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# Investor State Arbitration – the Australian Perspective

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# Overview

- ▶ Investor State Dispute Settlement – what is it
- ▶ Some Australian Statistics
- ▶ History of investor-state arbitration in Australia's politics
- ▶ Parliamentary Committee on TPP
- ▶ Known instances of Australian companies / investors bringing Investor-State Dispute Settlement Proceedings (not including those in consultation phase)
- ▶ Australia as a respondent in ISDS proceedings – plain packaging matter
- ▶ The focus of debates in Australia on ISDS



# Investor State Dispute Settlement

- ▶ Investor State Dispute Settlement (ISDS) is a mechanism that enables foreign investors to resolve disputes with the government of the country where their investment was made in a neutral forum through binding international arbitration.
- ▶ ISDS agreements are most commonly found in international treaties between states, but may also be found in domestic legislation and contracts. These instruments typically set out the substantive protections or obligations to which foreign investors are entitled, breach of which gives rise to a right to bring a claim directly against the host state.



# Some Australian Statistics – which countries invest in Australia

(based on ABS catalogue 5352.0, last updated July 2017) (A\$ billion dollars)

Rank in 2016	Country	2014	2015	2016	% of total	% change 2015 to 2016	5-year trend % growth
1	United States	782.6	877.5	860.9	27.0	-1.9	10.9
2	United Kingdom	477.7	482.6	515.5	16.1	6.8	3.4
3	Belgium	225.8	247.1	270.1	8.5	9.3	56.1
4	Japan	181.2	200.8	213.5	6.7	6.3	10.4
5	Hong Kong (SAR of China)	74.1	85.9	100.9	3.2	17.5	17.7
6	Singapore	87.4	98.8	98.9	3.1	0.2	14.9
7	China	66.4	75.9	87.2	2.7	15.0	37.9
8	Netherlands	58.2	66.3	74.7	2.3	12.6	14.7
9	Luxembourg	59.0	59.9	74.0	2.3	23.7	15.7
10	Switzerland	50.5	54.2	59.1	1.9	9.1	2.8
11	New Zealand	36.6	39.7	46.2	1.4	16.4	10.9
12	Canada	36.0	38.2	42.6	1.3	11.4	10.0
13	Germany	40.5	41.0	38.8	1.2	-5.4	16.1
14	France	21.4	22.3	28.3	0.9	26.9	7.2
15	Bermuda	31.0	25.1	27.2	0.9	8.4	37.8
16	Ireland	16.3	20.5	26.1	0.8	27.4	45.6
17	British Virgin Islands	19.9	22.9	24.2	0.8	5.7	..
18	Republic of Korea	21.7	23.4	23.6	0.7	0.9	14.7
19	Malaysia	21.0	20.4	20.5	0.6	0.1	6.9
20	Norway	13.2	13.5	15.8	0.5	16.6	29.6



# Some Australian Statistics – Where Does Australia Invest

(based on ABS catalogue 5352.0, last updated July 2017) (A\$ billion dollars)

Rank in 2016	Country	2014	2015	2016	% of total	% change 2015 to 2016	5-year trend % growth
1	United States	574.9	606.9	617.4	28.4	1.7	10.5
2	United Kingdom	329.7	351.6	350.5	16.1	-0.3	13.5
3	Japan	70.1	94.1	108.3	5.0	15.1	27.3
4	New Zealand	99.1	97.8	106.9	4.9	9.3	8.2
5	China	57.7	70.5	87.9	4.0	24.6	41.2
6	Germany	65.5	67.3	65.8	3.0	-2.2	9.6
7	Singapore	49.5	64.1	61.5	2.8	-3.9	25.0
8	France	42.3	46.4	55.1	2.5	18.7	15.0
9	Cayman Islands	39.2	49.2	53.2	2.5	8.1	23.1
10	Hong Kong (SAR of China)	46.3	48.5	52.9	2.4	9.2	20.4
11	Canada	42.4	42.4	42.4	2.0	0.0	-1.5
12	Netherlands	38.1	39.7	42.1	1.9	6.1	9.0
13	Switzerland	26.7	19.9	20.5	0.9	2.7	1.7
14	Papua New Guinea	18.9	18.2	18.0	0.8	-1.1	1.4
15	Luxembourg	17.3	17.7	17.6	0.8	-0.5	1.6
16	Republic of Korea	15.5	15.2	17.4	0.8	14.2	..
17	Bermuda	9.4	14.6	16.5	0.8	13.1	8.7
18	Ireland	9.2	9.9	12.9	0.6	29.9	25.1
19	India	9.8	10.7	10.3	0.5	-3.0	..
20	Sweden	7.2	7.6	9.3	0.4	21.2	15.6
	All countries	1,926.0	2,078.5	2,170.8		4.4	11.5



## Some Australian Statistics – ISDS protected IPPA (all 21 agreements contain ISDS provisions)

Australia's ISDS – Protected Agreements - Investment Protection and Promotion Agreements (IPPA)		
Signed In	Entry into Force	IPPA 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



# Some Australian Statistics – ISDS Protected FTAs (7 out of 11 FTAs)

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



# History of Investor – State Arbitration in Australia – the Hawke / Keating Era

- ▶ First wave of Australia's ISDS-protected agreements - Australia signed ISDS protected agreements with China, Papua New Guinea, Vietnam, Poland, Hungary, Indonesia, Romania, Hong Kong, Czech Republic, Laos, Philippines, Argentina and Peru.
- ▶ Vague language with few qualifications.
- ▶ All contain similar languages, providing broadly for fair and equitable treatment, most favoured nation provision, no nationalisation, expropriation, or measures having effect equivalent to nationalisation or expropriation unless the following conditions are complied with: (a) the expropriation is for a public purpose related to the internal needs of that contracting party and under due process of law; (b) the expropriation is non-discriminatory; and (c) the expropriation is accompanied by the payment of prompt, adequate and effective compensation
- ▶ Provide for the option for ISDS, commonly with ICSID being the first arbitral forum of choice





# History of Investor – State Arbitration in Australia – the Howard Era

- ▶ Signed further bilateral agreements with Pakistan, Lithuania, India, Egypt, Uruguay, Sri Lanka, Turkey and Mexico. Same vague wording.
- ▶ Also signed free trade agreements with Singapore and Thailand – containing ISDS-protected investment chapters with new features that better qualified the right of foreign investors to seek reparation.
- ▶ The Thailand-Australia Free Trade Agreement (TAFTA) is one of two FTAs that Australian businesses can use to trade with Thailand. As a member of ASEAN, Thailand is also part of the [ASEAN-Australia-New Zealand Free Trade Agreement \(AANZFTA\)](#)
- ▶ The TAFTA exempts government grants, subsidies and procurement matters from investor-state disputes. Also exempt decision of foreign investment authority in relation to, or conditions placed on, the establishment, acquisition or expansion of an investment by an investor, or in relation to the enforcement of any such conditions.
- ▶ Disputes (after consultations) may, at the choice of the investor, be (a) submitted to the competent judicial or administrative body of the Party; or (b) resolved by an ad hoc arbitral tribunal established under the UNCITRAL Arbitration Rules



# History of Investor – State Arbitration in Australia – the Howard Era

- ▶ After the SAFTA and TAFTA, ISDS provisions were dropped from the Australia-United Free Trade Agreement (AUSFTA)
- ▶ The official line for not adopting ISDS provisions in AUSFTA was that “Reflecting the fact that both countries have robust, developed legal systems for resolving disputes between foreign investors and government, the agreement does not include any provisions for investor-state dispute settlement.”



# History of Investor – State Arbitration in Australia - The Rudd-Gillard-Rudd Era

- In 2007, the ALP (Rudd) rose to federal government. During the Rudd-Gillard-Rudd era, the attitudes of the federal government toward ISDS moved from initial support to outright rejection.
- The Australia-Chile Free Trade Agreement signed in 2008 was the most advanced ISDS protected agreement in Australia up to that point, and included a list of new features in accordance with the most recent investment agreements worldwide.
- Some of the key features include: no U-turn clause; financial compensation nature of awards and qualification of indirect expropriation.
- However, no other ISDS protected agreement was signed by Australia until the end of the Rudd-Gillard-Rudd labour government. Worse, during the Gillard administration, the Australian official policy on ISDS provisions in future agreements became one of outright rejection.



# The Rudd-Gillard-Rudd Era II

- On April 12 2011, the Australian Government released a Trade Policy Statement condemning the purpose of investor-state arbitration:

“The Gillard Government...does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings on plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme. In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.”



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# History of Investor – State Arbitration in Australia – the Current Coalition Government

- ▶ The coalition government successfully fast-tracked and concluded five free trade agreement negotiations – Japan (2014), Korea (2014), ASEAN countries and New Zealand (2014), China (2015) and the Trans-Pacific Partnership members (2016).
- ▶ Out of these agreements, the Japan-Australia FTA excluded ISDS arrangements, although the same protection was included in the TPP agreement.



# Parliamentary Committee on TPP

- ▶ The Joint Standing Committee on Treaties reviewed treaty action on TPP that are applicable to all free trade agreements. Relevantly, this includes ISDS provisions, where concerns were focussed almost exclusively on the risk the ISDS provisions posed to Australia's ability to make public interest regulatory decisions.
- ▶ The Committee is of the opinion that the benefits for Australian investors from agreements that include ISDS have been largely ignored in the debate about ISDS. The debate about ISDS provisions is consequently unbalanced
- ▶ The Committee recognised that ISDS provisions are an established and evolving part of an international investment environment and that under the TPP ISDS provisions, Australian investors have more to gain than the Australian Government and the Australian people have to lose



## Known cases of Australian companies bringing ISDS proceedings – not including those in consultation stage

- ▶ Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v Republic of Timor-Leste, ICSID Case No. ARB/15/2, registered 14 January 2015, based on private contract;
- ▶ African Petroleum Gambia Limited (Block A1) v Gambia, ICSID Case No. ARB/14/6, registered 12 March 2014, based on private contract;
- ▶ African Petroleum Gambia Limited (Block A4) v Gambia, ICSID Case No. ARB/14/7, registered 12 March 2014, based on private contract;
- ▶ Tullow Uganda Operations Pty Ltd and Tullow Uganda Limited v Uganda, ICSID Case No. ARB/13/25, registered 26 September 2013, based on private contract;
- ▶ Tullow Uganda Operations Pty Ltd v Uganda, ICSID Case No. ARB/12/34, registered 31 October 2012, based on private contract



## Known cases of Australian companies bringing ISDS proceedings – not including those in consultation stage II

- ▶ Tethyan Copper Company Pty Ltd v Pakistan, ICSID Case No. ARB/12/1, filed 12 January 2012, based on Australia-Pakistan BIT
- ▶ Planet Mining Pty Ltd v Indonesia, ICSID Case No. ARB/12/40, registered 26 December 2012, based on Indonesia-Australia BIT (consolidated with Churchill Mining v Indonesia, ICSID Case No. ARB/12/14, registered 22 June 2012, based on Indonesia-UK BIT);
- ▶ Russell Resources International Limited et al v Democratic Republic of Congo, ICSID Case No. ARB/04/11, registered 6 April 2004, based on private contract (discontinued)
- ▶ Misima Mines Pty Ltd v Papua New Guinea, ICSID Case No. ARB/96/2, registered 29 April 1996 (discontinued under ICSID Arbitration Rule 44);
- ▶ White Industries Australia Limited v India, UNCITRAL, filed in 2010, based on Australia-India BIT





# Australia as a respondent in ISDS proceedings – plain packaging matter

- ▶ On 21 November 2011, Philip Morris Asia Limited filed a claim for arbitration under UNCITRAL Rules against Australia. Philip Morris Asia claimed that Australia's plain packaging laws on cigarettes constituted unlawful expropriation in breach of Article 6 of the Australia-Hong Kong BIT.
- ▶ The company also contended that the legislation infringed Australia's commitment to accord fair and equitable treatment to Philip Morris Asia's investments, and that such legislation also constituted an unreasonable and discriminatory measure depriving Philip Morris Asia's investments from full protection and security.
- ▶ 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.



# Focus of debate in Australia on ISDS

- ▶ Does ISDS encourage investments;
- ▶ Is ISDS a threat to Australia's sovereignty
- ▶ Reform of systems (appeal, transparency etc.)



# Questions?



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