

The eleven ASEAN countries and Australia and New Zealand have agreed to review investor rights to sue governments known as Investor State Dispute Settlement (ISDS) in the AANZFTA in 2026.

To begin, all trade agreements have state-to-state dispute processes.

The inclusion of ISDS clauses is a separate **optional** process in AANZFTA and some other trade and investment agreements that allows foreign (**but not local**) investors to claim billions from governments in compensation for law or policy changes if they can convince an international tribunal that the change will reduce their future profits, **even if** the change is for health, environmental or other public interest reasons.

In the past 60 years, foreign investor rights have expanded to include "indirect expropriation" and "legitimate expectations" neither of which exist in national legal systems. Investors can claim that they were not consulted adequately about the change or did not expect it when they made the investment. This has permitted corporations to use ISDS against laws and policies protecting environmental issues, workers' rights, and public health. Threats of ISDS are used by mining companies to create an atmosphere of fear on international agreed climate and environmental policy.

ISDS tribunals have no safeguards that national legal systems have. There are no independent judges, precedents or appeals.

There are increasing numbers of huge claims against developing countries e.g. in 2019, an ISDS tribunal ordered Pakistan to pay US\$5.8billion to a mining company.

ISDS provisions have been scrapped by many governments. India, Indonesia, South Africa and Ecuador have cancelled old investment agreements with ISDS. On the other hand, Brazil has never agreed to ISDS clauses.

Industrialised countries are now also resisting ISDS provisions. Australia and New Zealand have policies against ISDS. The European Union and the United Kingdom have withdrawn from the Energy Charter Treaty because its ISDS provisions were being used by fossil fuel companies against government policies to address climate change.

ISDS in AANZFTA has been weaponised against Australia by a coal mining company. Australian billionaire Clive Palmer has registered his mining company, Zeph Investments, in Singapore and claimed to be a Singaporean investor. He then used ISDS in AANZFTA to sue the Australian government for a total of \$420billion in four separate cases before an international investment tribunal, three relating to coal mining and energy licences. Palmer's first claim was for \$300billion after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license. The last three

claims for a total of \$120billion are because a Queensland Court refused his coal mining licence, and permission to operate a coalfired power plant for environmental reasons - including increased carbon emissions.

In September 2025 the international 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 \$13,6million But Palmer is seeking an annulment of the tribunal's decision in the Federal Supreme Court of Switzerland which can consider only technical legal issues, and which is he unlikely to win. He is simply stalling. In the interim the Australian Government (read Australian taxpayers) remain unpaid.

In the meantime his other three coal-related cases will proceed and the Australian Government (read Australian taxpayers) could have to spend tens of millions defending each one. Palmer's claims expose the absurdity of ISDS, which allows fossil fuel companies to make multi-billion dollar claims against court decisions, laws or policy changes, and to manipulate the locations of their investments to maximise claims as Palmer has done.

ISDS provisions have been recognised by governments and the United Nations as a major obstacle to climate action. Palmer's last three actions are clear demonstrations of this.

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 ISDS 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 climate action. Up to **US\$83billion** has been awarded through 349 investor-state disputes for policy actions such as denial of permits for greenhouse gas emissions-intensive exploration, extraction, or infrastructure. Developing countries are vulnerable to over 60 per cent of potential ISDS claims due to climate action.

Irene Vélez Torres, the environment minister of Colombia, stated that Colombia would protect its part of the Amazon region 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.

The Australian government has signed the Belem Declaration on the Transition away from Fossil Fuels. The government should work to remove ISDS because it is a barrier to this transition.

The Australian government has a policy of opposing ISDS in new trade agreements and reviewing and removing it from existing agreements. The Australian government should support the removal of ISDS provisions from the investment chapter of 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 ASEAN countries, which would limit the coverage of ISDS.

Australia must act against ISDS in AANZFTA.

Respectfully submitted,

