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CONTESTED TERRAINS

Clive Palmer's claims against Australia for billions renew pressure to remove investor rights to sue governments from trade agreements

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Abstract

The Australian debate over Investor-State Dispute Settlement (ISDS) sharpened in 2023 because Australian mining billionaire Clive Palmer, having previously registered his mining company in Singapore, has claimed to be a Singaporean investor. He is using ISDS provisions in the 2012 ASEAN-Australia-New Zealand Free Trade Agreement and the amended 2017 Singapore-Australia Free Trade Agreement to sue the Australian government for a total of A$410 billion in three separate claims. This article uses Cox's critical theory framework developed by Schneiderman to explain the historical development and power dynamics of ISDS, the contest between its business supporters and social movement critics, and the impact of this contest on governments. It then analyses the Palmer claims and explores the global debate about ISDS, including its increased use by fossil fuel companies against government regulation of carbon emissions, which has led to increased resistance from social movements and governments. ISDS is also being reviewed by the United Nations and World Bank institutions which provide arbitrators for its tribunals and by the Organisation for Economic Co-operation and Development. The conclusion assesses the debate over whether ISDS can be reformed and its future viability.

Keywords: climate change; investment disputes; regulation; trade agreements

One of the most contested aspects of the Liberal-National Coaliton (LNP) government's trade policy was its support (Tillett 2022) for the inclusion of specific legal rights in trade agreements for foreign (but not local) investors to be able to claim billions in compensation if they can convince an international tribunal that a change in law or policy reduces their future profits, even if the change is in the public interest, such as health or environmental regulation. These rights are known as Investor-State Dispute Settlement (ISDS). The Labor government elected in May 2022 has a policy to exclude ISDS from new trade agreements and to review it in existing agreements (Farrell 2022), partly inspired by its experience of being sued by the Philip Morris Tobacco Company over its 2012 tobacco plain packaging law.

The Australian debate over ISDS sharpened in 2023 because Australian mining billionaire Clive Palmer, having previously registered his mining company in Singapore, has claimed to be a Singaporean investor. He is using ISDS provisions in the 2012 ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) and the amended 2017

Singapore-Australia Free Trade Agreement (SAFTA) to sue the Australian government for a total of A$410 billion in three separate claims.

This article uses Cox's critical theory framework developed by Schneiderman to explain the historical development and power dynamics of ISDS, the contest between its business supporters and social movement critics, and the impact of this contest on governments. It then analyses the Palmer claims and explores the global debate about ISDS, including its increased use by fossil fuel companies against government regulation of carbon emissions, which has led to increased resistance from social movements and governments. ISDS is also being reviewed by the United Nations (UN) and World Bank institutions which provide arbitrators for its tribunals and by the Organisation for Economic Co-operation and Development (OECD). The conclusion assesses the debate over whether ISDS can be reformed and its future viability.

Historical development of ISDS

ISDS emerged in the post-World War Two decolonisation period and was originally designed as an international investment tribunal system to compensate foreign investors for nationalisation or expropriation of actual property, through bilateral investment treaties (BITs) between industrialised capital-exporting and developing capital-importing countries.

But over the last 60 years, the ISDS system has developed provisions such as 'indirect' expropriation (Malakotipour 2020), 'minimum standard of treatment', and 'fair and equitable treatment' (Levashova 2022), which do not involve taking of property and do not exist in most national legal systems. These provisions enable foreign investors to sue governments for billions of dollars of compensation if they can convince a tribunal that a change in domestic law or policy has reduced their expected future profits 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.

Unlike national legal systems, in which judges must cease to be practising advocates, ISDS tribunals do not have independent judges but are ad hoc panels of investment law arbitrators who can continue to be practising advocates, with potential conflicts of interest. Each party to the dispute chooses one arbitrator, and the third is chosen by mutual agreement between the parties. Arbitrators are funded by fees charged to the parties in each dispute. ISDS also lacks the precedents and appeals in national systems which are intended to ensure consistency of decisions, and proceedings are not public unless both parties agree (French 2014). The legal framework for investor-only claims, lack of independent judges, and lack of precedents and appeals, mean the tribunals can pay more attention to compensating investors than to whether the change in policy or regulation is in the public interest.

Other procedural criticisms of ISDS include the use of third-party speculative investments to fund claims and compensation of billions of dollars based on dubious calculations of lost future profits which can amount to a substantial proportion of developing country budgets (Bonnitcha and Brewin 2020).

One of the most notorious claims was the award in 2019 of $5.8 billion to Australian-based mining company Tethyan Copper in a dispute over a mining licence in Pakistan (Tienhaara 2019). This was more than 25 times the US$220 million the company had invested in the project. The amount was almost equivalent to the US$6 billion emergency loan the International Monetary Fund had just granted Pakistan to deal with its economic crisis and therefore cancelled the benefit from the loan. Such awards have led leading investment law expert George Kahale to conclude that ISDS 'is more about making money than obtaining justice' (Kahale 2018, 9).

From the 1960s, former colonial powers and capital-exporting countries, supported by business organisations, insisted on BITs containing ISDS with capital-importing countries, arguing that ISDS was needed to retain and protect investment in developing countries and, after 1991, in countries transitioning from centralised economies. These agreements were separate from broader trade agreements which dealt with tariffs and other issues.

The World Trade Organisation does not include ISDS in its broader global (multilateral) trade agreements, and ISDS has only become a feature of broader regional and bilateral trade agreements since its inclusion in the North American Free Trade Agreement (NAFTA) in 1994.

Trade agreements are legally enforced through state-to-state dispute processes. These enable states to bring a dispute to an agreed tribunal process if another state allegedly violates the legally binding commitments in the agreement. The tribunal findings are enforced through trade sanctions. ISDS is an optional additional dispute process included in only some trade agreements, giving individual corporations the right to initiate disputes against governments for the breach of specific investment provisions described above.

The number of known ISDS claims reached 1,303 in July 2023 (United Nations Conference on Trade and Development [UNCTAD] 2023a). There have been an increasing number of claims for compensation for public interest regulation decided through democratic processes. These include public health measures such as tobacco regulation (Ranald 2014, 2019), medicine patents (Baker 2017), environmental regulation (Withers 2019; Nelson 2022), indigenous land rights (International Centre for Settlement of Investment Disputes 2017), and regulation of the minimum wage (Breville and Bulard 2014; UNCTAD 2019). Recently, there has been a growth in claims against government action to address the climate crisis by reducing carbon emissions, examples of which are discussed in more detail below.

ISDS claims can have freezing or delaying effects on regulation by other governments (Malakotipour 2020). The New Zealand government delayed its tobacco plain packaging legislation when the Philip Morris Tobacco company sued the Australian government over its plain packaging law. The Minister of Health said:

> In making this decision, the Government acknowledges that it will need to manage some legal risks. As we have seen in Australia, there is a possibility of legal proceedings . . . To manage this, Cabinet has decided that the Government will wait and see what happens with Australia's legal claims, making it a possibility that if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes. (Turia 2013, 1)

In short, following Cox, ISDS has developed from post-colonial origins to become a supranational legal institution constructed by states and supported by international business interests (Cox 1994). ISDS has developed into a global legal industry, with its own culture, rules, and funding structures. The industry is used by international companies (Tillett 2022; Mizen 2018) and dominated by large specialised legal firms which promote and defend ISDS and advise companies on how best to structure their assets to maximise the use of ISDS in trade and investment agreements (Aceris Law 2020; Bradfield 2022).

These developments have led to increasing numbers of claims which are seen to undermine democratically decided public interest regulation. This has in turn spurred resistance to ISDS from social movements and pressure on governments, including the Australian government. Resistance and withdrawal have been led by developing capital-importing countries, which are still the most frequently affected by ISDS (UNCTAD 2023b; Ranald 2014), but more industrialised capital-exporting countries like Australia are now being affected.

How Clive Palmer can claim to be a Singaporean investor and the Australian government response

ISDS forum shopping by companies is the practice of setting up subsidiary companies in countries with trade or investment agreements that include ISDS if the parent company is from a country which does not have ISDS in trade or investment agreements with the country where their investment is located or, in Palmer's case, if the investor is from the country against which the case is taken.

For example, the US Philip Morris company could not use ISDS in the Australia-US Free Trade Agreement because community campaigning kept ISDS out of that agreement. Instead, Philip Morris shifted assets to Hong Kong in order to use ISDS in the Australia-Hong Kong investment agreement (Ranald 2014).

Clive Palmer has used a similar ploy by registering his company in Singapore and subsequently claiming compensation in three ISDS claims. Palmer is using ISDS clauses in Australia's free trade agreement with New Zealand and 10 ASEAN countries (AANZFTA) and in the SAFTA (ASEAN 2012; Department of Foreign Affairs and Trade (DFAT) 2017).

Palmer's first ISDS claim was for A$300 billion to compensate for legislation passed by the Western Australian (WA) Parliament as part of a commercial dispute with the WA government over licensing of an iron ore project. His claim for compensation from the WA government had already failed in the Australian High Court (Ranald 2023).

Palmer has lodged two further claims which total A$110 billion, using the ASEAN and Singapore agreements against refusal of a coal mining licence in Queensland. The licences were refused for environmental reasons, including their impact on carbon emissions (Karp 2023; Palmer 2023).

Amendments to the ISDS provisions in the Singapore agreement made in 2017 were intended to discourage the use of forum shopping of ISDS by investors like Palmer. The article reads that ISDS claims can be refused 'if the party has no substantial business activities in the territory of the other Party' (DFAT 2017, Chapter 8, Article 18). But these provisions did not prevent Palmer from lodging his third ISDS claim under that agreement.

Unlike most national legal systems, ISDS rules do not always prevent companies from making multiple claims over the same decision under different trade agreements (International Institute for Sustainable Development 2018). Palmer's strategy is clearly to double his chances of success and to maximise costs to the government in defending multiple cases.

The fact that an Australian company is able to bypass Australian court decisions and use ISDS to launch total claims for A$410 billion against the Australian government from Singapore has provoked more debate about the flaws in the ISDS system. Even if these claims are not successful, the government has to spend years of effort and tens of millions of dollars defending them. The Phillip Morris tobacco company claim against Australia's 2012 plain packaging law took almost 5 years to resolve and cost Australia A$24 million in legal fees, only half of which was recovered (Ranald 2019).

Labor's policy of reviewing ISDS in existing agreements commits it to review 15 BITs and 10 out of a total of 17 broader trade agreements which include ISDS (DFAT 2022).

A general review of the 2012 AANZFTA began under the LNP government and was completed in November 2022 shortly after the election of the Labor government and before Palmer's claims were launched. However, the ISDS provisions were not reviewed. Instead, there was an agreement to begin a review of ISDS 18 months after ratification of the amended agreement, to be completed in a further 18 months. Ratification may not take place for all ASEAN countries until the end of 2024, which means the review may not be completed at the earliest until 2028 (DFAT 2023b, paragraph 56). In the meantime, the government is vulnerable to further claims.

There is mounting evidence that other governments are willing to exclude ISDS from trade and investment agreements. Australia's recent agreements with the UK, India, and the Regional Comprehensive Economic Partnership (RCEP) with 14 Asia-Pacific countries have excluded ISDS. The other major party in Australia, Labor, later implemented its policy against ISDS in new agreements when Australia and the UK agreed to exclude ISDS from applying to each other when the UK joined the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which does include ISDS (DFAT 2023c). Previous agreements with New Zealand, the USA, Malaysia, and the Pacific Islands have also excluded ISDS.

The Labor Trade Minister has commissioned a parliamentary committee review of possible legislation to implement Labor's trade policy, which is ongoing. Many civil society organisation submissions urged the government to speed up the AANZFTA and other reviews of ISDS in existing agreements, to prevent further ISDS claims (Joint Standing Committee on Trade and Investment Growth 2023). Similar submissions have been made in the Parliamentary committee review of the amended AANZFTA (Joint Standing Committee on Treaties 2024).

Fossil fuel companies' use of ISDS against regulation of carbon emissions in industrialised countries

Palmer's second and third claims join a growing global list of ISDS claims from fossil fuel companies for billions in compensation for government decisions that aim to address the climate crisis by reducing carbon emissions. This has raised both social movement and government opposition to ISDS to a new level, since it threatens government action to address a fundamental environmental and economic threat, a threat which is also recognised by large sections of business outside of the fossil fuel industry. The legally binding 2016 UN international treaty (Paris Agreement) and subsequent agreements have established targets to reduce carbon emissions (UN 2016; UN 2023).

A comprehensive study published in the journal *Science* in May 2022 shows increasing use of ISDS clauses in trade agreements by fossil fuel companies to claim billions in compensation for government decisions to reduce carbon emissions, mostly from developing countries but increasingly from industrialised countries. The study predicts the risk of future claims worth hundreds of billions of dollars. The study's authors recommend that governments take steps to prevent fossil fuel investors from accessing ISDS (Tienhaara et al 2022).

Examples of fossil fuel companies' claims against industrialised countries include the following:

- The Westmoreland Coal Company sought compensation from Canada over the Province of Alberta's decision to phase out coal-fired electricity generation by 2030. This US-based company, an investor in two Alberta coal mines, did so using ISDS provisions in NAFTA. Its first claim was unsuccessful but only due to technicalities regarding changes in the company's ownership. In 2023, the company filed a new claim (International Institute for Sustainable Development 2018; Investment Treaty News 2022; ICSID 2023a).
- 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 (ICSID 2023b; Boston University 2023).

TransCanada Energy has two ISDS claims lodged in 2016 and 2021 against the USA, both for US$15 billion. The claims came after a pipeline permit, which would have transported tar sand crude oil from Canada to the USA, was refused for environmental reasons (ICSID 2021)[1]

In 2022, a Bond University academic reported that the Australian government was threatened with ISDS claims from Japanese and Korean energy companies resisting regulation of energy supply and prices (Ghori 2022).

In Europe, German energy companies RWE and Uniper launched ISDS claims against the Netherlands using ISDS in the Energy Charter Treaty (ECT) over its moves to phase out coal-powered energy by 2030 (Putter 2021). The Uniper claim was withdrawn as a condition of German government support when Uniper sought assistance after it was adversely affected by the energy crisis resulting from Russia's invasion of Ukraine (Hodgson and Miller 2022). RWE withdrew its claim after the German Federal Court ruled in July 2023 that, under EU law, the ECT's arbitration clause was not a valid basis for arbitration (Verbeek 2023). Although both claims have now been withdrawn, they contributed to the public debate which led to the EU decision to withdraw from the ECT, described below.

After this public debate and a comprehensive review, the EU Commission in July 2023 proposed a coordinated withdrawal of all EU states from the ECT. The then EU Executive Vice-President for the European Green Deal, Frans Timmermans, said:

> With the European Green Deal, we are reshaping our energy and investment policies for a sustainable future. The outdated Energy Charter Treaty is not aligned with our EU Climate Law and our commitments under the Paris Agreement. (European Commission 2023, 1)

The UK, which left the EU in 2020, has also decided to withdraw from the ECT because of climate policy concerns (Nelson 2024).

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), albeit with a 3-year sunset clause which expired in 2023 (Miller-Chevalier 2023). As a presidential candidate, Joe Biden said he was opposed to ISDS provisions before the 2020 election, and his administration has not initiated any agreements containing ISDS (International Economic Law and Policy 2020). Since its election, the Biden administration has faced increasing pressure to remove ISDS from existing agreements (Public Citizen 2023; Taft 2023).

A 2023 report of the UN Special Rapporteur on human rights and the environment found 'overwhelming evidence that ISDS is a major barrier to addressing climate change and is incompatible with the urgent action needed to transform the global energy system' (Boyd 2023, 1).

The ISDS system's loss of legitimacy is also being recognised by some of its strongest proponents. For example, Alexis Mourre, the former president of the commercial arbitration system for disputes between companies run by the International Chamber of Commerce (ICC), said recently in a lecture that defenders of ISDS had been 'defeated' by social movements and 'lost the battle of public opinion' and, 'to a large extent, the battle of legitimacy' (Ross 2024, 1).

This is significant because the ICC has been one of the main global supporters of including ISDS in bilateral and regional trade agreements. Mourre proposes that business should shift away from ISDS in trade and investment agreements and instead move to inserting rights to sue in commercial contracts between individual investors and states.

He argues that specific commercial contracts with individual companies could give states more options for limiting ISDS claims, by enabling them to exclude claims about public interest regulation from the contract (Ross 2024). Such a move could also be in the interests of the ICC since it would expand their commercial arbitration business.

The future of ISDS: reform or withdrawal?

ISDS has suffered a legitimacy crisis that has grown in the last decade, with opposition to the system shared by both social movements and governments from developing and industrialised countries and even acknowledged by some of its proponents.

This global debate has influenced the two institutions which 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 which recognise that there are flaws in the ISDS system. The reviews began in 2017, were interrupted by the coronavirus disease 2019 pandemic, and have resumed but not yet been completed (UNCITRAL no date). The ICSID review is not a public process, so it cannot be cited in detail. The UNCITRAL review, conducted by a UN body, had a more open structure with public submissions and publication of proceedings.

Widespread criticism of ISDS has been acknowledged in the UNCITRAL review (Langford et al 2020). Criticisms of ISDS *structure* include the following: 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.

Acknowledged criticisms of the ISDS *process* include the use of ad hoc tribunals, 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 (Langford et al 2020, 1).

Scholars have criticised the UNCITRAL review focus on procedural reforms rather than the structural power imbalances, noting that the review process was 'unduly narrow' (Kelsey et al 2019).

The EU has taken the opportunity in the review to promote a modified model of ISDS which retains its basic features but seeks to address issues about arbitrator conflict of interest by proposing a global investment court staffed by permanent judges with an appeal process and changes to other procedural issues. However, this model has also been criticised because it does not address the basic power imbalances (Van Harten 2016) and has not been supported by other key industrialised and developing countries.

So far, the only agreed change to emerge from the UNCITRAL process is a Code of Conduct for arbitrators which attempts to address arbitrator conflict of interest by defining conflict of interest and requiring disclosure by arbitrators of 'double hatting'. This occurs when an arbitrator is arbitrating one claim and practising as an advocate in another. After much debate, the final Code requires that double hatting must be publicly disclosed but has not been forbidden except in very narrow circumstances, when claims are closely related. Both ICSID and UNCITRAL have endorsed this document, and it was endorsed by UN processes in December 2023 (UNCITRAL 2023; ICSID 2023c).

The UNCITRAL review is also considering attempts in more recent trade agreements such as the CPTPP to include more protections for governments, including exemptions that are meant 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 (Benton Heath 2021).

For example, in the Eco Oro v. Colombia decision about the environmental impact of a mine, the tribunal disregarded a clause in the Colombia-Canada FTA included to protect governments' right to enact environmental regulation. The exception reads that nothing in the FTA's investment chapter 'shall be construed to prevent a Party from adopting or enforcing measures 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 this clause applies to a measure, 'this does not prevent an investor claiming ... that such a measure entitles it to the payment of compensation' (ICSID 2021, 829). In other words, the tribunal found that even if the government measure did protect the environment, the company was still entitled to compensation.

In the CPTPP, a similar clause includes the additional proviso that nothing should prevent measures to protect the environment 'otherwise consistent with this chapter' (DFAT 2015, Chapter 9, Article 9.16). Trade law experts have said that the circular language of this exception gives no additional protections for environmental regulation (Kawharu 2015).

Critics of these procedural reforms and modernised clauses note that they do not prevent claims from being brought against governments, and their outcome is uncertain 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. Only tobacco regulation has been clearly excluded or carved out from ISDS claims in the CPTPP (DFAT 2015, Chapter 29, Article 29.5) and in subsequent Australian agreements with Singapore, Hong Kong, and Indonesia.

The UNCITRAL review has so far taken 7 years and produced only one agreed outcome for procedural reform of ISDS. As discussed above, in the meantime, claims against government action to reduce carbon emissions have prompted an increasing number of governments to withdraw from ISDS arrangements.

The OECD has also initiated a work programme on the future of ISDS and climate change policies (OECD 2023). Submissions to this process contain recommendations ranging from withdrawal from ISDS arrangements (Centre for International Environmental Law 2022) to comprehensive carve-outs for climate change regulation which would prevent claims, similar to the tobacco carve-outs discussed above. Advocates of carve-outs note that other specific carve-outs would be required to prevent claims against regulation of other public interest issues like public health, indigenous land rights, and minimum wages discussed above (Paine and Sheargold 2023).

Conclusion

Clive Palmer's claims of hundreds of billions of dollars against the Australian government and increasing numbers of claims by fossil fuel companies against government action to address the climate crisis have exacerbated the legitimacy crisis of ISDS, which is acknowledged even by some of its strongest supporters.

Cox's framework of analysing the contesting interests in the historical development of ISDS as a supranational legal institution is useful in explaining the development of ISDS and the growth of its critics. The mounting numbers of ISDS cases and the recent success of fossil fuel companies in ISDS cases have spurred further social movement resistance and pressured both developing and industrialised country governments to withdraw from ISDS arrangements, most recently demonstrated by EU and UK withdrawals from the ECT, and the Australian government policy against ISDS in new agreements and to review it in existing agreements.

The UNCITRAL review of the ISDS process acknowledges the flaws in the system but has not addressed the structural power imbalances, nor the threat ISDS poses to urgently

needed government action to address the climate crisis. The OECD review recognises this threat and is receiving a broader range of submissions which canvass more fundamental change, ranging from comprehensive carve-outs for climate-related regulation to withdrawal from ISDS arrangements. But in the meantime, governments are voting with their feet by withdrawing from ISDS arrangements. It is likely that the urgent need to prevent fossil fuel investors from accessing ISDS claims will contribute to further withdrawals from existing ISDS arrangements. This need may also spur other governments to agree on mechanisms to definitively exclude ISDS claims from being made against climate change regulation but would not prevent claims against other public interest regulation. ISDS will continue to be a site of contested terrain.

Note

1 The 2021 claim was lodged under a 3-year sunset clause after ISDS provisions were removed from the US-Mexico-Canada Agreement by the Trump administration, which is discussed further below (Miller-Chevalier 2023).

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