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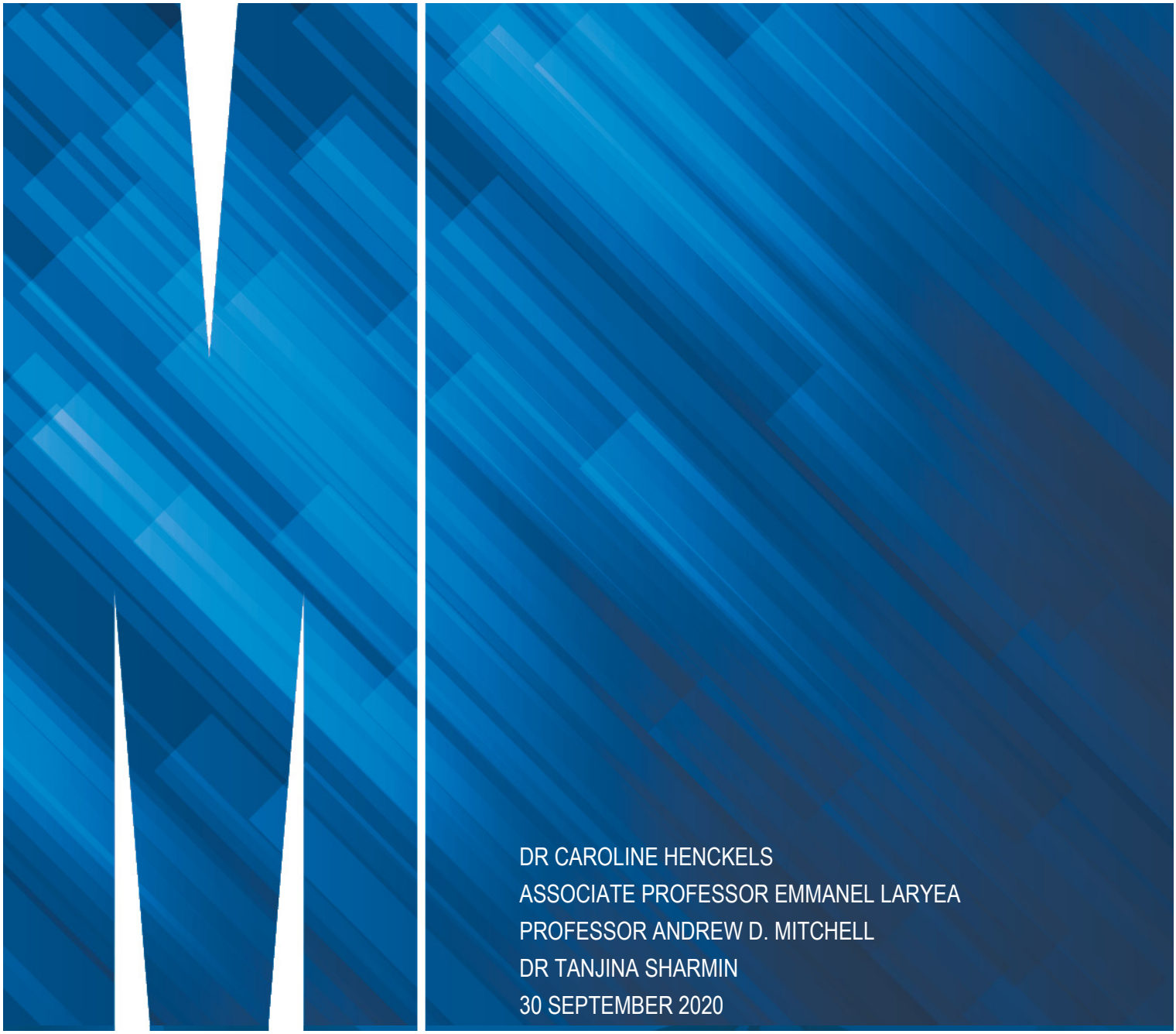
AUSTRALIA'S BILATERAL INVESTMENT TREATIES



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SAFEGUARDING REGULATORY AUTONOMY IN RENEGOTIATED BITS

There are several options available to the government to protect Australia's regulatory autonomy, as the Discussion Paper identifies. This section will offer some views about the desirability of some of these approaches.

Clauses that reiterate governments' right to regulate aim to steer tribunals toward interpreting the substantive provisions of investment treaties in a manner that provides greater weight to the government's regulatory prerogatives. However, it is unclear how useful these devices are in practice. For example, a clause common to many BITs says that governments have a right to regulate in a manner 'otherwise consistent with this agreement.' This does not appear to have any normative force. On the other hand, general preambular statements have been relied upon by tribunals in interpreting the substantive provisions of investment treaties, so this may be a preferable approach.

The Discussion Paper also refers to the exclusion of ISDS claims against public health measures including tobacco control measures, the Pharmaceutical Benefits Scheme and Medicare. This approach is undesirable. Excluding certain types of claims from the scope of the treaty obligations suggests that but for the clause, these measures would be vulnerable to being found to be inconsistent with Australia's treaty obligations. This is unlikely the case given the high level of deference that investment tribunals have afforded to public health measures. This approach also implicitly ranks some public welfare measures above others, which may influence tribunal decision-making in terms of the weight afforded to the importance of other measures' regulatory objectives.

Another issue that arises is the appropriate balance between obligations and exceptions in Australia's treaties. Recent treaty practice by the European Union relies heavily on attempting to define with a fair deal of precision the nature of the substantive obligations, such as an exhaustive list of conduct that could breach fair and equitable treatment. These sorts of lists have the benefit of tightly constraining the circumstances in which regulatory measures in the public interest may be found unlawful. For example, under article 8.10 of the Canada-EU Comprehensive Economic and Trade Agreement (CETA), it would only be possible for a regulatory measure to be in breach of the treaty where it was manifestly arbitrary. These approaches also have the benefit of constraining the grounds upon which legitimate expectations may arise and may be protected. Arguably, a more precise definition of the substantive obligations in the investment treaty would obviate the need for exceptions.

In any case and regardless of the precision of the relevant obligations, the balance between rules and exceptions in investment law is different to WTO law upon which exceptions are typically based: in relation to fair and equitable treatment, expropriation and national treatment, investment tribunals have almost invariably taken into account the purpose of the measure when determining whether a breach has occurred, which obviates the need to go to an exception. By contrast, WTO tribunals' approach to national treatment under the GATT (among other obligations) has not taken regulatory purpose into account, which makes the need for exceptions in that legal system far more crucial.

However, governments may wish to include exceptions as a backstop to make it abundantly clear that public welfare measures should not attract liability. It would be important to ensure that any exception clauses are appropriately drafted to the investment law context, and do not merely substantially replicate the cognate WTO provisions which have their own connotations accreted through the case law, and risk steering tribunals toward a WTO approach to interpreting the substantive obligations.

INVESTOR-STATE DISPUTE SETTLEMENT (ISDS) OPTIONS

Australia may wish to use a broader spectrum of options for the settlement of investor-state dispute settlement (ISDS). While the term ISDS has become synonymous with Investor-State-Arbitration (ISA), it is broader than that. Ordinarily, ISDS embraces all methods of settling investment-state disputes including negotiation, consultation, conciliation, mediation, litigation in domestic or international courts, and international arbitration.[1] Most of Australia's IIAs, including the older BITs, provide for more than just ISA. They typically provide consultations and/or negotiation first, before ISA. This is desirable, as it may help Australia and aggrieved investors to resolve disputes before embarking on expensive arbitral proceedings. However, the fall-back is mostly narrowed to arbitration (ISA).

The ISA system has come under attack, and work is underway for reform.[2] An option being considered for reform is a Multilateral Investment Court (MIC). It is desirable to include in future IIAs provisions for MIC that are contingent on: (1) if one eventuates; and (2) if Australia and its IIA partner(s) become parties to such a court.

Further, and beyond MIC, Australia may wish to consider provisions for bilateral Investment Courts (ICs). The EU has already replaced ISA with IC system in its newly signed IIAs.[3] Those IIAs also include provisions to account for the possible transition from the IC system to a MIC system. Including such provisions in Australia's IIAs would make them adaptive and flexible.

HOST-STATE-CITIZEN TO INVESTOR ARBITRATION (FORUM)

Australia may include in IIAs provisions for the settlement of disputes between nationals (host-state-citizens (HSCs)) and investors (nationals of the other party) to enable the seeking of remedy in reputable international forums if HSCs are harmed by investors. The domestic forums in some developing states with weak rule of

[1] Emmanuel T. Laryea, 'Making Investment Arbitration Work for All: Addressing the Deficit in Access to Remedy for Wronged Host State Citizens through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845, 2846-53.

[2] See, eg., UNCITRAL Working Group III, 'Investor-State Dispute Settlement Reform' https://uncitral.un.org/en/working_groups/3/investor-state; UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), A/CN.9/WG.III/WP.166, UNCITRAL Working Group III, July 2019; European Commission, 'Stakeholder meeting on the establishment of a multilateral investment court', https://trade.ec.europa.eu/doclib/events/index.cfm?id=2170#:~:text=Stakeholder%20meeting%20on%20the%20establishment%20of%20a%20multilateral%20investment%20court,-The%20European%20Commission&text=The%20purpose%20of%20the%20meeting,latest%20relevant%20EU%20policy%20developments.

[3] EU IIAs that contain IC provisions include those with Canada, Mexico, Singapore and Vietnam.

law, judiciary, institutions and systems leave harmed HSCs without avenues for effective remedies.[4] Including provisions in IIAs that enable HSCs to access an international forum, such as international arbitration or bilateral IC or Australian courts would address those flaws. Not only that, such provisions would prompt Australian investors abroad to adopt best practices and avoid causing harm knowing remedial action may be sought against them if they do not operate by appropriate standards.

The provisions being suggested here are not entirely new to Australia's IIA practice. For instance, there is a provision similar to what being suggested here in the Australia-PNG BIT 1995 (Article 15), the Australia-Laos BIT 1995 (Article 13) and the now terminated Australia-Vietnam BIT 1991 (Article 13). Consideration may be given to expanding the use of such provisions in IIAs between Australia and some developing states.

INVESTOR OBLIGATIONS

There have been calls for the inclusion of investor obligations in IIAs in recent years.[5] Such obligations may be to operate in accordance with international labour and environmental standards, eschew corruption of public officials, and respect for the rights of local communities in which investors operate. These calls stem from the view that some states, particularly weak developing states, lack economic strength, robust laws and institutions, capacity, and in some cases political will, to adequately protect citizens and the environment. Including investor-obligations in IIAs would elevate them from domestic to international standards.

The underlying reasons for the inclusion of investor- obligations in IIAs would suggest that it is not in Australia's interest to do so because Australia boasts of robust laws, institutions, systems, and political will to protect itself and its citizens from foreign investors. Thus, including such provisions in Australia's IIAs would burden Australian investors overseas to the advantage of those foreign governments and peoples hosting Australia's investors with no corresponding benefit to Australia.

It is arguable, however, that the inclusion of investor-obligations would prompt Australian investors in foreign jurisdictions to operate by international standards regardless of the standards in the host-state. This may enhance the reputation goodwill of those Australian investors and Australia generally. It can further be argued that this is already in consideration in Australia to some extent. For instance, the Australia-Hong-Kong IA affirms, in Article 16, the importance of each Party to encourage investors operating within its jurisdiction to voluntarily incorporate into their internal policies internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party. While these are

[4] Laryea, 'Making Investment Arbitration Work for All: Addressing the Deficit in Access to Remedy for Wronged Host State Citizens through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845; Amado, Kern and Rodriguez, *Arbitrating the Conduct of International Investors* (2018, CUP); Arcurri & Montanaro, "Justice for All? Protecting the Public Interest in Investment Treaties" (2018) 59 *Boston College L. Rev* 2791-2824.

[5] See, eg., Barnali Choudhury, 'Spinning the Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements' (2017) 38 *University of Pennsylvania Journal of International Law* 425; Laryea, 'Making Investment Arbitration Work for All: Addressing the Deficit in Access to Remedy for Wronged Host State Citizens through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845, 2846; George Forster, 'Investors, States and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties' (2013) 17 (2) *Lewis & Clark Law Review* 361, 367.

couched in voluntary terms, the clause signifies a recognition of the importance of corporate social responsibility.

Inclusion of such provisions may be considered in IIAs between Australia and developing countries in the Pacific, parts of Asia and Africa.

TREATY SHOPPING AND FORUM SHOPPING BY MFN CLAUSES

There are controversies regarding the scope of MFN clauses in Bilateral Investment Treaties (BITs). Scholars are split into two main groups. First, scholars who support that MFN is an instrument of multilateralization.[6] The idea implies that MFN breaks the bilateral rationales of BITs and creates a hypothetical treaty by cherry-picking the most favourable provisions from a range of BITs signed by the host-country. Second, some scholars believe that the scope of MFN is narrow, and the clause is not supposed to facilitate treaty shopping and forum shopping.[7] Application of MFN to import broader consent of the host-states for investment arbitration has been broadly criticised for undermining the legitimacy of investor-state arbitration. Consequently, many states recently have excluded dispute settlement from the scope of MFN. The MFN clause of CPTPP is an example as follows:

> CPTPP MFN
>
> Article 9.5: Most-Favoured-Nation Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement).8

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[6] Schill, Stephan W., 'Multi-lateralization through Most-Favoured Nation Treatment,' in *The Multi-lateralization of International Investment Law*, (Cambridge University Press, 2010); Schill, Stephan W., 'Most Favoured Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration: Arbitral Jurisprudence as a Crossroad' (2009), 10 *The Journal of World Investment and Trade* 189.

[7] Tanjina Sharmin, 'Application of Most-Favoured-Nation Clauses by Investor-State Arbitral Tribunals: Implications for the Developing Countries, 2020, 1st ed. Singapore, Springer (International Law and the Global South: Perspectives from the Rest of the World).

[8] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed on 8 March 2018, (entry into force on 30 December 2018).

However, the CPTPP has not limited the scope of MFN in substantive treatment standards. Therefore, the possibility of importing more favourable substantive provisions from other IIAs remain open. Some countries have attempted to cure this problem. An example can be found in CETA as follows:

> Canada-EU (CETA) 2016
>
> Article 8.7 Most-favoured-nation treatment
>
> 1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.
>
> 2. For greater certainty, the treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a Member State of the European Union, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of a third country.
>
> 3 Paragraph 1 does not apply to treatment accorded by a Party providing for recognition, including through an arrangement or agreement with a third country that recognises the accreditation of testing and analysis services and service suppliers, the accreditation of repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results of or work done by those accredited services and service suppliers.
>
> 4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.[9]

Whether Australia should follow the model in CETA will depend on the projected predominant role of Australia in any investment relationship. If it can be foreseen that in a specific bilateral investment relationship, Australia's capital import will be substantially more than its export, then Australia should have MFN provisions as narrow as possible.[10] Other countries are doing the same. For example, Canada is a party to CETA. However, unlike the CETA, Canada in another recent BIT, has only excluded dispute settlement from MFN, and has not excluded the possibility of importing more favourable substantive provisions from other treaties by MFN. The clause is as follows:

[9] Comprehensive Economic and Trade Agreement, signed on 30 October 2016.

[10] See the following piece for details on how important it is to project on whether Australia expects to predominantly play the role of host-country or home country of investors in any investment relationship for the purpose of drafting IIA provisions. Tanjina Sharmin, 'Should the MFN within Investment Treaties Exclude Dispute Resolution? An Evaluation of the Australian Approach, (2017) 35 Australian Yearbook of International Law 123-155.

Canada-Moldova BIT 2018

ARTICLE 5 Most-Favoured-Nation Treatment

1. Each Party shall accord to an investor of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of an investment in its territory.

2. Each Party shall accord to a covered investment treatment no less favorable than that it accords, in like circumstances, to investments of investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of an investment in its territory.

3. For greater certainty, the treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of a non-Party.

On the issue of excluding dispute settlement from MFN, Australia needs to be careful.[11] Instead of following the trend that some other countries are following to exclude dispute settlement or substantive standard relating to dispute settlement, Australia should consider situations like the case, *White Industries Australia v India.*[12] In that case, MFN was used to invoke jurisdiction of investment arbitral tribunal by importing a more favourable provision from another BIT to challenge a 9 years delay by the Indian domestic court to enforce a previous arbitral award in favour of an Australian investor. To decide on this point, Australia should take into account the rule of law situation in its investment partner country. The decision should be on a case-by-case basis.

While reforming MFN clauses in the older generation BITs, if Australia wants to include MFN clauses, the clause should purposively be extended only to the post-establishment phase of investments. It will keep the possibility open for Australia to treat investors differently for the purpose of admission of investments in Australian territory. In case Australia later decides to tighten the screening process by the Foreign Investment Review Board for the purpose of admitting foreign investments, narrowing own the scope of MFN to post-establishment phase will be helpful. However, if the likelihood is that in any investment relationship, Australia would play the predominant role of capital exporting country, then probably, Australia should push towards an opposite aim to extend MFN to both the pre-establishment and post-establishment phases of investments.

MFN treatment is supposed to apply to foreign investors in like circumstances. Arbitral jurisprudence shows that sometimes, tribunals have considered investors investing in the same economic sector to be in the like circumstances. This formulation helps the broader interpretation of MFN. Some modern IIAs have purported to define how to determine like circumstances for this purpose. Most of such reforms have required overall circumstances to be taken into account to determine if two investors are in the like circumstances. Australia's future IIAs may include a definition of like circumstances. Again, the decision should depend on a projection of the future investment relationship with any IIA partner country. If the chance is that Australia would export

[11] Tanjina Sharmin, Ibid.
[12] *White Industries v India*, UNCITRAL, Final Award dated 30 November 2011.

substantially more amount of capital to the IIA partner country, Australia should negotiate not to define like circumstances.

REGULATION DURING EMERGENCIES LIKE COVID-19, AND REGULATION FOR SUSTAINABLE DEVELOPMENT

The outbreak of the COVID-19 pandemic has made it clear that it is important to retain the right to regulate in IIAs during emergencies including health emergencies. Some foreign investors have already threatened host-states with investor-state arbitration for allegedly breaching IIA standards during COVID-19. As almost all economic sectors were frozen in many countries to contain the spread of COVID-19, investors have suffered economic loss. Questions may arise as to whether the restrictions on business imposed by the host-states were proportionate to the prevailing need of containing COVID-19. Any disproportionate measure for containing the pandemic can be challenged as breaches of Fair and Equitable (FET), the prohibition on unlawful expropriation, and commitment to provide full protection and security — the standards frequently included in IIAs.[13] Arbitral jurisprudence shows that investor-state tribunals have sympathised with the host-state's need to regulate during emergencies generally in the past. However, there is a general trend that tribunals tend to award compensation or damage to foreign investors if there is a breach of substantive IIA standards even if the breach arose from the lawful exercise of regulatory rights by the host state. The main reason behind such a trend in the arbitral jurisprudence is the imprecise drafting of IIA standards. While some IIAs include express provisions stating that regulatory measures in the context of emergencies, public policy, public interest, or to promote public purpose would be justified, it is not clear in IIAs whether the host-states would be liable to compensate investors in such a situation. Provisions prohibiting expropriation need special attention. Some IIAs allow expropriation subject to effective compensation. Diminishing value of investments resulting from regulatory measures to face an emergency such as COVID-19may be seen as indirect expropriation which may qualify for receiving prompt and effective compensation. Also, FET provisions are most frequently invoked by foreign investors to challenge regulatory measures by the host-states. The FET provisions impliedly guarantee that the legitimate expectation of foreign investors should be respected. Regulatory measures during emergencies may be argued as breaches of the legitimate expectation of the investors. Instead of including an emergency exception in every IIA standard, it would probably be better to include a general clause in the IIAs suggesting that regulation to respond to an emergency would not result into breaches of any IIA provision and no compensation would be provided for regulatory measures during emergencies. It would be better to exclude political and economic emergencies from any such general exceptions to safeguard against any possible misuse of the exception. Developing countries may have political and economic instability. It would be helpful and necessary to protect investors investing in the territory of any developing host-state from political and economic instability. IIAs may contain an express provision stating that loss or damages due to political and economic instability may result into breaches of IIA standards. It would

[13] Tanjina Sharmin, 'Is Australia Ready for the Post-Covid-19 International Investment Disputes,' (2020) Unpublished Research Paper kept in Author's file (also under review by a peer-reviewed law journal).

be even better to retain the right to regulate for a public purpose or to promote public policy and mention expressly that no compensation will be provided for any loss resulting from regulation for a public purpose.

Another issue to decide is whether to make regulation during emergency/regulation to promote public policy subject to review by investor-state tribunals or to make any such regulation as self-judging exercise by the host-state. If regulatory power preserved to face emergency/public policy is expressly declared to be a self-judging exercise, future investor-state tribunals would not be able to determine whether regulation by the host-state was justified in any given situation. Interesting to note that public policy exceptions in IIAs can be equally applicable for ensuring responsible behaviour by foreign corporations to promote sustainable development, to allow regulation for preventing climate change or to preserve human rights in the host-states.

INCLUSION OF INVESTOR-STATE ARBITRATION

This part of the submission only purports to answer, whether Investor-State Arbitration (ISA) should be included in Australian IIAs, which itself is a controversial issue. However, this part does not provide any detail as to how ISA should be reformed in future IIAs. Whether ISA should be included in IIAs has given rise to many controversies both in Australia and in other countries. Recent empirical research shows that there is no concrete evidence that the ISA system favours investors over host-countries or developed countries over developing countries.[14] However, there is a general assumption/perception especially amongst the developing countries that the ISA system does not work in their favour. If we refer to the evolution of ISA as a system of investment dispute settlement, it seems that the system developed in part over concerns with rule of law issues in developing countries' domestic courts. The domestic courts of the developing countries lacked expertise in international investment law, were often compromised, or took very long to resolve investment disputes. These problems still exist. In the absence of any permanent international investment court system, if Australia decides to exclude ISA form IIAs, the fall-back option for settlement of investment disputes will be the domestic courts of the host-states. The overall impression about the rule of law in Australia's domestic courts is satisfactory. However, Australian investors investing in the developing host countries can experience problems as happened in *White Industries Australia v India*. In this case, there was a delay of 9 years in the Indian domestic court enforcing an arbitral award in favour of the Australian Investor. The investor ultimately got a remedy from an ISA tribunal. Therefore, Australia should include ISA in its IIAs with developing countries. However, in any future IIA with any developed country with an equal rule of law situation, it should be fine to exclude ISA. In the long run, Australia may plan to establish an Australia based Arbitration Centre. Any such future centre may aim to be transparent, monitored by an independent authority, and diverse in terms of engaging arbitrators. One significant criticism against ISA system is that in the existing system there is a dominance of elderly, white, and, male arbitrators.[15] If Australia establishes its own Arbitration Centre with gender diversity and even geographical representation, the country may one day become a more popular seat for arbitration. It will open up an opportunity for Australian based scholars and international law experts to contribute to the development

[14] Michael Faure & Wanli Ma, 'Investor-State Arbitration: Economic and Empirical Perspectives,' (2020) 41 Michigan Journal of International Law 1 at 55-61.
[15] Ibid.

of the global rule of law. However, this proposal needs further research and it depends on various other political and economic issues. For the time being, Australia should include ISA in its IIAs with developing countries.

APPENDIX A - RESEARCH ON BILATERAL INVESTMENT TREATIES

- Caroline Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 *International and Comparative Law Quarterly* 557.
- Caroline Henckels, 'Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: the TPP, CETA, and TTIP' (2016) 19 *Journal of International Economic* Law 27.
- Caroline Henckels, 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59 *Boston College Law Review* 2825.
- Emmanuel T. Laryea, 'Making Investment Arbitration Work for All: Addressing the Deficit in Access to Remedy for Wronged Host State Citizens through Investment Arbitration' (2018) 59 *Boston College Law Review* 2845.
- Andrew Mitchell, 'Australia and New Zealand' in Markus Krajewski and Rhea Hoffmann (eds), Research Handbook on Foreign Direct Investment (Edward Elgar, 2019) 390.
- Andrew Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), Yearbook on International Investment Law & Policy 2017 (Oxford University Press, 2019) 305–355.
- Andrew Mitchell, Elizabeth Sheargold and Tania Voon, *Regulatory Autonomy in International Economic Law: The Evolution of Australian Policy on Trade and Investment* (Edward Elgar, 2017).
- Tanjina Sharmin, *Application of Most-Favoured-Nation Clauses by Investor-State Arbitral Tribunals: Implications for the Developing Countries* (1st ed, Singapore, Springer, 2020).
- Tanjina Sharmin, 'Is Australia Ready for the Post-Covid-19 International Investment Disputes' (2020) (On file with the author).
- Tanjina Sharmin, 'Should the MFN within Investment Treaties Exclude Dispute Resolution? An Evaluation of the Australian Approach' (2017) 35 *Australian Yearbook of International Law* 123.

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