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From: [redacted]
Sent: Monday, 3 March 2025 6:49 PM
To: BITreformproject
Subject: [EXTERNAL] ISDS Submission

I write to voice my opposition to the Investor-State Dispute Settlement (ISDS) because it gives special legal rights to corporations in trade and investment agreements to bypass national courts and claim millions or even billions of dollars in compensation.

The 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.

Thanks 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.

ISDS is a set of rules found in some, but not all, trade and investment agreements that give special legal rights to individualinternational investors to claim compensation of billions of dollars in an international tribunal if a change in law or policy reduces their future profits, even if the change protects the public interest, like health or the environment.

The Philip Morris Tobacco 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 and climate changepolicy, indigenous land rights and even

ISDS international tribunals are not staffed by independent judges but by arbitrators who continue to be practising lawyers with potential conflicts of interest, and there are no precedents or appeals, so their decisions do not have to be consistent, and often pay more attention to compensating investors than whether the change in regulation was in the public interest.

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.

The inconsistency of the ISDS system and the way it can be manipulated by investors has been dramatised by the fact thatAustralian 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.

The first claim was for $300 billion after he lost a High Court appeal against a Western Australian government decision to refuse an iron ore mining license. 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. He has now 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. This brings the total of his fossilfuel-related cases to $120 billion.

Palmer's last three cases join a growing global list of instances offossil 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."

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. The UK has also announced its withdrawal from the ECT.

The structure and processes of the ISDS system enable its use by large fossil fuel companies, which can restructure their assets to enable claims by subsidiaries in countries with ISDS in multiple trade and investment agreements, as Palmer has done. Australia is very vulnerable because, despite the exclusion of ISDS from more recent agreements and the cancellation of some older agreements, Australia has 15 bilateral investment treaties and 10 out of a total of 18 broader trade agreements that include ISDS. A recent reportmapping ISDS in trade agreements has found that Australia ranks fifth in the world for its exposure to potential claims by fossil fuel companies.

Because ISDS tribunals have no precedents or appeals, their decisions lack consistency. Attempts in more recent agreements to create exceptions for environmental concerns and other regulationshave not worked because tribunals can ignore them and give priority to compensating investors, even if there are valid environmental or other public interest reasons for regulation.

This is why the exclusion of and withdrawal from ISDS is needed. The OECD has also 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.

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 lawyeras "more about making money than obtaining justice". 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. 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.

Bilateral investment agreements do not need to include ISDS. They can include general rules that provide fair protections forinternational 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 Australian government should support the removal of ISDS from these agreements and support international initiatives for coordinated withdrawal from ISDS arrangements in other trade and investment agreements.

Sincerely,

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