

Investor-State Dispute Settlement: Thinking Forward

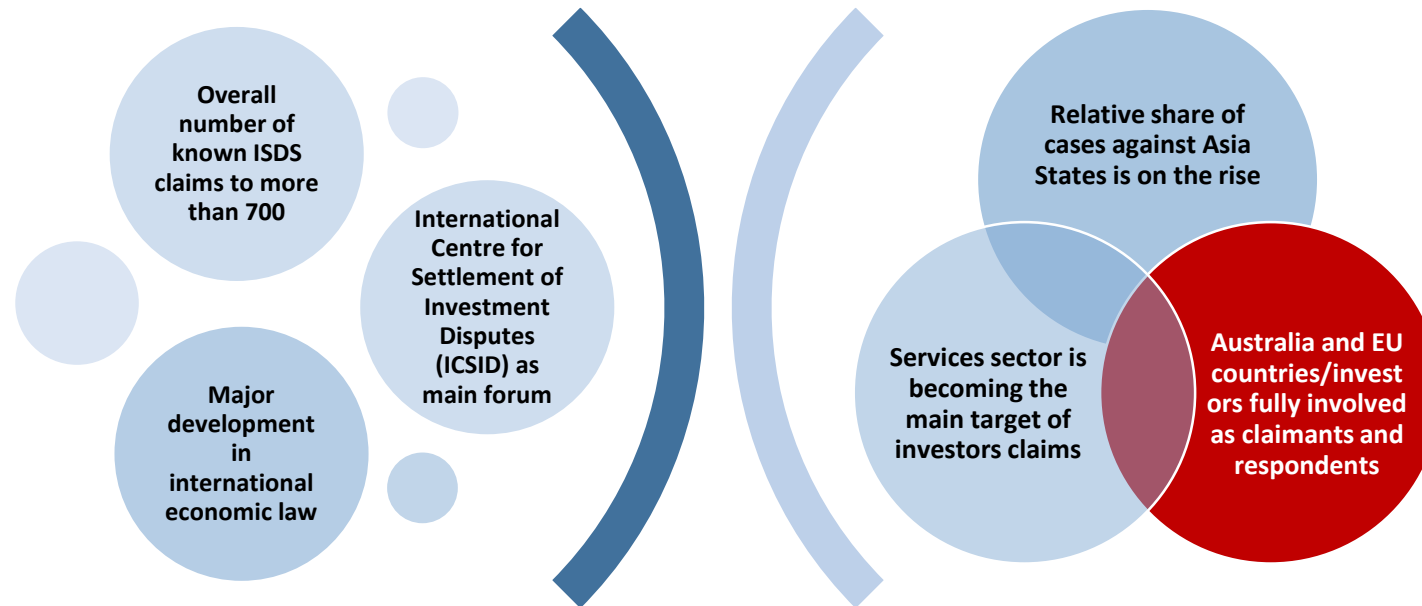
Julien Chaisse

‘FULFILLING THE VISION” EU FUTURES?’

Tuesday, 17 October 2017

Session 5A Towards an Australia/EU FTA 14:30 – 16:00

Investor-state dispute settlement (ISDS)



Key questions

What should
be the ISDS
mechanism
in Australia-
EU FTA?

Getting the facts straight:
Australia and EU practices –

What is the practical significance
of the investment chapter (and
ISDS) in EU-Australia FTA?

Drivers and (*latest*) determinants
of ISDS exclusion/inclusion in
Australia-EU FTA -

- Getting the facts straight: Australia and EU practices -

23 Australia's bilateral investment treaties

TITLE OF AGREEMENT	STATUS	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE	SIDE INSTRUMENTS
Australia - China BIT (1988)	In force	11/07/1988	11/07/1988	No
Australia - Papua New Guinea BIT (1990)	In force	03/09/1990	20/10/1991	No
Australia - Viet Nam BIT (1991)	In force	05/03/1991	11/09/1991	No
Australia - Poland BIT (1991)	In force	07/05/1991	27/03/1992	No
Australia - Czech Republic BIT (1991)	Terminated	29/07/1991		No
Australia - Hungary BIT (1991)	In force	15/08/1991	10/05/1992	No
Australia - Indonesia BIT (1992)	In force	17/11/1992	29/07/1993	No
Australia - Romania BIT (1993)	In force	21/06/1993	22/04/1994	No
Australia - Hong Kong, China SAR BIT (1993)	In force	15/09/1993	15/10/1993	No
Australia - Czech Republic BIT (1993)	In force	30/09/1993	29/06/1994	No
Australia - Lao People's Democratic Republic BIT (1994)	In force	06/04/1994	08/04/1995	No
Australia - Philippines BIT (1995)	In force	25/01/1995	08/12/1995	No
Argentina - Australia BIT (1995)	In force	23/08/1995	11/01/1997	No
Australia - Peru BIT (1995)	In force	07/12/1995	02/02/1997	No
Australia - Chile BIT (1996)	Terminated	09/07/1996	18/11/1999	No
Australia - Pakistan BIT (1998)	In force	07/02/1998	14/10/1998	No
Australia - Lithuania BIT (1998)	In force	24/11/1998	10/05/2002	No
Australia - India BIT (1999)	In force	26/02/1999	04/05/2000	No
Australia - Egypt BIT (2001)	In force	03/05/2001	05/09/2002	No
Australia - Uruguay BIT (2001)	In force	03/09/2001	12/12/2002	No
Australia - Sri Lanka BIT (2002)	In force	12/11/2002	14/03/2007	No
Australia - Turkey BIT (2005)	In force	16/06/2005	29/06/2009	No
Australia - Mexico BIT (2005)	In force	23/08/2005	21/07/2007	No

5 Australia's bilateral investment treaties with EU countries

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Title of FTAs	Investment rules	ISDS	ISDS features
ASEAN and New Zealand (AANZFTA)		Yes	
Chile		Yes	
China		Yes, but	ISDS claim under ChAFTA can only be made on the basis of a breach of either Party's obligation to provide non-discriminatory ("national") treatment to established investments of the other Party.
Gulf Cooperation Council (GCC)		negotiations	
India (CECA)		negotiations	
Indonesia		negotiations	
Japan	market access outcomes, JAEPA provides enhanced protections and certainty for Australian investors in Japan, with provisions to ensure non-discrimination, and protection and security for investments.	No	In JAEPA, Australia and Japan agreed not to include an Investor-State Dispute Settlement (ISDS) mechanism. JAEPA does include a review clause which provides for future consideration of an ISDS mechanism.
Korea	KAFTA provides enhanced protections and certainty for Australian investors in Korea (and equally for Korean investors in Australia) with provisions to ensure non-discrimination, and protection and security for investments.	Yes	ISDS does not apply to decisions made concerning investments which are subject to review under Australia's foreign investment policy. And, procedural safeguards built into the ISDS mechanism, such as an expedited procedure to promptly dismiss frivolous claims.
Malaysia	BIT-like + work program	No	Malaysia–Australia FTA omitted ISDS, although that was meaningless in practice as ISDS remains available to enforce similar substantive rights under the 2009 ASEAN–Australia–NZ FTA.
New Zealand		No	
Regional Comprehensive Economic Partnership		negotiations	
Singapore		Yes	
Thailand		Yes	
EU		negotiations	
Trans-Pacific Partnership (TPP)		Yes	
United States		No	

Australia tormented approach towards ISDS

Australian government's stance on ISDS has undergone a number of dramatic turnabouts

- Since the initial controversy sparked by the first investment treaty claim to be commenced against Australia by Phillip Morris in 2011.
- History and/or partner countries don't provide strong indication what should be ISDS in EU-Australia

Lessons

- To date, Australia has adopted ISDS provisions in 5 FTAs (Chile, Singapore, Thailand, Korea and NZ-ASEAN).
- Australia also has ISDS provisions in 21 bilateral investment treaties, including with 6 EU MS.
- As TPP provides for ISDS and since there are 6 EU Bits, hard to imagine there won't be ISDS in EU-Australia...

- What is the practical significance of the investment chapter (and ISDS) in EU-Australia FTA? -

Which countries invest in 2016 in Australia?

Rank	Country	A\$b	% of total
1	United States	860.3	28.4
2	United Kingdom	499.9	16.5
3	Belgium	238.5	7.9
4	Japan	199.6	6.6
5	Singapore	98.6	3.3
6	Hong Kong (SAR of China)	85.4	2.8
7	China	74.9	2.5
8	Netherlands	63.0	2.1
9	Luxembourg	58.3	1.9
10	Switzerland	50.2	1.7
11	Germany	41.2	1.4
12	New Zealand	39.7	1.3
13	Canada	38.8	1.3
14	Bermuda	25.9	0.9
15	Republic of Korea	23.3	0.8
16	Virgin Islands, British	22.9	0.8
17	France	22.1	0.7
18	Malaysia	20.5	0.7
19	Ireland	18.4	0.6
20	Cayman Islands	13.8	0.5

EU total= 31.1%

Australia's rank in global foreign direct investment (inward stock, 2015)

Rank	Country	US\$b	% of total
1	United States	5,409.9	22.0
2	United Kingdom	1,662.9	6.8
3	Hong Kong (SAR of China)	1,549.8	6.3
4	China	1,085.3	4.4
5	Singapore	912.4	3.7
6	Brazil	754.8	3.1
7	Germany	743.5	3.0
8	France	729.1	3.0
9	Spain	721.9	2.9
10	Switzerland	681.8	2.8
11	Netherlands	664.4	2.7
12	Canada	631.3	2.6
13	Australia	564.6	2.3
14	Belgium	525.6	2.1
15	British Virgin Islands	511.4	2.1
16	Russian Federation	378.5	1.5
17	Italy	373.7	1.5
18	Ireland	369.2	1.5
19	Mexico	338.0	1.4
20	Sweden	321.1	1.3

EU total= 24.8%

Christian Bellak (2015)

Meta-study of 141 studies/papers analyzing BITs impact on FDI flows

- All papers suffer major flaws/bias

Bellak/Chaisse Bitset Index 4.20 (2015) take into account the specific provisions on 1,200 BITs

- Finer analysis of stimuli that generates FDI
- Numerous tests ongoing

R. Desbordes (2017)

Key findings

BITs and RTIAs can promote FDI if they **include specific provisions**:

- ▲ **BITs: investor-state dispute mechanism.**
- ▲ **RTIAs: anti-discrimination provision.**
- ▲ Other clauses do not seem to matter.

The **effects of these provisions are very general**, with no statistically significant difference across:

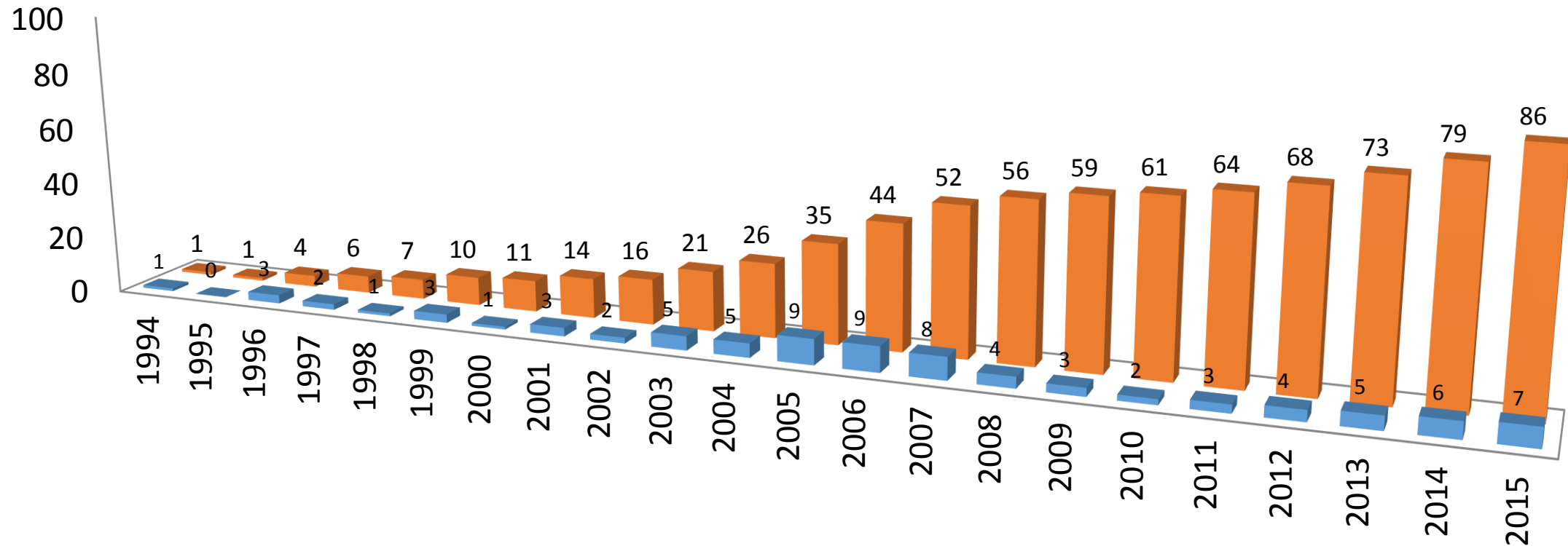
1. Dyadic directions (North-South, South-South...) or country characteristics.
2. Entry modes or destination sectors.

A 'PRO-FDI' BIT OR RTIA CAN BE EXPECTED TO INCREASE THE NUMBER OF FDI PROJECTS BY 35% AND 58% RESPECTIVELY.

Mimeo: ADB Conference June 14-15, 2017

Known investment treaty cases

EU Members as respondents (1994-Dec 2015)



*12% disputes involves EU
Member as RESPONDENT*

■ New Cases ■ Cumulative

Australia's (very positive) records

By contrast, Australia only sued once...

- Philip Morris Asia Limited v Australia, Award on jurisdiction and admissibility, PCA Case No 2012-12, IIC 777 (2015), 17th December 2015, Permanent Court of Arbitration [PCA]

Australian investors sued 5 times

- Churchill Mining PLC and Planet Mining Pty Ltd v Indonesia, Procedural Order No 14, ICSID Case No ARB/12/14, 12/40, IIC 663 (2014), 22nd December 2014, International Centre for Settlement of Investment Disputes [ICSID]
- Planet Mining Pty Ltd v Indonesia, Decision on jurisdiction, ICSID Case No ARB/ 12/40, IIC 635 (2014), 24th February 2014, World Bank; International Centre for Settlement of Investment Disputes [ICSID]
- Tethyan Copper Company Pty Limited v Pakistan, Decision on Claimant's request for provisional measures, ICSID Case No ARB/12/1, IIC 571 (2012), despatched 13th December 2012, International Centre for Settlement of Investment Disputes [ICSID]
- Tullow Uganda Operations Proprietary Company Limited and Tullow Uganda Limited v Uganda, Order taking note of the discontinuance of proceedings, ICSID Case No ARB/13/25, IIC 702 (2015), despatched 15th July 2015, World Bank; International Centre for Settlement of Investment Disputes [ICSID]
- White Industries Australia Ltd v India, Final award, IIC 529 (2011), 30th November 2011, Arbitration

- Drivers and determinants of ISDS exclusion/inclusion in Australia-EU FTA -

Where do we stand?

The notion of dispute settlement and, in particular, the possibility for a foreign investor to sue host-state does not seem a problem

Australia has come at age + positive records

EU never opposed and considerable offensive / defensive interests

Two main legal question relates to

Type of investor-state dispute settlement (court or arbitration)

Scope of investment chapter and possible claims

Recommendation September 13, 2017



Brussels, 13.9.2017
COM(2017) 472 final

Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations for a Free Trade Agreement with Australia

{SWD(2017) 292}
{SWD(2017) 293}

- No investment chapter (and no ISDS/ICS)
- While the proposals foresee the establishment of “an effective and binding dispute settlement mechanism”, there is no mentioning of ISDS/ICS.

European Commission's proposal

On 16 September 2015 the European Commission presented its draft proposal for a new Investment Court System to replace the investor-State dispute arbitration mechanism forming part of the proposed Transatlantic Trade and Investment Partnership ("TTIP").

TTIP fate uncertain but EU-Vietnam and EU-Canada include ICS

On 12 November 2015 the European Commission finalised this proposal and made it public, following extensive negotiations with the European Council, European Parliament, stakeholders and citizens.

- The proposal had been formally transmitted to the United States ("US").

Concluding remarks

Ball is now in the Member States' court.

Two main options:

- a) include FDI protection and state-to-state DS in the "EU-only" treaty;
- b) create separate mixed agreements for FDI and/or portfolio investment protection.

EU-Australia FTA focusing on exclusive competence to be completed soon (ASAP)

While other matters (including investment protection and ICS) are on a slow track



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