Submission to the Joint Standing Committee on Treaties on the termination of the Indonesia-Australia Bilateral Investment Treaty known as the Investment Protection and Promotion Agreement (IPPA)

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Introduction

The Australian Fair Trade and Investment Network (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 and recognises 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 framework that recognises the special needs of developing countries and is founded upon respect for democracy, human rights, labour rights and environmental protection.

In general, AFTINET advocates that non-discriminatory multilateral negotiations are preferable to preferential bilateral and regional negotiations that discriminate against other trading partners. We are concerned about the continued proliferation of bilateral and regional preferential agreements and their impact on developing countries which are excluded from negotiations, then pressured to accept the terms of agreements negotiated by the most powerful players.

AFTINET welcomes the opportunity to make this submission to the JSCOT inquiry on the termination of the 1993 Bilateral Investment Treaty between Indonesia and Australia, known as the Investment Protection and Promotion Agreement (IPPA).

Summary of recommendations

1. **AFTINET supports the termination of the 1993 Bilateral Investment Treaty between Indonesia and Australia, known as IPPA, including termination of the 15-year survival clause.**

2. **AFTINET recognises that the Indonesia-Australia Comprehensive Economic Partnership Agreement (IACEPA) includes more procedural safeguards and specific exclusions from potential Investor-State Disputes settlement (ISDS) cases than the 1993 IPPA in the area of public health. However we note that these definite exclusions do not extend into other areas of public policy like the environment and workers' rights. The general safeguards in the agreement could provide some arguments for governments to defend cases in other areas of public interest, but will not prevent cases from being brought, which governments have to spend millions of dollars over many years to defend.**

   We also note that there is a danger identified by the United Nations Conference on Trade and Development (UNCTAD), prominent economists and legal experts that global corporations may initiate ISDS cases against government measures taken during COVID-19 pandemic, given the experience of cases being taken against governments for action to deal with previous economic crises.

   AFTINET recommends that the Australian government should:

   - **permanently restrict the use of ISDS in all its forms in respect of claims that the state considers to concern COVID-19 related measures, by negotiating with trading partner governments withdrawal of consent from ISDS in relation to those measures.**
   - **exclude ISDS from current and future trade and investment negotiations.**
   - **in light of threats exposed by the pandemic, comprehensively review existing agreements that include ISDS with a view to removing ISDS provisions.**

Support for the termination of the 1993 Bilateral Investment Treaty

AFTINET noted in our submission to the JSCOT inquiry into the IACEPA that the biggest risk of Investor-state Dispute Settlement (ISDS) cases came from the fact that there were no provisions to cancel the old 1993 Indonesia-Australia bilateral investment agreement, which would have remained in force alongside the new agreement (DFAT 1993).

The older versions of ISDS in bilateral investment agreements had no procedural safeguards and no specific exclusions at all for cases against public interest laws. That is why the Philip Morris tobacco company chose the 1993 Australia-Hong Kong investment agreement when it sued Australia over our 2011 plain packaging law.

In other recent trade deals, like the TPP-11, the Hong Kong FTA, and the Uruguay Investment Agreement, the government has terminated these old investment agreements, claiming that the new agreements have more procedural safeguards and specific exclusions for cases against public health regulation. These include regulation related to Medicare, the Pharmaceutical Benefits Scheme, the Therapeutic Goods Administration, the Gene Technology Regulator and tobacco regulation. The claim is that cancelling the old agreements in favour of the new ones would exclude claims for compensation for regulation related to these institutions. Other general safeguards would not exclude cases from being brought against other areas of public interest regulation, but could provide some arguments for governments to defend cases.

The 1993 Indonesia agreement had no procedural safeguards or exclusions at all. This meant that corporations would have a choice of using ISDS in the old agreement, which has no procedural safeguards or exclusions, rather than ISDS in the new agreement, which has some procedural safeguards and exclusions. Obviously, they were likely to choose to use the old agreement, which has less procedural safeguards and exclusions.

AFTINET recommended termination of the 1993 bilateral agreement. We note that a number of other submissions to the JSCOT inquiry into the IACEPA supported termination of the 1993 Bilateral Investment Treaty, and that the Committee itself recommended termination of this Treaty. The National Interest Assessment also recommended termination of the treaty.

Recommendation

AFTINET supports the termination of the 1993 Bilateral Investment Treaty between Indonesia and Australia, known as IPPA, including the termination of the15-year survival clause.

The case for excluding ISDS from trade and investment agreements

ISDS gives foreign investors special legal rights to bypass national courts and sue governments in international tribunals for millions of dollars if they can argue that new laws or regulations harm their investment, through indirect expropriation or unfair treatment. The tribunals are staffed by practising advocates, not independent judges, and there are no precedents or appeals, leading to inconsistent decisions (French 2014, Kahale 2014, Kahale 2018).

See Appendix 1 for a summary of recent evidence of the dangers of ISDS, reviews by international bodies and moves by governments to exclude ISDS from trade and investment agreements.

We note that ISDS is not part of the negotiations for the EU-Australia Free trade Agreement and that in November 2019 the DFAT summary of outcomes announced that ISDS would not be included in the completed text of the negotiations for the Regional Comprehensive Economic Partnership between Australia, New Zealand, China, Japan, South Korea and the 10 ASEAN countries (DFAT 2019).

Possible ISDS cases resulting from government actions during the COVID-19 pandemic

We note that the Joint Standing Committee on Foreign Affairs Defence and Trade has initiated an inquiry into the impact of the pandemic and trade policy and foreign policy (Joint Standing Committee on Foreign Affairs Defence and Trade 2020). AFTINET will be making a submission to this inquiry. We wish to draw the attention of the JSCOT to the following issues.

In recent months the realities of the pandemic have forced the Australian government to act against some aspects of its current trade policy. The government has assisted firms to develop local manufacturing capacity for facemasks and ventilators (Tobin 2020, ABC 2020). The government has directed and funded private hospitals to treat pandemic patients (McCauley 2020). It has also reintroduced some screening of foreign investment by the Foreign Investment Review Board to prevent predatory takeovers by global companies (Crowe 2020).

Health researchers are calling for publicly funded vaccine development to ensure speedy and affordable access for all. This would bypass monopoly patents enshrined in trade agreements (Mannix 2020, Gleeson and Legge 2020). The Australian government supported a resolution in the World Health Assembly which committed WHO members to "work collaboratively at all levels to develop, test, and scale-up production of safe, effective, quality, affordable diagnostics, therapeutics, medicines and vaccines for the COVID-19 response, including existing mechanisms for voluntary pooling and licensing of patents to facilitate timely, equitable and affordable access to them."

There is now a debate about the flaws in current trade policy and the need to reassess this policy

One of the key issues requiring reassessment is ISDS. Some of these actions by the Australian and other governments could be vulnerable to ISDS cases from global corporations seeking compensation if they can argue that such government actions have reduced the value of their investments

ISDS has been rejected by the low-income majority of countries in the 164-member WTO, but has featured in bilateral and regional agreements. There are now over 1,000 ISDS cases, many against low income countries (UNCTAD 2020a). Costs awarded against individual governments have

amounted to hundreds of millions or even billions of dollars (Transnational Institute 2017, Tienhaara 2019).

The Philip Morris tobacco company used ISDS to claim billions in compensation from the Australian government for Australia's plain packaging legislation. Defeating this case and decisions about costs took a total of seven years, cost the Australian government $12 million in legal costs, and other countries delayed similar regulation pending the result (Ranald 2014, Ranald 2019). There are increasing numbers of ISDS cases against government regulation to reduce carbon emissions and combat climate change (Tienhaara 2018).

ISDS rules could result in cases from global companies claiming compensation for government actions during the pandemic that reduced their profits but were essential to save lives.

Legal firms specialising in ISDS are already advising corporations on possible cases. An international arbitration law firm has told its clients:

> While the future remains uncertain, the response to the COVID-19 pandemic is likely to violate various protections provided in bilateral investment treaties and may bring rise to claims in the future by foreign investors…While States may invoke *force majeure* and a state of necessity to justify their actions, as observed in previous crises that were economic in nature, these defences may not always succeed (Aceris Law 2020).

Legal scholars critical of ISDS have confirmed that after the pandemic governments could face claims for compensation from global corporations. They have called for all governments to withdraw consent from ISDS rules to avoid cases relating to the pandemic (International Institute for Sustainable Development 2020). UNCTAD, the UN body which monitors ISDS cases, has also acknowledged the danger of post-pandemic ISDS cases (UNCTAD 2020b: 11-12). Prominent global economists and lawyers led by Columbia University Professor Jeffrey Sachs have called for a moratorium on ISDS claims relating to government actions during the pandemic (Columbia Centre on Sustainable Investment 2020).

Recommendation

AFTINET recognises that the IACEPA includes more procedural safeguards and specific exclusions from potential ISDS cases than the 1993 IPPA in the area of public health. However, we note that these definite exclusions do not extend into other areas of public policy like the environment and workers' rights. The general safeguards in the agreement could provide some arguments for governments to defend cases in other areas of public interest, but will not prevent cases from being brought, which governments have to spend years and millions of dollars defending.

We also note that there is a danger identified by the United Nations Conference on Trade and Development (UNCTAD), prominent economists and legal experts that global corporations may initiate ISDS cases against government measures taken during COVID-19 pandemic, given the experience of cases being taken against governments for action to deal with previous economic crises.

AFTINET recommends that the Australian government should:

- **permanently restrict the use of ISDS in all its forms in respect of claims that the state considers to concern COVID-19 related measures by negotiating withdrawal of consent in relation to those measures.**

- **exclude ISDS from current and future trade and investment negotiations.**
- **in light of threats exposed by the pandemic, comprehensively review existing agreements that include ISDS with a view to removing ISDS provisions.**

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Appendix 1

Latest evidence on the Investor-State Dispute Settlement process

In recent years, the number of ISDS cases has increased to 942 reported cases in 2018 (United Nations Conference on Trade and Development (UNCTAD 2019a) and more evidence has come to light about the flaws in the ISDS system. The critical debate has affected all sides of politics, more governments are withdrawing from ISDS arrangements, and the EU and the US are now negotiating agreements without ISDS.

1. What is ISDS?

All trade agreements have government-to-government dispute processes to deal with situations in which one government alleges that another government is taking actions which are contrary to the rules of the agreement. ISDS gives additional legal rights to a single foreign investor (rights not available to local investors) to sue governments for damages in an international tribunal if they can claim that a change in national law or policy will harm their investment. Because ISDS cases are very costly, they are mostly used by large global companies that already have enormous market power, including tobacco, pharmaceutical, agribusiness, mining and energy companies.

2. Background and history

ISDS originated in the post-World War Two decolonisation period and was originally designed to compensate for nationalisation or expropriation of actual property, through bilateral investment treaties between industrialised and developing countries.

But over the last half century, the ISDS system has developed concepts like “indirect” expropriation, “minimum standard of treatment” and “legitimate expectations” which do not involve taking of property and do not exist in most national legal systems. These concepts enable foreign investors to sue governments for millions and even billions of dollars of compensation if they can argue that a change in domestic law or policy has reduced the value of their investment, and/or that they were not consulted fairly about the change, and/or that it did not meet their expectations of the regulatory environment at the time of their investment.

The World Trade Organisation does not recognise or include ISDS in its trade agreements, and it has only become a feature of other regional and bilateral trade agreements since the North American Free Trade Agreement in 1994.

There have been increasing numbers of cases against health, environment and other public interest laws and policies.

3. ISDS Tribunals not independent, no precedents or appeals

Many experts including Australia’s former High Court Chief Justice Robert French and investment law experts have noted that ISDS tribunals are not independent or impartial and lack the basic standards of national legal systems (French 2014, Kahale 2014, Kahale 2018).

ISDS has no independent judiciary. Tribunals are organised by one of two institutions, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID). Tribunals for each case are chosen by investors and governments from a pool of investment lawyers who can continue to practice as

advocates, sitting on a tribunal one month and practising as an advocate the next. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest. ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider, and appeal mechanisms to ensure consistency of decisions.

Leading international investment law expert and practitioner George Kahale has criticized ISDS in an April 2018 lecture at the Brooklyn Law School titled **"**The wild, wild west of international arbitration law" (Kahale 2018).

Kahale uses examples from his own experience representing governments in ISDS cases to argue that the ISDS system based on commercial arbitration principles is not fit to arbitrate cases in which international companies seek compensation from governments for changes in health, environment or other public interest laws.

Kahale says, "It's one thing to have party-appointed arbitrators negotiate a decision to settle a commercial dispute having no particular significance beyond the case at hand ... it is quite another to decide fundamental issues of international law and policy that affect an entire society" (Kahale 2018: 7).

Adding "there really are no hard and fast rules" in ISDS, he cites examples of claims of billions of dollars based on false documents, methodologies for calculations of future corporate income which are unacceptable in World Bank accounting practice, and similar claims before different tribunals resulting in inconsistent decisions (Kahale 2018: 14).

He notes the growth of third-party funding of ISDS cases, in which speculative investors fund cases in return for a share of the claimed compensation, and argues they fuel the growth of "surrealistic" claims and are "more about making money than obtaining justice" (Kahale 2018:17).

4. Recent ISDS cases on medicines, environment, carbon emissions reduction, Indigenous land rights, minimum wage

The most comprehensive figures on known cases, compiled by the United Nations Conference on Trade and Development (UNCTAD), show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 to 942 in 2018. Most cases are won by investors or settled with concessions from governments (UNCTAD 2019a and UNCTAD 2019b).

There are growing numbers of cases against health, environment (including laws to address climate change), Indigenous land rights and other public interest laws. Recent cases include the following:

- The US Philip Morris tobacco company shifted assets to Hong Kong and used ISDS in a Hong Kong investment agreement to claim billions in compensation for Australia's plain packaging law. It took over four years and $24 million in legal costs for the tribunal to decide that Philip Morris was not a Hong Kong company, and the case was an abuse of process, and the government only recovered half the costs (Ranald 2019).
- US Pharmaceutical company Eli Lilley used the ISDS provisions of NAFTA to claim compensation for a Canadian Supreme Court decision that found a medicine was not sufficiently different from existing medicines to deserve a patent, which gives monopoly rights for at least 20 years. Canada has a higher standard of patentability than the US and some other countries. The Canadian government won the case after six years and $15

million in costs, but the tribunal decision was ambiguous on some key points about Canada's right to have distinctive patent laws (Baker 2017).

- The US Bilcon mining company won millions in compensation from Canada because its application for a quarry development was refused for environmental reasons. The exact amount is still being determined (UNCTAD 2019c).
- The US Westmoreland mining company is suing the Canadian government over the decision by the Alberta province to phase out coal-powered energy as part of its emission reduction strategy (UNCTAD 2019d).
- The Canadian Bear Creek mining company recently won $26 million in compensation from the government of Peru because the government cancelled a mining license after the company failed to obtain informed consent from Indigenous land owners about the mine, leading to mass protests. The tribunal essentially rewarded the company despite the fact that it had violated its obligations under the ILO Convention on Indigenous Peoples to which Peru is a party (International Centre for Settlement of Investment Disputes (ICSID) 2017).
- The French Veolia Company sued the Egyptian Government over a local government contract dispute in which they claimed compensation for a rise in the minimum wage. This claim eventually failed but it took seven years and the costs to the Egyptian government have not been made public (Breville and Bulard 2014, UNCTAD 2019e).

Note that these examples include cases against court decisions and government laws and policies at national, state and local levels.

5. ISDS cases cost governments millions to defend, even if they win

Companies and governments fund the arbitration costs and their own legal costs. ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. A 2012 OECD Study found ISDS cases last for three to five years and the average cost to governments for defending cases was US$8 million per case, with some cases costing up to US$30 million. A more recent UNCITRAL paper indicated that ISDS costs are still a major concern (OECD 2012, UNCITRAL 2018).

ISDS tribunals have discretion about whether they decide to award some or all costs to the winning party, and applying for costs to be awarded prolongs the duration and costs of the case.

This differs from national systems. The Australian Government defeated the Philip Morris tobacco company's High Court claim for billions in compensation, and the High Court ordered the company to pay all of Australia's costs. The case and costs decision took less than a year.

Contrast this with the ISDS experience. Australia also won the 2011 Philip Morris ISDS case against our plain packaging law in 2015, but the costs were not awarded until 2017. Only half of Australia's almost A$24 million in legal and arbitration costs were awarded to Australia, despite the fact that the tribunal found that Philip Morris had abused the process (Ranald 2019).

6. United Nations criticism of ISDS: not compatible with human rights

In September 2015, United Nations Human Rights independent expert Alfred de Zayas launched a damning Report which argued strongly that trade agreements should **not** include ISDS (De Zayas 2015).

The Report says ISDS is incompatible with human rights principles because it "encroaches on the regulatory space of States and suffers from fundamental flaws including lack of independence, transparency, accountability and predictability".

In April 2019, six UN special rapporteurs on human rights wrote an open letter identifying similar fundamental flaws in the ISDS system, and arguing for systemic change (Deva et al, 2019).

7. The Australian experience of ISDS and previous Australian policy

After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Howard Coalition government did not include ISDS in the US-Australia Free Trade Agreement in 2004.

In 2010 a Productivity Commission study found that ISDS gives additional legal rights to foreign investors not available to domestic investors and lacked evidence of economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments. The then ALP government developed a policy against ISDS during the years 2011-2013 and did not include it in trade negotiations (Productivity Commission 2010).

A June 2015 Productivity Commission study of ISDS confirmed the findings of its 2010 study (Productivity Commission 2015).

8. The Philip Morris case against Australia's tobacco plain packaging law

in 2012 the US Philip Morris tobacco company lost its claim for compensation for Australia's 2011 plain packaging legislation in the Australian High Court and was ordered to pay all of the government's costs.

The company could not sue under the Australia-US Free Trade Agreement because the Howard government had not agreed to include ISDS in that agreement. The company moved some assets to Hong Kong, claimed to be a Hong Kong company and used the 1993 Hong Kong-Australia Investment Agreement to sue the Australian government. It took over four years for the ISDS tribunal to decide in December 2015 that Philip Morris was not a Hong Kong company and that its case was an "abuse of process" (Tienhaara 2015).

The Australian government applied for costs, but was only awarded a proportion of the costs by the tribunal in 2017. However, the total costs and proportion awarded to Australia were blacked out of the tribunal decision. It took another two years and two FOI cases to reveal that the legal and arbitration costs were almost A$24 million, but Australia was awarded only half of its costs, with the cost to taxpayers remaining at almost A$12 million (Ranald 2019).

The substantive issue of whether the company deserved billions of dollars of compensation because of the legislation was not tested.

Even so, the case had a freezing effect on other governments' introduction of plain packaging legislation. The New Zealand government delayed introducing its own legislation pending the tribunal decision (Johnston 2015).

International corporations are well aware of this freezing effect and use ISDS to attempt to prevent public interest regulation. The Canadian Chevron Company has lobbied for ISDS to be included in EU trade agreements as a deterrent against environmental protection laws (Nelson 2016).

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors. They have been used to claim compensation for new public interest regulation and to deter governments from introducing such regulation, including regulation to address climate change and to improve the minimum wage. Many developing country governments, including Brazil, India, South Africa and Indonesia have reviewed and/or cancelled their ISDS commitments (Filho 2007, Biron 2013, Uribe 2013, Mehdudia 2013, Bland and Donnan 2014).

9. EU and US governments are retreating from ISDS

Both the EU and the US governments have in the past been major proponents of ISDS. However, recently there have been increasing numbers of cases taken against changes to EU and US government laws and policy decisions, and there has been an enormous growth in public opposition to ISDS. Opposition has been expressed by legal experts, state and provincial governments, court decisions and the general public**.** Both the EU and the US are now retreating from ISDS in trade negotiations.

9.1 The EU

The use of ISDS by the Swedish company Vattenfall to sue the German government over the phasing out of nuclear energy, and the inclusion of ISDS in proposed trade agreements with Singapore, Canada and the US prompted fierce public debate. In 2014, the European Commission launched an online public consultation on ISDS. The consultation received over 150,000 submissions, the majority of which were critical of ISDS (European Union 2014).

The ongoing debate about ISDS has led to several EU court cases in which national governments have challenged the ability of the EU to make collective commitments on ISDS on behalf of national governments without such commitments being subject to democratic processes in each country.

On 16 May 2017, the Court of Justice of the European Union issued a landmark opinion on the investment and ISDS clauses in the EU-Singapore free trade agreement. It found that most of the agreement fell under the EU's powers, and that the EU could ratify it on behalf of member countries, except for some investment provisions, including ISDS. The court found that EU Member States' national and regional parliaments and the European Parliament must vote on provisions regarding investors, particularly ISDS (Court of Justice of the European Union 2017).

In March 2018, in a separate case brought by the government of Slovakia, the Court of Justice found that ISDS between EU governments is incompatible with EU law. The Court found that damages awarded to a Dutch private health insurance company against Slovakia by an ISDS tribunal breached EU law (Court of Justice of the European Union 2018).

The 28 EU member states decided in January 2019 to terminate all Bilateral Investment Treaties between themselves by December 6, 2019 (EU Member States 2019).

Following the court decisions, the European Commission has developed a "fast track" process for agreements without ISDS for non-EU countries, which would enable them to be approved by the European Commission alone, without seeking approval from national parliaments. Such agreements cannot include ISDS (Von der Burchard 2017).

The EU-Australia FTA now being negotiated does not include ISDS.

The EU is pursuing longer-term but equally controversial proposals for a Multilateral Investment Court (Van Harten 2016).

9.2 The US

Over the last three years, there has also been strong public opposition expressed in the US to the inclusion of ISDS in trade agreements from state governments and legal experts, which has influenced state and national governments.

In February 2016 the National Conference of State Legislatures declared that it "will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations" (National Conference of State Legislatures 2016).

In October 2017, more than 200 prominent law professors and economists signed an open letter arguing that ISDS undermines the rule of law and urging the US government to oppose ISDS in its renegotiation of the North American Free Trade Agreement (NAFTA). Signatories included Nobel laureate Joseph Stiglitz, former Labor Secretary Robert Reich, former California Supreme Court Justice Cruz Reynoso and Columbia University professor and UN Senior Advisor Jeffrey Sachs (Public Citizen 2017).

The US and Canada have since excluded ISDS from the revised US Mexico Canada Agreement (International Institute for Sustainable Development 2018).

10. Ongoing reviews conducted by ISDS institutions reflect community concerns about ISDS

Growing community concern about ISDS has also had an impact on the two institutions that oversee ISDS arbitration systems, the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Centre for Settlement of Investment Disputes (ICSID), both of which are conducting ongoing reviews of the system.

The November 2017 discussion paper for the UNCITRAL review involving member states, identified the following issues:

> "(i) inconsistency in arbitral decisions, (ii) limited mechanisms to ensure the correctness of arbitral decisions, (iii) lack of predictability, (iv) appointment of arbitrators by parties ("party-appointment"), (v) the impact of party-appointment on the impartiality and independence of arbitrators, (vi) lack of transparency, and (vii) increasing duration and costs of the procedure. These concerns … have been said to undermine the legitimacy of the ISDS regime and its democratic accountability" (UNCITRAL 2017: 6).

UN Human Rights Rapporteurs and hundreds of civil society groups have made submission to the UNCITRAL review criticising the fundamental imbalance of power in the ISDS system, as have sixty-five academics from around the globe (Deva *et al* 2019, Civil Society Groups 2019, Academics 2019).

A recent paper from the South Centre says there is a growing international consensus to fundamentally reform ISDS, and that developing countries are under-represented in the UNCITRAL process (South Centre 2019).

The UN Conference on Trade and Development also recognises that there is a new trend to limit companies' access to ISDS, by omitting ISDS from trade and investment treaties altogether, limiting treaty provisions subject to ISDS and excluding policy areas from ISDS coverage (UNCTAD 2019b).

In October 2016, the Secretariat of ICSID initiated a consultation with its Member States, which identified some similar areas of concern to the UNCTAD review. The review is ongoing (ICSID 2016).

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