

ActionAid Australia Submission to the Department of Foreign Affairs and Trade

Review of Australia's Bilateral Investment Treaties

September 2020

1. Introduction

ActionAid supports women in more than 45 countries to understand their rights, reflect on the people and systems that affect them, and harness their power to act with others to change their lives and positions in society. More than 60,000 Australians support our efforts to advance economic and climate justice for women and their rights in emergencies. ActionAid is a member of the Australian Council for International Development (ACFID) and partners with DFAT through the Australian NGO Cooperation Program and a number of other schemes including Pacific Women Shaping Pacific Development and the Australian Pacific Climate Change Partnership.

ActionAid Australia welcomes the opportunity to make this submission to the Department of Foreign Affairs and Trade's review of Australia's Bilateral Investment Treaties (BIT) and to share our concerns about the impact that investment protection rules pose to women's rights, particularly in developing countries. ActionAid also supports and reiterates the recommendations of the Australian Fair Trade and Investment Network (AFTINET) submission to this inquiry as a member of the network.

ActionAid is specifically concerned that BITs extend the power of international corporations by establishing binding rights for foreign investors under international law, offering investors a range of protections that go above and beyond those afforded to domestic investors. The inclusion of investor-state dispute settlement (ISDS) mechanisms in the majority of BITs, enables foreign investors to sue governments in international tribunals for policy decisions that impact on their investments. BITs have serious implications for women's rights and development in developing countries. They limit governments' policy space and restrict opportunities for policy reform that is necessary to achieve gender equality and development objectives. In particular, ISDS provisions enable international investors to challenge a broad range of public interest policy, such as health, energy, water and climate change policies. Additionally, with majority of the world's BITs agreed between developed and developing countries and most ISDS claims filed against developing country governments, ISDS has a significant impact on public expenditure as developing countries are forced to divert resources away from critical public services in order to pay exorbitant amounts of money to international investors. In the context where COVID-19 is increasing the need for resources and worsening debt distress in many developing countries, the inclusion of ISDS mechanisms in BITs poses additional challenges to economic stability of partner countries.

ActionAid would like to make the Review Committee aware of a number of examples of the impact that ISDS has had on bilateral partners. Pakistan was ordered to pay Australian company Tethyan US\$ 5 billion only two weeks after the country received a US\$6 billion loan from the IMF. Similarly, Papua New Guinea, which is facing high levels of debt distress and has received two budget support loans from Australia in the last 12 months, is now being sued by Australian company Barrick (PD) Australia Pty Ltd in response to a decision not to renew a mining license for the Porgera gold mine. UNCTAD has also warned that ISDS could be used by multinational corporations to sue governments for COVID-19 response efforts,¹ with Peru already facing the threat of an ISDS case after it cancelled road tolls to reduce the economic pressures of the pandemic.² It is inconceivable that governments could face arbitration for implementing policies that are necessary to save lives and livelihoods in a

¹ UNCTAD (2020) *Investment policy responses to the covid-19 pandemic*, Investment Policy Monitor, https://unctad.org/en/PublicationsLibrary/diaepcbinf2020d3_en.pdf

² Sanderson, C (2020) *Peru warned of potential ICSID claims over covid-19 measures*, Bilaterals, <https://www.bilaterals.org/?peru-warned-of-potential-icsid>

global health and humanitarian crisis. This only serves to reiterate the importance of this review and to highlight the critical need for reform of a global investment protection system that promotes corporate rights at the expense of citizens' rights and national sovereignty.

ActionAid notes that there are a number of alternative mechanisms available to Australian companies to protect their international investments, including market-based products such as political risk insurance. There are also a range of alternative BIT models that seek to limit the scope of investor rights and provide greater protection to governments' regulatory rights. We appreciate the broad scope of policy options, from the continuation of BITs through to BIT termination, referenced within the discussion paper accompanying this inquiry. We urge the Government use this review to identify the policy options that are best able to bring its investment policy into alignment with Australia's commitment to advance gender equality and sustainable development as outlined within the 2017 Foreign Policy white Paper,³ and to ensure policy coherence across Australia's aid and development and trade and investment policy.⁴ To do this, ActionAid recommends that the Government:

- 1. Immediately suspend ISDS provisions for COVID-19 response measures.** Governments must not be restricted from, or face arbitration for, implementing legitimate and necessary policy responses to the pandemic. To ensure this, the government should immediately suspend ISDS provisions for COVID-19 response measures. The Government should also conduct a broader review of BIT provisions and suspend any provisions that could undermine the capacity for an effective health response to COVID-19.

As a part of the longer-term review of Australia's BITs, ActionAid recommends that the Government:

- 2. Terminate all of Australia's Bilateral Investment Treaties.** The Government should instead look to alternative mechanisms that are better able to advance gender equality and sustainable development. These include mechanisms that prioritise investment facilitation, narrow the scope of investor rights, exclude ISDS and include investor obligations in relation to human rights. The Brazil-India Cooperation and Facilitation Investment Agreement provides a strong model for this approach.

In the case that Australia chooses to retain the use of BITs, ActionAid recommends that existing agreements are renegotiated. All renegotiated agreements should:

- 3. Exclude Investor-state dispute settlement mechanisms.** BITs should instead be enforced through state-to-state dispute processes.
- 4. Be compliant with Australia's obligations under international law.** This includes specific commitments on women's rights and gender equality as well as obligations in relation to human rights, labour rights and environment standards.
- 5. Be subject to independent ex ante and ex post gender impact assessments (GIAs).** GIA's should be completed, along with broader health, social, economic and environmental impact assessments, for all investment agreements in order to identify and respond to any potential negative impacts on women's rights and gender equality. GIA findings must be taken into account and investment protection provisions that are found to negatively impact women should be mitigated or removed from the agreement.

³ Australian Government (2017) *2017 Foreign Policy white Paper*, <https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper/fpwhitepaper/pdf/2017-foreign-policy-white-paper.pdf>

⁴ DFAT (2016) *Gender equality and women's empowerment strategy*, <https://www.dfat.gov.au/sites/default/files/gender-equality-and-womens-empowerment-strategy.pdf>

- 6. Not encroach on governments' policy space.** Governments, particularly in developing countries, must not be prevented from use of the full suite of policy tools necessary to develop gender-responsive industry policies and achieve their development goals.

In addition to reforming its approach to investment policy. The Government is also encouraged to ensure that Australian companies operating overseas are held accountable for their obligations under the UN Guiding Principles on Business and Human Rights. To do this the Government should:

- 7. Place binding human rights obligations on Australian companies operating overseas.** These should include obligations to undertake human rights due diligence, adhere to the international human rights and environmental law that Australia is a signatory to and comply with the national laws of the host country.
- 8. Establish legal process for communities to seek redress.** Legally binding mechanisms should be established to enable communities who have been negatively impacted by the activities of Australian-owned investors to seek redress, building on the recent reform of the National Contact Point.
- 9. Support the process within the UN Human Rights Council to develop a binding treaty to regulate transnational corporations as part of Australia's foreign policy objective of supporting a rule-based international order.**

2. Bilateral Investment Treaties and Foreign Direct Investment

The global investment protection regime is made up of 2,340 BITs, primarily between developed and developing countries, and a growing number of bilateral and regional trade agreements that include investment protection provisions.⁵ BITs originated in the post-World War 2 decolonisation period, with advocates suggesting that they would provide an added layer of protection for investments in countries that were considered to be risky investment environments.⁶ Additional justifications include the assertion that investment protection ensures a 'level playing field' for domestic and international investors.⁷ Proponents of investment protection measures argued that BITs were necessary to entice investment in developing countries, which urgently needed resources for poverty reduction efforts and economic development.⁸ In reality, there is no evidence that BITs significantly increase FDI flows to developing countries, as evidenced by Brazil's place in the top five recipients of FDI globally, despite having no investment treaties that contain ISDS.⁹ UNCTAD's 2014 *Trade and Development Report* found that international investment agreements "appear to have no effect on bilateral North-South FDI flows."¹⁰ Additional research suggests that while BITs may have a slight positive impact on FDI flows, other factors such as "the standard of infrastructure, availability of raw materials or size and proximity of target markets, are more important determinants."¹¹

While developing countries urgently need access to additional resources, from ActionAid's perspective there is no guarantee that increases in FDI will automatically result in strong women's rights or development outcomes. Rather, the extent to which FDI facilitates sustainable development depends on the sectors that are targeted by foreign investors as well as governance

⁵ UNCTAD (2013) *Investment Policy Hub*, <http://investmentpolicyhub.unctad.org/IIA>.

⁶ Trade Justice Movement (2015) *Worried About UK BITs? The case for reviewing UK investment protection provisions*, <https://www.tjm.org.uk/resources/reports/worried-about-uk-bits-analysis-of-uk-bilateral-investment-treaties>

⁷ Bonnitcha, J (2017) *Assessing the Impacts of Investment Treaties: Overview of the evidence*, The International Institute for Sustainable Development, p. 5, <https://www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf>

⁸ Ibid, p. 5.

⁹ UNCTAD (2018) *World Investment Report 2018: Investment and new industrial policies* p.4, https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf

¹⁰ UNCTAD (2014) *Trade and Development Report*, p.159, http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf

¹¹ Op. Cit. Trade Justice Movement (2015).

arrangements, such as corporate tax rates¹² and technology transfers.¹³ UNCTAD found that investment agreements are not designed with sustainable development in mind, and that BITs have failed to deliver investments in sectors that are critical for sustainable development.¹⁴ This raises serious questions about the effectiveness and appropriateness of BITs, particularly in light of a mounting body of evidence demonstrating their significant economic and regulatory risks.¹⁵

Concerning BIT provisions

- Fair and equitable treatment provisions have been interpreted by some tribunals to mean that investors should have a “stable legal and business framework or predictable investment environment.”¹⁶
- National treatment provisions, which require that governments treat foreign investors no less favourably than domestic investors.
- Indirect expropriation provisions, which enable corporations to claim compensation if government’s develop regulation that is considered to harm or interfere with their investment.
- Capital control provisions, which enables investors to transfer capital in and out of the country with minimal restrictions, which “exposes all States to destabilising capital flows, which in turn impacts domestic economic stability.”¹⁷
- Investor-state dispute settlement (ISDS) mechanisms enable international investors to sue governments in international tribunals for policy decisions that impact on their investments.

3. BITs and the threat to women’s rights

ActionAid understands that Australia currently has 15 BITs in force and that there is not uniformity across all of these agreements. This section provides a brief overview of the gendered impacts of key investment protection provisions and will not comment directly on the details of specific agreements.

3.1. BITs can undermine governments’ right to regulate

BITs pose serious risks to governments right to regulate, with the inclusion of broad investor rights and ISDS mechanisms enabling foreign investors to bring cases in international tribunals against a range of public interest legislation. ISDS tribunals lack transparency and are heavily biased towards international investors. Arbitrators are selected from a pool of practicing investment lawyers, meaning they can rotate between advocate and adjudication roles - a clear conflict of interest. There

¹² For an overview of the impact of corporate tax avoidance in developing countries and the need for progressive tax reform to resource public services see ActionAid International (2020) *Who cares for the Future: Finance gender responsive public services*, pp. 72-87, <https://actionaid.org/sites/default/files/publications/final%20who%20cares%20report.pdf>

¹³ Op. Cit. Trade Justice Movement (2015) p. 1.

¹⁴ UNCTAD (2014) *Reform of the IIA regime: four paths of action and a way forward*, https://unctad.org/en/PublicationsLibrary/webdiaepcb2014d6_en.pdf

¹⁵ See for example Bonnitca, J (2017) *Assessing the Impacts of Investment Treaties: Overview of the evidence*, The International Institute for Sustainable Development, p. 5, <https://www.iisd.org/system/files/publications/assessing-impacts-investment-treaties.pdf>. Yackee (2010) *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594887

¹⁶ Khor, M (2015) *A Summary of Public Concerns on Investment Treaties and Investor-State Dispute Settlement*, in *Investment Treaties: Views and Experiences from Developing Countries*, P. 3, https://www.southcentre.int/wp-content/uploads/2016/05/Bk_2015_Investment-Treaties_EN.pdf

¹⁷ Bhumika Muchhala (2018) *International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals*, Human Rights Council, Working Group on the Right to Development, A/HRC/WG.2/19/CRP.5.

is also no system of precedents or appeals in the ISDS system, and as such there is no requirement for consistency in arbitration decisions.¹⁸ ISDS Tribunals have the power to directly rule against policies put in place by governments. However, ISDS can also lead to ‘regulatory chill’ as governments either delay the implementation of a policy measure while an ISDS case is being decided; or resolve against implementing a policy measure due to concern that it will lead to an ISDS claim.¹⁹ This point was highlighted by several UN experts, who stated in an open letter that:

“We believe the problem has been aggravated by the “chilling effect” that intrusive ISDS awards have had, when States have been penalized for adopting regulations, for example to protect the environment, food security, access to generic and essential medicines, and reduction of smoking, as required under the WHO Framework Convention on Tobacco Control, or raising the minimum wage.”²⁰

There has been a significant increase in ISDS cases over the last 20 years, from less than 10 in 1994 to 300 in 2007, and 1,023 in December 2019,²¹ with a majority of cases taken against developing countries. Whilst no public ISDS cases have been solely focused on laws or policies designed purely to advance gender equality, many cases have had significant gendered impacts, including as a result of the reduction in public funding available for services that women disproportionately rely on. Additionally, ISDS has been used against broader social, economic and environmental policy critical to the realisation of gender equality, including policy on issues such as tax reform, minimum wage, public health measures, water and electricity pricing and environmental protections.²² Key ISDS cases that have challenged public interest legislation include:

- US tobacco company Philip Morris shifted assets to Hong Kong and sued Australia using the Australia-Hong Kong BIT, claiming billions in compensation for Australia’s plain packaging law. Australia won the case after the tribunal declared that Philip Morris was not a Hong Kong company and the case was an abuse of process. However, the case took more than four years and cost Australia over \$24 million in legal costs, only half of which were recovered when costs were awarded.²³
- Chevron sued Ecuador using ISDS provisions in the US-Ecuador BIT after a court ruled that the company had to pay compensation after a devastating oil spill in the Amazon, now recognised as one of the world’s worst environmental disasters. In 2018, arbitrators ordered the Ecuadorian government to annul the original judgement.²⁴
- In 2007, Italian and Luxembourg investors used ISDS provisions to sue the South African government for its Black Economic Empowerment Act that addressed ongoing economic discrimination against black South Africans as a result of apartheid. Investors challenged the government’s mining legislation, which mandated that a percentage of investor shares be transferred to black investors. While the case was suspended in 2009, this was only after the

¹⁸ Ranald, P (2019) *Investor-State Dispute Settlement process (ISDS): latest evidence*, AFTINET, <http://aftinet.org.au/cms/sites/default/files/200129%20updated%20AFTINET%20Summary%20on%20ISDS.pdf#overlay-context=node/1835>

¹⁹ Johnstone, M (2015) *Pressure to bring in tobacco plain packaging*, New Zealand Herald, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11410127

²⁰ OHCHR (2015) UN experts voice concern over adverse impact of free trade and investment agreements on human rights, media release, <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E>

²¹ UNCTAD (2020) *Investment Dispute Settlement Navigator*, <http://investmentpolicyhub.unctad.org/ISDS>

²² Ibid

²³ Ranald, P (2019) *When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging*, The Conversation, <https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>

²⁴ López, A (2019) *Chevron vs Ecuador: international arbitration and corporate impunity*, Open Democracy, <https://www.opendemocracy.net/en/democraciaabierta/chevron-vs-ecuador-international-arbitration-and-corporate-impunity/>

investors were granted the mining licence without having to meet the share transfer requirements.²⁵

- The Egyptian Government was sued by French Company Veolia over a local government contract dispute in which they claimed compensation for a rise in the minimum wage. This claim eventually failed but it took seven years and the costs to the Egyptian government have not been made public.²⁶
- In 2012 the UK company Tullow Oil sued Uganda over a disputed US \$400m capital gains tax bill resulting from the sale of the company's stakes in three oil and gas blocks for US \$2.9bn. Tullow said a government minister had granted the company an exemption from these taxes, but the Ugandan courts found that only Parliament can approve such an exemption. In 2015 Tullow withdrew its ISDS case, but only after Uganda lowered its tax bill to US \$250m.²⁷

3.2. BITs can restrict progress on gender equality and development

The impact of BITs on governments' right to regulate is a live issue for many developing countries, with an increasing number of governments questioning the benefits of investment protection measures in light of the significant economic and development costs. This reflects rising concerns about the compatibility of BITs with developing countries' right to development, particularly in relation to economic diversification and industrialisation. BIT provisions can impose severe restrictions on the types of policy tools that developing countries can use to facilitate economic development. For example, governments can be prevented from using local content requirements, technical standards and licensing and qualification requirements that are necessary to strengthen domestic markets and enable the transition to value-added production, in line with governments industry policies.²⁸

Fair and equitable treatment provisions have enabled "investors to bring disputes against a wide range of government activities from changes in tariff charges in public utilities to withdrawal of tax exemptions and changes to the regulation of chemicals." This can prevent governments from implementing new regulations in response to emerging evidence or a shift in government policy. National treatment rules also limit governments' ability to support industrialisation by protecting infant industries as they develop. This can have serious impacts for small to medium sized enterprises (SME), which are critical to the realisation of gender equality, with national treatment rules opening SME's up to competition with larger foreign firms without adequate government supports.²⁹ Additionally, whilst national treatment rules ensure foreign investors are not treated less favourably than domestic investors, foreign investors are given additional rights through BITs, including through ISDS, that are not available to investors from the host country.³⁰

²⁵ ICSID (2007) *Piero Foresti, Laura de Carli and Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, <https://www.italaw.com/cases/446>; see also Oxfam (2011) *Sleeping Lions: International investment treaties, state- investor disputes and access to food, land and water*, p. 21, https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/dp-sleeping-lions-260511-en_4.pdf

²⁶ UNCTAD (2012) *Veolia v. Egypt*, Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt>

²⁷ Riseborough, J (2015) *Tullow Oil to Settle Uganda Tax Dispute for \$250 Million*, Bloomberg, <https://www.bloomberg.com/news/articles/2015-06-22/tullow-oil-to-settle-uganda-tax-dispute-for-250-million>; See also The Transnational Institute and Global Justice Now (2016) *Taxes on trial: How trade deals threaten tax justice*, <https://www.tni.org/files/publication-downloads/taxes-on-trial.pdf>

²⁸ Mohamadieh, K and Montes, M (2015) *Throwing Away Industrial Development Tools: Investment Protection Treaties and Performance Requirements*, in *Investment Treaties: Views and Experiences from Developing Countries*, South Centre, https://www.southcentre.int/wp-content/uploads/2016/05/Bk_2015_Investment-Treaties_EN.pdf

²⁹ Williams, M (2015) *Gender Issues and the Reform of Investment Liberalization, IIAs and BITs*, in *Investment Treaties: Views and Experiences from Developing Countries*, p. 118, https://www.southcentre.int/wp-content/uploads/2016/05/Bk_2015_Investment-Treaties_EN.pdf

³⁰ Op. Cit. Khor, M (2015).

3.3. Excessive ISDS costs undermines development

The costs of ISDS cases for developing country governments are excessive, forcing governments to divert resources away from public services and crucial development initiatives. The legal costs of defending claims alone cost on average US\$ 8 million per case,³¹ and as Philip Morris v Australia demonstrated, even when governments win cases they still lose – with Australia only recovering half of its legal costs.³² Poor transparency means that information about arbitration and settlement awards are not always available. However, Bonnitcha and Brewin found in 2019 that there have been 46 cases with awards over US\$100 million, and multiple cases with awards over US\$ 1 billion.³³ Similarly, research by Friends of the Earth et al in 2019 found that for the almost 1,000 cases that data was available, governments had been sued for more than US\$623 billion and were forced to pay US\$88 billion in awards. This was the “equivalent to all Foreign Direct Investment to Australia, Japan and other developed economies outside of Europe and North America in 2018.”³⁴ These costs are disproportionately borne by developing countries who face the majority of ISDS claims.³⁵

UNCTAD estimated in 2019 that an additional US\$2.5 trillion dollars a year was needed to support developing countries to achieve the Sustainable Development Goals (SDGs).³⁶ This figure has increased dramatically as a result of COVID-19, with developing countries urgently requiring resources to expand healthcare and social protection measures in the face of the world’s largest global humanitarian crisis and an emerging debt crisis.³⁷ Yet, the economic and development impacts of ISDS cases risk undermining global progress towards the SDGs. A clear example of this is the US\$ 5 billion that Pakistan was ordered to pay to Australian company Tethyan, a subsidiary of the Canadian company Barrick Gold, in response to a decision not to grant the company a mining lease. The case was decided in 2019, less than two weeks after the International Monetary Fund approved a US\$6 billion loan to the country. The award was well above the US\$220 million that the company said it spent on exploration activities, due to ISDS Tribunal’s decision to include compensation for “lost future profits.”³⁸

A claim by Australian company Barrick (PD) Australia Pty Ltd, a subsidiary of Canadian company Barrick Gold, against Papua New Guinea (PNG) also highlights the serious economic risks of ISDS for developing countries. The claim was made under the Australia-PNG BIT, in response to PNG’s decision not to grant an extension to the mining lease for the controversial Porgera gold mine.³⁹ The resources sector has long been the source of controversy in the country due to concerns that the terms of mining agreements are not adequately benefiting the local community.⁴⁰ In the case of the Porgera mine, this has been compounded by allegations of human rights abuses, illegal mining and

³¹ United Nations Commission on International Trade Law (2018) *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017)*, A/CN.9/930, http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-34th-session/930_for_the_website.pdf

³² Op. Cit. Ranald, P (2019)

³³ Bonnitcha, J and Brewin, S (2019) *Compensation under Investment Treaties*, International Institute for Sustainable Development, <https://www.iisd.org/system/files/publications/compensation-treaties-best-practices-en.pdf>

³⁴ Friends of the Earth Europe et al (2019) Red Carpet Courts: 10 stories of how the rich and powerful have hijacked justice, p.4, <https://10isdstories.org/wp-content/uploads/2019/06/red-carpet-courts-WEB.pdf>

³⁵ UNCTAD (2019) Fact sheet on investor–state dispute settlement cases in 2018, https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf

³⁶ UNCTAD (2019) *Trade and Development Report 2019*, p.83, https://unctad.org/en/PublicationsLibrary/trd2019_en.pdf

³⁷ UNCTAD (2020) *UN calls for \$2.5 trillion coronavirus crisis package for developing countries*, <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2315>

³⁸ Tienhaara, K (2019) *World Bank ruling against Pakistan shows global economic governance is broken*, The Conversation, <https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414>

³⁹ Barrick (2020) *Barrick Serves Notice of Dispute Over Porgera*, media release, <https://www.barrick.com/news/news-details/2020/barrick-serves-notice-of-dispute-over-porgera/default.aspx>

⁴⁰ Howes, S., Fox, R et al (2019) 2019 Papua New Guinea economic survey, *Asia & the Pacific Policy Studies*, vol. 6, p. 276, https://www.researchgate.net/publication/336236601_2019_Papua_New_Guinea_economic_survey#read; See also Jubilee Australia Research Centre (2018) *Double or Nothing: The Broken Economic Promises of PNG LNG*, <https://www.jubileeaustralia.org/latest-news/new-jubilee-report-shows-that-efic-funded-png-lng-project-has-hurt-png>

environmental impacts.⁴¹ The ISDS claim comes at a time when PNG is facing serious economic challenges, as its already weak economy is hit hard by declining terms of trade for oil and gas as a result of COVID-19. The country is now facing high levels of debt distress⁴² and critical budget shortfalls. Australia has provided two loans in the last 12 months and additional support has been sought from the multilateral banks and other donors.⁴³ PNG will now have to find resources to cover legal costs associated with the case, diverting critical funds away from COVID-19 response efforts. In the long term, a potential arbitration loss risks worsening financial insecurity and undermining the Government's ability to decide how its resource projects are managed.

4. ISDS safeguards are ineffective

The Government has responded to the Philip Morris case, as well as widespread public criticism of ISDS, by including ISDS safeguards in Australia's recent trade agreements that protect some public health measures and are purported to provide greater protection to governments' regulatory rights. However, these measures fail to uphold governments' right to regulate. The CPTPP and other recent bilateral trade agreements exclude specific public health measures from ISDS. However, other public interest legislation, including relating to climate change and other environmental regulation, continue to be subject to ISDS provisions.⁴⁴ The fact that the Government has felt it necessary to exclude specific health measures indicates that general safeguards for other health, environment, labour rights and public interest regulation are ineffective.

Beyond this, regulatory 'safeguards' in the CPTPP only enable governments to "maintain and enforce environmental and health measures that are "otherwise consistent" with the agreement.^{45 46} Additionally, 'safeguards' in relation to indirect expropriation are undermined by their use of the phrases such as "legitimate public welfare objectives," which opens up scope for investors to challenge the legitimacy of the public welfare objectives, and "except in rare circumstances," which provides a loophole for investors to argue that their circumstances are rare.⁴⁷ Given, the limitations of these safeguards, and the ongoing risks that ISDS poses to the development of policy measures necessary to advance the rights of women and girls in developing countries, it is critical that the Government take action to exclude ISDS from all new BITs and trade agreements and to renegotiate existing agreements to exclude ISDS.

5. Alternatives to BITs

Concern about the negative impacts of BITs has led an increasing number of developing country governments to transition away from the traditional model of investment protection. Countries such

⁴¹ Burton, J and Banks, G (2020) *The Porgera mine in PNG: some background*, Devpolicy Blog, <https://devpolicy.org/the-porgera-mine-in-png-some-background-20200507-2/>

⁴² Jubilee Debt Campaign (2020) *Debt data portal, PNG*, <https://data.jubileedebt.org.uk/>

⁴³ Hawke, A (2019) *Australian budget support for Papua New Guinea*, media release, <https://ministers.dfat.gov.au/minister/alex-hawke-mp/media-release/australian-budget-support-papua-new-guinea>; See also ABC News (2020) *Alex Hawke interview Stephen Dzedzic*, 11 September, <https://ministers.dfat.gov.au/minister/alex-hawke-mp/transcript/interview-stephen-dzedzic-abc-news-channel>

⁴⁴ Annex 9-B, Article 3b of the CPTPP states that "Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances." The use of the phrases "legitimate public welfare objectives" opens up scope for investors to challenge the legitimacy of the public welfare objectives and "except in rare circumstances" provides a loophole for investors to argue that their circumstances are rare.

⁴⁵ Article 9.16 of the CPTPP states that "Nothing in this chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental health or other regulatory objectives". The use of the phrase 'otherwise consistent with this chapter' restricts regulatory measures to those that are consistent with the agreement's investment provisions.

⁴⁶ Kawharu, A. (2015) TPPA Chapter 9 on Investment, *Expert Paper no. 2 on the TPPA*, The Law foundation, <https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf>

⁴⁷ Tienhaara, K (2015) The TPP has been released and our concerns have been vindicated, The Drum, <https://www.abc.net.au/news/2015-11-06/tienhaara-tp-investment/6918810>

as South Africa, Ecuador, India, Indonesia and Brazil have either cancelled their BITs or reviewed and reformed their investment protection models, with many taking steps to restrict the scope of ISDS.⁴⁸ Some alternative BITs also include provisions that narrow the scope of investor rights and increase investor responsibilities, responding to significant concerns about human rights abuses being perpetrated by international investors, including in their supply chains.⁴⁹

Brazil's model BIT or 'Cooperation and Facilitation Investment Agreement', and the subsequent Brazil–India Investment Cooperation and Facilitation Treaty, is focused around investment facilitation rather than dispute resolution and ISDS is excluded. The agreement instead “establishing a national ombudsman to whom investors can appeal; clarifying the range of investor protections, for example by replacing ‘fair and equitable treatment’ with more specific standards like access to justice and excluding indirect expropriation. The agreement also narrows the definition of which investments are covered, excluding short term speculative portfolio investments.”⁵⁰

There are also a number of alternative ways that Australian investors can seek to protect their investments overseas, which negate the need for Australian BITs and investment protection provisions in trade agreements. These include:

- Insurance from the World Bank Multilateral Investment Guarantee Agency (MIGA);
- Political risk insurance offered by Export Finance Australia; and
- Private political risk insurance.

Given that Australian investors already have access to these alternative investment protection mechanisms, and in light of the potential negative impacts of BITs for the realisation of gender equality in developing countries, the Government is encouraged to reconsider the need to provide additional protections for investors in either BITs or trade agreements. ActionAid urges the Government to use this review process to consider alternative approaches to investment policy that are better aligned with its commitments to gender equality and sustainable development.

Recommendations

In light of the significant risks that ISDS pose to COVID-19 response efforts, ActionAid recommends that the Government:

- 1. Immediately suspend ISDS provisions for COVID-19 response measures.** Governments must not be restricted from, or face arbitration for, implementing legitimate and necessary policy responses to the pandemic. To ensure this, the government should immediately suspend ISDS provisions for COVID-19 response measures. The Government should also conduct a broader review of BIT provisions and suspend any provisions that could undermine the capacity for an effective health response to COVID-19.

⁴⁸ Trade Justice Movement (2017) Stepping Away from ISDS: Four alternatives to Investor-State Dispute Settlement, <https://www.tjm.org.uk/documents/briefings/Stepping-away-from-ISDS.pdf>

⁴⁹ Ibid

⁵⁰ Trade Justice Movement (2020) *Shaping Future UK Trade Policy: Investment Protection Provisions*, <https://www.tjm.org.uk/resources/briefings/shaping-future-uk-trade-policy-investment-protection-provisions>; See also Martin, J (2017) Brazil's cooperation and facilitation investment agreements (cfia) and recent developments, <https://cf.iisd.net/itn/2017/06/12/brazils-cooperation-facilitation-investment-agreements-cfia-recent-developments-jose-henrique-vieira-martins/>; Brauch, M (2020) The Best of Two Worlds? The Brazil–India Investment Cooperation and Facilitation Treaty, ISID, <https://cf.iisd.net/itn/2020/03/10/the-best-of-two-worlds-the-brazil-india-investment-cooperation-and-facilitation-treaty-martin-dietrich-brauch/>

As a part of the longer-term review of Australia's BITs, ActionAid recommends that the Government:

- 2. Terminate all of Australia's Bilateral Investment Treaties.** The Government should instead look to alternative mechanisms that are better able to advance gender equality and sustainable development. These include mechanisms that prioritise investment facilitation, narrow the scope of investor rights, exclude ISDS and include investor obligations in relation to human rights. The Brazil-India Cooperation and Facilitation Investment Agreement provides a strong model for this approach.

In the case that Australia chooses to retain the use of BITs, ActionAid recommends that existing agreements are renegotiated. All renegotiated agreements should:

- 3. Exclude Investor-state dispute settlement mechanisms.** BITs should instead be enforced through state-to-state dispute processes.
- 4. Be compliant with Australia's obligations under international law.** This includes specific commitments on women's rights and gender equality as well as obligations in relation to human rights, labour rights and environment standards.
- 5. Be subject to independent ex ante and ex post gender impact assessments (GIAs).** GIA's should be completed, along with broader health, social, economic and environmental impact assessments, for all investment agreements in order to identify and respond to any potential negative impacts on women's rights and gender equality. GIA findings must be taken into account and investment protection provisions that are found to negatively impact women should be mitigated or removed from the agreement.
- 6. Not encroach on governments' policy space.** Governments, particularly in developing countries, must not be prevented from use of the full suite of policy tools necessary to develop gender-responsive industry policies and achieve their development goals.

In addition to reforming its approach to investment policy. The Government is also encouraged to ensure that Australian companies operating overseas are held accountable for their obligations under the UN Guiding Principles on Business and Human Rights. To do this the Government should:

- 7. Place binding human rights obligations on Australian companies operating overseas.** These should include obligations to undertake human rights due diligence, adhere to the international human rights and environmental law that Australia is a signatory to and comply with the national laws of the host country.
- 8. Establish legal process for communities to seek redress.** Legally binding mechanisms should be established to enable communities who have been negatively impacted by the activities of Australian-owned investors to seek redress, building on the recent reform of the National Contact Point.
- 9. Support the process within the UN Human Rights Council to develop a binding treaty to regulate transnational corporations as part of Australia's foreign policy objective of supporting a rule-based international order.**

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