

‘Are US Investors Exceptionally Litigious with ISDS Claims?’

Critics of the Trans-Pacific Partnership (TPP) free trade agreement, and ISDS protections more generally, have often argued that a particular concern is that the US is not only a large source of FDI, but that it is ‘the nation whose corporations use ISDS the most’ (referring to ANU’s Professor Thomas Faunce).¹ A recent paper by ANU’s Dr Kyla Tienhaara for the ‘GetUp’ campaign in Australia,² in the context of ongoing parliamentary inquiries into ratifying the TPP,³ contends that:⁴

‘The biggest users of ISDS are US multinational corporations. This means that entering into a trade deal with the US that includes ISDS provisions – such as the TPP – places a country at high risk of ISDS suits’.

The inference is that Americans are particularly ‘litigious’ in the field of investment treaty claims – perhaps like they are purported to be in civil litigation in their home courts.⁵ In fact, empirical research into comparative civil dispute resolution patterns had long pointed out that a representative state within the US (in terms of urban/rural population mix, such as Arizona) has fewer filings per capita than countries such as Germany and Israel [Nottage & Wollschlaeger ‘What Do Courts Do?’ [1996] NZLJ 369].⁶

Table A and Figure A-1 below confirm that investors from the US had indeed lodged the most ISDS claims by end-2015 (138), on a per capita basis (per 100,000 people in the home state), yet US investors are historically *less* litigious compared to investors from eleven other countries whose investors have filed considerable numbers of ISDS claims. Those states are all in the EU (including Belgium and Luxembourg, which generally conclude investment treaties collectively and whose investors have filed the most claims per capita), except for Switzerland (whose investors become the fourth most litigious) and Canada (the fifth most litigious home state). As further indicated in Table A and Figure A-2, if we group together most of these EU states their investors’ per capita ISDS claim rate is also higher than that for US investors.

Table A: Most ISDS Claims Filed – Totals vs Per Capita

(Sources: UNCTAD⁷ and CIA⁸)

Ranking (per capita)	State(s) of Claimant	Claims per capita by end-2015 (per 100,000 people)	Total claims by end 2015
1	Luxembourg/Belgium	5.32	31
2	Cyprus	1.49	18

¹ See eg Jess Hill <http://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538>.

² <https://www.theguardian.com/business/2016/oct/25/trans-pacific-partnership-makes-australia-vulnerable-to-court-challenges-report-claims>

³ <http://kluwerarbitrationblog.com/2016/10/14/tpp-and-foreign-investment-does-isds-promote-fdi/>

⁴ http://cdn.getup.org.au/1929-Tienhaara_TPP_Final.pdf

⁵ See eg Shotaro Hamamoto, ‘Recent Anti-ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy’ (2015) 16(5-6) *Journal of World Investment and Trade* 931, outlined in: Luke Nottage, ‘ISDS in the Japanese Diet’ on *Japanese Law and The Asia-Pacific* (2 December 2015) <http://blogs.usyd.edu.au/japaneselaw/2015/12/isds_in_the_japanese_diet.html>.

⁶ Luke Nottage and Christian Wollschlaeger, ‘What Do Courts Do?’ [1996] *New Zealand Law Journal* 369.

⁷ <http://investmentpolicyhub.unctad.org/ISDS>

⁸ <https://www.cia.gov/library/publications/the-world-factbook/>

3	Netherlands	0.47	80
4	Switzerland	0.28	23
5	Canada	0.11	39
6	United Kingdom	0.09	59
7	Spain	0.07	34
8	EU (Netherlands, Germany, France, Spain, Luxembourg)	0.06	323
9	Germany	0.06	51
10	France	0.057	38
11	Italy	0.048	30
12	United States	0.042	138

Figure A-1: Total ISDS Claims Filed (by Home State of Investor)

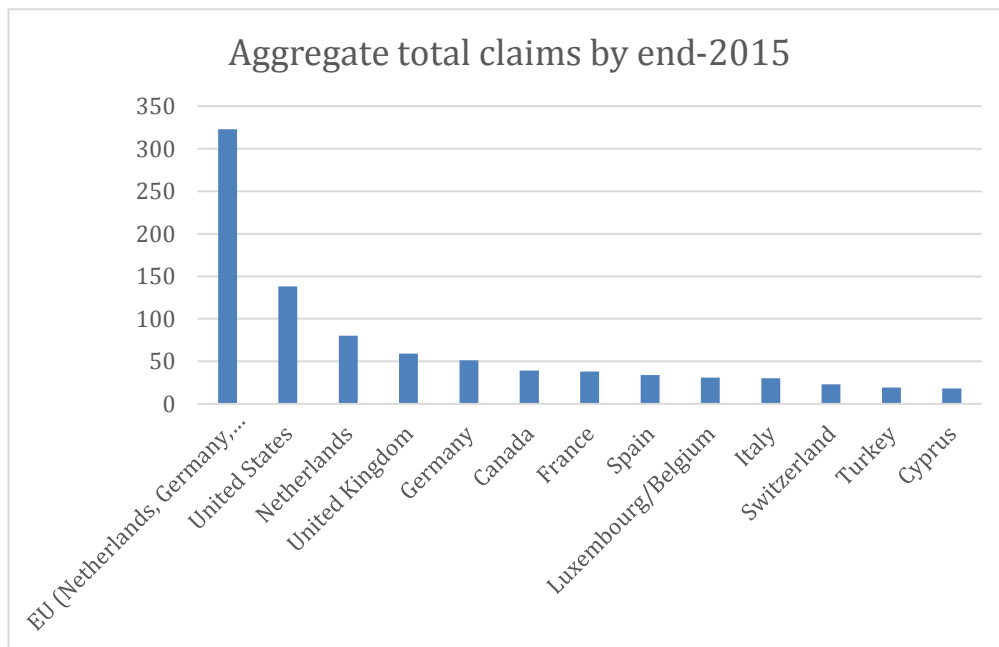
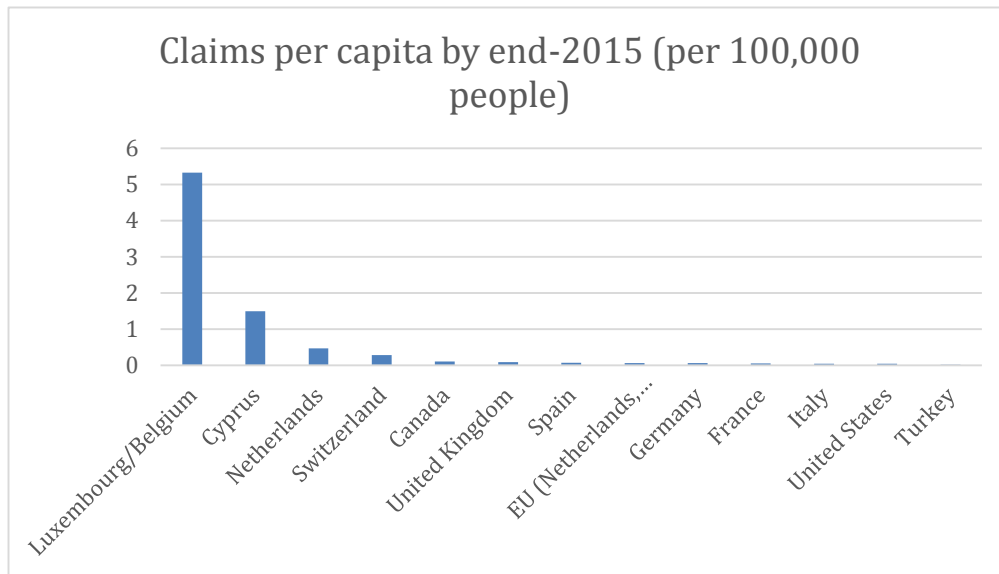


Figure A-2: Per capita ISDS Claims Filed (by Home State of Investor)



Admittedly, many of those other more highly-ranked states have historically attracted foreign investment for logistical and/or tax reasons (Luxembourg/Belgium, Cyprus, Netherlands). Some may have come from and remained controlled by US investors, who could have then launched ISDS claims under those countries' claims (to the extent not precluded from denial of benefits or other treaty provisions), such as the first-ever treaty claim against Korea.⁹ However, other such investments would have come from outside the US as well as from investors in fact from countries like Belgium; data is hard to come by.

It might also be retorted that per capita claim rates do not accurately reflect litigiousness anyway, in the sense of a propensity to sue based on a comparable corpus of underlying disputes. However, the latter is extremely difficult to determine (even for civil dispute resolution within one country, which is why researchers tend to use per capita filings). A starting point would be to ascertain outbound FDI stocks. Yet by the end of 2015 the US had a very large accumulated volume, even compared to the outbound stocks of major EU states combined (eg UK, Germany, France).¹⁰

One should then take into account how much of this stock is potentially covered by ISDS-backed investment treaties. The US does have comparatively few investment treaties, but some of those concluded by EU states may not originally have had ISDS protections (eg the initial BIT between Germany and Thailand).¹¹ In addition, some European treaties may have been concluded with counterparties that were less economically significant (thus not generating much additional FDI) compared to those focused on in US treaty negotiations. NAFTA, for example, was an early and economically significant free trade agreement (which also explains why Canadian investor claimants rank quite highly per capita).

It is also possible that the nature of US outbound investment differed from that originating from the EU, Switzerland or Canada. After all, for example, ISDS cases

⁹ <https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/12/37>

¹⁰ See <https://data.oecd.org/fdi/fdi-stocks.htm>.

¹¹ Nottage, Luke R. and Thanitcul, Sakda, The Past, Present and Future of International Investment Arbitration in Thailand (April 26, 2016). Sydney Law School Research Paper No. 16/31. Available at SSRN: <https://ssrn.com/abstract=2770889>

world-wide tend to congregate more on services and primary industry sectors, compared to FDI in manufacturing.¹² Additional research along all these lines would be helpful, although difficult.

Meanwhile, it is certainly more useful for policy-makers and commentators concerned about exposure of host states to ISDS claims by ‘litigious’ foreign investors from particular countries to focus on per capita rates rather than absolute numbers of claims. We may well object to individual claims, such the recent (happily unsuccessful) claims by the (originally US) tobacco company Philip Morris against Australia and Uruguay, but those need to be kept in perspective.¹³

Further, in the Southeast Asian context, one recent study has located 28 total claims (relatively few, given the many investment treaties and large volume of FDI now into that region). Only three claims have been brought by US investors, as indicated in Figure B below. Two were anyway brought by US companies under investment contracts (against Indonesia, eventually obtaining US\$2.7m;¹⁴ and failing against Cambodia),¹⁵ while another claim was brought under the US treaty with Vietnam (unsuccessfully). This hardly seems much basis for being concerned about treaties such as the TPP, which includes four ASEAN member state signatories and potentially three more,¹⁶ on the basis that such treaties include the US.

Figure B: ISDS Claims vs Southeast Asian States

(Source: Nottage and Thanitcul, “International Investment Arbitration in Southeast Asia”, Sydney Law School Research Paper, October 2016)¹⁷

¹² UNCTAD, “Investor-State Dispute Settlement: Review of Developments in 2015”, IIA Issues Note (No 2, June 2016) <http://investmentpolicyhub.unctad.org/Publications/Details/144> , 5.

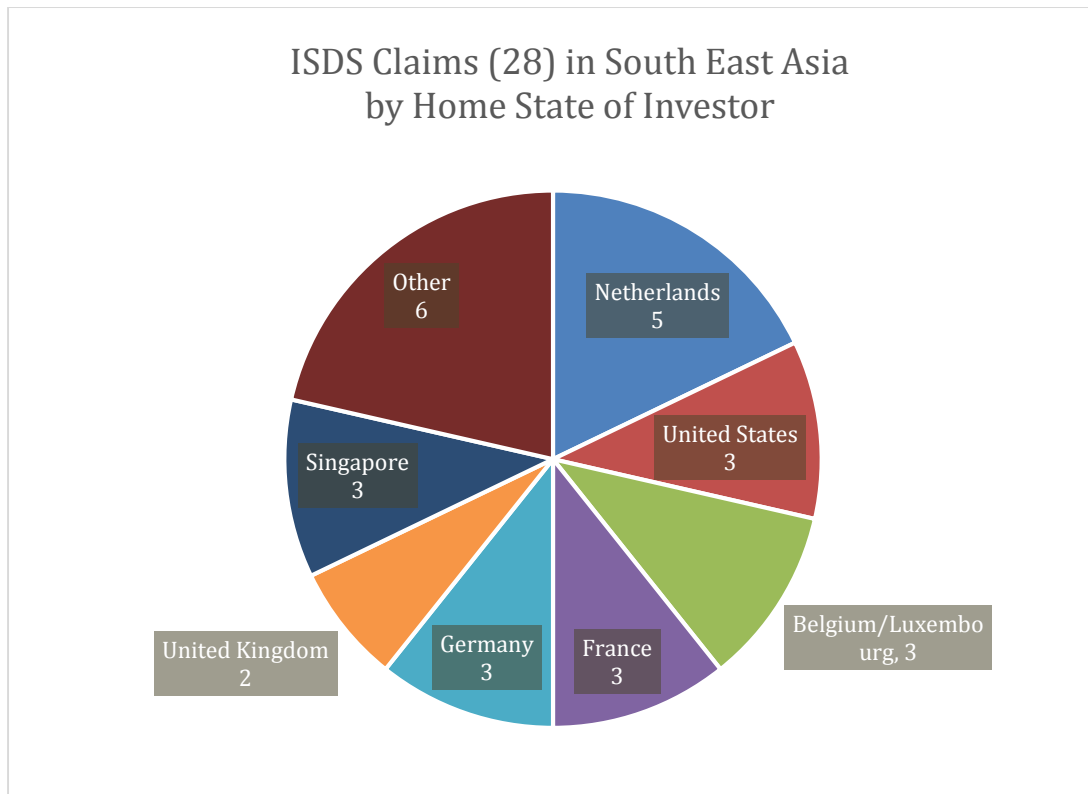
¹³ Hepburn, Jarrod and Nottage, Luke R., Case Note: Philip Morris Asia v Australia (September 29, 2016). *Journal of World Investment and Trade*, Forthcoming; Sydney Law School Research Paper No. 16/86. Available at SSRN: <http://ssrn.com/abstract=2842065>

¹⁴ <http://www.italaw.com/cases/3475>

¹⁵ <https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/09/18>

¹⁶ Nottage, Luke R., The TPP Investment Chapter and Investor-State Arbitration in Asia and Oceania: Assessing Prospects for Ratification (April 20, 2016). *Melbourne Journal of International Law*, Forthcoming, 2016; Sydney Law School Research Paper No. 16/28. Available at SSRN: <https://ssrn.com/abstract=2767996>

¹⁷ Forthcoming via <http://ssrn.com/author=488525>



Lastly, broader comparative empirical work along the lines outlined above may also be useful in the context of other treaty negotiations currently attracting public attention, such as the Canada EU Trade Agreement. The government of Wallonia (within Belgium) recently voted against signing this treaty, partly because their citizens were concerned about claims from Canada over environmental and social policies.¹⁸ To some extent this stance might be justified by per capita ISDS claim rates set out above, although further research is needed to determine whether Canadian investors have been prone to bring claims in relation to environmental measures adopted by host states. Yet the data also indicate that investors from Belgium (plus Luxembourg) have been more active in filing ISDS claims. In general, investment treaties cut both ways.

¹⁸ <https://euobserver.com/tickers/135606>