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ACCI Submission to the Review of Bilateral Investment Treaties

Department of Foreign Affairs and Trade
October 2020



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Chamber of Commerce
and Industry

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Executive Summary

ACCI welcomes the Department of Foreign Affairs and Trade (DFAT) review of the bilateral investment treaties to which Australia is a party. ACCI has long been involved in the discussion of Australia's trade and investment agreements including investor state dispute settlement (ISDS) provisions (see appendix 1 for our submission to the Senate inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014). Our position on investment remains largely unchanged, though it is heightened with the global protectionism we are seeing in the face of Covid-19.

The full extent to which bilateral investment treaties (BIT) directly impact investment is not widely understood, nor is it consistent. Investment agreements are not the sole determinant of investment. ISDS provisions, agreements which impact investors e.g. Double Taxation Agreements (DTA) and foreign investment policies, are all influential to investment, and by extension, BITs. Reforms to Australia's foreign investment policy in the direction of nationalism may have a greater impact on investors in the event Australia also terminates all BITs, given they are formed to promote investment and investor confidence. ACCI supports the promotion of two-way investment and the means through which investment is secured including bilateral investment treaties where effective.

ACCI provides the following recommendations:

Recommendation 1: Perform in depth analyses of Bilateral Investment Treaty (BIT) investment activity

ACCI encourages DFAT to build upon this brief examination and perform in depth analyses of investment activity with countries with active BITs to determine the true effectiveness of the BITs under review in realising investment. Further, assessment of the differences between the text of BITs between countries which have seen a marked increase in investment against those which have seen little effect may prove valuable to Australia's future investment policies and negotiations.

Recommendation 2: Consider value of Double Taxation Agreements (DTAs)

The review should also consider the value of DTAs and their overlap with BITs and the value proposition being offered from each.

Recommendation 3: Maintain Investor State Dispute Settlement (ISDS) Provisions

The Australian Government should maintain current ISDS policies and continue to pursue ISDS provisions on a case by case basis.

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1. Introduction

International Investment Agreements are in place throughout the world however they are not uniform. Some nations adhere to one model where as others, including Australia are host to a range of investment agreements. The two main types are Bilateral Investment Treaties (BIT) – which are also referred to as Investment Promotion and Protection Agreements (IPPA), and Preferential Trade Agreements. The United Nations Conference on Trade and Development (UNCTAD) posit the core elements and provisions of investment agreements are typically uniform however the wording and meaning is often divergent, especially in the APEC region.¹ The focus of this review is BITs specifically, however Australia is party to both BITs and IPPAs. Bilateral Investment Treaties (BIT) are developed with the aim to promote and protect two-way investment between parties. They serve to provide greater security for investors where their investments are in a foreign state – both inwards to and outwards from Australia. Guarantees in BITs often include protection from expropriation without compensation; most favoured nation (MFN) provisions; national treatment provisions; fair and equitable treatment; full protection and security; and free transfer of investment and returns.

When reviewing BITs and the promotion of investment, ACCI is concerned with:

1. Realised investment activity
2. Foreign investment reform
3. Double taxation
4. Investor state dispute settlement (ISDS) provisions

1.1 Australia's Investment Activity and the Realisation of Investment through Bilateral Investment Treaties

Australia's largest two-way investors are the US, UK and Japan, making up 49.7% of investment in Australia and 50.6% of Australian foreign investment. Australia has bilateral trade agreements with both the US and Japan, and is a party alongside Japan to the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP). All three of these trade agreements include investment provisions which mirror those common in BITs. Negotiations are underway with the UK on a bilateral free trade agreement with both parties indicating the inclusion of investment-supporting provisions; however, there is not an investment agreement currently in-force. Australia does not have a BIT or like-agreement with the EU which encompasses Australia's third largest foreign investor; and fifth largest destination for Australian investment overseas (Belgium and Germany respectively).

This begs the question, if two of Australia's largest two-way investment partners don't have investment agreements, how much value do bilateral investment treaties (BIT) really provide?

¹ https://unctad.org/en/Docs/diaeia20083_en.pdf

A study by Till Siegmann into the effect of BITs on Foreign Direct Investment (FDI) found a positive influence of BITs on FDI with 30-40% influence.² The study which employed a panel model also deduced a complementary relationship between FDI and institutional quality. The BITs were more effective when enforced during high political stability where both parties have an effective legal system and ratified the International Centre for Settlement of Investment Disputed (ICSID) convention. Of note, BITs enforced between 1985-1995 were determined to have been more effective for developing countries than those after 1995. This may be attributed to the time required for aspects of the agreement to come into force, or the time required for investors to be comfortable with the agreement's stability and enhanced cooperation between countries. The study also found that the influence of BITs on FDI was not uniform across the globe, nor was it solely accountable for FDI activity.

The Organisation for Economic Cooperation and Development (OECD) recognise investment is not solely driven by signing agreements committing to promote investment. FDI attractiveness is influenced by regulation, market size and access, domestic infrastructure, state ownership in key sectors, geographical location, and neighbour-country relations. While some of these factors can't be changed, governments do have control of some critical areas including FDI rules and regulations; a critical determinant of investment attractiveness.³

Australia has 15 active BITs and five BITs which were terminated with the enforcement of trade agreements subject to investment provisions. Appendix 2 graphically represents Australia's two-way investment statistics with countries subject to a BIT, and those in which BITs were terminated for trade agreements which include investment provisions. In the case of the Philippines we do see an increase in Australian investment abroad after the enforcement of the BIT however this is likely more indicative of the impact of the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) than the BIT given the timeframe. Additionally, an increase in Australian investment abroad is noted in Papua New Guinea, however this occurs 18 years after enforcement of the BIT and is therefore the unlikely influence. Further examination of the investment data for Australia's BIT partners both current and terminated presents a mixed picture of the effectiveness of BITs in realising investment. Countries which have seen moderate-high volumes of investment activity (>\$3 billion) have typically had BITs terminated for trade agreements, which suggests some value creation from the BIT; however three of the five highest value investments are from countries with active BITs and a mix of trade agreements.⁴ Conversely, some BIT partner countries have low value investments (<\$10 million) but have both BITs and trade agreements. Consequently, it is evident investment is influenced by more than just a BIT.

² Siegmann, Till, The Impact of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investments (November 2007). U. of St. Gallen Law & Economics Working Paper No. 2008-22, Available at SSRN: <https://ssrn.com/abstract=1268185> or <http://dx.doi.org/10.2139/ssrn.1268185>

³ <https://www.oecd.org/investment/fdiindex.htm>

⁴ China's investments peak at \$85 billion and Australia has an active BIT as well as bilateral trade agreement, the Philippines's investments peak at \$10 billion and Australia has an active BIT and multilateral trade agreement, and the PNG's investments peak at \$19 billion with an active BIT but no trade agreement.

Recommendation 1: Perform in depth analyses of BIT investment activity

ACCI encourages DFAT to build upon this brief examination and perform in depth analyses of investment activity with countries with active BITs to determine the true effectiveness of the BITs under review in realising investment. Further, assessment of the differences between the text of BITs between countries which have seen a marked increase in investment against those which have seen little effect may prove valuable to Australia's future investment policies and negotiations.

1.2 Foreign Investment Reform Detracting Investment

The Australian Government has and is continuing to undergo reforms to foreign investment through temporary COVID-19 changes and the permanent *Foreign Investment Reform (Protecting Australia's National Security) Bill 2020* (expecting to take force January 2021). The temporary changes to monetary thresholds for foreign investments impacted investments so dramatically and produced an exponential increase in red tape that the changes were reversed for existing investments in non-sensitive commercial land.⁵⁶ The red tape burden still exists for new and future investments, however, presenting significant risk of disincentivising foreign investment even where a BIT is in place. While the reforms stemmed from the mitigation of emerging risks and global developments, ACCI raised concerns in a verbal exposure draft consultation, and continues to be concerned about the implications of detracting foreign investment with an increase in protectionism and regulatory burden in a country as highly regulated as Australia already is.

Through the temporary and impending permanent reforms to Australia's foreign investment policy we are seeing a suite of implications to Australia's investment marketplace. ACCI is cautious that removal of all active bilateral investment treaties without due diligence on the wider implications to Australia's economic profile may further spoil Australia's investment attractiveness in a time of already heightened protectionism.

1.3 Double Taxation

The taxation of investment profits can have a direct effect on the amount of investment undertaken as a result of after-tax return on investment. Host country tax increases investment costs and generally discourages investment to the point it can be a factor in the decision not to invest in the host country. This is even more influential when tax provisions of two jurisdictions overlap and there is risk of double taxation. This includes instances where a party receives income in multiple countries, and all countries tax the total world-wide income; or where income is taxed at both the corporate and personal level.

Australia has standard mechanisms in place to relieve double taxation including foreign income tax offset or an exemption for foreign sourced income, credit for foreign tax paid and correlative

⁵ <https://firb.gov.au/about-firb/news/restoration-monetary-thresholds-renewal-leases-non-sensitive-developed-commercial>

⁶ <https://www.kwm.com/en/au/knowledge/insights/fdi-australia-20200724>

adjustments. These mechanisms may not however be enough to offset the risk/return ratio. As investors often determine the location for their investments based on estimated return on investments, they are likely to choose the location with the lowest risk/return ratio. This can be influenced by international agreements.

Double Taxation Agreements (DTAs) aim to reduce double taxation, and therefore reduce the disincentive for investment. They also work very similarly to BITs to provide investment certainty, dispute resolution mechanisms (though not always), and assist with growth and investments in partner countries. A US study into BITs and DTAs discusses the utilisation of BITs over DTAs for the resolution of tax disputes both in cases where the jurisdiction does not have a DTA, and where the BIT offers a better platform for the dispute.⁷ Alongside the relationship between BITs and FDI, the Siegmann study determined a positive influence between Double Taxation treaties (a form of DTA) and FDI flows to the value of 30%.

The relationship between DTAs and BITs reinforces the need to complete a thorough and holistic analysis of the influence of BITs not only on investment, but other areas in which it is employed e.g. for the resolution of taxation disputes, prior to any terminations.

Australia has 46 DTAs covering a wider range of nations than our suite of BITs, but there are also some cross overs between the agreement coverage. There are also nations where BITs have been cancelled and DTAs remain in place, such as Mexico and Vietnam. This indicates a lack of policy clarity in what is being sought when Australia seeks to enter into or withdraws from agreements with other nations.

Recommendation 2: Consider value of Double Taxation Agreements

The review should also consider the value of DTAs and their overlap with BITs and the value proposition being offered from each.

1.4 Investor State Dispute Settlement (ISDS)

Investor state dispute settlement (ISDS) provisions provide protection to Australian companies investing abroad and promote investor confidence. Despite these protections, Australia has a complicated history with ISDS provisions. Historically, Australia has had a bipartisan approach to “case by case” inclusion of ISDS provisions in trade and investment treaties. However in 2011, the then Gillard Government introduced a new Trade Policy Statement which reversed this position and abandoned ISDS clauses.⁸ The new ‘never-ever’ stance on ISDS provisions resulted in a standstill in free trade agreement (FTA) negotiations which was only resolved when the Government changed in 2013 and the policy position reverted to the historic ‘case by case basis’,

⁷ The study is available at: <https://www.mondaq.com/unitedstates/transfer-pricing/633908/bilateral-investment-treaties-when-double-taxation-agreements-are-not-enough>

⁸ <https://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement>

which stands today. Presently the provisions are written into 8 FTAs and 18 Investment Protection and Promotion Agreements (IPPAs).

The International Centre for Settlement of Investment Disputes (ICSID) has recorded 12 cases where an Australian company has brought a claim against a foreign state since 1996, however there has been just one case in which a foreign investor brought a claim against Australia– which Australia won.⁹

These cases demonstrate the system works; ISDS cases get heard and investors both Australian and foreign are provided some security over their investments. In a step towards supporting greater investment the Morrison Government recently ratified the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (also known as the Mauritius Convention) which applies greater transparency and confidence to ISDS proceedings.

ACCI supports actions which promote transparent and confident investment, including the ratification of the Mauritius Convention and ISDS provisions. The Government's actions in reigniting ISDS clauses, where appropriate, was a welcome compromise following the former ALP Government approach which eliminated them entirely. ACCI supports a similar approach for the review of bilateral investment treaties (BIT). Though BITs do not include ISDS provisions, they do often include articles for the settlement of disputes between parties including the function of an arbitral tribunal. Of the 5 BITs which were terminated following the signing of FTAs, 3 of the FTAs feature ISDS provisions, with the remaining 2 covered by an additional Investment Protection and Promotion Agreement (IPPA). Should the focus on investment with these countries be associated with the value provided by the original BIT, this would present an argument in favour of the retention of Australia's active BITs. In order to determine this, thorough analysis must be conducted on the value realised for these BITs so as to not repeat history and unreservedly eliminate means through which international cooperation and economic benefit are attained.

Recommendation 3: Maintain Investor State Dispute Settlement Provisions

The Australian Government should maintain current ISDS policies and continue to pursue ISDS provisions on a case by case basis.

1.5 Conclusion

Investment treaties and clauses create discipline with better regulation and an external stimulus for reform.¹⁰ ACCI supports the flexible use of investment treaties. The evidence is that there is no reason to fear their use against the Australian Government, as argued by some in relation to ISDS provisions, which would also have the effect of denying Australian investors overseas access to their provisions. Bilateral Investment Treaties (BIT) do not, by themselves, guarantee investment,

⁹ Note this case which was raised by Philip Morris Asia used UNCITRAL Arbitration Rules as opposed to ICSID. This uses a more ad hoc arbitration than the ICSID convention.

¹⁰ https://unctad.org/en/Docs/diaeia20095_en.pdf

as we do see countries party to a BIT which have very low levels of investment; but we equally see countries with substantial two-way investments. The purpose of a BIT is to promote investment and to protect investors from risks including political tensions.

We are living in a global environment where countries are moving further towards protectionism and pulling back from international economic engagement. Exacerbating these pandemic-induced changes are powerful nations withdrawing from multilateral organisations, retracting cooperation, and increasing the likelihood of conflict. ACCI advocates for greater engagement in the global market and enhanced cooperation. ACCI supports the promotion of investment in the global marketplace and encourages the Government to conduct in depth analyses of each Bilateral Investment Treaty to ensure it is promoting and realising investment. Should these treaties be effective, ACCI recommends they be reinforced, not removed.

2. Appendices

Appendix 1: ACCI Submission to the Senate Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 – April 2014

1. Background

ACCI welcomes the Senate inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014.

The background to the Bill indicates the purpose of this Bill is “to prevent the Commonwealth from entering into an agreement with one or one more foreign countries that includes investor-state dispute settlement provisions.”

“Section 3 sets out that the intention of the Bill is to prevent the Commonwealth from entering into agreements with foreign countries that include investor-state dispute settlement clauses. These clauses provide for corporations to sue foreign governments under specific circumstances.”

ACCI believes that the passage of such a Bill would:

1. Constrain the negotiation of trade liberalising agreements
2. Reduce the security for Australian investors internationally; and
3. Reduce the impetus for improvement in the legal systems of developing nations around the world.

1.1 Constraints of trade and investment liberalising negotiations

ACCI has been and remains a supporter of the case by case inclusion of ISDS provisions in Australia’s bilateral and regional trade investment agreements.

Around the world there are more than 2750 bilateral investment treaties (BITs), Multilateral Investment Treaties, and Free Trade Agreements which include legal protection for foreign direct investment.

Australia has included such provisions in almost 30 agreements over the past 30 years or so. This long history has not resulted in any significant deleterious effects on the Australian economy, but has provided a large amount of security for Australian investors internationally.

Australia has been a global leader in seeking liberalised trade and investment. It has done so by having “everything on the table” at the commencement of negotiations. As a principle, Australia has refused to accept day one “carve outs” by some countries in their negotiating positions such as quarantining market access for sensitive products. A legislatively mandated exclusion of the type contemplated in this Bill would establish a dangerous precedent that Australia would be providing imprimatur to other Governments to also establish legislatively mandated exclusions of matters they claim are sensitive. This would be extremely poor policy and undermine the general efforts to seek improved trade and investment liberations around the world.

Most recently such provisions were included in the Korea – Australia free trade agreement. This agreement had remained stalled in negotiations until the incoming Abbott Government signaled that it was willing to contemplate inclusion of such provisions to accommodate the political requirements of the Korean Government who had a mandate for inclusion of such provisions.

To mandate exclusion of such provisions would also preclude the completion of negotiations of agreements which may have significant economic benefits to Australia and the region. It is highly expected that the Trans-Pacific Partnership agreement which is currently under negotiation will see such provisions in the final draft of the agreement. If Australia were constrained to not accept inclusion of ISDS, then it may mean that Australia cannot sign the final deal and so miss out on any of the benefits on offer in the final agreement.

1.2 Reduced security for Australian investors internationally

While dispute resolution using ISDS provisions have not been utilised by Australia investors to any great degree in the past, this is changing with one case settled in 2011 under such provisions and at least two cases pending at present.

Increasingly as Australian companies expand their interests globally, such provisions will be utilised more and more. The proposed Bill would mean that Australian firms would not be able to protect their international interests using such provisions.

The simple existence of such provisions will also have had an impact on the decisions of some companies to invest in particular markets, irrespective of how often disputes are resolved utilising such provisions.

Failure to include such provisions, and to see evolution in the sophistication of such provisions, will mean that companies will engage in “treaty shopping” where such provisions are sought. Similarly a Bill to exclude Australia from ISDS provisions from future agreements leaves the nation exposed to the suite of existing arrangements with no hope of evolution to improved and modern versions.

1.3 Reduced impetus for improvement in the legal systems of developing nations around the world

We note there are many scholarly considerations of this issue but draw to the attention of the committee the report of the United Nations Conference on Trade and Development, *Investor–State Dispute Settlement and Impact on Investment Rulemaking 2007* (http://unctad.org/en/docs/iteiia20073_en.pdf), which includes the following excerpts:

“...the experience with the investor–State dispute settlement of a number of countries (mostly in the Asia-Pacific region) appears to have influenced the development of new international investment agreements (IIAs) by those countries.

“...having more capable and informed government officials who fully understood the content and implications of IIAs, is not only in the interest of host countries but also in the best interest of foreign investors and home countries. Better-prepared officials are likely to increase the quality of

domestic administration and domestic rulemaking and thereby reduce the need for foreign investors to invoke ISDS procedures to defend their interests.”

“...intensification of ISDS has two positive aspects for developing countries.

The first of these is the growing legal sophistication of investment dispute resolution. This serves the interests of all the parties involved – investors, developed countries and developing countries. However, since most developing countries lack the economic and political power of developed countries, they should be particularly interested in pursuing the further legalization of the international investment system. They benefit from further strengthening of the rule of law at the international level.

The second aspect is the possibility that increased ISDS may motivate host countries to improve domestic administrative practices and laws in order to avoid future disputes.”

Passage of this Bill would mean that Australia could no longer utilise such systems as a lever for improvements in the legal systems of developing countries around the world.

1.4 Conclusion

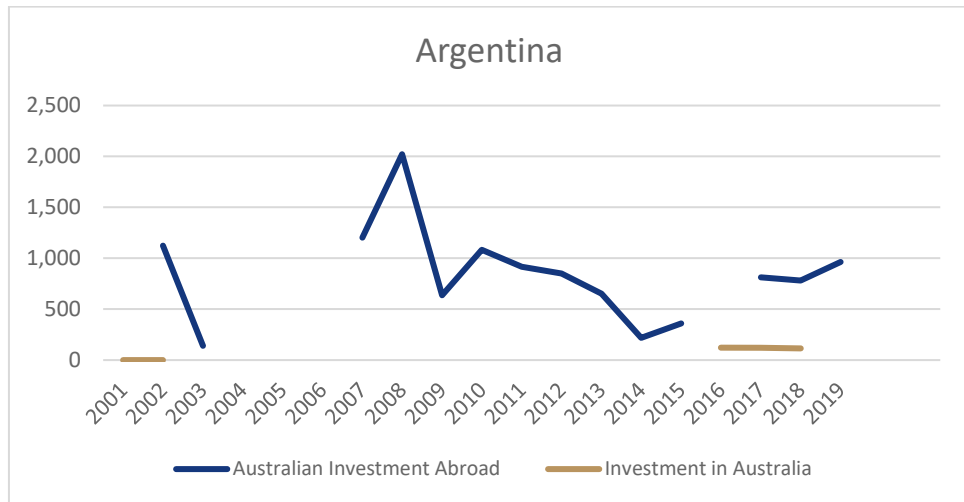
Capital is liquid and will seek out the highest return for the corresponding risk. Investors in global markets must be able to pursue appropriate investments and then expect that they can enjoy the returns from these investments without the risk of expropriation of their property or profits by the host nation Government.

ISDS provisions are an essential confidence and capacity building measure to facilitate global trade and investment.

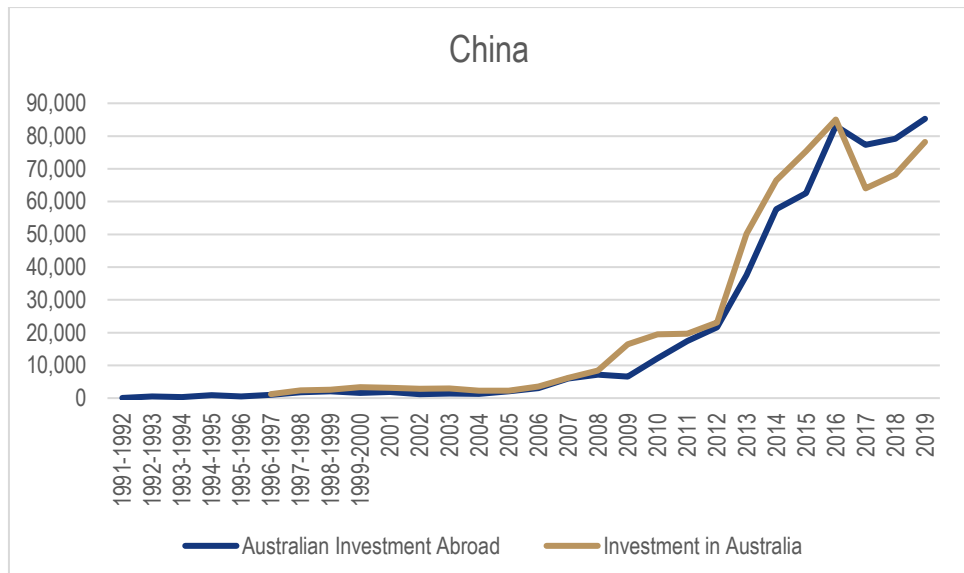
ACCI does not support the passage of the Bill and the Committee should recommend that the Bill not progress.

Appendix 2: Two-way investment statistics with countries to which Australia has a BIT in force. (Data Source: ABS 5352.0)(All values are in \$M)

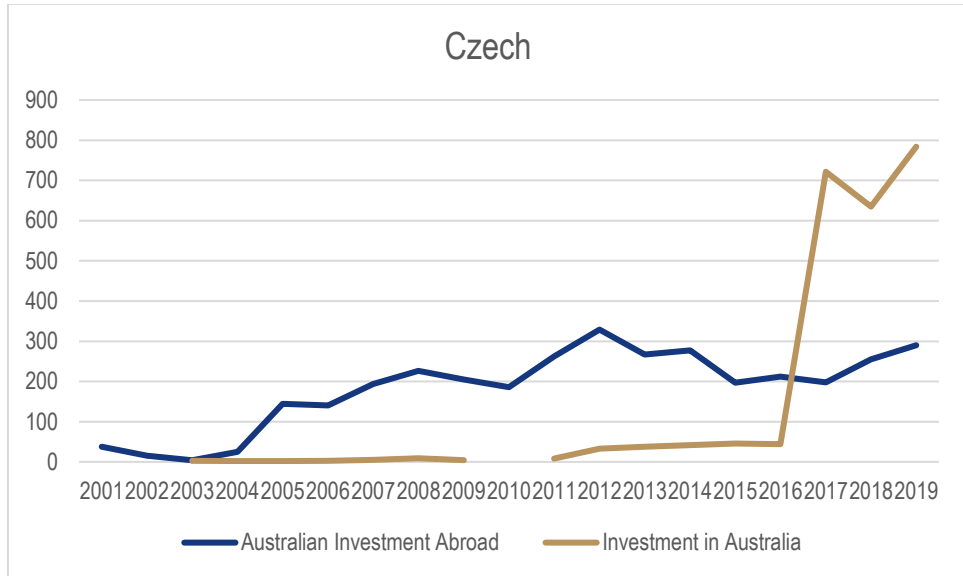
- **Argentina** (date of entry into force: 11 January 1997)
 - Note: ABS investment data doesn't go back to 1997



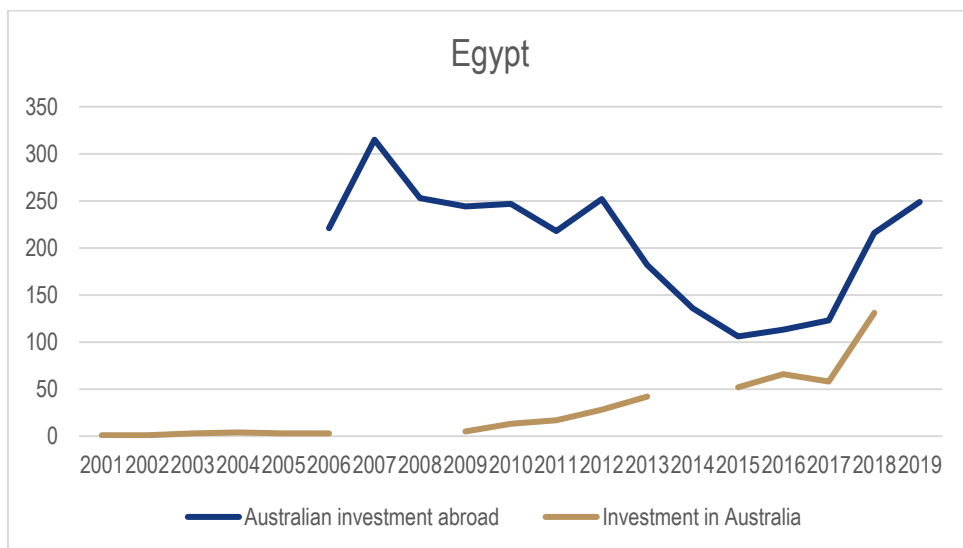
- **China** (date of entry into force: 11 July 1988)
 - Note: ABS investment data doesn't go back to 1988



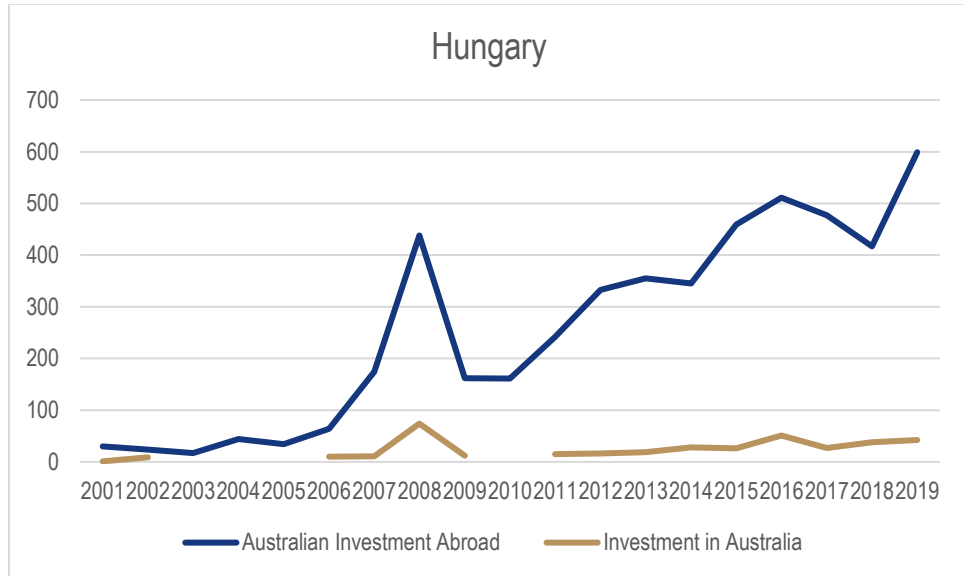
- **Czech Republic** (date of entry into force: 29 June 1994)
 - Note: ABS investment data doesn't go back to 1994



- **Egypt** (date of entry into force: 5 September 2002);



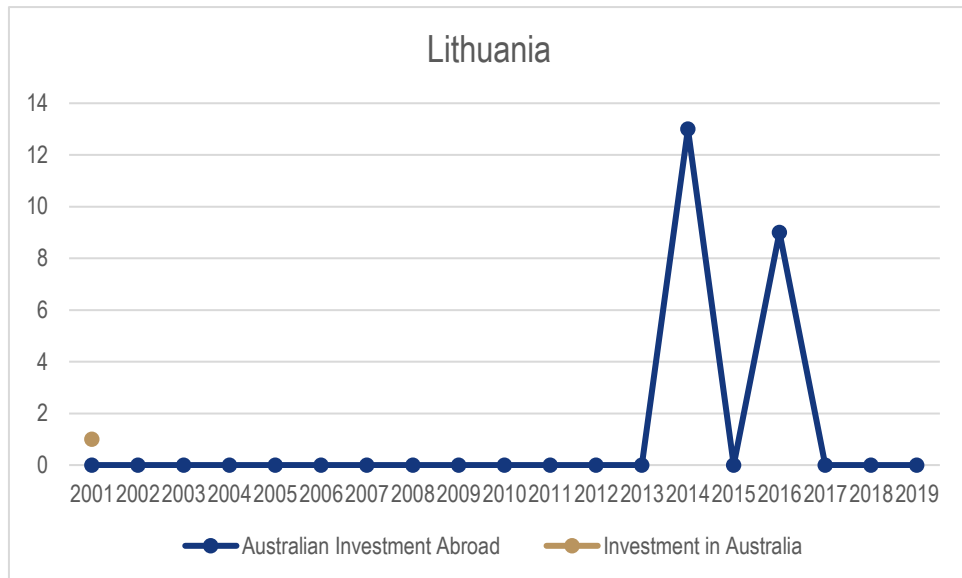
- **Hungary** (date of entry into force: 10 May 1992)
 - Note: ABS investment data doesn't go back to 1992



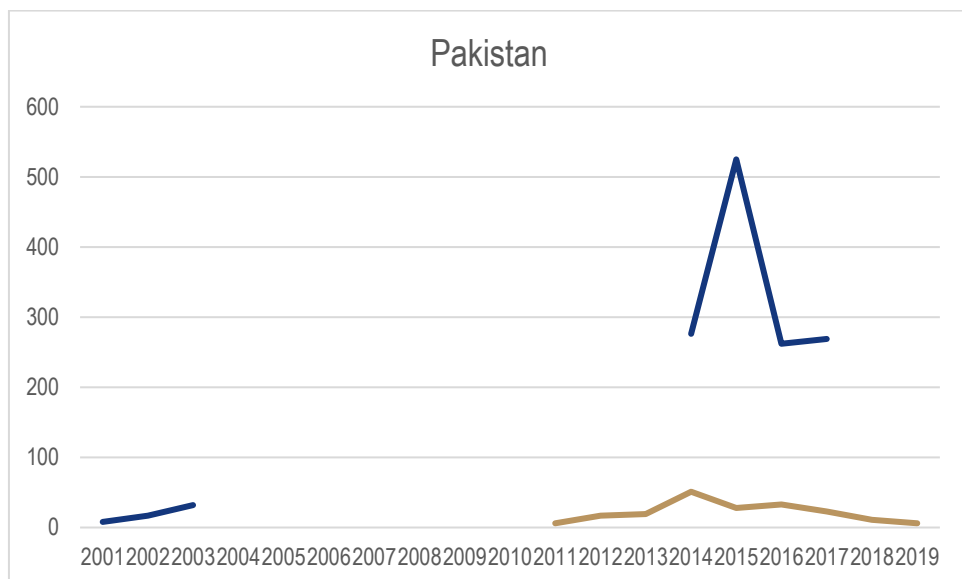
- **Laos** (date of entry into force: 8 April 1995)
 - Note: ABS investment data doesn't go back to 1995



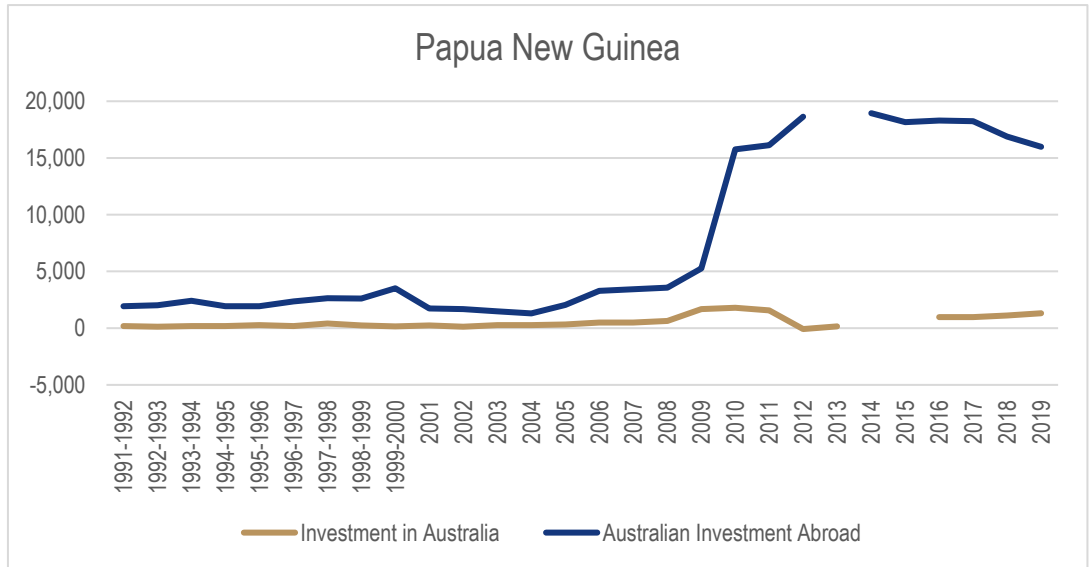
- **Lithuania** (date of entry into force: 10 May 2002)



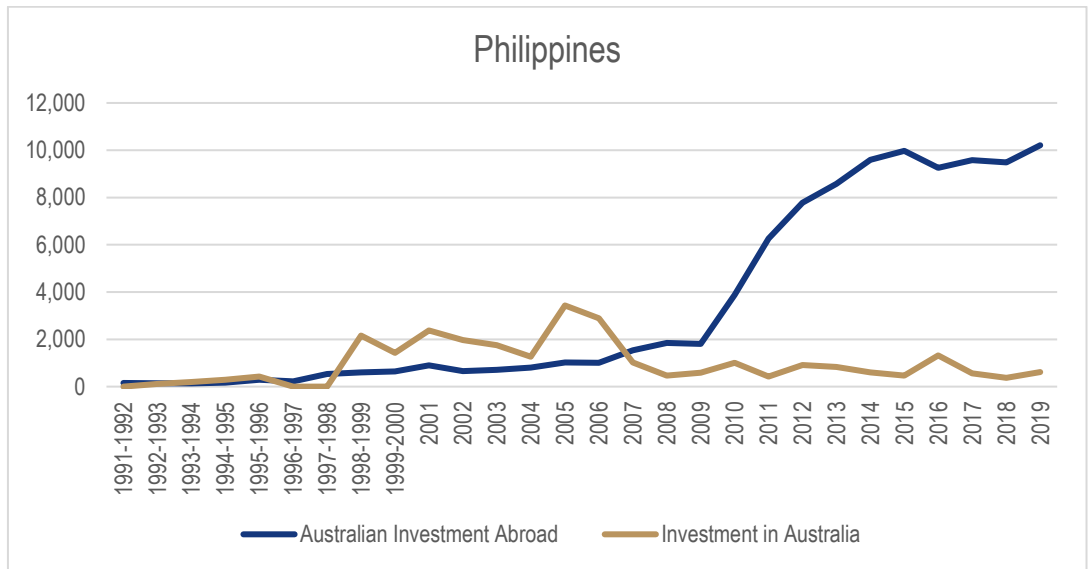
- **Pakistan** (date of entry into force: 14 October 1998)
 - Note: ABS investment data doesn't go back to 1998



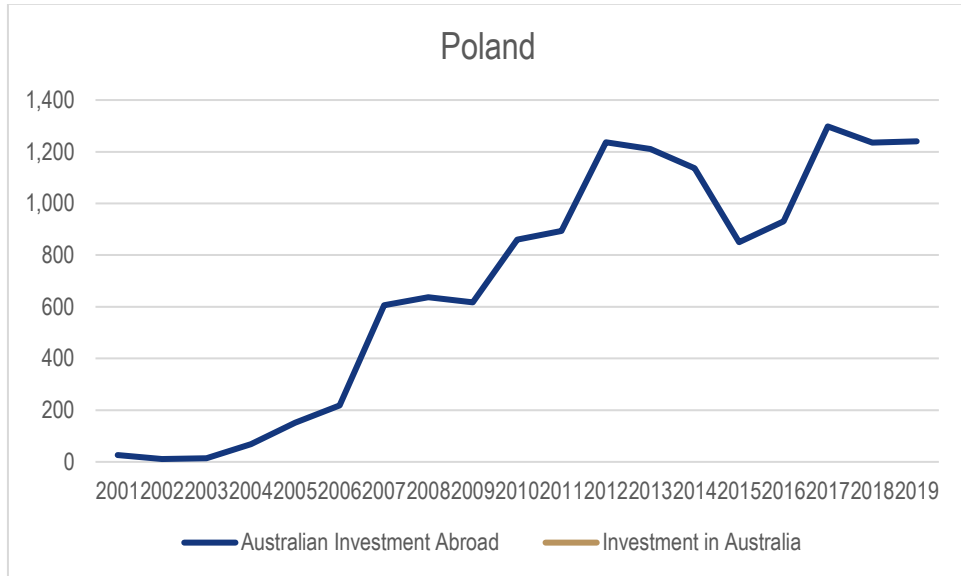
- **Papua New Guinea** (date of entry into force: 20 October 1991)



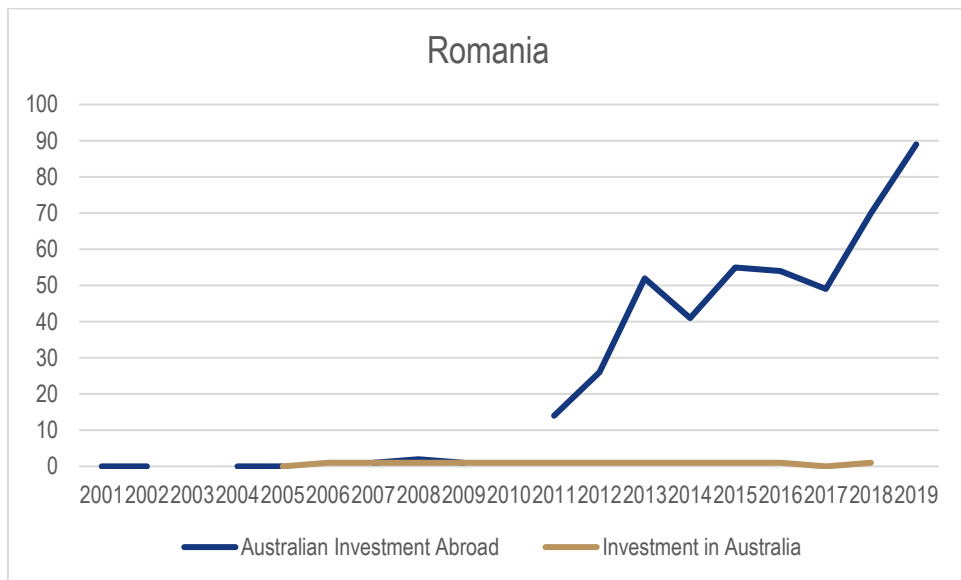
- **Philippines** (date of entry into force: 8 December 1995)



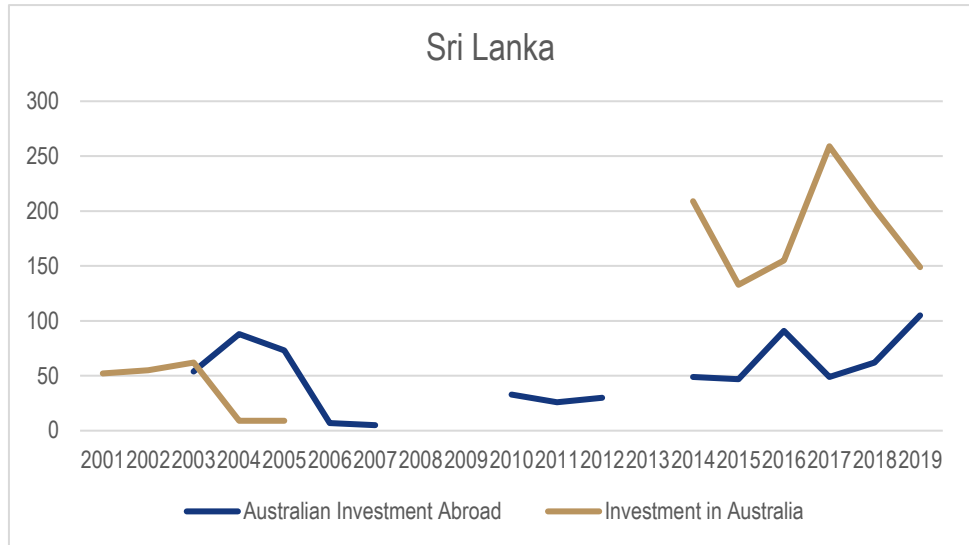
- **Poland** (date of entry into force: 27 March 1992)
 - Note: ABS investment data doesn't go back to 1992



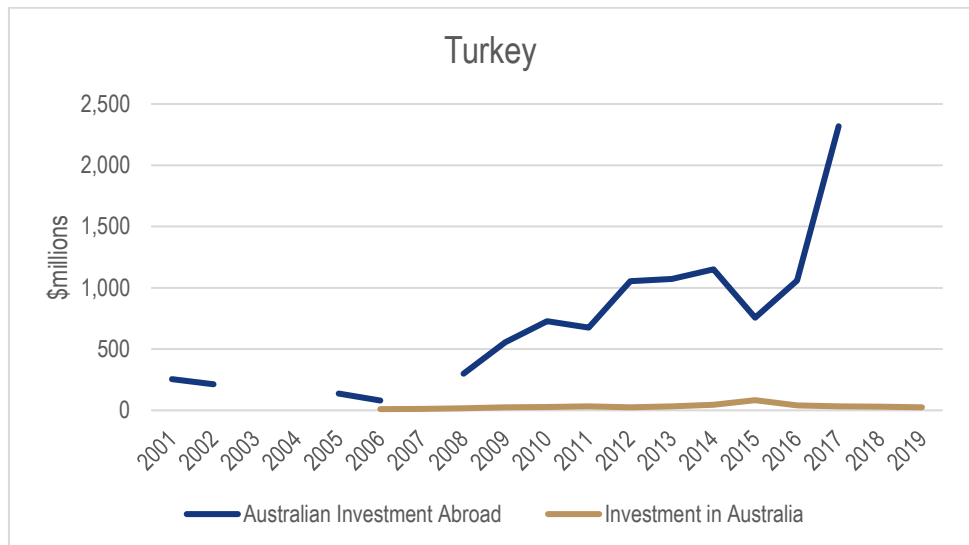
- **Romania** (date of entry into force: 22 April 1994)
 - Note: ABS investment data doesn't go back to 1994



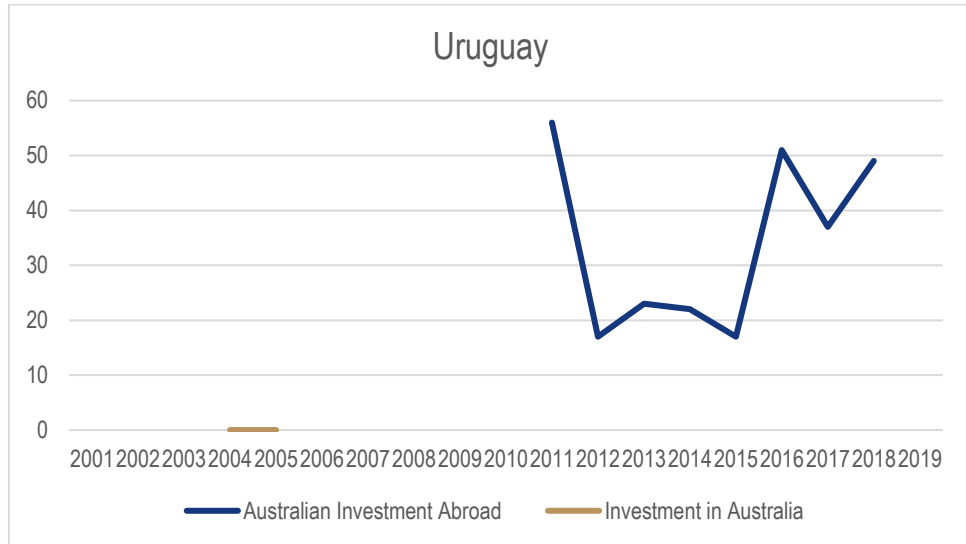
- **Sri Lanka** (date of entry into force: 14 March 2007)



- **Turkey** (date of entry into force: 29 June 2009)

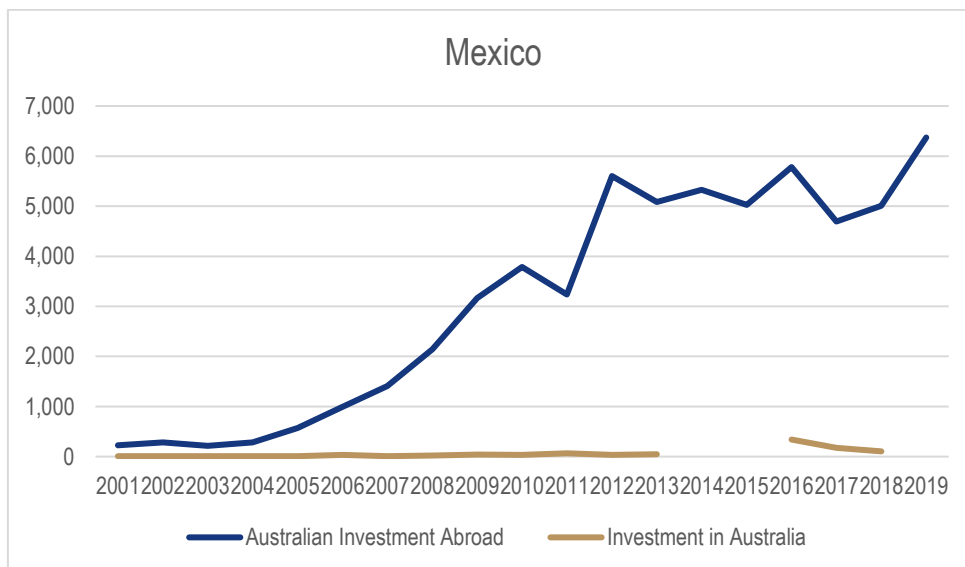


- **Uruguay** (date of entry into force: 12 December 2002) *Australia and Uruguay have agreed to terminate this BIT upon entry into force of the [updated Agreement](#) between Australia and Uruguay on the Promotion and Protection of Investments, which was signed on 5 April 2019 but has not yet entered into force.*

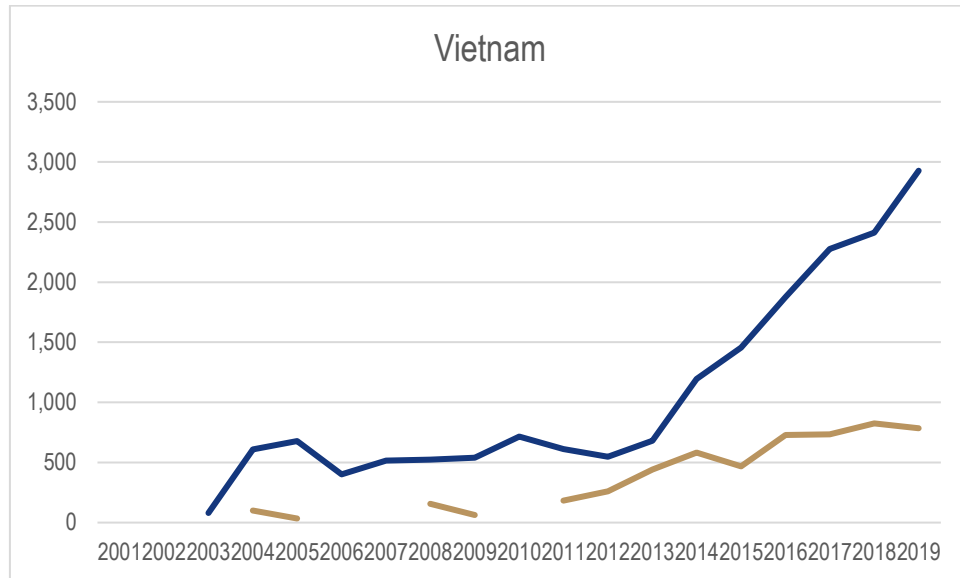


Australia has terminated the following BITs in recent years and replaced them with modern investment chapters in FTAs:

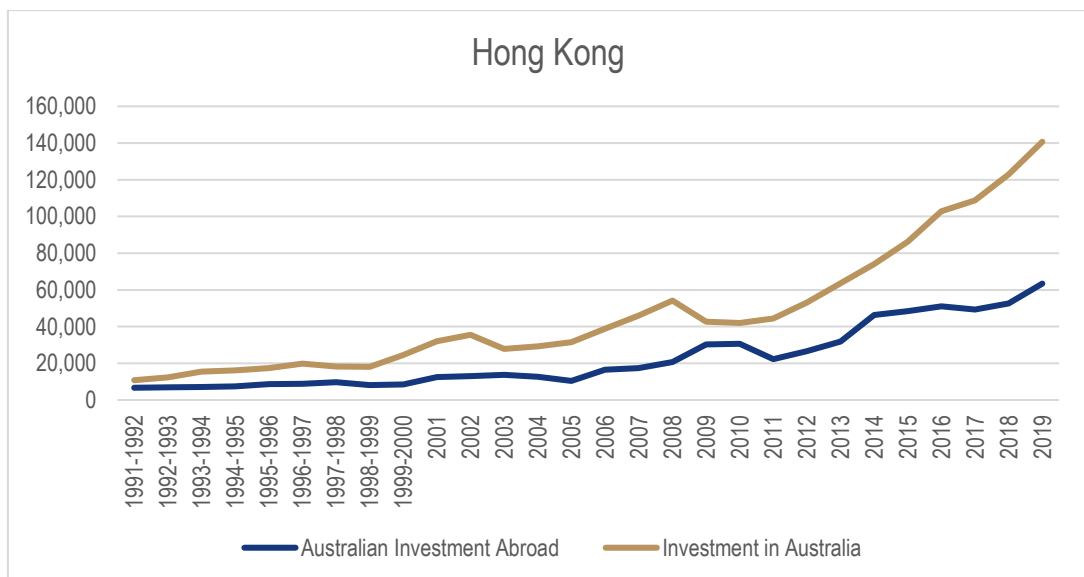
- **Mexico - terminated on 30 December 2018 (enforced 2005)**, following the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ([CPTPP](#)) between Mexico and Australia (subject to transitional arrangements)



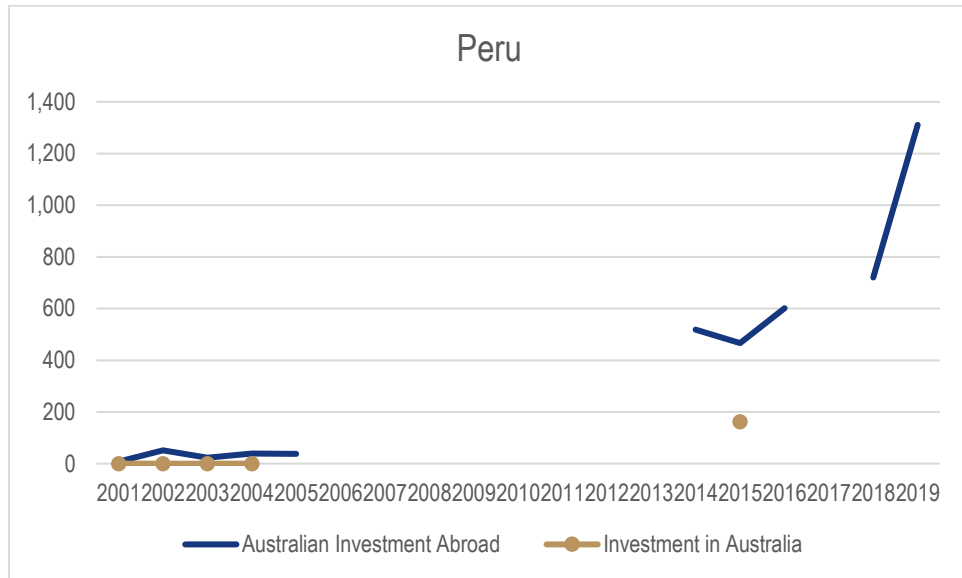
- **Vietnam - terminated on 14 January 2019 (enforced 1991)**, following the entry into force of the [CPTPP](#) between Vietnam and Australia (subject to transitional arrangements)
 - *Note: ABS investment data doesn't go back to 1991*



- **Hong Kong - terminated on 17 January 2020 (enforced 1993)**, following the entry into force of the [Hong Kong FTA package](#) (not subject to transitional arrangements)



- **Peru - terminated on 11 February 2020 (enforced 1995)**, following entry into force of the Peru-Australia Free Trade Agreement (subject to transitional arrangements)
 - *Note: ABS investment data doesn't go back to 1995*



- **Indonesia – terminated on 6 August 2020 (enforced 1992)**, 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).



3. About the Australian Chamber of Commerce & Industry

The Australian Chamber represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

OUR MEMBERS



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