

# **ISDS: AN ENABLER OF CORPORATE CONTROL**

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# ISDS and Right to Regulate

The power to sue governments



Policy being challenged	Case
Health	<ul style="list-style-type: none"> <li>• Philip Morris vs Uruguay</li> <li>• Philip Morris vs Australia</li> <li>• Eli Lilly vs Canada</li> </ul>
Public services: delivery of water	<ul style="list-style-type: none"> <li>• Bechtel vs Bolivia</li> <li>• Suez vs Argentina</li> <li>• Vivendi vs Argentina</li> <li>• Biwater Gauff v Tanzania</li> </ul>
Bans on mining (due to environmental regulations)	<ul style="list-style-type: none"> <li>• Pacific Rim v El Salvador<sup>3</sup></li> <li>• Renco vs Peru<sup>4</sup></li> <li>• Churchill Mining vs. Indonesia</li> <li>• Infinito Gold vs. Costa Rica</li> </ul>
Regulations aiming to improve labour rights (minimum wage, minimum hiring of locals)	<ul style="list-style-type: none"> <li>• Veolia vs Egypt</li> <li>• Astaldi vs Honduras</li> <li>• Golden East vs Mongolia</li> </ul>
Regulations regarding disposal of hazardous waste	<ul style="list-style-type: none"> <li>• Metalclad vs Mexico</li> <li>• Tecmed vs Mexico</li> <li>• Baird v USA</li> </ul>
Regulations to fight apartheid	<ul style="list-style-type: none"> <li>• Piero Foresti vs South Africa</li> </ul>
Environmental protection	<ul style="list-style-type: none"> <li>• Lone Pine Resources vs. Canada</li> <li>• Vattenfall v Germany</li> <li>• Methanex v. United States</li> <li>• Parkerings v. Lithuania</li> <li>• Glamis v. United States</li> </ul>
Austerity measures (cuts to subsidies)	<ul style="list-style-type: none"> <li>• 15 PV investors vs Spain</li> <li>• Charanne and Construction Investments vs Spain</li> <li>• Isolux Infrastructure Netherlands vs Spain</li> <li>• Abengoa / CSP Equity Investment vs Spain</li> <li>• Reef vs Spain</li> <li>• Antin vs Spain</li> <li>• Eiser Infrastructure vs Spain</li> </ul>
Debt restructuring as a result of financial crisis	<ul style="list-style-type: none"> <li>• Poštová bank and Istrokapital vs Greece</li> <li>• Marfin Investment Group (MIG) vs Cyprus</li> <li>• Abaclat vs Argentina</li> </ul>

# 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



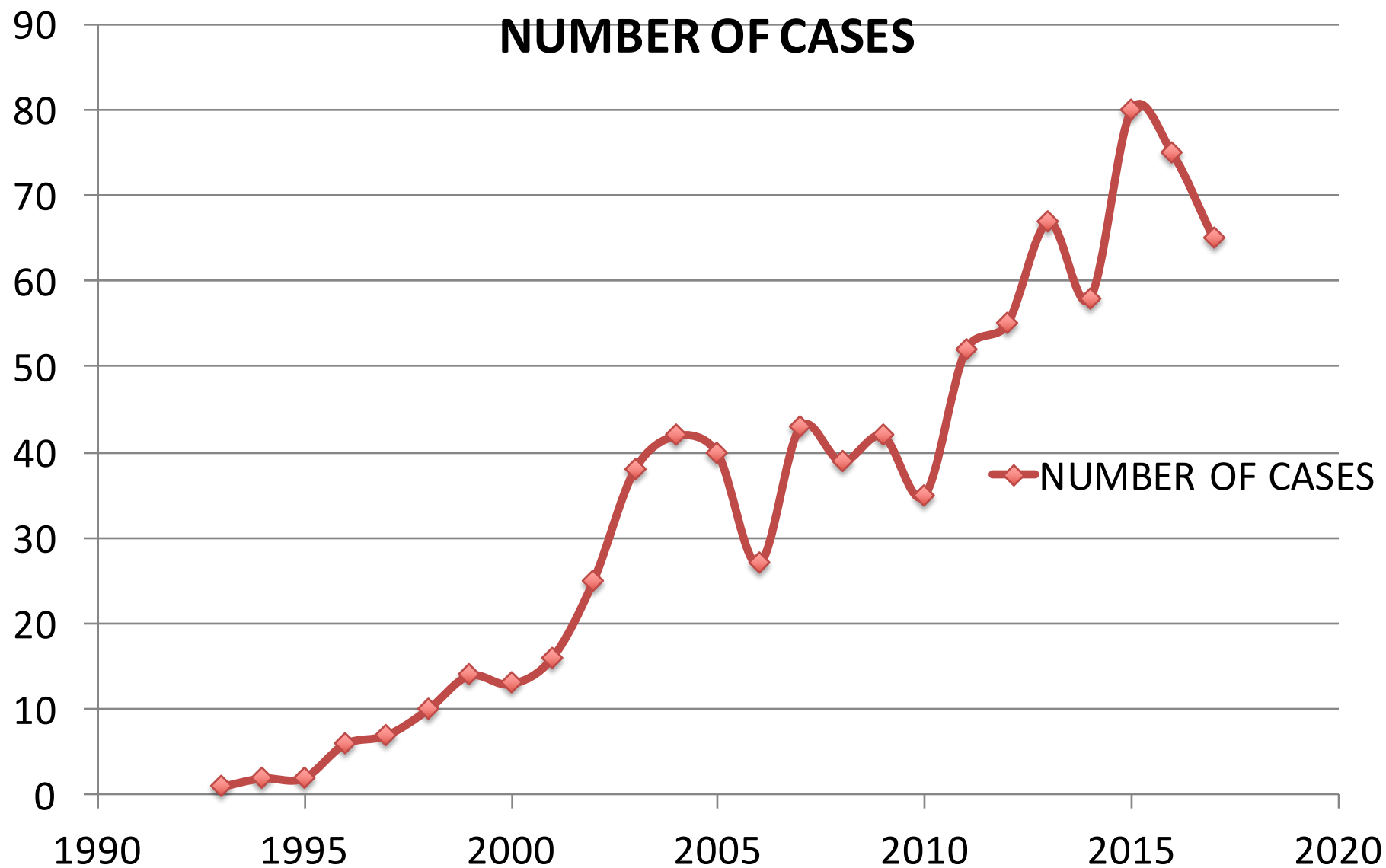
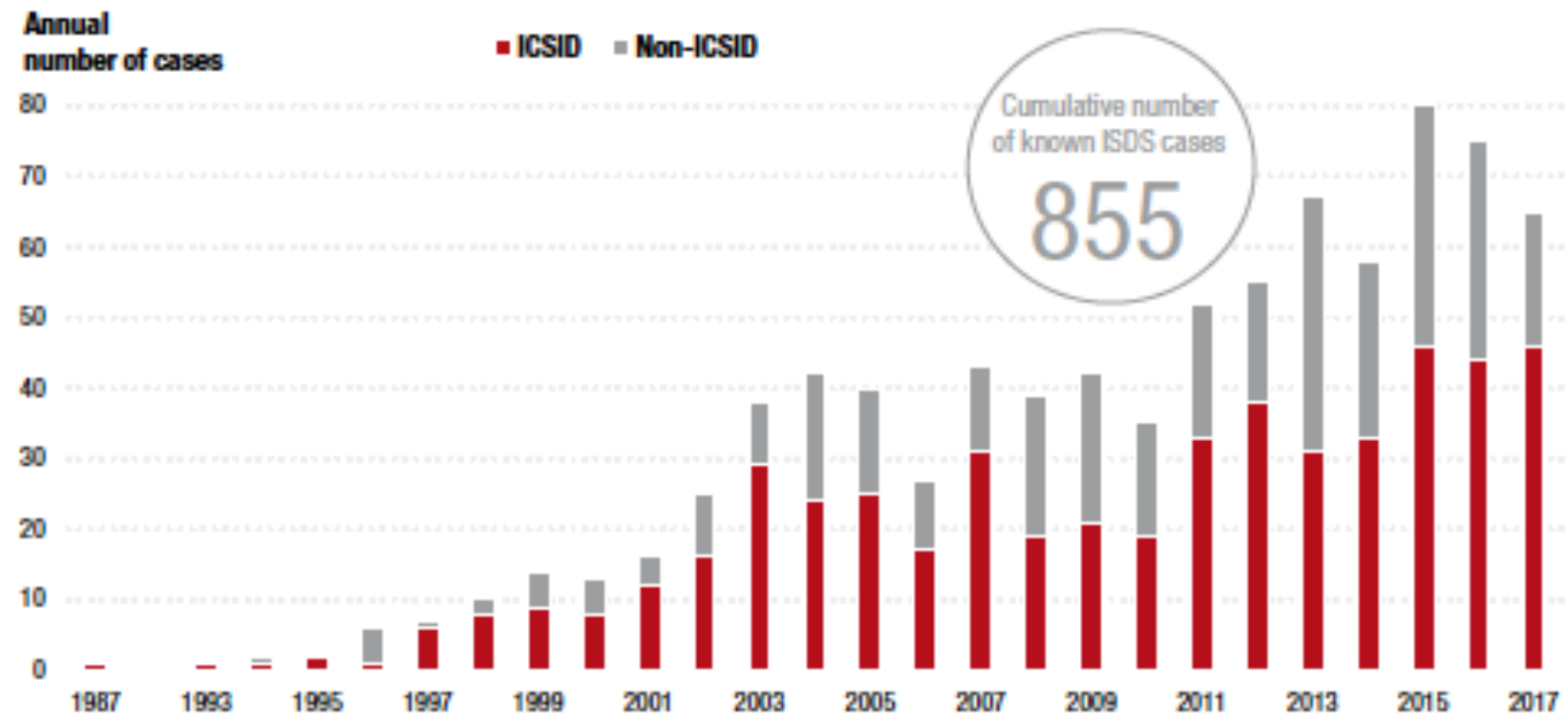


Figure 1. Trends in known treaty-based ISDS cases, 1987–2017



Source: UNCTAD, ISDS Navigator.



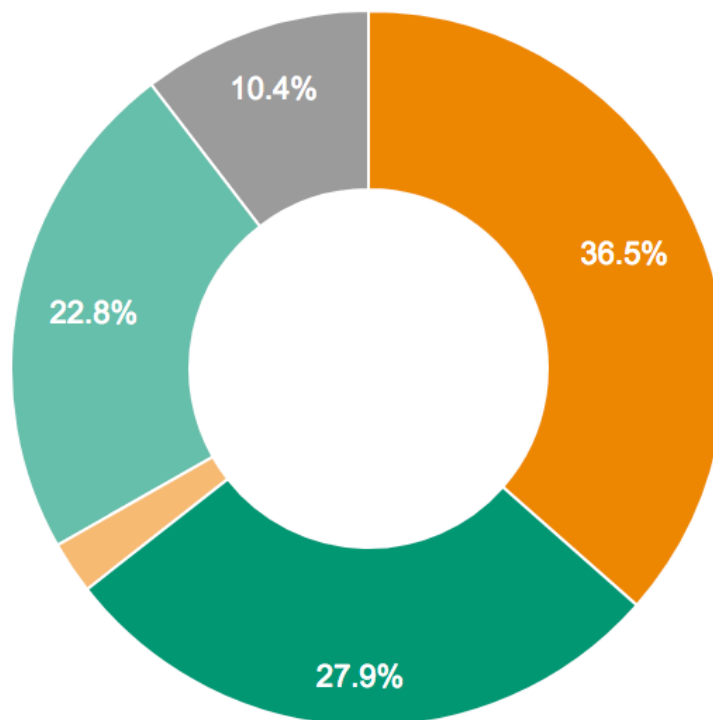
# **SPIKE IN 2015**

- 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

### Known treaty-based investor-State arbitrations

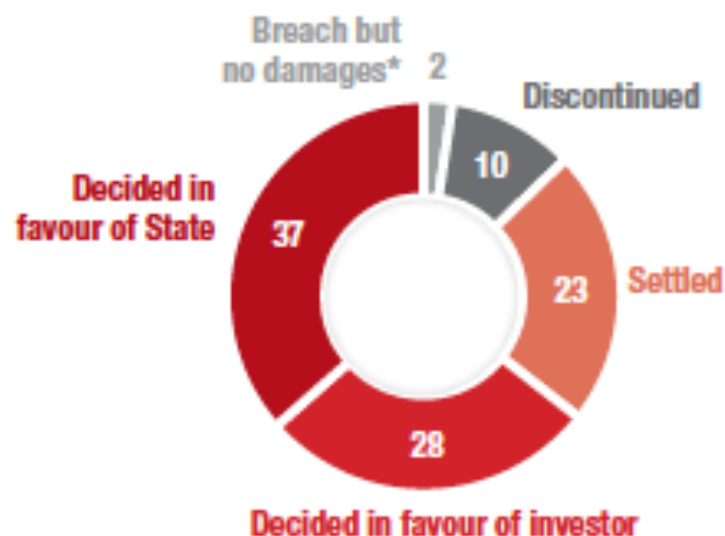
Total	855
Pending	297
Concluded	548
Unknown	10

### Concluded original arbitration proceedings



- Decided in favour of State
- Decided in favour of investor
- Decided in favour of neither party (liability found but no damages awarded)
- Settled
- Discontinued

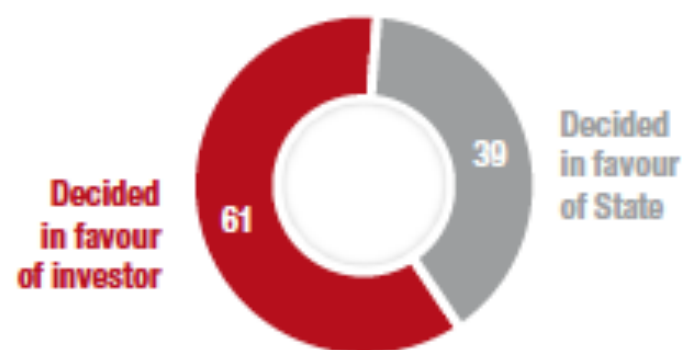
**Figure 4. Results of concluded cases, 1987–2017 (Per cent)**



Source: UNCTAD, ISDS 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)**



Source: UNCTAD, ISDS 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\$337M**

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 MONEYS PAID

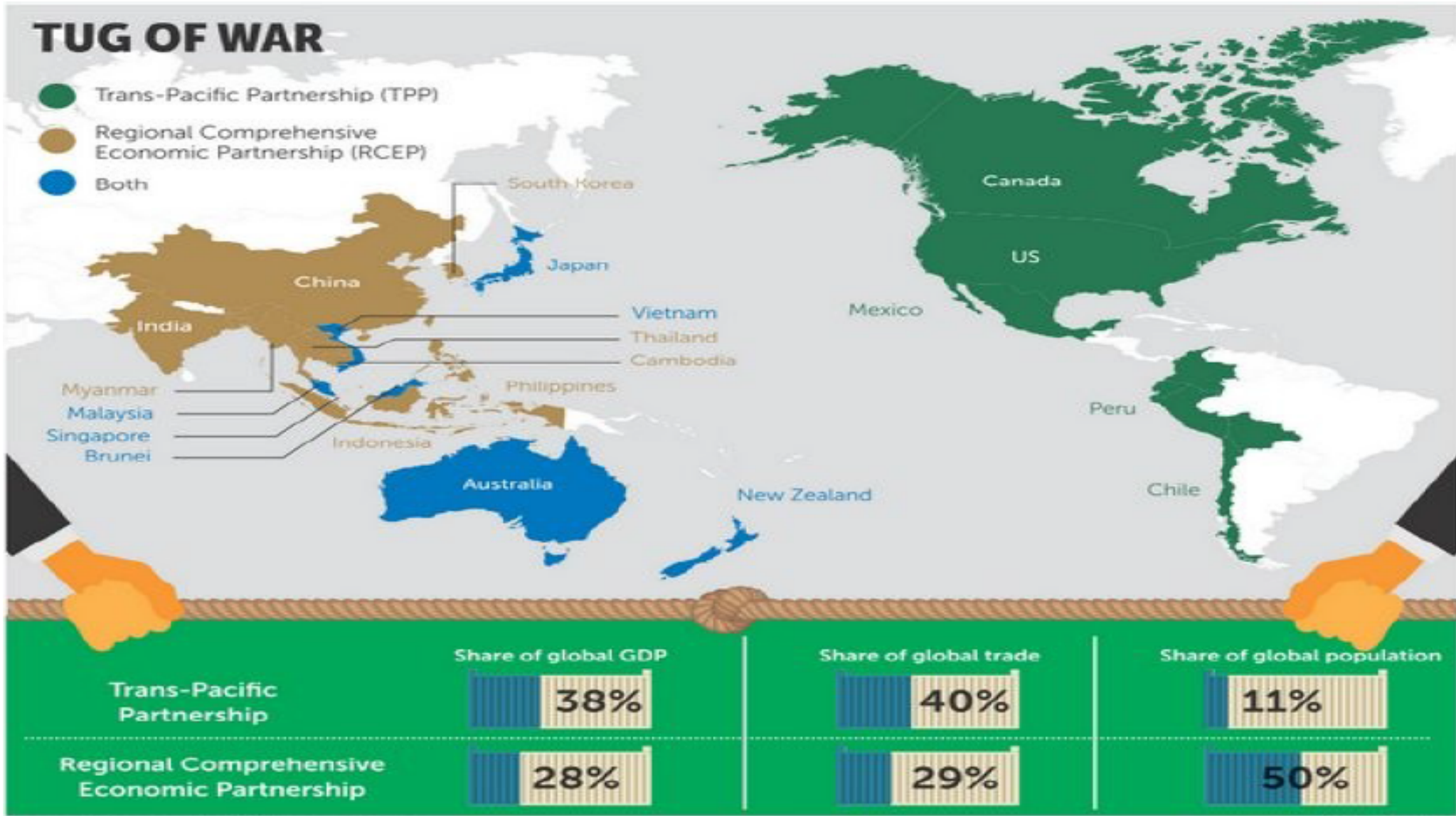
# CONSOLIDATION

1. INCREASING NUMBER OF CASES
2. Huge claims (damages) and how they push a pro-corporate policy environment
3. Mega FTAs

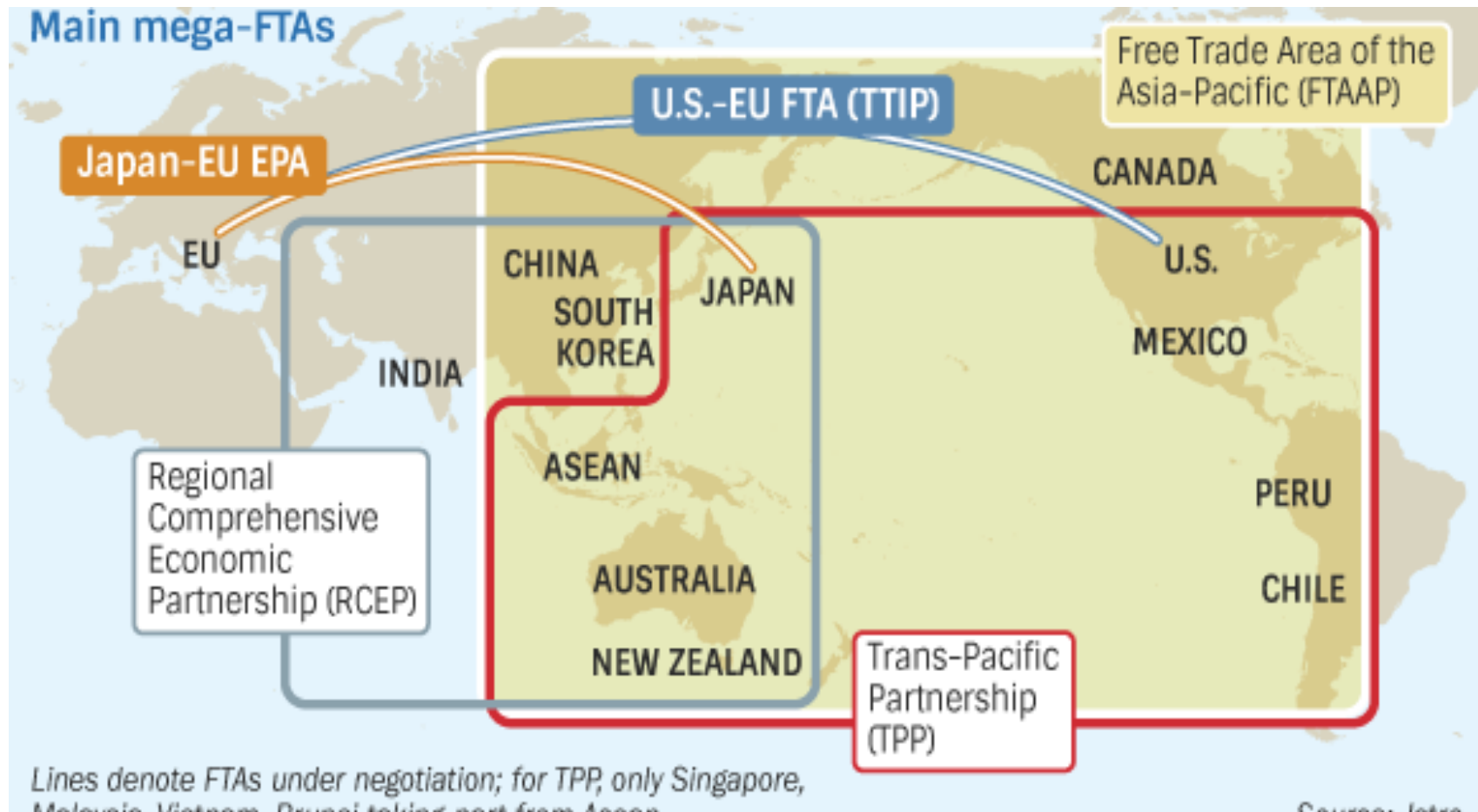
# RISE OF MEGA FTAS

## TUG OF WAR

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



# 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

# **ALTERNATIVES**

## **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