



7/321 Pitt Street,
Sydney, NSW, 2000
Phone: 02 9699 3686
Email: campaign@aftinet.org.au
ACN 097 603 131
ABN 83 659 681 462
www.aftinet.org.au

AFTINET submission on the Costa Rica accession to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) to support a side-letter excluding provisions on Investor-State Dispute Settlement (ISDS) from applying to Australia and Costa Rica

Australian government policy¹ opposes the inclusion of ISDS in new trade agreements, and pledges to review it in existing agreements because it reduces the rights of governments to regulate in the public interest.

Costa Rica has applied for membership of the CPTPP, which does include ISDS. The accession is in the process of being negotiated bilaterally with all current CPTPP member governments. The Australia-Costa Rica negotiations are still ongoing. Australia does not have a Bilateral Investment Treaty with Costa Rica or any other arrangements that includes ISDS.

The CPTPP includes ISDS and unless specific action is taken ISDS will apply to both Costa Rica and Australia in the CPTPP if the accession is approved. Consistency with government policy requires that the government acts to exclude new ISDS arrangements with Costa Rica.

There is a simple means to achieve this through both governments exchanging side-letters agreeing not to apply ISDS to each other, modelled on the CPTPP side-letter that Australia negotiated with the United Kingdom at the time of its accession. Recent evidence in support of the government's policy against ISDS is summarised below.

ISDS reduces the right of governments to regulate in the public interest and has been identified as a threat to urgently needed government action to address the climate crisis

ISDS 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"² and "legitimate expectations"³ 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/or 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.

¹ Trade Minister Don Farrell (2022) Trading our Way to Greater Prosperity and Security, <https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security>.

² 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

³ 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/>

The number of reported ISDS cases has been increasing rapidly, reaching 1,401 as of September 2025.⁴ These include cases against tobacco regulation,⁵ medicine patents,⁶ environmental protections,⁷ indigenous land rights,⁸ regulation of the minimum wage⁹ and more recently, government action to reduce carbon emissions, examples of which are discussed in more detail below.

A 2022 study published in the journal *Science* showed 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 climate action¹⁰.

Australia has experienced this threat. Australian billionaire Clive Palmer has registered his company Zeph Investments in Singapore and used ISDS in the ASEAN-Australia-New Zealand free trade agreement and the Singapore Free Trade Agreement to claim a total of \$A420 billion from the Australian government. The first claim was for \$300 billion after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license¹¹. The other three claims, which total \$120 billion, are for the refusal of permits for a coal mine and coal-fired power station in Queensland¹². The refusals were for environmental reasons, including contributions to increased carbon emissions¹³. The tribunal has taken over two years to decide¹⁴ that that Palmer is

⁴ UNCTAD (2022) Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement>

⁵ 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>

⁶ 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

⁷ 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.>

⁸ 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

⁹ 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>

¹⁰ 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>

¹¹ 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, <https://theconversation.com/how-clive-palmer-is-suing-australia-for-300-billion-with-the-help-of-an-obscure-legal-clause-and-christian-porter-203111>

¹² Attorney Generals Department (2023) Notice of Intension to Commence Arbitration 20 October <https://www.ag.gov.au/sites/default/files/2023-10/notice-of-intention-to-commence-arbitration-zeph-20-october-2023.pdf>

For the coal fired power station, see Attorney-General [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)

¹³ 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

¹⁴ Rowland, M (2025) International Tribunal rejects Clive Palmer's claim against Australia, Media Release, September 27, Attorney-General's Department, [International Tribunal rejects Clive Palmer's claim against Australia | Our ministers – Attorney-General's portfolio](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)

not a Singaporean investor, and awarded legal costs of \$13.6 million to the government. However the full decision has not been released, so the future of the other cases is not yet known.

Other governments are withdrawing from ISDS arrangements because of threats to climate action. 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 2030¹⁵. Although both cases have now been withdrawn, they spurred public debate,

After this debate and a comprehensive review, the EU Commission in July 2023 proposed a coordinated withdrawal of all EU states from the Energy Charter Treaty (ECT) because its ISDS provisions were being used against government policies to reduce carbon emissions¹⁶. This withdrawal is now proceeding. The UK has also announced its withdrawal from the ECT¹⁷.

There is also bipartisan opposition to ISDS in the USA. The USA and Canada both agreed not to apply ISDS to each other in the Trump administration's 2020 revision of NAFTA (now called the US-Mexico-Canada Agreement)¹⁸

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."¹⁹

CPTPP exemptions for environmental protections have been overruled by ISDS tribunals

There have been attempts in more recent trade agreements, such as CPTPP, to include more protections for governments. This includes exemptions that are meant 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.²⁰

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. 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 exemption applies to a measure, "this does not prevent an investor claiming ... that such a measure entitles it to the payment of compensation".²¹

¹⁵ Kluwer Arbitration (2021) <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>

¹⁶ European Commission (2023, 7 July, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

¹⁷ UK government (2024) UK departs Energy Charter Treaty, 22 February, <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty>

¹⁸ 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)

¹⁹ 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>

²⁰ 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&>.

²¹ 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”.²² Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation.²³

These exemptions 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.

Costa Rica is a world leader in forest conservation and other measures to protect the environment and reduce carbon emissions.²⁴ Adding Australia as a possible source of ISDS claims would unnecessarily expose Costa Rica to risks from both Australian-based companies and international companies which could establish subsidiary companies in Australia.

Conclusion and Recommendation

Consistency with government ISDS policy requires that Australia make a condition of approval of Costa Rica’s accession to the CPTPP that both government exchange legally binding side letters confirming that neither government will apply the ISDS provisions in the CPTPP to the other government, modelled on the Australia-United Kingdom side letter.

Recommendation: As a condition for approval of Costa Rica’s accession to the CPTPP the governments of Australia and Costa Rica should exchange legally binding side letters confirming that neither government will apply the ISDS provisions in the CPTPP to the other government. These letters could be modelled on the CPTPP side letter on ISDS between Australia and the United Kingdom.

²² 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>.

²³ 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.

²⁴ World Bank (2024) Sustaining Forests and Strengthening Communities in Costa Rica, March 21 <https://www.worldbank.org/en/news/feature/2025/03/21/proteger-bosques-fortalecer-comunidades-costa-rica>