Submission on Review of Australia's Bilateral Investment Treaties

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1. Introduction

The Department of Foreign Affairs and Trade (**DFAT**) has sought submissions from interested parties to inform the Commonwealth's review of Australia's Bilateral Investment Treaties (**BITs**) with Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay (collectively, the **existing BITs**).

We are full-time Australian investor-State dispute settlement (**ISDS**) practitioners at Clifford Chance based in Perth, Sydney and Singapore.[1] In addition to our work in previous ISDS cases (including *Planet Mining v Indonesia*),[2] we are currently acting for three Australian companies in ISDS cases against foreign States under Australian BITs and Free Trade Agreements (**FTAs**), plus claimant investors and respondent States in ISDS proceedings under the treaty programs of other countries. We also teach ISDS and international arbitration at various universities in Australia and the wider Asia-Pacific region and regularly publish in these fields.

2. Responses to DFAT questions

Question 1: In your view, are the existing BITs of benefit to Australian investors operating in these overseas markets? Please comment on their utility.

Response:

Based on our experience advising Australian investors making investments into overseas markets covered by the existing BITs and representing Australian investors in claims under the existing BITs (and other treaties), we can say that the existing BITs certainly do provide meaningful benefits to Australian investors. Fundamentally, this is because the existing BITs all contain ISDS mechanisms which give Australian investors the right to refer investment disputes with their host government to international arbitration.

If the existing BITs did *not* contain ISDS mechanisms, they would not provide any meaningful benefits to Australian investors, as the investment protections contained within the existing BITs would be unenforceable against the host State without the assistance and intervention of the Commonwealth (in the form of diplomatic protection

[1] We make this submission in our personal capacities. The views expressed in this submission do not necessarily reflect the views of Clifford Chance.

[2] ICSID Case No. 12/40 (consolidated with ICSID Case No. ARB/12/14).

and/or espousal of the investor's claim against the host State). Thus, in assessing the benefit to Australian investors, there is good reason to focus on the ISDS clauses of the existing BITs. That is not to say the substantive protections of each BIT are not important – they are, but it is the ISDS clause that is the *sine qua non* of an effective BIT and it is the ISDS clause that matters most in practice for Australian investors.

ISDS-backed BITs are useful to investors in two situations: when the investor makes (or expands) its investment and when a dispute arises between the investor and the host government.

The utility of an ISDS-backed BIT in the latter situation is obvious and relatively well understood. If an Australian investor has its investments unlawfully expropriated or subjected to unfair treatment by its host government, an ISDS-backed BIT gives the aggrieved investor direct access to an international forum that is outside the control of the host government and which has the power to make an award for the payment of monetary compensation that is enforceable against the non-immune property of the host government in over 160 countries. This means that in the enforcement of its treaty rights the Australian investor is not dependent on the courts of the host State, which may be subject to (actual or perceived) government influence or, due to weakness in the wider rule of law, unable to effectively control the executive branch of the host government.[3]

It must be recognised here that few situations test the rule of law like a claim by a foreigner against a host government. The unfortunate reality is that few countries have a strong enough rule of law to assure foreign investors that, in this situation, their courts will impartially and independently dispense justice and, if the investor prevails, the host government will fully and promptly comply with the court's decision. We note that several of the countries covered by the existing BITs have a fragile rule of law,[4] which strengthens the case for maintaining the existing BITs with those States.

The utility of ISDS-backed BITs at the investment-making (or expansion) stage is less obvious, but equally real. In contrast to the dispute context, where the benefits the investor enjoys are principally legal in nature, the benefits of being covered by an ISDS-backed BIT at the investment-making (or investment expansion) stage are largely commercial in nature.

The principal commercial benefit that a foreign investor gains from being covered by an ISDS-backed BIT is that it will (or should be) less expensive for the investor to finance its investment in the host State. This is because an investment made under an ISDS-backed BIT will (or should) attract a lower country risk premium (**CRP**) than it would if it was not covered by an ISDS-backed BIT. Financiers use CRP as a tool to calculate the necessary rate of interest on a loan or the return on an equity investment made in the host State: a high CRP increases the cost of capital – meaning financiers

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3 For more detail on the benefits of ISDS to Australia and Australian investors, see S. Luttrell, 'Why ISDS is Good for Australia,' Law Society of Western Australia, Brief, Vol. 42, No. 11, December 2015, p. 11.

4 For example, the World Justice Project Rule of Law Index 2020 ranks Egypt in 125th place, China in 88th place, Pakistan in 120th place, the Philippines in 91st place and Turkey in 107th place. In contrast, Australia is ranked 11th.

will require a higher interest rate for loans to the investor and equity investors will require higher rates of return on their investment; conversely, a lower CRP reduces the cost of capital, meaning the investor can borrow money at a lower rate or attract equity investors for lower returns.

Empirical research has now confirmed that by causing incremental CRP reduction, ISDS-backed BITs reduce the financing costs for foreign investors. In a 2019 study, a group of finance academics examined 45,255 syndicated cross-border loans initiated in the period 1980-2012 to determine the impact of investment treaties. The researchers found that syndicated loans covered by ISDS-backed investment treaties have an average loan spread of 159 basis points, whereas loans not covered by investment treaties have an average loan spread of 180 basis points. The researchers found that the discount was even greater (an average loan spread of 140 basis points) where the investment treaty-backed loan was for an investment in a country with a record of expropriating foreign property in the past. Overall, what this research shows is that, under syndicated loans covered by ISDS-backed investment treaties, the foreign investor/borrower has enjoyed an average discount of between 21 and 40 basis points, depending on the host State.[5] This is a significant financial commercial benefit for Australian foreign investors, especially small and medium sized enterprises (**SMEs**) who are typically dependent upon external sources of finance (including project finance) when they make foreign investments.[6] This class of SMEs includes many Australian companies engaged in natural resources exploration and development projects around the world, often in developing countries that have a pressing need for foreign investment (but a relatively weak rule of law). In addition to being finance dependent, these SMEs often do not have the clout to negotiate a contract directly with the host government that gives them protections equivalent to an ISDS-backed BIT and they generally cannot afford political risk insurance (**PRI**) – at least not until they are able to convert their discovery into a productive asset and have the cash flow needed to pay recurring PRI premiums.

Question 2: 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.

Response:

We are aware of various econometric studies that have sought to prove or disprove positive correlation between BITs and FDI flows. While we acknowledge that the results of these studies have been mixed, it appears to us (as lawyers, not economists) that there is now a reasonable body of empirical evidence to support the policy conclusion that BITs do have a positive impact on FDI flows between States. We have read the submission of Professor Nottage of the University of Sydney and endorse his

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5 V. Fotak, H. Lee, W. Megginson, "A BIT of investor protection: How Bilateral Investment Treaties impact the terms of syndicated loans", *Journal of Banking & Finance* (2019), Vol. 102, pp. 138-155.

6 This study also demonstrated that stronger investor property rights associated with ISDS-backed BITs delivered other benefits to investors, including larger loans and fewer covenants.

survey of these studies (which include the 2016 study he conducted with Dr Armstrong of Australian National University).

From a legal perspective, one of the salient features of these studies is that several of them have concluded that, of all the provisions of a BIT, it is the ISDS clause that has the greatest positive impact on FDI flows. An example of this is the Asian Economic Integration Report of 2016, published by the Asian Development Bank (referred to in Professor Nottage's submission), which found that:

> "[the results of the study] *indicate the BITs specifically granting access to an* [investor-State disputes mechanism] *have large, positive, and statistically significant effects on FDI. Hence, the most important provision in BITs is access to international arbitration—a finding in line with the sentiment of many legal scholars, suggesting that access to* [investor-State disputes mechanisms] *is the principal advantage of a BIT*".[7]

This is powerful evidence, from our region, of the positive macro-economic impact of ISDS-backed BITs. It also confirms that in assessing the utility of BITs for Australian investors, there is good reason to focus on the ISDS clauses of the existing BITs.

Outside of the realm of these empirical studies, we know from our professional experience as practitioners of international investment law that BIT coverage is now an established feature of investment decision making and due diligence practice in many industries – including the natural resources sector, where a large and diverse group of Australian companies (including many SMEs) are constantly engaged in foreign investment, often in countries with relatively high levels of political risk. These Australian businesses understand – at least in general terms – that BITs give them protection against unlawful expropriation and other adverse measures and usually entitle them to refer disputes with their host government to international arbitration. These businesses are also familiar with the investment planning and structuring techniques that may be used if Australia does not have a BIT with the country where they are proposing to invest (as is true of almost all African nations, for example).

The availability of BIT coverage is especially important to exploration-stage natural resources companies, whose greatest fear is that they will make a valuable discovery in the host State but, after reporting it to the host government (as required under their exploration licence), they will be unfairly deprived of their right to extract the resource they have discovered and disclosed. BITs disincentivise the host government from taking such action and give the exploration company an enforceable right to compensation if such action is taken. As explained above, this reduces country risk which in turn lowers the investor's cost of capital (with the net positive result that it is cheaper to invest in the country concerned). As exploration-stage mining companies are the dominant actors amongst the group of Australian foreign investors that have brought ISDS claims under Australia's BITs and FTAs in the past, their needs and the benefits they gain from BIT protection are relevant considerations for the Commonwealth.

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[7] Asian Development Bank, *Asian Economic Integration Report 2016*, p. 163.

We are also witnessing significant growth in the use of BITs as a risk mitigation tool in large-scale green or sustainable investment projects, such as wind farms, the success of which relies heavily on the host State guaranteeing stable electricity tariffs for 20 years or more. As part of this trend, we are also seeing an increase in BIT reliance in green or sustainable projects backed by pension or development funds. So, although natural resources companies have been the dominant ISDS user group to date, it is likely the user group will broaden to include renewable energy businesses in future.

Question 3: Do you have concerns about Australia's existing BITs? If so, please comment on any specific provisions of concern.

Response:

Most of the existing BITs are short and simple, as was the norm until around the year 2000. In contrast to the more recent generation of treaties, particularly FTAs with investment chapters, the existing BITs generally do not contain express reservations of the host State's right to adopt regulatory measures in areas such as public health and the environment. While we recognise that express reservations in these areas are desirable and comforting to government (and the public), it is important to understand that even without such language, a BIT will usually be interpreted in a manner that respects the host State's right to regulate (in good faith and within reasonable limits) and allows the host State to resort to customary international law and, by doing so, raise defences based on the doctrine of police powers (much like Uruguay did in opposing the BIT claim by subsidiaries of Philip Morris)[8] or the doctrine of necessity. Similarly, other general principles, such as the prohibition against abuse of rights, may also be raised by the respondent State even where the text of the treaty is silent.

Thus, in assessing whether the existing BITs meet contemporary expectations in terms of the way their substantive protections and standards are expressed, it is critical to take full account of the reality of treaty interpretation and how it operates to make certain defences available to a State under customary international law. As part of this, it should also be understood that, where specific exceptions for State powers are explicitly coded into a treaty, those specific exceptions may be taken as *lex specialis* and interpreted to preclude the State from raising defences under general customary international law (such as defences based on the police powers doctrine). The award in *Bear Creek v Peru* (issued by three eminent arbitrators) is an example of this interpretive outcome.[9]

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[8] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award, 8 July 2016.

[9] *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21), Award, 30 November 2017. In the *Bear Creek* case, the applicable treaty (the Canada-Peru FTA) contained a "*General Exceptions*" provision, similar to the general exceptions provisions of several Australian FTAs. Peru argued that the disputed measures were excluded from characterisation as an expropriation because they were taken to prevent social unrest around the claimant's mine and were therefore a legitimate exercise of police powers under international law. The tribunal found against Peru, holding (at paragraphs 473–474 of the Award): "*the title of Article 2201 'General Exceptions' shows that otherwise Chapter Eight (investment) remains applicable including its* [expropriation] *Articles* […] *Further, the list is not introduced by any wording (e.g. 'such as') which could be understood that it is only exemplary. It must therefore be understood to be an exclusive list. Also in substance, in view of the very detailed provisions of the* [Canada-Peru] *FTA regarding expropriation*

Our principal concern with the existing BITs is that several of them contain ISDS clauses that provide each State "*shall consent*" or "*shall consent in writing*" to arbitration at the International Centre for Settlement of Investment Disputes (**ICSID**), rather than each State "*hereby consents*" (the form of wording recommended by ICSID). The "*shall consent*" wording makes it possible for the respondent State, in an ICSID arbitration commenced by an Australian investor under one of these BITs, to argue that through the BIT it has not consented in advance to ICSID arbitration with the investor, as Indonesia did in the *Planet Mining* case.[10] We are currently acting for two Australian investors in a mining-related arbitration (ICSID Case No. ARB/18/22) under one of the existing BITs where the respondent State is objecting to the jurisdiction of the ICSID tribunal on this basis (the jurisdictional ruling in this case is due imminently – we will update DFAT once we know the result). As explained further below, we believe that the adoption of an Interpretive Note by the Commonwealth would be the best way to address this issue.

Question 4: 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?

Response:

If the Commonwealth is inclined to seek re-negotiation of some of the existing BITs, we would recommend that the re-negotiations focus on those of the existing BITs that contain "*shall consent*" or "*shall consent in writing*" ISDS clauses, with the objective of the Commonwealth being to secure updated ISDS clauses that contain the "*hereby consents*" wording found in Australia's more recent investment treaties (and the ICSID Model Arbitration Clauses).

Question 5: 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.

Response:

No. Australian investors may be adversely affected in the future if any of the existing BITs are terminated: although investments made before termination would still be protected under the "*sunset*" provisions of the existing BITs, investments expanded after termination might not be protected, and future investments by Australian investors would certainty not be protected (unless another treaty applies, such as a multilateral FTA, or a new treaty is concluded).

[…] *and regarding exceptions in Article 2201 expressly designated to 'Chapter Eight (Investment)', the interpretation of the FTA must lead to the conclusion that no other exceptions from general international law or otherwise can be considered applicable in this case* […] *There is, thus, no need to enter into the discussion between the Parties regarding the jurisprudence concerning any police power exception for measures addressed to investments*."

[10] *Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Decision on Jurisdiction, 24 February 2014.

For some of these countries, there is a very strong need for BIT protection. Taking the example of Papua New Guinea, this is a nation with strong political and economic links to Australia, that is host to many Australian investors (particularly in the energy and resources sector), but which is prone to political unrest and institutional frailty. Indeed, there have been recent changes to the oil and gas and mining laws in Papua New Guinea[11] which indicate that the Government of Papua New Guinea is seeking to re-calibrate its relationship with foreign investors in its resources sector.[12] In the parliamentary discussion on the amending acts, Prime Minister James Marape stated "*taking back our country is not just a slogan*". These developments have caused a degree of alarm amongst foreign investors with interests in Papua New Guinea, as they foreshadow a shift to resource nationalism. It is possible, even probable, that in the near future, Australian investors in the Papua New Guinea resources sector may need to rely on the protections afforded to them by the Australia-Papua New Guinea BIT (in circumstances where there is no alternative treaty between Australia and Papua New Guinea).

There is also a significant level of Australia foreign direct investment (**FDI**) in the natural resources sector in the Philippines and Laos. Although Australian investments in these States may be covered by the ASEAN-Australia-New Zealand FTA (**AANZFTA**), the substantive standards of protection offered by AANZFTA are lower in some areas than the existing BITs.

More broadly, consideration should also be given to the need to ensure continued protection for the investments that many Australian citizens have chosen to make (and will continue to make in the future) in some of the States covered by the existing BITs, for reasons of family, ethnic connections and historical ties. This category of "*diaspora*" FDI is harder to measure but must be regarded as significant for States such as Turkey, Poland, China and the Philippines (from which Australia has enjoyed significant levels of immigration). The economic benefits of diaspora trade and investment are well documented in other countries.

For greater context, the table below shows the number of cases brought by investors (of all nationalities, not just Australian) from and against the States covered by the existing BITs, with the value of Australian investment in each State (in billions of dollars) as at 2019.

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[11] On 10 June 2020, the Parliament of the Independent State of Papua New Guinea passed the *Oil and Gas (Amendment) Bill 2020*, amending certain provisions of the *Oil and Gas Act 1998*.

[12] S. Luttrell & A. Murphy, "*An international perspective on the Papua New Guinea Oil and Gas (Amendment) Bill 2020*" (forthcoming December 2020). Copy available on request.

Existing BIT counterparty	Cases as Respondent State	Cases as home State of Claimant investor	Value of Australian investment ($bn)[13]
Argentina	62	5	0.964
China	3	6	85.268
Czech Republic	40	5	0.290
Egypt	37	5	0.249
Hungary	16	2	0.599
Laos	4	0	No data
Lithuania	7	3	No data
Pakistan	10	0	0.269
Papua New Guinea	1	0	15.975
Philippines	6	0	10.211
Poland	30	7	1.240
Romania	17	1	0.089
Sri Lanka	5	0	0.105
Turkey	14	35	1.843
Uruguay	5	1	0.049

Question 6: 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?

Response:

We note that this question refers specifically to "*investment facilitation*" instruments. We take this to mean agreements that are intended to lower or eliminate barriers to FDI

[13] Australian Bureau of Statistics, 7 May 2020, Table 5. Australian investment abroad: level of investment by country and country groups by type of investment and year, Catalogue 5352.0.

between States by streamlining and improving the administrative procedures that a foreign investor must go through to make or expand an investment in the country concerned. We acknowledge that these instruments may be useful from a government-to-government perspective, including as a framework for coordinating investment promotion and approval activities. They can also assist Australian investors when they make investments abroad. However, an investment facilitation agreement normally has a different scope to a BIT and serves a different purpose: where an investment facilitation agreement will normally be concerned with the point in time at which an investor enters a country and makes an investment (or expands it), a BIT will ordinarily cover the entire lifecycle of an investment (from country entry to country exit). Although investment facilitation agreements often contain useful rules such as transparency, they generally do not contain the substantive protections typically found in BITs, such as protections against unlawful expropriation and commitments to fair and equitable treatment. Finally, investment facilitation agreements ordinarily do not contain ISDS provisions (or at least not investor-State arbitration clauses). Thus, although there is some overlap between the investment promotion purpose of an investment facilitation agreement and a BIT, the two types of instrument are otherwise generally quite different. In our view, investment facilitation agreements are therefore not comparable to BITs in terms of their ability to meet the interests of Australian industry and business.

Today, the main models for investment protection are:

- *Bilateral, investment specific* (such as the existing BITs);
- *Bilateral, investment plus trade* (such as Australia's bilateral FTAs with Thailand and Singapore);
- *Multilateral, investment specific* (such as the ASEAN Comprehensive Investment Agreement); and
- *Multilateral, investment plus trade* (such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership).

Fundamentally, what all four models have in common is that their objective is to establish binding substantive rules for the protection of foreign investments, usually enforceable directly by investors against the host State through ISDS. For this reason, all four models meet the interests of Australian industry and business. While each model has its pros and cons, so long as the treaty secures for investors binding substantive protections backed by unqualified ISDS rights, it will achieve its objectives of stimulating FDI flows, making it cheaper for businesses to finance foreign investments in the States concerned, and ensuring that investors can resolve disputes with their host State directly and without the need for the intervention of their home State government.

Question 7: 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.

Response:

As a prefacing remark, whatever policy option (or options) the Commonwealth decides to take in relation to the existing BITs, we respectfully encourage the Commonwealth to consciously avoid proceeding with the mindset of a potential defendant to ISDS claims under the existing BITs. There has only ever been one BIT-based arbitration against the Commonwealth, and the Commonwealth prevailed in that case (the BIT under which that claim was brought has since been terminated); in contrast, there have to our knowledge been over 15 ISDS claims by Australian companies (including arbitrations under BITs, FTAs and investment contracts with ICSID clauses). It is likely that Australia will face ISDS cases in the future, as will all major trading nations. But as a country where the rule of law prevails and there is a strong tradition of government accountability, Australia should be confident as to its ability to defend itself in future ISDS proceedings. The prospect of facing future ISDS claims should not constrain Australia, as a capital-exporting country, from seeking to secure the highest standards of protection (including ISDS rights) for Australian businesses investing overseas.

Regarding the specific policy options outlined by DFAT:

- **Full renegotiation of a BIT**: we do not recommend full renegotiation for any of the existing BITs because of the risk that, in the current conditions, the Commonwealth may be unable to secure substantive protections for Australian investors that are as favourable as those provided under the existing BITs. In considering the full renegotiation option, it should be assumed that, given modern treaty practice, the renegotiated BIT would (at best) be more like a "*NAFTA plus*" instrument and would therefore offer Australian investors lower standards of protection in certain areas (such as fair and equitable treatment). It is also possible that some of the counter-party States will not agree to ISDS in a renegotiated instrument, due to their experiences as respondents to BIT claims.

- **Amendment of a BIT**: as an alternative to the issuance of an Interpretive Note, we think this policy option is suitable as a means of addressing the issues that have arisen since the *Planet Mining* decision in relation to the "*shall consent*" wording of the ISDS clauses of certain existing BITs. However, as a precursor to the pursuit of this option, we recommend the Commonwealth first develop a model ISDS clause, containing modern features such as transparency and the incorporation of a code of conduct for arbitrators (features we support). The Commonwealth may also wish to include in the model a provision that binds the States to consult regarding further amendments of the ISDS clause if an Appellate Body or other international ISDS review mechanism is established in future.

- **Negotiation and adoption of a Joint Interpretative Note**: we think this is the best way of addressing the "*shall consent*" issue that affects several of the existing BITs. Ideally, the Joint Interpretive Note would simply confirm that it

was the intention of both the Commonwealth and the relevant counter-party State that the ISDS clause of the BIT contain and express the advance consent of both States to the referral of investment disputes with investors from the other State to ICSID arbitration. Such a joint statement would carry significant weight with ISDS tribunals and would therefore help Australian investors enforce their rights under the relevant BITs.

- **Adoption of a Unilateral Interpretive Note**: if it is not possible to secure each counter-party State's agreement to a Joint Interpretive Note confirming the intent of the "*shall consent*" ISDS clauses in certain of the existing BITs, a Unilateral Interpretive Note issued by the Commonwealth would be a suitable alternative. Although unilateral interpretations are normally not given much weight by ISDS tribunals, this situation is different because the "*shall consent*" wording in each of the relevant BITs came from Australia. The Unilateral Interpretive Note could simply confirm that it was Australia's intention that the ISDS clause of the BIT contain and express the advance consent of both States to the referral of investment disputes with investors from the other State to ICSID arbitration.

- **Termination of a BIT**: for reasons explained above, we do not think any of the existing BITs should be terminated – at the very least not until equally effective replacement instruments are concluded with each of the counter-party States concerned. In considering the option of termination, it must be understood that, with every BIT that Australia terminates, more Australian businesses are forced to structure their investments through third countries, with the result that Australia's share of the economic benefits of being a home State to outbound FDI is reduced (for example, because Australian businesses establish places of effective management and pay taxes in third countries, rather than in Australia). Australia already experiences this effect to an extent as a result of its very limited BIT program with Africa and it would be economically counter-productive to increase this effect by terminating the existing BITs.

- **Continuation of a BIT**: we think this policy option is appropriate, subject to the issuance of Interpretive Notes for the existing BITs that contain "*shall consent*" ISDS clauses and at least until such time as until equally effective replacement instruments (bilateral or multilateral) are concluded with each of the counter-party States concerned.

- **Replacement of a BIT with an FTA chapter that may or may not include ISDS**: we acknowledge that there is a wider trend towards treating investment as an FTA discipline, rather than an area for separate regulation in a BIT or multilateral investment agreement. The trend away from BITs and towards investment-inclusive FTAs is generally positive for Australia, because the prospects of gaining the broader economic benefits of an FTA with Australia can incentivise partner States to accept comprehensive investment rules that they might otherwise not be inclined to accept in an investment-specific instrument (such as a BIT). This is especially true of multilateral FTAs, where the economic benefits of membership of a multi-State bloc create even stronger incentives for participant States to accept robust investment protection rules.

Further, multilateral FTAs also tend to contain more balanced investment provisions – including in areas such as environmental protection – because they reflect the negotiating positions and model texts of multiple States.[14] Accordingly, we think this policy option is appropriate as a long-term strategy for replacing those of the existing BITs with nations likely to be involved in future FTA negotiations with Australia. However, for reasons outlined above, it is critical that any such future FTAs contain effective, arbitration-inclusive ISDS clauses (without which, their investment chapters will have no utility to Australian investors).

3. Conclusion

The existing BITs provide real benefits to Australian businesses investing in the countries concerned – both when they make (and expand) their investments and if they find themselves in disputes with their host government. We know this from our first-hand experience as ISDS practitioners and it is confirmed by empirical evidence. Although the existing BITs are shorter and simpler than most of the modern generation of investment treaties and FTAs, they are still fit for purpose and ISDS jurisprudence shows that the substantive protections they provide are generally interpreted in a manner that is properly sensitive to State rights and interests. Given the challenges that would likely arise if the Commonwealth sought to fully renegotiate the existing BITs, we think it is better to continue them, issuing Interpretive Notes (joint or unilateral) as appropriate.

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[14] For a wider discussion of this trend, see S. Luttrell, "Green multilateralism: 'mega FTAs' and the changing interface between environmental regulation and investment protection", in Miles, Kate (ed), *Research Handbook on Environment and Investment Law* (Edward Elgar Publishing, 2019) 264