

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

By Email: BITreforms submissions@dfat.gov.au

14 March 2025

Dear Sir/Madam

Review of Australia's bilateral investment treaties with Argentina, Türkiye and Pakistan

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 in these three agreements. We write this submission in our capacity as legal academics at [REDACTED]. The views expressed are our own.

Investor-State Dispute Settlement (ISDS) provisions bypass Australia's legal system, enabling foreign corporations to sue the Australian government in international arbitral tribunals, including in relation to national regulations to protect health, environment or workers. ISDS provisions undermine the principles of parliamentary sovereignty by constraining the development of regulations in the public interest due to the fear that some regulatory changes may lead international arbitral tribunals to impose large compensation orders. Due to concerns that ISDS provisions constrain global action on climate change, as well as the risk to the public interest in areas such as health policy, other OECD countries are both withdrawing from existing ISDS provisions and no longer accepting such provisions in future treaties. Australia should do the same.

The Development and Risks of Investor-State Dispute Settlement (ISDS) in Australia

International ISDS mechanisms originally developed in the post-colonial period in the second half of the 20th century to compensate international investors for the direct expropriation or taking of property by 'host' governments. However, over the past 60 years, international law rules have expanded to include compensation for "indirect" expropriation¹ and for government failure to meet "legitimate expectations."²

In the 1990s, Australia, like many other developed countries, was keen to assist Australian companies investing abroad. To this end, Australia negotiated and concluded treaties containing strong investment protection obligations and ISDS clauses. These provisions allow

¹ 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*, 22(2), 235-270. <https://doi.org/10.1163/18719732-12341428>.

² Levashova, Y (2020). "The Role of Investor's Due Diligence In International Investment Law: Legitimate Expectations of Investors" Kluwer Arbitration Blog (Webpage: <https://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/>).

foreign investors to sue governments of ‘host’ states before international arbitral tribunals based on high standards of investment protection. In accordance with the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention), decisions of arbitral tribunals must be enforced by national courts.

Since Australia is today as much a ‘host’ destination for foreign investment as a source of it, ISDS provisions pose a significant financial and regulatory risk. This is particularly so in relation to Australia’s mining industry, which is less than 10 per cent wholly Australian owned.³ There remain ongoing concerns that multinational energy companies will bring ISDS claims if the Australian government introduces price caps on gas or windfall profit taxes on gas companies.⁴ This is particularly alarming in the context of the global climate crisis.

ISDS provisions are not just powerful tools for foreign investors. Australian investors also make compensation claims against the Australian government under ISDS provisions through the strategic creation of overseas subsidiaries. Australian billionaire Clive Palmer has registered a mining company, Zeph Investments, in Singapore and, using investor rights in Australian trade agreements with Singapore⁵ and ASEAN⁶ has claimed a total of \$420 billion in compensation from the Australian government. The first claim is for \$300 billion after Palmer lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license.⁷ Claims two and three for \$110 billion are in response to a Queensland Court refusal of a coal mining license for environmental reasons, including increased carbon emissions.⁸ Palmer has made a fourth claim for another \$10 billion for the refusal of a license for a coal-fired power plant, which became public in December 2024.⁹

Developments in other jurisdictions

³ AMEC Submission, Foreign Investment Reform (Protecting Australia's National Security) Bill 2020, 31 August 2020.

⁴ Mizen, R. (2022) "Huge lawsuits loom over gas market Intervention" *Financial Review*, 10 November: <https://www.afr.com/politics/federal/massive-lawsuits-loom-over-gas-market-intervention-20221106-p5bvfwf>.

⁵ Singapore-Australia Free Trade Agreement (SAFTA), signed 17 February 2003, entered into force 28 July 2003, as amended 1 December 2017, chapter 8: <https://www.dfat.gov.au/sites/default/files/safta-chapter-8-171201.pdf>.

⁶ Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, signed 27 February 2009, entered into force 1 January 2010, as amended 1 December 2017, chapter 11: <https://www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/agreement-establishing-the-asean-australia-new-zealand-free-trade-area-aanzfta/chapter-11-investment>.

⁷ Ranald, P. (2023) "How Clive Palmer is suing Australia for \$300 billion with the help of an obscure legal clause (and Christian Porter)" *The Conversation*, 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?utm_source=clipboard&utm_medium=bylinecopy_url_button.

⁸ Attorney-General's Department, International trade and Investment law, webpage: [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%2D48,Waratah%20Coal's%20Galilee%20Coal%20Project,; Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors \(No 6\) \[2022\] QLC 21](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%2D48,Waratah%20Coal's%20Galilee%20Coal%20Project,; Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21)

⁹ *Zeph Investments Pte. Ltd. v The Commonwealth of Australia* (IV), PCA Case No. 2024-48.

Recent years has seen a significant number of ISDS cases in other countries against government policy on medicine patents,¹⁰ environmental regulation¹¹ and climate change policy,¹² indigenous land rights¹³ and labour law and worker protections.¹⁴

Clive Palmer's compensation claims 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.¹⁵ A 2023 Report by the United Nations Special Rapporteur on Human Rights and the Environment found "overwhelming evidence that ISDS is a major barrier to addressing climate change."¹⁶

There has also been a growth in third party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation. These fuel the growth of billion dollar claims and have been described by a prominent investment lawyer as "more about making money than obtaining justice".¹⁷ These claims are crippling for developing countries. Australian mining company Tethyan was, in 2019, awarded almost \$US 5.8 billion in an ISDS dispute with Pakistan.¹⁸ This was almost equivalent to the \$6 billion emergency loan the International Monetary Fund (IMF) had just granted Pakistan to deal with its economic crisis, and therefore potentially cancelled the benefit from the IMF loan.

Both expert commentators, and tribunal 'insiders' have expressed significant concerns over the lack of independence of arbitrators as well as the poor quality and consistency of arbitral decisions. As has been noted by Chief Justice French of the High Court, international arbitral tribunals are not staffed by independent judges but by private arbitrators who, as private lawyers, are also hired by foreign corporations to act as their advocates in ISDS proceedings.¹⁹ Furthermore, the lack of a tradition of publishing tribunal decisions, combined with the absence

¹⁰ Baker, Brook K. and Geddes, Katrina, The Incredible Shrinking Victory: *Eli Lilly v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS (July 6, 2017). Loyola University Chicago Law Journal, Vol. 49, 2017, Northeastern University School of Law Research Paper No. 296-2017, Available at SSRN: <https://ssrn.com/abstract=3012538>

¹¹ Martini, C. (2017). Balancing Investors' Rights with Environmental Protection in International Investment Arbitration: An Assessment of Recent Trends in Investment Treaty Drafting. *The International Lawyer*, 50(3), 529–584. <https://www.jstor.org/stable/26415686>

¹² *Westmoreland Mining Holdings LLC v Canada* (II) (ICSID Case No. UNCT/20/3).

¹³ *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21).

¹⁴ Cagnin, V. (2017). Investor-State Dispute Settlement (ISDS) from a Labour Law Perspective. *European Labour Law Journal*, 8(3), 217-231. <https://doi.org/10.1177/2031952517716280>

¹⁵ Kyla Tienhaara *et al.*, "Investor-state disputes threaten the global green energy transition." *Science* 376, 701-703 (2022). DOI:[10.1126/science.abo4637](https://doi.org/10.1126/science.abo4637)

¹⁶ UN Special Rapporteur on human rights and the environment (2023), A/78/168: Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights: <https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute?s=03>.

¹⁷ Kahale, G. III, The Inaugural Brooklyn Lecture on International Business Law: "ISDS: The Wild, Wild West of International Practice", 44 *Brook. J. Int'l L.* 1 (2018). Available at: <https://brooklynworks.brooklaw.edu/bjil/vol44/iss1/1>.

¹⁸ Tienhaara, K. (2019) 'World Bank ruling against Pakistan shows global economy governance is broken' *The Conversation*, 23 July: <https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414>.

¹⁹ Chief Justice RS French, Investor-State Dispute Settlement - A Cut Above the Courts?, Supreme and Federal Courts Judges' Conference, 9 July 2014, Darwin: <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>

of appeal rights or a doctrine of precedents diminish the quality of the ISDS dispute resolution process.

As a result, many governments are now withdrawing from ISDS processes. The EU decided in March 2024 to make 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.²⁰ The UK has also announced its withdrawal from the ECT.²¹

The OECD has stated 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.²²

Conclusion

Unlike the early 1990s, Australia is today a significant ‘host’ destination for foreign investment. So long as ISDS provisions exist in any treaty, Australia is at risk of claims by foreign investors before international arbitral tribunals. This risk potentially relates to investors from any country in the world as well as from investors who are Australian nationals. This is because with some careful forward planning, multinational companies can structure their global subsidiaries to take advantage of ISDS provisions anywhere.

The Albanese government policy is that it will not include ISDS clauses in future free trade agreements and that ‘when opportunities arise’ it will ‘engage in processes to reform existing ISDS mechanisms ... to ensure adequate scope to allow the Government to regulate in the public interest’.²³

The removal of existing ISDS provisions is urgently required to protect Australia from risk of international arbitral claims in response to legitimate regulatory actions and to limit Australia being the convenient vehicle for foreign companies to bring claims based on the regulatory actions of other national governments. Despite the exclusion of ISDS from more recent agreements and the cancellation of some older agreements, Australia has 15 bilateral investment treaties²⁴ and 10 out of a total of 18 broader trade agreements²⁵ that include ISDS. A recent report mapping ISDS in trade agreements has found that Australia ranks fifth in the

²⁰ Council of the European Union, COUNCIL DECISION on the withdrawal of the Union from the Energy Charter Treaty, 2023/0273(NLE), Brussels, 4 March 2024: <https://data.consilium.europa.eu/doc/document/ST-6509-2024-INIT/en/pdf>

²¹ Department for Energy Security and Net Zero and The Rt Hon Graham Stuart MP, UK departs Energy Charter Treaty, Press Release, 22 February 2024: <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty>.

²² Directorate For Financial And Enterprise Affairs Investment Committee, Future of Investment Treaties Track 1 -- Investment Treaties and Climate Change Methods to align investment treaty benefits for energy investment with the Paris Agreement and net zero, DAF/INV/TR1/WD(2024)1/REV1, 26 June 2024: [https://one.oecd.org/document/DAF/INV/TR1/WD\(2024\)1/REV1/en/pdf](https://one.oecd.org/document/DAF/INV/TR1/WD(2024)1/REV1/en/pdf)

²³ Senator Don Farrell, Trading our way to greater prosperity and security (Speech, The Australian APEC Study Centre, RMIT, Melbourne, 14 November 2022).

²⁴ Department of Foreign Affairs and Trade, About Foreign Investment, Australia's bilateral Investment treaties (webpage: <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties>).

²⁵ Department of Foreign Affairs and Trade, Australia's free trade Agreements (FTAs) (webpage: <https://www.dfat.gov.au/trade/agreements/trade-agreements>).

world for its exposure to potential claims by fossil fuel companies.²⁶ To this end, we urge the removal of ISDS provisions from Australia's bilateral investment treaties with Argentina, Türkiye and Pakistan

Bilateral investment agreements can include general rules that provide national treatment for international investment but should not give individual foreign investors lucrative rights to sue governments over and above the rights that exist under Australian law. Examples of such provisions include the Regional Comprehensive Economic Partnership of 14 Asia-Pacific countries, the Australia-UK Free Trade agreement and the India-Brazil bilateral investment agreement.

ISDS provisions undermine the development of regulation in the public interest by democratically elected governments. Without the removal of ISDS provisions in existing bilateral investment treaties, Australia will not have adequate scope to regulate in the public interest. The Australian government should agree to remove ISDS from the agreements with Argentina, Türkiye and Pakistan as well as support international initiatives for coordinated withdrawal from ISDS arrangements in other trade and investment agreements.

We would be happy to provide any further information or assist in any other way in relation to this review. Enquiries can be directed to [REDACTED]

Yours sincerely,

[REDACTED]

About the signatories

[REDACTED] teaches in private law and is researcher in national and international environmental law and governance. [REDACTED] teaches and researches in international trade law, human rights law and constitutional law.

²⁶ Lee, E & Dilworth, J. (2024) Investment Treaties are Undermining the Global Energy Transition, Report, July 2024, <https://www.e3g.org/wp-content/uploads/E3G-Report-Investment-treaties-are-undermining-the-global-energy-transition-2.pdf>.