

Submission on Renegotiation of Australia's Bilateral Investment Treaties

Thank you for the opportunity to contribute to this renegotiation process. I am a lawyer and legal academic. My research focuses on investment treaties and wider questions of foreign investment governance. From 2024-25 I was the co-Chair of the Academic Forum on Investor-State Dispute Settlement, which provides academic advice to the UNCITRAL Working Group III process on reform of Investor-State Dispute Settlement (ISDS). More information about my background and interest can be found on the University of New South Wales Faculty of Law & Justice website.¹

I write in my personal capacity. This submission builds on an earlier submission I made to the 2020 Review of Australia's Bilateral Investment Treaties.² This submission has four parts. The first part makes a series of recommendations on framing Australia's approach to renegotiation. The second part reflects briefly on the significance of recent innovations in Australian investment treaty practice. The third part identifies specific renegotiation priorities relating to the jurisdictional and substantive provisions of the investment treaties in question. The fourth part identifies specific renegotiation priorities in relation to the dispute settlement provisions of the investment treaties in questions.

A. Framing Australia's approach to renegotiation

Investment treaties are highly unusual instruments. Their substantive protections purport to govern interactions between covered foreign investors and the entire state apparatus – that is, interactions between foreign investors operating in any sector of the economy and all branches (legislative, executive and judicial) and levels (Commonwealth, the Australian states and local) of government. This breadth of application is reflected in the range of factual scenarios that have led to disputes under investment treaties – from technical disputes about the pricing of utilities, through to disagreements about new public health legislation, disputes about environmental and land use permits, arguments about delay and unfair treatment in local courts, and contractual disputes reformulated as treaty claims. In this way, vaguely drafted investment treaty provisions, such as the obligation to 'ensure fair and equitable treatment' (FET) of foreign investment,³ end up doing the work that would be done in the Australian legal system by a range of specific and highly developed bodies of law (administrative law, contract law, constitutional law, tax law, corporate law, environmental law etc). Each of these bodies of Australian law embodies a specific, carefully developed set of trade-offs between different rights and interests.

Investment treaties are also unusual in that they are a form positive discrimination or 'affirmative action' in favour of foreign investors, in the sense that they grant rights that go beyond those that Australian investors and other foreign investors possess under Australian law.⁴ For example, many

¹ <https://law.unsw.edu.au/staff/jonathan-bonnitcha>

² <https://www.dfat.gov.au/sites/default/files/bit-review-submission-unsw-sydney.pdf>

³ See, eg, Australia-Egypt BIT (2001) art 3(2)

⁴ This is not something that was well understood at the time the treaties that are the subject of this renegotiation process were entered into, because the meaning of the treaties' provisions has been developed through interpretation by ISDS tribunals, often in ways that would be baffling to those who originally negotiated the text. For example, the

ISDS tribunals have interpreted FET provisions as requiring a state party to protect foreign investors' legitimate expectations.⁵ In contrast, under Australian law an investor's legitimate expectations are not protected from government interference,⁶ nor is there any equivalent doctrine of Australian law that protects investors (or any other actor) from disappointed expectations in their interactions with government. Similarly, investment treaties allow minority shareholders to bring claims on behalf of companies in which they hold shares in a way that is inconsistent with foundational principles of Australian corporate law,⁷ and they provide more generous remedies in the event that investors are successful in their claims.⁸ Even in areas where there is somewhat closer alignment between the provisions of investment treaties and Australian law, there are still important divergences – for example, tribunals have interpreted treaty provisions on indirect expropriation more broadly than the Australian constitutional guarantee of compensation for acquisition of property.⁹

There is no plausible policy rationale for granting foreign investors in Australia more generous rights than Australian investors possess under Australian law, nor any rationale for seeking protections for Australian investors abroad beyond those that they would be entitled to under Australian law. For these reasons, a basic principle guiding Australia's investment treaty program should be that Australian domestic law, as it relates to the protection of investors' rights and interests, defines a maximum *ceiling* for the rights and protections that can be granted under

four page National Interest Analysis tabled in the Australian Parliament on 12 March 2002 along with the text of the Australia-Egypt BIT (2001) makes no reference to the FET provision in that treaty: Any contemporary analysis of BITs would point out that the FET standard, as interpreted by ISDS tribunals, has become the most far-reaching substantive protection contained in BITs and the provision with which investor-claimants have had the most success, see Bonnitcho, Poulsen and Waibel *The Political Economy of the Investment Treaty Regime* (OUP 2017) 108, similarly, Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 186.

⁵ Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 208.

⁶ Even in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the highwater mark of the doctrine of legitimate expectations in Australian law, a person's legitimate expectations only gave rise to an entitlement to procedural fairness and were not substantively protected under Australian law. See, Marilyn Pittard, 'The Triumph of Practical Fairness over Legitimate Expectation in Australian Administrative Law' (2017) 29 Singapore Academy of Law Journal 856, 863.

⁷ See, for example, Enron's indirectly-owned minority stake in TGS, which formed the basis for its successful claim in *Enron v Argentina* ICSID Case No. ARB/01/3, Award, 22 May 2007 paras 47-53. In Australia, derivative claims are only possible by *direct* shareholders and only with the leave of the court, which is rarely granted *Corporations Act 2001* (Cth) ss236-7. In this regard, it is relevant to note Draft Provision 18 of [UNCITRAL Working Group III's Working Paper 253](#), which seeks to be better align investment treaties with foundational and otherwise-uncontroversial principles of corporate law.

⁸ Jonathan Bonnitcho, 'Submission to OECD Investor-State Dispute Settlement Public Consultation' (2012) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129311

⁹ The test for an indirect expropriation under investment treaties is commonly understood as turning on whether there has been a 'substantial deprivation' of the investor's rights, see Dolzer, Kriebaum and Schreuer, *Principles of International Investment Law* (3rd edn, OUP 2022) 163-5. In contrast, to succeed in a s51(xxxi) constitutional claim a 'plaintiff must demonstrate not only that it has suffered a loss of valuable rights but that someone else has *acquired* a corresponding benefit or advantage. Thus, as acquisition of property for s 51(xxxi) purposes is more than a mere deprivation.' Rebecca Ananian-Welsh et al, *Blackshield and Williams: Australian Constitutional Law and theory* (8th edn, The Federation Press 2024) 1326 emphasis in original. The potential difference between the two approaches is illustrated by the High Court's rejection of JTP's challenge to Australia's tobacco plain packaging laws. The Court found that there was simply no acquisition of property and, therefore, that it did not need to wade into debates about whether the restrictions on the use of the trademarks were proportionate or justified on wider policy grounds [JT International SA v Commonwealth](#) (2012) 250 CLR 1 at [42] (French CJ), [101] (Gummow J), [189] (Hayne J and Bell J), and [344] and [357] (Kiefel J).

Australia's investment treaties.¹⁰ This principle calls for reconsideration of the core provisions of existing treaties, rather than tweaks to existing treaty language.

Recommendation 1: A basic principle underpinning Australia's investment treaty program should be that investment treaties should not provide more protection than Australian law provides in equivalent circumstances. Giving effect to this recommendation requires a careful comparison between Australian law and the content of investment treaties.

The investor-state dispute settlement (ISDS) provisions found in the bilateral investment treaties currently under renegotiation are also unusual. There is no other field of international law that allows private actors to bring international claims against a state without first exhausting remedies available within that state's own legal system. Even within the field of foreign investment, ISDS is the exception and not the norm. As of 2023, the OECD estimates that 2180 bilateral country relationships are covered by investment treaties,¹¹ which is only a modest share of the 18528 bilateral country relationships among the 193 UN Member States. Perhaps more meaningfully, the vast majority of the world's largest foreign investment relationships – including the various bilateral investment relationships among the US, the EU Member States and the UK – are not covered by investment treaties that provide for ISDS.¹² Policy debate about investment treaties sometimes loses sight of this basic fact: most foreign investment around the world happens without the presence of, or need for, ISDS.

Recommendation 2: Because BITs containing advance consent to ISDS are anomalous as a matter of international law, the default presumption should be against the retention of ISDS in any given investment treaty.

In framing the discussion of these renegotiations, another important factor is that five of the six treaties in question are with EU Member States. Australia is currently negotiating a Free Trade Agreement with the EU. Although the draft text of that treaty is not yet public, it seems that it will include an investment chapter.¹³ Overlapping treaties create complication and uncertainty.

Recommendation 3: All bilateral investment treaties between Australia and EU Member States should terminate on entry into force of any future Australia-EU FTA.

The three foregoing recommendations define important parameters for renegotiations, but they leave open a key question: How to assess the merits of particular BITs and the provisions in them? To answer this question Australia should develop and articulate a policy framework for the assessment of BITs. Articulating a policy framework would allow a more structured assessment of

¹⁰ To be clear, this is not to suggest that renegotiation should be driven by the objective of securing rights and protections in investment treaties up to the ceiling set by Australian law. This is because investment treaties should be designed to focus on clearly defined policy problems, meaning that they should be much more narrowly targeted than the entire corpus of Australian domestic law insofar as it happens to touch upon the interaction between investors and the state apparatus. See, text to Recommendation 5, below.

¹¹ <https://www.oecd.org/en/topics/sub-issues/the-future-of-investment-treaties.html> This figure has been slowly decreasing since the mid-2010s as terminations of existing investment treaties outpace the negotiation of new treaties.

¹² Jonathan Bonnitcha, Lauge Poulsen and Jason Yackee, 'A Future without (Treaty-Based) ISDS: Costs and Benefits' in M Elsig, R Polanco and P van den Bossche (eds) *International Economic Dispute Settlement Demise or Transformation* (CUP 2021) 199-204.

¹³ <https://www.dfat.gov.au/trade/agreements/negotiations/aeufta/australia-european-union-fta-fact-sheet>

the evidence relating to the various costs and benefits associated with BITs, and would help clarify the trade-offs involved in BIT design and negotiation.

Recommendation 4: Australia should develop and articulate a policy framework by which BITs can be assessed. In light of this framework, Australia should come to a decision about whether a BIT with any particular partner country is justified and, if so, what types of provisions it should contain.

In previous work commissioned by the UK government, my co-authors and I proposed a policy framework for assessing the costs and benefits of BITs.¹⁴ This document maps the political and economic costs and benefits of BITs, seeks to clarify the relationship between different categories of costs and benefits, and links the assessment of specific costs and benefits to the body of empirical evidence about investment treaties' effects and the legal content of the treaties. This document is by no means the only way of organising a policy assessment of investment treaties and there is now more evidence of investment treaties' effects than there was in 2013,¹⁵ however, it may provide a useful point of reference to Australia in developing its own policy framework.

Recent disputes under Australia's BITs draw attention to costs and benefits that were not adequately accounted for in the 2013 framework that we developed for use by the UK government. For example, in *Tethyan Copper v Pakistan*, the Australian subsidiary of a Canadian mining company used the Australia-Pakistan BIT to obtain an award of USD 5.7 billion (including interest) against Pakistan. From publicly available documents, it seems that the nominally Australian subsidiary has little connection to Australia's real economy and it is unclear that Pakistan's payment of this award would constitute a benefit to Australia in any meaningful sense. At the same time, Pakistan remains an important diplomatic and security partner for Australia and a beneficiary of Australian aid.¹⁶ It is not clear that it is in Australia's national interest for Pakistan to be bankrupted so that a Canadian investor can receive a USD 5.7 billion payout for interference with a proposed mine that was never actually built.¹⁷ (The claim ultimately settled.)¹⁸

Insofar as a decision is made to retain existing investment treaties, they should be renegotiated with a view to addressing clearly identified policy problems. This requires reconsideration of the core provisions of existing treaties, rather than tweaks to existing treaty language. Like most old-style BITs, the provisions of the treaties that are subject to renegotiation are drafted in vague

¹⁴ Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee, 'Analytical Framework for Assessing Costs and Benefits of Investment Protection Treaties' (2013) Report to the UK Department of Business Innovation and Skills <http://www.italaw.com/sites/default/files/archive/Analytical-framework-for-assessment-costs-and-benefits-of-investment-protection.pdf>.

¹⁵ For somewhat more recent reviews of the evidence, see Joachim Pohl, 'Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence' (OECD 2018) https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/01/societal-benefits-and-costs-of-international-investment-agreements_944ddf81/e5f85c3d-en.pdf and Jonathan Bonnitcha, *Assessing the Impacts of Investment Treaties: Overview of the evidence* (IISD 2017) <http://www.iisd.org/library/assessing-impacts-investment-treaties-overview-evidence>

¹⁶ <https://www.dfat.gov.au/geo/pakistan/development-assistance/Pages/development-assistance-in-pakistan>

¹⁷ The award in *Tethyan Copper v Pakistan* was roughly equivalent in scale to the IMF bailout package for Pakistan negotiated in 2019, see <https://www.nytimes.com/2019/05/12/world/asia/pakistan-imf-bailout.html>

¹⁸ Taylor St John et al, 'Bargaining in the Shadow of Awards' (2024) 35 *European Journal of International Law* 603, 606.

language that is not tethered to any internally consistent conception of the policy problem the treaties are intended to resolve.

Recommendation 5: Investment treaties are more likely to be justified on an overall cost/benefit assessment if the policy problem(s) they are intended to resolve is articulated clearly and if the provisions of the treaty are designed to target the specified problem(s).

My recent work with economist Emma Aisbett provides one example of how this approach might be operationalised. We argue that investment treaties should be designed to address opportunistic conduct by host states, but not to constrain states' ability to respond to new information or to change their policy priorities. With this policy problem in mind, we propose a new approach to compensation/damages under investment treaties that is calibrated to resolve the problem of host state opportunism. One implication of our proposal is that some types of government conduct for which compensation is currently required under Australia's existing BITs should not be compensable. Another implication is that, insofar as compensation is required, it should generally be less than is currently the case under existing BITs.¹⁹

B. General comments on innovation in Australia's recent BIT and FTA practice

In general, there is a very high level of technical knowledge of investment treaties within the relevant divisions of DFAT and the Commonwealth Attorney General's Department. This unusually high level of government capacity is reflected in the many clarifications and innovations contained in investment chapters of Australia's FTAs and recent BITs. Almost without exception, these innovations and clarifications are improvements on Australia's BITs. The tobacco carve-out in the CPTPP and language in Australia's FTAs requiring investors to have a substantial business interest in Australia are examples.

Nevertheless, these innovations tend to be too reactive, in the sense of responding to issues that have arisen in past ISDS cases rather than considering issues that might arise in the future. They are also too legalistic, in the sense that they prioritise clarification and qualification of existing treaty language over reflection of whether existing treaty provisions are justified in order to solve clearly defined policy problems. The approach outlined in the previous section calls for re-evaluation of the core provisions of Australia's BITs. This re-evaluation is especially important considering emerging evidence that the strategy of clarifying and qualifying existing treaty language has not been effective in discouraging problematic interpretation of treaties' provisions by ISDS tribunals.²⁰

¹⁹ Emma Aisbett and Jonathan Bonnitcha, 'A Pareto-Improving Compensation Rule for Investment Treaties' 24 (2021) *Journal of International Economic Law* 181; Jonathan Bonnitcha and Emma Aisbett 'Against Balancing: Revisiting the Use/Regulation Distinction To Reform Liability and Compensation Under Investment Treaties' 42 (2021) *Michigan Journal of International Law* 231.

²⁰ Perhaps the most startling example of this phenomenon is the *Eco Oro* tribunal's decision that the exception in the relevant investment treaty did not operate as an exception to the treaty's obligations *Eco Oro v Colombia* Decision on Jurisdiction, Liability and Directions on Quantum, ICSID Case No. ARB/16/41, 9 September 2021, paras 829-30. The problem, however, is a broader one, see generally Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (OUP 2022).

Recommendation 6: Technical improvements to treaty language are important. However, such tweaks should be supplementary to, rather than a substitute for, the reconsideration of core provisions of Australia’s BITs.

If, due to the practical challenges of renegotiation, Australia were faced with a choice between retaining its existing bilateral investment treaties in largely unmodified form and terminating those treaties, I would recommend termination.

C. Specific renegotiation priorities – jurisdictional and substantive provisions

Among the most urgent concerns with the BITs subject to renegotiation are:

- Provisions guaranteeing investment fair and equitable treatment. Given the ‘new treaties, old outcomes’ problem with redrafted FET provisions,²¹ FET provisions should be excluded from any new or renegotiated treaty;
- Provisions governing compensation and damages under investment treaties, including provisions relating to the amount of compensation due for expropriation and the treaties’ failure to address explicitly principles governing damages due for the breach of the treaties’ other provisions;²²
- Jurisdictional provisions that allow claims by shareholders and facilitate treaty shopping;²³
- Most Favoured Nation provisions. Even the most carefully drafted substantive provisions in BITs can be circumvented through an unqualified MFN provision. This is because arbitral tribunals have interpreted MFN provisions as allowing investors to benefit from most generous substantive provisions found in any of the host state’s other investment treaties.²⁴

Approaching the same question from a more positive perspective, provisions that might usefully be included in renegotiated BITs include:

- Provisions requiring compensation for direct expropriation and, in clearly defined circumstances, compensation for indirect expropriation;
- Redrafted provisions clarifying the amount of compensation due in the event of such expropriations;
- Provisions guaranteeing foreign investors the right of recourse to the domestic courts of the host state on a non-discriminatory basis;

²¹ See n 20.

²² See text to n 19. For further analysis, see Jonathan Bonnitcha et al, ‘[The Assessment and Calculation of Damages in Treaty-based ISDS](#)’, *Academic Forum on ISDS Concept Paper 2025/1*, 28 February 2025

²³ See n 7, including the reference to DP 18 in UNCTIRAL WG III WP 253.

²⁴ Note that Australia’s most recent BIT, the Australia-Uruguay BIT (2022), does not effectively prevent the importation of more generous substantive provisions found in Australia’s other investment treaties into that agreement. Article 8.7(4) of CETA provides a better model text in this regard.

- Provisions requiring states to publish laws and regulations that relate to foreign investment.²⁵

The call for submissions also raises the question of ‘safeguards that should be included to protect the Government’s right to regulate in the public interest’. The most effective way to safeguard states’ right to regulate in the public interest is to revisit the core provisions of investment treaties, so that investment treaties provide only the minimum protection needed to resolve clearly defined policy problems. If renegotiated on this basis, investment treaties would no longer provide general protection from regulatory changes that are unexpected or (perceived as) unfair to a foreign investment. This would exclude from the outset many of the complex disputes about the legitimacy of regulatory changes that give rise to justified concerns about states’ ability to regulate effectively in the public interest.

That said, one important area where safeguards may still be required is in relation to measures to mitigate climate change. Language that actively safeguards states’ ability to take measures to mitigate climate change is justified both because of the seriousness of climate change as global challenge that will require regulatory frameworks to evolve over the years and decades ahead, and because the experience of the past decade has clearly demonstrated the risks arising from the intersection of climate measures with investment treaties.²⁶ Paine and Sheargold provide a helpful model for how climate change measures could be carved out from the scope of investment treaties.²⁷ Another area where language safeguarding policy space is required is in relation to national security measures, including but not limited the operation of the Foreign Acquisitions and Takeovers Act (Cth) 1975 and the Foreign Investment Review Board.²⁸

Recommendation 7: The most effective way to safeguard Australia’s right to regulate in the public interest is to renegotiate core provisions of investment treaties, so that investment treaties provide only the minimum protection needed to resolve clearly defined policy problems. In addition, Australia should carve-out climate change measures from the scope of these BITs and include carve-outs and exceptions that protect the operation of the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* and other national security measures.

D. Specific renegotiation priorities – dispute settlement provisions

As previously noted, ISDS is unusual in international law. Because ISDS is an asymmetric system, foreign investors have incentives to bring long-shot claims and to advance expansive arguments

²⁵ See, eg Australia-Uruguay BIT (2022) art 6.

²⁶ I refer here to cases including: [Zeph v Australia II](#) (and the related cases *Zeph v Australia III* and *Zeph v Australia IV*); [Ruby River v Canada](#); [Westmoreland v Canada](#); [Rockhopper v Italy](#); [ExxonMobil v the Netherlands](#) (and the related case *Shell v the Netherlands*); [RWE v the Netherlands](#) (and the related case *Uniper v the Netherlands*); [Woodhouse Investment v UK](#); and [TC Energy v US](#). For more generally discussion, see Kyla Tienhaara, Rachel Thrasher, Alexander Simmons and Kevin Gallagher, ‘Investor-state dispute settlement: obstructing a just energy transition’ (2023) 23 *Climate Policy* 1197

²⁷ Joshua Paine and Elizabeth Sheargold, ‘A Climate Change Carve-Out for Investment Treaties’ (2023) 26 *Journal of International Economic Law* 285.

²⁸ For an illustration of the policy issues, see [Huawei v Sweden](#). For Australia’s current treaty practice, see Annex 9-H(1) and art 29.2 of the Trans-Pacific Partnership Agreement (2015), which has entered into force as the CPTPP.

that would not be advanced by investors' home states in a state-state context. These dynamics are one driver of expansive and problematic interpretation of investment treaties by ISDS tribunals. Moreover, even if unsuccessful, such claims generate legal and bureaucratic costs and, in some circumstances, can lead to regulatory chill. Australia has direct experience of these dynamics in *Philip Morris Asia v Australia* and the various *Zeph* cases, but the phenomenon is a more general one. For example, it is hard to imagine that the UK Government would pursue a state-state claim against the Netherlands in relation to expected future revenue allegedly lost due to the Netherlands' accelerated closure timetable of the Groningen gas field.²⁹ For these and other reasons, the Australian government should seek to remove ISDS from its renegotiated BITs, in line with current government policy.

Recommendation 8: Australia should seek to remove the ISDS mechanism from the BITs under renegotiation, in line with current government policy.

This leaves open the question of whether to include some other form of dispute settlement mechanism in the renegotiated BITs and, if so, what form that mechanism should take. Puig and Shaffer have usefully framed this as a question of comparative institutional choice between 'imperfect alternatives', each of which comes with its own set of trade-offs.³⁰ In existing investment treaties, the most common alternative to ISDS is state-to-state dispute settlement (SSDS) through ad hoc international arbitration – that is, the possibility of an investor's home state bringing claims to arbitration that the host state has breached the obligations under the treaty through its conduct in relation to an investment owned by an investor from the home state.³¹ However, the new permanent tribunal for international investment disputes that is likely to emerge from UNCITRAL Working Group III will likely provide a more specialised mechanism³² that resolves some of the problems ad hoc arbitration.³³

Australia should consider combining SSDS under the new permanent tribunal with other institutional arrangements in ways that seek to address some of the trade-offs that Puig and Shaffer identify with SSDS. For example, one concern sometimes expressed with freestanding SSDS is that 'the bringing of claims by one state against another could be viewed as an unfriendly, political act'.³⁴ There are ways to mitigate this concern to at least some extent through institutional design. For example, a renegotiated BIT could establish an oversight committee constituted of

²⁹ For a more detailed account of the underlying facts of this case, see Bart-Jaap Verbeek, '[Aftershock in Groningen: Shell and ExxonMobil's arbitration cases against the Netherlands](#)' (2026) Investment Treaty News.

³⁰ Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112 American Journal of International Law 361.

³¹ For discussion, Nathalie Bernasconi-Osterwalder, *State-State Dispute Settlement in Investment Treaties* (IISD 2014). There is a wider body of scholarship on SSDS, but much of it is focused on the relationship between SSDS and ISDS under treaties that provide for both dispute settlement options, see, eg, Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2018) 55 Harvard Journal of International Law 1. Many of the perceived complications with SSDS discussed in this literature fall away if treaties provide for SSDS but not ISDS.

³² Although the text of the current draft of the Statute of the Permanent Tribunal is not entirely clear (see UNCITRAL Working Group III, [Working Paper 259](#), art 14) the Submission of the European Union makes clear that this tribunal is intended to have the jurisdiction to hear state-state investment disputes that are referred to it, see UNCITRAL Working Group III, [Working Paper 257](#) para 7.

³³ Puig and Shaffer (n 30) 393.

³⁴ *ibid* 394.

representatives from both state parties. *Investors* could be empowered to bring complaints that they have not been treated in conformity with the BIT to this committee.³⁵ A sequential design leaves the power to initiate complaints in the hands of investors, while allowing home states to retain full discretion as to whether to escalate these complaints to formal SSSDS proceedings if they are not resolved by the committee to the satisfaction of the investor.

Another concern that has been raised with SSSDS is that ‘remedies issued by interstate bodies may not benefit the harmed investor’. This concern can be addressed simply by allowing (or even requiring) that any compensation ordered by a tribunal in subsequent SSSDS proceedings be awarded in favour of the aggrieved investor.

A final, and more general, concern is the relationship between SSSDS and domestic court processes. Puig and Shaffer argue that international disputes settlement mechanisms, whether ISDS or SSSDS, should be consciously designed in ways that *complement* domestic and administrative and judicial institutions, rather than to act as substitutes for them.³⁶ This is consistent with one of the core rationales for investment treaties, which is to improve domestic governance in the states that are bound by them.³⁷ There are a range of options for reflecting the principle of complementarity in the design of dispute settlement architecture.³⁸ One option worth considering would be requiring an investor to explain how it has sought to remedy the conduct of which it complains within the host state’s domestic administrative and judicial system when bringing a complaint to the oversight committee constituted of representatives of the treaty parties. Another more demanding option would be to make the investor’s exhaustion of local remedies a condition of the home state’s ability to escalate the dispute to SSSDS.

Recommendation 9: Australia should include a state-state dispute settlement (SSDS) mechanism in its renegotiated investment treaties. Australia should consider combining SSSDS with other institutional arrangements, such as an oversight committee composed of representatives of the treaty parties, in a way that responds to some of the concerns with SSSDS.

Australia’s engagement with the design of SSSDS mechanisms is timely in light of international moves away from ISDS and related international interest in developing SSSDS mechanisms as an

³⁵ This is a slightly different model to that adopted under Brazilian investment treaties, which establish a multilayered structure where an investment disputes must first be brought to a national investment ombudsperson, before being escalated to a joint committee of the state parties to the treaty and then, potentially, escalated to SSSDS. For discussion of the dispute settlement architecture under the Brazilian model, see Michelle Ratton Sanchez Badin and Fabio Morosini, ‘Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)’ in Michelle Ratton Sanchez Badin and Fabio Morosini (eds) *Reconceptualizing International Investment Law from the Global South* (CUP 2017) 232-6. For further discussion of some of the issues with establishing national investment ombuds offices, see Arato, Bonnitcho, Sattorova and Liss, ‘[Symposium on Institutionalizing Investment Dispute Prevention](#)’ (2024) 118 AJIL Unbound 224.

³⁶ ‘[W]e highlight the importance of complementarity as an institutional option’ Puig and Shaffer (n 30) 408.

³⁷ Evidence to date is that investment treaties have not supported improvements in domestic governance, partly because ISDS, as currently designed, acts as substitute for, not a complement to, domestic administrative and judicial processes. For evidence, see N Jansen Calamita and Ayelet Berman (eds) *Investment Treaties and the Rule of Law Promise: An Examination of the Internalisation of International Commitments in Asia* (CUP 2022); Jonathan Bonnitcho and Zoe Williams, ‘The Impact of Investment Treaties on Domestic Governance in Developing Countries’ 46 (2024) *Law & Policy* 140.

³⁸ Puig and Shaffer (n 30) 401-8.

alternative. In relation to the former, the EU and many of its Member States have withdrawn from the Energy Charter Treaty; in relation to the latter, state-state dispute settlement will be a central focus of OECD's Track 1 work on the future of investment treaties in 2026.³⁹ These multilateral discussions provide an opportunity for Australia to develop new ideas with like-minded states on how SSDS can be combined with other institutional arrangements to provide a coherent and effective dispute settlement architecture.

³⁹ See, eg, the OECD's forthcoming [11th Annual Conference on Investment Treaties](#), where SSDS is high on the agenda.