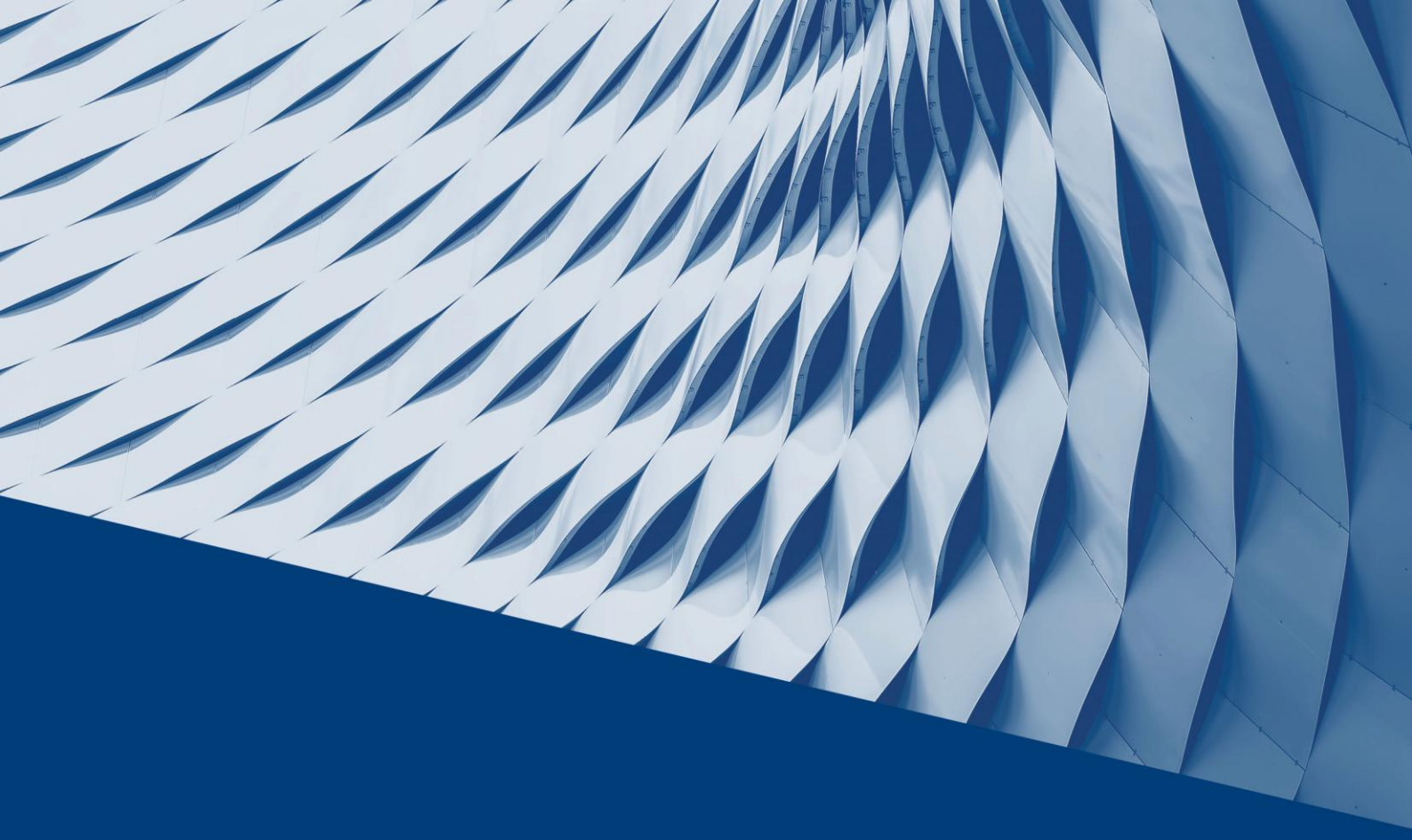

Renegotiation of Australia's Bilateral Investment Treaties with Argentina, Pakistan and Türkiye

Australian Council of Trade Unions (ACTU) submission to the Department of Foreign Affairs and Trade

ACTU Submission, 14 March 2025
ACTU D. No. 7/2025

ACTU
australian council of trade unions

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Introduction

About the ACTU

Since its formation in 1927, the Australian Council of Trade Unions (ACTU) has been the peak trade union body in Australia. The ACTU consists of affiliated unions and State and regional trades and labour councils. They have over 1.6 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Worker-centred trade policy

The ACTU supports fair trade as a vehicle for economic growth, job creation, tackling inequality and raising living standards. The most important objective of trade policy should be to deliver benefits to workers, the community and the economy by increasing opportunities for local businesses, creating quality local jobs, and protecting public services. The benefits of trade must be shared among our community and promote equitable development abroad.

We welcome the opportunity to make a submission to the DFAT consultations regarding renegotiation of the Bilateral Investment Treaties (BITs) with Argentina, Pakistan and Türkiye, which entered into force in 1997, 1998, and 2009 respectively. The Australian Union movement welcomes Trade Minister Farrell's commitment that new agreements will not contain Investor State Dispute Settlement clauses and will review ISDS in existing agreements[1]. These renegotiations are an important step to implement this policy. Scrapping ISDS is essential to ensuring that Australia's trade policy can protect workers' rights by safeguarding the ability of the government to regulate in the public interest, including regulation that protects workers' rights, the environment, public services, and public health. Scrapping ISDS in our agreements with our trading partners is also essential to promoting equitable development abroad, given the devastating impact ISDS can have on the public finances of low-income countries.

Investor-State Dispute Settlement (ISDS)

The Australian Union movement has long opposed ISDS provisions, which give additional legal rights to foreign investors to enable them to sue governments for compensation in international

[1] Minister for Trade and Tourism, Senator the Hon Don Farrell, 'Trading our way to greater prosperity and security', 14 November 2022 https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security

tribunals if they can argue that a change in law or policy reduces the value of their investment or will impinge on their future profits. These provisions preference the interests of corporations over the interests of the people: ISDS restricts the ability of governments to regulate in the public interest and imposes an unnecessary cost burden on governments to defend themselves in ISDS cases. ISDS also has a chilling effect on Government regulation, where governments may be reluctant to adopt measures out of fear of ISDS claims. For example, the New Zealand Government delayed the introduction of its tobacco plain packaging legislation when Philip Morris sued the Australian Government over its plain packaging law.[2] The impact of ISDS – both the chilling effect on Government regulation and the financial impact of defending ISDS cases – is particularly damaging to low-income countries.

While the Australian Union movement welcomes the Albanese Government's policy of excluding ISDS from future agreements and reviewing ISDS in existing agreements (of which the proposed renegotiation of the BITs with Argentina, Pakistan and Türkiye is a welcome start), we note with alarm that the Australian Government has four current ISDS cases pending against it from billionaire Clive Palmer, where he is seeking billions of dollars in compensation. This highlights the urgency of removing current ISDS provisions in Australia's trade agreements, and also the importance of ensuring that no future Government can expose Australia to the risk that ISDS poses to Australia's public finances and ability to enact public interest regulation.

Recommendations

Recommendation 1: ISDS provisions (Article 13) should be removed from the BITs with Argentina, Pakistan and Türkiye.

Recommendation 2: The BITs with Argentina, Pakistan and Türkiye should be renegotiated to include protections for the right of the governments to regulate in the public interest.

Recommendation 3: The Australian Government should accelerate its review of current trade and investment agreements to remove ISDS provisions.

Recommendation 4: The Government should respond to the recommendations of the Joint Standing Committee on Trade and Investment Growth *inquiry into Australia's approach to negotiating trade and investment agreements* by legislating a negotiating framework for Australia's

[2] Turia, T. (2013) Government moves forward with plain packaging, 20 February, NZ Department of Health https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products

trade and investment agreements that excludes ISDS provisions and ensures the ability of the Australian Government to regulate in the public interest is protected.

ISDS cases challenging workers' rights

The number of ISDS cases has been increasing, which include cases against public interest policies and laws – including regulation to protect workers rights. If Governments introduce laws and policies to improve workers' rights, for example increasing the minimum wage, companies could use ISDS as a mechanism to challenge these measures. The following case studies illustrate the risks of ISDS to government regulation and action to protect workers' rights:

- ***Piero Foresti & others vs. South Africa***: in 2007, Italian and Luxembourg investors lodged an ISDS claim against South Africa under the Italy-South Africa and Belgium-Luxembourg-South Africa BITs for US$350 million because a new mining law contained anti-discrimination rules from the country's Black Economic Empowerment Act, which aims to redress some of the injustices of the apartheid regime. The law required mining companies to transfer a portion of their shares into the hands of black investors. The dispute was discontinued in 2010, after the investors received new licenses requiring a much lower divestment of shares.
- ***Véolia (France) vs. Egypt:*** In 2012, the multinational utility corporation launched a dispute against Egypt under the Egypt-France BIT demanding US$110 million following changes to Egypt's labour laws leading to an increase in minimum wage. In May 2018, Veolia lost the arbitration but Egypt had to spend six years defending the case and likely pay millions of dollars in arbitration and legal costs (the amount has not been made public).
- ***Abitibi-Bowater (US) vs. Canada:*** the US paper corporation challenged the decision of Newfoundland and Labrador, a Canadian province, under NAFTA to confiscate various timber, water rights and equipment held by Abitibi-Bowater after the corporation closed a paper mill in Newfoundland, putting 800 employees out of work. Case was settled in 2010 for US$122 million to the investor.[3]

ISDS is also a threat to government action on climate change, with fossil fuel companies increasingly using ISDS to claim billions in compensation for government decisions to phase out fossil fuels. ISDS provisions can also have an impact on the rights of First Nations peoples,

[3] Case studies reproduced from Bilaterals, "ISDS Platform: Labour", https://isds.bilaterals.org/?-isds-labour-

including the right to free, prior, and informed consent about investment in projects on traditional lands. While there are some exemptions in Australian trade agreements relating to Aboriginal and Torres Strait Islander communities, there is no general exemption which would exclude an ISDS case.

ISDS provisions in Australia's trade and investment agreements

Australia currently has ISDS provisions in ten FTAs[4]:

- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- China–Australia Free Trade Agreement
- Korea–Australia Free Trade Agreement
- Australia–Chile Free Trade Agreement
- Singapore–Australia Free Trade Agreement
- Thailand–Australia Free Trade Agreement
- ASEAN–Australia–New Zealand Free Trade Agreement
- Peru-Australia Free Trade Agreement (PAFTA)
- Australia-Hong Kong Free Trade Agreement and Associated Investment Agreement (A-HKFTA)
- Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA)

Australia also has ISDS in 15 Investment Protection and Promotion Agreements with Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay.

While ISDS provisions have not been included in recent trade agreements, such as the Australia-United Kingdom Free Trade Agreement (A-UKFTA) and the Australia-India Economic Cooperation and Trade Agreement (A-IECTA), the presence of ISDS provisions in existing agreements leaves Australia highly vulnerable to ISDS claims. The number of agreements with these provisions also leaves Australia vulnerable to forum shopping, as has occurred with the current ISDS cases against Australia, where billionaire Clive Palmer has utilised subsidiaries in countries overed by treaties with Australia containing ISDS provisions.

Recommendation 1: ISDS provisions (Article 13) should be removed from the BITs with Argentina, Pakistan and Türkiye.

[4] DFAT, 'Investor-state dispute settlement', https://www.dfat.gov.au/trade/investment/investor-state-dispute-settlement

Recommendation 2: The BITs with Argentina, Pakistan and Türkiye should be renegotiated to include protections for the right of the governments to regulate in the public interest.

ISDS cases against the Australian Government

ISDS cases are being used to claim compensation for legitimate public interest regulation. Even if these cases are unsuccessful, governments have to spend years and millions of dollars defending them, as was the case with the Philip Morris case against the Australian Government challenging tobacco plain packaging. In December 2011, the *Tobacco Plain Packaging Act 2011* became law in Australia, as part of a comprehensive range of tobacco control measures to reduce the rate of smoking in Australia. Philip Morris Asia challenged the plain packaging legislation under an obscure FTA: the 1993 *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments* which contains ISDS provisions.

The arbitration was conducted by a tribunal composed of three arbitrators, who issued a unanimous decision in December 2015 agreeing with the Australian Government's position that the tribunal had no jurisdiction to hear Philip Morris Asia's claim. The tribunal found that Philip Morris Asia's claim was an abuse of process because Philip Morris Asia acquired an Australian subsidiary, Philip Morris (Australia) Limited, for the purpose of initiating arbitration under the Hong Kong Agreement challenging Australia's tobacco plain packaging laws.

In March 2017 the Tribunal issued the Award on Costs to the parties. It was revealed later through a freedom-of-information request that Australia's external legal fees and arbitration costs amounted to almost $24 million, with Philip Morris only having to pay half of Australia's legal costs, which shows that even when Governments win ISDS cases, the cases take years and cost millions in taxpayer dollars.[5]

The Australian Government is currently being challenged in 4 separate ISDS cases launched by Australian billionaire Clive Palmer[6]:

[5] Philip Morris ISDS case information sourced from Attorney General's Department, 'Tobacco plain packaging – investor-state arbitration', https://www.ag.gov.au/international-relations/international-law/tobacco-plain-packaging-investor-state-arbitration

[6] Attorney General's Department, 'International trade and investment law', https://www.ag.gov.au/international-relations/international-law/international-trade-and-investment-

- **The Balmoral Claim: *Zeph Investments Pte Ltd v The Commonwealth of Australia (I)*** Singapore based Zeph Investments seeking approximately $300bn for an alleged breach of the ASEAN-Australia-New Zealand free trade agreement (AANZFTA) after Palmer lost a high court appeal against Western Australia's decision to refuse an iron ore mining license for the proposed Balmoral South Iron Ore Project in the Pilbara.[7]
- **The Environmental Offsets Claim: *Zeph Investments Pte Ltd v The Commonwealth of Australia (II)*** Palmer's second case for damages of approximately $41bn alleges Australia breached the AANZFTA in relation to the refusal of coal exploration permits at his Waratah coal mine in the Galilee Basin of Queensland, which were refused for environmental reasons.
- **The Galilee Coal Project Claim: *Zeph Investments Pte Ltd v The Commonwealth of Australia (III)*** Palmer's third case was launched under the ISDS provisions in the Singapore-Australia FTA (SAFTA) claiming a further $69 bn for the same Waratah coal mine issue.
- **The Jericho Power Station Claim: *Zeph Investments Pte Ltd v The Commonwealth of Australia (IV)*** Palmer's fourth case relates to decisions of the Queensland Government to refuse approval for a proposed coal-fired power plant as part of Waratah Coal's Galilee Coal Project. Zeph has estimated the value of the project at approximately $10.1 bn.

These cases are scheduled for hearings in 2025. Even if the Australian Government is successful in defending these claims, as it was with the Philip Morris case, it will likely come at huge expense to Australian taxpayers.

Clive Palmer's attempts to claim billions of dollars in compensation from the Australian Government highlights the risk of ISDS provisions to governments. The Australian Government must accelerate its review of all trade and investment agreements to remove ISDS provisions from existing bilateral agreements, and pursue the removal of ISDS in plurilateral agreements. Where the removal from plurilateral agreements is not feasible, the Australian Government must seek to negotiate side letters to exclude Australia from ISDS provisions. This has already occurred between Australia and New Zealand in relation to the Comprehensive and Progressive Trans Pacific

law#:~:text=The%20Jericho%20Power%20Station%20Claim%20(PCA%20Case%20No%202024-48,Waratah%20Coal's%20Galilee%20Coal%20Project

[7] 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

Partnership (CPTPP) agreement, where the Governments negotiated a side letter in 2018 excluding the use of CPTPP ISDS provisions between Australia and New Zealand.[8]

Recommendation 3: The Australian Government should accelerate its review of current trade and investment agreements to remove ISDS provisions.

Legislating to exclude ISDS from future agreements

The Joint Standing Committee on Trade and Investment Growth conducted a recent parliamentary *inquiry into Australia's approach to negotiating trade and investment agreements*, and noted:

> The Committee is persuaded by the view that ISDS provisions in trade and investment agreements have the potential to impose significant costs on governments and can act to delay or deter governments from making regulatory decisions in the public interest…The Committee is not of the view that conferring such rights to international investors is in Australia's national interest.[9]

The Committee made the following recommendation in its final report relating to ISDS:

> *Recommendation 5:* The Committee recommends that the Australian Government should seek to not include provisions in trade and investment agreements that waive labour market and skills testing or include investor state dispute settlement (ISDS) provisions.[10]

The Committee further commented that there are certain elements regarding the content of trade and investment agreements that could be enshrined in a legislative framework. While noting that it would not be appropriate or necessary for a legislative framework to be highly prescriptive in ruling certain provisions in or out of future agreements

> …the Committee does believe that there are certain exceptional commitments that are fundamental to the public interest that could be appropriately enshrined in a legislative framework. Further…retaining the ability to regulate in the public interest across key policy areas could also be appropriately enshrined in a legislative framework.[11]

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[8] DFAT, 'Agreement between Australia and New Zealand regarding Investor State Dispute Settlement, Trade Remedies and Transport Services', 3 March 2018 https://www.dfat.gov.au/sites/default/files/sl15-australia-new-zealand-isds.pdf

[9] Joint Standing Committee on Trade and Investment Growth, 'Strengthening Australia's Approach to Trade Negotiations', https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000220/toc_pdf/StrengtheningAustralia'sapproachtotradenegotiations.pdf 1 May 2024, pp. 86-87.

[10] *Ibid.,* Recommendation 5, p. 88.

[11] *Ibid.,* p. 110.

The Committee went on to recommend the establishment of a legislative framework:

> *Recommendation 8:* The Committee recommends that the Australian Government establish a legislative framework for the negotiation of Australia's trade and investment agreements.[12]

The Australian Government has yet to respond to the Committee's recommendations. Given the dire impacts ISDS can have on the Government's ability to regulate, the impact on public finances, and the chilling effect the threat of ISDS has on regulation, we urge the Australian Government to codify their current policy of excluding ISDS provisions in this legislative framework as recommended by the Committee to ensure that future Australian Governments cannot expose Australia to the risk of ISDS. This legislative framework must also protect the ability for the Australian Government to regulate in the public interest.

Recommendation 4: The Government should respond to the recommendations of the Joint Standing Committee on Trade and Investment Growth *inquiry into Australia's approach to negotiating trade and investment agreements* by legislating a negotiating framework for Australia's trade and investment agreements that excludes ISDS provisions and ensures the ability of the Australian Government to regulate in the public interest is protected.

[12] *Ibid.,* Recommendation 8, p. 110.

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