Thank you for the opportunity to contribute to this review. I am a lawyer and legal academic. More information about my background and interest in the subject of this inquiry can be found on the University of New South Wales Law Faculty website.[1]

1. The scope of this review and its relationship to Australia's wider investment policy

The scope of this review is focused primarily on Australis's bilateral investment treaties (BITs). However, the discussion paper also acknowledges that the review needs to be considered in the light of Australia's wider investment policy, including investment chapters in FTAs.

Recommendation 1: It is important to consider Australia's BITs in the wider context of other aspects of Australia's investment policy.

The reason for this is the many points of intersection between BITs and other aspects of Australia's investment policy. For example, granting overly generous rights to Papua New Guinean (PNG) investors in Australia might not, in itself, raise major policy concerns for Australia given the low level of foreign investment by PNG investors in Australia. However, substantive rights granted by the Australia-PNG BIT can likely be imported into other treaties through the operation of most-favoured nation (MFN) provisions, such as the MFN provision contained in the Comprehensive and Progressive Agreement on Trans-Pacific Partnership.[2] In this way issues with any one of Australia's existing BITs can reverberated across Australia's investment treaty network.

Other dimensions of interaction that should be considered include the relationship between Australia's BITs and the operation of the Foreign Investment Review Board, including potential changes that might be made to FIRB's powers to order divestment of existing investments.[3] Australia's BITs also have important and largely overlooked implications for Australia's constitutional system, including the allocation of powers between the states and the commonwealth and the constitutional balance of powers between the legislature, executive and judiciary.[4]

2. The importance of a policy framework to guide Australia's BIT review

Investment treaties that contain ISDS provisions are highly unusual instruments of international law. 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. The monetary remedies available to investors through ISDS are vastly more generous than those available to claimants in any field of international law.[5] Because BITs containing advance consent to ISDS are

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[1] https://law.unsw.edu.au/staff/jonathan-bonnitcha

[2] See, article 9.5 TPP https://www.dfat.gov.au/sites/default/files/9-investment.pdf

[3] For public discussion of such changes, see, e.g. https://www.abc.net.au/news/2020-06-05/foreign-investment-restrictions-tighten-australian-businesses/12324276

[4] By way of illustration, consider the possibility of an investment treaty claim against *Australia* by Singaporean-incorporated companies controlled by Clive Palmer arising out of Mr Palmer's dispute with the Government of Western Australia. For public commentary, see, e.g. https://www.afr.com/companies/mining/wa-s-palmer-legislation-could-end-up-costing-the-commonwealth-billions-20200818-p55mum

[5] For a general overview of existing practice relating to compensation under investment treaties, see Bonnitcha and Brewin (2019) https://www.iisd.org/publications/iisd-best-practices-series-compensation-under-investment-treaties-advance-draft

anomalous, the default presumption should be against the existence/retention of such treaties unless a particular treaty can be specifically justified.

Recommendation 2: Because BITs containing advance consent to ISDS are anomalous as a matter of international law, the default presumption should be against the existence/retention of such treaties unless a particular treaty can be specifically justified on a cost/benefit evaluation on a case-by-case basis.

This recommendation is broadly in line with Australia's current policy of negotiating investment treaties on a case-by-case basis. It is also reflected in the historical caution of Australian governments from both sides of politics in entering into investment treaties – for example, the Howard Government chose to exclude ISDS from AUSFTA on the basis that Australia and the US have functioning court systems and, therefore, that there was no policy rationale for granting foreign investors access to ISDS.

How, then, to assess the merits of particular BITs? The discussion paper implicitly recognizes that Australia's approach to BITs must balance a range of competing considerations, including the interests of Australian foreign investors operating abroad and the litigation risks to the Australian government. It would be helpful if Australia developed and articulated a policy framework for the assessment of BITs, incorporating the full range of costs and benefits that are implicitly recognized in the discussion paper. Articulating a policy framework would allow a more structured assessment of 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 3: 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.[6] 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, 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.[7] It is not clear that it is in Australia's national interest for Pakistan to be bankrupted so that a Canadian investor can receive

[6] Poulsen, Bonnitcha and Yackee (2013) https://www.italaw.com/sites/default/files/archive/Analytical-framework-for-assessment-costs-and-benefits-of-investment-protection.pdf

[7] https://www.dfat.gov.au/geo/pakistan/development-assistance/Pages/development-assistance-in-pakistan

a USD 5.7 billion payout for interference with a proposed mine that was never actually built.[8] Similar concerns might be raised about the invocation of Australia's BIT with PNG by the Australian subsidiary of Barrick Gold.[9]

Insofar as a decision is made to retain existing investment treaties, they should be designed to address clearly identified policy problems. This may require reconsideration of the core provisions of existing treaties, rather than tweaks to existing treaty language. Like most old-style BITs, Australia's existing BITs contain vague language that is not tethered to any internally consistent conception of the policy problem the treaties are intended to resolve.

Recommendation 4: 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 with a view to targeting that problem(s).

My recent work with economist Dr Emma Aisbett provides one example of 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.[10]

3. General comments on innovations in Australia's modern 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. Almost without exception, these innovations and clarifications are improvements on Australia's BITs. The tobacco carve-out in the TPP 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, and too legalistic, in the sense of prioritising clarification and qualification of existing treaty language rather than reflecting on whether investment treaties should be reoriented to focus on addressing different types of policy problems. The approach outlined in the previous section calls for re-evaluation of the core provisions of Australia's BITs.

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[8] 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

[9] https://www.barrick.com/English/news/news-details/2020/barrick-serves-notice-of-dispute-over-porgera/default.aspx

[10] Aisbett, Emma and Bonnitcha, Jonathan, 'A Pareto-Improving Compensation Rule for Investment Treaties' (May 8, 2020). UNSW Law Research Paper No. 18-80 https://ssrn.com/abstract=3281334 ; Bonnitcha, Jonathan and Aisbett, Emma, 'Against Balancing: Revisiting the use/regulation distinction to reform liability and compensation under investment treaties' (2021 – forthcoming) Michigan Journal of International Law https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3637634

Recommendation 5: 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.

4. Responses to specific questions for consideration

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

The general body of evidence on the benefits of investment treaties suggests that BITs are only of use to a narrow class of foreign investors and only then in fairly limited circumstances.[11] For example, in my recent empirical study of the impacts of investment treaties on investment governance in Myanmar, foreign investment lawyers explained that they were involved in regulatory interactions and low level disagreements with government officials in Myanmar 'every day'. The most common sources of disputes were mundane issues relating to land use authorisation, and to permits and licensing. Investment treaties were not seen as especially useful tools in resolving such disputes, partly due to the cost and duration of ISDS proceedings and partly because recourse to ISDS would destroy any ongoing relationship between the investor and the host state.[12]

Myanmar is not necessarily representative of foreign investors' experiences of operating in other developing countries and there is little evidence on the benefits of investment treaties to *Australian* investors specifically. These questions could usefully be put to Australian diplomatic and consular officials in the countries in question. Such officials have regular contact with Australian investors that operate in, or are considering operating in, these countries and are likely to be familiar with the practical challenges facing Australian investors on the ground.

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.

The body of evidence on the benefits of investment treaties suggests that such treaties have a limited impact on the flow of foreign direct investment.[13] Dr Emma Aisbett has published some of the most important and widely cited academic studies globally on this question. I refer you to her submission in this regard.

It is difficult to assess reliably the impact of specific investment treaties on investment flows. This is because many factors aside from the existence/absence of a BIT affect investment flows and statistical studies need to control for these other factors. The narrower the scope of a study, the more difficult it is to control for other factors and the less reliable the study's findings are likely to be.

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[11] For a summary of the evidence, see Bonnitcha, Poulsen and Waibel, *The Political of the Investment Treaty Regime* (Oxford University Press 2017) chp 6.

[12] Jonathan Bonnitcha, 'The Impact of Investment Treaties on Domestic Governance in Myanmar' (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644056

[13] For a summary of the evidence, see *The Political of the Investment Treaty Regime*, chp 6.

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

Australia's existing BITs lack the clarifications and refinement found in the investment chapters of Australia's more recent FTAs. If, following an overall policy assessment, Australia decided to retain BITs with existing partner countries, several issues would need to be addressed. Among the most urgent concerns with Australia's BITs are:

- Unqualified guarantees of fair and equitable treatment;
- Existing 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;
- Jurisdictional provisions that allow claims by shareholders and facilitate treaty shopping;
- 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.

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?

If, on the basis of an overall policy assessment, a decision were made to retain some of Australia's existing BITs, then provisions that might be included in such agreements 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.
- Provisions requiring states to publish laws and regulations that relate to foreign investment. (Such provisions rarely lead to ISDS claims but address the practical concerns of foreign investors on the ground.)

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.

This question depends on an overall policy assessment. In my view, termination of each of Australia's existing BITs would be preferable to retaining each treaty in its current form.

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?

Brazil's approach to investment treaties has attracted much attention in recent years. Brazilian BITs do not provide for ISDS but, instead, seek to address practical issues facing foreign investors, such as difficulties in obtaining visas and the challenges of navigating complex/contradictory regulatory requirements in the host state. Instead of defining specific obligations in this regard, Brazil's treaties establish two types of institutions that aim to resolve such issues:

- A Joint Committee comprising representatives of both states;
- A focal point/ombudsperson in each state, to which foreign investors from the other state can address complaints/issues. Note that the treaty leaves it to the host state to specify the way that this institution will operate.

Brazil's approach illustrates that other models are possible – specifically, approaches that emphasise capacity building and collaborative problem-solving. (The US Trade and Investment Facilitation Agreement (TIFA) program is another example that has received less attention.) However, there is limited evidence to date on the effectiveness of Brazil's BITs from the perspective of foreign investors. Australian diplomatic and consular officials could consult with Australian investors on the ground about the utility of such an approach. Brazil's approach and Australia's current BITs are not mutually exclusive options. It would be possible to devise a new model that incorporates elements of both or neither.

It is important to distinguish the Brazilian approach from the July 2020 draft of the 'Informal Consolidated Text' for a Multilateral Framework on Investment Facilitation (MFIF) currently being negotiated within the World Trade Organization. Unfortunately, the draft has not yet been released publicly. The draft text proposes a range of detailed and specific obligations on states, such as obligations to ensure that measures of general application affecting investors are administered in 'a reasonable, objective and impartial manner' and to 'ensure that procedures covered by this framework are simple, reasonable, impartial, easy to understand and do not act as barriers to the ability to invest.' Such language seeks to transpose some of the most expansive and problematic interpretations of investment treaties' FET provisions into a WTO context. This language resembles the well-known and widely criticised interpretation of the FET standard proposed by the tribunal in *Tecmed v Mexico* that:

> … The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.[14] …

Such obligations embody aspirational standards of good governance that many developed countries and most developing countries would struggle to attain across every regulatory interaction with every

[14] *Tecmed v Mexico*, para 154.

foreign investor in their territory.[15] Australia should not support the inclusion of such obligations in BITs or a future MFIF.

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.

Australia should develop and articulate a policy framework by which its investment treaties can be assessed. In light of this framework, Australia should come to a decision about whether a BIT a particular partner country is justified and, if so, what types of provisions it should contain. In general terms, Australia's existing BITs provide too much protection to foreign investors, so policy responses should involve termination of existing BITs or substantial renegotiation/amendment.

The choice between various policy options available is less important than the outcome thereby achieved. Clarity around the outcome to achieve should drive the choice of means, rather than vice versa. For example, the discussion paper presents 'full renegotiation of a BIT' and 'amendment of a BIT' alternatives, although the same outcome could be achieved by either process. The option of 'replacement of a BIT with an FTA chapter that may or may not include ISDS' might also lead to a substantially identical outcome, although with an important difference being that a state cannot unilaterally terminate/withdraw from the investment chapter of an FTA without withdrawing from the wider agreement.

[15] E.g. Douglas, Z 'Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex' (2006) 22 *Arbitration International* 27