



REVIEW OF AUSTRALIA'S BILATERAL INVESTMENT TREATIES

The Government is reviewing the bilateral investment treaties (BITs) to which Australia is a party. The Department of Foreign Affairs and Trade (DFAT) is now seeking submissions from any interested party to inform this review. This discussion paper sets out, for context, some background, possible policy options and suggested questions for consideration to assist people to frame their submissions. This is not provided to limit input, and submissions going beyond these parameters are most welcome.

BACKGROUND

Currently, Australia has BITs in force with the following partners:

- (1) [Argentina](#) (date of entry into force: 11 January 1997);
- (2) [China](#) (date of entry into force: 11 July 1988);
- (3) [Czech Republic](#) (date of entry into force: 29 June 1994);
- (4) [Egypt](#) (date of entry into force: 5 September 2002);
- (5) [Hungary](#) (date of entry into force: 10 May 1992);
- (6) [Laos](#) (date of entry into force: 8 April 1995);
- (7) [Lithuania](#) (date of entry into force: 10 May 2002);
- (8) [Pakistan](#) (date of entry into force: 14 October 1998);
- (9) [Papua New Guinea](#) (date of entry into force: 20 October 1991);
- (10) [Philippines](#) (date of entry into force: 8 December 1995);
- (11) [Poland](#) (date of entry into force: 27 March 1992);
- (12) [Romania](#) (date of entry into force: 22 April 1994);
- (13) [Sri Lanka](#) (date of entry into force: 14 March 2007);
- (14) [Turkey](#) (date of entry into force: 29 June 2009);
- (15) [Uruguay](#) (date of entry into force: 12 December 2002)¹.

These BITs include rules to promote and protect two-way investment between the respective bilateral treaty partners. These investment rules provide greater certainty for Australian investors overseas (and foreign investors in Australia), including provisions to ensure non-discrimination as well as fair and equitable treatment for investments, and restrictions and conditions on expropriation of property.

Like other investment treaties negotiated during the same period, these Australian BITs contain relatively broadly drafted provisions and do not contain the explicit safeguards generally included in more modern treaties, such as Australia's modern Free Trade Agreements (FTA) investment chapters. More broadly drafted provisions in BITs have been seen to be open to an inconsistent and overly broad range of interpretation by tribunals.

There has been public debate about whether Investor-State Dispute Settlement (ISDS) should be available to foreign investors and about the appropriate balance when ISDS is included in Australia's

¹ Australia and Uruguay have agreed to terminate this BIT upon entry into force of the [updated Agreement](#) between Australia and Uruguay on the Promotion and Protection of Investments, which was signed on 5 April 2019 but has not yet entered into force.



FTAs and BITs. In December 2016, DFAT commenced negotiations to update the 2002 [Uruguay BIT](#) to replace its broadly drafted older-style provisions with modern provisions, including explicit procedural and substantive safeguards. Since the Uruguay BIT update, there have been further developments in ISDS cases as well as a continuing evolution of Australia's FTA treaty practice.

Australia has terminated the following BITs in recent years and replaced them with modern investment chapters in FTAs:

- Mexico - terminated on 30 December 2018, following the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ([CPTPP](#)) between Mexico and Australia (subject to transitional arrangements);
- Vietnam - terminated on 14 January 2019, following the entry into force of the [CPTPP](#) between Vietnam and Australia (subject to transitional arrangements);
- Hong Kong - terminated on 17 January 2020, following the entry into force of the [Hong Kong FTA package](#) (not subject to transitional arrangements);
- [Peru](#) - terminated on 11 February 2020, following entry into force of the Peru-Australia Free Trade Agreement (subject to transitional arrangements);
- Indonesia – terminated on 6 August 2020, following entry into force of the [Exchange of Letters](#) terminating the Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investment, which was signed on 6 February 2020 (not subject to transitional arrangements).

POLICY OPTIONS

Review and reform of Australia's BITs can aim to influence the interpretation of key obligations and introduce modern safeguards. A single approach may not suit all situations; a range of options exists, and could be deployed depending on individual circumstances. These options include:

- full renegotiation of a BIT;
- amendment of a BIT;
- negotiation and adoption of a Joint Interpretative Note;
- adoption of a Unilateral Interpretive Note;
- termination of a BIT
- continuation of a BIT;
- replacement of a BIT with an FTA chapter that may or may not include ISDS.

This list is not intended to be exhaustive; there may be other options available.



A range of safeguards and modern provisions could be included in a revised BIT or FTA investment chapter. Examples from Australia's modern FTA practice include:

- reiteration of the Government's right to regulate;
- exclusion of ISDS claims against public health measures, including tobacco control measures, the Pharmaceutical Benefits Scheme and Medicare;
- exclusion of ISDS claims that are frivolous or manifestly without merit;
- enabling a case to be blocked by an investor without substantial business activities in Australia;
- preventing abuse of process by allowing claims to be dismissed at a preliminary stage;
- limiting forum shopping; and
- providing detailed rules on ethics and conflict of interest of arbitrators.

Whether or not Australia would be able to pursue a particular option will also be dependent on the bilateral treaty partner. Moreover, different bilateral treaty partners may warrant different approaches. Submissions may wish to consider the possible relevance of factors specific to each BIT and each bilateral investment relationship, which could include:

- the nature of the foreign investment relationship (including the quantum and directional flow of the foreign investment);
- the dominant type of foreign investment (foreign direct investment or portfolio investment);
- the legal risk associated with each BIT, taking account of specific provisions and the bilateral investment relationship;
- the views of the bilateral treaty partner regarding full re-negotiation, amendment, continuation or termination of the specific BIT.

QUESTIONS FOR CONSIDERATION

1. In your view, are the existing BITs of benefit to Australian investors operating in these overseas markets? Please comment on their utility.
2. In your view, does the existence of a BIT impact on the flow of foreign direct investment and /or portfolio investment? Please comment, if possible, both generally and with reference to specific existing BITs.
3. Do you have concerns about Australia's existing BITs? If so, please comment on any specific provisions of concern.
4. If Australia took the approach of re-negotiating at least some of the existing BITs, do you have views on which clauses should be included in a renegotiated agreement?
5. In your view, would any concerns you have about any of Australia's existing BITs warrant termination of one or more BITs? Please comment, as relevant, both generally and with reference to specific existing BITs.

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6. There are various models and approaches that different countries take in relation to international investment agreements. For instance, some models are concerned with investment facilitation rather than dispute resolution. In your view, is there a particular approach that is suited to meeting the interests of Australian industry and business?
 7. In light of the various policy options available,² what approach do you consider should be taken? Please comment, if possible, both generally and with reference to specific existing BITs.

CALL FOR SUBMISSIONS

Stakeholders are invited to consider and comment on any of the specific questions raised above and on any related questions. Stakeholders are also invited to consider and comment on the commercial, economic, regional and other impacts that could be expected to arise from the review of Australia's older-style BITs.

Written submissions may take several forms - from a short email through to a more comprehensive analytical paper.

Submissions and confidentiality

All submissions will be treated as public and may be published on the DFAT website, unless the author specifically requests that the submission, or part thereof, be handled in confidence. Unless otherwise requested, DFAT will publish the submission and the name of the submitting organisation or individual on its website. DFAT will not edit submissions prior to publishing. All details that have been included in a submission, including contact information, will be available on the DFAT website.

Where submitters request that all, or part, of a submission be treated as confidential, they should mark that material clearly as 'IN CONFIDENCE' and provide it in a separate attachment to non-confidential material.

By making a submission, the author(s) agree to their submission, or part thereof, being used by the Commonwealth of Australia for Commonwealth purposes.

Submissions may be lodged as follows:

By email: BITreforms@dfat.gov.au

By mail: Bilateral Investment Treaty Reform Coordinator
Regional Trade Agreements Division
Department of Foreign Affairs and Trade
RG Casey Building, John McEwen Crescent
Barton ACT 0221

Submissions should be lodged no later than COB **Wednesday, 30 September 2020**.

² The policy options identified in this paper are illustrative only and do not purport to be exhaustive.