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***Submission for DFAT Review of Australia's Bilateral Investment Treaties<sup>1</sup>***

In formal and informal submissions or other communications over the last decade to Australian Parliament and other government agency inquiries considering old and new BITs and FTAs, I have urged a review like this and so am pleased to make this Submission. Australia has usefully replaced several old BITs with new FTA investment chapters (or a BIT alongside an FTA, in the case of Hong Kong last year). But Australian should indeed try renegotiating some of the remaining ones, although without terminating those that cannot be adjusted.

- A. In your view, are the existing BITs of benefit to Australian investors operating in these overseas markets?** Please comment on their utility.
1. BITs (and FTA investment chapters) promote a utilitarian approach to justice by encouraging more outbound investment, by bolstering confidence for outbound investors especially when first venturing into new and unfamiliar markets but also when considering reinvestments in existing markets abroad. This instrumental effect is particularly important now given the extra disincentives to investing abroad created by the COVID-19 pandemic and consequent global economic slowdown. BITs also serve a corrective justice function by compensating outbound investors if and when host states violate substantive minimum standards of protection (or liberalisation commitments) of customary international law or most investment treaty law.
  2. Both effects are particularly important when investing into developing economies, with more macro- and micro-economic fragility and uncertainties, and usually worse governance mechanisms including domestic law standards and

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<sup>1</sup> <https://www.dfat.gov.au/trade-and-investment/discussion-paper-review-australias-bilateral-investment-treaties>



court processes to promote investment. Basically all Australian BITs were concluded with such countries, at least at that time, although some have since “graduated” into at least the middle-income economy range and have improved their domestic law systems. Yet BITs can still form a useful fallback even for more developed countries. We can infer this eg from a recent ISDS arbitration filed by an Australian investor against Poland, which has been subject to considerable political upheaval and arguably a decline in the rule of law in recent years.<sup>2</sup>

3. Another useful function of BITs is to encourage better governance, decision-making and the rule of law in the counterpart state, although the extent to which this occurs is difficult to measure and the results of relatively few empirical studies have been mixed. Australia has also been trying to help especially developing countries in Asia to bolster their governance and legal systems through ODA, but that budget has been diminishing and again the results have been difficult to assess.
4. A third benefit of BITs for outbound investors is to complement political risk insurance. Having a BIT allows insurers to better price risk and insurance policies. If investors then take out such policies, disputes may be resolved more amicably, quickly and cheaply. However, insurance may still be very expensive or limited in amount and coverage, as we can infer from the ongoing Kingsgate TAFTA claim against Thailand.<sup>3</sup> Yet Australia benefits economically from its companies being integrated into (especially newer) investment destination countries. This is due to expansion of regional and global production chains, particularly in this era of heightened trade tensions and more awareness also from the pandemic of relying too much on a few market partners (eg China).<sup>4</sup>

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<https://www.iareporter.com/articles/australian-miner-makes-good-on-earlier-threat-to-initiate-treaty-based-arbitration-against-poland/>

<sup>3</sup> Kawharu, Amokura and Nottage, Luke R., Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu (February 1, 2018). Sydney Law School Research Paper No. 18/03, Available at SSRN: <https://ssrn.com/abstract=3116526>

<sup>4</sup> See generally Nottage, Luke R. and Jetin, Bruno, New Frontiers in Asia-Pacific Trade, Investment and International Business Dispute Resolution (June 25, 2020). in L. Nottage, S. Ali, B. Jetin & N. Teramura (eds), "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution", Wolters Kluwer (Forthcoming), Sydney Law School Research Paper No. 20/35, Available at SSRN: <https://ssrn.com/abstract=3635795>



5. These DFAT consultation questions also do not mention this but Australia as a host state can benefit from having BITs. It can encourage more investment (especially FDI), in an economy that has long been reliant on foreign capital to develop its rich resources despite a small population. Australia is also encouraged through BIT commitments to maintain and even improve its domestic governance and legal systems. Although we have quite developed systems, they are not perfect. Our politics and institutions quite often show inefficiencies, and even sometimes involve corruption (as with the NuCoal coal mining licence scandal in NSW). Our complex federal system allows States to engage in action that can discriminate or otherwise seriously harm foreign investors, with only the Federal Government potentially being liable under international investment law, thus creating a moral hazard – but also an incentive for the Federal Government to prompt the State governments to bring their systems up to widely accepted international standards. As Australian domestic investors then become aware of below-standard Australian standards, they can begin to press for the higher international standards – or at least prompt a debate over which standard is more appropriate on policy or philosophical grounds. This opens up Australian citizens and policy-makers to the wider world, combating parochialism and the assumption that our domestic solutions are always optimal. Promoting cosmopolitanism is particularly valuable in this era of heightened nationalism amidst global trade and public health tensions.
6. One example of a potentially productive debate followed the first and only real serious inbound ISDS claim against Australia, brought by Philip Morris Asia under the now-replaced old BIT with Hong Kong. It highlighted that even the federal Constitution does not protect against indirect expropriation (like Australian and other BITs and FTAs) but only direct expropriation. The less high-profile NuCoal dispute (which its US shareholders did not progress) highlighted that States are not constrained constitutionally even against direct expropriation. This gap has also been highlighted by Clive Palmer's (Singaporean parent company) dispute with Western Australia very recently,<sup>5</sup> along with the possibility that Australian domestic law may allow “denial of justice” that would be contrary to higher international investment law standards.<sup>6</sup>

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<sup>5</sup> See my preliminary analysis at <https://theconversation.com/clive-palmer-versus-western-australia-he-could-survive-a-high-court-loss-if-his-company-is-found-to-be-foreign-145334>

<sup>6</sup> See also, pointing out Australian domestic law's refusal to allow protection of “substantive legitimate expectations”: Nottage, Luke R., Investor-State Arbitration Policy and Practice in Australia (June 29, 2016). Second Thoughts: Investor-State Arbitration Between Developed



- B. 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.
7. The biggest theoretical and practical concern is FDI, rather than portfolio investment that is much more mobile, as FDI projects are often long-term and cannot be easily unwound or repatriated, so are often at the mercy of changing politics and “hold-ups” in the destination states. This is particularly true of FDI involving mining or infrastructure, hence they form a large proportion of known ISDS claims. These are also areas where Australian companies have experience and capacity to invest abroad. Unsurprisingly, therefore, almost all the known outbound ISDS arbitration claims involve Australia (related) resource companies.<sup>7</sup> Some on the political left may think companies in that sector do not deserve protection, to international minimum standards, but most would value their contributions to economic and technological development in Australia as well as the host country abroad.
8. In 2010 the (traditionally quite laissez-faire) economists in the Australian government’s Productivity Commission seized on a few studies suggesting that, on an aggregate (world-wide) basis, ISDS-backed treaty provisions had not significantly increased investment flows, in order to recommend that Australia cease agreeing to ISDS provisions in any future treaties.<sup>8</sup> Yet a 2016 econometric study by Armstrong and Nottage casts doubt on that observation.<sup>9</sup> It found instead positive and significant impacts from ISDS provisions on FDI outflows

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Democracies, Armand de Mestral, ed, Centre for International Governance Innovation, Canada, 2017, CIGI Investor-State Arbitration Series, Paper No. 6, 2016, Sydney Law School Research Paper No. 16/57, Available at SSRN: <https://ssrn.com/abstract=2802450>

<sup>7</sup> See also Bath, Vivienne and Nottage, Luke R., International Investment Agreements and Investor-State Arbitration in Asia (February 26, 2020). shorter version in J.Chaisse, L. Choukroune and S. Jusoh, "Handbook of International Investment Law and Policy", Springer, Singapore, 2020, Sydney Law School Research Paper No. 20/08, Available at SSRN: <https://ssrn.com/abstract=3544458>

<sup>8</sup> Australian Government Productivity Commission, ‘Bilateral and Regional Trade Agreements’, *Research Report*, (2010), [www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf](http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf).

<sup>9</sup> S. Armstrong & L. Nottage, ‘The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis’, *Sydney Law School Research Paper*, 16/74 (2016), [www.ssrn.com/abstract=2824090](https://ssrn.com/abstract=2824090).



from OECD countries over 1985-2014, using a Knowledge-Capital Model with a dynamic panel indicator (effectively addressing the problem of endogeneity in variables, since FDI might lead to treaties being signed, as well as vice versa). This impact on FDI flows was found from ISDS provisions on their own (especially in treaties signed or promptly ratified with non-OECD or less developed countries), and also when combined with the MFN provision (as a key and indicative substantive treaty commitment to foreign investors).

9. Nonetheless, counter-intuitively and importantly for negotiators of future treaties, positive FDI impact was even larger for *weaker-form* provisions. This could be due to investors historically having been impressed by a broader ‘signalling’ effect from states concluding investment treaties. Yet the impact from ISDS provisions also seems to be diminishing since 2001, when ISDS claims started to pick up world-wide and therefore investors (or at least legal advisors) could have begun to pay more attention to the details of ISDS and other treaty provisions. Reduced impact since 2001 may be related to more efforts from host states to unilaterally liberalise and encourage FDI. However, it could also be due to a saturation effect (as treaties began to be concluded with less economically important partner states), or indeed due to less pro-investor provisions being incorporated into investment treaties (influenced by more recent US practice, partly in response to ISDS claims<sup>10</sup>).
10. Further variables impacting on FDI (such as double-tax treaties) could be investigated, as can regional differences. A study published by Armstrong in 2018 found similar results when differentiating ASEAN+3 FDI.<sup>11</sup> Data limitations also remain, as there is now considerable FDI outflow from non-OECD countries. Nonetheless, this baseline study suggests that it has been and still may be risky to eschew ISDS provisions altogether. In particular, results indicate a strong positive effect on FDI flows from ratified investment treaties overall even from 2001. So states would have missed out on that if they had insisted on omitting ISDS, and this then became a deal-breaker for counterparty states.

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<sup>10</sup> W. Alschner & D. Skougarevskiy, ‘Mapping the Universe of International Investment Agreements’ (2016) 19(3) *Journal of International Economic Law* 561–588.

<sup>11</sup> S. Armstrong, ‘The Impact of Investment Treaties and ISDS Provisions in Asia and Globally’ in J. Chaisse and L. Nottage (eds) *International Investment Treaties and Arbitration Across Asia* (Brill, 2018).



11. Focusing more specifically on individual countries within Asia, econometric research for Indian Council for Research on International Economic Relations suggests that India was correct not to abandon ISDS provisions altogether in its revised Model BIT finalized in December 2015 (and to retreat from an even less pro-investor earlier draft of the Model BIT). Results from Professor Jaivir Singh (using instead a gravity-type model) find that although the signing of individual BITs had an insignificant impact on FDI inflows into India, the *cumulative* effect of signing BITs is significant and so is the coefficient associated with signing of FTAs. Since almost all of India's investment treaties provide for full ISDS protections, these preliminary results suggest that ISDS can have a positive influence on investment, albeit in a non-obvious compound manner.<sup>12</sup>
12. In addition, an econometric study of Chinese outbound FDI (measured instead by numbers of both greenfield and M&A projects, rather than investment value) finds a significant positive impact on outflows from 2003 to 2014 due to China's investment treaties, coded using the composite BITSel index to measure the overall extent to which treaties are favourable to foreign investors.<sup>13</sup> However, the impact instead became negative for Chinese FDI into the subset of upper-higher-income host states. Desbordes and others therefore speculate that Chinese investors 'may feel confident to invest in countries whose political-economic environment shares strong similarities with the one they face at home'.<sup>14</sup> Even more interestingly, and potentially relevant for Chinese negotiators of future investment treaties, this econometric study found no statistically significant effect on outbound investment numbers from including ISDS provisions in the relevant treaties. The positive impact on outbound FDI came instead from four other sets of provisions that also make up the composite BITSel index: provisions related to treaty scope (such as the definition of investment), market access (such as pre-establishment commitments), MFN and national treatment, expropriation and

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<sup>12</sup> J. Singh 'Indian Investment Treaty and Arbitration Practice: Qualitatively and Quantitatively Assessing Recent Developments' in L. Nottage et al (eds) [\*New Frontiers in Asia-Pacific Trade, Investment and International Business Dispute Resolution\*](#) (Kluwer, end-2020).

<sup>13</sup> On BITSel, see generally J. Chaisse & C. Bellak, 'Navigating the Expanding Universe of International Treaties on Foreign Investment: Creation and Use of a Critical Index', *Journal of International Economic Law*, 18(1) (2015), 79-115.

<sup>14</sup> C. Azemar, J. Chaisse, R. Desbordes & I. Wooton, 'Do Bilateral Investment Treaties Influence Chinese Outward FDI? More Than a BIT', *Paper presented at the Asian Investment Forum II conference, Chinese University of Hong Kong* (29-30 November 2016, on file with the present author), p. 13 (discussing results in their Table 3).



FET.<sup>15</sup> Future research may reveal different results if the ISDS provisions are further differentiated as strong (full) or weak (qualified), as in the study of world-wide FDI flows undertaken by Armstrong and Nottage applying some underlying coding of the treaties used to generate the BITSel index.

13. So far, this econometric analysis of Chinese outbound FDI patterns suggests that traditional ISDS provisions may be a less important component of investment treaties than has generally been assumed. However, this could be due to the unusually strong support on the part of the Chinese government for its outbound investors, making it easier to mobilise (informally) inter-state dispute settlement mechanisms. In particular, it is only in recent years that private companies in China, but still along with State-Owned Enterprises, have become major sources of outbound FDI.<sup>16</sup>
14. Indeed, another econometric study for the Asian Development Bank based on similar methods found that for BITSel-coded intra- and extra-Asian investment treaties (a large proportion of the total recorded by UNCTAD) over 2000-16, there is a significant positive impact on the cumulative number of FDI projects not only with respect to such investment treaties overall, but also with respect to their component ISDS provisions. In fact, when the *marginal* effects on FDI are analysed, ISDS is the *only* provision having a significant positive influence from among the five components, meaning that ‘the most important provision in BITs is access to international arbitration’.<sup>17</sup>

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<sup>15</sup> Ibid, p. 14 (Table 4).

<sup>16</sup> On broader trends in China’s cross-border FDI and investment treaty practice, including implications for several major negotiations with Asia-Pacific partner countries, see J. Chaisse, ‘China’s Three-prong International Investment Strategy: An Update on the Bilateral, Regional and Global Policies’ in J. Chaisse and L. Nottage (eds) *International Investment Treaties and Arbitration Across Asia* (2018).

<sup>17</sup> Asian Development Bank, *ASEAN Economic Integration Report 2016*, p. 163 (with reference to Tables 6.28 and 6.29). Overall, the study found (ibid, at p. xiv): “Despite the growing heterogeneity in the scope and depth of BITs, the treaties generally help both greenfield FDI and M&As. Empirical findings suggest that having investor-state dispute mechanisms (ISDMs) is most effective for BITs to attract FDI—it can increase the number of FDI projects by 35.3%. Separately, non-discrimination provisions—such as national treatment and most-favored nation clauses in regional trade agreement investment chapters—are the most effective element in attracting FDI.”





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

15. As I have communicated previously to Parliamentary and other government agency inquiries, I am concerned that the remaining old BITs are too brief and general by contemporary standards, as epitomised by the (NAFTA+) US-style FTA investment chapters Australia began concluding from 2003 (signed with Singapore, further revised in 2017 to bring it in line with the CPTPP). This leads to costs and delays, as we saw with the very many disputes and resultant Procedural Orders issued in the Philip Morris Asia claim under the old Hong Kong BIT. Jurisdiction is probably too broad, although it can be circumscribed by background customary international law. This supplementation is evident in that case: the investor lost because it became holder of the tobacco trademarks when a dispute was reasonably foreseeable over Australia's tobacco plain packaging legislation.
16. The substantive outcomes may also be too pro-investor by contemporary standards, although investment treaty provisions again can be supplemented by customary international law. That is how Philip Morris's Swiss parent lost on the merits in its BIT claim against Uruguay over different tobacco controls. A tribunal including Australia's pre-eminent international law expert (Prof James Crawford, now ICJ Judge) ruled that the "police powers" doctrine disallowed an indirect expropriation claim for proportionate, bona fide regulation for public health. Empirical research also shows some tendency for investment arbitrators to interpret existing treaties in more pro-state ways.<sup>18</sup> Yet clarifying standards in older treaties themselves will promote more certainty and reduce arguments (hence costs and delays) in future disputes, as well as providing more accessible guidance to host states as to what is and is not permitted under their international law commitments.
17. Secondly, I am concerned about several remaining older BITs stating that the host state "shall consent" to ISDS. The tribunal in a claim by Australian subsidiary Planet Mining (of UK's Churchill, under a separate BIT) against Indonesia interpreted this as not providing sufficiently clear advance consent to arbitration, so could only take jurisdiction under coal mining licences signed by

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<sup>18</sup> Langford, Malcolm and Behn, Daniel, Managing Backlash: The Evolving Investment Treaty Arbitrator? (September 6, 2016). European Journal of International Law, PluriCourts Research Paper No. 16-14, Available at SSRN: <https://ssrn.com/abstract=2835488>





Indonesia (later found to be forged by the local partner company, meaning Indonesia eventually prevailed). The reasoning is not very convincing, but it make almost worthless the similarly worded ISDS commitments in several other old Australian BITs. When renegotiating those treaties, Australia should seek wording clarifying that the host state “hereby consents” to future ISDS (as its other treaties, especially FTAs). This uncertainty has been partly remedied by belatedly mutually terminating that old BIT with Indonesia and replacing it with the FTA signed last year.<sup>19</sup>

18. Thirdly, I am concerned that there is still no review of the very old BIT with China, given some uncertainty over the scope of its ISDS-backed provisions,<sup>20</sup> and a commitment under the 2014 ChAFTA for an inter-state three-year work program to reconcile the two treaties. Australia may have been waiting for China to settle its new policy about BITs generally, especially as it was negotiating a BIT with the USA, but that is not going anywhere. Perhaps the delay was because Australia and China were anyway also negotiating the ASEAN+5 Regional Comprehensive Economic Partnership FTA, as another baseline, but that was reportedly agreed late last year. (However, RCEP is not yet “legally scrubbed” and publicised for signature, and apparently omitted ISDS for the time being, although anyway almost all pairs of 15 signatories would have in effect ISDS-backed commitments under other treaties).<sup>21</sup> Australia should use this review to complete negotiations with China, preferably folding modern BIT provisions into the bilateral FTA investment chapter.

**D. 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?**

<sup>19</sup> Nottage, Luke R., 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 (April 14, 2014). Transnational Dispute Management, Vol. 12, No. 1, pp. 1-18, 2015, Sydney Law School Research Paper No. 14/39, Available at SSRN: <https://ssrn.com/abstract=2424987> or <http://dx.doi.org/10.2139/ssrn.2424987>

<sup>20</sup> Voon, Tania and Sheargold, Elizabeth, Australia, China, and the Co-Existence of Successive International Investment Agreements, in Colin Picker, Heng Wang and Weihuan Zhou (eds), The China Australia Free Trade Agreement: A 21st Century Model (Hart Publishing, 2018) 216, 219-224, Manuscript Available at SSRN: <https://ssrn.com/abstract=2905516>

<sup>21</sup> Nottage and Jetin (2020) op cit.



19. Australia's de facto negotiating approach has been to use contemporary US-style (specially CP/TPP-style) drafting to conclude new treaties, including already some updates to old FTA provisions (eg Singapore, last amended in 2017) and old BITs (new ones with Hong Kong and, not yet in force, Uruguay). This even extends to outright exclusions for ISDS claims related to certain controversial products, eg tobacco, which are worth proposing as long as this does not spread to a plethora of products and services that are not subject to widespread international concern (and indeed other international instruments).
20. Another useful feature of such FTA drafting, to propose in renegotiated BITs, is an express prohibition on using MFN to "import" arguably more favourable ISDS provisions from any other treaty. Another useful FTA-like clarification would be to state that MFN for substantive commitments only applies to those contained in subsequently concluded treaties. This may be inferred anyway, but stating it avoids disputes and therefore costs or delays.
21. Regarding MFN but also National Treatment commitments, old BITs are focused on post-establishment protection, whereas FTAs also commit to such non-discrimination regarding pre-establishment treatment or market access for the foreign investor. Renegotiated BITs could usefully discuss such liberalisation, not just post-admission protection.
22. Transparency provisions have also become a feature of US-style and now Australian FTAs, yet are largely lacking in our old BITs. They are appropriate for investor-state as opposed to commercial arbitrations, given the greater public interests and expectations involved, as Federal Court Chief Justice Allsop also noted in his address to the ICCA Congress in 2018.<sup>22</sup> I gave JSCOT evidence supporting Australia ratifying the UN Mauritius Convention on Transparency, that will retrofit transparency provisions on pre-2014 treaties and will hopefully soon be ratified by Australia. But it will then only kick in if the counterparty state to such an old BIT also ratifies that framework Convention (or its investor consents to more transparency than provided in the old treaty). If a counterparty has no plan to ratify the Convention, Australia should seek to include similar transparency in pre-2014 BITs (and indeed upgrade post-2014 treaties to those, if

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<sup>22</sup> Cited in: Nottage, Luke R., Confidentiality versus Transparency in International Arbitration: Asia-Pacific Tensions and Expectations (August 29, 2019). *Asian International Arbitration Journal*, 16:1, 2020, pp. 1-23, Sydney Law School Research Paper No. #19/52, August 2019, Available at SSRN: <https://ssrn.com/abstract=3444692>



the counterparty is now interested). For most FTAs we have signed since 2003, there already some transparency provisions, but they should also be examined with a view to bringing them consistently in line with the UN Transparency Rules (even eg if the investor brings ICSID arbitration).

23. Another innovation from an originally US-style treaty, the CPTPP as signed in 2018 (after the Trump Administration withdrew US signature in 2017 to the 2016 TPP), is the express prohibition of double-hatting. This refers to serving as counsel and arbitration, thus creating at least a serious appearance of a conflict of interest. The January 2019 CPTPP Code of Conduct's welcome express prohibition<sup>23</sup> is also found in recent EU treaties. Double-hatting may be challenged under arbitration rules or background law, but an express prohibition provides clarity to minimise disputes and understandable public alarm over this otherwise quite persistent practice.<sup>24</sup> Unfortunately that is not found in the replaced HK-Australia BIT nor in our FTA with Indonesia, both signed last year,<sup>25</sup> but the prohibition should be sought when renegotiating old BITs.
24. The CPTPP and similar Australian FTAs also have useful provisions aimed at forum shopping, notably allowing denial of benefits for a "foreign" investor controlled from Australia with no substantial business activities in that counterparty state. The wording should clarify that the host state can deny benefits even after the dispute has been notified under the treaty, although arguably this can be inferred anyway. More importantly, treaties should clarify that it is an abuse of rights or process to commence arbitration if the dispute

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<sup>23</sup> Nottage, Luke R. and Ubilava, Ana, Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry (August 6, 2018). International Arbitration Law Review, Vol. 21, Issue 4, 2018, Sydney Law School Research Paper No. 18/46, Available at SSRN: <https://ssrn.com/abstract=3227401>

<sup>24</sup> Chiara Giorgetti, Steven Ratner, Jeffrey Dunoff, Shotaro Hamamoto, Luke Nottage, Stephan W. Schill and Michael Waibel, 'Independence and Impartiality of Adjudicators in Investment Dispute Settlement: Assessing Challenges and Reform Options' (2020) Journal of World Investment and Trade 441, freely downloadable via a special issue at <https://brill.com/view/journals/jwit/21/2-3/jwit.21.issue-2-3.xml?language=en>.

<sup>25</sup> Ubilava, Ana and Nottage, Luke R., Novel and Noteworthy Aspects of Australia's Recent Investment Agreements and ISDS Policy: The CPTPP, Hong Kong, Indonesia and Mauritius Transparency Treaties (March 4, 2020). in Nottage, Luke; Ali, Shahla; Jetin, Bruno; Teramura, Nobumichi (eds), "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution", Wolters Kluwer, (Forthcoming) , Sydney Law School Research Paper No. 20/12, Available at SSRN: <https://ssrn.com/abstract=3548358>



exists or is reasonably foreseeable. That was held by the Philip Morris Asia claim tribunal,<sup>26</sup> but its interpretation of customary international law does not bind subsequent tribunals.

25. A related policy and drafting question is the extent to which Australia's renegotiated BITs (and indeed FTAs, and other new treaties) should allow Australia-based investors to bring an outbound claim if they have only limited connections to Australia or indeed the host state (eg perhaps Tethyan's claim vs Pakistan or Planet Mining vs Indonesia, with the parent companies respectively linked to Canada and the UK). It may be that such Australian subsidiaries make a valuable contribution to our national economy. But such claims could trigger serious diplomatic difficulties for Australia, especially if (as with both those cases) the claim amounts happen to be very large.
26. A final US-style treaty provision that should be considered when renegotiated is whether and how to include reference to possibly adding an appellate review mechanism for serious errors (at least of law) by an initial ISDS arbitrators. Australia's wording even in FTAs is inconsistent. At least an obligation to discuss this option, within set time frames, would be helpful given that the mechanism has considerable attraction to enhance ISDS legitimacy (and this is another feature already of recent EU treaties).<sup>27</sup>
27. In addition, there are several useful features even in some of Australia's recent FTAs, going beyond US-style treaty practice, that should be proposed in other including renegotiated BITs:
  - a. On substantive commitments, more express references to proportionality as a test for impugned host state measures, as briefly in our FTA with Korea (probably from their side);
  - b. Procedurally, the "public welfare notice" allowing both states to suspend an ISDS claim by agreeing the impugned measure is not a treaty

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<sup>26</sup> Hepburn, Jarrod and Nottage, Luke R., Case Note: Philip Morris Asia v Australia (September 29, 2016). The Journal of World Investment and Trade, Vol. 18, No. 2, pp. 307-319, 2017, Sydney Law School Research Paper No. 16/86, Available at SSRN: <https://ssrn.com/abstract=2842065>

<sup>27</sup> Kawharu, Amokura and Nottage, Luke R., Models for Investment Treaties in the Asian Region: An Underview (September 21, 2016). Arizona Journal of International and Comparative Law, Vol 34, No. 3, pp. 462-528, 2017, Sydney Law School Research Paper No. 16/87, Available at SSRN: <https://ssrn.com/abstract=2845088>



- violation, added to the 2015 ChAFTA (probably from the Australian side);<sup>28</sup>
- c. Also procedurally, the power for a host state to require the foreign investor to attempt mediation before commencing arbitration, found in the FTA with Indonesia signed last year (and a new HK-UAE BIT), although probably proposed from the Indonesian side.<sup>29</sup>
28. A last idea is for Australia to propose an EU-style investment court alternative to ISDS, still allowing (more efficient and depoliticised) direct claims by investors against host states, but where only the states pre-appoint “judges” in a two-tier system to hear such claims. Australia will have to agree to such a mechanism if it ever concludes an FTA with the EU, given politics and policy in Europe especially since 2015. Yet Australia should be open to this useful compromise in its other future or renegotiated treaties.<sup>30</sup>
29. The EU treaty approach is also worth considering for delimiting the scope of MFN. It also relies more on general exceptions clauses to limit national treatment (whereas the TPP relied on a NAFTA case law inspired Drafters’ Note among signatories to limit this protection essentially to situations of intentional discrimination).<sup>31</sup>
30. Another clause that deserves scrutiny and possible clarification when renegotiating old BITs, even if folded into FTA investment chapters, is the national security exception. It is increasingly relevant in the context of greater geopolitical tensions, yet there are now cases and debates over the typically worded provision’s scope (given the growing interaction of security with

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<sup>28</sup> Nottage, Luke R., Investment Treaty Arbitration Policy in Australia, New Zealand – and Korea? (August 13, 2015). *Journal of Arbitration Studies*, Vol. 25, No. 3, pp. 185-226, 2015, Sydney Law School Research Paper No. 15/66, Available at SSRN: <https://ssrn.com/abstract=2643926>

<sup>29</sup> J. Claxton, L. Nottage and A. Ubilava, <http://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/>

<sup>30</sup> Kawharu and Nottage (2017) op cit.

<sup>31</sup> Henckels, Caroline, Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP (2016) 19(1) *Journal of International Economic Law*, <https://ssrn.com/abstract=2721523>.



economic interests) and trigger (especially whether and how it might be self-judging).<sup>32</sup>

E. **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.

31. Termination would be an over-reaction, given the various positive benefits from BITs plus specific ways to keep improving their drafting, as outlined above.

F. **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?**

32. The contemporary US-style approach to treaty drafting, which has become the de facto template for treaties signed over the last 15 years by Australia but also most Asia-Pacific economies,<sup>33</sup> generally strikes an acceptable balance. However, several useful suggested add-ons even from Australia's recent treaty practice are mentioned above, and the EU-style approach also has attractions.

33. Investment facilitation is a useful supplement. But it is no substitute for contemporary investment treaties backed by ISDS- and/or EU-Court-style dispute resolution mechanisms.

G. **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.

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<sup>32</sup> Compare the WTO jurisprudence discussed in Claxton, James M. and Nottage, Luke R. and Williams, Brett G., *Mediating Japan-Korea Trade and Investment Tensions* (December 3, 2019). in Nottage, Luke; Ali, Shahla; Jetin, Bruno; Teramura, Nobumichi (eds), "New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution", Wolters Kluwer, (Forthcoming), Sydney Law School Research Paper No. 19/73, Available at SSRN: <https://ssrn.com/abstract=3497299>

<sup>33</sup> Alschner, Wolfgang and Skougarevskiy, Dmitriy, *The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe* (November 20, 2015). *Journal of World Investment & Trade*, Vol. 17, pp. 339-373, Available at SSRN: <https://ssrn.com/abstract=2823476>



34. Australia should initiate **renegotiations** (including partial amendments), resulting in a substituted treaty, or the old one supplemented by a **joint interpretative note** (although less user-friendly, and maybe ignored by a tribunal if generated after a dispute has arisen). For practical reasons such renegotiations of standalone BITs should be pursued even though folding the new set of provisions into an **investment chapter in a wider FTA** would usually be better (and consistent with most Australian treaty practice). That is usually better because investment is now closely intertwined with trade and other topics covered by contemporary FTAs, and by putting all sectors and topics on the table there may be more chance of concluding negotiations successfully, at least with some counterparties. By contrast, the **unilateral interpretive note** option is unlikely to influence tribunals or counterpart states trying to work out what they can do or not under the treaties. **Termination** of treaties will not serve the immediate national interest or indeed the ongoing long-term refinement of the global regime made up of over 3000 investment treaties.
35. Lastly, as mentioned also in many Submissions to Parliamentary Inquiries and indeed as accepted in several Committee recommendations upon ratifying new treaties,<sup>34</sup> the Australian government should have a further public consultation aimed at developing a **model investment treaty or at least model provisions** (perhaps with different options over more controversial provisions). This will also help restore bipartisanship and public legitimacy around investment treaties, especially ISDS procedures. The project would also minimise drafting inconsistencies or even errors (as perhaps the “shall consent” wording replicated through some old BITs), and help other countries engaged or interested in reviewing and negotiating investment treaties.

I am happy to elaborate on any of the above points.

Yours sincerely

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<sup>34</sup> Eg Nottage (2017) op cit, updated in *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts* (Elgar, in press for early 2021, chapter summaries at <https://japaneselaw.sydney.edu.au/2020/08/book-in-press-with-elgar/>).