Senator Don Farrell  
Minister for Trade and Tourism  
Parliament House  
Canberra

Dear Senator Farrell

Open letter from Australian lawyers and legal scholars on Investor-State Dispute Settlement

We write as Australian lawyers and legal scholars to urge the Australian government to move quickly to implement your policy to exclude Investor-State Dispute Settlement (ISDS) provisions from future trade and investment agreements and review and remove those provisions in existing trade and investment agreements.

Australia is currently having to defend three ISDS claims brought by Clive Palmer’s company Zeph Investments, which is registered in Singapore.

The first claim is seeking $296 billion for alleged breaches of ASEAN-Australia-New Zealand Free Trade Area in relation to the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA) which prevents Palmer’s company, Mineralogy, from pursuing a $30 billion claim in relation to its Balmoral South Iron Ore Project against the West Australian government. Palmer lost his High Court application to have the act declared invalid.

The second claim is seeking $41.3 billion in damages for breaches of the ASEAN-Australia-New Zealand Free Trade Area relating to mineral exploration permits by Waratah Coal Pty Ltd, in Queensland’s Galilee Basin.

In October 2023, Zeph Investments Pty Ltd filed a further notice of intention to commence arbitration against the Australian government under the Singapore-Australia Free Trade Agreement, seeking $69 billion in damages. This arbitration also relates to the proposed Waratah Coal mine in Queensland’s Galilee Basin. The notice alleges, amongst other claims, that the decision of the Queensland Land Court in Waratah Coal v Youth Verdict & Ors (No 6) [2002] QLC 21 breached the minimum standard of treatment required under the fair and equitable treatment clause of the Agreement and constituted an expropriation.

The case of Waratah Coal v Youth Verdict was widely hailed as “historic” and “landmark” because it was the first time an approval for an Australian coal mine was not granted on human rights grounds. The ISDS proceedings risk undermining this important ruling by a domestic court found that approving this coal mine would lead to breaches of rights to life, the protection of children, and the right to culture as protected by the Human Rights Act 2019 (Qld).

These last two cases highlight how international arbitration risks undermining urgent and just energy transition to a low-carbon society.

A 2022 article in Science showed how ISDS threatens the global green energy transition, and documented that to date there have be at least 231 ISDS cases related to fossil fuel investment and that fossil fuel investors have been successful in 72 percent of cases decided on the merits. The authors estimate that governments around the world could be exposed to $340 billion from ISDS claims from fossil fuel investors.
In its Sixth Assessment Report, Working Group III of the Intergovernmental Panel on Climate Change (IPCC) noted that “Numerous scholars have pointed to ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets”.

In a recent report the United Nations Special Rapporteur on the human right to a healthy environment provided compelling evidence of how ISDS has “become a major obstacle to the urgent actions needed to address the planetary and human rights crises.”

Urgent action is needed to review and remove ISDS provisions from trade and investment treaties to which Australia is a party.

Although there have been efforts by parties to international investment treaties to take control over the meaning of the treaty and restore some balance between different types of obligations, and better integrate environmental and investment obligations, such attempts have been ignored in some arbitral tribunal decisions (e.g. Eco Oro v Colombia).

The OECD has also acknowledged that ISDS poses challenges to the green energy transition. Given ongoing concerns about how investment law is posing a barrier to a just and rapid transition to low-carbon societies, the European Commission has proposed a coordinated withdrawal from the Energy Charter Treaty by the European Union, its member states and Euratom.

Even if Australia ultimately wins these cases, defending them will still be costly.

There is a possibility that these cases will be dismissed on jurisdictional grounds, given questions about whether Clive Palmer can properly be considered a “foreign investor”. But legal costs may be tens of millions of dollars.

Even if not ultimately successful, such investment arbitration may still have a “chilling effect” on governmental action at a time when a much more rapid transition away from fossil fuels is urgently needed.

Delay in acting on these commitments is likely to expose the Australian government, and thus the citizens of Australia, to further ISDS claims that risk undermining public health, environmental values and climate action.

We urge the Australian government to act expeditiously to:

- Maintain the Australian government policy of excluding ISDS in current negotiations and future trade and investment agreements.
- Expedite the review of ISDS provisions in current bilateral agreements and set a clear timeline for their review and removal.
- Implement your policy of review and removal of ISDS provisions from regional trade agreements, or failing that, negotiate side letters excluding the application of ISDS to Australia, as Australia has done with New Zealand and the UK in other trade agreements.

1. Dr Julia Dehm, La Trobe University
2. Dr Dylan Lino, University of Queensland
3. Dr Justine Bell-James, Associate Professor, University of Queensland
4. Dr Hope Johnson, School of Law, Queensland University of Technology
5. Professor Nicole Graham, Sydney Law School, The University of Sydney
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7. Professor Margaret Davies, Flinders University
8. A/Prof Helen Gibbon, UNSW Law and Justice
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10. Chris McGrath, Queensland Barrister
11. Peter Burdon, University of Adelaide
12. Professor Louis de Koker, La Trobe Law School
13. Professor Afshin Akhtar-Khavari, School of Law, Queensland University of Technology
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19. Dr Tobias Barkley, La Trobe University
20. Caitlin Murphy, PhD Candidate, Melbourne Law School
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30. Associate Professor Paul Adam, School of BEES, University of NSW
31. Dr Phillipa McCormack, Research Fellow, Environment Institute, University of Adelaide
32. Professor Luis Eslava, Professor of International Law
33. Ms Anna Saunders, University College London
34. Elizabeth Hicks, University of Münster
35. Professor Anthony Burke, UNSW
36. Professor Nicole Rogers, Bond University
37. Professor Vivien Holmes, ANU
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40. Sanam Amin, PhD candidate, Melbourne Law School
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59. Ms Ella Vines, Melbourne University Law School
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All signatories have signed in their personal capacity and do not represent the opinion or position of the organization for whom they work.