

Submission to DFAT on Renegotiation of Australia's Bilateral Investment Treaties with Czechia, Egypt, Hungary, Lithuania, Poland and Romania

Introduction

The International Institute for Sustainable Development (IISD) is an award-winning independent think tank working to create a world where people and the planet thrive. IISD Investment Law and Policy team works with governments, international institutions, civil society, media, and academia to reform investment governance. Our mission is to align international investment with sustainable development and climate action.

IISD welcomes the opportunity to provide input on the renegotiation of Australia's older-generation Bilateral Investment Treaties (BITs) with Czechia, Egypt, Hungary, Lithuania, Poland and Romania. These treaties, concluded in the 1990s and early 2000s, are based on an outdated model that prioritizes investor protection and Investor-State Dispute Settlement (ISDS) over contemporary public policy objectives. IISD recommends a fundamental shift: proactively reimagining treaties as tools for sustainable investment governance.

1. Rethinking what treaties of future can do regarding investment policy problems



Modern treaties should be proactively designed to solve today's governance challenges rather than being reactive to the failures of the past. [IISD calls](#) for a broader rethinking of the function of investment treaties that starts from the formulation of the policy problems that need addressing, rather than shoehorning solutions onto the outdated investment protection model. There are numerous functions that a modern investment treaty could help solving for Australia, its treaty partners, the planet and its people.

A. Facilitating and Supporting Sustainable Investment

Treaties can act as platforms for international cooperation to address collective action problems that states cannot solve alone.

- **Targeted Facilitation:** Future treaty frameworks should prioritize investments that contribute to climate mitigation, adaptation, and a just transition. This involves regulatory cooperation, technical assistance, and capacity building to help developing partners attract "quality" foreign investment. Australia's Green Economy Agreements provide a more appropriate blueprint to follow in the renegotiation of BITs with the above-mentioned countries than the traditional investment protection treaty model.
- **Addressing High Capital Costs:** While recognizing that this issue does not necessarily apply to the renegotiation of BITs with the above-mentioned countries, cooperation through treaties on climate finance and other sustainable investment projects can help lower borrowing costs in treaty partners that are developing and least developed countries. Treaty cooperation can help make sustainable projects more "bankable" without relying on opaque protection mechanisms.

B. Regulating and Enhancing the Impacts of Investment Projects

A primary goal of a rethought investment treaty regime should be to ensure that foreign investment has a high positive impact on sustainable development while avoiding harm.

Maximizing Positive Impacts: To ensure that foreign investment serves as a genuine catalyst for sustainable development, treaties must go beyond merely protecting capital and instead focus on strengthening the host state's capacity to reap long-term benefits.

- **Facilitating Productive Industrialization and Strengthening Local Economic Linkages:** Treaties should not hamper national developmental policies by prohibiting performance requirements; instead, they should facilitate the integration of foreign projects into the local economy. Treaties should encourage foreign investors to engage with local suppliers and service providers, thereby creating a positive multiplier effect across the domestic economy.
- **Technology and Knowledge Transfer:** Treaty frameworks should address existing obstacles and create active incentives for the transfer of advanced technologies and innovative business practices to Australia and its treaty partners, especially when they are developing and emerging economies.



- **Creation of Decent Work:** Investment governance should prioritize the creation of high-quality employment and ensure that investment projects lead to tangible skills development within the local workforce.
- **Advancing the SDGs:** Treaties should be designed to maximize the achievement of the United Nations Sustainable Development Goals, ensuring that facilitated investments do not undermine national climate and social objectives.

Averting Negative Impacts: Reinforcing National Regulatory Frameworks: A reimaged treaty regime should move away from providing blanket protections that override domestic regulation and instead focus on the interaction between international law and national regulation.

- **National Law as the Primary Regulator:** Domestic legal frameworks are the most appropriate level for providing nuanced and dynamic regulation of foreign investment projects in areas such as public health, labor, and the environment. Investment treaty should recognize and strengthen national frameworks. Treaties may consider adding investor obligations only in areas where it would strengthen domestic regulation, fill gaps, or reinforce normative consensus, for instance around climate action.
- **Continuous Compliance Requirements:** Treaties should explicitly reinforce existing national frameworks by requiring that investors continuously comply with the laws of the host state throughout the life of the investment.
- **Complementary Enforcement and Access to Justice:** Rather than replacing national institutions with outdated and problematic ISDS, treaties should play a complementary role by strengthening the capacity of states to enforce their own regulations through national jurisdictions.
- **Strengthening Remedial Pathways:** This includes ensuring that national legal systems are available for civil and tort liability claims against investors for conduct that breaches applicable host or home state laws.
- **Institutional Alignment:** By focusing on improving access to justice and domestic grievance mechanisms, the treaty regime can support the development of robust national institutions rather than bypassing them through international arbitration.

C. Enhancing Investment Governance, Transparency, and Anti-Corruption

Transparency is a cornerstone of sustainable investment. Treaties should foster:

- **Public Accountability:** Contributing to the establishment of mandatory disclosure of government contracts and national incentive frameworks to prevent corruption and ensure public funds are used efficiently.
- **Beneficial Ownership Registry:** Establishing common registries to improve due diligence and monitoring of investment flows is an area where treaty can help overcome collective action problems that prevent countries from acting alone.



2. Reforming Problematic Aspects of Old-Generation BITs

Old-generation BITs have [largely failed to deliver on their promise of attracting increased foreign direct investment](#) (FDI). Instead, they have imposed significant costs on states and created a system that functions as an [unpriced public insurance for foreign investors](#). Taken together, there is a strong policy case against continuing reliance on investment treaty protection and ISDS. Only if Australia decides to keep treaties that contain some elements of investment protection, they should be significantly circumscribed, for instance, by carving out unsustainable investments, and by limiting the reach of protection standard to safeguard the right to regulate. Only if Australia decides to include ISDS, the way damages and compensation are calculated in ISDS practice must be significantly reformed.

At the same time, we reiterate that given that Australia has been a pioneer among developed countries in moving away from ISDS and pivoting towards new generation economic treaties, renegotiation of the above-mentioned BITs should not be used to regress back to outdated models. **IISD does not recommend including investment protection and ISDS in treaties; these are better addressed in national legal frameworks.** The following elements are recommended only to the extent that treaties do contain protection and ISDS element, for one reason or another. In such cases, the following elements are necessary safeguards.

A. Treaties as Unbalanced Risk Allocation Tools

Old-generation BITs function as unpriced public insurance, shifting regulatory and political risks onto the host state.

- **Pricing and Safeguards:** Future protections should not be "unconditional." They should be modeled on political risk insurance (PRI), requiring prior vetting of projects, performance benchmarks, and adherence to sustainability safeguards. In addition, any protection or other benefit that treaty grants must be limited to sustainable investments only (as detailed in the subsequent section).
- **Avoiding Double Recovery:** Reform must prevent "strategic arbitrage" where investors benefit simultaneously from PRI payouts, contractual stabilization clauses, and treaty-based compensation for the same risk event.

B. Must-Have Unsustainable Investment Carve-outs

Aligning the investment treaty regime with the Paris Agreement is a [prerequisite for a credible climate policy](#). Investment treaties often protect fossil fuel investments that [governments must phase out to meet climate goals](#). [Conservative estimates](#) suggest that ISDS-related costs of the energy transition could reach USD 340 billion globally. The mere threat of costly ISDS proceedings can lead to "[regulatory chill](#)," dissuading host states from enacting reforms in the public interest, such as environmental protections or public health



measures. [The current context of climate change](#) urges policymakers to reconsider the use of traditional investment treaty protections and ISDS.

- **Ending Support for Fossil Fuels:** To the extent the treaty confers protections or benefits, treaties should include a carve-outs that exempt all fossil fuel investments from the scope of ISDS, treaty protection, and any other benefits. Fossil fuel investors are currently [the most prolific users of ISDS](#), frequently challenging energy transition policies and claiming billions in projected losses.
- **Climate Change Measure Carve-out:** Australia should also adopt **measure-specific carve-outs** ensuring that all legitimate measures related to reducing greenhouse gas emissions or adapting to climate change are excluded from ISDS.
- **Preventing ISDS Jurisdictional Creep:** These carve-outs must be designed with effective procedural mechanisms to prevent arbitral tribunals from assuming jurisdiction over exempted measures, such as a "two-tiered" state-to-state filter.

C. Overhauling Damages and Compensation Calculation

The current lack of consistency and the use of speculative valuation methods in ISDS have led to [exorbitant awards that drain national budgets](#). There are [various options](#) at the governments' disposal through which this practice can and should be curtailed. Some of these options have been supported by [other governments at multilateral fora](#), such as UNCITRAL Working Group III.

- **Banning Speculative Valuations:** The Discounted Cash Flow (DCF) method [should be deemed inappropriate for projects that lack a firmly established record of profitability](#).
- **Capping Awards to Actual Expenditure:** To prevent "windfall profits," monetary damages should be limited to the [total expenditures actually incurred by the investor](#) (adjusted for inflation).
- **Simple, Risk-Free Interest Rates:** Tribunals should be restricted to awarding simple interest at a risk-free rate, ending the practice of awarding compound interest that drastically inflates claims.
- **The Role of Domestic Courts:** Instead of allowing private tribunals to decide on massive fiscal liabilities, treaties should explore a "deferential approach," allowing domestic courts or mechanisms to determine the appropriate amount of compensation, instead of entrusting this issue to ISDS that [contains perverse incentives for making larger and more complex valuations](#).
- **Mandatory Equitable Considerations:** Tribunals must be required to consider the "crippling effect" of an award on a state's fiscal health and the investor's own conduct, including contributory fault.

Conclusion

Australia has a unique opportunity to lead by transitioning away from the outdated BIT model toward a regime that actively facilitates sustainable development. We urge DFAT to



prioritize the termination of old-generation treaties that lack modern safeguards and to pursue a new generation of treaties focused on cooperation, facilitation, impact regulation, and shared prosperity.

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