

## Review of Three Australian Bi-Lateral Investment Treaties

I have been a trade unionist all my working and I oppose 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 in compensation for democratically decided legislation/ regulation which Australian Governments have been elected to mandate change which protects the health, environment, workers' rights etc of Australian citizens. The prime Australian example is Australia legislating to significantly reduce the use of tobacco products by the introduction of plain packaging and thus saving the lives of tens of thousands of Australians from the myriad of diseases and cancers associated with tobacco products.

I would acknowledge the opportunity of being able 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 Provisions are not Academic

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.

ISDS is a set of rules found in some, but not all, trade and investment agreements that give special legal rights to individual international 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 which sought to reduce the well-established health impacts of tobacco products. 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 change](#) policy, and [indigenous land rights](#)

### Not your ordinary tribunal

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 legislation/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.

### Enter Serial Litigant Clive Palmer

The inconsistency of the ISDS system and the way it can be manipulated by investors has been highlighted 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 in compensation 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 one of his companies 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 fossil fuel-related cases to \$120 billion.

Palmer's last three 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."

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](#).

### **Fossil Fuel Companies use of ISDS Provisions.**

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 [report](#) mapping 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 regulations have 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.

### **Third Party Funding of ISDS Cases**

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". 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.

### **No need for ISDS Provisions**

Bilateral investment agreements do not need to include ISDS provisions. 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.

I urge the Australian government to support the removal of ISDS from these three agreements subject to review and support international initiatives for coordinated withdrawal from ISDS arrangements in other trade and investment agreements.

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