



Australian Fair Trade and Investment
Network (AFTINET) Submission to the
review of the Investor-State Dispute
Settlement (ISDS) mechanism in
ASEAN-Australia-New Zealand Free
Trade Agreement (AANZFTA) February
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Introduction

AFTINET is a national network of community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries based on these principles. We recognise the need for regulation of trade through the negotiation of international rules.

We welcome the opportunity to make a submission to the review of the ISDS mechanism in the Second Protocol to Amend the AANZFTA.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries.

These principles are especially important in the current context when urgent multilateral action is required to address the climate crisis. However, both cooperative multilateral action on trade and climate action are under challenge from America First unilateral coercive tariffs and pressures to import more US fossil fuels. This creates more urgency to diversify cooperative trade and climate relationships in our region and elsewhere. Fossil fuel companies are also using ISDS claims to claim billions in compensation from governments acting to reduce carbon emissions. This is a direct threat which must be addressed.

Australian government policy recognises that ISDS reduces the right of governments to regulate in the public interest. The policy excludes ISDS from new trade agreements and pledges to review ISDS in existing agreements.¹

Since the 2022 general review of AANZFTA, which did not include a full review of ISDS, there have been important new developments which add substantially to the evidence against ISDS and to the imperative of removing ISDS from AANZFTA. The most egregious example is that Australian billionaire Clive Palmer is using ISDS in the AANZFTA to claim \$420 billion from the Australian government.

Summary

Since the negotiation of the Second Protocol of AANZFTA in 2022, in addition to evidence of ISDS as a general threat to public interest regulation, there have been increasing numbers of cases by fossil fuel companies against government actions to address the climate crisis by reducing carbon emissions.

The most egregious example is the use of ISDS in the AANZFTA by Clive Palmer, who has registered his mining company in Singapore and, since 2023, has made four claims totalling \$420 billion against the Australian government, three of which involve the refusal of coal mining and energy licenses. There have been new claims by fossil fuel companies against the UK and the Netherlands. ASEAN countries, rich in critical mineral deposits, have in the past faced ISDS cases against industry development policies to add value to these minerals by limiting exports of unprocessed products.

¹ Farrell, D., (2022) Trading our way to greater prosperity and security, November 13, <https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security>.

There is a danger of more such cases with the increasing demand for critical minerals needed for the transition to renewable energy.

The 2025 UNFCCC COP 30 report, *Baku to Belém Roadmap to 1.3T* on climate financing, which explicitly called out ISDS in trade agreements as a systemic barrier to financing climate action in developing countries. The Colombian and Dutch governments are sponsoring a conference to promote the Belem statement on phasing out of fossil fuels, supported by 24 countries at COP 31, which recognises ISDS as a threat to that objective.

“Modernised” exceptions to ISDS provisions have not been effective and do not prevent ISDS cases. There is an agreement between Australia and New Zealand to have a legally binding side-letter in which they agree not to apply ISDS provisions to each other².

Other countries have applied selective modifications to the application of ISDS provisions in the text of AANZFTA³. The Philippines and Vietnam may refer disputes to national courts (Chapter 11 Articles 22.1 a) and e). Malaysia applies local law on issues of land acquisition (Chapter 11 Article 10.1) footnote 19). Cambodia, Lao PDR and Myanmar, as least developed countries most vulnerable to ISDS threats, have sought exemptions from some prohibitions on performance requirements (Chapter 11 Article 6).

These modifications are moves toward more protection of governments’ rights to regulate. Given the increasing evidence against ISDS and the threat it poses to the urgent climate action required to reduce carbon emissions, there is a strong case for the removal of ISDS provisions from AANZFTA. The existing modifications indicate that there may be a number of ASEAN countries willing to discuss the removal of ISDS and/or or to negotiate legally binding side letters not to apply ISDS provisions.

Recommendations:

- The Australian government should advocate for the removal of ISDS provisions (Section B in investment chapter 11) from AANZFTA
- Australia and New Zealand already have a legally binding side letter in which they agree not to apply the ISDS provisions of AANZFTA to each other. If consensus is not reached to remove ISDS, the Australian government should seek the same side letters with all ASEAN countries.

Clive Palmer’s use of AANZFTA to claim \$420 billion from the Australian government

Since the negotiation of the Second Protocol to AANZFTA, Australian billionaire Clive Palmer has registered his company Zeph Investments in Singapore, claimed to be a Singaporean investor and used ISDS in the ASEAN-Australia-New Zealand free trade to claim a total of \$A420 billion from the Australian government. The first claim in 2023 was for \$300 billion after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license.⁴ The other

² New Zealand Ministry of foreign affairs and Trade (2023) Exchange of Letters constituting an Agreement between New Zealand and Australia on the Application of the First Protocol and Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area to the Australia-New Zealand Closer Economic Relations Trade Agreement. <https://www.treaties.mfat.govt.nz/search/details/t/4026/1578>

³ DFAT (2024) Text of the Second Protocol to Amend the AANZFTA <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/second-protocol-to-amend-the-agreement-establishing-asean-australia-new-zealand-free-trade-area-aanzfta>

⁴ Ranald, P. (2023) How Clive Palmer is suing Australia for 300 billion with the help of an obscure legal clause and Christian Porter 4 April,

three claims, which total \$120 billion, are for the refusal of permits for a coal mine and coal-fired power station in Queensland.⁵ The refusals were for environmental reasons, including contributions to increased carbon emissions.⁶

In September 2025, an ISDS tribunal dismissed Palmer's claim to be a Singaporean investor in the first WA iron ore case and ordered him to pay the Australian government legal costs of \$13.6 million⁷. The Attorney-General commented that "Australia should never have had to spend two years and over AU \$13 million defending an investor-State claim brought by an Australian national. The Albanese Government remains committed to actively engaging in processes to remove or reform existing investor-State dispute settlement mechanisms."⁸

The government hoped that Palmer would withdraw his remaining cases following the tribunal decision.⁹ However, Palmer then announced¹⁰ that his legal team will challenge the tribunal's decision in the Federal Supreme Court of Switzerland as one of the seats of the international tribunal process. The Swiss court is not an appeal mechanism for the tribunal and cannot consider the broad merits of the case, only technical legal issues, so the action may not succeed. In the meantime, his other three coal-related cases can proceed in 2026. ISDS tribunals have no precedents, so there is no guarantee that the other three tribunal decisions will be consistent with the first decision, including on the awarding of costs, which are at the discretion of the tribunal. This means the Australian government could face the time and costs associated with each individual case, amounting to multiples of tens of millions of dollars, even if Palmer loses.

The Palmer cases demonstrate how the ISDS system can be manipulated to enable claims of billions from a local investor claiming to be a foreign investor to maximise time and costs for governments.

Evidence of ISDS impacts on foreign direct investment is inconclusive

Supporters of ISDS claim that it increases the level of foreign investment, especially in developing countries. However, there is no conclusive evidence to support this, because studies show that investment decisions are influenced by many other more significant factors, including commercial viability and market conditions. A 2017 review by Bonnitcha *et al* of the impacts of ISDS in BITs on Foreign Direct Investment (FDI) notes the complexity involved in measuring the impact of this single variable on foreign investment flows, which are impacted by many factors. They conclude that

The studies' results are mixed. A majority find that bilateral investment treaties have a positive and statistically significant impact on inward FDI in at least some circumstances. Amongst these the scale and impact varies remarkably with some reporting strong effects

<https://theconversation.com/how-clive-palmer-is-suing-australia-for-300-billion-with-the-help-of-an-obs-cure-legal-clause-and-christian-porter-203111>

⁵ Attorney General's Department. Investor-State Dispute Settlement. Zeph Investments Pte Ltd.

[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](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)

⁶ Queensland Department of Environment and Science (2023) Waratah Galilee Coal Mine EA refused, www.des.qld.gov.au/our-department/news-media/mediareleases/waratah-galilee-coal-mine-ea-refused

⁷ Permanent Court of Arbitration (2025) Zeph Investment vs Australia PCA Case No. 2023-40 Award, September 26 <https://pcacases.com/web/sendAttach/90853>

⁸ Attorney-General Michelle Rowland (2025) International tribunal rejects Clive Palmer's claim against Australia, Media Release September 27, <https://ministers.ag.gov.au/media-centre/international-tribunal-rejects-clive-palmers-claim-against-australia-27-09-2025>

⁹ Attorney-General Michelle Rowland (2025).

¹⁰ Palmer, C. (2025) Clive Palmer to challenge tribunal decision, media release September 28, <https://x.com/CliveFPalmer/status/1972085296138498546>

and others finding positive but only small effects. Among the studies reporting a positive effect of BITS on investment flows, some also come to apparently contradictory findings. Finally a sizeable minority of studies find there was no statistically significant effect of BIT adoption on FDI.¹¹

The most comprehensive 2022 meta-study on ISDS and investment flows concluded that there was “robust evidence that effect of international investment agreements is so small as to be considered zero.”¹²

Brazil’s parliament has never endorsed BITS or trade agreements containing ISDS, but it has experienced high levels of FDI.¹³

ISDS colonial origins, lack of legal procedural protections and claims against public interest regulation

Legal rights for foreign investors to claim compensation originally developed in the post-colonial period after World War II to compensate international investors for the direct expropriation or taking of property by governments. However, over the past 60 years, they have expanded to include “indirect expropriation”¹⁴ and “legitimate expectations”,¹⁵ which do not exist in national legal systems. Investors can claim that they deserve compensation if they can argue that a change in law or policy reduces the value of their investment and/or expected future profits and/or that they were not consulted fairly about the change and did not expect the change to occur when they made the investment. These rules enable tribunals to pay more attention to the payment of compensation rather than whether the regulation is in the public interest.

Widespread criticism has influenced the two institutions that provide ad hoc tribunals to ISDS arbitration systems, the UN Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), to conduct reviews that recognise that there are serious flaws in the ISDS system.¹⁶ Criticisms of the ISDS *structure* include the power imbalance, which gives additional legal rights to international corporations that already exercise considerable market power, the lack of obligations on investors, and the use of claims for compensation for public interest regulation.

ISDS *ad hoc* tribunals are staffed by investment lawyers who continue to practice as advocates and the tribunals lack the protections of national legal systems. Acknowledged criticisms by the UNCITRAL review of the tribunal *process* include the lack of independent judges, arbitrator conflict of

¹¹ Bonnitca, J., Lauge, N., Skovgaard, P., Waibel, M. (2017) *The Political Economy of the Investment Treaty Regime*, Oxford University Press, Oxford, p. 159.

¹² Brada, J., Drabek Z., (2022) Does investor protection increase foreign direct investment? A Meta-Analysis 30 September <https://onlinelibrary.wiley.com/doi/full/10.1111/joes.12392>

¹³ Filho, J. (2008) “The Brazilian Experience with Bilateral Investment Agreements: A Note”, *Transnational Dispute Management*, No.1, <https://www.transnational-dispute-management.com/article.asp?key=1198>.

¹⁴ Malakotipour, M (2020) The chilling effect of indirect expropriation clauses on host states public policies: A call for a legislative response. *International Community Law Review*. 29 May. Available at https://brill.com/view/journals/iclr/22/2/article-p235_5.xml?language=en

¹⁵ Levashova, Y (2022) The role of investors’ due diligence in international investment law: legitimate expectations of investors. 22 April. *Kluwer Investment Blog*. Available at <https://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/>

¹⁶ Langford, M, Potesta, M and Kaufman, G (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. *Journal of World Investment and Trade*. 22 June. Available at https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

interest, lack of transparency, lengthy proceedings, high legal and arbitration costs, forum-shopping by investors, inconsistent decisions caused by the lack of precedents and appeals, third-party funding for claims as speculative investments, and excessively high awards based on dubious and inconsistent calculations of expected future profits.¹⁷ The Clive Palmer cases show how these flaws can be manipulated to maximise time and costs to governments.

The number of reported ISDS cases has been increasing rapidly, reaching 1440 as of July 2025.¹⁸ These include cases against tobacco regulation,¹⁹ medicine patents,²⁰ indigenous land rights,²¹ regulation of the minimum wage²² environmental protections,²³ and more recently, government action to reduce carbon emissions, examples of which are discussed in more detail below.

Latest evidence of ISDS claims against government regulation of carbon emissions

A 2022 study published in the journal *Science* showed that the increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels is a growing threat to government action to address climate change.²⁴

US company Ruby River Capital filed an ISDS claim against Canada after its liquefied natural gas project was rejected because of concerns about its greenhouse gas emissions. The company sought US\$20 billion in compensation despite having spent approximately US\$124 million on the project ²⁵.

In Europe, German energy companies RWE and Uniper launched ISDS cases against the Netherlands using ISDS in the Energy Charter Treaty (ECT) over its moves to phase out coal-powered energy by

¹⁷ Langford *et al*, *op.cit.*p.1.

¹⁸ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>

¹⁹ Ranald, P. (2019) When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging, *The Conversation*, March 27, <https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>

²⁰ Baker, B. (2017) The Incredible Shrinking Victory: *Eli Lilly v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS cases, *Loyola University Chicago Law Journal*, Vol. 49, 2017, *Northeastern University School of Law Research Paper No. 296-2017* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012538

²¹ International Centre for Settlement of Investment Disputes (2017) Decision on Bear Creek Mining Corporation versus the Republic of Peru, November 17, ICSID Case No. ARB/14/21, https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

²² UNCTAD (2019) Investment Dispute Settlement Navigator, *Veolia v. Egypt 2012*, <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt>; Breville, B and Bulard, M. (2014) The injustice industry and TTIP, *Le Monde diplomatique*, English edition, June, <https://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf>

²³ Withers, P. (2019) Canada ordered to pay US 7 million in NAFTA case, February 25, Canadian Broadcasting Company, <https://www.cbc.ca/news/canada/nova-scotia/nafta-bilcon-digby-neck-quarry-environmental-sovereignty-1.5032727>

Nelson, A. (2022) Oil firm Rockhopper wins £210m payout after being banned from drilling, *The Guardian*, August 25, <https://www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling#:~:text=Oil%20firm%20Rockhopper%20wins%20%C2%A3210m%20payout%20after%20being%20banned%20from%20drilling,-This%20article%20is&text=A%20corporate%20tribunal%20has%20ordered,an%20offshore%20oil%20drilling%20ban.>

²⁴ Tienhaara *et al*. (2022) Investor-State disputes threaten the global green energy transition, *Science*, 5 May 2022 Vol 376, Issue 6594 pp. 701-70 <https://www.science.org/doi/10.1126/science.abo4637>

²⁵ International Centre for Settlement of Investment Disputes (ICSID) (2023b) *Ruby River Capital LLC v. Canada*, ICSID Case No. ARB/23/5. Available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/5>. Boston University (2023) Submission to the Special Rapporteur on human rights and the environment call for inputs. Available at <https://www.bu.edu/gdp/files/2023/11/KT-RT-KG-OHCHR-ISDS-Submission-FIN.pdf>

2030.²⁶ Although both cases have now been withdrawn, they spurred public debate and a comprehensive review of the EU's membership of the ECT which led to EU withdrawal.

However the ECT's sunset clause continues to protect existing investments for 20 years. In 2025 Dutch oil company Shell registered in the UK and US company Exxon-Mobil initiated separate ISDS cases against the Netherlands over the closure of the Groningen gas field, one of Europe's largest gas projects, because a parliamentary inquiry found the drilling caused earthquakes resulting in widespread structural damage, safety risks, and social harm. These cases appear to be counterclaims to attempt to evade responsibility for the costs of environmental remediation²⁷, and show why it is essential to terminate ISDS sunset clauses. There are technical proposals to do so through the use of Article 62 of the Vienna Convention on the Law of Treaties (VCLT), on the basis that there has been a fundamental change in circumstances since the inception of the treaty. This can be justified on the basis that a swift and substantial transition away from fossil fuels is now required to ensure states can meet their obligations under the Paris Agreement²⁸.

In 2025 the UK faced its first ISDS claim under the bilateral Singapore UK investment agreement from Singapore-based Woodhouse Investment Pte Ltd against a High Court decision to deny a permit for a coal mine in Cumbria²⁹. The claim has provoked widespread public criticism as it is seen as a challenge to government policy to phase out fossil fuels³⁰.

Southeast Asian countries also face specific threats related to the climate crisis and development issues because they are rich in critical minerals needed for the transition to renewable energy, which has increased global demand. Some ASEAN countries have intensified their efforts to process these minerals to add value, rather than export raw materials. Indonesia's restrictions on raw materials exports were part of a broader development strategy for value-added exports, which was challenged through an ISDS case brought by Newmont Mining under the Netherlands-Indonesia Bilateral Investment Treaty before Indonesia terminated that treaty³¹. The rush to critical minerals could see ISDS threats against national development policies from mining companies based in or with subsidiaries in, Australia, New Zealand or Singapore using ISDS in the AANZFTA³².

²⁶ Kluwer Arbitration (2021) <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>

²⁷ Bedeschi, B. (2026) Groningen closure debate reignites as Shell brings fresh arbitration. *Gas Outlook*. January 21, <https://gasoutlook.com/analysis/groningen-closure-debate-reignites-as-shell-brings-fresh-arbitration/>

Hodgson, R. ExxonMobil sues Dutch government over gas field closure(2024) *EuroNews*. October 10. <https://www.euronews.com/my-europe/2024/10/10/exxonmobil-sues-dutch-government-over-gas-field-closure>

²⁸ Jackson, E. (2024) The Energy Charter Treaty: Letting the sun set on sunset clauses. *Review of European, Comparative & International Environmental Law*. Volume 33, Issue 3 pp. 619-63 <https://onlinelibrary.wiley.com/doi/10.1111/reel.12583>

²⁹ Investment Treaty News (2026)The United Kingdom faces its First ISDS Arbitration. January 19. <https://www.iisd.org/itn/2026/01/19/the-united-kingdom-faces-its-first-isds-arbitration/>

³⁰ ABColombia (2026) ISDS a threat to global security. February 4. Report of a conference sponsored by Christian Aid, CAFOD, SCIAF, Oxfam and Trocaire. <https://www.abcolombia.org.uk/isds-a-threat-to-global-security/>

³¹ Trans National Institute (2014). The Case of Newmont Mining vs Indonesia , November, Amsterdam <https://www.tni.org/en/publication/the-case-of-newmont-mining-vs-indonesia>

³² Hertanti, R. (2023) Between a Mineral and a Hard Place. June15, Transnational Institute. Amsterdam. <https://www.tni.org/en/article/between-a-mineral-and-a-hard-place>

Governments are refusing ISDS arrangements

Following the Court of Justice of the European Union (CJEU) Achmea judgment³³ in 2018, which found ISDS provisions to be incompatible with EU law, EU countries signed a plurilateral agreement to terminate over 130 intra-EU BITs, including terminating sunset clauses which provide for disputes to continue after agreements have been terminated³⁴.

As discussed above, the EU Commission in July 2023 proposed a coordinated withdrawal of all EU states from the ECT because its ISDS provisions were being used against government policies to reduce carbon emissions.³⁵ The UK has also announced its withdrawal from the ECT.³⁶

There has been bipartisan opposition to ISDS in the USA. The USA and Canada both agreed not to apply ISDS to each other in the first Trump administration's 2020 revision of NAFTA (now called the US-Mexico-Canada Agreement).³⁷

Other governments are withdrawing from ISDS arrangements. South Africa, India and Indonesia have terminated Bilateral Investment Treaties. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP) and the Australia-UK Free Trade Agreement (A-UKFTA). ISDS has also been excluded from the India-Australia Comprehensive Economic Cooperation Agreement and the Australia-EU Free Trade Agreement (A-EUFTA), both currently under negotiation.

The United Nations Framework Convention on Climate Change reports say ISDS is a systemic barrier to climate action

A 2023 report by the UN Special Rapporteur on human rights and the environment found “overwhelming evidence that ISDS is a major barrier to addressing climate change.”³⁸

This recognition continued in the 2025 UNFCCC COP 30 report, *Baku to Belém Roadmap to 1.3T* on climate financing, which explicitly called out Investor-State Dispute Settlement (ISDS) in trade agreements as a systemic barrier to financing climate action in developing countries (p.52):

A further systemic barrier reflects outdated clauses used in over 2,000 investment treaties that can impact the sovereign policy-making space of developing countries. Investment treaties with investor-state dispute settlements provisions allow foreign investors to claim compensation against government measures that may challenge their business interests. Potential damages liability can affect policy decisions to set enabling environments for

³³ Judgment of the Court of Justice of the European Union (2018), *Slowakische Republik v Achmea BV* 6 March, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62016CJ0284>

³⁴ Official Journal of the European Union (2020), Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union 29 May https://eur-lex.europa.eu/eli/agree_internation/2020/529/oj/eng

³⁵ European Commission (2023), 7 July, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

³⁶ UK government (2024) UK departs Energy Charter Treaty, 22 February, <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty>

³⁷ Miller-Chevalier (2023) As the end of NAFTA's sunset period approaches, Mexican, U.S. and Canadian investors have until April 1 to submit a notice of intent. *International Alert* March 15. Available at <https://www.millerchevalier.com/publication/end-naftas-sunset-period-approaches-mexican-us-and-canadian-investors-have-until-april> (accessed 23 February, 2024)

³⁸ Boyd, D. (2023) Paying polluters: the catastrophic consequences of Investor-State Dispute Settlement for climate and environment action and human rights. UN Commission on Human Rights, July 13 <https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute?s=03>

*climate action. Up to USD 83 billion has been awarded through 349 investor-state disputes for policy actions such as denial of permits for GHG emissions-intensive exploration, extraction, or infrastructure. Developing countries are vulnerable to over 60 per cent of potential Investor-state dispute settlement (ISDS) claims due to climate action.*³⁹

Irene Vélez Torres, the environment minister of Colombia, spoke following a much-lauded announcement in which Colombia said it would protect its part of the Amazon from fossil fuel exploitation. She said ISDS made such decisions far more difficult because Colombia is one of the most affected countries in the world by ISDS, with 23 known cases already, and as many as 280 potential cases if the country continues to take ambitious climate action. “No government should have to choose between protecting nature and its people, and protecting itself from arbitrators,” she said.⁴⁰

Australia and 23 other countries endorsed the Belem Declaration on the Transition away from Fossil Fuels, initiated by Brazil, the Netherlands and Colombia⁴¹.

Colombia and the Netherlands are hosting a high level government conference in Santa Marta, Colombia, from April 28-9, 2026, to develop practical action plans for the transition away from fossil fuels. The themes are overcoming economic dependence, transforming supply and demand for renewable energy and advancing international cooperation and multilateralism. The last theme includes addressing international legal barriers, particularly those arising from ISDS⁴².

‘Modernised’ ISDS provisions do not create effective protections against ISDS cases

There have been attempts in more recent trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to include more protections for governments. This includes exemptions that are intended to safeguard public interest regulation. However, the effect of the “modernised” provisions has been limited as ISDS tribunals have continued to draw on the text of old treaties when interpreting “modernised” treaties.⁴³

For example, in the *Eco Oro v. Colombia* decision, the tribunal disregarded an exception in the Colombia-Canada FTA included to protect governments’ right to enact environmental regulation, instead referring to decisions relating to older agreements. The exception reads that nothing in the FTA’s investment chapter “shall be construed to prevent a Party from adopting or enforcing measures necessary” to protect the environment if the measures do not amount to “arbitrary discrimination or disguised restraint on trade or investment.” However, the tribunal decided that even if the exception applies to a measure, “this does not prevent an investor claiming ... that such a measure entitles it to the payment of compensation.”⁴⁴

³⁹ UNFCCC COP 30 (2025) *From Baku to Belem roadmap to 13 T*, November 5. <https://unfccc.int/documents/650953>

⁴⁰ Montague, B. COP30 ‘must declare an end to ISDS’ *The Ecologist*, November 18.

<https://theecologist.org/2025/nov/18/cop30-must-declare-end-isds>

⁴¹ Belem Declaration on the Transition away from Fossil Fuels (2025) November 23.

<https://static1.squarespace.com/static/68dc91a7e566d74a91e8e22d/t/6982c9263e67ae51aa01c17d/1770178854739/BEL+EM+DECLARATION+ON+THE+TRANSITION+AWAY+FROM+FOSSIL+FUELS.pdf>

⁴² Colombia The Netherlands (2026) First conference on Transitioning away from Fossil Fuels: Principles and Thematic Pillars <https://transitionawayconference.com/>

⁴³ Wolfgang, A. (2022) *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes, OUP*.

<https://global.oup.com/academic/product/investment-arbitration-and-state-driven-reform-9780197644386?cc=ch&lang=en&>

⁴⁴ Benton Heath, J. (2021) *Eco Oro and the Twilight of Policy Exceptionalism*, *Investment Treaty News*, <https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/>.

In the CPTPP, a similar exception includes the additional proviso that nothing should prevent measures to protect the environment “otherwise consistent with this chapter.”⁴⁵ Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation.⁴⁶

These changes do not prevent claims from being brought against governments with uncertain outcomes because of inconsistent decisions by tribunals. They only provide some possible arguments governments can use while spending millions on legal and arbitration costs in defending them.

Conclusion and recommendations

This submission has shown that since the negotiation of the Second Protocol of AANZFTA in 2022, in addition to evidence of ISDS as a general threat to public interest regulation, there have been increasing numbers of cases by fossil fuel companies against government actions to address the climate crisis by reducing carbon emissions.

The most egregious example is the use of ISDS in the AANZFTA by Clive Palmer, who has registered his mining company in Singapore and, since 2023, has made four claims totalling \$420 billion against the Australian government, three of which involve the refusal of coal mining and energy licenses. There have been new claims by fossil fuel companies against the UK and the Netherlands. ASEAN countries, rich in critical mineral deposits, have in the past faced ISDS cases against industry development policies to add value to these minerals by limiting exports of unprocessed products. There is a danger of more such cases with the increasing demand for critical minerals needed for the transition to renewable energy.

The 2025 UNFCCC COP 30 report, *Baku to Belém Roadmap to 1.3T* on climate financing, which explicitly called out ISDS in trade agreements as a systemic barrier to financing climate action in developing countries. The Colombian and Dutch governments are sponsoring a conference to promote the Belem statement on phasing out of fossil fuels, supported by 24 countries at COP 31, which recognises ISDS as a threat to that objective.

“Modernised” exceptions to ISDS provisions have not been effective and do not prevent ISDS cases. There is an agreement between Australia and New Zealand to have a legally binding side-letter in which they agree not to apply ISDS provisions to each other⁴⁷.

Other countries have applied selective modifications to the application of ISDS provisions in the text of the agreement⁴⁸. The Philippines and Vietnam may refer disputes to national courts (Chapter 11 Articles 22.1 a) and e). Malaysia applies local law on issues of land acquisition (Chapter 11 Article 10.1) footnote 19). Cambodia, Lao PDR and Myanmar, as least developed countries most vulnerable

⁴⁵ DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Chapter 9, Article 9.16, p. 9-18. <https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents>.

⁴⁶ Kawharu, A. (2015) TPPA Chapter 9 on Investment, Expert Paper no. 2 on the TPPA, p.9, *The Law Foundation*, <https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf>, and Gleeson, D, and Labonte, R (2020) Trade Agreements and Public Health, pp.28-9. Palgrave studies in public health policy research, Palgrave Macmillan, Singapore.

⁴⁷ New Zealand Ministry of foreign affairs and Trade (2023) Exchange of Letters constituting an Agreement between New Zealand and Australia on the Application of the First Protocol and Second Protocol to Amend the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area to the Australia-New Zealand Closer Economic Relations Trade Agreement. <https://www.treaties.mfat.govt.nz/search/details/t/4026/1578>

⁴⁸ DFAT (2024) Text of the Second Protocol to Amend the AANZFTA <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/second-protocol-to-amend-the-agreement-establishing-asean-australia-new-zealand-free-trade-area-aanzfta>

to ISDS threats, have sought exemptions from some prohibitions on performance requirements (Chapter 11 Article 6).

These modifications are moves toward more protection of governments' rights to regulate. Given the increasing evidence against ISDS and the threat it poses to the urgent climate action required to reduce carbon emissions, there is a strong case for the removal of ISDS provisions from AANZFTA. The existing modifications indicate that there may be a number of ASEAN countries willing to discuss the removal of ISDS and/or or to negotiate legally binding side letters not to apply ISDS provisions.

Recommendations:

- The Australian government should advocate for the removal of ISDS provisions (Section B in investment chapter 11) from AANZFTA
- Australia and New Zealand already have a legally binding side letter in which they agree not to apply the ISDS provisions of AANZFTA to each other. If consensus is not reached to remove ISDS, the Australian government should seek the same side letters with all ASEAN countries.