Australian Government
Department of Foreign Affairs and Trade

27 September 2019

Mr Dave Sharma MP
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600
By email: jsct@aph.gov.au

Dear Chair

Inquiry into the *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments*

I refer to the above inquiry and to the public hearing which was held on 16 September 2019.

The Department of Foreign Affairs and Trade would like to correct answers provided in relation to the *Maffezini v Spain* case. In responding to questions from the Committee, I incorrectly stated that the case involved an investor who sought to incorporate an investor-State dispute (ISDS) mechanism into a treaty that did not include ISDS. In fact, the investor sought to include a more favourable ISDS mechanism into a treaty which had a less favourable ISDS mechanism. For your reference, please find enclosed a brief case summary.

As I noted during the hearing, the updated Uruguay bilateral investment treaty addresses the issue raised by the case by including a "Maffezini clause" in paragraph 2 of Article 5 dealing with most favoured nation treatment.

I trust this information is of assistance.

Yours sincerely

Paul Schofield
A/g Assistant Secretary
Trade and Investment Law Branch
Department of Foreign Affairs and Trade

Emilio Augustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on the Tribunal on Objections to Jurisdiction, January 25, 2000

Short decision summary

If a most-favoured nation clause provides a wide scope of application, advantageous provisions regarding arbitration procedures stipulated in other bilateral investment treaties (BITs) may be equally applied even when no specific reference is provided to such procedures, unless otherwise limited by public policy considerations.

Detailed summary

After his investment in Spain failed, Maffezini, an Argentinean national, requested arbitration on the grounds that the Spanish government was in violation of the Argentina-Spain BIT, stating the business failure was due to acts and omissions of his partner in a joint venture, a Spanish financial institution. The Spanish government objected to the jurisdiction of the arbitral tribunal on the grounds that the relevant BIT required that a dispute must first be referred to the domestic court of Spain before submitting it to arbitration, and that this procedural requirement had not been satisfied. Maffezini claimed that because the Spain-Chile BIT allowed submission of a case to arbitration without going through a domestic trial, he should be accorded the same right under the most-favoured nation treatment of the Argentina-Spain BIT.

The arbitral tribunal noted that the most-favoured-nation treatment provision under the Argentina-Spain BIT is applicable to "all matters subject to this Agreement". It referred to the role of investment treaty arbitration in protecting investors, and concluded that the most favoured-nation treatment provision applied to dispute settlement provisions as well. However, the tribunal found that whether most-favoured nation treatment would be extended to a matter was subject to limits arising from "public policy considerations", but that it did not apply to this case.