

Trade Q&A: What's the Deal on ISDS?



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Expanding U.S. exports, a vital step in promoting U.S. economic growth and raising stagnant middle-class wages, will be one of the biggest policy debates in this Congress. And with good reason—95% of the world's consumers live outside of our borders, and leaders on both sides of the aisle want to ensure global markets are buying more *Made in the USA* goods and services.

The first step in this debate is the bipartisan, bicameral trade promotion authority (TPA 2015) deal, the procedural tool that allows for the consideration of trade deals. As policymakers consider approving TPA 2015, one of the issues that's not well understood is investor-state dispute settlement (ISDS).

In this memo, we answer the five main questions about ISDS.

1. What is ISDS?

What recourse does a U.S. company have overseas if a foreign government seizes their factory or forces that company to turn over valuable intellectual property or patents? This is where ISDS comes in.

ISDS is a legal mechanism aimed at settling investment disputes between investors and countries. Using a panel of three adjudicators (each side selects one and the third person is selected based on agreement between the two sides), ISDS allows for an investor from one country to bring a claim and seek arbitration. This process provides an impartial approach to ensure companies have basic rights and resolve conflicts without creating conflict.

In the U.S., the Constitution ensures that everyone gets fair protection through our courts. The United States is prohibited from expropriating private property without compensation or enacting discriminatory laws against foreign firms.¹ But many other countries fail to offer protections and instead punish American companies. The goal of ISDS is to ensure everyone can have basic rights like they do under U.S. law. The simplest way to think about ISDS is that it helps bring other countries up to U.S. standards, and not bring U.S. standards down to those of other countries.

Take a small U.S. computer chip manufacturer operating overseas. If their factory gets taken over by foreign country, they could take their case to a foreign court. But not all foreign courts are as fair and transparent as those in the United States, and foreign courts do not always provide a neutral forum when a foreign investor is challenging a government. ISDS ensures that American companies and investments get a fair shake in foreign countries.

ISDS ensures five rights—rights that U.S. and foreign investors are guaranteed here in the United States, but may not enjoy overseas:

1. Freedom from discrimination, which assures that U.S. companies will play on a level field and will not be treated less favorably than local companies or those companies from other countries;
2. Protection against seizure (expropriation), preventing American companies' property from being seized without fair compensation;

3. Protection against denial of justice, which means that no U.S. company will be denied justice in any judicial proceeding, may it be criminal or civil;
4. Right to transfer capital, which allows for the freedom and flexibility to move capital; and
5. Freedom from forced use of local content or local technology, or forced technology transfer, which prevents a U.S. company from being required to use the foreign country's technology or tools rather than the U.S. company's preferred option.²

2. Is ISDS common in international agreements?

ISDS, in its various forms, is part of more than 3,000 worldwide agreements—including in 50 U.S. agreements.³ In its basic form (in which an international tribunal hears a case over investment disputes), this process has been around since the 1700s. Modern-day ISDS has been used regularly and increasingly often for decades. And while some decry that cases have been increasing, there have been only a total of 568 cases under all of these agreements since 1987.⁴

3. Has ISDS been used successfully against the United States?

The United States has rarely been the subject (or respondent) of an ISDS claim, having only faced 17 ISDS claims. But the U.S. is undefeated. Of these 17 cases, the United States has won 13 times, the plaintiff abandoned their case in two instances, one case was made moot by the conclusion of the U.S.-Canada Softwood Lumber agreement, and one case is dormant.⁵

On the other side, U.S. companies have used ISDS 132 times, or 22% of global ISDS claims, since 1987, which makes sense given that the United States accounts for the same proportion of global foreign investment.⁶ U.S. companies have won or settled 48 cases, lost 35, and have 37 cases (nearly all of the remaining cases) pending.

4. How is ISDS addressed in TPA 2015?

Although no federal labor or environmental law has ever been altered or abrogated due to ISDS, TPA 2015 added a series of protections to ensure ISDS helps against unfair government treatment overseas—but also to protect U.S. federal and state government activity.

Most notable is that TPA 2015 requires that protections offered to foreign investors do not exceed those offered to U.S. companies and citizens. That means it is no easier—and in many cases much harder—to challenge U.S. government activity under ISDS than under existing U.S. laws. In short, ISDS does not, in fact, create any greater risk to the United States. In TPA 2015, there are also procedures that tamp down frivolous claims, require transparency in all notices, briefs and hearings, and allow for efficient selection of arbitrators.

5. Will ISDS force the United States to change its current laws or prevent the United States from passing new laws?

ISDS does not change any U.S. law, nor will it prevent the United States from passing new laws. Any change to U.S. law must be approved by Congress. There's been a lot of misinformation that ISDS gives foreign companies the opportunity to affect and weaken U.S. laws—particularly environmental, health, and labor regulations. However, the reality is that ISDS cannot make any country change any law or regulation.⁷ The language of the model U.S. investment agreement is clear; panels can only require the payment of “monetary penalties.”⁸

As we detailed above, ISDS is an arbitration process and is simply a path for pursuing justice and ensuring that investors have basic rights abroad—just like we have here in the United States. As part of any trade or investment text, ISDS will not allow foreign countries to supersede or change U.S. laws. Most cases involve challenges to contract breaches, rather than

challenges to broad-based laws or regulations. But when our laws have been challenged, the U.S. government has won.

For example, California banned a gasoline additive in the 1990s due to concerns about it leaching into groundwater. And they had every right to do that. A Canadian company that made the additive wanted to stop the ban, but their claim was rejected because countries (the United States in this case) are allowed to regulate for health and the environment, and other areas that are considered public welfare. Indeed, recent U.S. FTAs include language stating that regulations to protect health, environment, and other public goods cannot be subject to ISDS claims.

Negotiators have also said that TPP doubles down on the idea that all countries have an inherent right to regulate public welfare—such as public health, safety, the environment, and the conservation of living or non-living exhaustible natural resources—further locking in fundamental U.S. rights.

Conclusion

ISDS is not only an extremely common part of international dispute settlement, but it's also necessary. ISDS protects U.S. companies and investments in foreign countries.

And because the United States does not steal other country's intellectual property, seize their factories, or use other discriminatory tactics, ISDS has never been used successfully against us. ISDS has not and will not weaken any American law, including those on the environment, worker protections, minimum wage, or anything else.

END NOTES

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