



# MINERALS COUNCIL OF AUSTRALIA

## SUBMISSION TO THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE REVIEW OF AUSTRALIA'S BILATERAL INVESTMENT TREATIES

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## EXECUTIVE SUMMARY

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- The investor protections established in Bilateral Investment Treaties (BITs) are an important part of the global trade and investment architecture which has supported improved living standards across the globe
- Bilateral Investment Treaties implemented as part of agreements entered into by Australia over recent decades display a significant range of provisions.
- Provisions in older-style investment agreements are sometimes criticised for their broad drafting. Such agreements should be regarded as stepping stones to more comprehensive international agreements that include modern investor protections and deepen economic ties with partner countries
- The Australian Government's review of Australia's 15 BITs should ensure agreements reflect modern provisions while prioritising investment certainty, broadening economic partnerships and reinforcing the rules-based international order in the current volatile global investment environment.

The MCA supports:

- Updating older agreements in line with model terms where there is an opportunity to do so in the context of deepening economic engagement with partner economies
- The pursuit of modern agreements that prioritise investment certainty, economic partnerships and reinforce the rules based international order. This is particularly important in the current volatile global trade and investment environment
- The Australian Government's continued commitment to international policy processes such as Working Group III with BIT reform considered in the context of those processes
- The principles underlying modern ISDS provisions, such as those included in IA-CEPA, which include safeguards preserving the ability of governments to regulate for legitimate public welfare objectives and clarify dispute resolution procedures.

Australia's openness to trade and investment underpins the minerals industry's ability to continue to deliver on the substantial contribution it has made to national prosperity over the past 20 years.

Trade and investment liberalisation enables growth, unlocking Australia's comparative advantage in mining by providing access to markets, capital and technology. Trade and investment support jobs and higher wages, allowing relationships to develop that grow and deepen cultural and social understanding and a willingness to work together on resolutions to common global problems.

The COVID-19 pandemic has accelerated tendencies towards nationalism and protectionism, changing the global trade and investment environment in which Australia's mining businesses compete for capital, secure supplies and supply the industries with whom they trade.

The rising tide of protectionism has led to a retreat from multilateralism eroding trust among nations while leading national governments to implement more stringent foreign investment screening, implement trade barriers and weaken efforts to negotiate international agreements.

The Australian minerals sector, having safely maintained production while supporting workers and communities through the global pandemic, is ready to support the challenge of national recovery. Australia has more than 106 mining projects that have completed feasibility studies. With the investment of a combined \$50 billion, these projects would create more than 32,000 construction jobs and 22,000 ongoing operating jobs across Australia.

Reforms that expand trade and investment opportunities include those that enhance training and skills, ensure a competitive taxation system, maintain competitive energy prices, support the discovery of new mining regions and enable businesses to adapt and grow are vital to support new jobs.

Mining is a capital intensive sector, so it is imperative that Australia's regulatory and investment policy settings continue to facilitate access to international investment. This will both sustain production levels in the large projects in which Australia is a global leader and encourage new investment in the next wave of small and medium sized projects in gold, base metals and rare earths extraction and processing.

The transfer of skills, capabilities and technologies closely associated with foreign direct investment (FDI) and trade is especially important to ensuring Australian mining maintains its edge in innovation, productivity growth and global competitiveness.

In addition to enabling inward investment, the Australian mining sector relies on its ability to access stable investment environments in overseas markets. This is increasingly important to Australia's Mining Equipment and Technology Services (METS) sector, which has become a significant source of export income in its own right, contributing approximately \$90 billion annually to the economy with yearly exports of at least \$27 billion.<sup>1</sup>

Australia's active Bilateral Investment Treaties (BITs), negotiated between the late 1980s and early 2000s are an important component of the trade and investment agreement architecture that gives Australian mining and METS businesses the confidence to form strong customer-supplier relationships in partner countries.

BITs and the investor protections they provide counterbalance the tendency of some governments, especially in times of political and economic uncertainty, to engage in resource nationalism or implement discriminatory or protectionist measures that adversely affect the global business environment.

Australia has entered into 21 BITs of which 15 are currently in force (Argentina, China, Czech, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay).<sup>2</sup>

The remainder – with the exception of the Australia-India BIT – have been replaced by agreements which reflect a much more sophisticated trade and investment relationship. The investment protections that existed for investors of both countries have been modernised and included in comprehensive bilateral or multilateral agreements which better reflect the contemporary economic, legal, investment and trade relationships between Australia's partners.

These agreements include modern investor-state dispute settlement (ISDS) terms.

The MCA supports this approach, which recognises that BITs can be an important stepping stone towards deepening economic ties and trade links with partner countries, delivering mutual economic benefits.

- Australia and Hong Kong agreed to terminate the Agreement upon entry into force of the Investment Agreement between Australia and the Hong Kong Special Administrative Region of the People's Republic of China (the AU-HK Investment Agreement) on 17 January 2020<sup>3</sup>
- India unilaterally terminated the agreement on 23 March 2017. The provisions of the Agreement will continue to apply to investments made on or before 22 March 2017 for a period of 15 years from the date of termination of the Agreement<sup>4</sup>

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<sup>1</sup> Austrade, [Mining equipment, technology & services](#) (accessed September 2020).

<sup>2</sup> Department of Foreign Affairs and Trade, [Review of Australia's Bilateral Investment Treaties](#), August 2020 (accessed September 2020)

<sup>3</sup> <https://www.dfat.gov.au/trade/agreements/in-force/a-hkfta/Pages/the-investment-agreement-text>

- Australia and Indonesia agreed to terminate the 1993 agreement (along with its 15 year survival clause contained in Article XV). Protections for Australian investors in Indonesia and Indonesian investors in Australia are available under IA-CEPA, which entered into force on 5 July 2020
- Australia and Mexico agreed to terminate the 2007 agreement upon entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in December 2018
- Australia and Peru agreed to terminate the 1997 agreement upon entry into force of the Peru-Australia Free Trade Agreement (PAFTA) on 11 February 2020
- Australia and Vietnam agreed to terminate the 1991 agreement upon entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) on 14 January 2019.

There is a continued need for investor protections to both manage sovereign risk and the emerging risks associated with anti-globalism and protectionism. The ability to operate a business in a common and evenly applied legal system remains an important step in the path to trade and investment co-operation.

With Australia currently undertaking a range of reforms that have the potential to impact the foreign investment environment and given the current global volatility and uncertainty for investment caused by the pandemic, the Australian Government's review of Australia's BIT's should prioritise maintaining investment certainty, broadening economic partnerships and reinforcing the rules based international order.

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<sup>4</sup> India's unilateral termination of the agreement means that investments made on or after 23 March 2017 will not be covered. <http://www.austlii.edu.au/au/other/dfat/treaties/2000/14.html>

## INTERNATIONAL INVESTMENT AND AUSTRALIAN MINING

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- Mining is Australia's largest source of export revenue generating \$289 billion of export revenue (59 per cent of total export revenue) and directly or indirectly supporting 1.1 million jobs
- Foreign investment has been key to maintaining Australia's global competitiveness in mining and will be a vital part of economic recovery
- Competition for foreign investment is becoming more intense as Australia's traditional competitors seek to develop their resource bases
- The government's review of Bilateral Investment Treaties should ensure there is certainty and stability for international investment and continued development of bilateral and multilateral frameworks supporting a global rules-based order for trade and capital flows.

Mining is a key industry for Australia. It is Australia's largest source of export revenue, provides highly-paid, highly-skilled jobs and pays billions of dollars to governments each year in taxes and royalties.

In 2019, the resources sector generated \$289 billion of export revenue (59 per cent of total export revenue) and invested \$34 billion in new capital expenditure. The Australian minerals industry paid an estimated \$39.3 billion in company tax and royalties in 2018-19 and accounted for approximately 30 per cent of all company tax in 2018-19.<sup>5</sup>

The resources sector directly employs approximately 240,000 people in highly skilled roles, mostly in rural and regional Australia. Together with the mining equipment, technology and services (METS) sector, mining accounts for approximately 15 per cent of Australia's gross domestic product and supports 1.1 million jobs – around 10 per cent of Australia's total workforce.

Australia's resources sector is one of the most productive industries in the world, according to the Productivity Commission.<sup>6</sup> Australia's strong comparative advantage in resources exports is no accident. It has been won through visionary investment over the last two decades, through the careful and deliberate development of trading and investment relationships across national borders and through the hard work and ingenuity of the industry's workforce.

The minerals industry responded to the COVID-19 pandemic by using its strict approach to protecting its workforce for the implementation of a strict health and hygiene regime, protecting workers and the communities in which the industry operates, both in Australia and in other countries.

Throughout the pandemic the minerals industry has maintained essential services, supported community needs and maintained production to deliver the substantial royalties and company tax to fund health, education and other critical services. This could not have been achieved without foreign investment-funded infrastructure and productive capacity and trade-driven jobs, income and productivity.

### **There is intense competition for the foreign investment relied on by the Australian economy**

The critical importance of international investment to maintaining and expanding Australia's comparative advantage in resources exports cannot be underestimated. As well as driving job creation and direct economic benefits, international investment introduces skills, innovation, efficiency and new technological capabilities and links businesses in to global supply chains.

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<sup>5</sup> Deloitte Access Economics, *Estimates of royalties and company tax accrued in 2018-19*, report prepared for Minerals Council of Australia.

<sup>6</sup> Productivity Commission, [Shifting the Dial: 5 Year Productivity Review: Supporting Paper No. 1: Productivity and Income – The Australian Story](#), Canberra, 3 August 2017, released on 24 October 2017, pp. 24, 26.

The mining industry needs at least \$7 billion of investment a year to maintain the existing stock of production, sustaining jobs particularly in regional areas and supporting economic activity.

The positive impact of foreign investment in Australian mining is demonstrated by the resources investment boom. Between 2001 and 2018 the value of foreign direct investment (FDI) in Australia's resources sector increased nearly ten-fold, from \$36.8 billion to \$365.5 billion.<sup>7</sup>

While these levels of FDI have tapered, Australia remains a net importer of capital, requiring international investment to fill the gap between domestic saving and investment. This capital shortfall has been on average about 4 per cent of GDP over the last decade.

The Reserve Bank of Australia has estimated that around \$100 billion will need to be spent on sustaining capital expenditure (capex) for coal, iron ore and LNG over the five years from 2018.<sup>8</sup> This will maintain the existing stock of production, sustain jobs particularly in regional areas and support economic activity.

With the global economic downturn caused by COVID-19, international competition to attract global capital is becoming more intense. UNCTAD forecasts that global FDI flows will decrease by up to 40 per cent in 2020 from their 2019 value, bringing FDI flows to their lowest in 15 years, with a further 5 to 10 per cent reduction projected in 2021.<sup>9</sup>

Australia is particularly exposed to tightening international investment flows, given that its traditional sources of foreign investment – the United States, the United Kingdom and the European Union – are the economies which will contract the most as a result of COVID-19.<sup>10</sup>

Moreover, investment into Australia from China (one of the few economies still growing according to the IMF) has fallen dramatically for three consecutive years from a peak of \$15.8 billion in 2016 to \$2.5 billion in 2019.<sup>11,12</sup>

These factors combined with Australia's comparatively high corporate tax burden and the impending imposition of further regulatory restrictiveness in Australia's foreign investment screening framework will weigh on Australia's competitiveness as a destination for investment.

### **Improving investment certainty for Australian businesses is one way Australia can take action to support jobs and the economy**

In the context of increased competition to attract foreign investment and tightening economic conditions reducing global investment flows, government policy will play a major role in determining whether the mining sector can contribute to the post-pandemic recovery.

Investment certainty is particularly important for mining investors. Mining projects are typically capital intensive and long-term propositions, involving high-risk exploration outlays, large upfront capital commitments, long-life assets, and long lead times to profitability. The exploration phases preceding start-up and production are lengthy and costly, and there is no income during these phases.

The scale of operations can require high replacement and incremental investment to maintain production and keep people in jobs, while market prices for the commodities produced can be highly volatile. Mining activities generally get more costly as a project matures because the resource becomes less accessible. Mine closure and rehabilitation incur large costs after income generation has ceased.

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<sup>7</sup> Australian Bureau of Statistics, [International Investment Position, Australia: Supplementary Statistics, 2018](#), ABS cat. no. 5352.0 released 8 May 2019.

<sup>8</sup> Reserve Bank of Australia, 'Mining Investment Beyond the Boom', Bulletin – March 2018, p10.

<sup>9</sup> UNCTAD, [World Investment Report 2020](#), Geneva, p 12.

<sup>10</sup> International Monetary Fund, [World Economic Outlook](#), Washington DC, June 2020, p 7.

<sup>11</sup> Ibid.

<sup>12</sup> The Australian National University, Media Release 'Chinese investment in Australia plummets to \$2.5 billion' 11 Sept 2020.

Australia already has over 106 mining projects that have completed feasibility studies. The combined \$50 billion investment associated with these projects could create more than 32,000 construction jobs and 22,000 ongoing operating jobs across Australia.

Market conditions will ultimately determine how many of these opportunities progress to become operational mines, however, policy reforms in key areas will improve the prospects of many of these projects and help to create more highly-paid jobs across the mining and METS sector.

In this context the Australian Government should approach its review of Australia's BITs to prioritise finding ways to enhance or maintain certainty and stability for international investment.

**Australian investment abroad brings market access, improved capabilities and broadens relationships and supports living standards in emerging economies**

Foreign Direct Investment in partner economies, including by Australia's mining and METS businesses can bring a range of benefits to the host economy, including supporting enhance growth and innovation, creating quality jobs, developing skills and human capital, and raise living standards and environmental sustainability, playing a crucial role in making progress toward the Sustainable Development Goals.<sup>13</sup>

Domestic firms and workers in emerging economies can, through the investments made by Australia's world leading mining sector, become more integrated into global value and supply chains.

Outbound investment also improves access to information and contacts in the recipient country, improving access to markets. Over time, operations in another country can build rapport and mutual good will. This deepening of a bilateral relationship can have long term economic benefits as the knowledge of how to do business between countries is transferred.

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<sup>13</sup> OECD, [FDI Qualities Indicators: Measuring the sustainable development impacts of investment](#), 23 October 2019.



## AUSTRALIA'S BILATERAL INVESTMENT TREATIES

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Australia's bilateral investment treaties remain relevant to Australian mining. They provide certainty and protection for Australian investors overseas and foreign investors in Australia. They include provisions enshrining the principle of non-discrimination; protections to guard against sovereign risks associated with the expropriation of property; investor-state dispute settlement (ISDS) clauses; and commitments to facilitate the movement of persons for investment purposes.

In addition they give effect to national treatment – the principle that foreign and domestic businesses should be treated equally under the law.

Of the 15 nations with which Australia has BITs in force, Australian mining companies have the most substantial investments in Papua New Guinea (PNG), with large gold mines employing thousands of locals, supporting local suppliers and businesses and contributing to public infrastructure and services, such as health services, electrical power and water. Australian mining companies also have significant operations in Egypt and the Philippines.

Australia's minerals companies with major investments in PNG invest heavily in maintaining strong, positive relationships with authorities and with local communities. This reflects modern mining practice, which is increasingly focused on long-term community partnerships and strategic investment to support sustainable long-term development outcomes.

However, resources nationalism and anti-mining sentiment present ongoing barriers and risk to mining and METS businesses with operations in across South-East Asia.<sup>14</sup> In relation to PNG, 45 percent of mining companies surveyed in the Fraser Institute's annual survey of investment attractiveness responded that the legal system (including processes that are fair, transparent, non-corrupt, timely and efficiently administered) was either a strong deterrent to investment or stated that they would not pursue investment due to this factor.<sup>15</sup>

The investment protections in BITs, while rarely used, provide some protection and comfort for mining companies making long term investments, mitigating some of the sovereign risk associated with resource nationalism.

ISDS clauses, which allow investors to seek mediation and arbitration where they claim that a government has breached the investment commitments it has made under the agreement, are an important component that provides for their enforceability.

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<sup>14</sup> M Adams, N Brown and R Wickes, '[New Frontiers South and East Asia](#)' report to the Minerals Council of Australia, December 2017, p. 9.

<sup>15</sup> Fraser Institute, 'Annual Survey of Mining Companies 2019' Table A5.

## Case study: BITs remain relevant to mitigating resources nationalism

Barrick (Niugini) Limited (BNL) is the owner and operator of the Porgera gold mine in PNG. BNL is a joint venture between Barrick Gold (47.5 per cent), Zijin Mining (47.5 per cent), the Enga Provincial Government (2.5 per cent) and the Porgera landowners (2.5 per cent).

In April 2020 the government of PNG denied an application from Barrick Gold to extend the company's 20-year Special Mining Lease. PNG's Prime Minister, James Marape elected on a platform of resource nationalism, announced that the basis of the decision was that it was 'in the best interests of the state, especially in light of environmental damages, claims and resettlements issues'. Shortly thereafter PNG granted a Special Mining Lease to a wholly state-owned enterprise, Kumul Minerals Holdings (KML). Barrick initiated a process within PNG for judicial review of the decision, which was dismissed by PNG's National Court.

Australia's Bilateral Investment Treaty with PNG includes provisions restricting the parties from taking 'measures of expropriation, nationalisation or any other dispossession' against the investments of the companies or nationals of the other party, except where the measures are undertaken under due process of law; are non-discriminatory; and are accompanied by the payment of prompt, adequate and effective compensation.

BNL has stated it considers the PNG Government's refusal of its application to extend its mining lease as 'tantamount to nationalisation without due process' and initiated a claim against the government of PNG through an Australian-listed investor in the project. Without this mechanism, Barrick would have limited recourse against the government of PNG.

## BITs are an important step on the path to stronger bilateral trade and investment relationships

Foreign investment by Australian firms largely flows to countries with similar legal and cultural environments – such as the US, UK, Canada and New Zealand. Those four countries make up more than half the stock of Australian investment overseas. However, the fastest-growing economies and the opportunities for growth are primarily elsewhere, in places like China, India and South-East Asia.

But Australian companies face significant obstacles to investment in places with different legal frameworks to our own.

BITs play an important role in bridging the divide between countries which can both benefit from better trade and investment relationships. In several cases BITs have preceded more comprehensive agreements, such as with Vietnam (replaced by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership – CPTPP), Peru (replaced by a bilateral FTA) and Indonesia (replaced by the Indonesia-Australia Comprehensive Partnership Agreement (IA-CEPA) which includes modern public interest safeguards in its investment chapter.

The MCA notes that on 5 August 2020 the Australian Government announced a Comprehensive Strategic and Economic Partnership (CSEP) with PNG, providing an enduring and overarching framework for deepening bilateral cooperation across a number of areas of cooperation including trade and investment.

As part of this announcement the Australian Government committed to reviewing and modernising the Australia-Papua New Guinea Bilateral Investment Treaty (1990) 'to enhance business confidence and investor certainty, which should also benefit Micro Small and Medium Enterprises (MSMEs)'. The focus on enhancing business confidence and investor certainty is welcome, and the Australian minerals sector encourages the Australian Government to pursue efforts to build more comprehensive trade, investment and economic engagement with the government of PNG.

## **ISDS clauses provide certainty for Australian investors and investors in Australia**

Investor-State dispute settlement (ISDS) mechanisms play an important role in protecting the rights and interests of foreign investors and promoting transnational investment. ISDS contributes to the resolution of disputes based on the rule of law, avoids economic disputes between investors and host countries escalating into political conflicts between nations, and supports a business environment conducive to growth for many developing nations.

The inclusion of ISDS provisions in trade and investment agreements has been the subject of public debate, based on claims that the provisions might allow foreign investors to force outcomes that compromise the ability of governments to regulate in the public interest.

Many of these claims are based on criticisms of investment disputes under provisions in agreements to which Australia is not a party, such as the North American Free Trade Agreement (NAFTA).

It is also important to observe that ISDS provisions in agreements to which Australia is a party do not enable wide-ranging rights for foreign investors to overturn domestic laws and regulations. While older ISDS clauses in BITs tend to be drafted broadly and do not include the same safeguards as modern clauses, they do not present a significant challenge to sovereignty. For example, in all cases the remedy for breach is compensation for loss of the investment – not a change to the law.

This is also borne out by the Australian experience with ISDS clauses. In the more than 30 years Australia has been subject to these provisions, no Australian law, regulation or public policy has had to be changed due to ISDS.

In fact, in all that time under all those agreements, there have only been two ISDS claims against Australia. The first of these claims was the Phillip Morris challenge to Australia's tobacco plain packaging legislation under the 1993 Australia-Hong Kong Investment promotion and Protection Agreement. This claim was unsuccessful and legal costs were awarded against Phillip Morris.<sup>16</sup>

The second claim was initiated under the Australia-United States Free Trade Agreement (AUSFTA) by APR Energy and a number of other US investors.<sup>17</sup> This case involved a commercial dispute arising out of the ANZ Bank's alleged illegal seizure of the claimants' turbines for power generation, which were leased by the claimants to Forge Group prior to its insolvency and recovered by the ANZ Bank as property for the payment of the Group's debt, as well as an Australian court decision to the claimants' detriment. The Australian Government in its response noted that Australia and the United States had made a clear public policy decision to not include investor-state dispute settlement in the AUSFTA. APR Energy dropped its claim in April 2019.

In contrast, the benefits of ISDS provisions in contributing to investment certainty investments by Australian companies in partner countries are substantial. For the mining sector, these provisions are important for creating the certainty needed to support outbound investment because of their capacity to reduce sovereign and political risk and provide greater certainty for what can be millions or billions of dollars of capital.

Since 2010 at least nine disputes in the public domain have been initiated by Australian claimants under investor-state dispute settlement clauses. All of these involve mining rights and investments, and six were initiated under BITs (see Table 1). As alternative dispute resolution methods are usually confidential, it is difficult to collect accurate data on their use. However, data from institutions such as

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<sup>16</sup> Permanent Court of Arbitration, *Phillip Morris Asia Ltd v Commonwealth of Australia*, Final Award Regarding Costs, 8 Mar 2017.

<sup>17</sup> *Power Rental Asset Co Two LLC (AssetCo), Power Rental Op Co Australia LLC (OpCo), APR Energy LLC v. the Government of Australia*, UNCITRAL.

the International Centre for Settlement of Investment Disputes (ICSID) suggest that they are not often used.<sup>18</sup>

**Table 1: Public disputes initiated by Australian claimants under Australia’s BITS**

Case	BIT	Summary of dispute
Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia (2012)	Indonesia - UK Australia - Indonesia	Claims arising out of the unilateral revocation by the Government of mining licenses in which the claimants held interests.
Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan (2012)	Australia - Pakistan	Claims arising out of the decision by the Pakistani province of Balochistan to refuse the application by claimant’s local operating subsidiary for a mining lease in respect of the Reko Diq gold and copper site.
White Industries Australia Limited v The Republic of India	Australia - India BIT	Claims arising out of alleged judicial delays by the Government of India that left the claimant unable to enforce an ICC award for over nine years concerning a contractual dispute with Coal India, a State-owned mining entity.
Barrick (PD) Australia Pty Ltd (wholly owned subsidiary of Barrick Gold Corp (Canada)) v Independent State of Papua New Guinea	Australia - Papua New Guinea	Claims arising from the PNG government’s refusal to extend its 20-year special mining lease over the Porgera Gold Mine.
Emerge Gaming Ltd and Tantalum International Ltd v Arab Republic of Egypt (2018)	Australia - Egypt	Claims arising out of the Egyptian authorities’ allegedly illegal measures to gain control of the claimants’ licences for the exploitation of a tantalum and tin mine.
Prairie Mining v Republic of Poland	Australia - Poland	Claims arising from delays in approvals from the Polish Government in relation to two coal mines (Jan Karski and Debiensko).

Source: UNCTAD Investment Policy Hub (Accessed September 2020); Department of Foreign Affairs and Trade.

### Opportunities for the Australian Government to work through international institutions

The COVID-19 pandemic has slowed down the pace of treaty making, with a number of negotiating rounds for BITS as well as bilateral summits cancelled or postponed. This includes the postponement of the 39<sup>th</sup> session of the United Nations Commission on International Trade Law Working Group III on the reform of ISDS, which is now scheduled for 5-9 October 2020.

The Australian Government has not yet made a public submission to Working Group III. Consideration should be given to participating in this process to represent Australia’s interests in maintaining a robust system of investor protections to support investor confidence.

UNCTAD has observed that ISDS clauses have come into play in relation to policy responses taken by governments to address the economic impact of the COVID-19 pandemic.<sup>19</sup> While the pandemic has highlighted the need to ensure governments retain the flexibility to initiate public health measures to combat the spread of the virus, a balance must be struck to ensure the increased regulatory action does not undermine investment certainty under the guise of public health regulation.

<sup>18</sup> United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-ninth session, Note by the secretariat (A/CN.9/WG.III/WP.190) ‘Possible reform of investor-State dispute settlement (ISDS) - Dispute prevention and mitigation - Means of alternative dispute resolution’, 15 January 2020, p. 11.

<sup>19</sup> UNCTAD, Investment Policy Monitor, [‘Investment Policy Responses to the COVID-19 Pandemic’](#), 4 May 2020.

The MCA supports the continued modernisation of ISDS provisions, including those found in bilateral investment treaties, to ensure there continues to be public confidence in these agreements and that they reflect contemporary expectations.

However, an examination of the history of disputes emerging under these agreements shows clearly that contrary to the claims made in some public campaigns, there is no threat to Australia's sovereignty arising from these agreements.