This submission is made on behalf of the non-governmental organisations PowerShift and the European Trade Justice Coalition (ETJC).

E-Mail address for correspondence: etjc@etjc.org

We have consistently argued over the past decade that international trade and investment agreements containing investment protections and the investor–State dispute settlement (ISDS) mechanism pose risks to the public interest, expose governments to significant financial liability, and fail to deliver the economic benefits often claimed by their proponents. We therefore support the Australian Government's policy of not entering into new agreements that include ISDS and of seeking to remove ISDS from existing agreements.

This submission focuses specifically on the legal uncertainty surrounding bilateral investment treaties (BITs) between EU Member States and third countries.

1. Legal uncertainty surrounding EU Member State BITs

In December 2025, several infringement complaints were filed with the European Commission concerning certain EU Member States' bilateral investment treaties with third countries ("extra-EU BITs").[1] The complaints argue that a number of these treaties contain provisions that may be incompatible with EU law.

This issue is directly relevant to Australia's ongoing review of its BITs with Hungary, Lithuania, Poland, Romania and the Czech Republic. The complaints highlight broader legal uncertainty about whether—and under what conditions—EU Member States may continue to maintain and operate third-country BITs containing ISDS in a manner consistent with EU law.

2. Two central legal risks

A. Risk to the autonomy of the EU legal order

The Court of Justice of the European Union (CJEU), including in Opinion 1/17, has held that international agreements providing for ISDS are compatible with EU law only if they

[1] A copy of the infringement complaint can be found here.

do not undermine the autonomy of the EU legal order. In practical terms, this means that arbitral tribunals must not:

1. Interpret or apply EU law as part of the applicable law; or
2. Undermine regulatory choices made by EU institutions regarding the protection of public interests (for example, by treating EU-compliant regulation as a breach of investment protection standards).

These concerns are not limited to EU-level agreements. They may also arise under extra-EU BITs concluded by Member States, particularly where EU law forms part of the legal context or where challenged measures implement EU obligations.

In our assessment, many Member State BITs—including those currently under review by Australia—do not contain safeguards comparable to those relied upon by the CJEU in Opinion 1/17. In particular, the treaties:

- Do not clearly exclude tribunal jurisdiction to interpret or apply EU law; and
- Do not contain provisions ensuring that tribunals cannot question the level of protection chosen by the EU for public interests.

As a result, there is a material risk that these BITs could be found to adversely affect the autonomy of the EU legal order and therefore be incompatible with EU law.

B. Conflict between free transfer clauses and EU sanctions powers

A second area of concern relates to treaty provisions guaranteeing the free transfer of funds related to an investment. Unqualified free-transfer clauses may conflict with EU restrictive measures adopted by the Council, including sanctions adopted under Article 215 of the Treaty on the Functioning of the European Union (TFEU), unless the treaty contains an explicit exception allowing Member States to comply with EU law.

The five BITs under review do not appear to contain such safeguards.

The CJEU has previously found that Austria, Finland and Sweden failed to fulfil their EU law obligations by maintaining BIT provisions that could undermine EU powers to restrict capital movements between Member States and third countries. This issue is particularly significant in the current geopolitical context, where sanctions have become

a central policy instrument and where sanctioned investors have begun invoking BIT protections in response to EU measures.

3. Implications for Australia’s BIT review

EU Member States are under an obligation to take appropriate steps to eliminate identified incompatibilities with EU law. However, in the absence of further guidance from the CJEU, there remains uncertainty as to whether renegotiated BITs would fully resolve these concerns.

For Australia, this creates an opportunity to consider terminating the five BITs in question, thereby reducing exposure to potential ISDS claims. The European Union has already taken similar steps with respect to intra-EU BITs through a coordinated termination agreement that also addressed the treaties’ sunset clauses.[2]

An opportunity for termination may arise in the context of negotiations for an Australia–EU Free Trade Agreement. It is understood that Indonesia and several EU Member States are using the FTA negotiations as a vehicle to amicably terminate their remaining BITs. Australia could pursue a similar approach.

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[2] The text of the termination treaty can be found here.