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Submission on Upgrading ISDS Mechanism in AANZFTA

Public Services International (PSI) is the global union federation representing workers who deliver essential public services. Our organisation comprises more than 700 union affiliates in 154 countries and represents over 30 million workers worldwide.

PSI welcomes the Department of Foreign Affairs and Trade's review of the ISDS provisions in the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA). We are opposed to the Investor–State Dispute Settlement (ISDS) mechanism being included in any agreement, due to its extensive record of enabling corporations to pursue multi-billion-dollar claims against governments, often at the expense of states' ability to provide quality public services. We urge the Australian Government to prioritise labour rights, human rights, and a health and safe environment, and to ensure that trade agreements do not compromise these imperatives. This submission draws on the experience of PSI affiliates across the territories covered by the agreement and presents recommendations to ensure that AANZFTA safeguards and advances the public interest.

This submission outlines the human rights, environmental, and fiscal risks arising from ISDS and recommends the full removal of ISDS provisions from all current and future Australian trade and investment agreements. We also call for robust safeguards to protect the regulatory space of national and subnational governments. Consistent with our previous submission made to the review of Australia's bilateral investment treaties with Türkiye, Argentina, and Pakistan, we reiterate the recommendations we presented to the *Joint Standing Committee on Trade and Investment Growth* regarding Australia's approach to trade and investment negotiations. We recommend that the Committee's report be used to guide this review.

Free Trade Agreements such as AANZFTA were initially negotiated to promote tariff-free trade between parties. However, the interpretation of certain provisions has expanded significantly in favour of investors, resulting in adverse human rights and environmental impacts, particularly in lower-income countries. Beyond direct economic harm, the mere threat of ISDS produces a "regulatory chill," discouraging governments from implementing public-interest measures for fear of costly arbitration claims. This effect undermines governments' capacity to deliver public services and compromises their human rights obligations.

Australia's experience illustrates these risks clearly. Clive Palmer has aggressively used ISDS under AANZFTA by re-registering his company, Zeph Investments, in Singapore to claim foreign investor status and initiate four ISDS claims totalling $420 billion against the Australian Government. Three of these cases challenge decisions denying him coal-related mining and energy licences. His initial $300 billion claim stemmed from the Western Australian Government's refusal to grant him an iron ore mining licence, while a further $120 billion in claims contest the Queensland courts' rejection of a coal mine and coal-fired power station on environmental grounds. These actions

demonstrate how ISDS allows fossil fuel companies to contest domestic legislation, judicial decisions, and environmental protections, and to strategically relocate corporate registrations to maximise their litigation opportunities.

In September 2025, an international tribunal dismissed Palmer's assertion that he qualified as a Singaporean investor in the Western Australian case and ordered him to pay $13.6 million in legal costs. Nevertheless, he has sought annulment in the Swiss Federal Supreme Court—a move widely viewed as a delaying tactic—while his three remaining coal-related claims proceed. Each case may cost Australia tens of millions of dollars to defend. These actions are part of a broader global trend in which fossil fuel corporations increasingly use ISDS to challenge climate policies, reinforcing the findings of a recent United Nations report that characterises ISDS as a "major obstacle" to effective climate action.

ASEAN countries face similar threats from Australian mining companies. Australian mining company Kingsgate filed a claim under the Australia-Thailand FTA following Thailand's 2017 decision to suspend operations at the Chatree gold mine. The Thai government acted on public health and environmental grounds after communities near the mine reported elevated levels of arsenic, manganese, and cyanide contamination. Kingsgate sought more than a billion dollars in compensation. After years of costly arbitration, the Thai government reinstated mining rights despite the environmental risks. The case raised serious concerns about the regulatory chill effect: governments may hesitate to enforce environmental or public health protections if doing so triggers costly arbitration.

Across ASEAN, ISDS mechanisms have created similar risks. Vietnam has faced 13 publicly known ISDS cases, many still pending, involving investors from China, Germany, Portugal, the United States, and Korea. These cases span sectors including industrial park development, construction, and financial services, often emerging when foreign investors challenge domestic regulatory or bankruptcy processes. Vietnam's expanding manufacturing economy and its commitments under CPTPP, EVIPA, and RCEP have heightened exposure to significant arbitration liabilities, risking substantial financial loss in the event of adverse rulings.

Indonesia offers another clear example of ISDS undermining policy autonomy, especially in environmentally sensitive and resource-dependent sectors. The country has been the subject of multiple mining-related ISDS claims, including from Australian mining company, Churchill Mining and another by Indian Metals & Ferro Alloys under the India–Indonesia BIT. Although Indonesia ultimately prevailed, the tribunal demonstrated the expansive range of allegations that foreign investors can pursue, from unfair treatment to indirect expropriation. In the Churchill mining case, the company was able to present falsified documents and pursue claims dismissed by national courts, with four years of litigation taking public resources. The dispute involving the Batu Hijau copper and gold mine is frequently cited as evidence of "regulatory chill," with academic studies linking Indonesia's subsequent softening of mining regulations to the threat of arbitration. Although Indonesia has attempted to withdraw from BITs with ISDS, survival clauses mean treaty obligations—and associated liabilities—remain in effect for 10 to 15 years after termination.

Malaysia's ISDS experience is equally concerning. The country has faced cases across sectors including real estate, construction, and cultural-heritage salvage. A prominent ongoing case, *Tjandranegara v. Malaysia*, brought under the ASEAN Comprehensive Investment Agreement, challenges government actions related to the "Exchange 106" real-estate project on grounds of direct and indirect expropriation. Earlier disputes, such as *Malaysian Historical Salvors*, show how commercial disagreements can escalate into ISDS claims. Malaysia has signed more than 70

investment guarantee agreements, most containing ISDS provisions, making it both a frequent respondent and a home state to companies initiating ISDS claims abroad. Malaysian civil society organisations have become increasingly vocal, warning that reintroducing ISDS into RCEP would expose the country to significant legal and financial risk. With global ISDS cases now exceeding 1,400—many resulting in enormous compensation payouts—concerns have intensified about ISDS undermining Malaysia's ability to regulate in the public interest.

Overall, ISDS mechanisms across ASEAN impose substantial and enduring burdens on governments at financial, political, and environmental levels. Vietnam's dense treaty network, Indonesia's mining-related disputes and survival clauses, and Malaysia's exposure through broad investment protections all underscore a consistent pattern: ISDS gives foreign investors powerful avenues to challenge measures taken in the public interest, while governments bear the long-term fiscal and policy consequences—even in cases where they ultimately succeed in arbitration.

Provisions required to ensure the economic, social and environmental impacts of a trade/investment agreement are considered and adverse impacts are avoided:

- The revised trade agreement should recognise that, pursuant to Article 103 of the United Nations (UN) Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." As the former UN Independent Expert on a Global Equitable Order, Alfred de Zayas proposed in his report to the General Assembly argued, "this means that bilateral and multilateral free trade and investment agreements that contain provisions that conflict with the letter and spirit of the UN Charter must be revised or terminated. Incompatible provisions can be eliminated according to the doctrine of severability, without overthrowing the entire international investment regime."

- Include the following clause, which is based on existing carve out clauses in USFTAs relating to security[1]: **'Nothing in this Agreement shall preclude a party from applying measures that it considers necessary to meet its United Nations obligations to respect, protect, fulfil or promote human rights and / or to meet their United Nations commitments in relation to the environment and climate action.' With a footnote which states that 'For greater certainty, if a Party invokes this Article in any dispute, the body hearing the matter shall find that this exception applies.'**

- Incorporate a clause guaranteeing respect for fundamental labour rights and principles, as defined by the ILO core instruments and establish a labour rights dispute mechanism between the parties which most involves trade unions from both parties. To this end, ensure that the human rights carve out clause (proposed above) includes all labour rights and applies to all provisions of the agreement.

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[1]This is adapted from: - the security exception in Colombia, Korea, Panama and Peru USFTAs at https://ustr.gov/trade agreements/free-trade-agreements which include wording such as: Article 22.2: 'Nothing in this Agreement shall be construed: . . . to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.[x]

[x]For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.' -the indigenous peoples exception proposed by New Zealand (on page 59 of https://www.bilaterals.org/?wto 2023-plurilateral-ecommerce-48862) in the plurilateral ecommerce negotiations that Australia is also participating in, https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm

- The labour rights enforcement mechanism should accept all findings and recommendations of ILO bodies as an established fact that the state party must act on.

- Produce ex ante and ex post agreement specific economic, social and environmental impact assessments including human rights, workers' rights, employment, gender and health impact assessments. This should also include listing and analysing the implications of any Australian measures which would need to be changed at any level of government to comply with the Agreement. Economic, social and environmental impact assessments should involve public participation.

Provisions required to protect the right to regulate in the public interest:

- Ensure that no investor-to-state dispute settlement (ISDS) provisions are included.

- Explicitly ensure that revised agreements do not undermine public services (e.g. the ability to reverse privatisations) by including an effective, self-judging and easy to use complete carve-out in the scope section for public services such as 'Nothing in this Agreement precludes a Party from applying measures that it considers affects public services. For greater certainty, if a Party invokes this Article in an arbitral proceeding under this Agreement, the tribunal or panel hearing the matter shall find that the exception applies.'

- Ensure that tax provisions are excluded from the agreement by including a clause - "Nothing in this Agreement shall apply to measures affecting tax. The Parties agree that whether a measure affects tax shall not be subject to the dispute settlement provisions of this Agreement.'

- Exclude ratchet and standstill provisions since these lock-in restrictions on regulatory and policy space.

- Given the current geopolitical climate, certain essential manufacturing may need to be onshored e.g. pharmaceuticals for a pandemic, so Australia must retain space for industrial policy including government procurement. Consequently, the agreements should explicitly exclude government procurement by all levels of government.

- Do not include any digital trade provisions in the revised agreement (including there must be no provisions on: data localisation/cross-border data flows, source code/algorithms, non-discriminatory treatment of digital products, tariffs on electronic transmissions etc).

- Ensure there are no restrictions on local presence requirements because these restrict the ability to effectively regulate and tax.

- There must be a genuine prudential carve-out (not the self-cancelling one usually copied from the WTO[3]). Based on the security exception in some USFTAs (see above), a genuine prudential carve-out could say: 'Nothing in this Agreement shall preclude a Party from applying measures that it considers necessary for prudential reasons. For greater certainty, if a Party invokes this Article in an arbitral proceeding initiated under this Agreement, the tribunal or panel hearing the matter shall find that the exception applies.'

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[3]E.g. Article 11.11.1 CPTPP uses the prudential defence from the WTO which includes this sentence which has been widely criticised (e.g. see https://www.citizen.org/wp-content/uploads/report-prudential measures.pdf) as making the exception self-cancelling: 'If these measures do not conform with the provisions of this Agreement to which this exception applies, they shall not be used as a means of avoiding the Party's commitments or obligations under those provisions.'

There are no provisions on state-owned enterprises (SOEs) in any revised agreements.

- There must be no intellectual property (IP) provisions or chapter in any such agreements. If there are any IP provisions, they must not be stronger than the WTO requires ('TRIPS-plus'). Instead, Australia should include recognition of TRIPS flexibilities in relation to medicines, and expand those flexibilities in relation to climate technologies required to rapidly decarbonise the economy and adapt to the climate crisis.

- There must be no services domestic regulation disciplines or investment facilitation provisions (such as those which have just been concluded[i] in the optional plurilateral negotiations at the WTO which Australia is part of[ii]) since they significantly restrict regulatory space[iii]. There are no provisions on regulatory coherence/good regulatory practices such as those in the US-Mexico-Canada Agreement (USMCA),[iv] since these lock-in processes that make it more difficult, slower and more expensive to regulate in the public interest[v].

- An explicit recognition of the agreed international principle of solidarity should be incorporated to ensure the agreements do not limit progressive realisation of economic rights.

- State, territory and local governments or any other subordinate bodies must be carved out from the whole Agreement.

- There is a self-judging security exception such as those in USFTAs.[4]

- That no investor-to-state dispute settlement (ISDS) provisions are included.

- There be a tight definition of 'investor of a Party' e.g. the parent company of the investor must be registered in the jurisdiction of one of the Parties[vi] to avoid treaty shopping as appears to have occurred in the Reko dik case.[vii]

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[4]See Colombia, Korea, Panama and Peru USFTAs at https://ustr.gov/trade-agreements/free-trade-agreements which include wording such as: Article 22.2: 'Nothing in this Agreement shall be construed: . . . to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.[x]

[x]For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.'

[i] https://www.wto.org/english/news_e/news23_e/infac_06jul23_e.htm

[ii] https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm

[iii] E.g. see JaneKelseyOct2021.pmd and Refpaper KindaNov21.pmd

[iv] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada agreement/agreement-between

[v] E.g. see IPEF GRP TWNBP Jan 2023 Kelsey.pdf

[vi] E.g. the way that Germany defined its investors in the Singapore-Germany BIT: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1413/download from https://investmentpolicy.unctad.org/international-investment-agreements/countries/190/singapore as is common in European practice, 'The International Law On Foreign Investment', Sornarajah, 2010.

- The definition of 'investment' be limited to an exhaustive list which is tangible property (e.g. real estate, cars etc), not licences, permits, concessions, public private partnerships, intellectual property, future profits etc. Otherwise investors can continue to claim the lost future profits they would have made if they had constructed the buildings and operated them etc, e.g. in the Reko Diq cases the award was based on future profits they would have made if they had operated a mine for 56 years.

- There not be any minimum standard of treatment/fair and equitable treatment (FET) provisions since this is the most common and most successful basis for investor claims via ISDS[viii] and has been interpreted as a standstill on laws and regulations[ix] which can restrict Parliament's ability to legislate in the public interest, e.g. to implement climate change measures, adapt financial regulation after crises and update tax laws to close loopholes etc. [5]

- There not be any most-favoured nation (MFN) (or umbrella clause) provision since this has been used to import problematic provisions from other treaties without the relevant exceptions/safeguards.[6]

- There are no restrictions on performance requirements (e.g. so that voluntary licence royalties can be capped to ensure that medicines, vaccines etc produced under such licences are affordable[7]).

- There be no indirect expropriation provision since this has been commonly and successfully used by investors to challenge public interest measures.[x]

- Any direct expropriation provision shall only allow compensation to the level permitted by the host government's law as from time to time in force.[xi]

- There are no restrictions on the ability to require local senior managers/directors to ensure corporate accountability (e.g. for industrial manslaughter) is possible.

[vii] E.g. see concerns about treaty shopping at International Investment Agreements Reform Accelerator and https://investmentpolicy.unctad.org/uploaded files/document/UNCTAD_Reform_Package_2018.pdf

[5]The number of international investment agreements (bilateral investment treaties or free trade agreement investment chapters) without FET or the other investment provisions mentioned here can be seen at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping e.g. the Australia-China FTA investment chapter does not include FET.

[6]E.g. an ISDS tribunal under the UK-Soviet BIT did not have jurisdiction, so it imported a broader dispute settlement provision from a Denmark-Russia BIT to give itself jurisdiction, without the exceptions in the Denmark Russia BIT (e.g. excluding disputes re tax, which was the basis of the British investor's claims against Russia), https://www.iisd.org/itn/2011/04/07/awards-and-decisions-2/ and the investor won, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/184/rosinvest-v-russia

[7]E.g. left to their own devices, patent owning pharmaceutical companies charged 30% royalties to generic companies to make antiretrovirals for people living with HIV/AIDS, https://cyber.harvard.edu/people/tfisher/South%20Africa.pdf . However to help keep the finished product affordable etc, India capped the royalties that needed to be paid for technology at 5%: Govt considering to reintroduce restrictions on royalty payments - The Economic Times

[viii] https://investmentpolicy.unctad.org/investment-dispute-settlement

[ix] https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

[x] E.g. see https://investmentpolicy.unctad.org/investment-dispute-settlement

[xi] E.g. this is what Singapore obtained in Annex 9-C CPTPP, https://www.dfat.gov.au/trade/agreements/in force/cptpp/official-documents

- That the agreement explicitly removes any grandfathering of earlier clauses, even if investments are already in place and that no grandfathering clauses are included if a party withdraws from the amended agreement.

Recommendations :

I. Remove ISDS from All Bilateral and Regional Treaties

As Australian and ASEAN cases demonstrate, ISDS:

- imposes severe fiscal costs,
- undermines climate, health, and labor protections,
- favors corporations over domestic democratic institutions.

II. Protect Public Services Across All Levels of Government

National and subnational authorities must retain full authority to regulate utilities, health, education, water, and other essential public services.

III. Preserve Regulatory Autonomy for States and Territories

Examples from Australia and ASEAN reveal that ISDS disproportionately penalizes decisions made by local authorities—particularly in resource management.

IV. If ISDS Is Not Removed, Strict Public-Good Exemptions Are Essential

These include:

- full protection for labor rights,
- environmental and climate policy immunity,
- the freedom to regulate wages and working conditions.