

19th December 2025

Submission to Southeast Asia FTA Modernisation Consultation

Please find below my personal academic submission to the Southeast Asia FTA Modernisation Consultation.

My submission addresses three main topics: investor-state dispute settlement reform; relationship between FTAs and International Green-Economy Collaborations (IGECs); and collaboration to support trade-related climate policies. Specifically, I recommend that:

1. Investor-state dispute settlement provisions be modified to clarify that damages should be calculated according to the proposal of Aisbett & Bonnitcha (2021).
2. Green-trade facilitation, including regulatory interoperability be prioritised. This could be achieved either through chapters in FTAs or through stand-alone International Green Economy Collaborations like the Singapore-Australia Green Economy Agreement.
3. Within green-trade facilitation, collaboration on embedded emissions accounting frameworks be prioritised.

As well as providing this submission, I would like to offer my expertise to discuss these issues further as appropriate.

Thank you for the opportunity to provide this submission.

Yours sincerely,



Emma Aisbett

1. Amending damages calculation in investment chapters

The *raison d'être* for compensation rules and investor-state dispute settlement (ISDS) in international investment agreements (including those embedded in FTAs) is protection of foreign investments from predatory behaviour by host states – for example, a state's uncompensated seizure of a foreign investor's assets. Discrimination concerns can be addressed adequately through state-state dispute mechanisms, as is standard in trade agreements. Investment treaties should not provide foreign investors with generalised protection from unexpected regulatory change.

Current compensation and liability rules in BITs and other IIAs, however, treat all three issues in the same way. They give foreign investors rights to compensation when host states take action in response to changing circumstances or new policy priorities. These rights are superior to those enjoyed by domestic investors. The ability to frame plausible investment treaty claims in response to regulatory change gives foreign investors an unfair advantage compared to domestic investors. These sorts of protections are highly unpopular and threaten the legitimacy and sustainability of the entire investment treaty regime. The *Phillip-Morris v. Australia tobacco plain packaging* dispute is a case in point. (Australia won this case on jurisdictional grounds.)

In award-winning work, Jonathan Bonnitcha and I have proposed an amendment to compensation requirements under IIAs that maintains protection from host predation (e.g. direct or indirect expropriation) while allowing governments to set their own policy agenda and respond to new information about the state of the world. The application of this proposal in any given case calibrates compensation to the extent that host state conduct involves predation on the foreign investment – the proposal does not require a tribunal to decide whether it perceives the state's action as predatory.

In times of crisis such as we are currently experiencing, the importance of governments maintaining the ability to undertake measures in response to new developments has become painfully clear. **Our proposal is that a state should only have to compensate the investor if it breaches or modifies the domestic legal regime governing the investment, and that compensation should be the lesser of the investor's loss and the host state's gain from the host state not having had the new legal regime in place when the investment was made.** The AB proposal could be relatively easily implemented as an amendment relating to the calculation of damages in existing treaties.

The AB proposal protects foreign investors from predatory host behaviour. With nationalism on the rise around the world, claims that ISDS is unnecessary because all forms of expropriation and takings are rare become harder to support. AB's rule deters predatory behaviour by requiring in many cases that the host repay any gain it had from allowing an investment and then changing the rules surrounding it. For example, if a host

sells a licence or concession to a foreign investor and then changes the rules to render the associated investment unprofitable, the host must repay all fees and taxes as well as the value it gains from any infrastructure or other benefits from the investment that it retains. This requirement deters that host from taking such actions in the first place. In the language of economics, AB's rule provides a commitment device allowing hosts to overcome the (hold-up) problem caused by time inconsistency of optimal policy toward an investment.

In some cases where compensation is required under existing rules in IIAs, it would not be required under the AB rule, or it would be much less. This class of cases arises when the host's change in policy is driven new information – for example about the environmental, health or social cost of an investment – rather than by time-inconsistency of optimal policy. Rules which require hosts to compensate for this class of action often leave hosts worse off. They are also politically unpopular and constitute the threat to the legitimacy and continuation of the investment treaty regime. *Vattenfall v. Germany II* is a key historical example. The Spanish solar cases – where Spain was forced to lower feed-in tariffs in response to the 2008 Global Financial Crisis - are another. Many cases surrounding revocation or failure to grant rights to natural resource extraction also fall into this category.

In conclusion, Aisbett and Bonnitcha's proposal ensures benefits to both host states and foreign investors compared to a world in which there is no investment treaties. As such it is likely to enhance the acceptance of the regime in countries that have historically been wary, as well as providing a much-needed legitimacy boost in countries that are re-considering their involvement with the regime. Given the twin challenges of rising nationalism and major health and economic crisis, a regime which protects investors from predatory host behaviour while allowing governments to respond to emerging policy issues is desperately needed. Amending existing treaties in line with the proposal of Aisbett & Bonnitcha could provide just such a regime.

Heading 1 references:

Aisbett, Emma, and Jonathan Bonnitcha. 2021. "A Pareto-Improving Compensation Rule for Investment Treaties." *Journal of International Economic Law* 24: 181–202.

<https://doi.org/10.1093/jiel/jgab006>.

Bonnitcha, Jonathan, and Emma Aisbett. 2021. "Against Balancing: Revisiting the Use/Regulation Distinction to Reform Liability and Compensation under Investment Treaties." *Michigan Journal of International Law* 42 (2): 231–90.

<https://heinonline.org/HOL/P?h=hein.journals/mjil42&i=243>

2. Prioritisation of green-trade facilitation

Green-trade facilitation measures represent a rare opportunity for triple bottom line wins for both Australia and its trading partners. This facilitation can be structured through a chapter in a comprehensive trade and investment agreement (as in the “Green Economy Pillar” of the Indo-Pacific Economic Framework for Prosperity) or through a stand-alone International Green Economy Collaboration (IGEC) (as in the Singapore-Australia Green Economy Agreement).

Economic, climate, and strategic trade rationale for IGECs have been outlined in Aisbett et al. (2023). The role of IGECs in supporting sustainable development and Australia’s place in the international network of IGECs are discussed in Aisbett et al. (2024).

Heading 2 references:

Aisbett, Emma, Wyatt Raynal, Ralf Steinhauser, and Bruce Jones. 2023. “International Green Economy Collaborations: Chasing Mutual Gains in the Energy Transition.” *Energy Research & Social Science* 104 (October): 103249.
<https://doi.org/10.1016/j.erss.2023.103249>.

Aisbett, E., Steinhauser, R., & Zharova, A. (2024). International Green Economy Collaborations for Climate Action and Sustainable Development. In J. Beirne, S. Ma, D. B. Rahut, & D. Suryadarma (Eds.), *Striving to Meet the Sustainable Development Goals: Next Steps for Policymakers and Practitioners* (pp. 273-286). Asian Development Bank Institute. <https://doi.org/10.56506/ACFH4829>.

3. Collaboration on embedded emissions accounting and verification frameworks

The international regime of Embedded Emissions Accounting and Verification Frameworks (EEFs) unpins a range of domestic and trade-related climate policies, including carbon border adjustments, eco-certification, and Green Industrial Policy targetting. As such a high-performance (efficient and effective) regime is essential to support a range of economic and climate objectives. Yet the emerging regime is at risk of poor performance due to rapid and uncoordinated proliferation, and potential capture by vested interests. This poor performance creates non-tariff barriers to green trade.

Australian Government, through its domestic Guarantee of Origin Scheme and extensive international engagement (through DFAT and DCCEEW) is a leader in the emerging international regime. This leadership is supported by my own active international engagement – including giving a keynote presentation at the December Plenary of the OECD’s Inclusive Forum on Carbon Mitigation (IFCMA) as well as presentations at DFAT-

organised panels at the WTO Trade & Environment Week (2024 & 2025). FTA modernisation provides an opportunity to build on this leadership and help to ensure both Australia and its regional trade partners are able to benefit from emerging clean trade opportunities.

Recommendations on general approach to this coordination and leadership can be found in Aisbett & Burkitbayeva (2025). Recommendations specifically focused on the iron & steel sector can be found in Aisbett & Aslam (2025).

Heading 2 references:

Aisbett, E., & Aslam, H. (2025). Building trust: A guide to navigating the global verification regime for greening iron & steel – Opportunities for international collaboration and coordination. WWF-Australia.

https://assets.wwf.org.au/image/upload/f_pdf/WWF1520_Green_Iron_and_Steel_Full_Report_LR

Aisbett, E. & Burkitbayeva, S. (2025), Designing a high-performance international regime for embedded emissions accounting, Working Paper 2501, Jul 2025, Centre for Climate and Energy Policy, Crawford School of Public Policy, The Australian National University.

<https://crawford.anu.edu.au/sites/default/files/2025-11/High%20Performance%20EEF%20regime%20CCEPWP2501v2.pdf>