



**SUBMISSION TO THE DEPARTMENT OF FOREIGN  
AFFAIRS AND TRADE**

**REVIEW OF BILATERAL INVESTMENT TREATIES**

The Export Council of Australia

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## About the Export Council of Australia

### *What is the ECA?*

The ECA is a not-for-profit, member-driven organisation. Its purpose is to support Australian entrepreneurs and firms in undertaking international business.

### *What does the ECA do?*

The ECA supports its members through various efforts, including:

1. Providing updated information – Members are alerted to news and reports, including on government policies and regulations, as well as market conditions.
2. On-going capacity building – Exporters benefit from tailored training to build on their knowledge and skills, as global rules and practices change, trade patterns shift, and technologies develop.
3. Advisory services – Exporters can get immediate insight on pressing challenges and questions, such as on licensing, clearances, access to finance and trade agreements.
4. Creating ecosystems – Facilitating crucial business relationships help exporters progress opportunities, including with sourcing materials and new ideas, getting things stored and delivered, and channelling financial transactions.
5. Advocating on behalf of members – Members' views and concerns are articulated to government partners. Effective and sustainable solutions are best reached through collaboration with governments and other stakeholders.

### *Who are ECA's members?*

The ECA's membership covers a wide range of industries and sectors. Its members are individuals, small, medium and large enterprises.

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30 September 2020

## REVIEW OF BILATERAL INVESTMENT TREATIES

This submission focusses on the practical utility of Bilateral Investment Treaties, in particular the mechanism of Investor State Dispute Settlement, and the awareness of these topics among Australian small and medium sized exporters and investors. This submission does not address issues such as legal interpretations of provisions or the potential misuse of ISDS.

The preparation of this submission was informed by ongoing dialogue, including recent consultations, between the Export Council of Australia and its members and strategic partners. We believe it reflects the views of most Australian small and medium sized firms conducting international business.

In framing this submission, we sought insights into three broad questions:

- (i) Are 'Bilateral Investment Treaties' a factor in Australian firms choosing to do business or invest in a market or jurisdiction?
- (ii) How much awareness do Australian firms involved in international business have about the Investor State Dispute Settlement mechanism?
- (iii) What markets or trading partners are a priority for Australian exporters and investors?

### Bilateral Investment Treaties

We understand that Bilateral Investment Treaties are intended to “provide protections and greater certainty for Australian investors overseas (and foreign investors in Australia), including provisions to ensure non-discrimination, restrictions on expropriation of an investor's property, and fair and equitable treatment for investments”.<sup>1</sup>

However, in considering the practical usefulness of BITs, it is important to assess whether it is an actual factor in the front-end decision-making process, and whether it is utilised down the track when things go wrong for Australian businesses. When seeking to do business internationally, Australian firms have informed us that they consider the following:

- (i) Will the market provide growth opportunity for their product or service?
- (ii) Will the return on investment be sufficient?

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<sup>1</sup> <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties>

- (iii) How easy is it to do business in that country (including market entry)?
- (iv) Is there a reliable infrastructure and source of supply?
- (v) Can they trust the people they work with?
- (vi) What kind of legal system operates in that country?

Complementing these, Australian businesses assess the risks, such as economic, political, and sovereign risks.

Across the board, SME exporters and investors highlighted that BITs are not a factor when making decisions to invest in a foreign market. But they do consider the administrative and legal system of their target market, including whether it is similar to that of Australia, it is transparent, predictable and based on the rule of law.

Note that FTAs are a separate matter. Australian traders and investors have some awareness of FTAs, and sometimes this influences their decision-making, because FTAs provide market access. BITs, however, do not.

### **Investor State Dispute Settlement**

According to the Department of Foreign Affairs and Trade, “Australia has negotiated ISDS provisions over the past three decades to provide protection for Australian companies investing abroad. ISDS promotes investor confidence and can protect against sovereign or political risk. If a country does not uphold its investment obligations, an investor can have their claim determined by an independent arbitral tribunal, usually comprising three arbitrators.”<sup>2</sup>

Having an alternative mechanism to address investment disputes seems sensible. However, if ISDS does not provide an affordable or meaningful option for legal redress, then its usefulness is questionable. That is the conclusion Australian SME international investors have made about ISDS.

Their fundamental approach is that smart businesses should undertake appropriate research and preparation to avoid disputes in the first instance. If disputes do arise, the

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<sup>2</sup> <https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement>

hope is that insurance would cover the loss. If not, the potential loss will have to be weighed against taking legal action, which in most instances will be costly. Some Australian firms have decided to simply walk away and wear the cost of transactions that go awry. Others pursued legal action, but through regular channels, including the host country's courts. And they have found that approach sufficiently effective, if not also expensive.

Many Australian SMEs involved in doing business internationally are not aware of ISDS. Those who may have heard of it, do not understand the scope of its potential application.

When we attempted to describe ISDS in an objective manner, we generally got three reactions: One, is that it (ISDS) would seem to cater for larger companies. Two, they are unlikely to use it, but concede that it may be useful to maintain just in case. Three, they expect larger foreign entities investing in Australia to use ISDS, as more of them seek to establish operations here.

Underpinning these reactions is the view that ISDS will be onerously expensive and only adds value in countries where the legal and administrative regimes are capricious.

In discussions with those somewhat knowledgeable of ISDS, a number of interesting questions were raised, such as:

- (i) Could ISDS be utilised for losses resulting from geographical indications restrictions?
- (ii) Has the government considered whether foreign firms might increasingly use ISDS, due to losses arising from Covid restrictions?
- (iii) Could the government provide advice to Australian business when it seeks to weigh the merits of pursuing ISDS?

## **Priority markets**

Having consulted with a range of stakeholders, there is equally diverse views as to which countries we should seek to improve our investment relationship with. Countries of interest include Austria, Bahrain, China, Germany, Hong Kong, India, Kuwait, Malaysia, Mexico, Peru, Sri Lanka, UAE and the UK.

We recognise there may not be sufficient two-way trade and investment flows between Australia and some of these countries to justify stand-alone BITs or FTAs.

## Conclusion

We understand that investment protections or even ISDS might now be a regular feature of FTAs, and that there may be support for these from certain quarters (e.g. among larger companies from particular industries). However, among Australian SME exporters and investors, BITs or ISDS do not register, nor is a factor in their decision-making. We suspect that is reflected in the low utilisation of ISDS by Australian firms. As a caveat, SME exporters and investors have very limited resources or the bandwidth to think of such issues.

If the government intends to continue its efforts in investment protection, we would suggest the following:

- (i) Investment protection provisions should be contained in FTAs, rather than in separate BITs, to help build the profile of investment protection issues;
- (ii) Consideration of incorporating ISDS in bilateral agreements should be done on a case by case basis (as this may minimise the risk of misuse against Australia);
- (iii) Future BITs or efforts to improve investment protection should be targeted at countries/markets in which the rule of law is lacking;
- (iv) To be meaningful to investors, future BITs should be more about 'facilitating investments', including making it easier to access information, simplifying registration requirements, reducing thresholds for ownerships, as well as allowing special travel visas (for those on temporary work assignments);
- (v) DFAT must undertake an awareness building program on the benefits and potential application of investor protection provisions and ISDS among Australian SME traders and international investors.

The Export Council of Australia would be pleased to facilitate dialogue between the government, the Department of Foreign Affairs and Trade, and Australian SME exporters and international investors, to discuss BITs, investment protection issues and ISDS.