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Fact sheet on Investor-State Dispute Settlement (ISDS)

MYTH: *ISDS supporters claim that it is an independent and impartial international arbitration system which foreign investors can use against nationalisation or discriminatory actions against them by governments.*

FACT: ISDS was originally designed to compensate for nationalisation or expropriation of property by governments. But ISDS has developed concepts like “indirect” expropriation which do not exist in national legal systems. These enable foreign investors to sue governments for millions and even billions of dollars of damages or compensation if they can argue that a change in law or policy has “harmed” their investment.

Many [experts](#) including [Australia’s High Court Chief Justice French](#) and the [Productivity Commission](#) have noted that ISDS is not independent or impartial and lacks the basic standards of national legal systems. ISDS has no independent judiciary. Arbitrators are chosen from a pool of investment law experts who can continue to practice as investment law advocates. In Australia, and most national legal systems, judges cannot continue to be practising lawyers because of obvious conflicts of interest.

ISDS has no system of precedents or appeals, so the decisions of arbitrators are final and can be inconsistent. In Australia, and most national legal systems, there is a system of precedents which judges must consider and appeal mechanisms to ensure consistency of decisions.

ISDS arbitrators and advocates are paid by the hour, which prolongs cases at government expense. Even if a government wins the case, a 2012 [OECD study](#) found ISDS cases last for 3 to 5 years and the average cost is US\$8 million per case, with some cases costing up to US\$30 million.

In short, ISDS is an enormously costly system with no independent judiciary, precedents or appeals, which gives increased legal rights to global corporations which already have enormous market power, based on legal concepts not recognised in national systems and not available to domestic investors.

MYTH: *Australians have nothing to fear from ISDS. Australia has 21 bilateral investment agreements and other trade agreements with Singapore, Thailand, Chile and ASEAN countries which include ISDS. There has been only one case brought against Australia by the Philip Morris tobacco company over plain packaging legislation, and further cases are unlikely.*

FACT: Many ISDS cases are conducted in secret, but the most comprehensive figures on known cases from the [United Nations Committee on Trade and Development](#) show that there has been an explosion of known ISDS cases in the last 20 years, from less than 10 in 1994 to 300 in 2007 and 608 in 2014, of which 80% come from global corporations based in the US and Europe. US-based companies are by far the most frequent users, with twice as many cases as the country of the next largest users. Most cases are [won by investors](#). There are increasing numbers of cases against health, environment and other public interest

legislation. Tobacco companies are [systematically using ISDS](#) cases against Australia and Uruguay to undermine public health regulation of tobacco advertising.

The main reason the Australian government has not experienced more ISDS cases is that Australia's agreements containing ISDS are with developing countries, which do not have the giant corporations with the resources to launch cases. After a public debate about the experience of US companies using ISDS to sue Canada and Mexico in the North American Free Trade Agreement, the Coalition Howard government refused to include ISDS in the US-Australia free trade agreement in 2004. That is why the US [Philip Morris tobacco company](#) had to move some assets to Hong Kong and claim to be a Hong Kong company so that it could use ISDS in a Hong Kong-Australia investment agreement to sue for billions of dollars. This case has been ongoing for 4 years and has already delayed the [New Zealand](#) government from proceeding with similar legislation.

The inclusion of ISDS in recent agreements with South Korea and China, and the proposal to include it in the Trans-Pacific Partnership (TPP) are especially dangerous because South Korea and China now have international corporations capable of launching cases, and the TPP includes the US, whose corporations are the most frequent user of ISDS. This means Australia is far more likely to face more ISDS cases.

***MYTH:** ISDS leads to greater levels of foreign investment and is good for the economy.*

FACT: The recent [Productivity Commission](#) study of ISDS found that there is no evidence that ISDS increases levels of foreign investment, or has any economic benefits. The study recommended against the inclusion of ISDS in trade or investment agreements on the grounds that it poses "considerable policy and financial risks" to governments. This is why the previous ALP government had a policy against ISDS from 2011, and why many other governments, including [Germany](#), [France](#), [Brazil](#), [India](#), [South Africa](#) and [Indonesia](#) have policies against or are reviewing ISDS.

***MYTH:** Australian companies need ISDS to protect their investments in developing countries.*

FACT: There are only 3 known examples in which Australian companies have used ISDS, and two of these, [Planet Mining](#) and [Tethyan Copper](#) are subsidiaries of global corporations. Most Australian companies do not have the resources to launch ISDS cases. There are alternatives available to protect overseas investments, including [investment insurance and agreements for specific projects](#). There is no need to give international investors additional general powers to sue governments which are not available to domestic investors.

***MYTH:** More recent versions of ISDS clauses in trade agreements like the Korea-Australia FTA and the TPP have "safeguards" which would prevent cases from being brought against health, environment or public welfare legislation or policy.*

FACT: Recent ISDS "safeguards" for health, environment and other public welfare measures have not [prevented cases](#). The US-Peru FTA has similar general "safeguards" but this has not prevented the [Renco](#) lead smelting company from suing the Peruvian government over a court decision which ordered it to clean up and compensate for lead pollution. The US pharmaceutical company [Eli Lilly](#) is currently suing the Canadian government over a court decision which refused a patent for a medicine which was not sufficiently more medically effective than existing medicines. The US [Lone Pine](#) mining company is suing the Canadian government because the Québec provincial government conducted a review of environmental regulation of gas mining. The French [Veolia company](#) is suing the Egyptian government over a contract dispute in which they are claiming compensation for a rise in the minimum wage.

The latest [leaked TPP Investment Chapter](#) confirms that, despite general “safeguards”, foreign companies could sue the Australian government for damages over future decisions of key institutions like the Pharmaceutical Benefits Scheme, Medicare, the Therapeutic Goods Administration and the Office of the Gene Technology Regulator. The Government has sought to provide exemptions from ISDS for these specific institutions, but the bracketed text shows this has not been agreed (p. 55). If specific exemptions from ISDS are needed for them, this begs the question of what other Australian regulation could be exposed, including environmental and food regulation. The leaked [TPP Annex on pharmaceuticals](#) could also assist corporations with ISDS claims against the Pharmaceutical Benefits Scheme, and has been strongly criticised as a threat to affordable medicines by [the AMA](#) and other [health experts](#). The only way to prevent threats to these policies is to say no to ISDS in the TPP and other trade agreements.