



N.S.W. Retired Teachers' Association

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Introduction. The New South Wales Retired Teachers' Association represents almost four thousand members who are concerned for the futures of their children, grandchildren and former students. They are concerned that Investor-State Dispute regimes may disrupt the sovereign Australian government's ability to suitably legislate about Global Warming, the Environment, and Human Rights, Labour Rights, Women's Rights and Indigenous Land Rights.

Our members thank you for the opportunity to make a short submission to the review of Australia's bilateral investment treaties with Argentina, Türkiye and Pakistan. This submission supports the removal of ISDS provisions from these three agreements.

Evidence The members fear that investors, holding stranded assets, will seek to use ISDS to circumvent Climate Change legislation. This is dramatically demonstrated by Clive Palmer. Palmer's recent cases join a growing global list of instances of fossil fuel companies that challenge the urgent action needed to reduce carbon emissions. A 2022 study published in the journal ***Science*** showed the increasing use of ISDS clauses in trade agreements by fossil fuel companies. 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."

The inconsistency of the ISDS system and the way it can be manipulated by investors has been dramatised by the fact that Australian billionaire Clive Palmer has registered his mining company, Zeph Investments, in Singapore and claims to be a Singaporean investor, using investor rights in two Australian trade agreements with Singapore and ASEAN, to claim a total of \$420 billion from the Australian government.

His first claim occurred after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining licence. Other claims are in response to a Queensland Court refusal of a coal mining license for environmental reasons, including increased carbon emissions. He has now made another ISDS claim due to the refusal of a licence for a coal-fired power plant.

The Philip Morris Tobacco Company case again demonstrated the detrimental effects of ISDS. The company claimed billions from the Australian government over Australia's 2012 plain packaging law. Although the case failed on a technicality, it took five years and the government had to spend \$12 million in legal costs. There have also been ISDS cases in other countries against government policy on medicine patents, environmental regulation, climate change policy and indigenous land rights.

History Our History teacher members recognise that 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, the rules have expanded to include "indirect" expropriation and "legitimate expectations", which do not exist in national legal systems. Investors can claim that they deserve compensation if they can convince a tribunal that a change in law or policy reduces 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. ISDS international tribunals are not staffed by independent judges, but by arbitrators who may continue to be practising lawyers with potential conflicts of interest, and there are no precedents or appeals.

Policy The current Australian government has a policy against ISDS provisions in new trade and investment agreements and to review it in existing agreements, recognising that ISDS provisions reduce government scope to regulate in the public interest.

Submission. Bilateral investment agreements do not need to include ISDS. They can include general rules that provide fair protections for international investment, but do not give individual foreign investors extra legal rights to sue governments, and 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.

The OECD has acknowledged that ISDS is not aligned with the global climate transition, and that multilateral cooperation to prevent its use against climate regulation is urgently needed. A paper by the OECD secretariat proposes coordinated international action by governments, including coordinated withdrawal from existing ISDS arrangements.

Conclusion The Australian government should support the removal of ISDS from these three bilateral agreements, and actively assist international initiatives for coordinated withdrawal from ISDS arrangements in other trade and investment agreements.

 M.A. M.Ed.

On behalf of the NSW Retired Teachers' Association