ASEAN-ANZ, Chile, China, Korea and Singapore FTAs). That is, investors must elect either to pursue their claim through the local courts or by international arbitration. They cannot do both. The fork-in-the-road provision in the Korea FTA applies only to Australian investors who have brought claims before a court or administrative tribunal of Korea. However, some of these treaties expressly provide that the election to submit a dispute to arbitration may not preclude an investor commencing proceedings in local courts to obtain certain types of interim relief (Mexico BIT and ASEAN-ANZ, Chile and Singapore FTAs).
Waiver of local remedies	Some treaties condition the right to commence arbitration on an investor having waived its right to pursue any cause of action arising from the same circumstances giving rise to the alleged breach of the treaty in the contracting party's courts or tribunals (Mexico and Turkey BITs and ASEAN-ANZ, China, Chile and Singapore FTAs).
Exhaustion of local remedies	The right to commence arbitration under two Australian investment treaties is contingent on the exhaustion of local remedies in respect of disputes that do not concern expropriation (Hungary and Poland BITs). The Czech Republic BIT explicitly provides that arbitration proceedings can be commenced even if local remedies have already been exhausted. Their prior exhaustion is not, however, a condition precedent to the right to commence arbitration.
ICSID or ad-hoc arbitration	Most Australian investment treaties provide a right of recourse to ICSID. Some treaties also allow investors to pursue an arbitration claim through: (i) an ad hoc tribunal constituted in accordance with the UNCITRAL rules (eg, Chile, India and Mexico BITs and the China FTA); and/or (ii) any other tribunal acting in accordance with any other arbitration rules as is mutually agreed by the parties to a dispute (eg, Argentina and Indonesia BITs, and China and Korea FTAs).
Time limits	Five Australian investment treaties require that a claim be commenced within a specified time (often three years) of the investor having first acquired knowledge of the facts giving rise to the alleged breach (Mexico BIT and ASEAN-ANZ, Chile, China, Korea and Singapore FTAs).
Use of MFN to expand procedural rights	Some Australian investment treaties expressly provide that MFN treatment does not encompass investor-state dispute settlement procedures or mechanisms (eg, Chile, China, Korea and New Zealand FTAs and Japan EPA).

Issue	Procedural Rights
Applicable law	Australian investment treaties that provide a right to refer a dispute to ICSID are generally silent as to what law or laws are to govern the parties' dispute (two exceptions to this are the Mexico BIT and the China FTA that provides that the tribunal shall decide the dispute in accordance with the treaty and the applicable rules and principles of international law). In such circumstances, the applicable law is likely to be determined in accordance with article 42 of the ICSID Convention, which provides that in the absence of an agreement between the parties to a dispute, the tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. With respect to ad hoc arbitration, Australian investment treaties generally provide that arbitral tribunals must have regard to the terms of the investment treaty when determining the dispute (eg, India BIT). Such treaties also often provide that an arbitral tribunal must have regard to relevant international law (eg, Argentina and Mexico BITs and ASEAN-ANZ FTA) and the laws of the contracting state that is party to the dispute (eg, Romania BIT, and China and ASEAN-ANZ FTA).
Preliminary issues	Two of Australia's more recent investment treaties provide that objections to jurisdiction or a submission that a claim is manifestly without merit must be heard and determined by the tribunal as a preliminary issue (ASEAN-ANZ and Chile FTAs). Similarly, the China and Korea FTAs provide that any objection that a claim submitted is not a claim for which an award in favour of the claimant may be made shall be decided as a preliminary issue.
Confidentiality	While the majority of Australia's investment treaties are silent on the issue of confidentiality, four provide that the parties' submissions, the hearing transcript and the arbitration award can be made public in certain circumstances (ASEAN-ANZ, Chile, China and Korea FTAs). Under the Mexico BIT, the award may only be published if both parties consent. Under the Chile, China and Korea FTAs, the hearing itself must also be open to the public in certain circumstances.
Tribunals	The China FTA obliges the contracting parties to establish a standing body of 20 arbitrators who will be available to determine claims under the treaty, though the parties to an arbitration are at liberty to appoint an arbitrator from outside the body. The China FTA also provides that all arbitrators shall have expertise or experience in international law or international investment disputes, and that they must comply at all times with a Code of Conduct annexed to the FTA.

11 What is the status of this country's investment treaties?

Termination provisions

All of Australia's BITs contain a provision specifying an initial period of time (10 or 15 years, depending on the treaty) during which the treaty shall remain in force. With the exception of the Indonesia BIT, such provisions further state that the treaty shall continue in force thereafter indefinitely until a contracting party exercises the right to terminate the treaty by giving one year's written notice of its intention to terminate. By contrast, Australia's FTAs and the Japan EPA can be unilaterally terminated by a contracting party at any time after giving, depending on the treaty, either six or 12 months' notice. The ASEAN-ANZ FTA terminates if Australia withdraws, New Zealand withdraws or the treaty is in force for fewer than four ASEAN member states.

While the Australian government has expressed concerns about the incorporation of arbitration provisions in future investment treaties (discussed below at question 19), it has not made any announcements to the effect that it will not renew existing treaties that contain investor-state arbitration provisions.

Survival clauses

Australia's BITs provide for the protection of qualifying investments after a treaty has been terminated. Specifically, all of Australia's BITs incorporate a 'survival clause', which provides that investments made prior to the date of termination of the treaty will be protected by the treaty's provisions for a further period of 15 years or, in the case of the Mexico and Sri Lanka BITs, 10 years.

Australia's FTAs and the Japan EPA do not include 'survival clauses'.

Termination of Indonesia BITs

The Australia–Indonesia BIT may expire on 29 July 2023, following Indonesia's publicly stated intention to terminate (and possibly renegotiate) all of its existing BITs. Investments that qualify for protection on the date of termination will be protected for a further 15 years.[21]

V Practicalities (Claims)

12 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

Government entity to which claim notices are sent	Some of Australia's investment treaties provide that notices should be served on the Commonwealth of Australia (Australia), care of the Department of Foreign Affairs and Trade (eg, Chile and China FTAs). If the treaty does not stipulate upon whom a dispute notice is to be served, the notice should be addressed to the Commonwealth Attorney-General (the Attorney-General). Service upon the Attorney-General can be effected by sending the notice to the Australian Government Solicitor's Canberra office.

13 Which government department or departments manage investment treaty arbitrations on behalf of this country?

Australian government department that manages investment treaty arbitrations	The Office of International Law (a department within the Attorney-General's Department), in conjunction with the Department of Foreign Affairs and Trade, has managed on behalf of the government of Australia the one investment treaty claim thus far known to have been brought against Australia.

14 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

Internal/External Counsel	The Australian Government Solicitor[22] is authorised to represent the Australian government in international arbitration.[23] The Solicitor-General[24] and external barristers may also be retained to represent the Australian government (as it has done in the one claim thus far brought against Australia).

VI Practicalities (Enforcement)

15 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

ICSID Convention implementing legislation	ICSID Implementation Act 1990 (Cth), which amended the International Arbitration Act 1974 (Cth). Part IV of the International Arbitration Act 1974 (Cth), as amended, gives the ICSID Convention the Force of Law in Australia. An application for enforcement of an investment treaty award may be made in the Supreme Court of each state and territory, or the Federal Court of Australia.

16 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

New York Convention implementing legislation	International Arbitration Act 1974(Cth).

17 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	The International Arbitration Act 1974 (Cth) gives the UNCITRAL Model Law the force of law in Australia. Following an inter-governmental agreement each state and territory has passed or is in the process of passing new arbitration legislation (the Uniform Commercial Arbitration Acts) which is intended to apply only to domestic arbitrations.

18 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards	No publicly available awards have been rendered against Australia under its investment treaties. A claim brought by Phillip Morris Asia Limited (Hong Kong) against Australia in relation to cigarette plain packaging legislation is presently being determined.

19 Describe the national government's attitude towards investment treaty arbitration.

Attitude of the government towards investment treaty arbitration	The Australian (Labor) government announced in April 2011 that it will no longer accept investor-state arbitration provisions in investment treaties.[25] The Australian government stated at the time that it adopted this position because: (1) foreign businesses should not be given greater legal rights than domestic businesses; and (11) the government's ability to legislate on social, environmental or economic matters should not be unduly constrained where the proposed laws do not discriminate between domestic and foreign businesses. The Australian government's decision came after several mining companies indicated that they were contemplating bringing a treaty claim against the Australian government in relation to a proposed super profits mining tax. Phillip Morris had also indicated that it might bring a claim in relation to the government's proposed Tobacco Plain Packaging Bill. Phillip Morris Asia Limited subsequently filed a claim on that issue against Australia under the Hong Kong–Australia BIT, which is currently pending. Following the election of a Liberal/National coalition government in September 2013, the Australian government's position on investor-state arbitration provisions appears to have softened, with a number of investment treaties being agreed that incorporate investor-state arbitration provisions having been recently agreed. Specifically, the Korea FTA, signed on 8 April 2014, allows an investor to refer an arbitration claim to ICSID or be resolved under the UNCITRAL Arbitration Rules or any other arbitration rules as agreed by the parties to the dispute. The Japan EPA, signed on 8 July 2014, leaves open the possibility for an investor-state dispute settlement mechanism to be established through a review by the contracting parties five years after entry into force of the agreement (or as otherwise agreed by the contracting parties) or if Australia enters into an investment agreement providing for such a mechanism following the EPA's entry into force. The China FTA, signed on 17 June 2015 (and not yet in force), allows an investor to bring, for a breach of the obligation of national treatment only, an arbitration claim under ICSID, the UNCITRAL Arbitration Rules or any other arbitration rules as agreed by the parties to the dispute. The Australian government's official view is that it: 'will consider investor-state dispute settlement provisions in FTAs on a case-by-case basis. The Australian government is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest — including in areas such as public health, the environment or any other area of the economy.'[26] A committee of Australia's Senate published a report on 27 August 2014, which recommended that the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, which sought to prevent Australia from agreeing to investor-state dispute settlement provisions in future FTAs, should be rejected. The Bill, however, remains before the Senate. The Federal opposition Labor Party has indicated that it may vote against the China FTA when it is put before Australia's Senate for ratification (expected to be in late 2015).[27] Finally, Australia is also an active participant in the negotiations for the Trans-Pacific Partnership Agreement among countries in the Asia-Pacific region, which is reported to include an investment chapter.

20 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

Attitude of local courts towards investment treaty arbitration	Australian courts have never been called upon to enforce an investment treaty award against Australia. Australian courts, however, have demonstrated a pro-international arbitration bias in the commercial sphere[28] and in international sport and could be expected to do so in the context of investment treaty awards.[29] The Australian Parliament passed various amendments to the International Arbitration Act 1974 in 2010 to ensure that courts continue to adopt a pro-arbitration bias.[30] Further, in relation to the recent investment treaty case of *White Industries Australia Limited v India* (UNCITRAL), the Australian company, White Industries, filed a summons and supporting affidavit in the New South Wales Supreme Court on 17 February 2012 seeking recognition and enforcement of the investment treaty award it obtained against India. On 30 March 2012, the NSW Supreme Court granted White Industries leave to discontinue the enforcement proceedings (suggesting that the matter had been settled).

VII National Legislation Protecting Inward Investment

21 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

National legislation	Substantive protections			Procedural rights	
	FET	Expropriation	Other	Local courts	Arbitration
Commonwealth of Australia Constitution Act 1901	No	Yes	No	Yes	No

VIII National Legislation Protecting Outgoing Foreign Investment

22 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
Multilateral Investment Guarantee Agency	Australia has ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) (Seoul, 11 October 1985).[31] Australian nationals and corporates are eligible to acquire, for the payment of a premium, political risk insurance from MIGA in respect of investments made in certain developing states provided that certain conditions are met. To be eligible for assistance, the investment must be medium to long term in nature, support the host country's development goals, comply with MIGA's Policy on Social and Environmental Sustainability and anti-corruption and fraud standards, and also be financially viable.

IX Awards

23 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties

Awards
White Industries Australia Limited v The Republic of India, UNCITRAL, Final Award, 30 November 2011.
Pending Proceedings
Phillip Morris Asia Limited (Hong Kong) v the Commonwealth of Australia. Notice of Claim dated 22 June 2011 (UNCITRAL), Australia–Hong Kong BIT.
Tethyan Cooper Company v Islamic Republic of Pakistan (ICSID Case No. ARB/12/1), Australia–Pakistan BIT.
African Petroleum Gambia Limited (Block A1) v Republic of The Gambia (ICSID Case No. ARB/14/6), Australia–Gambia BIT.
African Petroleum Gambia Limited (Block A4) v Republic of The Gambia (ICSID Case No. ARB/14/7), Australia–Gambia BIT.
Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40), Australia–Indonesia BIT.

Reading list

Mark Mangan, 'Australia's Investment Treaty Program and Investor-State Arbitration' in Luke Nottage and Richard Garnett (eds), International Arbitration in Australia (The Federation Press Annandale 2010). Dr Chester Brown, 'Bilateral Investment Treaty Overview – Australia' (Oxford University Press 2010). Available online at: www.investmentclaims.com/home_public.
Jonathan Kay Hoyle, International Investment Law in Australia: Terra incognita? Commentary on the Role of Bilateral and Multilateral Investment Treaties in Australia (unpublished manuscript, 2008). Available online at: www.acica.org.au/downloads/Jonathon%20Kay%20Hoyle.pdf.
Peter Turner, Mark Mangan and Alex Baykitch, 'Investment Treaty Arbitration: An Australian Perspective' (2007), 24 *Journal of International Arbitration* 103.
Luke Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of Planet Mining v Indonesia and Regional Implications' (*Transnational Dispute Management*, 2015).

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* *The information within this article is accurate as at September 2015.*

Notes

1 The answer 'yes' indicates that the treaty in question expressly grants an investor the right to bring a dispute under the treaty before local courts while 'no' means that the right to use local courts is not express in the treaty and therefore subject to local law.
2 The Australia–Chile BIT was terminated on the date of entry into force of the Australia–Chile FTA. Nevertheless, pursuant to article 12 of the Australia–Chile BIT and Annex 10-E of the Australia–Chile FTA, the BIT between the two countries continues to apply to any investment that was made before its termination with respect to any act, fact or situation that originated before its termination.
3 The Parties to the Australia–China FTA agreed to review the Australia–China BIT within three years of the entry into force of the former: Australia–China FTA, article 9.9(2). Pending such review, the Australia–China BIT remains in force.
4 By Exchange of Notes at Beijing, 9–26 June 1997, the governments of Australia and the People's Republic of China confirmed the continued application of the agreement between Australia and Hong Kong from 1 July 1997.
5 The Australia-Indonesia BIT may be terminated on 29 July 2023, given the government of Indonesia's stated intention to withdraw from all of its BITs. For more information, see https://www.dechert.com/How_to_protect_investments_in_Indonesia_despite_the_termination_of_its_Bilateral_Investment_Treaties_09-08-2015/.
6 The right is limited to circumstances in which both parties to the dispute agree to submit the dispute to the host country's local courts: Australia-India BIT, article 12(2).
7 The treaties listed below are all characterised by the Australian government as free trade agreements (including the Australia–New Zealand Closer Economic Relations Trade Agreement Investment Protocol (hereinafter referred to as the New Zealand FTA)) except for the Australia–Japan Economic Partnership Agreement (Australia–Japan EPA). In addition, Australia signed the Energy Charter Treaty on 17 December 1994, but ratification is still pending.
8 The answer 'yes' indicates that the treaty in question expressly grants an investor the right to bring a dispute under the treaty before local courts while 'no' means that the right to use local courts is not express in the treaty and therefore subject to local law.
9 Australia's BITs with the ASEAN countries, Indonesia, Laos, the Philippines and Vietnam and the investment provisions of Australia's FTAs with Singapore and Thailand remain in force and are not superseded or terminated by the ASEAN-ANZ FTA: Chapter 18, article 2. In the event of any inconsistency between the ASEAN–ANZ FTA and these existing investment agreements, the Contracting Parties have agreed to immediately consult with a view to finding a mutually satisfactory solution: ASEAN-ANZ FTA, Chapter 18, article 3. Australia and New Zealand have entered into a side agreement excluding the application of the investment chapter in the ASEAN-ANZ FTA as between their two countries.
10 While no MFN clause was agreed in the ASEAN–ANZ FTA, the Contracting Parties have undertaken to enter into discussions with a view to agreeing the application of MFN treatment to the treaty. Note that article 4 of Chapter 11 requires national treatment of qualifying investments.
11 The Australia–China FTA was signed on 17 June 2015. It will come into force 30 days after both Contracting Parties have completed the domestic legislative procedures necessary for ratification (the Australian Parliament is expected to vote on ratification before the end of 2015).
12 While no FET clause was agreed in the Australia–China FTA, the Contracting Parties agreed to enter into negotiations with a view to agreeing the inclusion of a 'Minimum Standard of Treatment' in the treaty: Australia-China FTA, article 9.9(3)(b)(i). The Australia–China BIT includes FET protection, though without granting an investor a right of recourse to arbitration in the event that the standard is breached.
13 While there is no expropriation protection in the Australia–China FTA, the Contracting Parties agreed to enter into negotiations with a view to agreeing the inclusion of an expropriation clause in the treaty: Australia–China FTA, Article 9.9(3)(b)(ii). The Australia–China BIT, however, includes protection against expropriation without compensation.
14 The claimant may submit to arbitration a claim that the respondent has breached an investment authorisation or investment agreement: Australia-Korea FTA, article 11.16(1)(a).
15 The claimant may submit a claim to arbitration provided that six months have elapsed since the events giving rise to a claim. In addition, the claimant must submit a notice of intent to submit the claim to arbitration at least 90 days before the notice of arbitration: Australia-Korea FTA, articles 11.16(2) and (3).
16 In addition, the Contracting Parties shall consider, within three years after the entry into force of the agreement, whether to establish a bilateral appellate mechanism to review arbitral awards: Australia–China FTA, article 9.23.
17 In addition, the Contracting Parties shall consider, within three years after the entry into force of the agreement, whether to establish a bilateral appellate mechanism to review arbitral awards: Australia–Korea FTA, Annex 11-E.

18 Article 3 of the Australia–Singapore FTA requires national treatment of qualifying investments.
19 Articles 904 and 907 of the Australia–Thailand FTA also require national treatment of qualifying investments.
20 Footnote 6 to article 917 of the Australia–Thailand FTA states that the consultations and negotiations between the investor and the state should in principle continue for three months.
21 For more information on the termination of Indonesia's BIT programme, please see https://www.dechert.com/How_to_protect_investments_in_Indonesia_despite_the_termination_of_its_Bilateral_Investment_Treaties_09-07-2015/.
22 The Australian Government Solicitor is a fully commercial and competitive law firm which provides legal services to the Australian government, and occasionally to governments of the States and Territories of Australia. It was originally established as an office within the government, headed by an individual Commonwealth Crown Solicitor, but was turned into a government business enterprise in 1999.
23 Legal Services Directions 2005 (Cth), Appendix 1, section 2.
24 The Solicitor-General is the second Law Officer of the Commonwealth of Australia (after the Attorney-General). He or she provides written and oral advice on matters of significance to the Australian Government and appears as counsel in cases of constitutional significance, international cases and other cases of special government interest.
25 See Department of Foreign Affairs and Trade (2011) *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity*. Note that the Australian government has traditionally rejected the need for investor-state arbitration provision in agreements between developed countries: eg, Australia–USA FTA.
26 Sydney Morning Herald, 'Labor hardens its stance on China-Australia Free Trade Agreement', 12 August 2015. See www.smh.com.au/federal-politics/political-news/labor-hardens-its-stance-on-chinaaustralia-free-trade-agreement-20150811-giwpm5.html.
27 Department of Foreign Affairs and Trade, 'Frequently Asked Questions on Investor-State Dispute Settlement' (accessed 14 August 2015). Visit www.dfat.gov.au.
28 See eg, *Uganda Telecom Ltd v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 where the Federal Court noted: 'In the United States, the courts have generally regarded the public policy ground for non-enforcement as one to be sparingly applied… Other courts in the United States have held that there is a pro-enforcement bias informing the [New York] Convention… Whether or not, in 2004, there was a general discretion in the Court to refuse to enforce a foreign award that was brought to the Court for enforcement, the amendments effected by the 2010 Act make clear that no such discretion remains. Section 8(7)(b) preserves the public policy ground. However, it would be curious if that exception were the source of some general discretion to refuse to enforce a foreign award. Whilst the exception in s 8(7)(b) has to be given some room to operate, in my view, it should be narrowly interpreted consistently with the United States cases. The principles articulated in those cases sit more comfortably with the purposes of the Convention and the objects of the Act.'
29 See eg, *Raguz v Sullivan* (2000) 50 NSWLR 236 and discussion of the same in Mark Mangan 'With the Globalisation of Arbitral Disputes, is it Time for a New Convention?', (2008) 11 *International Arbitration Law Review* 133.
30 See International Arbitration Amendment Act 2010 (Cth).
31 31 See the Multilateral Investment Guarantee Agency Act 1997 (Cth).

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