

**AUSTRALIA'S NEW BILATERAL INVESTMENT TREATY STANCE: AN OPEN
AMICUS CURIAE SUBMISSION**

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The recent Australian Parliamentary Commission's stance that any new Bilateral Investment Treaties (hereinafter referred to as 'BIT's) entered into by Australia will no longer contain an alternative dispute resolution (ADR) clause normally calling for international arbitration or a hybrid method of international arbitration and mediation. Throughout the modern history of Bilateral Investment Treaty Law, the ADR clause has been an essential component and is the legal manifestation of the entire raison d'être of the BIT; which exists to protect investors whether they are individual or state parties. This new stance contradicts the historical precedent in BIT interpretation and practise. Furthermore, it poses significant adjudicatory risk for Australian investors who sign contracts with state parties under these new BIT provisions, putting them at risk for unfavourable court intervention. Additionally, the image of Australia as a safe party to investment contracts and as a neutral haven for arbitration is compromised because the adjudicatory risk of dealing with Australian investors under these new provisions opens the door to potentially unfavourable perceptions of court intervention as well. Australia will be signing a multilateral treaty with a number of Asian countries whose legal systems and court decisions may be unknown to Australian practitioners. The Productivity Commission's stance is highly unfavourable to Australian interests and should be revised or withdrawn.

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I INTRODUCTION

Australia's recent Productivity Commission's (hereinafter referred to as 'the Commission') stance, that new Bilateral Investment Treaties (hereinafter referred to as 'BIT's) with the Australian government would not have international arbitration clauses,¹ is highly distressing in terms of Australia's reputation as well as investment risk.² A parliamentary briefing, *amicus curiae* submissions, legal expert opinions, and a task force committee to put forth the facts before the Commission, *inter alia*, must advise the government and the Commission of the gravely negative implications of this stance, *prima facie*, particularly in respect to its negative implications from an adjudicatory risk view for investors.³ The definition of what constitutes an investor is expanded to include a state. In the case of *CSOB v Slovak Republic*, the tribunal based this decision on the grounds that the Convention use of the term 'investor' referred not only to companies with private capital exclusively but also to companies controlled by states, either

¹ Currently, Bilateral Investment Treaties contain two separate provisions for ADR. In the first case, an investor-state provision which gives the investor standing to bring forth a claim against a state in an investor-state dispute arising from the BIT, and in the second case, a state-state provision which gives one state party to a BIT standing to bring a claim against the other state party in a state-state contract under the BIT. The Productivity Commission intends to remove the investor-state ADR clause. The arguments outlined in this submission deal with the implications of the removal of the investor-state ADR clause.

² The risks to Australia are twofold. On the one hand Australia risks creating a negative image and on the other hand any adjudicatory risks perceived in Australia by those investing here would be mirrored by similar risks that Australia would face in dealing with investment or commercial contracts with developing nations (namely India and China) under these new BIT provisions absent ADR clauses.

³ Kathryn Gordon, *International Investment Law: Understanding Concepts and Tracking Innovations* (Organisation for Economic Cooperation and Development [OECD] Paris, 2008) 38, "The ICSID definition is not explicit as to whether eligibility is limited to investors who are private entities or whether they could be state-controlled."; In the case of *CSOB v Slovak Republic* which was adjudicated by ICSID the state controlled 65% of the capital. The tribunal found that a legal person could have access as an investor to proceedings under ICSID unless it: "acts as a state agent or undertakes a governmental function." See Gordon 39, "Some investment agreements make it clear that state entities are included. For instance, the 2004 US Model BIT and Canada Model FIPA cover governmentally owned or controlled entities. According to Article 1, Definitions, enterprise means any entity constituted or organised under applicable, whether or not for profit, and *whether privately or governmentally owned or controlled.*" Further, "Some investment agreements include in addition to state entities, the government itself." Terms such as 'legal entity' or 'juridical person', have been interpreted to mean governments or states, as per the Convention establishing the Multilateral Investment Agency, the 1996 Czech Republic-Kuwait BIT, the US and Canada Model BITs, the Swiss Model BIT and the German Model BIT. Refer to *Ceskoslovenska Obchodni Banka, AS, v Slovak Republic* (ICSID CASE No. ARB/97/4), Procedural Order No 2.

partially or entirely. This submission is divided into two sections. The first section deals largely with the risk to Australia on the basis of a creation of adjudicatory risk for investors interested in Australia. The legal basis for why this is the case shall be examined. The second sections deals exclusively with the risks that Australia faces in dealing with investor nationals⁴ who are under the jurisdiction of a BIT that does not contain an Alternative Dispute Resolution (ADR)⁵ clause. The author submits the following argument in support of the aforementioned conclusion that the Commission's stance creates serious adjudicatory risk for any party to an Australian BIT.

II AUSTRALIA'S ADJUDICATORY IMAGE

A *Factual Premises*

From an investment⁶ point of view Australia has held a very strong position (formerly); for example, Australia:

- (i) Technically invented the notion of the sovereign wealth fund. This played a doubled feedback role in motivating Australia to take a forward-looking stance to maintaining and expanding its SWF, thereby linking its resources with investment opportunities.

⁴ Ibid 40: The legal definition of who is considered an investor is well established in law and practise. However, the question of shareholders, although challenged by previous scholarship further complicates matters as "investment protection treaties in their definitions of investments very often include shares or participation in companies as forms of investment." The US-Argentina BIT and the Barcelona Traction recognise 'A company or shares of stock or other interests in a company or interests in the assets thereof' and 'the central role of shareholders as investors', respectively. This increases the scope of what is considered an 'investment' and therefore what falls under the scope and jurisdiction of a BIT.

⁵ This normally refers either to international arbitration in this context or mediation. It may also refer to the hybrid arb-med method which will be discussed further in subsequent paragraphs.

⁶ S Ripinsky and K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, London, 2008) 5, "In the era of growing cross-border economic activities, the number of disputes concerning foreign investments has grown substantially and by now has formed a distinct category of international disputes. These disputes involve allegations of impairment to, or destruction of, economic interests of foreign investors in host states. Such economic interests are encompassed by the term 'investment'. 'Investment' can be understood as a transaction and as an asset. As a transaction, investment refers to 'expenditure to acquire property or assets to produce revenue' and 'any use of resources intended to increase future production output or income'. The three principle characteristics of investment as a transaction are the commitment of capital (or other resources), the expectation of profit and the assumption of risk, i.e. uncertainty about the realisation of profit." Further, at 6, "Professor Schreuer summarised the typical list of investments as: traditional property rights, participation in companies, money claims and rights to performances, intellectual and industrial property rights, concessions or similar rights."

- (ii) Australia weathered the GFC relatively well compared to the United States, Europe and a number of developing nations. The author submits that this is linked to the above, *inter alia*.
- (iii) Australia's view in regards to China differs from that of the United States. Australia is willing to engage in trade and develop a proper investment relationship with China as evidenced by the promotion of Asia-Pacific Arbitration centres and the collegiate relationships developing therein.
- (iv) This new BIT change is thoroughly alarming, *prima facie*, and in light of the foregoing; challenges to arbitrator jurisdiction or compétence de la compétence (normally on the basis of the plea of sovereign immunity; which only a state or government party can invoke) are a matter of consistent (undermining) policy⁷ of even legitimately drafted international arbitration clauses in Investor-State contracts. This change to new BITs could mean these challenges to jurisdiction and competence of the arbitral tribunal will increase since conservative judges may interpret this change broadly to mean that if ADR was not provided for in the BIT then it may be untenable. This stance creates adjudicatory risk. It also creates country risk for Australia. Even contracts with properly drafted arbitration clauses are currently challenged in ICSID cases, *inter alia*.⁸ Awards that are further challenged by parties who wish to escape payment of damages⁹ and/or interest and intangible damages are even more vulnerable as the judge who reviews them will look to the overall legal framework in Australia. The absence of ADR provisions in Australian BITs undermines the *res iudicata* of the tribunal.

⁷ For a more thorough discussion of the plea of sovereign immunity in arbitration see Mary B Ayad, 'Investor Risks Due to "Sovereign Immunity" Pleas in Court Rulings on Arbitral Award Enforcement of MENA-FI Investment Can Be Mitigated via a Harmonised International Commercial Arbitration Law Code' (2010) 11(5) *Journal of World Investment and Trade* 753-87, 772-9, particularly discussions regarding the following cases ICC Case 1803, *Société de Grandes Travaux de Marseille (France) v East Pakistan Industrial Development Corporation, Solel Boneh International Ltd (Israel) and Water Resources Development International (Israel) v The Republic of Uganda and National Housing and Construction Corporation of Uganda*, ICC Case 3494, *SPP (Middle East) Ltd, Hong Kong and Southern Pacific Properties Limited, Hong Kong v The Arab Republic of Egypt and the Egyptian General Company for Tourism and Hotels (EGOTH)*, and ICC Case 3879, *Westland Helicopters Limited v Arab Organisation for Industrialisation, United Arab Emirates, Kingdom of Saudi Arabia, State of Qatar, Arab Republic of Egypt and Arab British Helicopter Company*. The *corpus lex* of cases and arbitral hearings in which sovereign immunity was raised as a defence is not restricted solely to the aforementioned cases.

⁸ Ibid.

⁹ Ripinsky and Williams, above n 6, xxxiv, "Claimants in investor-state disputes almost invariably request compensation as a primary remedy. The amounts claimed can be very significant: in some cases they have exceeded several billion US dollars. The average amount of damages claimed has been estimated at US\$343.4 million". The average amount awarded "being US\$25.5 million, or only 7.4 per cent of the average amount of claims made".

- (v) Under the Vienna Convention's Article 33 (3) BIT interpretations are guided to turn to the 'general principles of law',¹⁰ thus this change could be manipulated by the doctrine of sovereign immunity to undermine investor interests, *inter alia*. Indeed, learned scholars have previously argued that since WTO law falls under international law then the Vienna Convention's provision to allow BIT tribunals to be guided by international law also applies to WTO Law. If WTO law can play such an important role in BIT interpretation, then certainly new trends in BIT Law such as this stance have hitherto unknown consequences that do not take investor protection in consideration in terms of future BIT interpretative guidelines. There are other implications. In light of the foregoing analysis, this stance requires an *amicus curiae* submission or parliamentary briefing. The doctrine of sovereign immunity as it occurs in practise as *customary usage* can be constructed as a 'general principle' of International Law and thus serve as a pleading against the investor in a dispute arising from a contract under an Australian BIT, even if it is adjudicated through ICSID or the ICC because any challenges to the jurisdiction of the tribunal or to the award itself will open the door to court review and thus, to the use of the plea of the doctrine of sovereign immunity or state immunity.
- (vi) Under the Rome Statute, treaties are a source of law. "The doctrine of precedent, or *stare decisis*, refers to the doctrine under which a court, when deciding a point of law, is generally required to defer to a holding of a prior court on that point if that prior court is hierarchally superior. The highest appellate court will also generally follow its prior decisions on a point of law, except in exceptional circumstances".¹¹

¹⁰ See Gaetan Verhoosel, 'The Use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law' (2003) 6(2) *Journal of International Economic Law* 496: "When a foreign investor suffers injury by a WTO-inconsistent measure and initiates investor-State arbitrations under the BIT to seek withdrawal and/or damages, WTO law may come into play in two distinct manners. First, it may be argued that WTO law is applicable to the investment dispute...this may be the case when the BIT governing the dispute sets the standard of regulatory treatment which is defined by reference to existing or future rules of international law applicable as between the Parties. Accordingly, if it can be successfully argued that the relevant provisions of the WTO agreement lay down 'international law' standards of treatment which the Arbitral Tribunal is required to apply, the investor may be able to rely on the inconsistency of the measure with one or more provisions of the WTO Agreements to argue a breach of the regulatory treatment standard of the BIT. Second, even if WTO law could not be construed as 'applying to' the investment dispute, it may still inform the interpretation of the regulatory treatment obligations in BITs as *interpretative context*, pursuant to Article 31(3) (c) of the Vienna Convention on the Law of Treaties [Vienna Convention]."

¹¹ Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' in Andrea Bjorklund, Ian Laird and Sergey Ripinsky (eds) *Investment Treaty Law: Current Issues, Remedies in International Investment Law, Emerging Jurisprudence of*

- (vii) There is an element of precedent especially with ICSID tribunals and awards, *inter alia*¹², in which in the current case 'removing' arbitration as *customary usage* lessens the import of International Commercial Arbitration, International Investment Arbitration and the hybrid med-arb method in terms of being legitimate means (read *res iudicata*) of addressing disputes arising from within BIT provisions or under BITs, (in the case of Australia) thereby undermining the aforementioned. In this vein, the Commission's stance lowers the credibility and status of ICA and the other ADR methods whilst raising adjudicatory and country risk for Australia. ICSID, more than any other ADR forum such as institutional commercial arbitration centres, and much like courts, has relied on precedent to some degree, thus, the new precedent of lessening the importance of ADR in investment disputes in Australia is going to have a negative impact on future ICSID constructions of arbitration clauses, jurisdiction, competence and the *res iudicata* of awards, if this disastrous policy continues to stand.
- (viii) If a contract contains within it an arbitration clause but the BIT under which it falls does not provide for it - what then? What is the implication? Is there not a doctrinal conflict now? What then would happen to the arbitration clause in the contract, especially if the construction of its wording is (purposefully) vague or subject to aggressive jurisdictional challenges? We must ask these questions. The challenges to ICA tribunal jurisdiction are already a thorn in the side of investors—wouldn't this change give those challenges further legitimacy? The author submits that this poses a serious setback and harms Australia's image and potential.

Further elaboration in terms of submission of further facts regarding the highly negative implications of the cited BIT changes are required according to the following:

- (i) Australia ranks in the top ten countries in terms of size of Sovereign Wealth Funds, with estimates at 73 Billion in third place after oil producing Arab States and Singapore, respectively and this is largely a conservative estimate in light of non-transparency considerations related to the protection of SWFs. The ideal consideration for choosing the Seat of arbitration¹³ is a

International Investment Law (British Institute of International and Comparative Law, 2009) vol 3, 149-82, 151.

¹² Meg Kinnear, Andrea Bjorklund and John Hannaford, 'Finality and Enforcement of an Award', *Investment Disputes under NAFTA: An Annotated Guide to NAFTA* (Kluwer Law, 2006) ch 11.1, 1136-41, 1136-8. This point will be discussed further in subsequent sections. See also *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AB)(97/1), Submission of the Government of the United States of America, *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (Award on Jurisdiction and Liability, 27 Oct 1989) 95 ILR 184, *Methanex Corporation v United States of America*, UNCITRAL (NAFTA) Final Award, 3 August 2005.

¹³ A Redfern et al, *Law and Practise of International Commercial Arbitration* (Thomson, Sweet and Maxwell, 2004) 2, "The law that governs the arbitral

- practical matter; it is easier to enforce an award where the offending party holds assets. If the Seat is elsewhere it may be more difficult. Thus, in Investor-State disputes with Australia, it will be a practical consideration to select the Seat of arbitration therein, thereby exposing the investor to an environment that now looks unfavourably on ADR, from the Australian Government's perspective.
- (ii) If the author were a legal advisor briefing in-house counsel who would be instructing overseas investor clients on Australia's now country and adjudicatory risk, the author would target the *mens rea* of this new policy which is a disaster in its implications: on the face of it, Australia is planning to pursue a heavily aggressive policy of investment and in the event of contractual breaches even if it were the case that Australia would be liable, it intends to ensure protection of its assets from substantially large awards by relying on the fact that without an arbitration clause in the BIT, either litigation will be forced on the investor or, if there is a separate contract under the BIT which is normally the case, the arbitration clause would be harder to achieve if it even had a nascent chance to be properly worded, i.e. the other party to said contract would be a government agent and if it was included, judges will review arbitral awards because as the author submitted previously, challenges to competence will increase.
 - (iii) Further, given that the seat of the arbitration would be in Australia as would the location of assets, there is a serious conflict of interest for investors, as the Seat is no longer such an auspicious place given the Australian government's hostile attitude towards ADR, whilst also being the location of assets in the event that the contract was breached and leads to a dispute
 - (iv) Thus, the penultimate conclusion follows from the above facts: the long-term, potentially negative outcome of this disastrous change to BITs with Australia is that investors would highly rethink the merits of investing in Australia leading to loss to Australia's SWF and economy; a veritable Catch 22. Australia has rightly prided itself on maintaining a decidedly pro-arbitration stance as evidenced by a number of important High Court rulings on international and even domestic arbitration cases in the past. This recent change on the part of the Productivity Commission greatly undermines Australia's previous gains. It is definitely a step backwards, and not only that, but a step into a highly risky and unknown path not without seriously negative consequences.

III THE ARGUMENT DERIVED FROM THE FACTS

proceedings (which will usually be the national law of the place of arbitration) may also govern the substantive matters in issue.”

Hence, in light of the foregoing analysis, the ultimate conclusion derived from the facts is plain. Notwithstanding the challenges to ADR in Australian BITs, A hybrid med-arb¹⁴ method is vitally important to the Australian investment framework, as *the* only feasible and tenable method to mitigate the risks the author has put forth for consideration. The author submits that international commercial arbitration should not technically fall under the term ADR (Alternative Dispute Resolution) simply due to the fact that arbitration alone does not resolve a dispute. Arbitrations allow a tribunal to determine who is responsible for a breach of contract and to award the party who suffered loss with damages which may include interest and intangible loss. Mediation allows a neutral third party to meet first with both parties and to flesh out the interests and concerns of both parties in a mutual meeting and then to meet separately with each party in order to air out further hidden concerns and obstacles, with the intention of reconciling both parties and creating a situation where they can agree on a number of interests and concerns so that they may continue their business relationship or renegotiate the contract in such a manner as to minimise costs to both or either party and to preserve business and contractual ties in good faith and in fair dealing. Thus, the author submits that med-arb is really the ideal way to resolve these types of disputes in move forward with the parties in resolving the dispute and reconciling them whilst preserving contractual obligations and future business relations in the interests of continued trade and sustainable economic development or barring successful reconciliation and renegotiation, in order to redress previous damages. Notwithstanding the discussion by Redfern et al, the current practise as it now stands is arb-med in which in the course of an arbitration, if there are issues that can be resolved by mediation, a mediation is commenced with the view of renegotiating the contract or reconciling the parties in such a manner as to resolve issues that obstruct the contract or prevent further business dealings. This may occur during the arbitration or immediately after damages are awarded. This method is particularly favoured in the Asia-Pacific as evidenced by accounts of arbitration practitioners and the new Hong Kong City University ADR Moot which tests students in a hybrid arb-med method in which after an arbitration is commenced, the arbitrators may decide to initiate a mediation procedure in order to more effectively resolve the dispute and restore contractual ties and future business dealings. The popularity and prestige of this Mooting competition, now in its second annual year is evidence of the popularity of this hybrid method. Fortunately, Australia has a number of distinguished and prominent arbitrators who are experts in arb-med¹⁵ and would be a tremendous asset to

¹⁴ Ibid 47: "In this process, the parties agree that if mediation does not produce a negotiated agreement, the mediator will change identity and adopt the role of arbitrator to decide the dispute." Thus, mediation followed by arbitration.

¹⁵ Notwithstanding the discussion by Redfern et al, the current practise as it now stands is arbitration-mediation in which in the course of an arbitration, if there are issues that can be resolved by mediation, a mediation is commenced with the view of renegotiating the contract or reconciling the parties in such a manner as to resolve issues that obstruct the contract or prevent further business dealings. This may occur during the arbitration or immediately after damages are awarded. This method is particularly favoured in the Asia-Pacific as evidenced by accounts of arbitration

contracting parties that sign contracts with Australia under this new BIT stance as advocates and practitioners of ADR as well as advocates for increasing investment into Australia in order to maintain and develop Australia's economic assets. The very nature of arb-med is precisely well suited to the situation as the author has outlined it herein. However, it is important to keep in mind that "frequently, however, the general dispute resolution clause is not linked in any way to the renegotiation clause."¹⁶

Face saving and maintaining business ties whilst avoiding litigation or large awards against the state, concurrently with protecting investor rights are amongst the obvious reasons. The *res iudicata* of international investment arbitration with the soft diplomacy and resolution of mediation combined, ensure a win-win outlook; one that offers hope irrespective of Australia's bleak new policy.

The relationship between the erosion of investor protection through the removal of the arbitration agreement clause or ADR from the BIT, with the further consequence of lessening court enforcement of arbitration agreements or decisions of arbitral tribunals will become very plain indeed with an examination of the existing legal framework governing foreign investment. First, it is important to understand that: "The international legal framework governing foreign investment consists of a vast network of international investment agreements (IIAs) supplemented by the general rules of international law."¹⁷ What is meant by the term IIAs refers also to Bilateral Investment Treaties (BITs), or bilateral, regional, or sectoral treaties that include investment obligations.¹⁸ Further, "Although other international treaties interact with this network in important ways, IIAs are the primary public international law instruments governing the promotion and protection of foreign investment."¹⁹ IIAs are of supreme importance to investment and economic development.²⁰ Thus the treaty, specifically the BIT, is the first and

practitioners and the new Hong Kong City University ADR Moot which tests students in a hybrid arb-med method in which after an arbitration is commenced, the arbitrators may decide to initiate a mediation procedure in order to more effectively resolve the dispute and restore contractual ties and future business dealings. The popularity and prestige of this Mooting competition, now in its second annual year, is evidence of the popularity of this hybrid method.

¹⁶ S Kroll, 'The Renegotiation and Adaptation of Investment Contracts in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International Law, 2004) 450.

¹⁷ A Newcombe and L Paradell, *Law and Practice of Investment Treaties. Standards of Treaties* (Kluwer Law International, 2009) 1.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ripinsky and Williams, above n 6, xxxiii, "The proliferation of international investment treaties has played a key role in bringing investor-state disputes into the arena of international arbitration. Investment treaties- by providing guarantees that the foreign-owned assets will not be expropriated without compensation, that investors will be treated fairly and without discrimination, that the States will respect the specific commitments undertaken with respect to investments, etc- aim at

foremost source of protection²¹ of foreign investors and investments and as such is of paramount importance thereof. Not only do IIAs or BITs exist to protect investors, they specifically exist to protect industrialised countries' investors in respect to the adjudicatory and legal risk inherent in developing countries.²² In the case of Australia's trading trends, this is particularly relevant given the Asia-Pacific environment. This point will be further discussed in the second section in regards to adjudicatory risk that Australia must face in regards to nations such as India, China, and Malaysia, *inter alia*. Given that BITs exist to bring about this aforementioned confidence, the removal of ADR clauses is highly problematic.²³ The standard within the corpus lex of International Public Law for investment/investor protection is relatively uniform as:

IIA texts differ in many important respects but they are also remarkably similar in structure and content: Most IIAs combine similar (sometimes identical) treaty-based standards of promotion and protection for foreign investment with an investor-state arbitration mechanism that allows foreign investors to enforce these standards against host states. The network of IIAs provides foreign investors with a powerful and dynamic method of international treaty enforcement.²⁴

Hence the Commission's erroneous decision to remove ADR clauses from BITs greatly undermines both investment/investor protection as well as arbitral award enforcement. The link between investment and ADR is well established. The link between ADR and economic development is further established. The main instrument through which ADR and economic development²⁵ are connected is

providing a stable and predictable environment for foreigners and reducing the investment risks."

²¹ Norbert Horn, 'Arbitration and the Protection of Foreign Investment: Concept and Means' in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International Law, 2004) 6, the growing trend of foreign investment arbitration is driven by: "the beneficial economic effects expected from the cross-border transfer of economic resources and the fact that such transfer can only be promoted when the confidence of foreign investors is won through adequate protection."

²² J Salacuse, 'Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain' in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes*, (Kluwer Law International Law, 2004) 59: "The impetus for the flurry of BIT-making activity over the last five decades has been the strong drive by growing numbers of companies in industrialised states to undertake direct foreign investments in other countries and their consequent need to create a stable international legal framework to facilitate and protect those investments."

²³ Horn, above n 21, 6-7: "BITs are designed to 'encourage and create favourable conditions for investors of the other contracting party to make investment in its territory. Arbitration is part of the protection concept."

²⁴ Newcombe and Paradell, above n 17, 1-2.

²⁵ Salacuse, above n 22, 55: "This international flow of capital has both driven and been driven by the development of international investment law. Investors seeing profitable economic opportunities for their capital and technology abroad have

through the BIT. The removal of ADR clauses from the BIT will greatly compromise this link. If the removal of ADR clauses from BITs becomes the norm through customary law and international law, then ADR as a dispute resolution method of investment disputes arising under BITs is severely compromised.²⁶ Indeed, the author submits that without ADR clauses in BITs, investment will halt as: “accordingly, investment arbitration has increasingly attracted the attention of lawyers and, in some cases such as the CME dispute, of politicians and the general public. This growing role is based on the proliferation of investor-state arbitration provisions in investment treaties and the expanded investors’ access to arbitration of disputes with Host States through arbitration clauses in investment contracts and investment legislation.”²⁷ The basis for this argument rests in the following facts:

Provisions on applicable law for the resolution of IIA disputes are also found in the arbitration rules governing the IIA arbitral proceedings. Article 42(1) of the ICSID Convention, for example, provides: The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.²⁸

In the absence of an ADR clause in a BIT and in the absence of an ADR clause in the contract under the BIT the law of the state would normally require that the dispute that arises from the aforementioned is heard before a national court. For reasons outside of the scope of this paper, adjudicating international disputes before national courts is a highly risky and expensive procedure for investors.²⁹

pushed their governments to enter into international arrangements with other countries to facilitate and protect those investments. At the same time, the development of new international investment rules also had the effect of encouraging new capital flows to the countries concerned.”

²⁶ Horn, above n 21, 23, further evidence that removing the ADR clause from a BIT undermines arbitration: “In contrast to commercial arbitration, where the jurisdiction of the arbitral tribunal is based exclusively on a valid arbitration clause contained in the contract between the parties or concluded ad hoc, the power of the tribunal in an investment dispute often emanates from an interplay of parties’ consent and objective legal rules contained either in the investment protection law of the Host State or in bilateral or multilateral investment treaties. Such laws and treaties, in their provisions for arbitration, contain a public offer of the state that the investor can accept when commencing arbitration procedures.” Without ADR clauses in BITs, the implicit consent to arbitrate is withdrawn.

²⁷ Ibid 6.

²⁸ Newcombe and Paradell, above n 17, 85.

²⁹ Ripinsky and Williams, above n 6, 7-10: Notwithstanding, there is furthermore that matter that when the state is the party in breach of the contract, that state’s courts do not inspire investor confidence in terms of impartiality or neutrality. Although this is more so the cause in developing countries or in countries where the judiciary is not independent, the principle applies universally. Indeed, the state has the means to interfere in investment contracts in a number of ways, for example through

Furthermore, arbitration is the far more preferable dispute resolution method than litigation.³⁰ Furthermore:

It may be argued that unless the relevant IIA contains an express choice of law clause (an agreement of the contracting parties as to applicable law), the second sentence of Article 42 (1) provides the choice of law rule for IIA disputes submitted to ICSID arbitration. Some tribunals, however, have inferred an agreement of the parties on the applicable law arising from their consent to arbitration under the IIA and the rules of law invoked in their submissions. Thus, tribunals have found the IIA, international law and municipal law applicable under Article 42(1), first sentence, even in the absence of an express choice of law clause.³¹

On the basis of the foregoing facts, what is the case in a situation where there is altogether no consent to arbitrate under the IIA/BIT? The absence of an ADR clause is tantamount to an absence of express consent to arbitrate. The consent to arbitrate must be explicit. Thus, this would not only render the choice of applicable law question moot but would call into question the validity and consent to arbitration in the first place. What expert practitioner in the field know and what is not normally information found in the textbooks is that far less investors and in-house counsel are aware of the merits of ADR and the need to include an agreement to arbitrate in the first instance when drafting investment contracts. This material fact, in light of the Commission's stance is a serious obstruction of investment, as well as to the protection of investors and to international arbitration as a preferred method of dispute resolution and arbitral award enforcement. This last point requires further elucidation. If in the absence of a choice of law clause, the tribunal must follow international law or custom, then in principle if the absence of an ADR clause in BITs becomes customary international law (which it will if the Commission's stance continues), then by logical extension of the inapplicability of the choice of law clause, the author submits that the Commission's stance will undermine arbitration as an alternative dispute resolution method as well as a means to enforce awards in the face of court intervention. Indeed, this change to BITs initiated by the Commission actually invites court intervention.³² The implication of this is that in

interference with property rights, contractual rights, management rights and administrative rights, as well as changes to the regulatory framework.

³⁰ Redfern et al, n 13, 26, "Why has arbitration become established worldwide as the usual method of resolving international commercial disputes? There are two principle reasons. First arbitration gives the parties an opportunity to choose a 'neutral' forum and a 'neutral' tribunal. Secondly, arbitration if carried through to the end- leads to a decision which is enforceable internationally, under the provisions as such treaties as the New York Convention."

³¹ Newcombe and Paradell, above n 17, 85.

³² J Lew, 'ICSID Arbitration: Special Features and Recent Developments' in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International Law, 2004) 267: "The dispute resolution mechanisms in more recent international treaties can be relied on by an investor to protect its investment even in circumstances where there is no direct contractual provision with the Host State."

the absence of an ADR clause, disputes arising from contracts under BITs entered into by Australia with other nations will lead to Australian parties facing a higher likelihood of court intervention by the courts of the other party, whether the Australian party is in actual or alleged breach of the contract. The reverse is also true. The only way for Australia to protect itself from unnecessary adjudicatory risk is to maintain ADR clauses in BITs.³³ Therefore, the problem is a two-way street since not only will foreign parties be required to face Australian courts, but now the converse will occur more frequently than is desired by the Australian parties.

The implication of the Commission's decision on the overall *corpus lex* of public international law is a further contribution to an already serious problem, that of inconsistency, unpredictability and lack of precedent. This is already the case to a certain degree:

In the tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be for each BIT and each Respondent state. Moreover, there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals.³⁴

The author hopes therefore, on the basis of the foregoing analysis, that the Australian Government and particularly the Productivity Commission find the above submission helpful in considering our ethical duty to promote Australia's economy by protecting Australian economic interests through investment protection and consideration for Australia's reputation, as learned advocates for a sound fiscal management policy and consideration for Australia's international obligations. It is of the author's view that the complete lack³⁵ of any formally binding precedent in

Furthermore, at 268, "Many countries have concluded bilateral investment treaties (BITs) and multilateral investment treaties, for example, ICSID and NAFTA, which usually make international arbitration available directly to the investor against a Host State." The implication of the foregoing quote in the context of the Productivity Commission's current stance is that without ADR clauses in treaties and without ADR clauses in a contract the state party can refuse to submit to arbitration more easily than is the case even when there is a clause, as has also been discussed elsewhere in this submission.

³³ Ibid 268: "This 'arbitration without privity' gives foreign investors direct recourse against a state that has acted in violation of the terms of a BIT or multinational investment treaty which previously would not have been possible."

³⁴ Newcombe and Paradell, above n 17, 104.

³⁵ Cheng, Tai-Heng, above n 11, 151, "In many investment treaty arbitrations, parties have either unilaterally published the awards or consented to the administering arbitral institution publishing the awards. With disclosure comes public scrutiny. Because international investment law, i.e. the international legal principles and rules

international investment and international commercial arbitration law is a very serious problem. Indeed:

With the proliferation of over 2007 bilateral investment treaties and the explosive resort to investor-State arbitration in the same period since the WTO came into existence in 1995, investment arbitration has moved in the opposite direction from the WTO. Rather than a unified, integrated dispute settlement mechanism, a multiplicity of forums and mechanisms under different international arbitration agreements are available for investment disputes. The WTO has an Appellate Body which has contributed significantly to coherence, consistency and predictability by developing an extensive body of jurisprudence and judicial practise in the trade field. The jurisprudence of the Appellate Body has had an influence not only on WTO panels but also on the development of international law generally, and is often referred to by investment arbitration tribunals. In investment arbitration, while there has been a tremendous proliferation of agreements and arbitration awards, there is no appellate mechanism. This has led to concerns about inconsistency, incoherence, and fragmentation of law. In fact, there have been many examples of tribunals making different and inconsistent rulings on important, substantive legal issues.³⁶

However, notwithstanding the aforementioned problem of the lack of *binding precedent*, the complexity of the issue of precedent or *stare decisis* in the context of arbitral tribunals is made more complex by the fact that although it is not *binding*, there are cases of referring to previous decisions:

Other Chapter 11 tribunals have also referred to decisions in non-NAFTA investment cases. For example, in *Metalclad Corporation v. Mexico*, the tribunal compared *Biloune v. Ghana Investment Centre*, which related to the expansion of a resort in Ghana and the need to comply with local permitting requirements, issues similar to those presented in *Metalclad*. 'Although the decision in *Biloune* does not bind this Tribunal, it is a persuasive authority and the Tribunal is in agreement with its analysis and its conclusion.' Other tribunals have proceeded in a similar manner, and have compared, relied on,

relevant to foreign investments, is a rapidly developing field, it is inevitable that arbitrators occasionally render contradictory awards. These conflicts have raised urgent questions about the extent to which awards are bound by a system of precedent, and, more broadly, whether international investment law is stable and predictable. International arbitrators have acknowledged that these issues may influence both the actual legitimacy and the public's perceptions of legitimacy of investment treaty arbitral awards, and even international investment law itself. Academics, practitioners and arbitrators are now accordingly actively engaged in discussions to fill this *lacuna*."

³⁶ Debra P Steger, 'Towards a System of International Economic Law: Putting the Investment Genie Back into the Bottle' (Speech delivered via Skype at the International Economics Law Interest Group of the Australian and New Zealand Society for International Law and the Sydney Centre for International Law at the Faculty of Law of the University of Sydney Symposium, University of Sydney Camperdown Campus, 25 February 2011).

and distinguished decisions of other international tribunals, including decisions of the ICJ, and of other investor-State tribunals. Tribunals have also referred to decisions by WTO/GATT tribunals when those tribunals have been interpreting issues similar to those found in Chapter 11. The *Methanex* tribunal made clear that it was not authorised to decide claims that the GATT had been violated under the auspices of a NAFTA Chapter 11 tribunal. Yet the tribunal indicated that it 'would be open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant.'³⁷

The fact that tribunals are acknowledging prior legal reasoning and are willing to consider it speaks in favour of the argument that there can be a corpus of precedent found in arbitral tribunal decisions. Indeed, this is not only restricted to the WTO or to NAFTA but to other tribunals, for example those adjudicating disputes arising from contracts under BITs such that:

Article 1136(1) makes clear that the rule of *stare decisis* does not apply to awards rendered under Chapter 11. It reads: '[a]n award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.' This is generally true of decisions made by international tribunals- Article 59 of the Statute of the International Court of Justice provides that decisions of the ICJ are binding only with respect to the parties before the Court and only with respect to that particular case- and it is true in investor-State arbitrations as well. The principle that international tribunal decisions are not precedential stems in part from the role they play in the hierarchy of international law established by Article 38 of the Statute of the International Court of Justice, which assigns them a subsidiary role in the development of international law. In addition, investment treaty arbitration takes place under numerous treaties pursuant to which host states may have undertaken different obligations. Thus a legal standard from BIT is not necessarily instructive in the case of another BIT.³⁸

The implication of this in terms of relevance to the matter at hand is that although there is no doctrine of binding precedent or *stare decisis per se*, the trend of referring to previous decisions is occurring and this is even the case for disputes heard before ICSID tribunals. Thus, the Commission's stance to alter future BITs by removing ADR clauses essentially sets a dangerous non-binding precedent, but a precedent no less and it will have repercussions for the future of international investment arbitration law and international commercial arbitration law well into the coming decades; implications that are unfavourable to investment overall and to investor rights as well as award enforcement. Furthermore, in light of the facts presented regarding the complexity centred on the doctrine of precedent or lack thereof, this decision by the Commission in going against established practise³⁹ in

³⁷ Kinnear, Bjorklund and Hannaford, above n 12, 1136-8.

³⁸ Ibid 1136-4.

³⁹ Newcombe and Paradell, above n 17, 3-4, the established practise of the protection of investors and investments has a long history and this historical evolution has followed a clear and precise pattern of moving towards greater and greater protection such that: "The treatment and the legal status of the alien has markedly improved

investment treaty law is creating further chaos. Given the supreme importance of ADR to investment and investor protection, the Commission's stance sets investment protection back to the situation it was in the days of early Rome. If such an analysis is seen as extreme, then it would be safe to state that at the very least it undermines the developments that have occurred since the Medieval Era⁴⁰ and this is certainly not the best example of progress. Rather, it is a model that Australia as the leader in international arbitration practise in the Asia-Pacific region should eschew before the other nations of the world. The impact of this on developing nations in the region and their progress towards mainstream acceptance of ADR and investment protection will also be greatly undermined. Indeed, the author further submits that the Commission's stance undermines the very purpose and aim of the BIT.⁴¹

Removing ADR clauses from BITs also creates another very serious problem. It undermines the very existence of the acceptance that an investment is, indeed, an investment. The basis for this submission by the author finds grounds in the following fact: "determination of whether or not there has been an investment is primarily relevant at the jurisdictional stage of the proceedings (in deciding whether a tribunal has jurisdiction *ratione materiae*)."⁴² The determination of what constitutes an investment occurs through the arbitral tribunal proceedings. If a dispute is not arbitrated but must be heard before a national judge, investor confidence declines because it is a well-established fact that tribunals, particularly

from ancient times through the Middle Ages to the modern era. In his classic 1915 treatise, *The Diplomatic Protection of Citizens Abroad*, Edwin Borchard wrote that the 'legal position of the alien has in the progress of time advanced from that of complete outlawry, in the days of the early Rome and Germanic Tribes, to that of the practical assimilation with nationals, at the present time. These developments have continued through the twentieth and twenty-first centuries and are reflected in the current network of IIAs.'

⁴⁰ Salacuse, above n 22, 61: "The basic structure of any BIT encompasses eight topics: 1. Scope of application, 2. Conditions for the entry of foreign investment, 3. General standards of treatment of foreign investments, 5. Monetary transfers, 6. Protection against expropriation and dispossession, 7. Compensation for losses, 8. Investment dispute settlement." Removing ADR clauses or the means for dispute settlement undermines the basic structure of BITs as they have been throughout modern history.

⁴¹ Newcombe and Paradell, above n 17, 114: "In looking at object and purpose and, with it, the title and preamble of BITs, tribunals have noted that the purpose of BITs is to protect investment and investors: The tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty 'to protect' and 'to promote' investments. The preamble provides that the parties have agreed to the provisions of the treaty for the purposes of creating favourable conditions for the investments of nations or companies of one of the two states in the territory of the other state. Both parties recognise that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiative."

⁴² Ripinsky and Williams, above n 6, 7.

institutional tribunals such as the ICC and ICSID have relatively clear guidelines and expertise in determining what constitutes an investment, whereas courts do not. A national court judge, out of bias or the national interest would be more predisposed either consciously or subconsciously⁴³ to find that an investment did not constitute an investment in the interests of protecting the state from having to pay a significant sum in compensatory damages. Further evidence for the author's submission that without an ADR clause it is easier for a state to deny that an investment is an investment is based on the following:

Modern BITs use a broad definition of investment. The jurisdiction of the tribunal depends on the existence of an investment and on the applicability of the respective BIT. The ICSID Convention, in Art. 25 on jurisdiction, does not define 'investment' as a requirement for commencing arbitration proceedings under the Convention, leaving it to the parties to decide what constitutes an investment. An arbitration clause in an investment agreement providing for ICSID arbitration is an implied agreement that the investment covered by the agreement falls under Art. 25.⁴⁴

The author submits therefore that removing the ADR clause from a BIT removes this first test of this implicit agreement by the parties that the investment in question is indeed an investment. This prevents the court from accepting that an investment is an investment in the first instance particularly because the losing party or party in breach of the contract, or further, the party that would have to pay damages, would be most likely to deny that an investment exists and would therefore make it more difficult for the court to apply the second test which is to attempt to determine if the investment in question meets the criteria for an investment, as discussed elsewhere in this submission.

Removing ADR clauses from BITs creates unfavourable conditions for investors and thus undermines the overall purposes of BITs. The Commission's stance renders confusion in respect to Australia's overall investment stance and protection. This creates high adjudicatory risk. This is a highly dangerous precedent indeed.

IV ADJUDICATORY RISKS FOR AUSTRALIA AS AN INVESTOR

⁴³ A recent conference in Dubai, held by the IBA, "In a session more focused on psychology than law, delegates at the International Bar Association conference in Dubai discussed how to identify- and dispel- subconscious bias in Arbitrators." Global Arbitration Review Briefing, November 3, 2011. Clearly the prohibitions against bias in arbitrators have a much lower threshold than those of judges in terms of nationality; arbitrators must adjudicate between people of different nationality, whereas judges are sworn to uphold the national interest. One may even put forth the argument that in light of that, judges must be consciously biased to uphold the national interest and would be less predisposed to award an investor's claims of damages of the average \$25 million against the state. Hence, another reason why arbitration is preferred to litigation in cross-border disputes.

⁴⁴ Horn, above n 21, 17-18.

A Adjudicatory Risk based on Cultural Influences

It is largely understood that the purpose of a BIT exists to protect investors from a national government in the event of an investment or large scale commercial dispute and on the basis of the fact that State parties are generally seen as the stronger party and the one with more recourse to avail itself to in the event of a breach of contract, namely such pleas as sovereign immunity and public policy.⁴⁵

At the present time, Australia's major trading partners are not Europe or the United States, but logically due to geographical and geo-political reasons, as well as to greater opportunities in the Asia-Pacific, are nations such as primarily China and India, with a number of other states such as Singapore, Bangladesh, Hong Kong, and Malaysia playing a central role, the question of adjudicatory risk in dealing with these nations is extremely high. There are a number of different reasons for this fact. Given also that most BITs entered into are done so by parties that are on unequal footing, two factors must be remembered here in respect to what makes the investor-state relationship unequal. The first factor has to do with the powers of the state to rescind any contract at will. Examples of this were given in the previous section. The second factor is that states are able to appear before a court (usually their own in the event of a challenged award - in which they are the challenging party) or a tribunal with highly creative legal defences to which an investor may have great difficulty appealing and therefore enforcing an award in their favour. In light of serious financial and non tangible losses incurred by the breach and/or termination of the contract by the state as the case may be, challenges to enforcement incur further losses to the investor. In this case, aside from the obvious pleas of sovereign immunity and public policy, there is also the question of cultural considerations. In the case of China,⁴⁶ the concept of a contract is fluid. In China arbitration is the preferred method of domestic and international dispute resolution.⁴⁷ However, if a foreign investor is facing a Chinese tribunal or court,⁴⁸

⁴⁵ KM Meesen, 'State Immunity in the Arbitral Process' in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International Law, 2004) 394: "In *Creighton Ltd. v. Government of State of Qatar*, an ICC award on a claim for remuneration for building a hospital in Qatar was taken for enforcement to the United States. Enforcement, however, was denied. The court found that Qatar had not signed the New York Convention and therefore argued 'we do not think that its (Qatar's) agreement to arbitrate in a signatory country, without more, demonstrates the requisite intent to waive its sovereign immunity in the United States.'" See 181 F. 3d 118 (DC Cir. 1999), XXV YBCA 1001 (2000).

⁴⁶ R Rosendahl, 'Political, Economic and Cultural Obstacles to Effective Arbitration of Foreign Investment Disputes' in N Horn and S Kroll (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International Law, 2004) 43: "Anyone who has spent any extended period of time on legal matters in China will appreciate that problems of effective legal enforcement, be it of contractual provisions, arbitration awards or even foreign court judgements are not a simple matter in China."

⁴⁷ Sundra Rajoo, (Director, Kuala Lumpur Regional Centre for Arbitration, Malaysia, chartered arbitrator, advocate and solicitor of the High Court of Malaya, founding president of the Society of Construction Law and a chairman of the Chartered

the absence of an ADR clause in the contract is a serious consideration. One of the most commonly employed defences of a breaching State party is that of competence and jurisdictional challenge.⁴⁹ If the contract itself is seen as non-binding (which is what the author is pointing out), even in light of the separability doctrine, the ADR clause in the contract will also be challenged, as well the jurisdiction of the tribunal⁵⁰ and without an ADR clause in the BIT, this opens an entire Pandora's box of major barriers to enforcing an award if the State breaches the contract against an Australian investor. One of these barriers is that if a state succeeds in challenging an arbitral tribunal's jurisdiction, the losing party will be forced to face a foreign court.⁵¹ Furthermore the consequences of facing a foreign court are not always foreseeable.⁵²

Institute of Arbitrators) (Speech delivered at the Financial Review International Dispute Resolution Conference 2010, Four Seasons Hotel Sydney, 15 October 2010): a conference largely attended by judges, members of parliament, established arbitrators, directors of arbitration centres, and lawyers and scholars, sponsored by the Financial Review Group) recently stated that: "the reason that China is doing so well economically has to do with the fact that they resort to arbitration on a regular basis."

⁴⁸ Rosendahl, above n 46, 43: "China perhaps best exemplifies the dominance of the political, economic and cultural system over the legal. Informal dispute resolution almost invariably trumps formal; in short, one does not want to find oneself in a Chinese court."

⁴⁹ Horn, above n 21, 23-24: for an example of objection to competence even in the event of a valid arbitration clause in the national legislation: "ICSID arbitration was successfully initiated by an investor in Egypt relying on Art. 8 Egyptian Investment Law of 1974, where ICSID arbitration was provided for investment disputes with a foreign investor. Egypt challenged jurisdiction, among other issues, by arguing that the investment law did not establish Egypt's consent to ICSID jurisdiction in a given case; that contention was rejected by the tribunal." The author agrees with the correct decision of the tribunal and submits that if it is so difficult to have the parties agree to arbitration in the event of a law that provides for it, then how much harder when the legal provision, in the form of ADR clauses in BITs, are removed? Please refer to *Southern Pacific Properties, Ltd (Middle East) et al v. Arab Republic of Egypt*, XVI YBCA 16 (1991).

⁵⁰ Lew, above n 32, 271: another example of procedural objection to jurisdiction: "In the *Wena* jurisdiction decision of 29 June 1999 the tribunal had to consider a challenge to its jurisdiction by Egypt on this ground as applied under the relevant BIT." Please refer to *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4 Jurisdiction Decision 29 June 1999, 41 (4) ILM 881.

⁵¹ Horn, above n 21, 24: "Normally, a conflict between litigation before the state courts and arbitral procedures between the same parties is, as far as possible, avoided by the relevant arbitration laws. A valid arbitration clause, as a rule, gives a party a valid defence against being involved in litigation before a state court."

⁵² Lew, above n 32, 273: In ICSID's first case: "In *Holiday Inns v Morocco* the parties entered into a contract for the construction of hotels by the Holiday Inns Group in Morocco. Work on the hotels stopped after a dispute arose between the parties. ICSID arbitration was commenced in January 1972. The government turned to its own national courts after arbitration was initiated to obtain orders authorising them to

The question of why one voluntarily would wish to even enter into such a situation creates a headache of certain legal adjudicatory uncertainty and risk, as well as a legal headache that would not easily be resolved. Thus, this cultural reality of how contracts are perceived is something that should not be undertaken without insurance. Given that the costs of political risk insurance are high, ADR is the next best option.

B *Adjudicatory Risk based on Unforeseeable Legal Provisions*

Cultural constructions of contracts aside, the very real issue of an Islamic Council, as is the case in Malaysia, is not something to be ignored. This body of Islamic jurists rules as to whether an arbitral award is soundly in line with Islamic law,⁵³ and therefore with Malaysian public policy as interpreted by these particular scholars. What they decide is law. In the interests of enforcing a large sum against the state in favour of an investor, in light of public policy, the odds are highly tipped against the investor.⁵⁴

In addition to the complex factors that contribute to adjudicatory risk is the entire question of the seat of arbitration,⁵⁵ which may determine the procedural law⁵⁶ governing the arbitration itself, and absent that, determines when and how the domestic national laws would apply, particularly in light of a *lacuna* or the ever

take all necessary measures to have construction resumed and completed at the claimants' cost." Please refer to *Holiday Inns SA and others v Morocco* (ICSID Case No Arb/72/1).

⁵³ Rajoo, above n 47.

⁵⁴ Horn, above n 21, 24-25: "It is well known that one of the reasons for multilateral and bilateral investment treaties was and still is the concern of foreign investors about submitting the investment claims exclusively to the state courts of the Host State that are considered to be, at least in some parts of the world, instrumentalities of the Host States government. This is the reason why Calvo-clauses in investment contracts or in bond conditions that subject the foreign investor exclusively to the jurisdiction of the courts of the state are no longer used. There are some recent international investment disputes that support the concern that Host State courts may not provide adequate protection to foreign investors."

⁵⁵ Redfern et al, above n 13, 92, "This difference between the *lex arbitri* (the law of the place or 'seat' of the arbitration) and the law governing the substance of the dispute, was part of the juridical tradition of continental Europe, but is now firmly established in international commercial arbitration."

⁵⁶ Ibid 98, "The concept that an arbitration is governed by the law of the place in which it is held, which is the 'seat' (or 'forum' or '*locus arbitri*') of the arbitration, is well established in both the theory and practice of international arbitration. It has influenced the wording of international conventions from the Geneva Protocol of 1923 to the New York Convention of 1958. The Geneva Protocol states: 'The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the *will of the parties* and by *the law of the country* in whose territory the arbitration takes place.'"

ubiquitous *compétence de la compétence* challenge. Thus, unless the arbitrations are held at ACICA or elsewhere in Australia, and this is not likely unless drafted into any and every contract that every Australian investor enters into with one of the aforementioned states, the seat or location of the arbitration would be in one of these countries. And given the almost positive certainty that the state party *will* (as a matter of policy) object to the jurisdiction of the tribunal (in order to force the investor to face a national court) it is most likely that the arbitration will be held in one of these local jurisdictions whereby the investor will not only have to face competence challenges to the tribunal but also face national law. Thus, a familiarity with Chinese, Indian, Malaysian national law and domestic statutes will be required as well as an understanding of how these nation's courts rule on issues of contractual breaches whether it is the state or the investor is at fault. Is the Australian government prepared to deal with such a large number of cases impacting Australian investors in light of these adjudicatory risks? What possible logical and valid reason could possibly exist that would motivate the Productivity Commission to remove ADR clauses from BITs and subject the Australian Government and Australian investors to such high adjudicatory risks? This is not a rhetorical question.

V CONCLUDING REMARKS: THE PRACTICAL COST OF THE COMMISSION'S STANCE

By way of concluding the remarks the author submits further arguments in respect to the ever importance of dispute resolution methods such as international arbitration, mediation and the hybrid method of med-arb. In regards to international investment arbitration and international commercial arbitration, the legal framework governing the proceedings and the outcomes is widely available to scholars and practitioners as well as to in-house counsel by way of treatises, textbooks and case law and the proceedings themselves as well as the law governing the substantive and procedural aspects of the disputes can be further clarified through case law. The outcomes of these types of arbitration proceedings are invariably more satisfactory to investors than the outcomes of court cases, which are inherently biased, *prima facie*, against the investor. However, what is slightly less known and starting to gain more ground in practice is the fact that mediation is arguably a more superior method of dispute resolution than arbitration in that although it does not seek to award damages or interim relief the way an international arbitration award does, it does allow for unresolved issues amongst the parties to be canvassed in such a way that the contract can continue either as a renegotiated contract or with new terms of reference such that the business relationship and the large amounts of tangible and intangible assets of both parties remain intact. This is extremely important for the facilitation of international trade and for economic prosperity as well as for diplomacy. The risk of not having an ADR clause in a BIT, in the final analysis, speaks to this very point. What it says is that the Australian government is not aware of the supreme importance of ADR in maintaining and preserving extremely important business relationships and in such a manner that is professional, and expert. To do otherwise is to say that international trade is no longer of such

paramount importance and therefore measures to protect it really are not essential. It undermines the entire purpose of a BIT as well as undermines the entire edifice of investor-state contractual relations and the billions of dollars of trade that flows there-from.

Australia is currently in the process of negotiating a multi-lateral investment treaty with Vietnam and Cambodia, *inter alia*, this treaty will not include the investor-state ADR clause. The adjudicatory risks examined herein will most certainly apply to this treaty. The author therefore submits that the ADR clause must be included in BITs as an act of good faith and quite simply, wisdom; to do otherwise is to ignore the facts, the purpose of the law, and all common sense.



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