

Question on Notice from Joint Standing Committee on Treaties:

Inquiry into the Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments

Table setting out key explicit public policy reservations, exceptions and carve-outs in Australia’s international investment agreements containing investor-state dispute settlement (ISDS)

Australia currently has 18 older-style bilateral investment treaties (BITs) in force, which were signed between 1988 and 2009. At the time those BITs were signed, like other countries, Australia’s investment treaty practice was different from what it is now.

These older-style BITs are broadly drafted and do not contain the same explicit substantive and procedural safeguards found in modern investment treaties. However, there are implicit safeguards by virtue of customary international law, such as the ‘police powers doctrine’.

Since those older-style BITs were signed, international investment law, Australia’s approach to investment treaties, and the approach of our trading partners, has evolved. This evolution is reflected in the investment chapters of Australia’s recent free trade agreements (FTAs), which are more detailed and contain a range of explicit substantive and procedural safeguards, which are not included in our older style BITs. It is important to consider the various safeguards in a particular agreement holistically.

Like other countries, Australia has been working on reforming its network of older-style BITs. In June 2017, the United Nations Conference on Trade and Development (UNCTAD) published a report ‘Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties’ setting out a range of possible options for countries seeking to modernise their existing stock of older-style international investment agreements.

One of the options in the UNCTAD report is to update the older-style agreements, and this is what the Government has done with the updated Uruguay BIT. Another option in the UNCTAD report is replacing the older-style agreements – which the Government has done in terminating the BITs with Mexico and Vietnam, following the entry into force of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP-11) – with its modern investment chapter, and is doing in our trade agreements with Peru and Hong Kong.

The key explicit public policy reservations, exceptions and carve-outs in Australia’s international investment agreements containing ISDS are as follows:

Explicit reservation, exception or carve-out applicable to ISDS	BITs ⁱ		FTAs ⁱⁱ in force containing ISDS							FTAs not yet in force containing ISDS		
	Older style BITs ⁱⁱⁱ	Updated Uruguay BIT (not yet in force)	Thailand-Australia FTA (2005)	Australia-Chile FTA (2009)	ASEAN-Australia-NZ FTA (2010)	Korea-Australia FTA (2014)	Australia-China FTA (2015)	Revised Singapore-Australia FTA (2017)	CPTPP (2018)	Australia-Hong Kong FTA/ investment agreement	Indonesia-Australia CEPA	Peru – Australia FTA
Schedules of reservations, including public policy measures (i.e. non-conforming measures)	n/a	n/a	✓	✓	n/a	✓	✓	✓	✓	✓	✓	✓
WTO-style general exception ^{iv}		✓	✓		✓	✓	✓	✓		✓	✓	✓
Public health measures carve-out from ISDS and/or Tobacco control measures carve-out from ISDS							✓	✓	✓	✓	✓	✓

The above is not intended to be an exhaustive list of all safeguards in our modern international investment agreements, which include a range of other procedural and substantive safeguards, including recognition of the inherent right to regulate in order to protect legitimate public welfare objectives (which include public health and the environment), as well as security exceptions.

In order to understand the scope of a particular reservation, exception or carve-out it is necessary to refer to the actual text of the relevant agreement here: [Australia's bilateral investment treaties](#) / [Australia's free trade agreements](#).

ⁱ BITs protect investments that have already been established (post-establishment).

ⁱⁱ FTAs seek to promote investment (pre-establishment), and also protect investments that have already been established (post-establishment).

ⁱⁱⁱ These BITs all contain ISDS and are with Argentina (1997), China (1988), Czech Republic (1994), Egypt (2002), Hong Kong (1993), Hungary (1992), Indonesia (1993), Laos (1995), Lithuania (2002), Pakistan (1998), PNG (1991), Peru (1997), Philippines (1995), Poland (1992), Romania (1994), Sri Lanka (2007), Turkey (2009) and Uruguay (2002). The BITs with India, Mexico and Vietnam have been terminated but are subject to transitional provisions. The Hong Kong BIT will be terminated on the entry into force of the Australia-Hong Kong FTA. The BIT with Peru will be terminated when the CPTPP enters into force for both Peru and Australia, or when the Peru-Australia FTA enters into force, whichever occurs first. Further to JSCOT recommendations on the Indonesia-Australia CEPA, Australia is working with Indonesia to terminate the Indonesia BIT. Should the updated Uruguay BIT enter into force the old Uruguay BIT would be terminated.

^{iv} Article XX of the *General Agreement on Tariffs and Trade* and Article XIV of the *General Agreement on Trade in Services*: see particularly “(b) necessary to protect human, animal or plant life or health”.