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

Public Services International (PSI) is the global union federation for workers who deliver public services. We consist of more than 700 union affiliates, covering 154 countries, representing more than 30 million workers worldwide.

PSI welcomes DFAT's initiative to review the Bilateral Investment Treaties (BITs) between Pakistan, Argentina, and Turkiye. PSI has affiliate trade union members in all countries reviewed. This submission draws from experience with affiliates in Australia, Pakistan and Argentina. The Australian Government has extraterritorial obligations to ensure that Australia's trade arrangements do not undermine the enjoyment of human rights beyond its borders. Consequently, we make recommendations to ensure that these trade agreements advance labour rights and the public good in all countries under review.

PSI made a submission to the Joint Standing Committee on Trade and Investment Growth on the approach adopted by the Australian government when negotiating trade and investment agreements with trading partners. We reiterate some of the points made in that submission and suggest the committee's report be utilised to inform this process.

Summary: This submission makes a series of recommendations designed to ensure the BITs under review do not pose a threat to public interest and the capacity of governments at all levels to regulate. Our key recommendations include removing ISDS provisions from all instruments under review, inserting stronger public interest protections, excluding sub-national governments from agreements and ensuring that agreements unequivocally recognise the primacy of human rights and obligations to protect the environment.

Discussion: BITs, like the three instruments under review, were negotiated primarily to promote tariff free trade between the parties. Yet interpretation of various provisions of the agreements have expanded significantly in the favour of investors resulting in significant harm to human and environmental rights, particularly in low-income countries. As the case study below demonstrates, Australia's BITs have been used by corporations, including corporations whose parent companies are not Australian, to vast awards against unrealistic future projected profits. In addition to the economic harm detailed below, the threat of ISDS results in 'regulatory chill' where governments are unable to regulate in the public interest for fear of ISDS cases that can significantly undermine their capacity to

deliver public services and that very clearly undermine the human rights obligation to progressively realise economic rights.

PSI has consulted with trade unions in Pakistan and Argentina to prepare this submission. They point to the case studies below to illustrate the human rights harms arising for BITs, particularly in relation to the capacity of governments to deliver public services.

ISDS Example using Australia – Pakistan BIT

In 2011, the Tethyan Copper Company (TCC), a joint venture between Canada's Barrick Gold and Chilean miner Antofagasta, sued the government of Pakistan using ISDS provisions in the Australia – Pakistan BIT. The mining companies claimed future profits were expropriated after an application for an exploration licence was rejected by the provincial government of Balochistan. In 2013, the high court of Pakistan found an earlier agreement between Pakistan and TCC was void and had resulted from corrupt practices. The total awarded to the companies, including interest, was US$11B. The companies had spent a total of USD$220 million in exploration.

The amount awarded to the two companies exceeded the US$6B loan awarded by the International Monetary Fund and would cause immeasurable harm to a country where public services are grossly inadequate and poverty is rising.

The corporations pursued payment during the pandemic when the government of Pakistan had inadequate funds to purchase vaccines. In an application to a New York court to stay one of the two awards the government argued that enforcement of the award would produce immeasurable harm to human rights and would "negate its 2019 $6 billion loan from the International Monetary Fund, derail its economic stability and diminish its ability to fight COVID-19". In the decision to reject the application for a stay the court dismissed human rights arguments and instead explicitly decided to "Consider the hardship to Tethyan from a stay … that delay hurts the economic interests of not only the company but also of its shareholders and employees".

Despite determining that the mine is unlawful, the government of Pakistan has been forced to payout USD2 billion to one company and to agree to proceed with the mine, using public funds, invite the government of Saudi Arabia to share ownership and costs and to sign on to a new trade agreement to secure that ownership. Unions have pointed to the additional stress this payment has put on the government and the consequent effort to privatise public services, including public health, cut the public sector wage bill and cut subsidies and services to the poorest.

Argentina

While the Australia-Argentina BIT has not been used to lodge ISDS cases, Argentina has been respondent to the highest number of ISDS disputes, registering 65 cases by July 31, 2024.

In the midst of a serious social, economic and fiscal crisis that plagued the country Argentina has had to pay out more than U$D 9.2 billion to international investors, not including arbitration defense costs. By mid-2023, 48 of the 65 lawsuits had been settled, with investors winning 85% of the cases.

The cases against Argentina often involved efforts to restore public services that had been privatised under undemocratic governments and involving alleged corruption. Privatised public services, like provision of water and sanitation, were failing low income and marginalised communities and, consequently, contracts were cancelled. In one decision, the tribunal recognised that the right to water existed and was potentially violated, but that investor rights need to be 'counterbalanced' with human rights and found in favour of the investor.[1]

Provisions required to ensure the economic, social and environmental impacts of a trade/investment agreement are considered and adverse impacts are avoided:

- The revised BITs should recognise that, pursuant to Article 103 of the United Nations (UN) Charter: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." As the former UN Independent Expert on a Global Equitable Order, Alfred de Zayas proposed in his report to the General Assembly argued, "this means that bilateral and multilateral free trade and investment agreements that contain provisions that conflict with the letter and spirit of the UN Charter must be revised or terminated. Incompatible provisions can be eliminated according to the doctrine of severability, without overthrowing the entire international investment regime."

[1] https://www.isds.bilaterals.org/?disputes-between-states-and&lang=en

- Include the following clause, which is based on existing carve out clauses in USFTAs relating to security[2]: '**Nothing in this Agreement shall preclude a party from applying measures that it considers necessary to meet its United Nations obligations to respect, protect, fulfil or promote human rights and / or to meet their United Nations commitments in relation to the environment and climate action.' With a footnote which states that 'For greater certainty, if a Party invokes this Article in any dispute, the body hearing the matter shall find that this exception applies.'**

- Incorporate a clause guaranteeing respect for fundamental labour rights and principles, as defined by the ILO core instruments and establish a labour rights dispute mechanism between the parties which most involves trade unions from both parties. To this end, ensure that the human rights carve out clause (proposed above) includes all labour rights and applies to all provisions of the agreement.

- The labour rights enforcement mechanism should accept all findings and recommendations of ILO bodies as an established fact that the state party must act on.

- Produce ex ante and ex post agreement specific economic, social and environmental impact assessments including human rights, workers' rights, employment, gender and health impact assessments. This should also include listing and analysing the implications of any Australian measures which would need to be changed at any level of government to comply with the Agreement. Economic, social and environmental impact assessments should involve public participation.

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[2] This is adapted from:
- the security exception in Colombia, Korea, Panama and Peru USFTAs at https://ustr.gov/trade-agreements/free-trade-agreements which include wording such as:
Article 22.2: 'Nothing in this Agreement shall be construed: . . . to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.[x]
[x] For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.'
-the indigenous peoples exception proposed by New Zealand (on page 59 of https://www.bilaterals.org/?wto-2023-plurilateral-ecommerce-48862) in the plurilateral ecommerce negotiations that Australia is also participating in, https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm

Provisions required to protect the right to regulate in the public interest:

- Ensure that no investor-to-state dispute settlement (ISDS) provisions are included.

- Explicitly ensure that revised agreements do not undermine public services (e.g. the ability to reverse privatisations) by including an effective, self-judging and easy to use complete carve-out in the scope section for public services such as 'Nothing in this Agreement precludes a Party from applying measures that it considers affects public services. For greater certainty, if a Party invokes this Article in an arbitral proceeding under this Agreement, the tribunal or panel hearing the matter shall find that the exception applies.'

- Ensure that tax provisions are excluded from the agreement by including a clause - "Nothing in this Agreement shall apply to measures affecting tax. The Parties agree that whether a measure affects tax shall not be subject to the dispute settlement provisions of this Agreement.'

- Exclude ratchet and standstill provisions since these lock-in restrictions on regulatory and policy space.

- Given the current geopolitical climate, certain essential manufacturing may need to be onshored e.g. pharmaceuticals for a pandemic, so Australia must retain space for industrial policy including government procurement. Consequently, the agreements should explicitly exclude government procurement by all levels of government.

- Do not include any digital trade provisions in the revised agreement (including there must be no provisions on: data localisation/cross-border data flows, source code/algorithms, non-discriminatory treatment of digital products, tariffs on electronic transmissions etc).
- Ensure there are no restrictions on local presence requirements because these restrict the ability to effectively regulate and tax.

- There must be a genuine prudential carve-out (not the self-cancelling one usually copied from the WTO[3]). Based on the security exception in some USFTAs (see above), a genuine prudential carve-out could say: 'Nothing in this Agreement shall preclude a Party from applying measures that it considers necessary for prudential reasons. For greater certainty, if a Party invokes this Article in an arbitral proceeding initiated under this Agreement, the tribunal or panel hearing the matter shall find that the exception applies.'

- There are no provisions on state-owned enterprises (SOEs) in any revised agreements.

- There must be no intellectual property (IP) provisions or chapter in any such agreements. If there are any IP provisions, they must not be stronger than the WTO requires ('TRIPS-plus'). Instead, Australia should include recognition of TRIPS flexibilities in relation to medicines, and expand those flexibilities in relation to climate technologies required to rapidly decarbonise the economy and adapt to the climate crisis.

- There must be no services domestic regulation disciplines or investment facilitation provisions (such as those which have just been concluded[i] in the optional plurilateral negotiations at the WTO which Australia is part of[ii]) since they significantly restrict regulatory space[iii].

- There are no provisions on regulatory coherence/good regulatory practices such as those in the US-Mexico-Canada Agreement (USMCA),[iv] since these lock-in

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[3] E.g. Article 11.11.1 CPTPP uses the prudential defence from the WTO which includes this sentence which has been widely criticised (e.g. see https://www.citizen.org/wp-content/uploads/report-prudential-measures.pdf) as making the exception self-cancelling: 'If these measures do not conform with the provisions of this Agreement to which this exception applies, they shall not be used as a means of avoiding the Party's commitments or obligations under those provisions.'

[i] https://www.wto.org/english/news_e/news23_e/infac_06jul23_e.htm

[ii] https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm

[iii] E.g. see https://www.twn.my/title2/briefing_papers/twn/Domestic%20regulation%20TWNBP%20Oct%202021%20Kelsey.pdf and https://www.twn.my/title2/briefing_papers/MC12/briefings/Reference%20paper%20on%20SDR%20TWNMC12BP%20Nov%202021%20Mohamadieh.pdf

[iv] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between

processes that make it more difficult, slower and more expensive to regulate in the public interest[v].

- An explicit recognition of the agreed international principle of solidarity should be incorporated to ensure the agreements do not limit progressive realisation of economic rights.

- State, territory and local governments or any other subordinate bodies must be carved out from the whole Agreement, see above.

- There is a self-judging security exception such as those in USFTAs.[4]

- That no investor-to-state dispute settlement (ISDS) provisions are included.

- There be a tight definition of 'investor of a Party' e.g. the parent company of the investor must be registered in the jurisdiction of one of the Parties[vi] to avoid treaty shopping as appears to have occurred in the Reko dik case.[vii]

- The definition of 'investment' be limited to an exhaustive list which is tangible property (e.g. real estate, cars etc), not licences, permits, concessions, public private partnerships, intellectual property, future profits etc. Otherwise investors can continue to claim the lost future profits they would have made if they had constructed the buildings and operated them etc, e.g. in the Reko Diq cases the

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[4] See Colombia, Korea, Panama and Peru USFTAs at https://ustr.gov/trade-agreements/free-trade-agreements which include wording such as:
Article 22.2: 'Nothing in this Agreement shall be construed: . . . to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.[x]
[x] For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.'
[v] E.g. see https://twn.my/title2/briefing_papers/twn/IPEF%20GRP%20TWNBP%20Jan%202023%20Kelsey.pdf
[vi] E.g. the way that Germany defined its investors in the Singapore-Germany BIT: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1413/download from https://investmentpolicy.unctad.org/international-investment-agreements/countries/190/singapore as is common in European practice, 'The International Law On Foreign Investment', Sornarajah, 2010.
[vii] E.g. see concerns about treaty shopping at https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf and https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

award was based on future profits they would have made if they had operated a mine for 56 years

- There not be any minimum standard of treatment/fair and equitable treatment (FET) provisions since this is the most common and most successful basis for investor claims via ISDS[viii] and has been interpreted as a standstill on laws and regulations[ix] which can restrict Parliament's ability to legislate in the public interest, e.g. to implement climate change measures, adapt financial regulation after crises and update tax laws to close loopholes etc. [5]

- There not be any most-favoured nation (MFN) (or umbrella clause) provision since this has been used to import problematic provisions from other treaties without the relevant exceptions/safeguards.[6]

- There are no restrictions on performance requirements (e.g. so that voluntary licence royalties can be capped to ensure that medicines, vaccines etc produced under such licences are affordable[7]).

- There be no indirect expropriation provision since this has been commonly and successfully used by investors to challenge public interest measures.[x]

- Any direct expropriation provision shall only allow compensation to the level permitted by the host government's law as from time to time in force.[xi]

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[5] The number of international investment agreements (bilateral investment treaties or free trade agreement investment chapters) without FET or the other investment provisions mentioned here can be seen at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping e.g. the Australia-China FTA investment chapter does not include FET.

[6] E.g. an ISDS tribunal under the UK-Soviet BIT did not have jurisdiction, so it imported a broader dispute settlement provision from a Denmark-Russia BIT to give itself jurisdiction, without the exceptions in the Denmark-Russia BIT (e.g. excluding disputes re tax, which was the basis of the British investor's claims against Russia), https://www.iisd.org/itn/2011/04/07/awards-and-decisions-2/ and the investor won, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/184/rosinvest-v-russia

[7] E.g. left to their own devices, patent owning pharmaceutical companies charged 30% royalties to generic companies to make antiretrovirals for people living with HIV/AIDS, https://cyber.harvard.edu/people/tfisher/South%20Africa.pdf . However to help keep the finished product affordable etc, India capped the royalties that needed to be paid for technology at 5%: http://articles.economictimes.indiatimes.com/2013-12-22/news/45475757_1_royalty-payment-fdi-policy-cent-domestic-sales

[viii] https://investmentpolicy.unctad.org/investment-dispute-settlement

[ix] https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf.

[x] E.g. see https://investmentpolicy.unctad.org/investment-dispute-settlement

[xi] E.g. this is what Singapore obtained in Annex 9-C CPTPP, https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents

- There are no restrictions on the ability to require local senior managers/directors to ensure corporate accountability (e.g. for industrial manslaughter) is possible.

- That the agreement explicitly removes any grandfathering of earlier clauses, even if investments are already in place and that no grandfathering clauses are included if a party withdraws from the amended agreement.

RECOMMENDATIONS

Given the facts stated above, PSI would like to present the following recommendations:

I. Removal of the Investor-State Dispute Settlement (ISDS) provisions in the bilateral investment treaties between Australia and other countries, specifically Pakistan and Argentina

- Considering the context, in addition to the lack of historical correlation between agreements containing ISDS and increased foreign direct investment flows, it is best that the Australian government remove the ISDS clause from the Australia-Argentina, and Australia- Pakistan BIT. Trade is an important aspect of any economy, and it has the potential to lead countries towards mutual benefit. However, one-sided provisions that only ensure the profit of corporations and nations from the global north, should be repealed. Countries from the global south such as Pakistan and Argentina remain to be under-developed despite their rich natural resources and enormous labor force. This is the effect of systemic exploitation that only the wealthy benefits from, and international trade rules enforce such order. We endorse greater trade and cultural exchanges aimed at the development of all countries, based on strengthening human rights, public services and the fight against climate change. As a more developed nation, we urge the Australian government to do the humane and just move. Removing ISDS from all bilateral trade agreements is equivalent to not allowing the government to be one of the causes of the impediment of the global south's inclusive development.

II. Limiting the scope of trade rules to public services, i.e., there must be safeguards against privatization and there must be no repercussions and prohibitions to national and subnational governments that decide to remunicipalize privatized services

- Nothing in Australian trade/investment agreements should undermine public services (e.g. the ability to reverse privatisations) If it is not possible to avoid provisions which could do so, there must be an effective, self-judging and easy to use complete carve-out in the scope section for public services such as 'Nothing in this Agreement precludes a Party from applying measures that it considers affects public services. For greater certainty, if a Party invokes this Article in an arbitral proceeding under this Agreement, the tribunal or panel hearing the matter shall find that the exception applies.

III. Establishing limits on how investment deals restrict subnational governments to regulate trade-related activities in order to promote public interest

- As in the case of Balochistan, Pakistan had to pay a fine of US$11B to TCC after the local government decided to reject the latter's request to renew its contract to operate in Riko Diq. Governments in all levels should be able to regulate trade arrangements where the value of production can be equitable shared by the state and the investors. This can include (but not limited to) identification of production processes that can be done locally, and taxation of revenues of corporations according to local laws, etc. There should also be no clause in the agreement that only ensure profiteering, including the projected and future gains of corporations in trade and business processes. This would be equally favorable to the parties of the bilateral agreements as it allows governments to effectively regulate and equitably share the added value of trade.

IV. Ensuring public good exemptions in investor-state disputes, if ISDS will not be repealed.

- Investments in global south must not be used to systematize and legitimize low wage rates in developing countries. Wage increases and instituting regulations to improve working conditions must not be used as a ground for filing disputes against governments, especially when arguing for "profit losses" of corporations and/ or investors.
- Environmental and climate obligations of countries must be upheld and prioritized over profit. If governments and other stakeholders deem that trade processes could compromise the environment and further aggravate the effects of climate change, they should be able to enact/ lobby for laws that may affect trade and business operations without the threat of retaliation through ISDS. This is also beneficial for Australia, considering that the country's current ISDS lawsuits are concentrated in

the mining, oil, and gas sectors that are known to negatively impact the environment.

This submission is framed to promote not only the interest of Australia, but also the other parties in the BITs. We have affiliates in AU, Pakistan, and Argentina, and they are all in support of the mentioned recommendations which means that as far as the workers in the public sector is concerned, ISDS only brings harm to all parties concerned in the trade/ investment agreements. We believe that it is in the best interest of the people of Australia and of the world to have unjust trade provisions, such as the ISDS, removed from all agreements, including those that are bilateral, plurilateral, and multilateral. The fact that the DFAT is now conducting a review is a step forward towards a more just international relations, and we urge the Australian government to push through continue towards this direction.