

Bilateral Investment Treaty Reform Coordinator
Trade Law and Economic Security Division
Department of Foreign Affairs and Trade
RG Casey Building, John McEwen Crescent
Barton ACT 0221

By email: BITreforms submissions@dfat.gov.au

12 March 2025

**Subject: Submission to Australian Government Department of Foreign Affairs and Trade
Review of Australia's Bilateral Investment Treaties - Renegotiation of Australia's Bilateral
Investment Treaties with Argentina, Pakistan, and Türkiye**

Dear Madam/Sir,

Please find enclosed a submission from myself and Mr Dmytro Cherneha in response to the call for submissions on the Renegotiation of Australia's Bilateral Investment Treaties with Argentina, Pakistan, and Türkiye. We would be happy to provide copies of any publications referenced in the submission.

We remain at your disposal in case of any questions.

Yours sincerely,



Dr Stephanie Triefus
Researcher, TMC Asser Institute
Academic Coordinator, Netherlands Network for Human Rights Research



Dmytro Cherneha
Intern, TMC Asser Institute

**Submission to Australian Government Department of Foreign Affairs and Trade Review
of Australia's Bilateral Investment Treaties - Renegotiation of Australia's Bilateral
Investment Treaties with Argentina, Pakistan, and Türkiye**

Dr Stephanie Triefus¹ and Dmytro Cherneha²

12 March 2025

The purpose of this submission is to bring attention to how Australian companies have used investment arbitration to challenge human rights and environmental measures in host states, and how international investment law poses a threat to the transition away from fossil fuels both in Australia and around the world. Beyond these points, we express our support for submissions to the previous call for submissions in the BIT review process that draw attention to the human rights and environmental issues raised by international investment law, such as submissions by ActionAid, Dr Emma Aisbett, Australian Fair Trade and Investment Network, Friends of the Earth, University of Technology Sydney and ANU, and Public Health Association of Australia.

Australian companies are using investor-state dispute settlement to challenge human rights and environmental measures in host states

Australian companies have brought a number of investment arbitration cases that challenge host state measures aimed at protecting human rights and the environment. For example, Australian company Kingsgate used proceedings under the Thailand-Australia FTA to negotiate the reopening of the Chatree gold mine, which was closed in 2017 following years of complaints and legal concerning the impact of the mine on the health

¹ Stephanie Triefus is a Researcher at the TMC Asser Institute and the Academic Coordinator of the Netherlands Network for Human Rights Research. Stephanie received her PhD cum laude from Erasmus University Rotterdam with her thesis on international investment law and the participatory rights of people affected by foreign investment projects. Stephanie holds a Master of Public International Law specialising in Human Rights (cum laude) from Utrecht University and a Bachelor of Laws/Arts (Honours I) from Macquarie University. She is admitted as a lawyer in New South Wales and the Australian Capital Territory.

² Dmytro Cherneha is an intern at the TMC Asser Institute. He recently graduated from the University of Utrecht, where he obtained an L.L.M in Public International Law. Prior to joining the Asser Institute, he interned at the Supreme Court (Ukraine) and Prosecutor's office and worked as a paralegal in a law firm. His main research interests revolve around business and human rights, investment and arbitration law, and international human rights law.

of local communities and the environment.³ Similarly, an Australian subsidiary of Barrick Gold used the Australia-Papua New Guinea BIT to negotiate the reopening of the Porgera gold mine after Papua New Guinea decided not to grant Barrick a permit renewal due to severe environmental impacts and allegations of human rights abuses perpetrated by the mine's private and public security personnel.⁴ A UK subsidiary of Australian company South 32 used the UK-Colombia BIT to challenge a ruling of the Colombia Constitutional Court that found that its ferronickel mine violated the right to consultation of indigenous populations, right to health and right to protection of the environment, and that the company had to re-apply for an environmental permit and carry out a consultation process.⁵ Australian company Tethyan Copper used the Australia-Pakistan BIT to seek \$5.8 billion in compensation in relation to a copper mine that was still in the planning stages, in circumstances where Pakistan was deep in an economic crisis and such an award could be crippling.⁶ The pressure felt by states facing these kinds of huge awards is demonstrated by the fact that the copper mine has since the award been approved and

³ *Kingsgate Consolidated Ltd v Kingdom of Thailand*, PCA Case No 2019-45; Petchkaew K, 'Thai Gold Mine Blamed for Sickening Local Villagers Is Set to Reopen' (10 May 2022) *Mongabay* <https://news.mongabay.com/2022/05/thai-gold-mine-blamed-for-sickening-local-villagers-is-set-to-reopen/> accessed 12 March 2025.

⁴ *Barrick (PD) Australia Pty Limited v Papua New Guinea*, ICSID Case No ARB/20/27; Columbia Law School Human Rights Clinic, *Red Water: Mining and the Right to Water in Porgera, Papua New Guinea* (February 2019) https://hri.law.columbia.edu/sites/default/files/publications/red-water-report-2019_1.pdf accessed 12 March 2025; Canadian Network on Corporate Accountability, *Case Study: Barrick Gold Corp.'s Porgera Joint Venture Mine - Human Rights Abuses* (14 February 2023) <https://cnca-rcrce.ca/2023/02/14/case-study-barrick-gold-corp-s-porgera-joint-venture-mine-human-rights-abuses/> accessed 12 March 2025.

⁵ *South32 SA Investments Limited v. Republic of Colombia*, ICSID Case No. ARB/20/9; Bohmer L, 'Colombia Put on Notice of BIT Arbitration by Another Mining Company Following Recent Rulings by Constitutional Court' (29 March 2019) *Investment Arbitration Reporter* <https://www.iareporter.com.proxy.uba.uva.nl/articles/colombia-put-on-notice-of-bit-arbitration-by-another-mining-company-following-recent-rulings-by-constitutional-court/> accessed 12 March 2025.

⁶ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1; Paparinskis M, 'Crippling Compensation in the International Law Commission and Investor–State Arbitration' (2021) 37(1–2) *ICSID Review* 289–312.

will proceed.⁷ Argentina,⁸ Pakistan⁹ and Türkiye¹⁰ have all been the subject of investment arbitration cases that have challenged human rights and environment-related measures.

Investment arbitration can contribute to adverse human rights impacts in host states.¹¹ In the renegotiation of Australia's bilateral investment treaties, it is important to consider not only the benefits to Australian businesses, but also how Australian businesses are able to use their extensive rights under investment treaties to undermine Australia's international human rights obligations abroad.

Investor-state dispute settlement poses a threat to Australia's transition away from fossil fuels

It is becoming increasingly clear that investment arbitration poses a threat to the global transition away from fossil fuels,¹² and Australia is no exception to this. Tienhaara et al have demonstrated that over 19% of the world's oil and gas projects without a final investment decision are protected by ISDS, and cancellation of these projects could lead to \$US57-234 billion in compensation depending on future oil prices.¹³ A number of investment arbitration cases have been brought challenging state measures that impact

⁷ Barrick, 'Massive Reko Diq Project Gets All Clear, Barrick Starts Updating Plans' (15 December 2022) <https://www.barrick.com/English/news/news-details/2022/massive-reko-diq-project-gets-all-clear-barrick-starts-updating-plans/default.aspx> accessed 12 March 2025.

⁸ Reinisch A and Tropper J, 'The Argentinian Crisis Arbitrations' in Hélène Ruiz Fabri and Edoardo Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) 119–134.

⁹ Bonnitich J and Brewin S, 'Compensation Under Investment Treaties: What Are the Problems and What Can Be Done?' (IISD, 16 December 2020) <https://www.iisd.org/publications/compensation-under-investment-treaties> accessed 25 February 2025.

¹⁰ Verbeek B-J and Erol A, 'Disputed Grounds: Gold Mining, Resistance and Investment Arbitration in Türkiye' (SOMO, 13 November 2024) <https://www.somo.nl/disputed-grounds/> accessed 25 February 2025.

¹¹ Triefus S, 'The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor–State Arbitration?' (2023) 8(3) *Business and Human Rights Journal* 329–351.

¹² Cotula L, 'International Investment Law and Climate Change: Reframing the ISDS Reform Agenda' (2023) 24(4-5) *The Journal of World Investment & Trade* 766–791.

¹³ Tienhaara K et al, 'Investor-State Disputes Threaten the Global Green Energy Transition' (2022) 376(6594) *Science* 701; Tienhaara K et al, 'Investor-State Dispute Settlement: Obstructing a Just Energy Transition' [2022] *Climate Policy* 1.

fossil fuel companies, such as *RWE v Netherlands*,¹⁴ *Uniper v Netherlands*,¹⁵ *Exxon v Netherlands*¹⁶ and *Rockhopper v Italy*.¹⁷

Australia is currently facing its own investment arbitration case that seeks to chill the implementation of human rights considerations in decisions on fossil fuel investments. Zeph Investments is using the Singapore-Australia FTA to challenge the landmark decision of the Queensland Land Court that considered how emissions from burning the mined coal would impact human rights.¹⁸

While it seems unlikely that BITs with Argentina, Pakistan or Türkiye would pose a specific threat to Australia's decarbonisation policies, climate change is a global problem that requires a global response, including ensuring that international investment law cannot be used to challenge climate measures anywhere in the world.

Costs and benefits of investor-state dispute settlement

A growing body of research challenges the assertion that investment treaties have a positive impact on foreign investment and development outcomes.¹⁹ Various types of research, *inter alia* econometric studies, suggest that there is no empirical confirmation

¹⁴ *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4; Verbeek B-J, "Super-Protections" for Corporations: How Investment Treaties and Investor-to-State Dispute Settlement Grant Foreign Investors Greater Rights Than Dutch and EU Law (SOMO, March 2021) <https://www.somo.nl/wp-content/uploads/2021/03/SOMO-Factsheet-Greater-rights.pdf> accessed 12 March 2025.

¹⁵ *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherlands*, ICSID Case No ARB/21/22.

¹⁶ *ExxonMobil Petroleum & Chemical BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/24/44; Verbeek B-J, 'ExxonMobil Sues the Netherlands Over Gas Field Closure' (SOMO, 10 October 2024) <https://www.somo.nl/exxonmobil-sues-the-netherlands-over-gas-field-closure/>, accessed 12 March 2025.

¹⁷ *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v Italian Republic*, ICSID Case No ARB/17/14; Alessandra Arcuri, 'On How the ECT Fuels the Fossil Fuel Economy: Rockhopper v Italy as a Case Study' (2023) 7(1) *Europe and the World: A Law Review*; Alessandra Arcuri, Kyla Tienhaara en Lorenzo Pellegrini, 'Investment Law v. Supply-side Climate Policies: Insights from Rockhopper v. Italy and Lone Pine v. Canada' (2024) 24 *International Environmental Agreements: Politics, Law and Economics* 193.

¹⁸ *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21; Dehm J, 'Undermining the Energy Transition' (19 November 2023) *Verfassungsblog* <https://verfassungsblog.de/undermining-the-energy-transition/> accessed 12 March 2025.

¹⁹ Pohl J, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence' (OECD Working Papers on International Investment 2018) No 2018/01, 30; Brada JC et al, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2021) 35(1) *Journal of Economic Surveys* 34–70.

that BITs increase FDI flows or stocks.²⁰ The idea that investment treaties create societal benefits by promoting 'high quality FDI' currently lacks empirical support.²¹ Additionally, the evidence suggesting a causal relationship between investment treaties and foreign direct investment flows is still unclear and inconclusive.²² In 2021, Brada et al., in their meta-analysis of 74 studies, found that investment treaties have such a small impact on foreign direct investment that it amounts to almost zero.²³ A 2018 report revealed that countries that have recently terminated investment treaties have experienced or are likely to experience an *increase* in foreign investment following the termination of these treaties.²⁴ What's more, it was found that claims against a state result in a greater decline in foreign direct investment from sources with a bilateral investment treaty compared to those without such protection.²⁵

At the same time, investment arbitration has been heavily criticised for a number of reasons, including its chilling effect on state human rights regulation,²⁶ how some awards may be crippling for respondent states,²⁷ and how the rights of investment-affected communities may be impacted but are rarely taken into account.²⁸ Investment arbitration can also impact non-party stakeholders.²⁹ These include local communities,

²⁰ Bellak C, *Economic Impact of Investment Agreements* (Vienna University of Economics and Business, Working Paper No. 200, 2015).

²¹ Pohl J, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* (OECD Working Papers on International Investment, No. 2018/01, 2018) 39.

²² Calvert J and Tienhaara K, 'Beyond 'Once BITten, Twice Shy': Defending the Legitimacy of Investor-State Dispute Settlement in Peru and Australia' (2023) 30(5) *Review of International Political Economy* 1799–1823, 1802.

²³ Brada JC, Drabek Z and Iwasaki I, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2021) 35(1) *Journal of Economic Surveys* 34.

²⁴ Public Citizen, *Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows*, Research Brief, Public Citizen Global Trade Watch, April 2018

https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf accessed 27 February 2025.

²⁵ Aisbett E, Busse M and Nunnenkamp P, 'Bilateral Investment Treaties Do Work; Until They Don't' (Kiel Working Paper No 2021, January 2016)

<https://www.econstor.eu/bitstream/10419/125937/1/846070405.pdf> accessed 1 March 2025.

²⁶ Tienhaara K et al, 'Investor-State Disputes Threaten the Global Green Energy Transition' (2022) 376(6594) *Science* 701.

²⁷ Paparinskis M, 'Crippling Compensation in the International Law Commission and Investor-State Arbitration' (2021) 37(1–2) *ICSID Review* 289–312

²⁸ Perrone NM, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7 *Transnational Legal Theory* 383; Triefus S, *International Investment Law from Below: Taking Local Community Rights Seriously* (PhD Thesis, Erasmus University Rotterdam 2024).

²⁹ Cotula L and Perrone N, *Reforming Investor-State Dispute Settlement: What About Third-Party Rights?* (IIED, 2019) <https://www.iied.org/17638iied> accessed 26 February 2025.

labour unions, environmental protection organizations, and civil society groups, all of which often lack the right to participate fully in the process. The investment arbitration system has no substantive rules that can protect local communities' rights³⁰ and has procedural flaws (as it is unbalanced, permitting only investors to file claims).³¹ The voices of the local community are often disregarded in investment law, particularly in investment arbitration proceedings, which significantly impedes their human rights and interests.³²

Recommendations for how to proceed with BIT review

In light of the above, we would recommend that Australia exclude investor-state dispute settlement from all of its bilateral and multilateral trade and investment treaties as a general policy. Failing this, investment treaties should contain specific, binding safeguards for the ability of states to take measures that promote human rights and environmental measures, including in relation to the transition away from fossil fuels. Rather than giving Australian companies wide-ranging rights to challenge human rights and environmental measures abroad, Australia should consider its investment cooperation with developing states holistically, ensuring that human and environmental rights are protected and local communities are empowered from the moment an investment project is being considered.

³⁰ Perrone N, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?' (2016) 7(3) *Transnational Legal Theory* 383–405.

³¹ Arcuri A, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in L Sachs, L Johnson, and J Coleman (eds), *Yearbook on International Investment Law and Policy* (2019) 394–413.

³² Triefus S, *International Investment Law from Below: Taking Local Community Rights Seriously* (Thesis, Erasmus University 2024).