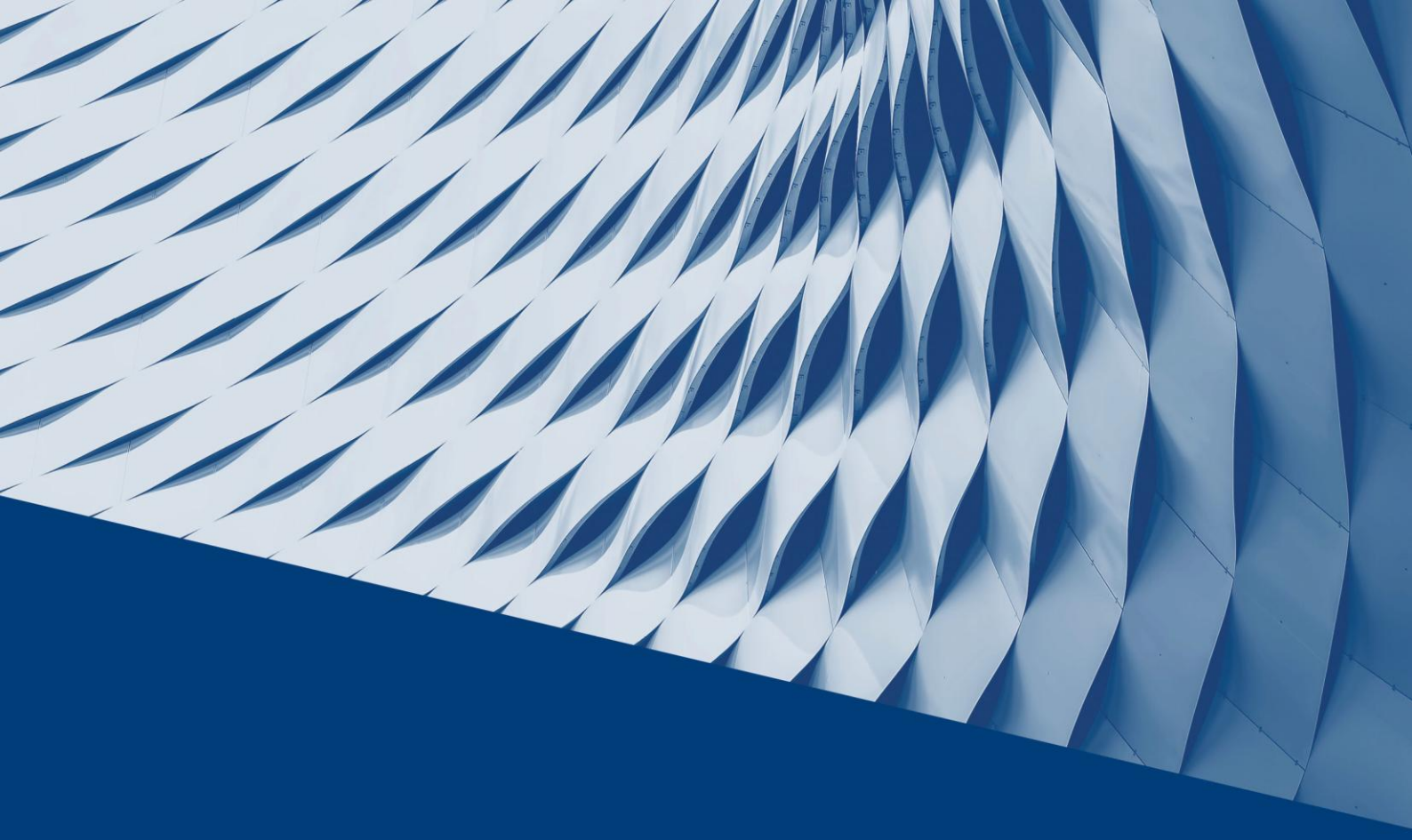

Australia's Bilateral Investment Treaties (BITs) and AANZFTA ISDS Review

Australian Council of Trade Unions (ACTU) submission to the Department of Foreign Affairs and Trade

ACTU Submission, 3 March 2026
ACTU D. No 15/2026

ACTU
australian council of trade unions

Contents

Introduction

About the ACTU

Since its formation in 1927, the Australian Council of Trade Unions (ACTU) has been the peak trade union body in Australia. The ACTU consists of affiliated unions and State and regional trades and labour councils. They have over 1.6 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Worker-centred trade policy

The ACTU supports fair trade as a vehicle for economic growth, job creation, tackling inequality and raising living standards. The most important objective of trade policy should be to deliver benefits to workers, the community and the economy by increasing opportunities for local businesses, creating quality local jobs, and protecting public services. The benefits of trade must be shared among our community and promote equitable development abroad.

We welcome the opportunity to contribute to the DFAT review of Australia's Bilateral Investment Treaties (BITs) and ISDS provisions in the ASEAN Australia–New Zealand Free Trade Agreement (AANZFTA).[1] This review encompasses six BITs—Czechia (1994), Egypt (2002), Hungary (1992), Lithuania (2002), Poland (1992), and Romania (1994), all of which contain ISDS provisions. It also includes the ISDS mechanism in AANZFTA, which entered into force for Australia in January 2010.

The ACTU has consistently called for the removal of Investor-State Dispute Settlement (ISDS) clauses from current and future trade agreements.[2] We therefore welcome Trade Minister Farrell's commitment that ISDS will not be included in new agreements and will be reviewed in existing ones.[3] This review represents a critical opportunity to implement this policy.

---

[1] Australia's Bilateral Investment Treaties (BITs) and AANZFTA ISDS Review.

[2] Australian Council of Trade Unions (ACTU), Submission to the Joint Standing Committee on Treaties Inquiry into the Second Protocol to Amend the AANZFTA, 19 January 2024, ACTU D. No. 02/2024, and

ACTU, Submission to DFAT on the Renegotiation of Australia's Bilateral Investment Treaties with Argentina, Pakistan and Türkiye, 14 March 2025, ACTU D. No. 07/2025.

[3] Minister for Trade and Tourism, Senator the Hon Don Farrell, 'Trading our way to greater prosperity and security', 14 November 2022 https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

ISDS provisions have no place in modern trade policy. They limit the capacity of governments to regulate in the public interest by exposing them to punitive claims when they introduce legitimate and democratically mandated reforms. These provisions do not provide certainty for Australian investors or the public; instead, they undermine democratic expectations that governments will act to protect community welfare without the threat of costly international litigation.

Removing ISDS provisions is essential to enabling governments to regulate effectively in areas including labour rights, environmental protection, public health, education, and national security. It also promotes equitable development internationally: ISDS-related liabilities and legal costs can inflict severe financial burdens on low-income countries.[4]

Investor-State Dispute Settlement (ISDS)

ISDS clauses grant foreign investors exclusive rights to sue governments in international tribunals for measures alleged to reduce the value of their investments or expected future profits. These tribunals operate outside domestic legal systems, are not bound by precedent, and have been criticised for inconsistent reasoning, lack of transparency, and limited accountability.[5]

The origins of ISDS lie in the post-colonial period, where newly independent states sought to reclaim control of natural resources and regulate foreign corporations.[6] Many BITs were drafted by wealthier, capital-exporting countries to preserve their commercial interests and restrict the ability of developing nations to freely implement public-interest regulation.[7] Thus, from their inception ISDS provisions have been used to entrench historical power imbalances and constrain decolonisation efforts.

Today, ISDS continues to prioritise corporate interests over those of workers and communities. Claims can involve demands for hundreds of millions, or even billions of dollars in compensation.

---

[4] An example of the disproportionate impact ISDS claims can have is shown in Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan. Pakistan was ordered to pay UD 5.8 billion in compensation, a sum almost as large as an IMF emergency loan intended to address an economic crisis. Mining companies dominate ISDS treaty-shopping claims from Australian companies | ISDS Platform

[5] Robert French, 'Investor-State Dispute Settlement – A Cut Above the Courts?' (Paper, Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014).

[6] Jinane Ejjed, 'Corporate Courts: The Case of Investor-State Dispute Settlement (ISDS)' (The Historian's Tribune, 11 August 2025) https://www.historianstribune.com/post/corporate-courts-the-case-of-investor-state-dispute-settlement-isds.

[7] Ibid.

Even in unsuccessful cases, governments may incur significant legal costs defending claims, placing pressure on public budgets and discouraging necessary regulation.

ISDS also has a well-documented "regulatory chill" effect. Following Australia's introduction of tobacco plain-packaging legislation in 2011, Philip Morris Asia launched an ISDS claim seeking billions in compensation.[8] The existence of this claim contributed to New Zealand, Namibia, and Togo delaying similar public-health measures.[9] This demonstrates how the threat of litigation alone can impede evidence-based policymaking.

Despite the Albanese Government's commitment to phase out ISDS, recent developments highlight the urgency of reform. Australian billionaire Clive Palmer has lodged four ISDS claims against Australia (one now dismissed), two of which use the very AANZFTA provisions currently under review. Collectively, these claims seek more than $420 billion in compensation.[10] They illustrate the profound risks ISDS pose, even encouraging domestic investors engage in "treaty shopping" to disguise themselves as foreign claimants.

Decisive action during this review is essential to eliminate these risks and safeguard Australia's ability to regulate in the public interest.

Recommendations

Recommendation 1: *Remove ISDS provisions from the BITs with Czechia, Egypt, Hungary, Lithuania, Poland, and Romania.*

Recommendation 2: *Renegotiate these BITs to include explicit protections for the right of governments to regulate in the public interest. If and when Australia signs a trade agreement with the European Union, the European BITs should be abolished.*

---

[8] Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, Australia–Hong Kong, signed 15 September 1993, [1993] ATS 30 (entered into force 15 October 1993).

[9] 'Philip Morris vs Australia: ISDS Used to Delay Public Health Policies' (ISDS Platform, bilaterals.org, updated April 2021) https://www.isds.bilaterals.org/?philip-morris-vs-australia-isds

[10] Australian Fair Trade and Investment Network (AFTINET), "Clive Palmer's foreign investor claims against Australia now $420 billion" (10 January 2025) https://aftinet.org.au/clive-palmer-latest-ISDS-claim-against-australia

Recommendation 3: *Remove ISDS provisions from AANZFTA.*

Recommendation 4: *Accelerate the review of all current trade and investment agreements to remove ISDS provisions.*

Recommendation 5: *As COP31 President for Negotiations, Australia should raise the challenge posed by ISDS to global climate action in both formal negotiations and the Action Agenda and work to build support across UNFCCC Parties for the removal of ISDS from all trade agreements.*

Recommendation 6: *Implement the Joint Standing Committee on Trade and Investment Growth's recommendations by legislating a trade-negotiation framework that excludes ISDS and protects Australia's sovereign right to regulate.*

Recommendation 7: *Renegotiate AANZFTA to ensure it complies with the new trade negotiation framework.*

ISDS cases undermining workers' rights

ISDS clauses have frequently been used to challenge measures intended to protect workers' rights or improve working conditions. Even actions taken to comply with international labour obligations, such as adopting or enforcing effective minimum wage laws,[11] have prompted investor challenges.

The following case studies demonstrate how ISDS can undermine progress in labour rights and social justice:

- **Piero Foresti & others v. South Africa:** Foreign investors used ISDS provisions under Italy–South Africa and Belgium–Luxembourg–South Africa BITs to challenge South Africa's post-apartheid Mining Charter,[12] which required companies to transfer partial ownership to Black South Africans. Investors claimed USD $350 million in compensation and, were

[11] International Labour Organization, C131 – Minimum Wage Fixing Convention, 1970, adopted 22 June 1970, entered into force 29 April 1972,

[12] The reforms stemmed from the Broad-Based Black Economic Empowerment Act 53 of 2003, which was passed as part of an effort to redress harms caused by the legacy of South African apartheid.

ultimately successful in pressuring the government into reducing equity-transfer requirements, thus weakening key anti-discrimination reforms.

- **Véolia (France) v. Egypt:** In 2012, the multinational utility corporation brought a claim under the France–Egypt BIT seeking USD $110 million after Egypt increased its minimum wage. In May 2018 Egypt ultimately prevailed. However, the case took six years and imposed substantial legal costs on Egypt. This case illustrates the financial pressures that ISDS cases can impose on governments that seek to implement basic labour protections.
- **Abitibi-Bowater (US) v. Canada**: In 2009, after closing a major mill and laying off 800 workers, Abitibi-Bowater used North American Free Trade Agreement (NAFTA) to challenge a provincial government's decision to reclaim resources linked to the mill's operations. In this case, the government re-asserted control over water and timber rights and claimed equipment to protect local resources and compensate impacted workers. Canada settled the case with USD $122 million being paid to the corporation. This case significantly undermined governmental efforts to protect workers and communities affected by mass layoffs.[13]

ISDS provisions are also increasingly used to challenge climate action and environmental transitions, with fossil-fuel companies seeking vast sums for loss of "future profits." These cases threaten workers, communities, and global climate commitments.[14]

ISDS also poses a documented threat to Indigenous rights.[15] While Australian agreements contain limited exceptions relating to Aboriginal and Torres Strait Islander communities, no general carve-out exists to prevent ISDS claims where governments act to uphold Indigenous land rights or free, prior, and informed consent.[16]

ISDS provisions in Australia's trade and investment agreements

[13] Case studies drawn from Bilaterals, "ISDS Platform: Labour", https://isds.bilaterals.org/?-isds-labour-

[14] Kyla Tienhaara et al, 'Investor-State Disputes Threaten the Global Green Energy Transition' (2022) 376 Science 701
Investor-state disputes threaten the global green energy transition | Science

[15] Sebastián Sauter Odio, 'Arbitrating Human Rights of Third Parties to ISDS Cases' (2024) Harvard International Law Journal (online) https://journals.law.harvard.edu/ilj/2024/03/arbitrating-human-rights-of-third-parties-to-isds-cases/

[16] United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007), Article 28 (1).

Australia is bound by ISDS provisions in ten current FTAs[17].

- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- China–Australia Free Trade Agreement
- Korea–Australia Free Trade Agreement
- Australia–Chile Free Trade Agreement
- Singapore–Australia Free Trade Agreement
- Thailand–Australia Free Trade Agreement
- ASEAN–Australia–New Zealand Free Trade Agreement
- Peru-Australia Free Trade Agreement (PAFTA)
- Australia-Hong Kong Free Trade Agreement and Associated Investment Agreement (A HKFTA)
- Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA).

Additionally, Australia also has ISDS in 15 Investment Protection and Promotion Agreements (IPPAs) with Argentina, China, Czechia, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay.

While some recent agreements—such as the Australia–UK FTA and the Australia–India Economic Cooperation and Trade Agreement—exclude ISDS, these are exceptions. The widespread presence of ISDS across Australia's treaty network facilitates forum shopping, where corporations establish subsidiaries in particular jurisdictions solely to gain treaty-based litigation rights.

Clive Palmer's use of Singapore-registered entities to launch ISDS cases against Australia exemplifies this problem. Such manoeuvres erode the integrity of the investment system and expose governments to manufactured disputes.

Recommendation 1: *Remove ISDS provisions from the BITs with Czechia, Egypt, Hungary, Lithuania, Poland, and Romania.*

Recommendation 2: *Renegotiate these BITs to include explicit protections for the right of governments to regulate in the public interest. If and when Australia signs a trade agreement with the European Union, the European BITs should be abolished.*

---

[17] DFAT, 'Investor-state dispute settlement', https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement

Recommendation 3: *Remove ISDS provisions from AANZFTA.*

ISDS cases against Australia

Philip Morris Asia challenged the *Tobacco Plain Packaging Act 2011* under the 1993 Australia–Hong Kong BIT. The Act was part of a comprehensive government programme to address the harmful effects of smoking in society. It was passed in accordance with Australian law and as part of an evidence based public health policy.

In December 2015, the arbitration tribunal unanimously found it lacked jurisdiction because Philip Morris restructured its corporate ownership to gain treaty protection after the dispute was foreseeable constituting an "abuse of rights."[18] While Australia prevailed, the case took years and cost nearly $24 million in legal fees, paid for from public funds[19]. Two years later (in 2017) the tribunal awarded costs against Phillip Morris, however, this order only requires the corporation to pay half of the external legal costs incurred by the government.[20] Overall, this dispute has been costly and protracted, taking many years to resolve.

Australia's exposure to retaliatory ISDS action is not a thing of the past. Clive Palmer has lodged four claims totalling more than $420 billion, challenging lawful regulatory decisions relating to mining licences and environmental approvals. Clive Palmer's cases involve a tactical registration of a corporate entity to pass himself off as a foreign investor and gain dispute rights as a foreign investor under specific BITs. In the 4 cases brought by Clive Palmer, he uses *Zeph Investments Pte Limited,* a corporation lodged in Singapore in order gain access to ISDS provisions available to Singaporean investors under both the AANZFTA and the Singapore-Australia FTA (SAFTA).[21]

---

[18] Philip Morris Asia Limited v Commonwealth of Australia (Award on Jurisdiction and Admissibility) (PCA Case No 2012-12, 17 December 2015).

[19] ISDS Platform, 'Philip Morris vs Australia: ISDS Used to Delay Public Health Policies' (bilaterals.org, updated April 2021) https://www.isds.bilaterals.org/?philip-morris-vs-australia-isds

[20] Ibid.

[21] Attorney General's Department, 'International trade and investment law' https://www.ag.gov.au/international-relations/international-law/international-trade-and-investment-law#:~:text=The%20Jericho%20Power%20Station%20Claim%20(PCA%20Case%20No%202024-48,Waratah%20Coal's%20Galilee%20Coal%20Project

In 2025, the tribunal dismissed the largest claim (*The Balmoral Claim: Zeph Investments Pte Ltd v The Commonwealth of Australia (I)*) after finding Palmer was not a foreign investor and therefore could not rely on AANZFTA's ISDS provisions. Although costs were awarded to Australia,[22] Palmer has sought further legal challenge by lodging the matter in the Federal Supreme Court of Switzerland, a court with a narrow, technical jurisdiction to review procedural matters only.[23]

The course of the Cliver Palmer disputes illustrates how ISDS clauses can generate prolonged and resource-intensive disputes even when claims lack merit. This ability to inflict cost and uncertainty upon a government, make ISDS claims an effective tool for corporate retaliation as even if a claim fails, the harm inflicted on a country merely by becoming involved in an ISDS process is significant and undermining. Three cases remain pending, and the process involved in attempting to resolve them is likely to follow the established pattern in causing a severe drain on public resources.[24]

Australia must ensure that no future government is exposed to claims of this nature. The Government must fulfil its commitment to review and remove all ISDS provisions from all existing bilateral agreements. This policy should extend to plurilateral agreements also. Where full treaty negotiation is not possible, side letters, as used in 2018 between Australia and New Zealand under the CPTPP[25], as a method for carving out the application of ISDS clauses.

Recommendation 4: *Accelerate the review of all current trade and investment agreements to remove ISDS provisions.*

ISDS is an impediment to government action on climate change

ISDS provisions increasingly constrain governments' capacity to respond effectively to climate change and to manage energy system transitions in the public interest. Globally, ISDS claims are being used to challenge a growing range of climate- and environment-related measures, including

[22] Zeph Investments Pte Ltd v Commonwealth of Australia (PCA Case No 2023-40), Award (26 September 2025) (Permanent Court of Arbitration).

[23] Patricia Ranald, 'Clive Palmer's Multibillion-Dollar Claims Make a Mockery…' The Guardian (30 September 2025), reproduced at bilaterals.org Clive Palmer's multibillion-dollar claims make a mockery of a tribunal that allows foreign investors to challenge court decisions | bilaterals.org

[24] The three cases pending are: The Environmental Offsets Claim: Zeph Investments Pte Ltd v The Commonwealth of Australia (II), The Galilee Coal Project Claim: Zeph Investments Pte Ltd v The Commonwealth of Australia (III) and, The Jericho Power Station Claim: Zeph Investments Pte Ltd v The Commonwealth of Australia (IV).

[25] Comprehensive and Progressive Trans Pacific Partnership Agreement

changes to environmental approvals, planning frameworks, emissions regulation, and energy policy. Fossil fuel and extractive companies account for a significant share of these disputes, with claims frequently seeking compensation for alleged loss of expected future profits rather than actual capital invested. Research published in *Science* finds that ISDS claims linked to the energy transition already expose governments to potential liabilities of USD $340 billion, a number exceeds the total level of public climate finance provided globally in 2020.[26] These legal claims effectively takes critical public finance out of essential mitigation and adaptation activities and drives it into returns for fossil fuel industry shareholders.

For Australia, these risks have direct implications for governments' ability to provide certainty for workers and communities and maintain social cohesion over the duration of the energy transition. Climate and energy policy necessarily involves long-term regulatory and investment decisions affecting infrastructure, regional economies, and employment. ISDS allows foreign investors to challenge such decisions outside domestic legal systems, even where governments act lawfully, transparently, and in pursuit of democratically mandated objectives. The threat of costly and protracted arbitration contributes to regulatory delay and policy caution, limiting governments' capacity to plan and implement a just and orderly transition that supports existing workers while developing new green industries and well-paid, safe, and secure jobs. Clive Palmer's recent ISDS claims brought against Australian governments sought to ram through approvals for new coal mining and power plants facilities by overruling the decisions of the Australian judicial system, the conclusions of atmospheric scientists, and, in at least one case, the vehement objections of First Nations people.[27]

ISDS does not protect workers in emissions-intensive industries or provide greater employment security. Instead, it privileges investor interests over democratic decision-making and weakens governments' ability to balance climate obligations, energy security, and employment outcomes. Effective climate action requires governments to retain full policy and fiscal space to regulate, plan, and invest in a just transition — including retraining, income support, and regional development — without the constant risk of investor litigation. ISDS is fundamentally incompatible with these objectives and with the Australia's legislated emissions targets. A recent United Nations Report concluded that ISDS is a "major obstacle" to government action on climate change[28] and

[26] *Kyla Tienhaara et al.* Investor-state disputes threaten the global green energy transition..Science**376**,701-703(2022).
[27] Bonnitcha, Jonathan. Why Clive Palmer lost his $300B case against Australia—and what it means for ISDS. UNSW Sydney 2025.
[28] Note by Secretary-General. "Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights". United Nations General Assembly. July 2023.

the OECD has also acknowledged that ISDS works directly against the achievement of net zero by 2050.[29]

Recommendation 5: *As COP31 President for Negotiations, Australia should raise the challenge posed by ISDS to global climate action in both formal negotiations and the Action Agenda and work to build support across UNFCCC Parties for the removal of ISDS from all trade agreements.*

Legislating to exclude ISDS from future agreements

The Joint Standing Committee on Trade and Investment Growth's inquiry into Australia's approach to trade negotiations concluded that ISDS provisions pose significant financial risks to the government, while delaying or deterring legitimate public interest regulation, and are overall not in Australia's public interest.[30]

The Committee made the following recommendation in its final report relating to ISDS:

Recommendation 5: The Committee recommends that the Australian Government should seek to not include provisions in trade and investment agreements that waive labour market and skills testing or include investor state dispute settlement (ISDS) provisions.[31]

The Committee further commented that there are certain elements regarding the content of trade and investment agreements that could be enshrined in a legislative framework. While noting that it would not be appropriate or necessary for a legislative framework to be highly prescriptive in ruling certain provisions in or out of future agreements

---

https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute?s=03

[29] Ana Novik and David Gaukrodger. Future of Investment Treaties Track 1 -- Investment Treaties and Climate Change: Methods to align investment treaty benefits for energy investment with the Paris Agreement and net zero. OECD Secretariat. June 2024. https://one.oecd.org/document/DAF/INV/TR1/WD(2024)1/REV1/en/pdf#:~:text=This%20note%20was%20originally%20prepared,note%20by%2016%20September%202024

[30] Joint Standing Committee on Trade and Investment Growth, 1 May 2024, pp. 86-87:

"Strengthening Australia's Approach to Trade Negotiations', The Committee is persuaded by the view that ISDS provisions in trade and investment agreements have the potential to impose significant costs on governments and can act to delay or deter governments from making regulatory decisions in the public interest…The Committee is not of the view that conferring such rights to international investors is in Australia's national interest."

[31] Ibid., Recommendation 5, p. 88.

…the Committee does believe that there are certain exceptional commitments that are fundamental to the public interest that could be appropriately enshrined in a legislative framework. Further…retaining the ability to regulate in the public interest across key policy areas could also be appropriately enshrined in a legislative framework.[32]

The Committee went on to recommend the establishment of a legislative framework:

Recommendation 8: The Committee recommends that the Australian Government establish a legislative framework for the negotiation of Australia's trade and investment agreements.[33]

The Australian Government has yet to respond to the Committee's recommendations. The ACTU strongly supports embedding the Government's policy against ISDS into legislation, as recommended by the Committee. Doing so will protect democratic decision-making, prevent future governments from reversing current reforms, and ensure Australia's trade policy is aligned with public interest, social justice, and regulatory sovereignty.

The ACTU strongly affirms the Committee's findings on the harmful nature of ISDS clauses. These provisions are inimical to public interest. They invariably serve to chill or quash regulatory initiatives the benefit workers and their communities and give private corporations the power to penalise governments that lawfully act in the interests of their populations. We urgently call upon the Government to play its part in dismantling the role of these clauses in modern trade relations.

Recommendation 6: *Implement the Joint Standing Committee on Trade and Investment Growth's recommendations by legislating a trade-negotiation framework that excludes ISDS and protects Australia's sovereign right to regulate.*

Recommendation 7: *Renegotiate AANZFTA to ensure it complies with the new trade negotiation framework.*

[32] Ibid., p. 110.
[33] Ibid., Recommendation 8, p. 110.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU Australian Unions