

13 Myths about Investment Agreements and Investor-State Dispute Settlement (ISDS)



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Myth 1: ISDS is a novel and exotic way to settle investment disputes.

Fact: ISDS is neither new nor exotic. Provisions for international arbitration for the settlement of investment disputes have been included in approximately 3,000 investment treaties signed by scores of countries over the past four decades. ISDS allows for neutral arbitrators to enforce the basic rights of investors as established in investment agreements.

Myth 2: ISDS allows corporations to overturn laws and regulations.

Fact: Arbitrators in ISDS disputes have no power to overturn laws or regulations. On the contrary, they are charged with upholding the same kind of fundamental rule of law protections that appear in the U.S. Constitution. In the event a government has breached its obligations under an investment treaty, the only recourse ISDS arbitrators can provide is to require compensation to the investor for losses incurred.

Myth 3: ISDS heightens the taxpayer's jeopardy in investment disputes.

Fact: If the United States were to engage in discriminatory or unfair actions against foreign investors, an arbitral panel might require compensation. However, of the 22 ISDS cases brought against the United States over the past 30 years, the United States has never lost a case. Foreign investors in the United States are far more likely to seek redress via U.S. domestic courts than ISDS because U.S. law affords greater protections to assure fair and equitable treatment of foreign investors than any international investment treaty. This reality incentivizes foreign investors to seek redress in domestic courts whenever possible. The U.S., state, and local governments routinely pay compensation and awards in domestic court cases to both domestic and foreign investors in such disputes. In fact, the federal government judgment fund paid out more than \$3 billion in 2014 to settle cases or pay judgments in domestic litigation while it has never paid a dollar in an ISDS case.

Myth 4: ISDS isn't necessary because domestic courts can handle investment disputes.

Fact: As noted, foreign investors in the United States usually have good reasons to take their disputes to U.S. courts and not ISDS. However, domestic law in other countries at times provides inadequate protections for U.S. investments; for instance, it often fails to bar discrimination against foreign investors on the basis of their nationality. This important national treatment obligation, which is a hallmark of investment agreements, would be meaningless without an enforcement mechanism such as ISDS.

Myth 5: Use of ISDS is exploding.

Fact: Few disputes are brought to arbitration under ISDS. According to UNCTAD, a total of 512 investor-state disputes were filed between 1987 and 2012. This is a remarkably small number of disputes given that:

- The stock of foreign direct investment worldwide is estimated at \$25.5 trillion;
- The number of investment agreements worldwide is approximately 3,000; and
- A 25-year period was examined.

In fact, Susan Franck of the Washington and Lee University School of Law found that the ISDS provisions of 97% of all BITs have never been used.

Myth 6: ISDS gives investors the whip hand.

Fact: Under ISDS, investors usually lose. One-third of disputes end in a settlement, and governments win twice as often as investors in cases that go to arbitration. Even when an investor prevails, the compensation awarded tends to be a small fraction of the amount originally sought.

Myth 7: ISDS limits governments' ability to regulate.

Fact: ISDS does not limit the ability of governments to issue regulations to protect public health, the environment, and worker and consumer safety. The commitments governments make in investment agreements are straightforward: Governments agree (1) not to discriminate on the basis of the nationality of the investor; (2) to afford fair and equitable treatment and full protection and security; (3) to expropriate an investment only for a public purpose, with due process and upon payment of prompt, adequate, and effective compensation; and (4) to guarantee freedom of transfers related to an investment.

Myth 8: ISDS confers special rights for corporations.

Fact: There is nothing “special” about ensuring fair treatment of cross-border investment under international law or arranging for neutral arbitration of a dispute. Moreover, since 2004, the U.S. Model BIT has expressly stated that investment agreements do not create greater rights for foreign investors than those enjoyed by domestic investors.

Myth 9: ISDS undermines sovereignty.

Fact: Investment treaties are an expression of sovereignty, not a limitation on it. Governments always retain the right to impose non-discriminatory measures to protect public health, the environment, and worker and consumer safety, and ISDS panels cannot overturn those regulations.

Myth 10: ISDS lets multinational corporations sue governments any time they fail to make a profit.

Fact: Investment agreements and ISDS uphold standards of fairness, not profits. If a government breaches obligations it has undertaken in an investment agreement, an arbitration panel may award compensation for harm to investments. Breaches of an investment agreement occur only where there is corrupt, biased, or arbitrary application of regulation that harms an investment. Further, arbitration panels have an exemplary track record of determining appropriate levels of compensation. According to Public Citizen—an organization that actively cultivates fear of international investment agreements—the average recovery is approximately 15% of the original claim in instances in which the investor prevailed.

Myth 11: ISDS is just for big business.

Fact: Most ISDS cases are not brought by big companies. The OECD has found that only 8% of the all ISDS claims were brought by multinational corporations. Rather, the companies that bring ISDS cases tend to be small businesses seeking protection against discrimination and other unfair practices.

Myth 12: Arbitration under ISDS is conducted in secret tribunals.

Fact: There is nothing secret about investor-state arbitration. Proceedings are open and documents are available to the public under rules established in U.S. investment treaties. Interested parties such as environmental organizations and public interest organizations can and do file amicus submissions.

Myth 13: Pending ISDS cases promise shocking outcomes.

Fact: The arguments of anti-ISDS activists tend to rely on hypothetical scenarios or cases that have been initiated but not yet decided. By contrast, the real-world record shows that when a government has acted in a non-discriminatory manner and affords investors due process, it always wins.