



RESEARCH REPORT SNAPSHOT

THE CENTRE FOR
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Investor-State Arbitration and the Rule of Law: Debunking the Myths

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Investor-state arbitration has been in the Australian spotlight due to the current parliamentary discussions on ratifying the Trans-Pacific Partnership. Critics question the introduction of ISDS provisions in the agreement, but their criticisms are myths.

Investor-State Dispute Settlement (ISDS) is a legal provision in international agreements that enables foreign investors to take host states to an arbitral tribunal for alleged treaty breaches.

The goal of investor-state arbitration 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 ICSID forum or by the United Nations' UNCITRAL rules.

Debunking the ISDS Myths

- As part of an evidence-based and informed debate, this report debunks the seven major myths about investor-state arbitration:

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.

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*.

Myth 3. ISDS provisions give special rights to foreign investors

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.

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.

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 the benefits of investor-state arbitration.

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.

Myth 7. ISDS benefits only big multinationals

ISDS benefits business of all shapes and sizes, with a greater part of claims initiated by either individual investors or small and medium enterprises.

Policy Recommendations

- ***Australia should fully embrace investor-state arbitration***
- ***Transparency of ISDS procedures should be the rule***
- ***ISDS provisions should ensure a well-delimited and legitimate use of investor-state arbitration***
- ***An ISDS appellate mechanism should be implemented***
- ***Whenever possible, previous ISDS commitments should be realigned to the latest advancements in investor-state arbitration provisions***

The Case for Investor-State Arbitration

- There are many benefits from introducing ISDS provisions in international agreements. First and foremost, the case for investor-state arbitration lies in the strengthening of the rule of law — the quintessential feature of free markets and individual liberty, and indeed a cornerstone to human prosperity since 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, who tend to be increasingly vocal in their demand for a law-based democratic system.
- Another important ISDS corollary regards 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, providing a safer environment that invariably ends up benefiting both importers and exporters of capital.

ISDS in Australia's Politics and International Agreements

- Australia has agreed to ISDS protection in 21 bilateral investment treaties and seven free trade agreements. 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.
- In the past 30 years since Australia's first ISDS-protected treaty, 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 in three occasions indeed providing a neutral and de-politicised forum to assert a just treatment to Australian interests overseas.
- Domestically, 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.

ISDS Cases initiated by Australian Investors

- White Industries Australia Limited v. The Republic of India (2010)
- Planet Mining Proprietary Limited v. Republic of Indonesia (2012)
- Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan (2012)

ISDS Case against the Australian Government

- Philip Morris Asia Limited v. The Commonwealth of Australia (2011)

Table 2: 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

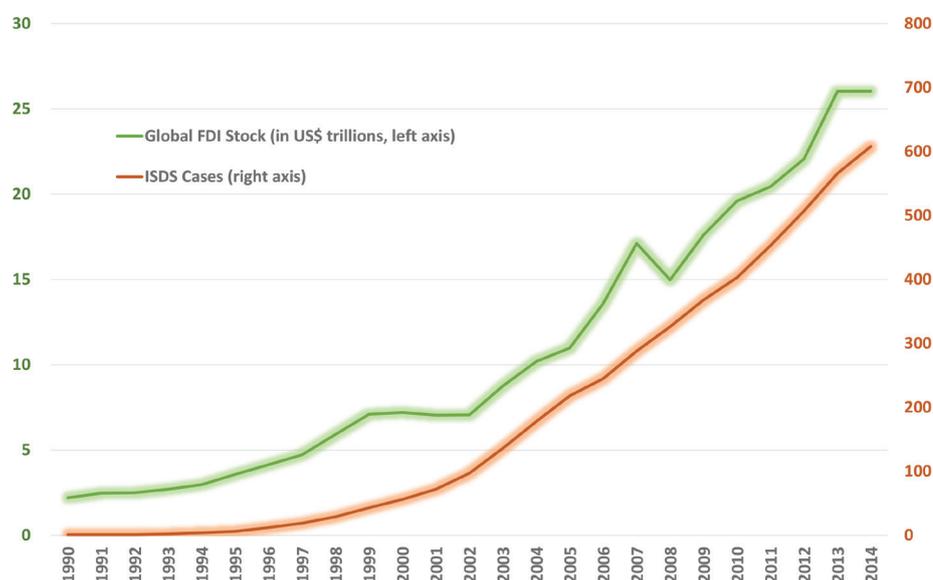
Source: Australia’s Department of Foreign Affairs

NB. 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.

ISDS in the World

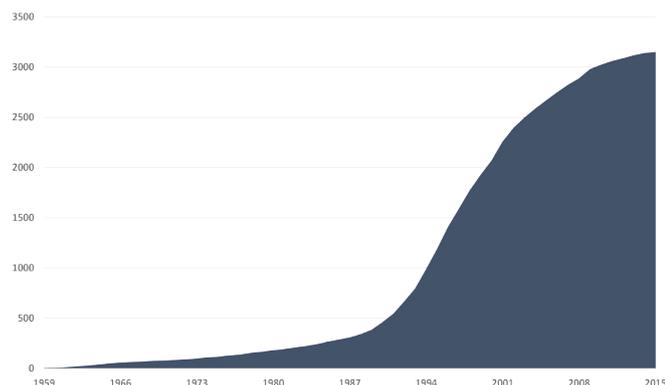
- The first ISDS agreement was signed in 1959 between Germany and Pakistan. Since then, investment-protected international treaties have been gaining pace worldwide, from less than 500 agreements in 1990 to 2184 in 2000 to 3509 at the start of 2016.
- Likewise, as globalised capital flows and international investment agreements proliferate, ISDS cases have accelerated since the turn of the millennium. From close to 100 proceedings initiated before 2003, the total amount of known ISDS cases is currently 608.
- Although most ISDS claims are brought against non-developed governments, the incidence of developed states responding in investor-state arbitrations is rising, currently accounting for almost a third of all cases.
- Of the total 362 currently concluded ISDS cases, the great majority were ruled either in favour of the state or by consensual settlement.

Figure 4: Globalisation and ISDS Cases



Source: UNCTAD; Author’s calculations.

Figure 1: Investment-Protected International Agreements



Source: UNCTAD; Author's calculations.

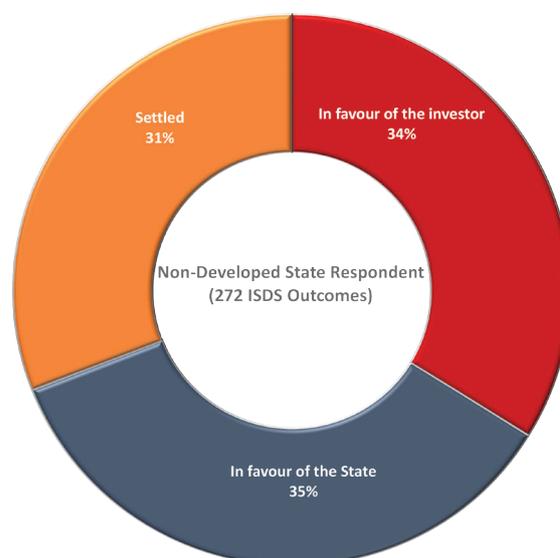
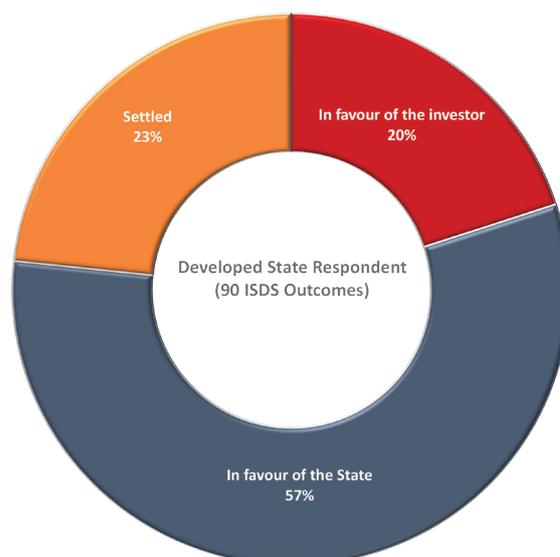
Table 1: Most Frequent Respondents and Claimants in ISDS Cases (number of cases within brackets)

	State Respondents	Home State Claimants
1	Argentina (56)	United States (134)
2	Venezuela (36)	Netherlands (70)
3	Czech Republic (29)	United Kingdom (49)
4	Egypt (24)	Germany (42)
5	Canada (23)	Canada (35)
6	Ecuador (21)	France (35)
7	Mexico (21)	Spain (28)
8	India (16)	Italy (27)
9	Ukraine (16)	Switzerland (19)
10	Poland (15)	Luxemburg (19)
11	United States (15)	Turkey (18)
12	Kazakhstan (14)	Belgium (14)
13	Spain (14)	Austria (13)
14	Hungary (13)	Cyprus (13)
15	Slovakia (12)	Russia (12)

Source: UNCTAD; Author's calculations.

NB. Cases started by investors from more than one country are counted for each country.

Figure 7: ISDS Arbitration Outcome by development status of state respondents



Source: UNCTAD; Author's calculations.

NB. ISDS arbitration outcomes do not account for discontinued cases or treaty breaches with no monetary compensation awarded.

Author

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