THE SWORD OF DAMOCLES Investor-State Dispute Settlement and the Rule of Law

There is nothing to fear and much to welcome from investor-state arbitration, argues **Patrick Carvalho**

A recent development in the global battle between free trade supporters and national protectionists is the rise of Investor-State Dispute Settlement (ISDS) provisions in international agreements. ISDS allows foreign investors to take a host government to arbitration in the event their treaty rights are infringed. Prior to the introduction of ISDS, there were limited options for investors seeking recompense from unlawful acts of foreign governments.

ISDS has been in the spotlight in Australia due to parliamentary discussions on ratifying the Trans-Pacific Partnership (TPP). Critics question the introduction of ISDS provisions in the agreement, but their criticisms are based on myths. The most vitriolic myth is that ISDS can overturn national legislation or regulations, followed closely by the claim that it breaches sovereign immunity. Another widely-heard accusation is that ISDS favours big multinationals and that it gives special rights to foreign investors that are not available to their domestic counterparts.

This article debunks the most widespread and unfounded myths about investor-state arbitration. It begins by making the case for ISDS as a beacon for the rule of law in international affairs and traces its global evolution since the first ISDS agreement was signed almost 60 years ago. It then examines Australia's chequered history with ISDS—which has swung from total acceptance to outright rejection—and urges the current government to fully embrace ISDS provisions. It concludes by debunking seven of the most common myths about ISDS in the interests of evidence-based debate.

What is ISDS?

Investor-State Dispute Settlement (ISDS) is a legal provision in international trade and investment agreements that enables foreign investors to take host states to a neutral, third-party arbitral tribunal for alleged treaty breaches. The goal of ISDS is to provide a de-politicised, unbiased and law-based adjudication forum to guarantee the investor's rights against unlawful overseas government actions. On average, investor-state arbitration proceedings last approximately 3.5 years, with a great majority of ISDS cases overseen either by the World Bank's International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL).

Australia has much to gain by fostering the rule of law in international affairs through welcoming ISDS provisions in international agreements. Since Australia's first ISDS-protected treaty with China in 1988, the world has become a safer place for Australian investors, with investor-state arbitration acting as a powerful and effective 'Sword of Damocles' against unlawful foreign government acts—and on three occasions

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providing a neutral and de-politicised forum to assert just treatment to Australian interests overseas.

Domestically, ISDS provides an extra check on our judicial and political systems to ensure they remain fair and expedient in the treatment of international investments. Further, ISDS brings little disruption given the high standards of Australia's rule of law culture: for example, the first and only ISDS case against the Australian government (on tobacco packaging legislation) has been recently dismissed (see box 1 p. 24). In short, the system works.

The case for ISDS

First and foremost, the case for investor-state arbitration lies in strengthening the rule of law—the quintessential feature of free markets and individual liberty, and a cornerstone of human prosperity since the Magna Carta. The main achievement of ISDS is to provide legal predictability and equality in the international arena among disputing parties who do not necessarily share the same domestic legal values and customs. In addition, despite being an international remedy for a breach of international obligations, ISDS has important beneficial spill-over effects on the rule of law for the host's citizens in non-developed states, who tend to be increasingly vocal in their demand for a law-based democratic system.

Another important ISDS corollary concerns the introduction of competition in the delivery of justice. Most ISDS provisions allow international investors to choose whether to pursue their grievances in either domestic courts or ad-hoc tribunals, which are set to compete on umpire expertise, costs, expediency, flexibility and impartiality. Such a race for excellence ends up breaking one of the last frontiers of national monopoly, the domestic judicial system, resulting in an enhanced rule of law administration for all users.

Further, ISDS is a non-belligerent alternative to state-to-state dispute escalation, reducing the necessity of international sanctions or even gunboat diplomacy, where powerful states would threaten to (or actually) militarily intervene in other sovereign nations in order to secure private commercial interests.

Also important is the ISDS ability to reduce the sovereign risks associated with investments across borders by providing an effective remedy to curb unlawful treatment from host governments. Hence, despite many other factors playing on Foreign Direct Investment (FDI) decisions, and the difficulty of quantifying the impact of ISDS on cross-border investments, a safer environment for international investments invariably ends up benefiting both importers and exporters of capital.

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The global evolution of ISDS

The first ISDS agreement was signed in 1959 between Germany and Pakistan. Since then, investment-protected international treaties have been gaining pace worldwide, from less than 500 agreements in 1990 to 2,184 in 2000 to 3,509 at the start of 2016. Likewise, as globalised capital flows and international investment agreements proliferate, ISDS cases have accelerated since the turn of the century. From close to 100 proceedings initiated before 2003, the total amount of known ISDS cases is currently at 608.

Despite more than 100 nations being involved in ISDS proceedings, countries with a long history of high FDI outflows are more likely to have their national investors under arbitral disputes against foreign governments. The United States leads the home state investors ranking with 134 ISDS cases, or 22% of the total, followed by the Netherlands (70 ISDS cases), United Kingdom (49) and Germany (42). These four countries alone account for half of all home state claimants in ISDS cases, although the growing presence of emerging economies is notable.

When it comes to state respondents, national governments under a weak rule of law environment tend to feature prominently in ISDS cases. As representative cases, Argentina and Venezuela are by far the most targeted countries, having responded to 56 and 36 ISDS cases respectively. However, developed nations are increasingly facing ISDS claims. Most notably, Canada (23 ISDS

Table 1: Australia's ISDS-Protected Agreements

Bilateral Investment Treaties		
Signed In	**Entry into Force**	**BIT with**
1988 (July)	1988 (July)	China
1990 (September)	1991 (October)	Papua New Guinea
1991 (March)	1991 (September)	Vietnam
1991 (May)	1992 (March)	Poland
1991 (August)	1992 (May)	Hungary
1992 (November)	1993 (July)	Indonesia
1993 (June)	1994 (April)	Romania
1993 (September)	1993 (October)	Hong Kong
1993 (September)	1994 (June)	Czech Republic
1994 (April)	1995 (April)	Laos
1995 (January)	1995 (December)	Philippines
1995 (August)	1997 (January)	Argentina
1995 (December)	1997 (February)	Peru
1998 (February)	1998 (October)	Pakistan
1998 (November)	2002 (May)	Lithuania
1999 (February)	2000 (May)	India
2001 (May)	2002 (September)	Egypt
2001 (September)	2002 (December)	Uruguay
2002 (November)	2007 (March)	Sri Lanka
2005 (June)	2009 (June)	Turkey
2005 (August)	2007 (July)	Mexico

Free Trade Agreements		
Signed In	**Entry into Force**	**FTA with**
2003 (February)	2003 (July)	Singapore
2004 (July)	2005 (January)	Thailand
2008 (July)	2009 (March)	Chile
2014 (April)	2014 (December)	Korea
2014 (August)	2015 (October)	ASEAN and New Zealand
2015 (July)	2015 (December)	China
2016 (February)	---	Trans-Pacific Partnership

Source: Australian Department of Foreign Affairs and Trade.

Note: ASEAN members are Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Vietnam, Laos, Myanmar and Cambodia; TPP members are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States and Vietnam.

cases), United States (15) and Spain (14) appear in the top 15 most frequent respondents.

Of the total 362 currently concluded ISDS cases, only 30% of rulings have been in favour of foreign investors, with the great majority ruled either in favour of the state or consensual settlement among the disputing parties.

International evidence shows that ISDS cases tend to consist of sectors with high state involvement, which makes them prone to government misconduct. The leading sector is the mining and hydrocarbon industries, followed by electricity generation and distribution. Both sectors feature conspicuous state involvement, either through heavy regulation and/or joint-ventures with state companies.

Some valid concerns

ISDS arrangements are not perfect. Like any other system, there is always room for corrections, and investor-state arbitration is no different. In particular, three areas need improvement: transparency of ISDS proceedings (for example, open hearings), consistency of ISDS rulings and provisions (so that discrepancies do not create room for treaty shopping), and ensuring the well-defined and legitimate use of ISDS through checks and balances in the access to investor-state arbitration (statutes of limitations and the like).

The design of investor-state arbitration provisions has been in constant evolution—including amid Australia's international investment treaties—with more than 600 known cases globally since the first ISDS international agreement was signed. This process of fine tuning ISDS provisions requires constant and vigilant effort. As UNCTAD has warned, a balance needs to be found between qualifying or introducing limits to ISDS provisions and maintaining valid protective coverage so that its quality as an investment tool is not undermined.

Australia and ISDS: a chequered history

Australia has agreed to ISDS protection in 21 bilateral investment treaties and seven free trade agreements (see Table 1). However, support for ISDS provisions in Australia has swung from full engagement in the 1990s to outright rejection during the Gillard administration to the current 'case-by-case basis' approach. This zig-zagging between the need to spur the rule of law in the international arena and fears about the impact of ISDS rulings on national sovereignty has often been due to domestic politics.

From the Hawke-Keating years to the Howard era

In the late 1980s the Hawke and Keating government seized the opportunity to embrace investor-state arbitration, recognising the benefits of expanding the rule of law globally and of being an active player in the process. The first ISDS-protected agreement was signed with China in 1988, marking the beginning of a golden era for investor-state arbitration support both here and overseas.

Under Hawke and Keating, Australia signed a further 12 bilateral investment treaties between 1990-1995. These ISDS-protected agreements, however, were marked by the use of very vague language, with few qualifications and a lack of precise definition on key terms. Much of the crude wording was due to a still fledgling Bilateral Investment Treaty (BIT) global environment, with only a handful of ISDS disputes to guide international treaty lawmaking.

Under the Howard government, the Australian government signed a further eight BITs between 1998-2005. However, as global multilateral trade talks began to falter in the 2000s—of which the still lingering Doha Development Round is a prime example—the attractiveness of more extensive and viable regional and bilateral trade agreements became clear. A new breed of broader and more detail-oriented ISDS agreements began to emerge with the signing of free trade agreements with Singapore (2003) and Thailand (2004) containing ISDS-protected investment chapters. The Singapore-Australia Free Trade Agreement (SAFTA) in particular set a benchmark in specifying the legitimate use of ISDS provisions. For example, for the first time in Australia's investment agreements, foreign investors would face a statute of limitation. Furthermore, SAFTA features important exemptions to ISDS protection such as exceptions for legitimate national security reasons and public order, and safeguards for protecting 'human, animal or plant life or health'.

SAFTA—and to a certain extent the Australia-Thailand FTA—seemed to represent a more enlightened commitment from Canberra to ISDS. However, a last-minute political decision to drop ISDS provisions from the Australia-United States Free Trade Agreement (AUSFTA) in 2004, because both countries had robust legal systems, represented the first major setback in Australia's ISDS history. In reality, the provisions were dropped because of domestic politics: the Howard government feared the Agreement would not be ratified in parliament because the Labor Party, the Greens and the Democrats—who held a majority of Senate seats—all strongly opposed ISDS provisions in the agreement and could have blocked the implementing legislation.

> During the second half of Labor administration, the official policy on ISDS provisions in future agreements became one of outright rejection—and made Australia the first and only developed country to do so.

The Rudd-Gillard era and the swinging pendulum

When the Labor Party came to power in late 2007 the swinging pendulum of the ISDS debate moved from initial support to outright rejection. The 2008 Australia-Chile Free Trade Agreement signed during Kevin Rudd's first term was the most advanced ISDS-protected agreement in Australia's history up to that point with many new features including full transparency of arbitral proceedings.

Yet this momentum was short-lived: no other ISDS-protected agreement was signed by Australia until the end of the Rudd-Gillard-Rudd Labor Government. Worse, during the second half of Labor administration, the official policy on ISDS provisions in future agreements became one of outright rejection—and made Australia the first and only developed country to do so. This rejection was largely based on disputed assumptions concerning investor-state arbitration: that ISDS constrains the sovereign ability to legislate (see myth 2 opposite); that ISDS confers greater legal rights to foreigners (myth 3); that ISDS should be included in trade agreements only with developing countries (myth 4); and that ISDS is a redundant tool to overcome political risks (myth 5).

There were a few other reasons behind this abrupt change of heart. First, there was concern that the Greens—the government's key supporting partner in power—would effectively once again be able to block any trade deal containing ISDS provisions. Second, a 2010 report by the Productivity Commission had downplayed the role of ISDS provisions. Third, there was huge uproar regarding the looming ISDS case on Australia's tobacco plain packaging legislation—the first and only ISDS claim against Australia, which was later dismissed (see Box 1).

Australia's rejection of investor-state arbitration clauses was short-lived, however, with only the ISDS-free Australia-Malaysia Free Trade Agreement signed in 2012 affected by it.

The current case by case approach and the way forward

When the Coalition government was elected in September 2013, ISDS negotiations were put back on the table—albeit on a 'case-by-case basis'. Australia has since successfully fast-tracked the conclusion of five free trade agreement negotiations: with Japan (2014), Korea (2014), ASEAN countries and New Zealand (2014), China (2015) and the Trans-Pacific Partnership or TPP (2016). Through varying routes, Australia formalised ISDS provisions with all the countries involved, including amending the lack of ISDS clauses in earlier agreements signed with Malaysia (through the ASEAN-NZ-Australia FTA) and the United States, Japan and New Zealand

Box 1: Philip Morris Asia Limited v. The Commonwealth of Australia

On 21 November 2011, Philip Morris Asia Limited (Philip Morris Asia) filed a claim for arbitration under UNCITRAL Rules against Australia. Philip Morris Asia held that Australia's plain packaging laws on cigarettes violated Australia's commitments under the 1993 Agreement between the Governments of Hong Kong and Australia for the Promotion and Protection of Investments (Australia-Hong Kong Bilateral Investment Treaty or BIT).

Under a series of claims, Philip Morris Asia argued Australia's 2011 Plain Packaging Act legislation constituted unlawful expropriation in breach of Article 6 of the Australia-Hong Kong BIT. In addition, the company contended the legislation infringed Australia's commitment under Article 2(2) of the Hong Kong Agreement in two respects: (i) that the Plain Packaging Act failed to accord fair and equitable treatment to Philip Morris Asia's investments; and (ii) that such legislation also constituted an unreasonable and discriminatory measure depriving Philip Morris Asia's investments from full protection and security. Australia rejected all these claims, arguing that the arbitral court lacked jurisdiction and admissibility to hear the claim.

Background

Instead of seeking reparation through Australian domestic courts as other tobacco companies had done, Philip Morris headquarters took a different route. Following announcements from the Australian government of its intention to introduce a legislative bill on tobacco plain packaging, Philip Morris International arranged for its wholly-owned Hong Kong subsidiary, Philip Morris Asia, to take over its two Australian subsidiaries, Philip Morris Australia Limited and Philip Morris Limited. Then in June 2011, Philip Morris Asia placed a notice of claim seeking amicable settlement under the Australia-Hong Kong BIT. After frustrated negotiations with the Australian government, a formal claim for arbitration was filed under UNCITRAL Rules.

The First Procedural Meeting was held in July 2012 in Singapore with an ad hoc three-person arbitral tribunal. Australia argued that Article 10 of the Australia-Hong Kong BIT did not afford jurisdiction for an arbitral tribunal to preside over previous disputes re-packaged as BIT claims after a government has passed relevant legislation. Australia also argued its plain packaging policy could not breach protections provided under the BIT because Philip Morris decided to acquire shares in Philip Morris Australia in full knowledge of Australia's intention to implement plain packaging legislation.

On 17 December 2015 the arbitral tribunal in Singapore dismissed the case, agreeing with Australia's position that the tribunal had no jurisdiction or admissibility to hear Philip Morris's claim.

(through the state-of-the-art investment chapter in the TPP).

Most importantly, the FTAs signed with Korea, ASEAN, China, and the TPP (2016) all included an improved set of ISDS provisions, such as further limitations of ISDS scope on sensitive regulatory areas and plans to build an effective appellate review mechanism (or second instance adjudication).

ISDS provisions in Australia's history have therefore come a long way: from the simple and rudimentary clauses found in the first wave of BITs to the latest protections in recent free trade agreements; and from total political acceptance to outright rejection to the current hesitant case-by-case basis.

It is now time to renew the national commitment to this important international legal institution. Hopefully, as ISDS cases increasingly become part of the international legal framework the myths about investor-state arbitration will be debunked while the benefits from a stronger international rule of law become more evident.

Myth 1: ISDS breaches sovereign immunity

Investor-state arbitration is a conscious act of sovereignty, and there is nothing in its arrangements that cannot be separately found in other legitimate legal instruments and procedures.

ISDS detractors are quick to criticise the legitimacy of investor-state arbitration, questioning the adjudication powers of a collegiate of appointed umpires outside domestic courts. For instance, the Australian Services Union condemns ISDS provisions for 'undermin[ing] democratic processes by enabling foreign investors to sue governments for compensation' while the Greens call them a 'Trojan Horse in our secretive trade agreements'. Yet there is no breach of sovereign immunity, as nation states willingly give their advance consent to this form of adjudication through the proper validation of international agreements.

Arbitration itself is a commonly used form of adjudication outside national courts, present in commercial disputes as old as trade itself. It involves the mutual and voluntary consent of the disputing parties for an impartial, law-based approach to resolve conflicts. Moreover, legal disputes between commons and sovereign national states constitute the central tenet of civilised society as set in stone by the Magna Carta, 'the King too should be bound by the law'. Fortunately, most governments are legally and judicially held accountable for their acts. Outside the ISDS arena, there are also many examples of sovereign states (including their domestic court decisions) being brought to international adjudication forums with legally binding resolutions such as the WTO Panel Proceedings and the International Court of Justice.

What makes ISDS unique—and yet no less legitimate—is the summation of these features in one single institution: that is, a set of legal rules governing an international arbitration forum to settle disputes between an investor and a sovereign state outside the domestic court system.

> No international agreement exists that allows ISDS tribunals to overturn national legislation or regulation.

Myth 2: ISDS tribunals can overturn national legislation

ISDS tribunals do not have the authority to reverse national legislation or regulations. If anything, investor-state arbitration constitutes an extra layer curbing government's ability to *misregulate*.

This is the most vitriolic—yet misinformed—criticism of ISDS. No international agreement exists that allows ISDS tribunals to overturn national legislation or regulation. Most modern BITs unambiguously limit awards to non-punitive financial compensation and restitution of property. The myth of ISDS adjudications mandating changes to national legislation is also not supported by evidence. A recent Dutch study attests that 90% of ISDS cases are merely targeted to administrative acts (for example, cancellation of licenses or permits), with the remaining 10% directed against general legislative measures 'hardly, if ever, successful'. This finding is reinforced by UNCTAD analysis.

Critics still point to concerns over 'regulatory chill'. This is where policymakers are discouraged from introducing new regulations due to fear of immense financial costs in potential ISDS award compensations. Yet empirical evidence is again lacking. ISDS does not impose regulatory chill any more than other forms of litigation in international forums (such as the WTO) or domestic courts. Most governments are already required to act in accordance to the law and the due process. ISDS is just another legal remedy to prevent unlawful government acts, particularly in countries where the domestic rule of law is weak. If anything, 'ISDS imposes a chill on government's ability to "misregulate", that is, to act in an arbitrary, discriminatory, unfair, and inequitable manner'. Moreover, most modern BITs already include safeguards to avoid unnecessary regulatory chills.

> At the core of ISDS provisions is the right to 'no expropriation without compensation', which has been a well anchored principle since the 1215 Magna Carta.

Myth 3: ISDS provisions give special rights to foreign investors

Another common libel against ISDS provisions concerns the allegedly special rights status given to foreign investors, which would be denied to domestic citizens. Yet ISDS simply provides the necessary means to enforce international treaty-based agreements in accordance to the rule of law. Further, there is nothing in ISDS material protections that is not covered—or should not be covered—by any nation that respects the rule of law.

Overall, there are two specific arguments regarding alleged ISDS special rights status to foreign investors: one concerning procedural rights and the other with respect to substantive rights. Both arguments are overstatements and should be refuted.

First, ISDS procedural rights granting foreign investors access to investor-state arbitration forums concern the specific legal nature of international investment agreements. Such agreements are based on international law, and not always part of the domestic legal system. Basically, these are international treaty-based matters well suited for an equally international law-based adjudication forum.

Second, there is the myth concerning ISDS special substantive rights or material safeguards. Yet at the core of ISDS provisions is the right to 'no expropriation without compensation', which has been a well anchored principle since the 1215 Magna Carta and is consistent with the United Nations Universal Declaration of Human Rights and civil rights legislation across developed democracies, including the Australian Constitution.

Myth 4: ISDS provisions should not be part of international treaties among developed nations

ISDS provisions should be included in international treaties among developed nations, since a patchwork collection of ISDS-protected agreements is counterproductive and undermined by treaty shopping conduct.

The rationale for this myth is that domestic judicial systems in advanced democracies are fully able to provide a safe and impartial rule of law environment without the need for other alternative forms of adjudication such as investor-state arbitration. This assessment was endorsed by the 2010 Productivity Commission Report on Bilateral and Regional Trade Agreements. However, the same 'high-quality-legal-system' argument could be used to exempt disputes among developed countries from *any* form of international adjudication forum, including from the International Court of Justice or the WTO Panels. Yet past experience and theory show how important a neutral and de-politicised forum can be to effectively solve international disputes, even among developed nations with outstanding judicial systems.

In any case, a patchwork collection of ISDS-protected agreements can lead to perverse incentives for treaty shopping. As happened with the arbitral case involving Philip Morris Asia and the Australian government (see box 1, p. 24), some companies might attempt to use subsidiaries in other countries as proxies to pursue an investor-state arbitration solution—undermining not just the effectiveness of Australia's current 'case-by-case basis' approach, but the very legitimacy of ISDS provisions before the general public.

There is also an unfounded self-serving assumption that developed countries provide a perfect (or quasi-perfect) rule of law environment. In Australia, even the Productivity Commission—which once disavowed ISDS provisions between developed countries—in a more recent study claimed our own legal system is 'too slow, too expensive and too adversarial'. Little wonder foreign investors in developed states are turning to ISDS forums.

Myth 5: ISDS is redundant in international affairs

ISDS is an effective and unique tool to overcome political risks. For example, political risk insurance and private contracts with host governments cannot fully substitute for the benefits of investor-state arbitration.

Some critics claim that ISDS is a redundant tool to overcome political risks, as there are other options available for foreign investors to hedge their international operations. For instance, the Productivity Commission suggests that investors should either seek political risk insurance—in private markets or in public shops such as the Australian Government's Export Finance and Insurance Corporation and the World Bank Multilateral Investment Guarantee Agency—or directly negotiate a private contract with host governments for dispute resolution mechanisms. However, there are some important forewarnings with such proposed ISDS substitutes.

First, due to potentially high upfront costs, such political risk insurance would not constitute a viable option for many international investors. As even the Productivity Commission recognises, such insurance markets are 'more feasible for large business rather than small and medium business'. Second, the notion that foreign investors could seek private contracts with host governments is misguided. It 'ignores the fact that most investments are private affairs in which no government is a party.'

The truth is that ISDS is a unique legal provision offering an alternative neutral, law-based adjudication forum. Investor-state arbitration, as opposed to other forms of state-state disputes such as the WTO dispute settlement mechanism—or even armed conflicts and international sanctions—provides an independent, cost-effective and depoliticised environment. This makes ISDS arbitration a faster, cheaper and more efficient alternative for dispute resolution.

Unlawful government acts against foreign investments are far from confined to a bygone era, with the rising number of ISDS cases indicating that reputational effects alone will not hinder mistreatment of foreign investors.

Myth 6: There is no economic case for ISDS

The porous global rule of law constitutes a strong economic case for ISDS provisions to provide a safer environment for international investments.

Claims that there is no economic case for ISDS provisions would mean that inclusion of ISDS clauses in international treaties would be justified only if there were severe and concrete menace to foreign investments. Yet according to some critics there is no such problem because contemporary political risks to foreign investments are limited and already constrained by *reputational effects*—that is, countries perceived to mistreat foreign investors would already be penalised with lower future capital inflows.

Nonetheless, there is plenty of evidence supporting the economic case for investor-state arbitration. First and foremost, by limiting unlawful government acts when it comes to foreign investment, ISDS promotes the rule of law across borders. Since the Magna Carta, a strong law-based society has been fundamental to continuous social and economic development. In this sense, the sharp decrease in expropriation of foreign investors in the past decades should not be seen as a justification for ditching ISDS provisions, but as a reflection of a better international law framework, of which bilateral investment agreements constitute a central part. Besides, unlawful government acts against foreign investments are far from confined to a bygone era, with the rising number of ISDS cases indicating that reputational effects alone will not hinder mistreatment of foreign investors.

Further, economic research indicates that investment-protection agreements may help promote cross-border investments. ISDS-containing agreements effectively contribute to a better regulatory and institutional framework and, in some cases, can function as a substitute for poor institutional quality. This contributes toward a more conducive international investment framework, benefiting both importers and exporters of capital.

> While foreign investors are popularly thought of as 'big business', smaller firms use the ISDS system more often than larger ones.

In short, contrary to the critics' claims, a porous global rule of law framework when it comes to foreign investment treatment constitutes an underlying and vivid economic problem, for which ISDS-protected agreements are well suited to cater.

Myth 7: ISDS benefits only big multinationals

A particularly unhelpful myth is that ISDS only benefits big multinationals. However, despite widespread belief, such criticism is not backed by data.

While foreign investors are popularly thought of as 'big business', smaller firms use the ISDS system more often than larger ones: an OECD survey found that 22% of ISDS claimants are individuals and only 8% of the companies concerned are multinational corporations. Another study of US investors shows that two-thirds of ISDS claimants were either individuals or small and medium-sized enterprises with fewer than 500 employees.

Therefore, as evidence shows, it is mutually beneficial for both small and bigger investors to create an effective mechanism for the protection of foreign investments. ISDS provisions empower foreign investors of all stripes to pursue their claims without needing to align them with their home state's interests—a particularly daunting task for individual entrepreneurs and small businesses.

Conclusion

With ISDS provisions in 21 bilateral investment treaties and seven free trade agreements, investor-state arbitration has served Australia's national interests well, promoting a better global rule of law environment along with protecting Australian investors from unlawful foreign government acts. Hence, it is time to advance our commitment to this important international tool: that is, Australia must reconsider its current 'case-by-case basis' approach and move towards fully embracing ISDS provisions, advocating for a transparent, consistent, well-delimited and legitimate use of investor-state arbitration. Moreover, Australia should maintain its international efforts to implement an ISDS appellate mechanism, and whenever possible, to work with its trading partners to ensure that previous ISDS commitments are updated and fit for purpose.