

Friends of the Earth Australia submission to DFAT's review of BITs

Friends of the Earth Australia welcomes DFAT's review of Australia's Bilateral Investment Treaties. We focus our submission on responding to DFAT's key questions and the most controversial and environmentally harmful aspect of BITs, the Investor State Dispute Settlement mechanism. We have also submitted to the inquiry a briefing on ISDS that we produced in 2018, which provides a more detailed examination of the issues.

Impact of BITs on flow of foreign direct investment

Evidence presented in academic studies, business surveys and governments' experience globally shows no or very limited impact of BITs on the flow of Foreign Direct Investment.¹ While some econometric studies find that investment treaties do attract investment, others find no effect at all – or even a negative impact. Qualitative research suggests that the treaties are not a decisive factor in where investors invest abroad. The Australian Government can learn from other national governments, who have undertaken similar BIT reviews to Australia, and have found:

- Former European Trade Commissioner Cecilia Malmström has stated that most studies showed no *'direct and exclusive causal relationship' between International Investment Agreements (IIAs) and Foreign Direct Investment.*²
- Xavier Carim, Deputy Director General of South Africa's Department of Trade and Industry stated, *'South Africa does not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, continues to receive investment from jurisdictions with which we have no BITs. In short, BITs have not been decisive in attracting investment to South Africa.'*³
- Brazil is the only country in Latin America that has never ratified a BIT that includes ISDS. Yet it receives the largest amount of FDI in the region.⁴
- Hungary is one of only two Central and Eastern European Union countries without BITs with the US. Yet, during the last 10 years, Hungary has been one of the biggest recipients of US FDI in the region.⁵

Moreover, the business community's response as presented in various large-scale surveys concludes that investment protection agreements are not a key determinant in deciding to invest abroad.

For example, according to a survey of top American multinationals 'the responses indicate a low level of familiarity with BITs, a pessimistic view of their ability to protect against adverse host state actions, and a low level of influence over FDI decisions'.⁶ In 2010 300 European companies interviewed about the relevance of investment treaties by the European Commission found that only 10 per cent had a working knowledge of these treaties, 40 per cent had some general awareness, and 50 per cent had no knowledge-at all.⁷

¹For an overview of the literature, see: Lauge Skovgaard Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence" in: K. Sauvant, ed., Yearbook on International Investment Law & Policy 2009/2010 (New York: Oxford University Press, 2010). http://works.bepress.com/lauge_poulsen/4

²Samuel Morgan, "Positive effects of TTIP tribunals for investment unclear", Euractiv., 16 September 2015, <http://www.euractiv.com/sections/trade-society/positive-effects-ttip-tribunals-investment-unclear-31766>

³Xavier Carim, "International Investment Agreements and Africa's Structural Transformation: A Perspective from South Africa", Investment Policy Brief, Number 4, August 2015, South Centre, http://www.southcentre.int/wp-content/uploads/2015/08/IPB4_IIAs-and-Africa%E2%80%99s-Structural-Transformation-Perspective-from-South-Africa_EN.pdf

⁴UNCTAD, Brazil, country profile. https://unctad.org/sections/dite_fdistat/docs/wid_cp_br_en.pdf

⁵Cecilia Olivet, Pietje Vervest, and Luuk Schmitz, "Central and Eastern European countries at the crossroads. Why governments should reject investment arbitration in TTIP", Transnational Institute, IGO, and Protect the Future, 2015, <https://www.tni.org/en/publication/central-and-eastern-european-countries-crossroads>

⁶Jason Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment?", 2011, 51 Virginia J Int'l Law, p429 <http://ssrn.com/abstract=1594887>

⁷European Commission, "Survey of the Attitudes of the European Business Community to International Investment Rules", TN Sofres Consulting on behalf of European Commission DG Trade, 2000 <http://trade.ec.europa.eu/doclib/html/111125.htm> and <http://trade.ec.europa.eu/doclib/html/111127.htm>

Another survey, carried out among political risk insurers (companies that assess the risk and provide insurance to operations of business overseas), established that few private risk insurers ‘find BITs of much relevance when determining the risk of investment projects’.⁸ Some quotes illustrate the point:

‘The existence of a BIT may provide us with comfort, but they are not specifically taken into account when we are considering investment projects.’ (UK political risk insurer);⁹

‘BITs can perhaps simplify our analysis... but in practice they are hardly ever decisive.’ (Dutch political risk insurer).¹⁰

Concerns about Australia's existing BITs

Friends of the Earth is deeply concerned about the social, environmental and sovereignty implications of the Investor State Dispute Settlement mechanism included in many of the BITs under review. Some of the key concerns outline in our attached briefing include:

ISDS is a secret, undemocratic and unaccountable process that undermines democracy and sovereignty. The ISDS mechanism enables foreign corporations to sue governments for almost any measure or environmental regulation that would harm their expected profits.

ISDS is frequently used to undermine and challenge public policies to protect the environment. For example over 40% of ISDS cases launched in 2016 were related to mining, quarrying and gas.¹¹ Some environment key related ISDS cases include, Vattenfall (Sweden) vs. Germany, Bilcon (US) vs. Canada and Gabriel Resources v. Romania.

ISDS undermines the government’s right to regulate and is a risk to taxpayer money. Canada, which has faced 26 known ISDS cases with claims of over \$9.2 billion, should act as warning to Australia of the dangers of this mechanism to developed legal systems.¹² Globally to date, over \$570 billion dollars has been claimed by transnational corporations and investors from states. There is a growing number of ISDS cases that challenge public policies to protect the environment, with currently over 1000 known cases registered.¹³

Clive Palmer’s threat to use the Singapore-Australia FTA to sue the Australian government shows that current changes in ISDS provisions to prevent forum shopping are not adequate.

The recent award of US\$5 billion to Australian company Tethyan against Pakistan under the Australian-Pakistan BIT highlights the enormous danger of the ISDS mechanism to sustainable development. This single award was larger than the entire \$4 billion of Australian Official Overseas Assistance budget 2019-20.¹⁴

BIT Renegotiation and termination

Friends of the Earth Australia recommends that:

- 1 Australia should renegotiate and amend its BITs under review to remove ISDS. If other parties do not wish to renegotiate, Australia should seek to terminate the agreements.

⁸Lauge Skovgaard Poulsen, “The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence”, Yearbook on International Investment Law and Policy 2009/2010, K. Sauvant, ed., Oxford University Press, 2010, p20. <http://ssrn.com/abstract=1685876>

⁹ Ibid

¹⁰ Ibid.

¹¹ UNCTAD, Investment Dispute Settlement Navigator, <http://investmentpolicyhub.unctad.org/ISDS>

¹² FoE Australia, Briefing The case for banning Investor State Dispute Settlement in Australia, 2018.

¹³ UNCTAD, ‘Investor–State Dispute Settlement Cases Pass the 1,000 Mark.’ 2020. <https://investmentpolicy.unctad.org/news/hub/1655/20200708-investor-state-dispute-settlement-cases-pass-the-1-000-mark-cases-and-outcomes-in-2019>

¹⁴ DFAT, 2019-20 Australian aid budget at a glance; <https://www.dfat.gov.au/about-us/corporate/portfolio-budget-statements/Pages/2019-20-australian-aid-budget-at-a-glance>

- 2 Australia should take a consistent approach to the review of its BITs, based on its commitments to the right of governments to regulate in the public interest and its commitments to human rights, labour rights and environmental standards as expressed in UN and ILO conventions and agreements.
- 3 The review should recognise the impact on aid and development budgets of forum shopping and excessive awards made to Australian companies against developing countries, and develop policies to prevent this.
- 4 The review should recognise that current revised clauses in ISDS provisions are not effective in protecting the rights of governments to regulate and the exclusions only prevent cases in a narrow range of areas, omitting important public policy areas like the environment, workers' rights and Indigenous land rights.
- 5 The review should acknowledge the danger of ISDS cases being taken against a wide range of governments' actions during the COVID-19 pandemic, recognised by legal experts and by UNCTAD, the body responsible for monitoring ISDS cases.¹⁵ The Government should follow the advice of legal experts to make arrangements in the short-term with BIT partners to exclude cases against pandemic-related actions and to review BITs to exclude ISDS.

¹⁵ UNCTAD, 'From global pandemic to prosperity for all: avoiding another lost decade', 2020. <https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2853>