

125 State Legislators Representing All 50 States Write to TPP Negotiators Urging Rejection of Investor-State Dispute Settlement

AN OPEN LETTER FROM U.S. STATE LEGISLATORS TO NEGOTIATORS OF THE TRANS-PACIFIC PARTNERSHIP URGING THE REJECTION OF INVESTOR-STATE DISPUTE SETTLEMENT

As elected members of our state legislatures from throughout the United States, we value international trade when fair rules are in place, and encourage our states to actively participate in the global economy in furtherance of economic prosperity.

Modern trade agreements have impacts that extend significantly beyond the bounds of traditional trade matters, such as tariffs and quotas, and can undermine the role of the states in protecting the public health, safety and welfare through our system of federalism, as established in the U.S. Constitution. Trade rules can limit state sovereignty and our authority as legislators to regulate to ensure a level playing field for workers and businesses or to include meaningful human rights, labor and environmental standards.

The lack of transparency of the treaty negotiation process, and the failure of negotiators to meaningfully consult with states on the far-reaching impact of trade agreements on state and local laws, even when binding on our states, is of grave concern to us.

We have a particular concern about the impact on state regulatory, legal, and judicial authority if the Investor-State dispute arbitration provisions are adopted as part of the Trans-Pacific Partnership (TPP) agreement. The TPP, which is currently under negotiation among nine Pacific Rim nations including the U.S. – and may be expanded to include NAFTA partners Canada and Mexico plus Japan -- is a wide-ranging treaty that will likely have significant implications for the states.

Investor-state dispute settlement (ISDS) clauses allow foreign investors the right to sue governments directly in offshore private investment tribunals, bypassing the courts and also allowing a "second bite" if the investors do not like the results of domestic court decisions. Although the investor-state tribunal has no power to nullify U.S. federal, state, and local laws, in practice, when a country loses to an investor, it will change the offending law, or pay damages, or both. Moreover, a country need not even lose a case for the chilling effect to impact its future policy making deliberations.

While these powers are not new, the TPP negotiation comes amidst mounting criticism of the rapid rise in Investor-State claims, as foreign corporations use these powers to challenge core public policy decisions. In particular, there is increasing concern about the way that investor-state disputes in bilateral investment treaties and free trade agreements are being used to challenge domestic legal processes, including processes and decisions of national courts. Recent examples include challenges to mining regulations and tobacco labeling laws, including a challenge to a state jury determination under the North American Free Trade Agreement (NAFTA).

Increasingly decisions issued under this system result in foreign investors being granted greater rights than are provided to domestic firms and investors under the Constitutions, laws and court systems of host countries. In several instances, arbitral tribunals have gone beyond awards of cash damages and issued injunctive relief that creates severe conflicts of law. For instance, a recent order by a tribunal in the case brought by Chevron against Ecuador under a U.S.-Ecuador bilateral investment treaty ordered the executive branch of that country to suspend the enforcement of an appellate court ruling, violating its constitutional separation of powers.

State legislators in the U.S. have adopted a clear position opposing Investor-State dispute settlement clauses in trade agreements. The National Conference of State Legislators (NCSL), which represents all 50 states and the District of Columbia, has adopted the following policy with respect to ISDS:

NCSL will not support Bilateral Investment Treaties (BITs) or Free Trade Agreements (FTAs) with investment chapters that provide greater substantive or procedural rights to foreign companies than U.S. companies enjoy under the U.S. Constitution. Specifically, NCSL will not support any BIT or FTA that provides for investor/state dispute resolution. NCSL firmly believes that when a state adopts a non-discriminatory law or regulation intended to serve a public purpose, it shall not constitute a violation of an investment agreement or treaty, even if the change in the legal environment thwarts the foreign investors' previous expectations.

NCSL believes that BIT and FTA implementing legislation must include provisions that deny any private action in U.S. courts or before international dispute resolution panels to enforce international trade or investment agreements. Implementing legislation must also include provisions stating that neither the decisions of international dispute resolution panels nor international trade and investment agreements themselves are binding on the states as a matter of U.S. law.¹

We strongly endorse this position, and urge the U.S Trade Representative to remove any Investor-State dispute settlement clause from further consideration for inclusion in the TPP.

We are encouraged that the Government of Australia has said it is unwilling to submit to Investor-State dispute settlement powers under a TPP and other future trade agreements, and we urge the TPP negotiators to exclude the Investor-State system for all countries participating in the TPP, not just Australia.

Five years ago, the South Korea Supreme Court wrote a briefing paper on the implications of ISDS on its judicial system, during negotiations for the Korea-U.S. free trade agreement. Because these trade negotiations were conducted in secret, the Court's document, and the fact that it cautioned that the ISDS could cause "extreme legal chaos," has just come to light. The Korean government now seeks to renegotiate this key treaty provision *after* ratification and signing of the KORUS free trade agreement by both countries.

We have an opportunity to prevent a repeat of the problems ISDS has created in NAFTA, KORUS and other trade agreements if U.S negotiators act now to exclude this provision from the TPP. The ISDS has proven to be extremely problematic, undermining legislative, administrative, and judicial decisions, and threatening the system of federalism established in the U.S. Constitution. It interferes with our capacity and responsibility as state legislators to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment. It should have no place in the Trans-Pacific Partnership.

Thank you for your consideration.

Signed:

ALABAMA

State Representative Richard Laird

ALASKA

Representative David Guttenberg

ARIZONA

Representative Lela Alston

ARKANSAS

State Representative Kathy Webb
Representative Jim Nickels

CALIFORNIA

Assemblywoman Fiona Ma

COLORADO

State Representative John Kefalas

CONNECTICUT

Representative Kevin Ryan

State Representative Zeke Zalaski

State Representative Elizabeth Ritter

DELAWARE

State Representative John Kowalko

FLORIDA

State Representative Geraldine F. Thompson

Florida House Representative Betty Reed

GEORGIA

Representative Virgil Fludd

State Representative Pat Gardner

HAWAII

Representative Roy Takumi

Representative Della Au Belatti

IDAHO

State Representative Wendy Jaquet

ILLINOIS

State Representative Constance A. Howard

INDIANA

Representative Matt Pierce

IOWA

Representative Chuck Isenhardt

Representative John Wittneben

Senator Joe Bolkom

KANSAS

Representative Sydney Carlin

KENTUCKY

Representative Joni Jenkins

LOUISIANA

Representative Patricia Haynes Smith

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Representative Sharon Treat

Representative Diane Russell

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Representative Terry Hayes

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Representative Michael Carey

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Representative Thomas R.W. Longstaff

Representative Melissa Walsh Innes

Representative Walter Kumiega

State Representative Sheryl Briggs

State Representative Denise Harlow

Representative Jon Hinck

Representative Peter Stuckey

Representative Roberta Beavers

Representative Mark Bryant

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Maryland State Senator Karen S. Montgomery

Delegate Carolyn J.B. Howard

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Representative Denise Provost

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State Representative Ellen Lipton

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Senator D. Scott Dibble

State Representative Carlos Mariani
Representative Linda Slocum
Representative Tina Liebling
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Representative Jeanette Mott Oxford

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Assemblywoman Maggie Carlton

NEW HAMPSHIRE

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NEW JERSEY

Assemblyman Herb Conaway

NEW MEXICO

State Senator Gerald Ortiz y Pino
Senator Dede Feldman
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Representative Stan Blake

¹ <http://www.ncsl.org/state-federal-committees/sclaborecon/free-trade-and-federalism.aspx>, NCSL Labor and Economic Development Committee – Policy on Free Trade and Federalism (expires August 2013)

Dated: July 5, 2012