Australian Fair Trade and Investment Network (AFTINET) Submission to the DFAT Southeast Asia Free Trade Agreements (FTAs) modernisation review

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Introduction

AFTINET is a national network of 60 community organisations and many more individuals supporting fair regulation of trade consistent with democracy, human rights, labour rights and environmental sustainability.

AFTINET supports the development of fair trading relationships with all countries based on these principles. We recognise the need for regulation of trade through the negotiation of international rules.

AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent and democratically accountable framework that recognises the special needs of developing countries.

These principles are especially important in the current context when urgent multilateral action is required to address the climate crisis. However, both cooperative multilateral action on trade and climate action are under challenge from unilateral coercive tariffs and pressure to import more fossil fuels. This creates more urgency to diversify cooperative trading and climate cooperation relationships in our region and elsewhere.

We welcome the opportunity to make a submission to the DFAT Southeast Asia Free Trade Agreements (FTAs) modernisation review.

When Trade Minister Farrell announced the Southeast Asia Economic Strategy as part of the government's broader trade policy on November 13, 2022, he recognised the environmental necessity and the economic development opportunities in "the transition to low-carbon, low-cost and reliable energy generation, storage and transmission." He also stated that "the benefits of trade must be shared among the community." This includes "rules in trade agreements that commit to maintaining high labour standards" and ensuring that "traditionally marginalised voices are amplified including those of First Nations Australians and women." The policy also recognised that investor-state dispute settlement (ISDS) in trade agreements, which enables international corporations to sue governments over policy changes, reduces the right of governments to regulate in the public interest. He pledged to exclude ISDS from new trade agreements and review ISDS in existing agreements. [1]

The scope of this review includes bilateral agreements, the Singapore-Australia Free Trade Agreement (SAFTA), the Malaysia-Australia Free Trade Agreement (MAFTA), the Thailand-Australia Free Trade Agreement (TAFTA), the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA), and regional or plurilateral agreements, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Regional Comprehensive Economic Partnership Agreement (RCEP) and the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA).

We note that there are separate reviews being conducted in 2026 on ISDS in the AANZFTA, CPTPP, the RCEP and the Indonesia bilateral agreement, to which we will make more detailed submissions about the specific provisions in those agreements. We also note that this situation of military dictatorship and civil war in Myanmar has worsened, and that Australia should maintain sanctions

[1] Farrell, D., (2022) Trading our way to greater prosperity and security, November 13, https://www.trademinister.gov.au/minister/don-farrell/speech/trading-our-way-greater-prosperity-and-security.

and pressure on the military government by recognising and supporting the calls of democratic resistance forces for a return to democracy.

This submission has two parts. Part One addresses issues that should be included in reviews of agreements to implement the government's policy of transition to a net zero carbon emissions economy and sharing the benefits of trade as discussed above.

Part Two addresses issues like ISDS, which should be excluded from trade agreements to ensure that they preserve the sovereign right of governments to regulate in the public interest, including regulation required to phase out fossil fuels and transition to a net zero carbon economy and measures which are designed to share benefits from trade. This will also address some other specific issues, like regulation of equitable access to medicines[2] and public interest regulation of the digital domain,[3] which should not be limited by trade agreements provisions. Again, these are especially important in the current context, where such public interest regulations are being improperly identified as barriers to trade and threats of coercive trade measures are being used to limit the sovereign right of governments to regulate in these areas.

Part One: What should be included in trade agreements

Australian bilateral and regional agreements and other trade arrangements, like the Indo-Pacific Economic Partnership (IPEF), over the last decade have included chapters and/or commitments on environmental standards and labour rights. However, the strength of the commitments and their enforceability has varied widely. There are weak commitments not to reduce labour and environmental standards in bilateral agreements with the US and the Republic of Korea.[4] The Australia-UK Free Trade Agreement has chapters with more detailed commitments on United Nations (UN) environmental agreements and net zero emissions and on women's rights.[5] The Australia-UAE agreement also includes these chapters and a chapter on indigenous rights. However, none of these commitments are enforceable through the same state-to-state dispute processes that apply to other chapters in the agreement.

Seven of the ten ASEAN countries are members of the Indo-Pacific Economic Framework (IPEF), which is not a traditional trade agreement but a series of diplomatic agreements with no disputes process or enforceability. The IPEF clean economy agreement outlines pathways to advance the transition to clean economies and achieve net-zero, and promotes international labour standards and labour rights, but by DFAT's own admission, it contains minimal legally binding obligations.[6] The

[2] Tenni et al

[3] Tommaso Giardini (2025) Is US Pressure Against Foreign Digital Policy Working? An Investigation of US Tariff Deal Priorities and Government Responses, including an Annex with Annotated Tariff Deal Texts, December 2, https://digitalpolicyalert.org/report/reactions-to-tensions

[4] Department of Foreign Affairs and Trade (2004) *Text of the Australia-United States Free Trade Agreement,* Chapter 18 (Canberra: Department of Foreign Affairs and Trade, March 6) https://www.dfat.gov.au/trade/agreements/in-force/ausfta/official-documents/Pages/official-documents.
Department of Foreign Affairs and Trade (2014) *Text of the Korea-Australia Free Trade Agreement,* (Canberra: Department of Foreign Affairs and Trade December 12), Chapter 17, https://www.dfat.gov.au/trade/agreements/in-force/kafta/official-documents/Pages/full-text-of-kafta

[5] Department of Foreign Affairs and Trade (2021) Australia-UK Free Trade Agreement text Chapters 21, 22 and 24 https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text

[6] DFAT (2024), National Interest Analysis (NIA) on Indo-Pacific Economic Framework for Prosperity Agreement Relating to a Clean Economy, 6 June, p. 6, para. 14, https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/JSCT/2024/IPEF_Clean_Economy/NIA.pdf

IPEF Supply Chains agreement mentions the importance of consultation with workers, women and Indigenous peoples in the preamble[7] and has commitments to monitoring the implementation of ILO standards on labour rights, but there is no disputes process to enforce the commitments.[8] However, these IPEF provisions demonstrate a willingness on the part of those ASEAN countries to discuss these issues in the context of trade arrangements.

The current review of Southeast Asian trade agreements is an opportunity for the Australian government to propose more consistent and enforceable commitments on environmental standards, including commitments to net zero emissions and cooperation on the development of renewable energy industries, labour rights, women's rights and rights of Indigenous peoples in the context of trade agreements in the region. In the case of developing countries, Australia should contribute to development assistance funding to achieve these goals.

Commitments to UN Environment agreements and net zero emissions

Australia and Southeast Asian countries are especially vulnerable to events like cyclones and typhoons, which are becoming more intense and frequent as a result of climate change. Changing weather patterns are also leading to adverse health outcomes through the spread of water-borne and mosquito-borne diseases.

The Australian Government has recognised the serious climate crisis by adopting a target of net zero emissions by 2050 and interim targets by 2030 and 2035, though there is still debate about what more can be done. The government is also committed to the development of national and regional renewable energy initiatives in cooperation with trading partners.

We support the development of cooperation and investment in renewable energy and other projects in the region to meet targets for the reduction of carbon emissions.

Meeting the challenge of climate change is also interlinked with other forms of environmental protection - protection of the marine environment, biodiversity conservation, combating wildlife trafficking, and illegal logging.

Recommendations

Trade agreements should include commitments to adopt, develop and implement United Nations multilateral environmental agreements, including:

- ***the UN Framework Convention on Climate Change 1992, the Paris Agreement 2015, and Implementation Agreements at subsequent COP meetings***
- ***the Montréal Protocol on Hydrofluorocarbons***
- ***the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978***
- ***the UN Convention on International Trade in Endangered Species***
- ***the UN Convention on Biological Diversity***
- ***the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001).***

[7] DFAT (2023) Text of the Indo-Pacific Economic Framework for Prosperity Agreement relating to supply chain resilience, November 14, pp1-2, https://www.dfat.gov.au/sites/default/files/indo-pacific-economic-framework-prosperity-agreement-relating-supply-chain-resilience.pdf

[8] DFAT (2023), Section A Article 1 Definitions.

Labour Rights

Increased trade and investment can improve the majority of peoples' lives if the benefits of trade and investment are shared equitably. This will not happen automatically but requires active policies to adopt and progressively implement internationally recognised standards for labour rights.

AFTINET's 2023 submission to the Southeast Asian 2040 strategy noted that, although many countries in the region have ratified some International Labour Organisation's (ILO) labour rights conventions, there were large variations in labour rights practices. [9]We recognise that ASEAN trading partners include developing countries and least developed countries and that they will require cooperation and support to implement these over time, including specific support from Australia's Official Development Assistance programs.

The government should implement its commitments to maintain high standards of labour rights in trade agreements through supporting the following recommendations:

Trade agreements should include commitments to progressively adopt, develop and implement international standards on labour rights, including the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work and the Fundamental Conventions. These include:

- ***The right of workers to freedom of association and the effective right to collective bargaining (ILO Conventions 87 and 98)***
- ***The elimination of all forms of forced or compulsory labour (ILO Conventions 29 and 105)***
- ***The effective abolition of child labour (ILO Conventions 138 and 182), and***
- ***The elimination of discrimination in respect of employment and occupation (ILO Conventions 100 and 111)***
- ***A safe and healthy working environment (ILO Conventions 185 and 187).***

Each country should also develop appropriate minimum standards for working hours, wages and health and safety, based on ILO principles.

Women's rights and rights of Indigenous peoples

Women form half the population the economy relies on their paid and unpaid work caring for children and elders. However, because of historic discrimination his work is often unrecognised and under-rewarded resulting in higher rates of poverty. Changes in trade policy can have disproportionate impacts on women's economic participation. Gender analysis is required to assess and mitigate those impacts. For example tariff changes can disproportionately impact female dominated industries like the garment industry. In developing countries many small farmers are women so changes to agricultural trade policies can disproportionately impact them. We note that article 7 of the International Covenant on Economic, Social and Cultural Rights of which Australia is a signatory speaks of ensuring equal pay for work of equal value free of assumptions of gender.

[9] AFTINET submission to the Department of Foreign Affairs and Trade on the Southeast Asia Economic Strategy to 2040, March 2023, Annex 2.
https://aftinet.org.au/sites/default/files/230301%20AFTINET%20ASEAN%202040%20submisssion%20to%20DFAT%20final.pdf#overlay-context=users/editor

The UN Convention on the elimination of all forms of discrimination which many countries have ratified shows how discrimination can be removed to increase women's social and economic participation. This is essential for women's full participation in both policy and in economic and trade activities, and sharing the benefits of those activities.

Indigenous peoples are rights-holders with jurisdictional authority over Country, not merely stakeholders to be consulted. In particular free prior and informed consent is required for activities on Indigenous Country. Trade agreements that constrain environmental regulation, land governance, or climate action on Indigenous Country also undermine indigenous rights, even if it those rights are referenced formally.

The government should implement its commitments to the inclusion of women and Indigenous peoples and maximising the benefits of trade for them through supporting the following recommendations:

Trade agreements should include commitments to progressively adopt, develop and implement international standards based on

- ***the UN Declaration on the Rights of Indigenous Peoples***
- ***the UN Convention on the Elimination of All Forms of Discrimination Against Women.***

Part Two: What should be excluded

Investor-State Dispute Settlement (ISDS)

Investor-State Dispute Settlement (ISDS) is a threat to government climate action and other public interest regulation. Australia should support the removal of ISDS provisions in the review of Southeast Asian agreements. We note that ISDS has already been excluded from the 15-member RCEP and the Malaysia-Australia Free Trade Agreement.

AFTINET's submission and several other submissions to this review focus on the climate crisis and the urgent need to phase out fossil fuels and develop national and regional investment and other regulations for the development of renewable energy and other low carbon industries to support the transition to a net zero emissions economy. ISDS provisions in trade and investment agreements give special legal rights to international investors to claim billions in compensation from governments if they can convince an international tribunal that a change in law or policy has breached the broad terms of the agreement and/or will harm their future profits. ISDS claims from fossil fuel companies claiming billions of dollars in compensation for phasing out fossil fuels or other regulations of carbon emissions are a major threat to this transition, especially in developing economies. The review and removal of ISDS from Southeast Asian trade agreements should be an urgent priority.

Removal of ISDS can be achieved by retaining general conditions for investment in an investment chapter, but also by removing ISDS provisions that give individual foreign investors the right to claim compensation. The investment chapter can then be subject to the same state-to-state dispute settlement process as the rest of the agreement. This was done in the case of the Australia-UK FTA, and in the case of a bilateral investment treaty, for the Australia-UAE bilateral investment agreement. Detailed technical recommendations to achieve this are in the AFTINET submission to the DFAT

review of bilateral investment treaties with Argentina, Pakistan and Türkiye.[10] Australia should also cooperate with other governments to develop plurilateral and multilateral arrangements to amend trade and investment agreements to remove ISDS, as recommended by the 2024 OECD secretariat proposal.[11] The latest evidence against ISDS is presented below.

ISDS origins, lack of legal procedural protections, cases against environmental and other public interest regulation

Legal rights for foreign investors to claim compensation 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, they have expanded to include "indirect expropriation"[12] and "legitimate expectations",[13] which do not exist in national legal systems. Investors can claim that they deserve compensation if they can argue that a change in law or policy reduces the value of their investment and/or 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. These rules enable tribunals to pay more attention to the payment of compensation rather than whether the regulation is in the public interest.

Widespread criticism has influenced the two institutions that provide ad hoc tribunals to ISDS arbitration systems, the UN Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), to conduct reviews that recognise that there are serious flaws in the ISDS system.[14] Criticisms of the ISDS *structure* include the power imbalance, which gives additional legal rights to international corporations that already exercise considerable market power, the lack of obligations on investors, and the use of claims for compensation for public interest regulation.

ISDS *ad hoc* tribunals are staffed by investment lawyers who continue to practice as advocates and lack the protections of national legal systems. Acknowledged criticisms by the UNCITRAL review of the tribunal *process* include the lack of independent judges, arbitrator conflict of interest, lack of transparency, lengthy proceedings, high legal and arbitration costs, forum -shopping by investors, inconsistent decisions caused by the lack of precedents and appeals, third-party funding for claims as speculative investments, and excessively high awards based on dubious and inconsistent calculations of expected future profits. [15]

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[10] AFTINET submission to the DFAT renegotiation of Bilateral Investment Treaties (BITS) with Argentina, Pakistan and Türkiye. (2025), March. https://aftinet.org.au/sites/default/files/2025-06/250306%20AFTINET%20submission%20final%20.pdf

[11] OECD Secretariat (2024) Methods to align investment treaty benefits for energy investment with the Paris Agreement and net zero, Annex C p.18. https://one.oecd.org/document/DAF/INV/TR1/WD(2024)1/REV1/en/pdf#:~:text=This%20note%20was%20originally%20prepared,note%20by%2016%20September%202024.

[12] 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*. 29 May. Availableat https://brill.com/view/journals/iclr/22/2/article-p235_5.xml?language=en

[13] Levashova, Y (2022) The role of investors' due diligence in international investment law: legitimate expectations of investors. 22 April. *Kluwer Investment Blog*. Available at https://arbitrationblog.kluwerarbitration.com/2020/04/22/the-role-of-investors-due-diligence-in-international-investment-law-legitimate-expectations-of-investors/

[14] Langford, M, Potesta, M and Kaufman, G (2020) UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions. *Journal of World Investment and Trade.* 22 June. Available at https://brill.com/view/journals/jwit/21/2-3/article-p167_1.xml?language=en

[15] Langford *et al,* op.cit.p.1.

The number of reported ISDS cases has been increasing rapidly, reaching 1440 as of July 2025.[16] These include cases against tobacco regulation,[17] medicine patents,[18] indigenous land rights,[19] regulation of the minimum wage[20] environmental protections,[21] and more recently, government action to reduce carbon emissions, examples of which are discussed in more detail below.

From a climate perspective, Indigenous governance of land, water, and biodiversity is increasingly central to effective climate mitigation and adaptation. Trade rules like ISDS that limit public interest regulation can also have a chilling effect on Indigenous-led climate and environmental decision-making.

ISDS cases against government regulation of carbon emissions and Clive Palmer's claims against Australia's refusal of coal mining permits

A 2022 study published in the journal *Science* showed that the increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to phase out fossil fuels is a growing threat to government action to address climate change.[22]

US company Ruby River Capital filed an ISDS claim against Canada after its liquefied natural gas project was rejected because of concerns about its greenhouse gas emissions. It is seeking US$20 billion in compensation despite having spent approximately US$124 million on the project [23].

In Europe, German energy companies RWE and Uniper launched ISDS cases against the Netherlands using ISDS in the Energy Charter Treaty (ECT) over its moves to phase out coal-powered energy by 2030.[24] Although both cases have now been withdrawn, they spurred public debate, which led to the EU's decision to withdraw from the ECT, as described below. After this debate and a comprehensive

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[16] UNCTAD (2022) Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement

[17] Ranald, P. (2019) When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging, The Conversation, March 27, https://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279

[18] Baker, B. (2017) The Incredible Shrinking Victory: *Eli Lilly v. Canada*, Success, Judicial Reversal, and Continuing Threats from Pharmaceutical ISDS cases, *Loyola University Chicago Law Journal,* Vol. 49, 2017, Northeastern University School of Law Research Paper No. 296-2017 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012538

[19] International Centre for Settlement of Investment Disputes (2017) Decision on Bear Creek Mining Corporation versus the Republic of Peru, November 17, ICSID Case No. ARB/14/21, https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DS10808_En.pdf

[20] UNCTAD (2019) Investment Dispute Settlement Navigator, Veolia v. Egypt 2012, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/458/veolia-v-egypt;
Breville, B and Bulard, M. (2014) The injustice industry and TTIP, *Le Monde diplomatique*, English edition, June, https://www.bresserpereira.org.br/terceiros/2014/agosto/14.08.injustice-industry.pdf

[21] Withers, P. (2019) Canada ordered to pay US 7 million in NAFTA case, February 25, Canadian Broadcasting Company, https://www.cbc.ca/news/canada/nova-scotia/nafta-bilcon-digby-neck-quarry-environmental-sovereignty-1.5032727
Nelson, A. (2022) Oil firm Rockhopper wins £210m payout after being banned from drilling, *The Guardian*, August 25, https://www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling#:~:text=Oil%20firm%20Rockhopper%20wins%20%C2%A3210m%20payout%20after%20being%20banned%20from%20drilling,-This%20article%20is&text=A%20corporate%20tribunal%20has%20ordered,an%20offshore%20oil%20drilling%20ban.

[22] Tienhaara *et al.* (2022) Investor-State disputes threaten the global green energy transition, *Science,* 5 May 2022Vol 376, Issue 6594 pp. 701-70 https://www.science.org/doi/10.1126/science.abo4637

[23] International Centre for Settlement of Investment Disputes (ICSID) (2023b) Ruby River Capital LLC v. Canada, ICSID Case No. ARB/23/5. Available at https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/23/5. Boston University (2023) Submission to the Special Rapporteur on human rights and the environment call for inputs. Available at https://www.bu.edu/gdp/files/2023/11/KT-RT-KG-OHCHR-ISDS-Submission-FIN.pdf

[24] Kluwer Arbitration (2021) http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/

review, the EU Commission in July 2023 proposed 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.[25] The UK has also announced its withdrawal from the ECT.[26] There is also bipartisan opposition to ISDS in the USA. The USA and Canada both agreed not to apply ISDS to each other in the Trump administration's 2020 revision of NAFTA (now called the US-Mexico-Canada Agreement.[27]

Closer to home, Australian billionaire Clive Palmer has registered his company Zeph Investments in Singapore and used ISDS in the ASEAN-Australia-New Zealand free trade agreement and the Singapore free trade agreement to claim a total of $A420 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.[28] The other three claims, which total $120 billion, are for the refusal of permits for a coal mine and coal-fired power station in Queensland.[29] The refusals were for environmental reasons, including contributions to increased carbon emissions.[30]

In September 2025, an ISDS tribunal dismissed Palmer's claim to be a Singaporean investor in the first WA iron ore case and ordered him to pay the Australian government legal costs of $13.6 million[31]. The Attorney -General commented that "Australia should never have had to spend two years and over AU $13 million defending an investor-State claim brought by an Australian national. The Albanese Government remains committed to actively engaging in processes to remove or reform existing investor-State dispute settlement mechanisms."[32]

However, Palmer then announced[33] that his legal team will challenge the tribunal's decision in the federal supreme court of Switzerland as one of the seats of the international tribunal process. The Swiss court is not an appeal mechanism for the tribunal and cannot consider the broad merits of the case, so the appeal may not succeed. But in the meantime, his other three coal-related cases can

[25] European Commission (2023), 7 July, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

[26] UK government (2024) UK departs Energy Charter Treaty, 22 February, https://www.gov.uk/government/news/uk-departs-energy-charter-treaty

[27]Miller-Chevalier (2023) As the end of NAFTA's sunset period approaches, Mexican, U.S. and Canadian investors have until April 1 to submit a notice of intent. *International Alert* March 15. Available at https://www.millerchevalier.com/publication/end-naftas-sunset-period-approaches-mexican-us-and-canadian-investors-have-until-april (accessed 23 February, 2024)

[28] Ranald, P. (2023) How Clive Palmer is suing Australia for 300 billion with the help of an obscure legal clause and Christian Porter 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

[29] Attorney General's Department (2023) Notice of Intention to Commence Arbitration 20 October https://www.ag.gov.au/sites/default/files/2023-10/notice-of-intention-to-commence-arbitration-zeph-20-october-2023.pdf For the coal fired power station, see Attorney-General https://www.ag.gov.au/international-relations/international-law/international-trade-and-investment-law#:~:text=The%20Jericho%20Power%20Station%20Claim%20(PCA%20Case%20No%202024-48,Waratah%20Coal's%20Galilee%20Coal%20Project

[30] Queensland Department of Environment and Science (2023) Waratah Galilee Coal Mine EA refused, www.des.qld.gov.au/our-department/news-media/mediareleases/waratah-galilee-coal-mine-ea-refused

[31] Permanent Court of Arbitration (2025) Zeph Investment vs Australia PCA Case No. 2023-40 Award, September 26 https://pcacases.com/web/sendAttach/90853

[32] Attorney-General Michelle Rowland (2025) International tribunal rejects Clive Palmer's claim against Australia, Media Release September 27, https://ministers.ag.gov.au/media-centre/international-tribunal-rejects-clive-palmers-claim-against-australia-27-09-2025

[33] Palmer, C. (2025) Clive Palmer to challenge tribunal decision, media release September 28, https://x.com/CliveFPalmer/status/1972085296138498546

proceed in 2026. ISDS tribunals have no precedents, so there is no guarantee that the other three tribunal decisions will be consistent with the first decision. This means the Australian government will face the time and costs associated with each individual case, amounting to multiples of tens of millions of dollars, even if Palmer loses. The Palmer cases which use ISDS in Southeast Asian agreements to claim hundreds of billions expose the flaws in the ISDS process discussed above, demonstrate the threat to reduction of carbon emissions, and show why ISDS should be removed from trade and investment agreements.

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."[34] This recognition has continued in the 2025 UNFCCC COP 30 report, *Baku to Belém Roadmap to 1.3T* on climate financing which explicitly called out Investor-State Dispute Settlement (ISDS) in trade agreements as a systemic barrier to financing climate action in developing countries (p.52):

> *A further systemic barrier reflects outdated clauses used in over 2,000 investment treaties that can impact the sovereign policy-making space of developing countries. Investment treaties with investor-state dispute settlements provisions allow foreign investors to claim compensation against government measures that may challenge their business interests. Potential damages liability can affect policy decisions to set enabling environments for climate action. Up to USD 83 billion has been awarded through 349 investor-state disputes for policy actions such as denial of permits for GHG emissions-intensive exploration, extraction, or infrastructure. Developing countries are vulnerable to over 60 per cent of potential Investor-state dispute settlement (ISDS) claims due to climate action.*[35]

Irene Vélez Torres, the environment minister of Colombia, spoke at an ISDS and climate civil society event at COP 30, following a much-lauded announcement in which Colombia said it would protect its part of the Amazon from fossil fuel exploitation.

She said ISDS made such decisions far more difficult because Colombia is one of the most affected countries in the world by ISDS, with 23 known cases already, and as many as 280 potential cases if the country continues to take ambitious climate action.

"No government should have to choose between protecting nature and its people, and protecting itself from arbitrators," she told the conference.[36]

ISDS in Australia's many BITs and trade agreements make it vulnerable to ISDS claims

Law firms specialising in ISDS cases advise international companies to set up subsidiary companies in jurisdictions where governments have ISDS agreements so they can use forum-shopping to maximise ISDS opportunities. One firm advised that "companies in industries most affected by States' climate change obligations (e.g., fossil fuels, mining, etc.) should audit their corporate structure and change it, if needed, to ensure they are protected by an investment treaty."[37]

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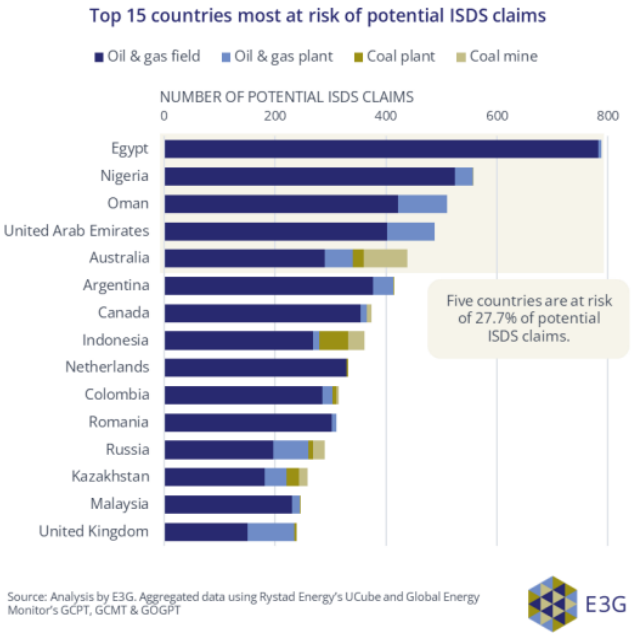
[34] Boyd, D. (2023) Paying polluters: the catastrophic consequences of Investor-State Dispute Settlement for climate and environment action and human rights. UN Commission on Human Rights, July 13 https://www.ohchr.org/en/documents/thematic-reports/a78168-paying-polluters-catastrophic-consequences-investor-state-dispute?s=03

[35] UNFCCC COP 30 (2025) F*rom Baku to Belem roadmap to 13 T,* November 5. https://unfccc.int/documents/650953

[36] Montague, B. COP30 'must declare an end to ISDS' *The Ecologist*, November 18.https://theecologist.org/2025/nov/18/cop30-must-declare-end-isds

[37] Bradfield, M. (2022) Climate change and investor-state dispute resolution. *Lexology*. 1 March. Available at https://www.lexology.com/library/detail.aspx?g=086370ea-bd96-4c3d-9446-24ca72136151

Australia has 15 bilateral investment agreements and 10 out of a total of 18 broader trade agreements that include ISDS.[38] This leaves Australia particularly vulnerable to claims by fossil fuel companies against regulation to reduce carbon emissions. A 2024 report mapping ISDS in trade agreements has found that Australia ranks fifth in the world for its exposure to such claims.[39]



More governments are withdrawing from ISDS arrangements. South Africa, India and Indonesia have cancelled BITs. The EU and the UK have withdrawn from the Energy Charter Treaty and the US and Canada withdrew from ISDS arrangements in the US MCA. ISDS has been excluded from the Regional Comprehensive Economic Partnership (RCEP) and the Australia-UK Free Trade Agreement (A-UKFTA). ISDS has also been excluded from the India-Australia Comprehensive Economic Cooperation Agreement and the Australia-EU Free Trade Agreement (A-EUFTA), both currently under negotiation.

'Modern' ISDS provisions and proposals for a Multilateral Investment Court do not create effective protections against ISDS cases

There have been attempts in more recent trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), to include more protections for governments. This includes exemptions that are intended to safeguard public interest regulation. However, the effect of the "modernised" provisions has been limited as ISDS tribunals have continued to draw on the text of old treaties when interpreting "modernised" treaties.[40]

For example, in the Eco Oro v. Colombia decision, the tribunal disregarded an exception in the Colombia-Canada FTA included to protect governments' right to enact environmental regulation, instead referring to decisions relating to older agreements. The exception reads that nothing in the FTA's investment chapter "shall be construed to prevent a Party from adopting or enforcing measures

[38] See https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties and https://www.dfat.gov.au/trade/agreements/trade-agreements

[39] Lee, M. and Dilworth, J. (2024) *Investment treaties are undermining the global energy transition: Mapping the global coverage of ISDS-protected fossil fuel assets*, July 31, p.25 https://www.e3g.org/publications/investment-treaties-are-undermining-the-global-energy-transition/

[40] Wolfgang, A. (2022) *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes*, *OUP*. https://global.oup.com/academic/product/investment-arbitration-and-state-driven-reform-9780197644386?cc=ch&lang=en&.

necessary" to protect the environment if the measures do not amount to "arbitrary discrimination or disguised restraint on trade or investment." However, the tribunal decided that even if the exception applies to a measure, "this does not prevent an investor claiming … that such a measure entitles it to the payment of compensation."[41]

In the CPTPP, a similar exception includes the additional proviso that nothing should prevent measures to protect the environment "otherwise consistent with this chapter."[42] Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation.[43]

These changes do not prevent claims from being brought against governments with uncertain outcomes because of inconsistent decisions by tribunals. They only provide some possible arguments governments can use while spending millions on legal and arbitration costs in defending them.

Likewise, the EU proposal for a standing Multilateral Investment Court with permanent judges attempts to address some of the procedural problems in the ISDS system. However, it does not address the fundamental power imbalances in the ISDS system. Damjanovic [44]notes that, despite the fact that the EU has proposed this in the UNCITRAL reform discussions, none of the EU trade and investment agreements introducing a court system have been ratified by the EU Member States. Many other states have expressed scepticism about the MIC, including the US, China and many developing countries.

Recommendations:

- ***The Australian government should support the removal of ISDS from investment chapters in regional and bilateral trade agreements in the ASEAN region***
- ***Investment chapters can then be subject to the same state-to-state dispute settlement process as the rest of the agreement. This was done in the case of the Australia-UK FTA, and in the case of a bilateral investment treaty, for the Australia-UAE bilateral investment agreement.***
- ***Detailed technical recommendations to achieve this are in the AFTINET submission to the DFAT review of bilateral investment treaties with Argentina, Pakistan and Türkiye.[45]***
- ***Australia should also cooperate with other governments to develop plurilateral and multilateral arrangements to amend trade and investment agreements to remove ISDS***

[41] Benton Heath, J. (2021) Eco Oro and the Twilight of Policy Exceptionalism, *Investment Treaty News*, https://www.iisd.org/itn/en/2021/12/20/eco-oro-and-the-twilight-of-policy-exceptionalism/.
[42] DFAT (2015) Text of the Trans-Pacific Partnership (incorporated into the CPTPP) Chapter 9, Article 9.16, p. 9-18. https://www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents.
[43] Kawharu, A. (2015) TPPA Chapter 9 on Investment, Expert Paper no. 2 on the TPPA, p.9, *The Law Foundation,* https://tpplegal.files.wordpress.com/2015/12/ep2-amokura-kawharu.pdf, and Gleeson, D, and Labonte, R (2020) Trade Agreements and Public Health, pp.28-9. Palgrave studies in public health policy research, Palgrave Macmillan, Singapore.
[44] Damjanovic, I. (2025) The European Union's Reform of International Investment Law: per aspera ad astra or an unfeasible aspiration? https://www.internationalaffairs.org.au/australianoutlook/the-european-unions-reform-of-international-investment-law-per-aspera-ad-astra-or-an-unfeasible-aspiration/
[45] AFTINET submission to the DFAT renegotiation of Bilateral Investment Treaties (BITS) with Argentina, Pakistan and Türkiye. (2025), March. https://aftinet.org.au/sites/default/files/2025-06/250306%20AFTINET%20submission%20final%20.pdf

No extension of intellectual property rights, or increased restrictions on the rights of governments to regulate the price of medicines

The extension of intellectual property rights on medicines should be excluded, and trade agreements should not restrict the right of governments to regulate the wholesale prices of medicines or take other measures to ensure that medicines are available at affordable prices.

This is relevant now because the US government, on behalf of US pharmaceutical companies, is pressuring governments to reduce the regulation of wholesale medicine prices contained in schemes like Australia's Pharmaceutical Benefits Scheme, which regulates the wholesale price of medicines and then subsidises the price to consumers.[46] Changes are also being sought to strengthen patents on medicines, which would delay the availability of cheaper generic forms of medicines after patents have expired.[47] This would have the worst impacts in developing and least-developed countries in Southeast Asia.

Intellectual property rights, as expressed in patent and copyright law, are monopolies granted by states to patent and copyright holders to reward innovation and creativity. However, intellectual property law should maintain a balance between the rights of patent and copyright holders and the rights of consumers to have access to products and created works at a reasonable cost. This can be a matter of life or death in the case of affordable access to essential medicines**.** Trade agreements should not be the vehicle for the extension of monopolies that contradict basic principles of competition and free trade.[48]

The WTO Trade-Related Intellectual Property Rights (TRIPS) agreement grants monopolies on products, including medicines, for 20 years, with some limited exceptions for least developed countries and for medical emergencies.

The 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements concluded that, since Australia is a net importer of patented and copyrighted products, the extension of patents and copyright imposes net costs on the Australian economy. The Commission also concluded that the extension of patent and copyright can also impose net costs on most of Australia's trading partners in Southeast Asia, especially for developing countries' access to medicines.[49] Based on this evidence, the Productivity Commission Report recommended that the Australian government should avoid the inclusion of intellectual property matters in trade agreements. This conclusion was reinforced by a second report in 2015.[50] A study of the costs of biologic medicines in Australia found that longer data exclusivity monopolies proposed in the original Trans-Pacific Partnership (TPP) agreement would cost

[46] Koziol, M. and Chrysanthos, N. (2025) Australia in talks with US over Trump demands to pay more for medicine, Sydney Morning Herald December 2, https://www.smh.com.au/world/north-america/trump-forces-uk-to-pay-25-per-cent-more-for-new-drugs-australia-s-pbs-could-be-next-20251202-p5njzc.html

[47] United States Trade Representative (2025) *2025 National Trade Estimate Report on FOREIGN TRADE BARRIERS of the President of the United States on the Trade Agreements Program, p. 19.* https://ustr.gov/sites/default/files/files/Press/Reports/2025NTE.pdf

[48] Stiglitz J. (2015) "Don't trade away our health," New York Times, January 15. Available at http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?_r=0

[49] Productivity Commission (2010) Bilateral and Regional Trade Agreements Final Report, Productivity Commission, Canberra, December, via: https://www.pc.gov.au/inquiries-and-research/trade-agreements/

[50] Productivity Commission (2015) Trade and Assistance Review 2013-14, June. Available at https://www.pc.gov.au/ongoing/trade-assistance/2013-14/.

the Pharmaceutical Benefits Scheme (PBS) hundreds of millions of dollars per year.[51] This clause was subsequently suspended from the CPTPP after the US left the agreement.

More recent studies indicate additional costs to governments resulting from longer medicine monopolies in some bilateral trade agreements.[52] Public health experts have also demonstrated how successive bilateral and regional trade agreements have strengthened patent and other monopoly rights on medicines to the benefit of global pharmaceutical companies and to the detriment of access to affordable medicines, especially in developing countries.[53]

This has been confirmed by a 2022 systematic review of studies which showed that longer pharmaceutical monopolies created by intellectual property rules stronger than those in the WTO TRIPs agreement ('TRIPs-plus' rules) are generally associated with increased drug prices, delayed availability and increased costs to consumers and governments.[54]

The Australian government should continue to resist any pressures for provisions in trade agreements that strengthen monopolies on medicines or reduce the right of governments to regulate medicine prices. It should also work cooperatively in the region to assist other governments to resist these pressures.

Recommendations:

- ***There should be no extension of medicine monopolies in trade agreements***
- ***Governments should retain the right to regulate the wholesale and retail prices of medicines.***

Trade agreements must ensure that governments retain the right to regulate the digital domain

Digital trade is a complex area of trade law that is directly tied to provisions relating to financial services and broader trade in services. The digital trade agenda is highly influenced by the US digital industry lobby, which seeks to codify rules that suit the dominant digital industry companies.

The aim of this digital trade agenda is to secure the cross-border free flow of data and to establish an international regulatory framework that prevents governments from regulating the digital domain and the operations of digital companies. This is particularly concerning given the recent issues arising from the lack of regulation of digital platforms and the business practices of digital companies including:

- Facebook and Google's data privacy abuse scandals[55]

[51] Gleeson D. et al (2017) Financial Costs Associated with Monopolies on Biologic Medicines in Australia, *Australian Health Review* 43, no.1: 36-42

[52] Gleeson, D. and Labonté, R. (2020) Trade Agreements and Public Health. London: Palgrave Studies in Public Health Policy Research, pp 47-52.

[53] Lopert, R. and Gleeson, D. (2013) The high price of "free" trade: US trade agreements and access to medicines. Journal of Law, Medicine and Ethics, 41(1): 199-223, via: http://onlinelibrary.wiley.com/doi/10.1111/jlme.12014/abstract.

[54] Tenni, B., *et al*, (2022) What is the impact of intellectual property rules on access to medicines? A systematic review, *Global Health*; 18: 40, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9013034/.

[55] Waterson, J. (2018) UK fines Facebook £500,000 for failing to protect user data, The Guardian, October 25, via: https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica.

- Uber classifying itself as a technological platform, not an employer, to avoid labour regulation and enable the exploitation of workers[56]
- tax avoidance[57]
- abuse of market power and anti-competitive practices by Facebook, Google and Amazon[58]
- use of algorithms which enable anti-competitive conduct or result in discrimination based on class, gender or race
- The abuse of facial recognition technology and Artificial Intelligence.

The 2019 Australian Competition and Consumer Commission's (ACCC) digital platforms report identified the need for regulatory reform in Australia to address concerns about the market power of big tech companies, the inadequacy of consumer protections and laws governing data collection, and the lack of regulation of digital platforms.[59] Successive governments, including the current government, have developed regulation to address these concerns.

One example is the News Media Bargaining Code, a mandatory code of conduct that governs commercial relationships between Australian news businesses and digital platforms that benefit from a significant bargaining power imbalance. The code enables news media companies to reach agreements for payment from digital platforms for their use of news media information.[60] Addressing this imbalance was seen as necessary to support the sustainability of the Australian news media sector, which is essential to a well-functioning democracy. This code is currently being reviewed. Another example is the development of Online Safety Codes and Standards and age-related restrictions on use of social media.[61] There has also been legislation to improve the rights of digital platform workers. There is ongoing consideration of the public interest in the regulation of the expansion of cybercrime and some aspects of Artificial Intelligence.

Some of these forms of regulation have been identified by the US digital trade lobby as barriers to trade in the US' America First trade policy agenda. The US government is pressuring governments to remove them under the threat of increased tariffs.[62] Australia should cooperate with other governments to resist such pressure.

Digital trade provisions should not prevent governments from regulating all aspects of the digital domain that require regulation in the public interest.

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[56] Bowcott, O. (2017) Uber to face stricter EU regulation after ECJ rules it is transport firm, The Guardian, December 21, via: https://www.theguardian.com/technology/2017/dec/20/uber-european-court-of-justice-ruling-barcelona-taxi-drivers-ecj-eu.

[57] Drucker, J. and Bowers, S. (2017) After a Tax Crackdown, Apple Found a New Shelter for Its Profits, The New York Times, November 7, via: https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html.

[58] Ho, V. (2019) Tech monopoly? Facebook, Google and Amazon face increased scrutiny, *The Guardian*, June 4, via: https://www.theguardian.com/technology/2019/jun/03/tech-monopoly-congress-increases-antitrust-scrutiny-on-facebook-google-amazon.

[59] Australian Competition and Consumer Commission (2019) Digital Platforms Inquiry final report, June 2019, via: https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report.

[60] Australian Competition and Consumer Commission (2021) News Media Bargaining Code, https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code.

[61] Australian e- safety Commissioner (2025) online safety codes and standards https://www.esafety.gov.au/industry/codes#about-the-phase-2-industry-codes

[62] Tommaso Giardini (2025) Is US Pressure Against Foreign Digital Policy Working? An Investigation of US Tariff Deal Priorities and Government Responses, including an Annex with Annotated Tariff Deal Texts, December 2, https://digitalpolicyalert.org/report/reactions-to-tensions

Recommendations:

Trade agreements should not include provisions that:

- ***Prevent governments from regulating the cross-border flow of data***
- ***Prevent regulation to address market power imbalances***
- ***Prevent governments from accessing source code and algorithms and from regulating to prevent the misuse of algorithms to reduce competition and to prevent class, gender, race and other forms of discrimination***
- ***Prevent governments from setting standards for the security of electronic transactions and preventing cybercrime***
- ***Prevent governments from regulating to ensure that digital platform workers have access to the same minimum standards for wages and working conditions as other workers***
- ***Prevent governments from regulating to protect workers' privacy, prevent intrusive surveillance and ensure that workers have access to data collected about them.***

Agreements should include:

- ***Full exemptions for tax policy to ensure that digital companies do not evade tax.***
- ***Mandatory minimum standards for privacy and consumer protections, including where data is held offshore. These should be no weaker than Australian standards.***