BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE RESOLUTION

Six key facts

1. There are more than 3000 international investment agreements in force internationally.

2. Bilateral Investment Treaties have been part and parcel of the international investment system since the 1960s.

3. Global FDI totalled around $1.6 trillion in 2013— with developing economies accounting for more than 50% of inward flows.

4. International investment directly created more than 40 million jobs over the past two decades.

5. Over 40% of investment disputes to date have been settled in favour of host states.

6. New transparency requirements for investor—state arbitrations were introduced by the UN in 2014.
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Key issues for international business

What are BITs and why do they matter?

- **Investment protection clauses** are found in more than 3,000 international investment agreements, often known as bilateral investment treaties or “BITs”. These agreements are sometimes contained in chapters of Free Trade Agreements (“FTAs”) that deal specifically with investment issues.

- These agreements have been **recognised by the UN as a key factor in helping countries attract foreign direct investment (“FDI”)**—with recent studies indicating that the implementation of BITs can increase a country’s annual stock of inward investment by upwards of 10 percent.

- In general, BITs provide protection to investors by: prohibiting favouritism for local investors; ensuring fair compensation for any expropriation or nationalisation of assets; and protecting foreign investors from local content requirements and export quotas. These protections help provide the stability, predictability and transparency that businesses require when making decisions on where to invest.

- **FDI and international trade serve as the twin engines of world prosperity.** Since 1980, merchandise trade has expanded by a factor of six and the stock of FDI has expanded by a factor of 20. **Employment growth associated with FDI is impressive:** some 21 million people were employed by foreign affiliates of multinational companies in 1990, rising to 69 million in 2011.

- **To recover from its growth slump, the world economy needs a big dose of new FDI.** At the current rate, US$1.6 trillion, new FDI flows are little more than 2 percent of world GDP. Doubling that rate, to around US$3 trillion annually, would provide a major stimulus to the world economy—helping create jobs, raise living standards and contributing to government tax revenues.

- **Implementing strong investment protection standards should be a policy priority for all governments in order to promote new waves of prosperity-enhancing FDI.**
Investor-state dispute resolution—a BIT of a problem or much ado about nothing?

- BITs and FTA investment chapters often contain investor-state dispute settlement (“ISDS”) provisions which allow investors to bring a claim in front of an international tribunal where it is alleged that one of the core provisions of an investment agreement has been breached.

- The inclusion of ISDS provisions in these agreements is neither new nor novel: they have, in fact, been part and parcel of the international investment system since the late 1960s.

- ISDS is used in relatively rare—but highly serious—situations, such as where a company’s assets are expropriated without proper compensation.

- ISDS does not limit the policy space of states to introduce new regulation. Instead, it helps establish a balance between the right of States to regulate and the rights of investors to protection under international law. Contrary to some suggestions, investors cannot use investment provisions to bring a claim against a state just because their profits might be affected by a new government policy.

- The confidential—or “secretive”—nature of ISDS arbitrations has received significant attention from many civil society groups. In this context, it is important to note that there have been a number of important transparency-related innovations in international arbitration in recent years. In 2013, for instance, the United Nations Commission on International Trade Law adopted new transparency rules which came into effect from April 2014.

TTIP—why is the investment chapter important?

- To maximize the potential gains of a new transatlantic deal for businesses, workers and consumers, negotiators must ensure that the final TTIP agreement contains gold-standard, 21st Century investment provisions.

- This means that the TTIP investment chapter should include, at a minimum:
  - broad definitions of investment to capture the full range of investment vehicles and global supply chains in today’s globalised economy;
  - strong and comprehensive investor protections;
  - “pre-establishment” provisions to minimize protectionism; and
  - strong, transparent ISDS provisions, to ensure enforcement by efficiently resolving disputes on the merits of each case.

- The benefits of a strong TTIP investment chapter should not be viewed in isolation. As the largest bilateral trade deal ever negotiated, third countries will look to TTIP as a model for future free trade agreements. A gold-standard agreement could play a central role in fostering improved conditions for a much-needed expansion of global investment flows.