ISDS:
AN ENABLER OF CORPORATE CONTROL

JOSEPH PURUUGGANAN
FOCUS ON THE GLOBAL SOUTH
ISDS and Right to Regulate

The power to sue governments

97% of people said
"We do not want businesses to be able to sue our governments in corporate tribunals"

"No 2 ISDS"
<table>
<thead>
<tr>
<th>Policy being challenged</th>
<th>Case</th>
</tr>
</thead>
</table>
| Health                                                      | • Philip Morris vs Uruguay  
• Philip Morris vs Australia  
• Eli Lilly vs Canada                                                                                                   |
| Public services: delivery of water                          | • Bechtel vs Bolivia  
• Suez vs Argentina  
• Vivendi vs Argentina  
• Biwater Gauff v Tanzania                                                                                           |
| Bans on mining (due to environmental regulations)           | • Pacific Rim v El Salvador  
• Renco vs Peru  
• Churchill Mining vs. Indonesia  
• Infinito Gold vs. Costa Rica                                                                                         |
| Regulations aiming to improve labour rights (minimum wage, minimum hiring of locals) | • Veolia vs Egypt  
• Astaldi vs Honduras  
• Golden East vs Mongolia                                                                                             |
| Regulations regarding disposal of hazardous waste          | • Metalclad vs Mexico  
• Tecmed vs Mexico  
• Baird v USA                                                                                                          |
| Regulations to fight apartheid                              | • Piero Foresti vs South Africa                                                                                               |
| Environmental protection                                    | • Lone Pine Resources vs. Canada  
• Vattenfall v Germany  
• Methanex v. United States  
• Parkerings v. Lithuania  
• Glamis v. United States                                                                                              |
| Austerity measures (cuts to subsidies)                      | • 15 PV investors vs Spain  
• Charanne and Construction Investments vs Spain  
• Isolux Infrastructure Netherlands vs Spain  
• Abengoa / CSP Equity Investment vs Spain  
• Rreelf vs Spain  
• Antin vs Spain  
• Eiser Infrastructure vs Spain                                                                                         |
| Debt restructuring as a result of financial crisis          | • Poštová bank and Istrokapital vs Greece  
• Marfin Investment Group (MIG) vs Cyprus  
• Abaclat vs Argentina                                                                                                  |
Agriculture, forestry and fishing

• Crop and animal production, hunting and related service activities (19 cases)
• Forestry and Logging (8 cases)
• Fishing and aquaculture (5 cases)
Agro EcoEnergy v. Tanzania

Investment: Investment of the alleged USD 52 million in developing 20,000 hectares of land to grow sugar cane and produce ethanol.

Summary: Claims arising out of the cancellation by the Government, in 2016, of the claimants’ sugar cane and ethanol project on the grounds that it would have adverse impact on local wildlife.
CONSOLIDATION

1. INCREASING NUMBER OF CASES

MORE WARS
MORE CRISSES
MORE INVESTMENT DISPUTES
Figure 1. Trends in known treaty-based ISDS cases, 1987–2017

Annual number of cases

ICSID  Non-ICSID

Cumulative number of known ISDS cases 855

Source: UNCTAD, ISDS Navigator.
SPIKE IN 2015

• SPAIN - 19 CASES : ENERGY REFORMS
• RUSSIA - 7 CASES: 3 cases related to annexation of CRIMEA
• ITALY - 5 CASES: 3 CASES related to changes in tariff incentive policies on solar energy
<table>
<thead>
<tr>
<th>Category</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>855</td>
</tr>
<tr>
<td>Pending</td>
<td>297</td>
</tr>
<tr>
<td>Concluded</td>
<td>548</td>
</tr>
<tr>
<td>Unknown</td>
<td>10</td>
</tr>
</tbody>
</table>

**Concluded original arbitration proceedings**

- Decided in favour of State: 36.5%
- Decided in favour of investor: 27.9%
- Decided in favour of neither party (liability found but no damages awarded): 22.8%
- Settled: 10.4%
- Discontinued: 10.4%
Figure 4. Results of concluded cases, 1987–2017 (Per cent)

- Decided in favour of State: 37
- Settled: 23
- Decided in favour of investor: 28
- Breach but no damages*: 2
- Discontinued

Source: UNCTAD, ISOS Navigator.

*Decided in favour of neither party (liability found but no damages awarded).

Figure 5. Results of decisions on the merits, 1987–2017 (Per cent)

- Decided in favour of investor: 61
- Decided in favour of State: 39

Source: UNCTAD, ISOS Navigator.

Note: Excluding cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons), and (iv) decided in favour of neither party (liability found but no damages awarded).
CONSOLIDATION

1. INCREASING NUMBER OF CASES
2. Huge claims (damages) and how they push a pro-corporate policy environment
50 ISDS cases already filed against 11 RCEP countries.

More than India's entire health budget for 2015.

At least US$31 billion claimed by foreign investors.

Given the secrecy surrounding ISDS proceedings, this could be much more.

42% of ISDS cases are still pending.

36% of cases in RCEP concern the environment.

20 ISDS cases filed against India— the most in the region, by far.

Largest known amount agreed in favour of foreign investors: US$337 million (Cemex vs. Indonesia case).

Investors considered to have won 67% of cases against RCEP countries.

Over 20% of cases settled had limited or no information publicly available on legal fees or monies paid.
1. INCREASING NUMBER OF CASES
2. Huge claims (damages) and how they push a pro-corporate policy environment
3. Mega FTAs
RISE OF MEGA FTAS

TUG OF WAR

- Trans-Pacific Partnership (TPP)
- Regional Comprehensive Economic Partnership (RCEP)
- Both

Share of global GDP
- Trans-Pacific Partnership: 38%
- Regional Comprehensive Economic Partnership: 28%

Share of global trade
- Trans-Pacific Partnership: 40%
- Regional Comprehensive Economic Partnership: 29%

Share of global population
- Trans-Pacific Partnership: 11%
- Regional Comprehensive Economic Partnership: 50%
The Rise of the Mega FTAs
CRISIS

1. DEBATE OVER ISDS
2. PUBLIC BACKLASH

3. GOVERNMENT ACTIONS
THE CHALLENGE

NAVIGATING THIS MOMENT OF CRISIS AND CONSOLIDATION

• ON THE SPACES FOR REFORMS LIKE UNCITRAL PROCESS

• CONTINUING CAMPAIGNS AGAINST FTAS AND ISDS AS A KEY MOBILIZING ISSUE
POSSIBLE PATHWAYS
state-to-state dispute settlement; international collaboration to strengthen domestic legal systems; political risk insurance systems; human rights mechanisms like the binding treaty on HR obligations of TNCs