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Investor State Dispute Settlement (ISDS) Benefits Both Investors and States

◆ Concerns with ISDS are being addressed

Canada and the EU are currently among the most active negotiators of “second generation” trade agreements that include, *inter alia*, investment-related chapters, such as provisions for Investor State Dispute Settlement (ISDS), conducted through independent tribunals. Negotiated investor rights date back to the 1950s, but have traditionally taken the form of bilateral investment treaties (BITs), of which Canada’s 30 represent a relatively modest share of the global 2,900. The more recent shift to mega-regional, second generation trade agreements — including NAFTA, the Trans-Pacific Partnership (TPP) and the Canada-EU Comprehensive Economic and Trade Agreement (CETA) — has cast a public spotlight on investor protection as the large number of participants contribute to an “up-scaling” of the global investment environment. For example, Canada’s current trade negotiations involve close to 60 countries, twice its existing BITs; while, more illustrative, Asia’s current Regional Comprehensive Economic Partnership (RCEP) negotiations, which include ASEAN, China, India and Japan, will impact almost half the world’s population.

In line with the expansion of BITs and second-generation trade agreements, the number of instances where investors sue governments pursuant to ISDS provisions over alleged breaches of their rights is ballooning. In 2013, investors initiated 57 ISDS cases, slightly below the previous year’s all-time record high of 59 cases. Three cases were filed by US investors under NAFTA, naming Canada’s federal government as the respondent. From a few isolated cases in the late 1980s and early 1990s, by 2013, a total of 98 states have been respondents to a cumulative total of 568 cases (including 51 NAFTA cases).

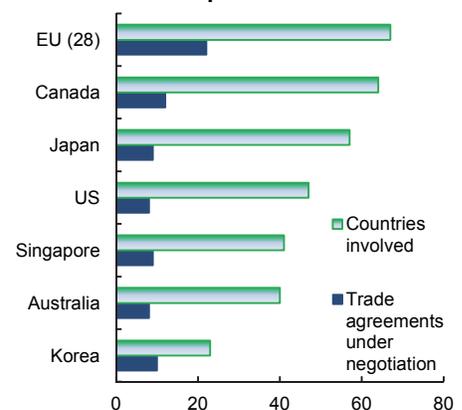
Impacted transnational societies, including environmental and consumer groups, are scrutinizing the emerging globalized investment regime. Their concern that ISDS is the tool of multi-nationals to undercut food safety standards, public health, labour and environmental protections in the name of profit was amplified when the EU launched a public consultation in March 2014. German government concern over ISDS during the summer revealed complex procedural and substantive issues, though German officials have subsequently indicated that the differences have been resolved.

ISDS is here to stay

A review of all ISDS cases suggests that the outcomes are reasonably balanced and benefit both investors and states:

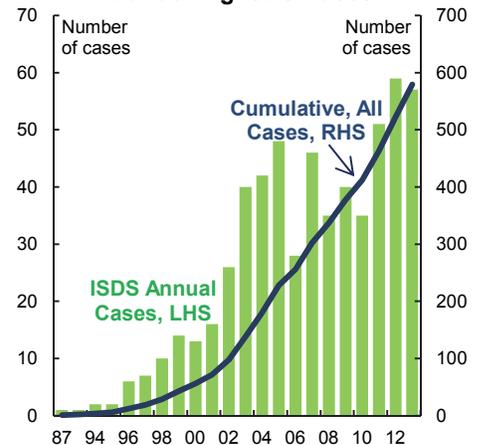
- ◆ Investors don’t shape public policy: Based on all 274 settled ISDS cases, governments prevailed in 43% of cases, investors in 31%, while 26% were settled outside of arbitration before a verdict was handed down. In those instances where investors won, cash compensation has been as high as USD \$935 million, but there is no pattern of investors being able to reverse public policy and/or regulatory decisions.
- ◆ ISDS may be pro-environment: Of the 57 ISDS cases initiated in 2013, close to a quarter involved claims by investors in renewable energy against the governments of Spain (6 cases) and the Czech Republic (7 cases). At issue

Top Current Negotiators of Investor Protection Chapters in Trade Pacts*



* Does not include BITs. Source: UNCTAD.

Ballooning ISDS Cases



Source: UNCTAD.

are allegations that both governments modified incentive regimes previously put into place to attract large investments, rendering them subsequently non-viable.

- ◆ **Greater north-south balance:** In 2013, of the 57 new ISDS cases, about 50% name developed sovereigns as respondents — a significant change from the cumulative historic record which saw 73% of all ISDS cases naming developing states as respondents.

Investors are pre-dominantly from developed economies, with the EU and the US accounting for 75% of all ISDS cases. EU claimants rank first, with 299 (or 53%) of all ISDS cases, and US claimants second, with 127 cases (or 22%). In 2013, of 57 ISDS cases initiated by investors:

- ◆ 45 (or 79%) were brought by investors from developed countries and 12 from developing countries.
- ◆ 24 (or 42%) were intra-EU, pitting EU investors against EU governments, with German investors ranking as the second largest user of ISDS (one case behind the Netherlands).

Significantly, Germany's 196 investor protection agreements (which includes its BITs) make it the world's leader in negotiated investor protection rights.

Concerns with ISDS are being addressed

The German government's concerns with CETA's ISDS provisions highlight legitimate issues that are being addressed. Some of these concerns have little to do with the substance of ISDS and more with the EU process of administering ISDS. Indeed, CETA was the first agreement with an investment chapter that the EU ever negotiated (having obtained jurisdiction over EU investment policy in 2009 through the Lisbon Treaty). Under the internal EU mechanism, investor settlements are paid out of the EU's budget, to which Germany is by far the largest contributor, raising Chancellor Angela Merkel's concern that ISDS is just another tool to make Germany the "paymaster for Europe".

Chancellor Merkel's opposition to ISDS was welcomed by Deputy Chancellor, Sigmar Gabriel, who represents the left-leaning Social Democrats in Germany's Grand Coalition and who took up the cause of the popular opposition to ISDS. Gabriel's position has highlighted a number of substantive concerns with ISDS that are being addressed and should strengthen ISDS while it remains in the limelight of public scrutiny. Specifically, ISDS is being recast along the following dimensions:

- ◆ To promote sustainable development by including, often in the preamble, the commitment of all parties to protect human, animal and plant life, while conserving exhaustible resources;
- ◆ To recognize that investment attraction cannot be achieved through the relaxation of health, safety and labour laws;
- ◆ To reconcile high standards of investor protection with the right of governments to regulate in the public interest by including specific carve-outs — for example, treaty scope can be limited to exclude prudential regulatory measures that governments and/or bank regulators might take to promote financial stability;
- ◆ To ensure ISDS cases are transparent and fully accessible to public scrutiny; and
- ◆ To further enhance investor interests with measures such as expedited arbitration processes for investors selling perishable items.

These reforms are fully compatible with the core objectives of ISDS to protect investors from expropriation, discrimination, and from unfair and inequitable treatment. These changes should strengthen the global investment environment, supporting efficient capital allocation and economic growth.

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