

SUBMISSION

Renegotiation of Australia's Bilateral Investment Treaties

IISD submission

April 2026

Introduction

The International Institute for Sustainable Development (IISD) is an award-winning independent think tank working to create a world where people and the planet thrive. IISD Investment Law and Policy team works with governments, international institutions, civil society, media, and academia to reform investment governance. Our mission is to align international investment with sustainable development and climate action.

IISD welcomes the opportunity to provide input on the renegotiation of Australia's older-generation bilateral investment treaties (BITs) with Czechia, Egypt, Hungary, Lithuania, Poland, and Romania. These treaties, concluded in the 1990s and early 2000s, are based on an outdated model that prioritizes investor protection and investor-state dispute settlement (ISDS) over contemporary public policy objectives. IISD recommends a fundamental shift: proactively reimagining treaties as tools for sustainable investment governance.

Rethinking What Future Treaties Can Do Regarding Investment Policy Problems

Modern treaties should be proactively designed to solve today's governance challenges rather than being reactive to the failures of the past. IISD calls for a broader rethinking of the function of investment treaties that starts from the formulation of the policy problems that need addressing, rather than shoehorning solutions onto the outdated investment protection model (Ostřanský & Bonnitcha, 2024). There are numerous problems that a modern investment treaty could help solve for Australia, its treaty partners, the planet, and its people.



Facilitating and Supporting Sustainable Investment

Treaties can serve as platforms for international cooperation to address collective action problems that states cannot solve on their own.

- **targeted facilitation:** Future treaty frameworks should prioritize investments that contribute to climate mitigation, adaptation, and a just transition. This involves regulatory cooperation, technical assistance, and capacity building to help developing partners attract “quality” foreign investment. Australia’s Green Economy Agreements provide a more appropriate blueprint to follow in the renegotiation of BITs with the above-mentioned countries than the traditional investment protection treaty model.
- **addressing high capital costs:** While recognizing that this issue does not necessarily apply to the renegotiation of BITs with the above-mentioned countries, cooperation through treaties on climate finance and other sustainable investment projects can help lower borrowing costs in treaty partners that are developing and least developed countries. Treaty cooperation can help make sustainable projects more “bankable” without relying on opaque protection mechanisms.

Regulating and Enhancing the Impacts of Investment Projects

A primary goal of a reimagined investment treaty regime should be to ensure that foreign investment has a high positive impact on sustainable development while avoiding harm.

Maximizing Positive Impacts

To ensure that foreign investment serves as a genuine catalyst for sustainable development, treaties must go beyond merely protecting capital and instead focus on strengthening the host state’s capacity to reap long-term benefits.

- **facilitating productive industrialization and strengthening local economic linkages:** Treaties should not hamper national developmental policies by prohibiting performance requirements; instead, they should facilitate the integration of foreign projects into the local economy. Treaties should encourage foreign investors to engage with local suppliers and service providers, thereby creating a positive multiplier effect across the domestic economy.
- **technology and knowledge transfer:** Treaty frameworks should address existing obstacles and create active incentives for the transfer of advanced technologies and innovative business practices to Australia and its treaty partners, especially when they are developing and emerging economies.
- **creation of decent work:** Investment governance should prioritize the creation of high-quality employment and ensure that investment projects lead to tangible skills development within the local workforce.



- **advancing the Sustainable Development Goals:** Treaties should be designed to maximize the achievement of the United Nations Sustainable Development Goals, ensuring that facilitated investments do not undermine national climate and social objectives.

Averting Negative Impacts: Reinforcing national regulatory frameworks

A reimagined treaty regime should move away from providing blanket protections that override domestic regulation and instead focus on the interaction between international law and national regulation.

- **national law as the primary regulator:** Domestic legal frameworks are the most appropriate level for providing nuanced and dynamic regulation of foreign investment projects in areas such as public health, labour, and the environment. Investment treaties should recognize and strengthen national frameworks. Treaties could include investor obligations only in areas where it would strengthen domestic regulation, fill gaps, or reinforce normative consensus, for instance, around climate action.
- **continuous compliance requirements:** Treaties should explicitly reinforce existing national frameworks by requiring that investors continuously comply with the laws of the host state throughout the life of the investment.
- **complementary enforcement and access to justice:** Rather than replacing national institutions with outdated and problematic ISDS, treaties should play a complementary role by strengthening the capacity of states to enforce their own regulations through national jurisdictions.
- **strengthening remedial pathways:** This includes ensuring that national legal systems are available for civil and tort liability claims against investors for conduct that breaches applicable host or home state laws.
- **institutional alignment:** By focusing on improving access to justice and domestic grievance mechanisms, the treaty regime can support the development of robust national institutions rather than bypassing them through international arbitration.

Enhancing Investment Governance, Transparency, and Anti-Corruption

Transparency is a cornerstone of sustainable investment. Treaties should foster

- **public accountability:** Contributing to the establishment of mandatory disclosure of government contracts and national incentive frameworks to prevent corruption and ensure public funds are used efficiently.
- **beneficial ownership registry:** Establishing common registries to improve due diligence and monitoring of investment flows is an area where treaties can help overcome collective action problems that prevent countries from acting alone.



Reforming Problematic Aspects of Old-Generation BITs

Old-generation BITs have largely failed to deliver on their promise of attracting increased foreign direct investment (Bonnitcha, 2017). Instead, they have imposed significant costs on states and created a system that functions as an unpriced public insurance for foreign investors (Ostránský & Schaugg, 2025). Taken together, there is a strong policy case against continuing reliance on investment treaty protection and ISDS. If Australia decides to keep treaties that contain some elements of investment protection, they should be significantly circumscribed, for instance, by carving out unsustainable investments and limiting the reach of the protection standard to safeguard the right to regulate. Also, if Australia decides to include ISDS, the way damages and compensation are calculated in ISDS practice must be significantly reformed.

At the same time, we reiterate that, given Australia's pioneering role among developed countries in moving away from ISDS and pivoting toward new-generation economic treaties, renegotiating the above-mentioned BITs should not be used to regress to outdated models.

IISD does not recommend including investment protection and ISDS in treaties; these are better addressed in national legal frameworks. The following elements are recommended only to the extent that treaties do contain protection and ISDS elements, for one reason or another. In such cases, the following elements are necessary safeguards.

Treaties as Unbalanced Risk Allocation Tools

Old-generation BITs function as unpriced public insurance, shifting regulatory and political risks onto the host state.

- **pricing and safeguards:** Future protections should not be “unconditional.” They should be modelled on political risk insurance, requiring prior vetting of projects, performance benchmarks, and adherence to sustainability safeguards. In addition, any protection or other benefit granted by the treaty must be limited solely to sustainable investments (as detailed in the subsequent section).
- **avoiding double recovery:** Reform must prevent “strategic arbitrage” where investors benefit simultaneously from political risk insurance payouts, contractual stabilization clauses, and treaty-based compensation for the same risk event.

Must-Have Unsustainable Investment Carve-Outs

Aligning the investment treaty regime with the Paris Agreement is a prerequisite for a credible climate policy (Schaugg et al., 2025). Investment treaties often protect fossil fuel investments that governments must phase out to meet climate goals (Schaugg et al., 2025). Conservative estimates suggest that ISDS-related costs of the energy transition could reach USD 340 billion globally (Tienhaara et al., 2022). The mere threat of costly ISDS proceedings can lead to “regulatory chill,” dissuading host states from enacting reforms in the public interest, such as environmental protections or public health measures (Urazova et al., 2025). The current



context of climate change urges policy-makers to reconsider the use of traditional investment treaty protections and ISDS (Ostránský, 2025).

- **ending support for fossil fuels:** To the extent the treaty confers protections or benefits, treaties should include carve-outs that exempt all fossil fuel investments from the scope of ISDS, treaty protection, and any other benefits. Fossil fuel investors are currently the most prolific users of ISDS, frequently challenging energy transition policies and claiming billions in projected losses (Di Salvatore, 2021).
- **climate change measure carve-out:** Australia should also adopt measure-specific carve-outs, ensuring that all legitimate measures related to reducing greenhouse gas emissions or adapting to climate change are excluded from ISDS.
- **preventing ISDS jurisdictional creep:** These carve-outs must be designed with effective procedural mechanisms to prevent arbitral tribunals from assuming jurisdiction over exempted measures, such as a “two-tiered” state-to-state filter.

Overhauling Damages and Compensation Calculation

The current lack of consistency and the use of speculative valuation methods in ISDS have led to exorbitant awards that drain national budgets (UN Trade & Development, 2024). There are various options at the government's disposal through which this practice can and should be curtailed (Ostránský et al., 2024). Some of these options have been supported by other governments at multilateral fora, such as UNCITRAL Working Group III (United Nations Commission on International Trade Law, 2025).

- **banning speculative valuations:** The discounted cash flow method should be deemed inappropriate for projects that lack a firmly established record of profitability (Bernasconi-Osterwalder & Ostránský, 2022).
- **capping awards to actual expenditure:** To prevent “windfall profits,” monetary damages should be limited to the total expenditures actually incurred by the investor (adjusted for inflation) (Aisbett & Bonnitcha, 2021).
- **simple, risk-free interest rates:** Tribunals should be restricted to awarding simple interest at a risk-free rate, ending the practice of awarding compound interest that drastically inflates claims.
- **the role of domestic courts:** Instead of allowing private tribunals to decide on massive fiscal liabilities, treaties should explore a “deferential approach,” allowing domestic courts or mechanisms to determine the appropriate amount of compensation, instead of entrusting this issue to ISDS that contains perverse incentives for making larger and more complex valuations (Ostránský et al., 2025).
- **mandatory equitable considerations:** Tribunals must be required to consider the “crippling effect” of an award on a state's fiscal health and the investor's own conduct, including contributory fault.



Conclusion

Australia has a unique opportunity to lead by transitioning away from the outdated BIT model toward a regime that actively facilitates sustainable development. We urge DFAT to prioritize the termination of old-generation treaties that lack modern safeguards and to pursue a new generation of treaties focused on cooperation, facilitation, impact regulation, and shared prosperity.

References

- Aisbett, E., & Bonnitcho, J. (2021). A Pareto-improving compensation rule for investment treaties. *Journal of International Economic Law*, 24(1), 181–202,
- Bernasconi-Osterwalder, N., & Ostránský, J. (2022). *UNCITRAL Working Group III and the assessment of compensation and damages: Thinning scope for impactful reform or an opportunity to make a difference?* Investment Treaty News. <https://www.iisd.org/itn/2022/10/07/uncitral-working-group-iii-and-the-assessment-of-compensation-and-damages-thinning-scope-for-impactful-reform-or-an-opportunity-to-make-a-difference-nathalie-bernasconi-osterwalder-josef-ostransky/>
- Bonnitcho, J. (2017). *Assessing the impacts of investment treaties: Overview of the evidence*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/assessing-impacts-investment-treaties-overview-evidence>
- Di Salvatore, L. (2021). *Investor–state disputes in the fossil fuel industry*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry>
- Ostránský, J. (2025). *Inter-American Court of Human Rights urges states to review investor–state dispute settlement for climate action*. International Institute for Sustainable Development. <https://www.iisd.org/articles/policy-analysis/court-urges-isds-review-climate-action>
- Ostránský, J., Atanasova, D., & Beyer, V. (2024). *Compensation and damages in investor–state dispute settlement: Options for reform*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/compensation-damages-isds-reform>
- Ostránský, J., & Bonnitcho, J. (2024). *Rethinking investment treaties: A roadmap*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/rethinking-investment-treaties-roadmap>
- Ostránský, J., Sarmiento, F., & Nikiéma, S. H. (2025). *Why is investment treaty and investor–state dispute settlement reform needed? Questions & answers*. International Institute for Sustainable Development. <https://www.iisd.org/publications/report/investment-treaty-and-isds-reform-questions-answers>
- Ostránský, J., & Schaugg, L. (2025). *Investment treaties as a risk allocation tool: The missing link in the reform agenda*. International Institute for Sustainable Development. <https://www.iisd.org/publications/brief/investment-treaties-risk-allocation-tool>



- Schaugg, L., Jones, N., & Qi, J. (2025). *Historic International Court of Justice opinion confirms states' climate obligations*. International Institute for Sustainable Development. <https://www.iisd.org/articles/deep-dive/icj-advisory-opinion-climate-change>
- Tienhaara, K., Thrasher, R., Simmons, B. A., & Gallagher, K. P. (2022). Investor–state disputes threaten the global green energy transition. *Science*, 376(6594).
- United Nations Commission on International Trade Law. (2025). *Possible reform of investor–state dispute settlement: Submission from the governments of Viet Nam and Nigeria*. <https://docs.un.org/en/A/CN.9/WG.III/WP.261>
- UN Trade and Development. (2024). *Compensation and damages in investor–state dispute settlement proceedings* (IIA issues note). https://unctad.org/system/files/official-document/diaepcbinf2024d3_en.pdf
- Urazova, I., Schaugg, L., & Muttitt, G. (2025). *Legally sound oil and gas phase-outs: Shielding climate action from investor–state lawsuits*. International Institute for Sustainable Development. <https://www.iisd.org/articles/policy-analysis/legally-sound-oil-gas-phase-outs>

© 2026 International Institute for Sustainable Development

Published by the International Institute for Sustainable Development

This publication is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-nc-sa/4.0/).

INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT

The International Institute for Sustainable Development (IISD) is a globally recognized think tank with 3 decades of experience working to solve the world's most pressing sustainable development challenges. We combine deep expertise in a wide range of issues with a collaborative approach to research, policy advice, and hands-on support to ensure these solutions are brought to life. Headquartered in Winnipeg, Manitoba, we are a diverse team of over 300 professionals working from offices in Canada, Switzerland, and other locations around the world.

IISD's headquarters in Winnipeg are situated on Treaty 1 Territory—the ancestral lands of the Anishinaabe (Ojibwe), Ininiw (Cree), Anisininew (Ojibwe Cree), Dene, and Dakota Nations, and the homeland of the Red River Métis Nation.

IISD is a registered charitable organization in Canada and has 501(c)(3) status in the United States. IISD receives core operating support from the Province of Manitoba and project funding from governments inside and outside Canada, United Nations agencies, foundations, the private sector, and individuals.

Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4



[iisd.org](https://www.iisd.org)