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ANU Zero-Carbon Energy for the Asia-Pacific Submission
Review of Australia's Bilateral Investment Treaties

Please find below the ANU Grand Challenge *Zero-Carbon Energy for the Asia-Pacific's* submission to the Review of Australia's Bilateral Investment Treaties. As well as providing this submission, we would like to offer my expertise to discuss these issues further as appropriate.

Thank you for the opportunity to provide this submission.

Yours sincerely,

A handwritten signature in blue ink that reads "Emma Aisbett".

Emma Aisbett

On behalf of: Emma Aisbett, Esme Shirlow, Christian Downie and Lily O'Neill

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

It is widely agreed, on both sides of politics, that Australia has the potential to be a renewable energy superpower. Realising this potential, however, will require proactive policy, including green industrial policies like the Australian National Hydrogen Strategy (Nov, 2019) and the low emissions Technology Investment Roadmap (Sept, 2020). Experience has shown that these sorts of energy transition policies can expose governments to the risk of investor-state disputes under current generation investment treaties. The cost of these disputes can run into multiple tens of millions of dollars. Given the history of shifting climate and energy policies in Australia, these sort of claims are a genuine risk under Australia's current BITs. There is urgent need for meaningful reform.

Australia's approach to investment treaty reform until now has been largely ad hoc and reactive. A case in point is the addition of a carve-out for tobacco related policies from ISDS protections in response to the Phillip Morris plain packaging case. The combination of COVID-19 and climate crises means that government involvement in the economy is becoming deeper and more structural than it has been for many decades. Specific carve-outs will not be sufficient to protect legitimate public policy actions from potentially damaging investment disputes.

A case in point is the incentives and subsidies for gas which are being proposed by the current government. Were a future government to align their green industrial policy better with the Paris Agreement and change or remove these favourable conditions for gas producers and downstream users, they would very likely be exposed to substantial ISDS claims by foreign investors. Indeed, government energy transition policies have proved fertile ground for ISDS cases under IIAs (Tienhaara & Downie, 2018). A recent paper by Bonnitcha and Aisbett (2020) discusses the Spanish Solar cases which could cost the state around €30mill, and how their proposal for reform of compensation rules under IIAs would avoid governments being exposed in this way while still protecting energy investments from being captured through opportunistic behaviour by host governments.

Also notably missing from current investment treaty carve-outs are actions to protect the rights of First Nations peoples. This is a substantial omission given the amount of foreign investment in the mining industry in Australia. Similarly, the best renewable energy resources in the country are concentrated on traditionally owned lands. Australia's rise as renewable energy superpower cannot happen without investments worth over \$AU100 billion on Aboriginal land. The Western Australian Government's policy change in response to the Juukan Gorge destruction is an example of policy changes in response to new information that could lead to a dispute under Australia's current BITs.

- **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.**

Unreformed existing BITs with ISDS are likely to be of net cost to Australia – and will constrain the ability of governments to respond dynamically to new or changed public policy imperatives. Termination should be considered.

- **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?**

As Shirlow explains in a forthcoming paper, non-arbitral forms of dispute settlement might also be worth exploring instead of – or in addition to – investor-State arbitration. Mediation is particularly likely to be beneficial for renewable energy investments because it is less destructive of relationships than arbitration typically is. Renewable energy investments have many of the features of disputes that are particularly well-suited to resolution through facilitative mediation, including because they often depend upon community buy-in, are made by investors who may wish to make further investments, or involve parties engaged in a long-term project.

- **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.**

One way to reduce the threat of disputes against legitimate public policy actions is to remove ISDS provisions from Australia's investment treaties. This approach, however, may have negative effects for Australia's ability to become a renewable energy powerhouse. Foreign investment into Australia will be crucial to bring frontier technology and speed of expansion of renewable energy production and related industries such as hydrogen and steel. Similarly, Australian exporters of renewable energy and embedded products will need to make complementary investments overseas. Suncable's proposed export of renewable energy to Singapore via Indonesia is a good example of a major investment with large hold-up risk.

Aisbett and Bonnitcha have a proposal for the reform of damages calculations which could address many of the wide-spread concerns about BITs/ISDS while preserving their ability to deter and/or compensate predatory or opportunistic behaviour by hosts. Aisbett and

Bonnitcha (2020, see also Bonnitcha and Aisbett, 2020) make a reform proposal that would prevent governments from being exposed to compensation claims for actions taken in response to new information, while still protecting investors from hold-up and opportunistic host behaviour. Their proposal is comprehensive, giving it the added benefit of avoiding the need for ad hoc carve-outs. Their proposal is discussed in the separate submissions to this review by Emma Aisbett and Jonathan Bonnitcha. Worthy of note here, their proposal could plausibly be implemented as an addition or clarification in existing treaties. This would allow substantive improvement to the existing BIT stock with relatively low renegotiation or uncertainty costs.

There are several more specific procedural and substantive options available to better safeguard public and community interests and rights. For the case of Indigenous Australians this could include better integrating Australia's foreign investment admission procedures and/or investor obligation clauses with specific undertakings relevant to protecting Aboriginal and Torres Strait Islander rights. It could otherwise include the creation of general public purposes or specific carve-out clauses in Australia's investment treaties. Canada, for example, includes provisions in its treaties that provide any non-discrimination obligations will not capture 'rights or preferences provided to aboriginal peoples'. Where such exceptions or carve-outs are adopted, a further option for States is to develop specific procedural protocols to apply in the event of an investor-State dispute implicating such clauses. New Zealand, for example, has developed a draft 'ISDS Protocol' which provides a mechanism for the appointment of a legal expert wherever New Zealand is confronted with 'an ISDS case in which the Treaty of Waitangi exception is likely to be relied on'.¹ The Protocol provides that the role of the expert is 'to bring an expert and independent perspective to the Government's legal team in its defence of the case'.

Many investment treaties contain provisions that give some legal relevance to domestic investment laws and policies. Several authors of this submission are currently investigating whether investment treaties could link in to domestic investment admission procedures. Many investment treaties, for example, expressly predicate investment protection on compliance by the investor with any applicable admission requirements and – in some cases – with domestic law during the life of the investment. This might enable Australia to leverage changes to its domestic law without treaty reform, in order to impose obligations upon investors in particular sectors (including to secure better protections for indigenous peoples with interests in the lands or resources likely to be impacted by proposed inbound energy investments).

¹ New Zealand Foreign Affairs & Trade, 'New Zealand Defence of an Investor-State Dispute Settlement (ISDS) Case' (<https://www.mfat.govt.nz/assets/Trade-General/Investor-State-Dispute-Settlement-ISDS/Draft-ISDS-Protocol-for-consultation.pdf>).

References:

Aisbett, Emma and Bonnitcha, Jonathan, **A Pareto-Improving Compensation Rule for Investment Treaties** (May 8, 2020). UNSW Law Research Paper No. 18-80. Available at SSRN: <https://ssrn.com/abstract=3281334> or <http://dx.doi.org/10.2139/ssrn.3281334>.

Bonnitcha, Jonathan and Aisbett, Emma, **Against Balancing: Revisiting the use/regulation distinction to reform liability and compensation under investment treaties** (July 2020). Forthcoming in the Michigan Journal of International Law. Available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637634.

Shirlow, Esmé, **'The Promises and Pitfalls of Investor-State Mediation'** (2020, forthcoming Yearbook on International Investment Law and Policy)

Tienhaara, Kyla & Downie, Christian. (2018). **Risky business? The energy charter treaty, renewable energy, and investor-state disputes**. Global Governance. 24. 451-471. 10.1163/19426720-02403009.