Australian Fair Trade and Investment Network (AFTINET) Submission to the DFAT re-negotiation of bilateral investment treaties with with Argentina, Pakistan and Türkiye March 2025

Contents

Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair-trading relationships with all countries based on the principles of human rights, labour rights and environmental sustainability. We recognise the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries.

We welcome the opportunity to make a submission to the DFAT renegotiation of Bilateral Investment Treaties (BITS) with Argentina, Pakistan and Türkiye.

The Labor government has a policy against Investor-State Dispute Settlement (ISDS) in new trade agreements and to review it in existing agreements because ISDS provisions reduce government scope to regulate in the public interest[1]**.** The government also has policies to include enforceable human rights (including women's and Indigenous rights), labour rights and environmental standards (including commitments to reduce carbon emissions) in trade and investment agreements. As discussed below, ISDS can undermine regulation in all these areas. The Government should also respond to the recommendations of the Joint Standing Committee on Trade and Investment Growth[2] *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.

Bilateral investment agreements do not need to include ISDS. They can include general rules that provide fair protections for international investment and governments' right to regulate but do not need to give individual foreign investors special legal rights to sue governments. Such agreements can be enforced by state-to-state dispute processes. Examples of this include the Regional Comprehensive Economic Partnership of 14 Asia-Pacific countries, the Australia-UK Free Trade Agreement, and the India-Brazil bilateral investment agreement.

This submission has two parts.

Part one presents the latest evidence against ISDS and argues that ISDS should be removed from the three agreements

Part two makes specific recommendations using examples of investment agreements without ISDS, which give reasonable general protections to investors but protect the right of governments to regulate. These can be enforced through state-to-state dispute processes.

[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] Joint Standing Committee on Trade and Investment Growth (2024) inquiry into Australia's approach to negotiating trade and investment agreements *Final Report* https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000220/toc_pdf/StrengtheningAustralia'sapproachtotradenegotiations.pdf, recoomendation 5, p. 88.

Summary

ISDS should be removed from BITs with Argentina, Pakistan and Türkiye

Part one outlines the evidence showing that Investor-State Dispute Settlement (ISDS) in trade and investment agreements does not lead to increased investment, is structurally imbalanced in favour of investors, is often used against public interest regulation, including the reduction of carbon emissions and that international institutions like the UN and the OECD have acknowledged that it is an obstacle to the urgent transition to a low carbon global economy. Studies show that Australia's large number of agreements with ISDS leave it vulnerable to more cases from fossil fuel companies and to forum shopping from both international and Australian investors, as has occurred with the Clive Palmer cases. Two of the 10 mining and energy companies based in Australia that have used ISDS cases against other countries are subsidiaries of larger foreign-based companies. This use of Australia's many agreements with ISDS for forum-shopping claims against developing countries, like the US$5.8 billion successful claim against Pakistan, harms Australia's reputation and relationships with those countries. Speculative third-party funding has fuelled the rise in multibillion-dollar claims, which are especially damaging to low-income countries. Attempts to reform ISDS processes through UNCITRAL and ICSID have been slow and have not addressed its fundamental flaws, and the introduction of environmental and health exceptions in "modernised" agreements has not been effective.

The Australian government should therefore accelerate its program of review and removal of ISDS in current agreements and support international efforts for coordinated withdrawal of ISDS arrangements.

ISDS provisions should be removed from the agreements with Argentina, Pakistan and Türkiye, which were signed in 1997, 1998 and 2009, respectively. They all include ISDS and lack protections for the right of governments to regulate in the public interest.

The agreements have a similar structure. The first 12 Articles deal with aims, definitions and general protections for investment, and a state-to-state process for dealing with disagreements between state parties about the interpretation and application of the agreement. Article 13 deals specifically with disputes initiated by individual investors, Investor-State Dispute Settlement (ISDS).

Article 13 ISDS provisions should be removed from the agreements. The agreement preamble should also include the right of governments to regulate in the public interest, and the safeguards for government regulation should be strengthened in the context of a state-to-state dispute process. Specific recommendations are listed below.

Specific technical recommendations to exclude ISDS and protect government regulation

1. The ISDS provisions (article 13), which allow single investors to claim compensation from governments, should be removed from the BITs with Argentina, Pakistan and Türkiye.
2. There should be a state-to-state dispute process similar to the processes in other bilateral investment agreements without ISDS or investment chapters in recent trade agreements without ISDS, for example, the UK-Australia FTA and the Australia-UAE investment agreement.
3. The aims of the agreement in the preamble should include cooperation to promote mutually beneficial investment, the protection of investment and the right of governments to regulate in the public interest.

4. The state-to-state dispute process should have a code of conduct for dispute panel members to prevent perceived and actual conflicts of interest and to maintain the highest standards of independence and impartiality.
5. In the context of the state-to-state dispute mechanism, there should be the following clear exclusions from the provisions of the agreement and the application of the state-to-state dispute settlement mechanism:

- government subsidies or grants
- public services
- taxation measures
- safety
- human plant and animal health, including environmental regulation, regulation to reduce carbon emissions, regulation to protect and improve human rights and labour rights, regulation to protect public morals or maintain public order, deceptive and fraudulent practices, national treasures of artistic historical or archaeological value, the privacy of individuals in relation to processing and dissemination of personal data and confidentially of individual records and accounts
- measures for international peace or security, and protection of essential security interests
- Australia's foreign investment framework, including legislation on Foreign Acquisitions and Takeovers from 1975 to 2020, Financial Shareholdings and their Ministerial Guidance Notes
- prudential measures relating to regulation of financial institutions
- rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement ("TRIPS Agreement"), or to the revocation, limitation, or creation of intellectual property rights
- government procurement
- preferences to indigenous persons, the Native Title Act 1993 and protection of Indigenous heritage
- contracting out and privatisation of government services
- funding, licensing and quality of all education services
- income security or insurance, Social Security or insurance, social welfare, public education, public training, health, childcare, aged care, public utilities, public transport and public housing.
- the creative arts, cultural heritage including indigenous cultural heritage, audiovisual services and other cultural industries
- gambling and betting
- tobacco regulation

- federal leased airports, maritime cabotage, registration of vessels and agricultural marketing boards
- favourable treatment to New Zealand and Pacific Islands Forum countries

6. The Most Favoured Nation treatment of investment should clarify that it does not apply to international dispute procedures or mechanisms and that ISDS or other dispute provisions from previous or future agreements cannot be imported into the agreement.

7. The agreement should clarify that obligations to investors do not go beyond customary international law and that the definition of breaches of these obligations must demonstrate denial of justice in civil or administrative proceedings, fundamental breach of due process, including a fundamental breach of transparency in judicial or administrative proceedings, manifest arbitrariness, targeted discrimination, abusive treatment, or failure to provide full protection and security.
8. Obligations should clarify that the mere fact that a party takes or fails to take an action that may be inconsistent with investor expectations does not constitute a breach of the agreement, even if there is loss or damage to the investment as a result.
9. The obligations on national treatment should clarify that national treatment applies “in like circumstances” and depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare or regulatory objectives.
10. There should be no provisions for indirect expropriation.
11. The definition of expropriation should clarify that non-discriminatory regulatory measures by a party or judicial bodies of a party that are designed to protect legitimate public interest or public purpose objectives such as public health safety and the environment do not constitute expropriation

Part One: Why ISDS should be removed from trade and investment agreements

Evidence of ISDS impacts on foreign direct investment is inconclusive

Supporters of ISDS claim that it increases the level of foreign investment, especially in developing countries. However, a comprehensive review by Bonnitcha *et al* of the impacts of ISDS in BITS on Foreign Direct Investment (FDI) notes the complexity involved in measuring the impact of this single variable on foreign investment flows, which are impacted by many factors. They conclude that

> The studies' results are mixed. A majority find that bilateral investment treaties have a positive and statistically significant impact on inward FDI in at least some circumstances. Amongst these the scale and impact varies remarkably with some reporting strong effects and others finding positive but only small effects. Among the studies reporting a positive effect of BITS on investment flows, some also come to apparently contradictory findings. Finally a sizeable minority of studies find there was no statistically significant effect of BIT adoption on FDI. [3]

A more recent 2022 meta-study on ISDS and investment flows concluded that there was "robust evidence that effect of international investment agreements is so small as to be considered zero." [4]

A 2018 study of official FDI statistics in five countries whose governments had terminated BITS – Ecuador, Bolivia, South Africa, Indonesia and India - found that "investment flows from former BIT partner countries were more likely to increase rather than decrease after BIT termination," and concluded that

> While the findings do not suggest terminating BITs directly boosts investment inflows, they do point to an extremely weak or non-existent relationship between BITs and the magnitude of investment inflows.[5]

Brazil's parliament has never endorsed BITs or trade agreements containing ISDS, but it has experienced high levels of FDI.[6]

ISDS origins, cases against public interest regulation and reviews by tribunal institutions

Legal rights for foreign investors to claim compensation 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

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[3] Bonnitcha, J., Lauge, N., Skovgaard, P., Waibel, M. (2017) *The Political Economy of the Investment Treaty Regime*, Oxford University Press, Oxford, p. 159.

[4] Brada, J., Drabek Z., (2022) Does investor protection increase foreign direct investment? A Meta-Analysis 30 September https://onlinelibrary.wiley.com/doi/full/10.1111/joes.12392

[5] Public Citizen (2018) *Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows,* April, Public Citizen, Washington, pp. 1-2, https://www.citizen.org/wp-content/uploads/pgcw_fdi-inflows-from-bit-termination_finaldraft.pdf

[6] Filho, J. (2008) "The Brazilian Experience with Bilateral Investment Agreements: A Note", *Transnational Dispute Management*, No.1, https://www.transnational-dispute-management.com/article.asp?key=1198.

expropriation"[7] and "legitimate expectations",[8]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 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.

The number of reported ISDS cases has been increasing rapidly, reaching 1368 as of July 2024.[9] These include cases against tobacco regulation,[10] medicine patents,[11] environmental protections,[12] indigenous land rights,[13] regulation of the minimum wage[14] and more recently, government action to reduce carbon emissions, examples of which are discussed in more detail below.

Widespread criticism has influenced the two institutions that provide ad hoc tribunals to ISDS arbitration systems, the UN Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), to conduct reviews that recognise that there are flaws in the ISDS system. The reviews began in 2017, were interrupted by the coronavirus disease 2019 pandemic, and have resumed but not yet been completed[15]. The ICSID review is not a public process. The UNCITRAL review, conducted by a UN body, has a more open structure with public submissions and publication of proceedings.

The criticism of ISDS has been acknowledged in the UNCITRAL review. Criticisms of the ISDS *structure* include the following: the power imbalance, which gives additional legal rights to international corporations that already exercise considerable market power, the lack of obligations on investors, and the use of claims for compensation for public interest regulation.

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[7] 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.
Availableat https://brill.com/view/journals/iclr/22/2/article-p235_5.xml?language=en

[8] 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/

[9] UNCTAD (2022) Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement

[10] 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

[11] 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

[12] 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.

[13] 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

[14] 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

[15] United Nations Commission on International Trade Law (UNCITRAL) (No Date) Working Group III: Investor-State Dispute Settlement Reform. Available at https://uncitral.un.org/en/working_groups/3/investor-state

Acknowledged criticisms of the ISDS *process* include the lack of independent judges, arbitrator conflict of interest, lack of transparency, lengthy proceedings, high legal and arbitration costs, forum shopping by investors, inconsistent decisions caused by the lack of precedents and appeals, third-party funding for claims as speculative investments, and excessively high awards based on dubious and inconsistent calculations of expected future profits. [16]

After eight years, the only agreed change to emerge from the UNCITRAL process is a Code of Conduct for arbitrators, which attempts to address arbitrator conflict of interest by defining conflict of interest and requiring disclosure by arbitrators of 'double hatting'. This occurs when an arbitrator is arbitrating one claim and practising as an advocate in another. After much debate, the final Code adopted by ICSID and UNCITRAL requires that double hatting must be publicly disclosed, but it has not been forbidden except in very narrow circumstances when claims are closely related. [17]

ISDS cases against government regulation of carbon emissions: a recognised threat to the urgent transition to low carbon economies

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 change action[18].

US company Ruby River Capital filed an ISDS claim against Canada after its liquefied natural gas project was rejected because of concerns about its greenhouse gas emissions. It is seeking US$20 billion in compensation despite having spent approximately US$124 million on the project [19]

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 2030[20]. Although both cases have now been withdrawn, they spurred public debate, which led to the EU's decision to withdraw from the ECT, as described below. 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 emissions[21]. This withdrawal is now proceeding. The UK has

[16] Langford, M, Potesta, M and Kaufman, G (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. *Journal of World Investment and Trade.* 22 June. Available at https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

[17] United Nations Commission on International Trade Law (UNCITRAL) (2023) Code of Conduct for arbitrators in international investment dispute resolution. 21 December. Geneva: United Nations. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2318944_coc_arbitrators_e-book_eng.pdfInternational Centre for Settlement of Investment Disputes (ICSID) (2023c) Code of conduct for arbitrators in international investment disputes. Available at https://icsid.worldbank.org/resources/code-of-conduct

[18] Tienhaara *et al.* (2022) Investor-State disputes threaten the global green energy transition, *Science,* 5 May 2022Vol 376, Issue 6594 pp. 701-70 https://www.science.org/doi/10.1126/science.abo4637

[19] International Centre for Settlement of Investment Disputes (ICSID) (2023b) Ruby River Capital LLC v. Canada, ICSID Case No. ARB/23/5. Available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/5Boston University (2023) Submission to the Special Rapporteur on human rights and the environment call for inputs. Available at https://www.bu.edu/gdp/files/2023/11/KT-RT-KG-OHCHR-ISDS-Submission-FIN.pdf

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

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

also announced its withdrawal from the ECT[22]. 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 [23]

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."[24]

ISDS in Australia's many BITs and trade agreements make it vulnerable to claims by Clive Palmer and others

Law firms specialising in ISDS cases advise international companies to set up subsidiary companies in jurisdictions where governments have ISDS agreements so they can use forum shopping to maximise ISDS opportunities. One firm advised that "companies in industries most affected by States' climate change obligations (e.g., fossil fuels, mining, etc.) should audit their corporate structure and change it, if needed, to ensure they are protected by an investment treaty".[25].

Australia has 15 bilateral investment agreements and 10 out of a total of 18 broader trade agreements that include ISDS[26]. This leaves Australia particularly vulnerable to claims by fossil fuel companies against regulation to reduce carbon emissions. More generally, the number of agreements with ISDS enables international companies based elsewhere to register subsidiaries in Australia through which they can make claims against other countries.

This use of Australian subsidiaries is shown by the fact that there are 10 known claims using ISDS in Australia's trade and investment agreements (all from mining and energy companies) in the UNCTAD database[27]. Two of the companies are subsidiaries of a Canadian mining company.

The negative impact of Australian mining companies' ISDS claims on international reputation and broader foreign policy is discussed in detail in another section below. This is particularly relevant to the Australian investment agreement with Pakistan because an Australian subsidiary of a Canadian and Chilean mining company achieved damages of $US 5.8 billion against Pakistan, which is also discussed further below.

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

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

[23]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)

[24]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

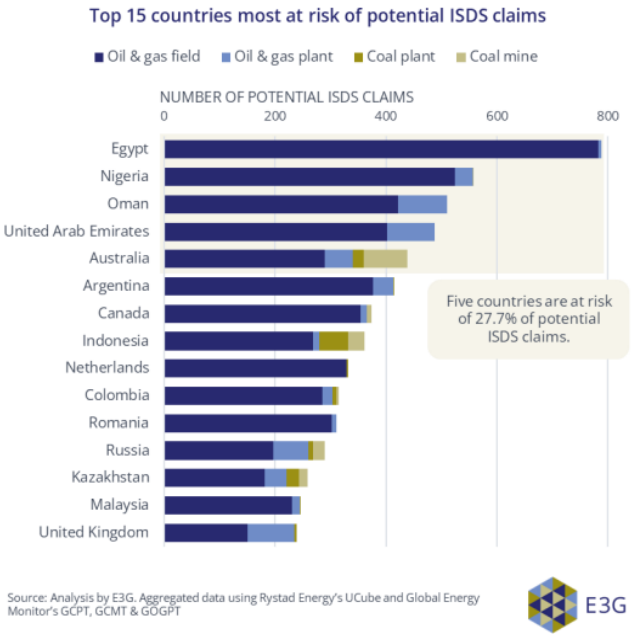
[25] Bradfield, M (2022) Climate change and investor-state dispute resolution. *Lexology*. 1 March. Available at https://www.lexology.com/library/detail.aspx?g=086370ea-bd96-4c3d-9446-24ca72136151

[26] See https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties and https://www.dfat.gov.au/trade/agreements/trade-agreements

[27] United Nations Trade and Development (2025) Investment Policy Hub https://investmentpolicy.unctad.org/investment-dispute-settlement/country/11/australia/investor

refuse an iron ore mining license[28]. The other three claims, which total $120 billion, are for the refusal of permits for a coal mine and coal-fired power station in Queensland[29]. The refusals were for environmental reasons, including contributions to increased carbon emissions[30]. These cases are scheduled for hearing in 2025. The ISDS system enables Palmer to have multiple claims, which increases the time and expense for governments in defending them.

Australia's large number of agreements make it vulnerable to claims by other fossil fuel companies. A recent report mapping ISDS in trade agreements has found that Australia ranks fifth in the world for its exposure to such claims.



Use of third-party speculative funding and growth in ISDS billion dollar awards

Leading international investment law expert and practitioner George Kahale has argued that "there really are no hard and fast rules" in ISDS claims for compensation. He cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future lost profits, which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions[31].

[28] 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

[29] 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

[30] 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

[31] Kahale p.14

Kahale also notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation and argues that they fuel the growth of "surrealistic" claims and are "more about making money than obtaining justice" [32].

Legal scholars Bonnitcha and Brewin have also noted:

> The possibility of large compensation awards has systemic implications. Investors with long-shot claims are more likely to proceed to arbitration if they expect to receive a large payout should their case succeed. The possibility of a large award also encourages third-party funding.[33]

These findings have been reinforced by the increasing numbers of awards of billions of dollars against low-income governments, which are a substantial proportion of their national budgets and can damage their ability to provide essential services. There is no general right of appeal for substantive ISDS decisions. For ICSID tribunal decisions only, governments can apply to have the award annulled or reduced. This is rarely successful.

As of July 2023, the twelve largest known ISDS awards totalled US$96.7 billion.[34] There were 64 known ISDS cases that were awarded over US$100 million by tribunals, not including pending cases or awards agreed in settlement.[35]

Australian-based mining companies' use of forum shopping to sue low-income countries harms Australia's reputation: US$5.8 billion award against Pakistan

The Australian-registered mining company Tethyan Copper Company Ltd had an exploration licence with the intention of opening a mine in Pakistan. The Pakistan federal government refused to grant a mining licence because of claimed anomalies in the way the provincial government had granted the initial exploration licence.

Using ISDS provisions in the Australia-Pakistan investment treaty, Tethyan Copper took an ISDS case against Pakistan in 2012. In 2019, an international investment tribunal ruled that Pakistan should pay Tethyan Copper US$5.8 billion in compensation.[36] Tethyan is owned by the Canadian Barrick Gold Corporation and Chilean Antofagasta PLC. Neither Canada nor Chile has an investment treaty with Pakistan. Tethyan was able to use its Australian subsidiary to lodge the claim because of the Australia-Pakistan investment treaty.

The Pakistan award made headlines around the world because the compensation payout was more than 25 times the US$220 million the company had invested in the project and included an unknown payout for 'lost future profits'.[37] The amount is almost equivalent to the US$6 billion emergency loan

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[32] Kahale p. 17

[33] Bonnitcha J., and Brewin S. (2019) *Compensation under Investment Treaties*, International Institute for Sustainable Development, October, https://www.iisd.org/sites/default/files/publications/compensation-treaties-best-practicies-en.pdf

[34] Special Rapporteur on human rights and the environment (2023) Twelve Largest Known ISDS Awards, https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/reports-annex/Annex1-to-A-78-168.pdf

[35] UNCTAD (2023) Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2

[36] Antofagasta PLC (2019) Reko DIQ project arbitration award Media Release, 12 July, https://www.antofagasta.co.uk/investors/news/2019/reko-diq-project-arbitration-award/

[37] Teinhaara, K. (2019) World Bank ruling against Pakistan shows global economic governance is broken, 23 July, https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414

the International Monetary Fund (IMF) had just granted Pakistan to deal with its economic crisis, and therefore potentially cancels any benefit from the IMF loan.

Commentators have noted[38] that there are fundamental flaws when the government of a developing country qualifies for an emergency loan from the IMF to prevent economic collapse, but an ICSID tribunal under the auspices of the World Bank determines that equivalent funds must then be paid to a global corporation for a dubious calculation of future lost profits, thereby nullifying any benefit to the population from the IMF loan.

The same Canadian company, Barrick Gold, announced on July 10, 2020, that its Australian subsidiary, Barrick (PD) Australia Pty Ltd, was using the ISDS provisions of a bilateral investment treaty between Papua New Guinea (PNG) and Australia to claim compensation for the PNG government's refusal to grant an extension of the company's expired 30-year lease at the controversial Porgera Joint Venture gold mine in the PNG highlands.[39]

Canada does not have a BIT with PNG, so again, Barrick's use of an Australian subsidiary appears to be an exercise in forum shopping. There is a documented record of decades of environmental and human rights abuses at the Porgera mine.[40] There have also been recommendations from human rights experts that the company should address these claims.[41] Despite this record, Barrick sought compensation because its lease was not extended after its expiration.

After negotiations with the company in 2021, the PNG Prime Minister announced an agreement with the company to renew the lease on terms that he claimed were more favourable to the local community and the PNG government.[42] Critics disputed this and claimed that the ISDS threat had intimidated the government. Catherine Coumans of MiningWatch Canada, which worked with local landowners, said:

> "It seems that the legal pressure Barrick has maintained on the COVID-19-ravished state has finally worn down the resolve of the PNG government to chart a course for the mine without Barrick. It will be important to see what kind of deal Barrick has offered local landowners, as most have been adamant that they want to see the back of this controversial company. Our partners in particular want to know that human rights claims for victims of violence by mine security will finally be dealt with equitably."[43]

The use of ISDS in Australian agreements in forum shopping by companies based elsewhere provides no benefits to the Australian economy and can contradict Australia's commitments to human rights, undermine its aid and development programs in low-income countries, and harm Australia's reputation and relationships with them.

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[38] Tienhaara (2019)

[39] Barrick Gold (2020) Barrick serves notice of dispute over Porgera, 10 July, https://www.barrick.com/English/news/news-details/2020/barrick-serves-notice-of-dispute-over-porgera/default.aspx

[40] Amnesty International (2010) *Undermining Rights: forced evictions and police brutality around the Porgera gold mine, Papua New Guinea,* Amnesty International, London, https://www.amnesty.org/download/Documents/36000/asa340012010eng.pdf

[41] Jungk, M., Chichester, O., and Fletcher, C. (2018) *In Search of Justice: Pathways to Remedy at the Porgera Gold Mine* Report, BSR, San Francisco https://www.bsr.org/reports/BSR_In_Search_of_Justice_Porgera_Gold_Mine.pdf.

[42] Marape, J. (2021) Government set to sign agreement with Barrick to reopen Porgera mine", Media Release, PNG government, 5 April, https://miningwatch.ca/news/2021/4/6/barrick-forces-hand-papua-new-guinea-government-reopening-porgera-mine

[43] Coumans, C. (2021) quoted in Bilaterals (2021) Barrick forces hand of Papua New Guinea government in reopening Porgera mine, 6 April, https://www.bilaterals.org/?barrick-forces-hand-of&lang=fr

Experience of ISDS has led to ISDS legitimacy crisis

Scholars have identified that ISDS has suffered a legitimacy crisis that has grown in the last decade, with a lack of confidence in the system shared by both civil society organisations and a growing number of governments.[44] ISDS cases can have chilling or delaying effects on regulation by other governments[45]. The New Zealand government delayed its tobacco plain packaging legislation when the Philip Morris Tobacco company sued the Australian Government over its plain packaging law. The Minister of Health said:

> "In making this decision, the Government acknowledges that it will need to manage some legal risks. As we have seen in Australia, there is a possibility of legal proceedings… To manage this, Cabinet has decided that the Government will wait and see what happens with Australia's legal cases, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes."[46]

Companies also acknowledge that they use the threat of ISDS to prevent regulation. Documents revealed under freedom of information laws showed that the Chevron oil company lobbied EU officials to include ISDS in the Trans-Atlantic Trade and Investment Agreement then being negotiated because "the mere existence of ISDS is important as it acts as a deterrent" to regulation[47].

The ISDS system's loss of legitimacy is also being recognised by some of its strongest proponents. For example, Alexis Mourre, the former president of the commercial arbitration system for disputes between companies run by the International Chamber of Commerce (ICC), said recently in a lecture that defenders of ISDS had been 'defeated' by social movements and 'lost the battle of public opinion' and 'to a large extent, the battle of legitimacy' [48]

More governments are withdrawing from ISDS arrangements. South Africa, India and Indonesia have cancelled BITS. As documented above, the EU and the UK have withdrawn from the Energy Charter Treaty and the US and Canada withdrew from ISDS arrangements in the US MCA. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP) and the Australia-UK Free Trade Agreement (A-UKFTA). ISDS has also been excluded from the India-Australia Comprehensive Economic Cooperation Agreement and the Australia-EU Free Trade Agreement (A-EUFTA), both currently under negotiation.

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[44] Langford M., Potesta M., Kaufman G. (2020) "UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions" in *Journal of World Investment & Trade*, 22 June,p.1 https://lk-k.com/wp-content/uploads/2020/07/22119000-The-Journal-of-World-Investment-Trade-Special-Issue_-UNCITRAL-and-Investment-Arbitration-Reform_-Matching-Concerns-and-Solutions.pdf

[45] 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

[46] 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

[47] Nelson, A. (2016), Chevron lobbied for controversial right as 'environmental deterrent' 26 April TTIP: Chevron lobbied for controversial legal right as 'environmental deterrent' | Oil | The Guardian

[48] Ross, A (2024) We're losing the ISDS fight. *Global Arbitration Review*. 19 January. Available at https://globalarbitrationreview.com/article/were-losing-the-isds-fight-warns-mourre (accessed 27 February 2024)

'Modern' ISDS provisions and proposals for a Multilateral Investment Court do not create effective protections against ISDS cases

There have been attempts in more recent trade agreements, such as the Comprehensive and Progressive Trans-Pacific Partnership (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.[49]

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, instead relying on decisions relating to older agreements. 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 exception applies to a measure, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation".[50]

In the CPTPP, a similar exception includes the additional proviso that nothing should prevent measures to protect the environment "otherwise consistent with this chapter".[51] Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation.[52]

These reforms 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.

Likewise, the EU proposal for a standing Multilateral Investment Court with permanent judges attempts to address some of the procedural problems in the ISDS system. However it does not address the fundamental power imbalances in the ISDS system. Damjanovic [53]notes that, despite the fact that the EU has proposed this in the UNCITRAL reform discussions, none of the EU trade and investment agreements introducing a court system have yet been ratified by the EU Member States. Many other states have expressed scepticism about the MIC, including the US, China and many developing countries.

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[49] 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&.

[50] 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/.

[51] 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.

[52] 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.

[53] Damjanovic, I., (2025) The European Union's Reform of International Investment Law: per aspera ad astra or an unfeasible aspiration? https://www.internationalaffairs.org.au/australianoutlook/the-european-unions-reform-of-international-investment-law-per-aspera-ad-astra-or-an-unfeasible-aspiration/

Part Two: Conclusions and specific recommendations

ISDS should be removed from BITs with Argentina, Pakistan and Türkiye

Part one has outlined the evidence showing that that Investor-State Dispute Settlement (ISDS) in trade and investment agreements does not lead to increased investment, is structurally imbalanced in favour of investors, and that international institutions like the UN and the OECD have acknowledged that it is an obstacle to the urgent transition to a low-carbon global economy. Australia's large number of agreements with ISDS leave it vulnerable to more cases from fossil fuel companies, and to forum shopping from both international and Australian investors, as has occurred with the Clive Palmer cases. Speculative third-party funding has fuelled the rise in multibillion-dollar claims, which are especially damaging to low-income countries. Attempts to reform ISDS processes through UNCITRAL and ICSID initiatives have been too slow and have not addressed its fundamental flaws, and the introduction of environmental and health exceptions in "modernised" agreements has not been effective.

The Australian government should therefore remove ISDS from these three agreements, accelerate its program of review and removal of ISDS in current agreements and support international efforts for coordinated withdrawal of ISDS arrangements.

ISDS provisions should be removed from the agreements with Argentina, Pakistan and Türkiye, which were signed in 1997, 1998 and 2009, respectively. They all include ISDS and lack protections for the right of governments to regulate in the public interest.

The agreements have a similar structure. The first 12 Articles deal with aims, definitions and general protections for investment, and a state-to-state process for dealing with disagreements between state parties about the interpretation and application of the agreement. Article 13 deals specifically with disputes initiated by individual investors, Investor-State Dispute Settlement (ISDS).

Article 13 ISDS provisions should be removed from the agreement. The agreement preamble should also include the right of governments to regulate in the public interest, and the safeguards for government regulation should be strengthened in the context of a state-to-state dispute process. Specific recommendations are listed below.

Specific technical recommendations to exclude ISDS and protect government regulation

1. The ISDS provisions (article 13), which allow single investors to claim compensation from governments, should be removed from the BITs with Argentina, Pakistan and Türkiye.
2. There should be a state-to-state dispute process similar to the processes in other bilateral investment agreements without ISDS or investment chapters in recent trade agreements without ISDS, for example, the UK-Australia FTA and the Australia-UAE investment agreement.
3. The aims of the agreement in the preamble should include cooperation to promote mutually beneficial investment, the protection of investment and the right of governments to regulate in the public interest.
4. The state-to-state dispute process should have a code of conduct for dispute panel members to prevent perceived and actual conflicts of interest and to maintain the highest standards of independence and impartiality.

5. In the context of the state-to-state dispute mechanism, there should be the following clear exclusions from the provisions of the agreement and the application of the state-to-state dispute settlement mechanism:

- government subsidies or grants,
- public services
- taxation measures
- safety
- human plant and animal health, including environmental regulation, regulation to reduce carbon emissions, regulation to protect and improve human rights and labour rights, regulation to protect public morals or maintain public order, deceptive and fraudulent practices, national treasures of artistic historical or archaeological value, the privacy of individuals in relation to processing and dissemination of personal data and confidentially of individual records and accounts
- measures for international peace or security, and protection of essential security interests
- Australia's foreign investment framework, including legislation on Foreign Acquisitions and Takeovers from 1975 to 2020, Financial Shareholdings and their Ministerial Guidance Notes
- prudential measures relating to the regulation of financial institutions
- rights in accordance with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement ("TRIPS Agreement"), or to the revocation, limitation, or creation of intellectual property rights
- preferences to indigenous persons and the Native Title Act 1993,
- contracting out and privatisation of government services
- funding, licensing and quality of all education services
- income security or insurance, Social Security or insurance, social welfare, public education, public training, health, childcare, aged care, public utilities, public transport and public housing.
- the creative arts, cultural heritage, including indigenous cultural heritage, audiovisual services and other cultural industries
- gambling and betting
- tobacco regulation
- Federal leased airports, maritime cabotage, registration of vessels and agricultural marketing boards
- favourable treatment to New Zealand and Pacific Islands Forum countries

6. The Most Favoured Nation treatment of investment should clarify that it does not apply to international dispute procedures or mechanisms and that ISDS or other dispute provisions from previous or future agreements cannot be imported into the agreement.

7. The agreement should clarify that obligations to investors do not go beyond customary international law, and that the definition of breaches of these obligations must demonstrate denial of justice in civil or administrative proceedings, fundamental breach of due process, including a fundamental breach of transparency in judicial or administrative proceedings, manifest arbitrariness, targeted discrimination, abusive treatment, or failure to provide full protection and security.
8. Obligations should clarify that the mere fact that a party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the agreement, even if there is loss or damage to the investment as a result.
9. The obligations on national treatment should clarify that national treatment applies "in like circumstances" and depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare or regulatory objectives.
10. There should be no provisions for indirect expropriation.
11. The definition of expropriation should clarify that non-discriminatory regulatory measures by a party or judicial bodies of a party that are designed to protect legitimate public interest or public purpose objectives such as public health safety and the environment do not constitute expropriation..