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Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges

Amid growing controversy over the investor-state dispute settlement (ISDS) system, the Office of the U.S. Trade Representative (USTR) has declared that critiques of the system amount to mere “myths.”¹ Yet, in attempt to counter the critiques, USTR’s ISDS defenses rely on false and misleading statements. Below we respond to 10 common defenses of ISDS from USTR. USTR’s claims attempt to paper over 10 stark realities of the investor-state system that it seeks to expand via the Trans-Pacific Partnership (TPP) and Trans-Atlantic Free Trade Agreement (TAFTA):

1. ISDS gives foreign corporations greater procedural and substantive rights than domestic firms by providing only foreign firms access to extrajudicial tribunals and by enabling them to obtain compensation for government policies and actions that apply equally to domestic firms and that would not be deemed to violate domestic property rights protections.
2. ISDS undermines the rule of law by empowering extrajudicial panels of private sector attorneys to contradict domestic court rulings, including those in which countries’ supreme courts interpret domestic Constitutions and laws, in decisions not subject to any substantive appeal.
3. ISDS cases have led to the watering down of environmental, health and other public interest policies, and chilled the establishment of new ones, as the mere threat of an ISDS case against an existing or proposed policy raises the prospect that a government will need to spend millions in tribunal and legal costs to defend the policy, even if the government might ultimately prevail.
4. Investor-state tribunals often order governments to pay foreign corporations large sums of taxpayer funds as compensation for future profits that the tribunals surmise the firms would have earned if not for the challenged government actions or policies.
5. The TPP and TAFTA would expose the U.S. government, taxpayers and domestic laws to an unprecedented surge in ISDS liability.
6. The very structure of the ISDS regime gives rise to conflicts of interest that would not be remediated by enhancement of the weak “conflict of interest” rules for tribunalists.
7. Purported safeguards and explanatory annexes added to agreements in recent years have failed to prevent ISDS tribunals from exercising enormous discretion to impose on governments obligations that they never undertook when signing agreements.
8. Transparency rules and amicus briefs are insufficient to hold accountable tribunals that remain unrestrained by precedent, States’ opinions or substantive appeals.
9. State and local governments have no standing to defend the state and local policies that are often challenged in ISDS cases.
10. The Obama administration has repeatedly ignored ISDS opposition from Congress, the bipartisan National Conference of State Legislatures, diverse public interest groups and legal scholars.

By ignoring these realities and instead choosing to hawk counterfactual claims aimed at dismissing demonstrated ISDS problems, USTR threatens to expand further the damage the ISDS system has inflicted on public interest policymaking, democratic processes and public budgets in numerous countries. To avoid such an expansion via the TPP and TAFTA, the legacy of existing ISDS pacts warrants honest examination.

USTR's 10 Reality-Defying Defenses of the Investor-State System

- 1. Reality: ISDS gives foreign corporations greater procedural and substantive rights than domestic firms by providing only foreign firms access to extrajudicial tribunals and by enabling them to obtain compensation for government policies and actions that apply equally to domestic firms and that would not be deemed to violate domestic property rights protections.**

USTR Claim: Investment protections are intended to prevent discrimination, repudiation of contracts, and expropriation of property without due process of law and appropriate compensation. These are the same kinds of protections that are included in U.S. law. But not all governments protect basic rights at the same level as the United States. Investment protections are intended to address that fact. Our agreements provide no new substantive rights for foreign investors.

Regardless of the intent, the ISDS provisions of existing U.S. “free trade” agreements (FTAs) and bilateral investment treaties (BITs) provide foreign investors greater substantive and procedural rights than U.S. firms are afforded under U.S. law and under the jurisprudence of the U.S. Supreme Court.

The substantive privileges investors obtain under the ISDS regime include a highly elastic right to a guaranteed “minimum standard of treatment.” Investor-state tribunals have interpreted this provision to mean that investors must be compensated for nondiscriminatory changes to generally applicable regulatory policy that occur after an investment is established.² ISDS terms also grant foreign firms a right to compensation for indirect expropriation for a wide category of property interests not subject to indirect expropriation compensation in U.S. law.³

In U.S. law, there is no right for government compensation if a new policy of general application – such as the new Dodd-Frank financial rules or the new carbon emissions standards from the Environmental Protection Agency (EPA) – frustrate an investor’s “expectations.” There is no right to compensation merely because a government policy changes after the establishment of an investment in a way that may affect a business operating here. Yet, many ISDS tribunals have granted such rights to foreign firms via broad interpretations of the common FTA and BIT provision that obliges States to afford investors “fair and equitable treatment” as part of the guarantee of a “minimum standard of treatment.” Tribunals have interpreted this provision to mean that investors must be guaranteed a stable regulatory framework *that does not frustrate the expectations* they held at the time they established their investment.⁴

In defending itself against an investor-state challenge that tried to invoke this sweeping interpretation, the U.S. government argued, “[I]f States were prohibited from regulating in any manner that frustrated expectations – or had to compensate for any diminution in profit – they would lose the power to

regulate.”⁵ However, under the ISDS regime, “The power to regulate operates within the limits of rights conferred upon the investor,” according to a recent pro-ISDS law review article that sought to summarize tribunals’ interpretations of the “fair and equitable treatment” standard.⁶

While the United States avoided liability in the specific case cited, increasingly tribunals are using just such broad interpretations of the “fair and equitable treatment” and “minimum standard of treatment” provisions to rule against governments. The tribunal in *Occidental Exploration and Production Co. v. Ecuador*, brought under the U.S.-Ecuador BIT, argued, “Although fair and equitable treatment is not defined in the Treaty, the Preamble clearly records the agreement of the parties that such treatment ‘is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.’ *The stability of the legal and business framework is thus an essential element of fair and equitable treatment.*”⁷ The tribunal used this curt interpretation to rule against Ecuador, in part, for enacting policy changes that frustrated the investor’s expectation of a stable policy framework, despite Ecuador’s plea “that no investor can expect that all of its expectations will be met.”⁸ Violations of the “minimum standard of treatment” and “fair and equitable treatment” standards have been the basis for tribunal rulings against governments in three out of every four investor-state cases under U.S. FTAs and BITs in which the investor has “won.”⁹

Foreign corporations are also empowered under U.S. FTA and BIT terms to obtain compensation on the basis of claims that government policies or actions “indirectly expropriated” their investments. Unlike direct expropriation, claims of indirect expropriation do not require that the government take ownership or control of the investment, and often involve demands of compensation for nondiscriminatory government regulations that affect the value of an investment. Under U.S. law, the right for property holders to obtain compensation for such “regulatory takings” is extremely limited,¹⁰ and U.S. Supreme Court jurisprudence explicitly holds that the mere diminution of the value of property does not alone create a taking.¹¹ U.S. organizations opposing environmental and land use regulations have sought unsuccessfully to pass federal legislation establishing broader rights to compensation for “regulatory takings.”¹² In considering “regulatory takings” claims, U.S. courts must undertake detailed analyses developed in a series of Supreme Court rulings.¹³

In contrast, ISDS tribunals’ interpretations of what constitutes an indirect expropriation are not bound by any required analyses and need not conform to any prior findings. For instance, the tribunal in another *Occidental v. Ecuador* case simply declared in a single paragraph that its finding of a “minimum standard of treatment” violation also supported a finding of indirect expropriation.¹⁴

Moreover, the right to compensation for indirect expropriation, like other substantive rights granted in ISDS pacts, applies to much wider categories of property than those to which similar rights apply in U.S. law. To the limited extent that indirect expropriation compensation is permitted in U.S. law, it has generally been held that the requirement of compensation for “regulatory takings” under the Fifth Amendment of the U.S. Constitution primarily applies to regulations affecting *real* property (i.e. land).¹⁵ For example, the Supreme Court has indicated that personal non-real-estate property is unlikely to be the basis for a successful “regulatory takings” claim given that “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”¹⁶ However, the broad provisions of FTAs and BITs enable foreign investors to claim “indirect expropriation” if government regulations implicate their personal property, intellectual property rights, financial instruments, government permits, money, minority shareholdings or other forms of non-real-estate property.¹⁷

In sum, contrary to USTR's claims, the substantive rights underlying the ISDS regime are not limited to non-discrimination, due process and compensation for expropriation of property – the rights available under U.S. law. This is the case even if the expansive substantive rights that ISDS tribunals have afforded to foreign investors were not *intended* by those who drafted U.S. FTAs and BITs.

In the U.S.-Central America Free Trade Agreement (CAFTA), for example, the U.S. government and other CAFTA Parties inserted an annex that attempted to narrow the vague obligation for States to provide foreign investors a “minimum standard of treatment.” By defining the right as derived from Customary International Law that “results from a general and consistent practice of States that they follow from a sense of legal obligation,” the annex attempted to constrain the “minimum standard of treatment” obligation to the terms to which the signatory governments agreed and considered themselves bound, such as the provision of due process and police protection.¹⁸ But in *Railroad Development Corporation (RDC) v. Guatemala* – one of the first investor-state cases brought under CAFTA – the tribunal largely ignored the annex. The three lawyers also paid little heed to the official submissions of four sovereign governments (including the U.S. government) that the “minimum standard of treatment” obligation should be interpreted narrowly.¹⁹ Instead, the tribunal used a more expansive interpretation of “minimum standard of treatment” – one that included protection of investors' expectations – that had been concocted by another ISDS tribunal. On the basis of that imported interpretation, the tribunal ruled against Guatemala.²⁰

And the *RDC* ruling is not an isolated case. In *TECO Guatemala Holdings v. Guatemala*, another CAFTA case, an investor-state tribunal ruled in favor of TECO, a U.S.-based energy corporation, after deciding that Guatemala's policy for setting electricity rates had violated the “minimum standard of treatment” obligation. As with the *RDC* tribunal, the *TECO* tribunal ignored the CAFTA annex that attempted to assert a narrower “minimum standard of treatment” definition and instead borrowed the broad interpretation of the obligation from the same ISDS case used by the *RDC* tribunal.²¹ On that basis, the tribunal ordered Guatemala to pay TECO \$25 million, plus \$7.5 million to cover the corporation's legal expenses.²² ISDS tribunals have thus repeatedly ignored States' opinions and annexes intended to rein in their discretion, instead using expansive interpretations of ISDS terms that grant foreign investors sweeping new rights not available in the domestic laws of the investors' host countries, and not agreed to by signatory governments in the ISDS pacts.

Finally, USTR's factsheet only claims that the agreements provide no new *substantive* rights for foreign investors, avoiding the fact that the ISDS system inarguably provides greater *procedural* rights for foreign firms operating in the United States than are available to domestic firms. If a U.S. firm takes issue with a new U.S. financial or environmental regulation, for example, the corporation cannot skirt the entire U.S. domestic legal system and take its case to a private three-person international tribunal empowered to order the U.S. Treasury to compensate the firm, with extremely limited options for appeal. Nor can a U.S. firm engage in “forum shopping” – launching an ISDS claim to get a second bite at its case after a U.S. domestic court does not provide a satisfactory ruling. But those are precisely the procedural privileges granted to foreign corporations under the ISDS provisions of U.S. pacts.

2. Reality: ISDS undermines the rule of law by empowering extrajudicial panels of private sector attorneys to contradict domestic court rulings, including those in which countries' supreme courts interpret domestic Constitutions and laws, in decisions not subject to any substantive appeal.

USTR Claim: [The Obama administration works] to ensure that our trade agenda advances our economic interests and reflects our values. One of our core values is promoting the rule of law.

How can ISDS's empowerment of foreign corporations to circumvent an entire domestic legal system so as to challenge democratically-enacted laws before extrajudicial tribunals be said to "reflect" the value of "rule of law"? And how does it convey respect for the rule of law to authorize tribunals of three private attorneys, unaccountable to any electorate, to contradict domestic court rulings and order governments to pay large sums to the foreign firms in decisions that cannot be appealed on the merits? Time and again, foreign corporations have used ISDS under U.S. pacts to undermine the deliberations and decisions of domestic courts:

- When a Mississippi state court jury ruled against the Loewen Group, a Canadian funeral home conglomerate, in a private contract dispute, Loewen launched an ISDS claim against the U.S. government under the North American Free Trade Agreement (NAFTA).²³ In the underlying U.S. court ruling challenged by Loewen, a Mississippi jury determined that Loewen had engaged in anti-competitive and predatory business practices that "clearly violated every contract it ever had" with a local Mississippi funeral home.²⁴ After Loewen rejected an offer to settle the case, the company was hit with a jury damages award requiring it to pay the local funeral home \$500 million.²⁵ Loewen sought to appeal. Under both U.S. federal and Mississippi state court procedures, a bond must be posted as part of the appeal process to ensure that a losing party does not seek to move its assets to avoid paying on the initial ruling.²⁶ This procedural rule, as well as the uncertainties related to jury damage awards, pertains to domestic and foreign firms alike. After a failed bid to lower the bond, Loewen reached a settlement for approximately \$85 million.²⁷ But then Loewen launched a NAFTA case for \$725 million, claiming that the requirement to post bond and the jury trial system violated the company's investor rights under NAFTA.²⁸ The tribunal explicitly ruled that court decisions, rules and procedures were government "measures" subject to challenge and review under the ISDS regime.²⁹ The ruling made clear that foreign corporations that lose tort cases in the United States can ask ISDS tribunals to second-guess the domestic decisions and to shift the cost of their court damages to U.S. taxpayers. On the merits, the tribunal agreed with some of Loewen's claims and "criticized the Mississippi proceedings in the strongest terms."³⁰ Luckily for the U.S. government, Loewen's bankruptcy lawyers filed for reincorporation as a U.S. firm under bankruptcy protection, thus destroying Loewen's foreign investor status, and the case was dismissed.³¹
- When the government of Guatemala initiated a legal process to consider revoking a disputed railroad contract with RDC, the U.S.-based firm launched a CAFTA claim against the government, even while defending itself in Guatemala's domestic legal process. The Guatemalan government had issued a legal challenge to the company's contract after multiple assessments concluded that it did not comply with Guatemalan law.³² This process, called *lesivo*, provided RDC the opportunity to present its case before an administrative court, and then still appeal the resulting decision to the country's Supreme Court.³³ But while taking advantage of this domestic due process, RDC launched its CAFTA claim. The tribunal not only allowed the ISDS claim to move forward despite the unresolved domestic process, but opined that in such instances of parallel ISDS claims, investors should be allowed to access extrajudicial investor-state proceedings *before* the conclusion of domestic legal processes.³⁴ The tribunal soon ruled against Guatemala, ordering the payment of more than \$18 million to RDC for initiating a domestic legal challenge to the company's contract.

- When Eli Lilly and Company, a U.S. pharmaceutical corporation, failed to prove in Canada's domestic courts that it had met the legal standard for obtaining patents for two drugs, resulting in the invalidation of its patents, the firm launched a \$481 million NAFTA claim against Canada. Canadian courts invalidated the company's patents for Strattera and Zyprexa after ruling that Eli Lilly had failed to meet the utility standard required to obtain a patent – demonstration or sound prediction that the drugs would provide the benefits that the company promised when applying for the patents' monopoly protection rights.³⁵ Eli Lilly is asking a NAFTA tribunal to second-guess not only the courts' decisions, but Canada's entire legal basis for determining a patent's validity. The case is pending.³⁶
- When the Peruvian government denied a request from the U.S.-based Renco Group for a third extension of its deadline to comply with its contractual commitment to remediate environmental and health problems caused by its toxic metal smelting operation, Renco launched an \$800 million ISDS case against the government under the U.S.-Peru FTA.³⁷ After having already granted two extensions to the company, the government ordered the plant closed, pending compliance. Even though the smelter is now shut down because of bankruptcy, the mere filing of the ISDS case assisted Renco in its efforts to evade cases brought in U.S. courts against the firm on behalf of Peruvian children allegedly injured by the smelter's emissions.³⁸ Renco had failed three times³⁹ to get the cases out of Missouri courts, where claims by foreign plaintiffs were permitted against companies located in the state.⁴⁰ The cases had a decent chance of success, since Renco's companies have also faced heavy penalties for highly publicized pollution in Missouri,⁴¹ and the jury pool was likely to be skeptical of the company.⁴² In January 2011, one week after starting its investor-state case, Renco moved for a fourth time to have the Missouri state court cases removed to federal courts, this time based on its ISDS case. The same judge that had denied the previous requests now granted it, citing the ISDS case as the reason: "In removing these cases, defendants rely on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ... [U.S. law] allows removal of any action in state court in which 'the subject matter ... relates to an arbitration agreement or award falling under the Convention...' ... Accordingly, because the [FTA] arbitration panel's decision on the claims raised by Renco ... could conceivably affect the issues in this case, these actions are removable..."⁴³

In several ISDS cases brought under U.S. deals, tribunals have even obliged foreign corporations' requests to defy or reinterpret a country's Constitution. One example comes from an ISDS case that Chevron Corporation has launched against Ecuador under the U.S.-Ecuador BIT in an attempt to evade payment of a \$9.5 billion judgment that Ecuador's domestic courts have ordered the U.S. oil corporation to pay for mass contamination of the Amazonian rain forest. A three-person tribunal in 2012 ordered Ecuador's executive branch to interfere in the operations of the independent court system on behalf of Chevron to suspend enforcement of domestic rulings against the corporation.⁴⁴ Ecuador's government had explained to the panel that compliance with any order to interfere with the country's independent judiciary would violate the separation of powers enshrined in the country's Constitution.⁴⁵ Undeterred, the tribunal proceeded with their order.

After the government decided to heed its Constitution rather than the three lawyers, the same tribunal delivered another ruling in 2013 that cast aside 20 years of litigation and court rulings against Chevron under two sovereign legal systems. The tribunalists went beyond second-guessing this long history of domestic court proceedings – they pretended it never even happened. In entertaining Chevron's request to order the taxpayers of Ecuador rather than the oil corporation to pay the billions that Ecuador's courts had ordered the company to pay to clean up the vast Amazonian pollution, the tribunal barely

made mention of the domestic rulings against Chevron.⁴⁶ Instead, the tribunal invited Chevron to make the same arguments already rejected by domestic courts as if for the first time.

In a preliminary decision, the tribunal accepted an improbable Chevron argument that had failed in Ecuador's domestic courts.⁴⁷ The three lawyers deigned to reinterpret Ecuador's Constitution and domestic law,⁴⁸ and declared that some of Ecuadorians' legal rights even to initiate a case against Chevron had been unwittingly extinguished.⁴⁹ As a final decision remains pending, it remains to be seen whether the ISDS tribunal will attempt to further trump domestic courts, impose its own interpretation of the nation's Constitution and order Ecuadorians themselves to pay for the poisoning of their ecosystem.⁵⁰

3. Reality: ISDS cases have led to the watering down of environmental, health and other public interest policies, and chilled the establishment of new ones, as the mere threat of an ISDS case against an existing or proposed policy raises the prospect that a government will need to spend millions in tribunal and legal costs to defend the policy, even if the government might ultimately prevail.

USTR Claim: Our investment rules preserve the right to regulate to protect public health and safety, the financial sector, the environment, and any other area where governments seek to regulate. U.S. trade agreements do not require countries to lower their levels of regulation. In fact, in our trade agreements, we require our partners to effectively enforce their environmental and labor laws and to take on new commitments to increase environmental and labor protections.

This USTR claim relies on language tricks to obscure the effect of ISDS rules. Of course the standard ISDS terms of U.S. pacts do not directly "require countries to lower their levels of regulation." That is not the concern raised by critics. The actual concern starts with the fact that the ISDS regime empowers foreign corporations to demand taxpayer compensation when a country enacts *higher* levels of regulation (i.e. stronger protections for consumers and the environment). For example:

- When Canada imposed a temporary ban on the export of a hazardous waste called polychlorinated biphenyls (PCB), considered by the U.S. EPA to be toxic to humans and the environment, U.S. waste treatment company S.D. Myers launched a case under NAFTA that resulted in an ISDS tribunal ordering Canada to pay the company almost \$6 million.⁵¹
- When a Mexican municipality required Metalclad Corporation, a U.S. waste management corporation, to clean up existing problems before expanding a toxic waste facility, Metalclad launched a NAFTA case that resulted in an ISDS tribunal ordering Mexico to pay the corporation \$16 million.⁵²
- When the Canadian province of Ontario enacted a program to incentivize the production of renewable energy and green jobs – hailed as one of the most advanced clean energy programs in North America – a company owned by Texas oil magnate T. Boone Pickens filed a \$746 million NAFTA case against Canada while U.S.-based Windstream Energy launched its own \$457 million NAFTA claim against the government.⁵³
- When the Canadian province of Quebec imposed a moratorium on fracking to conduct a study of environmental and health effects that could result from a possible leaching of chemicals and gases

into the groundwater and air, the Lone Pine Resources corporation, which had plans to frack beneath the St. Lawrence Seaway, launched a \$241 million NAFTA claim against Canada.⁵⁴

The usage of ISDS to target increased consumer and environmental safeguards has two damaging effects on public interest policymaking. First, if a corporation launches an ISDS case against a given consumer or environmental protection, the government may feel compelled to roll back the challenged policy to avoid costly legal and tribunal fees, the risk of an even more costly tribunal order to compensate the firm, and the potential for other firms to launch further ISDS cases against the policy. Second, for a proposed public interest policy that has yet to be implemented, the mere threat that ISDS cases would be brought against the policy can chill its implementation. Indeed, regulatory chill and regulatory rollback have been the product of a series of ISDS cases under U.S. pacts. Here are three examples from Canada alone:

- When Canada banned the import and transport of MMT, a toxic gasoline additive that is also banned by U.S. law in reformulated gasoline,⁵⁵ the U.S. chemical firm Ethyl Corporation launched a NAFTA claim against Canada.⁵⁶ (MMT was not produced in Canada, and given Canadian provinces have significant jurisdiction over environmental matters, this import and interprovincial transport ban was a means for the national government to effectively implement a national ban.⁵⁷) Less than a month after the investor-state tribunal ruled in favor of Ethyl in a jurisdictional ruling, indicating that the case would go forward to the merits, the Canadian government announced that it would settle with Ethyl. The terms of that settlement required the government to pay the firm \$13 million in damages and legal fees, to post advertising saying MMT was safe and, critically, to reverse the ban on MMT.⁵⁸ Today Canada depends largely on voluntary restrictions to reduce the presence of MMT in gasoline.⁵⁹
- When an all-party committee of the provincial government of New Brunswick, Canada recommended that the province develop its own public auto insurance program, the private insurance industry used the threat of a NAFTA investor-state case to successfully lobby against the program. In response to public outcry over skyrocketing auto insurance premiums, the New Brunswick committee recommended a public plan that would achieve average premium reductions of approximately 20 percent. The Insurance Bureau of Canada, representing Canada's largest insurers, immediately warned that the proposal could trigger NAFTA investor-state cases from foreign insurance providers in Canada as a NAFTA-prohibited "expropriation" of their market share.⁶⁰ The proposal was soon scuttled, due in part, according to observers, to "aggressive threats of treaty litigation."⁶¹
- When Canada's Parliament started to consider the enactment of plain packaging policies for cigarettes to curb smoking in 1994, the tobacco industry responded with the specter of a NAFTA investor-state case in attempt to forestall the regulation. R.J. Reynolds Tobacco Company sent a letter to the health committee of Canada's House of Commons, arguing that a plain packaging policy would constitute a NAFTA-prohibited expropriation and "would give rise to a claim under the provisions of the NAFTA for hundreds of millions of dollars in compensation."⁶² The Parliament never acted on the plain packaging plan, and analysts credited the NAFTA threat for helping to bury the proposed public health measure.⁶³ Evidence suggests that the threat of ISDS cases is still chilling plain packaging proposals today in several countries. For example, in February 2013, New Zealand's Ministry of Health announced that the government planned to introduce plain packaging legislation, but indicated that it will wait until Philip Morris's investor-state case against Australia's plain packaging law is resolved, and that enactment of New Zealand's

legislation could be delayed as a result.⁶⁴ The legislation has since been introduced, but not enacted.⁶⁵

The increasing pattern of investor-state retaliation for health, environmental and other public interest regulations may well lead policymakers to think twice about enacting protections that could expose the government to a costly investor-state dispute. Even when governments win cases, they are often ordered to pay for a share of the tribunal's costs plus their own legal fees – these expenses average \$8 million per case.⁶⁶ As observed, the prospect of having to spend millions to defend a given safeguard, and potentially being ordered by a tribunal to pay millions more, can have a chilling effect on the enactment of public interest regulations. The extraordinary investor-state provisions of U.S. FTAs and BITs thus undermine public interest regulation not by directly requiring regulations to be dismantled, but by imposing new liabilities and risks on the enactment of new regulations in the public interest.

Concerned about the mounting ISDS claims against such public interest policies, countries negotiating agreements with the United States have not been convinced by USTR's claim that "[o]ur investment rules preserve the right to regulate." In both the TPP and TAFTA, negotiating partners have proposed environmental or health exceptions that would apply to investor-state cases.⁶⁷ But the U.S. government has actually opposed the inclusion of exceptions that governments could use to defend health and environmental policies challenged in investor-state cases as indirect expropriation or "minimum standard of treatment" violations. In the case of TPP, where most of the investment chapter's text is agreed, this is a matter of serious contention, as many other TPP nations demand such exceptions be included.⁶⁸

The investment chapters of past U.S. trade pacts, which inform the U.S. proposals for the TPP and TAFTA, also provide no meaningful exception or defense provisions for public interest regulations challenged by foreign firms as violations of commonly-invoked foreign investor rights.⁶⁹ Though the standard language of U.S. pacts includes an "investment and environment" section, the clause provides no meaningful safeguard against investor-state challenges to environmental policies.⁷⁰ The relevant language in the investment chapter of existing U.S. FTAs, the leaked investment chapter of the TPP and the 2012 U.S. model BIT (a stated U.S. template for investment provisions in the TPP and TAFTA)⁷¹ is written in a manner that would likely be deemed self-canceling. It states that a signatory government may enact environmental protections, so long as doing so does not conflict with the sweeping rights that the pact gives to foreign investors. But the only instances for which a government needs an agreement to specify that its environmental regulatory rights trump its obligations to foreign investors are those in which investors' broad rights conflict with environmental policies. For such instances, this supposed "right to regulate" provision appears to be inapplicable.⁷² Indeed, a tribunalist in the *S.D. Myers v. Canada* NAFTA ISDS case noted that this environmental provision, also included in NAFTA, was among those referred to by trade analysts as "'tautologies' or as 'diplomatic, rather than legal' statements."⁷³ A recent legal review from Cambridge University Press concluded that this environmental clause "falls short in failing to add more than a nebulous provision that can easily be marginalized."⁷⁴

USTR also makes reference to the labor and environmental chapters typically included in U.S. FTAs. In 2007, Congress forced President George W. Bush to make some provisions of both the environment and labor chapters enforceable and subject to the same state-to-state dispute resolution system as other chapters in his pacts. But these provisions are subject to the "Gramm Clause." Senator Phil Gramm (R-Texas) inserted in the 2002 Fast Track legislation an amendment that ensured the FTA enforcement language would be undercut.⁷⁵ The resulting Fast Track law "recognize[d] that parties to a trade

agreement retain the right...to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities.” Fast Track further stated, “no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environmental protection.”⁷⁶ Thus, U.S. FTAs negotiated under that Fast Track included such language as: “The Parties recognize that each Party retains the right to exercise prosecutorial discretion and to make decisions regarding the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities.”⁷⁷

Even though the 2002 Fast Track authority expired and does not apply to the TPP, the leaked draft TPP environmental text appears to still abide by the limiting “Gramm Clause,” stating: “The Parties recognize that each Party *retains the right to exercise discretion* and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance...where a course of action *or inaction* reflects a reasonable exercise of such discretion...”⁷⁸

But even if the provisions of the labor and environment chapters of the TPP and TAFTA, unlike other U.S. FTAs, were strong and fully enforceable, it would not diminish signatory governments’ broad and binding obligations to foreign investors under an investment chapter with ISDS. Nor would it prevent foreign firms from citing those expansive obligations, such as the guarantee of a “minimum standard of treatment,” in launching investor-state cases against environmental, labor and other public interest policies. Indeed, it is precisely when governments have effectively enforced their environmental laws, as USTR claims is required by U.S. FTAs, that foreign firms have launched an array of costly ISDS cases.

4. Reality: Investor-state tribunals often order governments to pay foreign corporations large sums of taxpayer funds as compensation for future profits that the tribunals surmise the firms would have earned if not for the challenged government actions or policies.

USTR Claim: [U.S. investor-state provisions] provide no legal basis to challenge laws just because they hurt a company’s profits...Our investment rules seek to promote standards of fairness, not protect profits.

While the basis of a foreign corporation’s investor-state claim under U.S. pacts cannot be simply that the firm lost profits, if a corporation convinces an ISDS tribunal on the merits of its case – that a given domestic law violated one of the panoply of foreign investor rights not available to domestic firms – the firm can then calculate its demand for compensation on the “expected future profits” that the law allegedly impeded. After using sweeping interpretations of foreign firms’ rights to find governments at fault, investor-state tribunals under U.S. pacts have frequently used this “expected future profits” approach to determine how much governments must pay to foreign firms. Under such logic, tribunals have ordered governments to pay more than \$3.6 billion to foreign corporations under U.S. FTAs and BITs for nondiscriminatory toxics bans, land-use rules, regulatory permits, water and timber policies and more. Meanwhile, in the 19 pending claims under U.S. FTAs alone, foreign firms are demanding \$38 billion for environmental, energy, financial regulation, public health, land-use and transportation policies.⁷⁹

Due to ISDS tribunals' increasingly wide interpretations of foreign firms' rights and increasingly investor-friendly damages calculations, the amounts that tribunals have ordered governments to pay foreign corporations have soared. While just 15 years ago tribunals typically ordered payment of millions of dollars in a given ISDS case, today it is not uncommon for a single lost case to cost a government hundreds of millions of dollars.⁸⁰

This trend was dramatically confirmed in October 2012 when the ISDS tribunal in the previously mentioned *Occidental v. Ecuador* case, brought under the U.S.-Ecuador BIT, ordered Ecuador's government to pay \$2.3 billion to the U.S. oil corporation – one of the largest-ever investor-state awards.⁸¹ The penalty imposed by the tribunal on Ecuador's taxpayers was equivalent to the amount Ecuador spends on healthcare each year for over seven million Ecuadorians – almost half the population.⁸² The tribunal decided on the massive penalty after acknowledging that Occidental had broken the law,⁸³ that the response of the Ecuadorian government (forfeiture of the firm's investment) was lawful, and that Occidental indeed should have expected that response.⁸⁴ But the tribunal then concocted a new obligation for the government (one not specified by the BIT itself) to respond proportionally to Occidental's legal breach and, upon deeming themselves the arbiters of proportionality, determined that Ecuador had violated the novel investor-state obligation.⁸⁵

To calculate damages, the tribunal majority estimated the amount of future profits that Occidental would have received from full exploitation of the oil reserves it had forfeited due to its legal breach, including profits from not-yet-discovered reserves.⁸⁶ The tribunal majority then substantially increased the penalty imposed on Ecuador by ordering the government to pay compound interest. It has become increasingly common for investor-state tribunals to order governments to pay compound rather than simple interest, often requiring that the interest be retroactively compounded from the moment of the challenged action or policy to the date of the tribunal's decision, and prospectively until the date of payment.⁸⁷ In the *Occidental v. Ecuador* case, these interest requirements alone cost the Ecuadorian government more than \$500 million.

5. Reality: The TPP and TAFTA would expose the U.S. government, taxpayers and domestic laws to an unprecedented surge in ISDS liability.

USTR Claim: ...the United States has only been sued 17 times under any U.S. investment agreement and has never once lost a case.

Citing the number of cases brought against the United States under existing FTAs and BITs says little about the investor-state liability to which the United States would be exposed under the TPP and TAFTA. Of all the countries currently covered by U.S. ISDS-enforced FTAs, only two – Canada and Singapore – are among the world's top 20 exporters of foreign direct investment (FDI).⁸⁸ Having signed deals primarily with developing countries that have few investments in the United States, the investor-state liability of existing pacts has been limited.

But were the TPP and TAFTA to be enacted with ISDS, the United States would grant investor-state privileges to corporations from 15 of the world's 20 largest FDI exporters, dramatically increasing U.S. exposure to ISDS attacks.⁸⁹ Corporations in the European Union (EU) own more than 27,000 U.S.-based subsidiaries and corporations in TPP countries own more than 16,000 U.S.-based subsidiaries. Any of these more than 43,000 firms could serve as the basis for an investor-state claim against U.S. government policies or actions were the TPP and TAFTA to go into effect with ISDS included.⁹⁰

The TPP alone would roughly double the United States' exposure to ISDS attacks against U.S. policies. The United States currently has ISDS-enforced pacts with 55 (mostly developing) countries.⁹¹ In the TPP, six countries are not already covered by an ISDS-enforced pact with the United States. Corporations based in those six countries own nearly as many subsidiaries in the United States as the combined total of all U.S. subsidiaries owned by firms in the 55 countries already covered by U.S. ISDS-enforced pacts. That is, there are currently 9,585 firms doing business in the United States that could serve as the basis for an ISDS claim against U.S. policies. Were the TPP to take effect, foreign corporations would be newly empowered to bring such claims against the United States on behalf of an additional 9,274 firms doing business in the United States. No other ISDS-enforced pact has subjected the United States to such an increase in ISDS liability. (NAFTA, the largest existing ISDS-enforced U.S. pact, covers 8,196 foreign-owned firms doing business in the United States.)⁹²

TAFTA alone would roughly quadruple the United States' exposure to ISDS attacks against U.S. policies. Of the 28 member states of the EU, nine are already covered by ISDS-enforced BITs. Some U.S. government officials have downplayed the surge in ISDS liability that TAFTA implies, arguing that no investor-state case has been brought against the United States under these nine BITs.⁹³ What they do not mention is that those nine pacts cover a mere 33 firms doing business in the United States.⁹⁴ That is because the nine existing U.S. BITs with EU countries are exclusively with Eastern European nations that have relatively low FDI exports: Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia. In other words, U.S. officials are arguing that because U.S. policies have not been challenged under existing BITs by 0.1 percent of the more than 27,000 European firms operating here, empowering the other 99.9 percent to challenge domestic safeguards should not be cause for concern. Corporations in the 19 EU countries without U.S. BITs own 27,091 firms in the United States, any one of which could serve as the basis for an ISDS claim against the United States if TAFTA were to take effect. That is nearly three times the 9,585 foreign-owned businesses in the United States that are currently covered by U.S. ISDS pacts.⁹⁵

The TPP and TAFTA together would roughly quintuple the United States' exposure to ISDS attacks against U.S. policies. Were the TPP and TAFTA to take effect, foreign corporations in 25 EU and TPP countries would be newly empowered to launch ISDS claims against the United States on behalf of an additional 36,365 firms doing business in the United States. The degree of ISDS liability that the United States has undertaken during three decades of enacting ISDS-enforced pacts would increase nearly five-fold in two fell swoops.⁹⁶

Even assuming that the United States could somehow win all of the new cases spurred by this vast increase in investor-state liability, U.S. taxpayers would still have to pay substantially just to defend the targeted domestic policies. As mentioned, in an average investor-state case, governments spend \$8 million just on legal fees and tribunal costs – expenses that often must be paid even if the government wins the case.⁹⁷ The government of the Philippines has spent at least \$58 million on tribunal and legal expenses alone in two ISDS cases brought by German firm Fraport AG Frankfurt Airport Services Worldwide.⁹⁸ As explained above, the prospect of paying millions for repeated investor-state claims against a proposed public interest policy can chill a government's resolve to enact the policy even if it expects to win an ensuing string of ISDS cases.

But the assumption that the U.S. government will continue to dodge the ISDS bullet indefinitely is not one on which TPP and TAFTA negotiators should rely. The United States has already nearly lost ISDS cases that were dismissed on narrow procedural grounds.⁹⁹ The fact that these were launched by firms

in Canada – the only major FDI exporter among U.S. FTA partners – should raise further concern about enacting an FTA with the EU’s array of major FDI exporters. For example, in the *Loewen v. United States* case described above, the ISDS tribunal supported several of Loewen’s arguments on the merits,¹⁰⁰ and only dismissed the case without imposing a penalty on the U.S. government thanks to a remarkable fluke: lawyers involved with the firm’s bankruptcy proceedings reincorporated Loewen as a U.S. firm, thus destroying its ability to obtain compensation as a “foreign” investor.¹⁰¹ Such luck should not be expected to continue if foreign investor privileges are granted to thousands of European firms.

6. Reality: The very structure of the ISDS regime gives rise to conflicts of interest that would not be remediated by enhancement of the weak “conflict of interest” rules for tribunalists.

USTR Claim: Investor-state arbitration is designed to provide a fair, neutral platform to resolve disputes. The arbitration rules applied by tribunals under our agreements require that each arbitrator be independent and impartial. These rules permit either party in a dispute to request the disqualification of an arbitrator and the appointment of a new arbitrator if necessary to ensure the independence and impartiality of all tribunal members.

The actual conflict of interest rules that apply under U.S. pacts containing ISDS are notably weak. But there are more fundamental problems. The entire structure of ISDS has created a biased incentive system in which tribunalists can boost their caseload by using broad interpretations of foreign investors’ rights to rule in favor of corporations and against governments, and boost their earnings by dragging cases out for years. ISDS is neither fair nor neutral, not because of a few compromised tribunalists, but due to core design flaws.

Under ISDS rules, only foreign investors can launch cases and also select one of the three tribunalists. (By contrast, in domestic courts, judges are assigned to a case, not hired by the plaintiff.) Thus, ISDS lawyers that create novel, expansive interpretations of foreign investors’ rights while serving as a tribunalist in one case can increase the number of investors interested in launching new cases and enhance the likelihood of their selection by investors for future tribunals. (While governments can also select one of the tribunalists, these individuals do not have the same structural conflict of interest – interpreting investors’ rights narrowly may curry favor with governments, but it would diminish the number of firms interested in launching ISDS claims in the first place.) This helps explain why a few lawyers are repeatedly picked as ISDS tribunalists – just 15 lawyers have been involved in 55 percent of all public ISDS cases.¹⁰² The absence of any system of precedent for ISDS rulings, or of governments’ rights to appeal the merits of cases, further enables tribunalists to concoct ever more fanciful interpretations of ISDS-enforced agreements and order compensation for breaches of obligations to which signatory governments never agreed.

And because tribunalists are paid by the hour, unlike salaried domestic judges, the longer a case continues, the more money the tribunalist makes (and the government pays), even if the case is ultimately dismissed. Tribunalists are paid at rates ranging from \$375 to more than \$700 per hour.¹⁰³ Even when governments add language in ISDS-enforced agreements intended to allow for quick termination of frivolous cases, the decision to accept an argument for termination based on such terms rests with three tribunalists whose incomes rely on the case continuing.

Moreover, the ISDS system allows lawyers to rotate between roles, as supposedly impartial arbitrators and as advocates for investors, in a manner that would be unethical for judges. Many lawyers who

serve on ISDS tribunals as “judges” also represent corporations in other ISDS cases against governments, or have had a business relationship with the particular corporation in their case. Thus, a lawyer can use her role as a tribunalist to push expansive interpretations of governments’ obligations that she can then take advantage of when launching an ISDS case for an investor in the future.

Specific conflicts of interest have raised alarm, such as in the *Vivendi Universal v. Argentina* case, in which the tribunal’s award in favor of Vivendi was not annulled despite one of the tribunalists serving on the board of directors of a bank that held shares in Vivendi. The tribunalist did not disclose the conflict, much less recuse herself.¹⁰⁴

Neither U.S. FTAs nor the 2012 U.S. model BIT directly stipulate requirements for investor-state tribunalists to be independent or impartial. Rather, the pacts rely on weak impartiality provisions included in the World Bank and United Nations rules under which most tribunals operate. The rules of the World Bank’s International Centre for Settlement of Investment Disputes (ICSID) – the most commonly used rules for investor-state cases – state that tribunalists need to be “relied upon to exercise independent judgment.”¹⁰⁵ However, the rules make it very difficult for a government to disqualify a tribunalist even when she or he exhibits a clear conflict of interest (e.g. serving on the Board of a firm invested in the corporation bringing the case). ICSID requires the government to convince both of the other tribunalists, or the president of the World Bank, to remove the biased tribunalist.¹⁰⁶ Convincing investor-state tribunalists to remove one of their colleagues is a tall order, particularly given that, as stated, the lawyers who serve on investor-state tribunals form part of a small, tight-knit club.

That may explain why in ICSID’s 48-year history, attempts to disqualify biased tribunalists have only been successful on four occasions. In 37 other ISDS cases brought under ICSID rules, tribunalists have dodged attempts at disqualification on grounds that they exhibited bias or had conflicts of interest.¹⁰⁷ This track record hardly inspires confidence in the impartiality of tribunalists.

The conflict of interest rules of the United Nations Commission on International Trade Law (UNCITRAL) – the second most commonly used set of rules for ISDS cases – are similarly weak. While UNCITRAL rules require arbitrators to “disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence,” there are no stipulated consequences for failure to do so.¹⁰⁸ And while a party to the dispute can challenge an arbitrator as exhibiting a conflict of interest, the contested tribunalist would not be removed unless the other party agrees, the arbiter removes herself, or the “appointing authority” empowered to unilaterally decide on the challenge opts for removal.¹⁰⁹ The first scenario seems unlikely – a party should not be expected to dismiss an arbiter whose conflict of interest bends in their favor. The second scenario has rarely played out – challenged arbitrators in investor-state cases have generally not proven willing to leave the arbitration on their own volition. And the third scenario – delegating the decision over challenged arbitrators to the “appointing authority” (e.g. the Secretary-General of the Permanent Court of Arbitration at The Hague) – grants wide discretion to the authority to make a unilateral decision. The rules neither stipulate criteria that shall guide the authority’s decision nor require the authority to disclose the criteria actually used.¹¹⁰

But even if such weak rules concerning the specific conflicts of interest of individual tribunalists were strengthened, the structural conflicts of interest of the ISDS system would remain. An ISDS tribunalist who has no relationship with the particular firm bringing a case still has an incentive to use expansive interpretations of government obligations to rule in favor of the firm so as to boost the utility of ISDS and the probability of being picked for future cases.

7. Reality: Purported safeguards and explanatory annexes added to agreements in recent years have failed to prevent ISDS tribunals from exercising enormous discretion to impose on governments obligations that they never undertook when signing agreements.

USTR Claim: [U.S. pacts with ISDS provisions] include strong safeguards to deter frivolous challenges to legitimate public interest measures. The United States has proposed additional safeguards that include stricter definitions than are in most investment agreements of what is required for successful claims, as well as mechanisms for expedited review and dismissal of frivolous claims...

In fact, the “safeguards” USTR touts have already been tested, and have failed to prevent investor-state cases brought under U.S. FTAs and BITs from growing not just in number, but in the range of legitimate public interest policies being targeted. The “additional safeguards,” included in U.S. pacts since CAFTA, have not stopped investors from mounting increasingly daring challenges or prevented tribunals from handing down increasingly expansive rulings against public interest policies.

With respect to the investors’ challenges, the new “safeguards” touted by USTR were included in the Peru FTA. But that did not stop the Renco corporation from using that pact to launch its \$800 million ISDS claim against Peru for not giving the firm a *third* extension on its unfulfilled commitment to remediate against toxic pollution created by its metal smelter.¹¹¹ And despite the inclusion of the “safeguards” in CAFTA, a subsidiary of the Canada-based Pacific Rim Mining Corporation, named Pac Rim Cayman, used that pact to challenge El Salvador’s refusal to grant a mining permit to the company amid a major national debate about the health and environmental implications of mining and the announcements, by presidents from both the right and left parties, of a moratorium on gold mining. Pac Rim launched the ISDS case because it wanted a permit to build a controversial cyanide-leach gold mine, despite the company’s failure to complete a required feasibility study.¹¹² While the tribunal ultimately ruled that the Canada-based Pac Rim did not have standing as a U.S. firm to pursue the case under CAFTA (while giving the corporation a green light to pursue the ISDS case under a domestic investment law), this decision was not the result of the touted safeguards. Had Pac Rim simply better organized its corporate structure, the case likely could have proceeded under the U.S. pact.¹¹³ And despite the tribunal’s ruling, El Salvador still had to pay millions to defend its decision not to grant a contentious mining permit. Further, in the wake of Pac Rim’s ISDS claim, implementation of proposed new mining restrictions have been delayed indefinitely.¹¹⁴

The attempt to “include stricter definitions...of what is required for successful claims” has also failed to stop tribunals from using increasingly expansive interpretations of foreign investors’ rights to side with corporations in ISDS challenges to public interest policies. In CAFTA, the Parties inserted an annex,¹¹⁵ as described above, that attempted to narrow the vague obligation for States to guarantee foreign investors a “minimum standard of treatment,” which a litany of tribunals had interpreted as an obligation for the government to not frustrate investors’ expectations, for instance by improving environmental or health laws after an investment was established. As mentioned, in both *RDC v. Guatemala* and *TECO v. Guatemala* – two of the first investor-state cases brought under CAFTA – the tribunals simply ignored the annex’s narrower definition of “minimum standard of treatment.” Instead, the *RDC* and *TECO* tribunals both relied on an expansive interpretation of that standard, concocted by a previous investor-state tribunal, which included an obligation to honor investors’ expectations.¹¹⁶ Both ISDS tribunals ruled that Guatemala had violated the expanded obligation, and ordered the government to pay millions.

Another provision that USTR touts as a “safeguard” is a mechanism to dispense with frivolous investor-state claims. The relevant language in the 2012 U.S. model BIT provides for expedited consideration of arguments from the government that a case should be terminated because the legal claim used by the foreign corporation to attack its policies is not permitted under the treaty’s sweeping investor protections.¹¹⁷ One problem is that tribunalists with financial incentives to continue cases are the ones who decide whether to accept such arguments for termination. Another problem is that many investor-state claims *do* in fact fall within the wide ambit of the investor privileges found in U.S. FTAs and BITs. That is because the pacts grant broad rights to investors and give ample discretion to tribunals to interpret those rights as far-reaching restrictions on States’ prerogative to regulate in the public interest. Until foreign investors’ substantive rights and tribunalists’ discretion are narrowed, language to prevent claims not falling under those rights will have limited impact in preventing investor-state rulings against “legitimate public interest measures.”

Indeed, initial attempts to use this mechanism against frivolous claims suggest that it may be largely ineffective, thereby adding another step in the prolonged ISDS timetable (and more billable tribunalist hours) rather than expediting the process. In the *Pac Rim v. El Salvador* case, El Salvador attempted to use the “safeguard” against frivolous cases, arguing that the company’s claim was not one that could be legally argued under CAFTA.¹¹⁸ But in evaluating the government’s argument, the tribunal decided that for a State to successfully use the mechanism to dismiss a frivolous claim, the tribunal must determine at the outset of a case that the claim was “certain” to fail, not merely “likely” to fail.¹¹⁹ Having decided that *Pac Rim*’s claim did not meet this improbably high threshold, the tribunal dismissed the government’s attempted usage of the “safeguard.”¹²⁰ As mentioned, *Pac Rim*’s CAFTA claim did eventually fail, as the tribunal later denied *Pac Rim* jurisdiction under the pact. In the two intervening years, the government spent millions defending the mining decisions at issue – the very eventuality that the frivolous claims “safeguard” was supposed to prevent.

8. Reality: Transparency rules and amicus briefs are insufficient to hold accountable tribunals that remain unrestrained by precedent, States’ opinions or substantive appeals.

USTR Claim: The United States is committed to ensuring the highest levels of transparency in all investor-state proceedings. Investment arbitration hearings under recent U.S. trade and investment agreements, as well as all key documents submitted to investor-state tribunals and tribunal decisions, are public. Recent U.S. trade and investment agreements also give NGOs and other non-parties to a dispute the ability to participate by filing amicus curiae or “friend of the court” submissions, similar to non-parties’ ability to make filings in U.S. courts.

Transparency is a necessary, but not sufficient, condition for reining in investor-state tribunals’ ability to fabricate new obligations for States and then rule against public interest policies as violations of the novel obligations. As investor-state documents have become more publicly available, tribunals have not indicated greater hesitance to use overreaching interpretations of investors’ rights. Documents were generally made available in the recent *Occidental v. Ecuador* case brought under the U.S.-Ecuador BIT. That includes the publicly-available 2012 award in which the tribunalists concocted a new obligation for Ecuador to respond proportionally to *Occidental*’s breach of the law, deemed themselves the arbiters of proportionality, and ordered the government to pay \$2.3 billion for violating the creative obligation.¹²¹

And while it is important for public interest groups to be able to submit amicus briefs in investor-state cases, they will be inadequate to halt the threat that those cases pose to public interest policies, given the structural incentive and ability, described above, for ISDS tribunalists to simply ignore submissions that call for greater policy space. If these structural problems permit tribunalists to ignore the submissions of the sovereign governments whose agreements they are ostensibly interpreting, there is little reason to think they would do otherwise when facing private sector amicus submissions. As mentioned, in the *RDC v. Guatemala* CAFTA case, the governments of the United States, El Salvador and Honduras all joined Guatemala in arguing via non-disputing Party submissions that the “minimum standard of treatment” obligation should be narrowly defined according to State practice. But the tribunal paid little heed to the suggestions, skipped any examination of State practice, and instead imported an interpretation of “minimum standard of treatment” from yet another ISDS tribunal.¹²² Why would tribunals exhibiting such gall feel bound to the suggestions of NGOs?

None of the provisions that USTR touts restrict the latitude of investor-state tribunals to levy binding decisions against domestic policies based entirely on the reasoning of three private lawyers. Tribunalists are not bound to base their decisions on precedent. They are not bound to adopt standard interpretations of international law. And they are not bound to a robust appeal system. Governments facing unfavorable investor-state rulings may only file for an “annulment” for certain specific categories of tribunal “error.” Annulment claims are not heard by domestic courts, but are decided by another tribunal comprised of private sector attorneys. U.S. FTAs have never included a substantive appeal mechanism for investor-state cases despite longstanding calls for one. The future development of such a mechanism was even included in CAFTA:

*Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter... The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism.*¹²³

Eight years have passed since CAFTA took effect in most signatory countries, and no such amendment has been produced.

9. Reality: State and local governments have no standing to defend the state and local policies that are often challenged in ISDS cases.

USTR Claim: [Investor-state provisions in U.S. FTAs and BITs] do not expose state or local governments to new liabilities. In any disputes arising under our trade agreements, the federal government assumes the cost of defending the United States, even if they relate to state and local issues.

An increasing range of measures taken by state, provincial and municipal governments have been challenged under the ISDS terms of U.S. pacts, including state and local land use decisions, state environmental and public health policies, adverse state court rulings, and state and municipal contracts.¹²⁴ If a foreign corporation challenges a state or local policy, the state or local government does not have standing to defend the policy and must rely on the federal government.

When the federal government does choose to call on a state's lawyers, given their particular expertise, to assist with the defense of a challenged state-level policy, there is no guarantee that the expenditure of state resources will be recovered, even if the corporation loses the case. Indeed, in several ISDS cases, tribunals have ordered losing corporations to pay federal government lawyers' legal fees, but the legal expenses incurred by states have not been reimbursed. For instance, in the *Methanex Corporation v. United States* NAFTA case in which a Canadian corporation challenged a California ban of the gasoline additive MTBE, the tribunal ordered that \$3 million be paid to the U.S. federal government to help cover its legal expenses. However, the tribunal did not award legal fees for the California state lawyers who worked long hours helping the federal government defend the California law.¹²⁵

While the federal government is technically responsible for paying any compensation ordered by an investor-state tribunal, in a successful ISDS case against a state or local measure, the federal government could hold funds for state or local projects hostage until the challenged measure was rescinded or until the locality agreed to help pay the foreign firm. While the legality of this maneuver has not been addressed by U.S. courts, attempts to foist the investor-state compensation burden onto sub-federal governments have already been tried in U.S. FTA partner countries.¹²⁶ The federal government could also try to avoid having to pay damages in response to a tribunal's ruling against a state or local law by preempting the challenged policy with a federal law.

State and local governing bodies have expressed strong opposition to U.S. investor-state pacts due to these threats to their autonomy and the basic tenets of federalism. The National Conference of State Legislatures (NCSL), a bipartisan association representing U.S. state legislatures, many of which are GOP-controlled, has repeatedly approved a formal position of opposition to such pacts. The association's most recent position states:

*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.*¹²⁷

10. Reality: The Obama administration has repeatedly ignored ISDS opposition from Congress, the bipartisan National Conference of State Legislatures, diverse public interest groups and legal scholars.

USTR Claim: As the Obama Administration promotes trade and investment agreements, we work closely with Congress, stakeholders, and the public to ensure that our trade agenda advances our economic interests and reflects our values...the Model BIT that the Obama Administration released in 2012 followed[] an extensive period of public comment and consultation.

USTR fails to mention that all public interest groups acting as advisors in the 2012 model BIT development process opposed the resulting model BIT as a rejection of their recommendations for change and an embrace of the ISDS status quo. Heeding the counsel of corporate advisors in the model BIT review process, the administration chose to perpetuate the investor-state regime's expansive corporate privileges.

Since then, ISDS opposition has only grown. Members of Congress have voiced increasing opposition to ISDS in “trade” pacts via letters and floor statements.¹²⁸ As mentioned, NCSL approved in 2012 a resolution stating in unequivocal terms that the bipartisan association of state legislatures would oppose any pact with ISDS.¹²⁹ Legal scholars from around the world have announced their opposition to ISDS in a letter that urges governments to “withdraw[] from or renegotiate[]” investor-state pacts.¹³⁰ Conservative groups have also joined the anti-ISDS chorus, as the CATO Institute made clear in its March 2014 article calling for ISDS to be excluded from the TPP and TAFTA due to “legitimate concern that corporations will run roughshod over domestic laws.”¹³¹ Echoing that concern, 120 legal scholars from leading universities in the United States, Europe and elsewhere recently submitted a joint response to the European Commission public consultation on ISDS that strongly criticized the proposed inclusion of ISDS in TAFTA.¹³²

The largest U.S. labor, environmental, health, privacy, Internet freedom, financial, development, family farmer, faith and consumer groups have also called for the Obama administration to exclude investor-state provisions in U.S. agreements. Noting in a December 2013 letter that ISDS provisions in past U.S. pacts have undermined public interest policies and democratic decision-making, these diverse “stakeholders” have made clear they do not see the current trade agenda as “reflecting our values.”¹³³ This view is held across the political spectrum. Conservative and small business stakeholders opposing TAFTA’s inclusion of ISDS include the U.S. Business and Industry Council, Coalition for a Prosperous America,¹³⁴ the CATO Institute,¹³⁵ and various tea party groups.¹³⁶ Numerous large U.S. public interest groups and small business associations indicated similar sentiments by signing a February 2014 letter urging USTR to launch a public consultation process on the inclusion of ISDS in TAFTA, to parallel the EU public consultation. Groups such as the AFL-CIO, Consumers Union, National Farmers Union, Natural Resources Defense Council, Presbyterian Church USA and U.S. Business and Industry Council argued:

*...[a] public consultation process in which American workers, families, communities, small businesses, faith institutions and civil society organizations have a real voice will be an important step toward creating more balanced investment policies that reflect the diverse needs and interests of real people and their communities, not simply large, global corporations.*¹³⁷

The Obama administration has denied this broadly-supported request, refusing thus far to initiate a public consultation on the inclusion of ISDS in TAFTA.

The current breadth of U.S. opposition to ISDS stems in part from the manner in which the Obama administration handled the “extensive period of public comment and consultation” that USTR characterizes as part of the development of the 2012 U.S. model BIT that now serves as the U.S. template for TAFTA and the TPP’s investment provisions. Though the Obama administration solicited the input of several public interest groups in developing the model BIT, that input was ignored. As part of the consultation, public interest organizations represented on a special subcommittee of business, civil society and academic representatives (under the Advisory Committee on International Economic Policy) submitted a list of 17 concrete recommendations for the model BIT. But when the organizations saw the “new” model BIT, they concluded that the administration had outright rejected 15 of their 17 recommendations. The results of the remaining two recommendations “fell well short of expectations.”¹³⁸

The groups had tried to reform the old U.S. model BIT to “make[] dispute settlement consistent with the public interest,” “ensure[] that foreign investors do not have greater rights than U.S. investors,” and “protect[] health, safety, and the environment and promote[] good jobs.”¹³⁹ Instead, the “extensive period of public comment and consultation” touted by USTR ignored these recommendations, producing a “new” model BIT that mirrored the old model BIT and its dangers to the public interest.¹⁴⁰

ENDNOTES

¹ Office of the U.S. Trade Representative, “The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors,” USTR factsheet, March 27, 2014. Available at: <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.

² See Kenneth J. Vandeveld, “A Unified Theory of Fair and Equitable Treatment,” *New York University Journal of International Law & Politics*, 43:1, 2010. (“Yet, circumstances may arise where changes in the law may violate the fair and equitable treatment standard even in the absence of a promise or assurance to the contrary,” at 81.)

³ See Vicki Been and Joel C. Beauvais, “The Global Fifth Amendment? Nafta's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine,” *New York University Law Review*, April 2003. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=337480. (“Although many have argued that NAFTA simply ‘exports’ the U.S. regulatory takings standard into international law, we demonstrate that, in fact, the NAFTA tribunal decisions and dicta significantly exceed U.S. takings protections (which are already among the most protective in the world) in several respects,” at 5.)

⁴ See Lori Wallach, “‘Fair and Equitable Treatment’ and Investors’ Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed,” PC memo, September 5, 2012. Available at: <http://www.citizen.org/documents/MST-Memo.pdf>.

⁵ This is the tribunal’s summary of the U.S. government’s argument. *Glamis Gold, Ltd. v. United States of America*, Award, Ad hoc—UNCITRAL Arbitration Rules (2009), at para. 576. Available at: <http://italaw.com/sites/default/files/case-documents/ita0378.pdf>.

⁶ Rudolf Dolzer, “Fair and Equitable Treatment: Today's Contours,” *Santa Clara Journal of International Law*, 12: 1, January 17, 2014, at 21. Available at: <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil>.

⁷ *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, Ad hoc – UNCITRAL Arbitration Rules (2004), at para. 183. Italics added. Available at: <http://italaw.com/sites/default/files/case-documents/ita0571.pdf>.

⁸ *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, Ad hoc – UNCITRAL Arbitration Rules (2004), at para. 187. Available at: <http://italaw.com/sites/default/files/case-documents/ita0571.pdf>.

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¹⁰ Supreme Court rulings have indicated that compensation for claims of “regulatory takings” under the Fifth Amendment of the U.S. Constitution is only available when a government measure results in “permanent physical invasion” of a property, causes a complete and permanent destruction of a property’s value, constitutes a land-use exaction “so onerous that, outside the exactions context, they would be deemed *per se* physical takings,” or is otherwise “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540, 547-548 (2005).

¹¹ “[O]ur cases have long held that mere diminution in value of property, however serious, is insufficient to demonstrate a taking.” *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California.*, 508 U.S. 602, 645 (1993).

¹² Harvey M. Jacobs, “New Actions or New Arguments over Regulatory Takings?” *The Yale Law Journal*, 117: 65 (September 16, 2007). Available at: <http://www.yalelawjournal.org/forum/new-actions-or-new-arguments-over-regulatory-takings>.

¹³ See Robert Meltz, “Takings Decisions of the U.S. Supreme Court: A Chronology,” Congressional Research Service report, December 9, 2013. Available at: <http://fas.org/sgp/crs/misc/97-122.pdf>.

¹⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), at para. 455. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

¹⁵ See Eduardo Moisés Peñalver, “Is Land Special?” 31 *Ecology L.Q.* 227, 231 (2004) (“it is almost beyond dispute that . . . the [Supreme] Court has focused overwhelmingly on regulations affecting land and that landowners bringing regulatory takings claims stand a greater chance of prevailing in the Supreme Court than the owners of other sorts of property”); Molly

S. McUsic, “The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation,” 76 *B.U. L. Rev.* 605, 647, 655 (1996) (“Economic interests, such as personal property, trade secrets, copyright, and money, are all recognized by the Court as ‘property’ under the Fifth Amendment, but receive little protection against government regulation.”) J. Peter Byrne, “Ten Arguments for the Abolition of Regulatory Takings Doctrine,” 22 *Ecology L.Q.* 89, 127 (1995) (“the Supreme Court has shown absolutely no interest in applying the regulatory takings doctrine to assets other than land”).

¹⁶ *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1027-28 (1992). For further information on Supreme Court cases indicating that indirect takings compensation is generally only available for real estate claims in U.S. law, including a rebuttal to the common claim that the Supreme Court’s decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) provides an exception to the rule, see Matthew C. Porterfield, “International Expropriation Rules and Federalism,” 23 *Stanford Environmental Law Journal* 3, 11-16 (2004).

¹⁷ 2012 U.S. Model Bilateral Investment Treaty, U.S. Department of State, 2012, at Article 1. Available at: <http://www.state.gov/documents/organization/188371.pdf>.

¹⁸ Dominican Republic – Central America – United States Free Trade Agreement, ch. 10 (Annex 10-B), August 5, 2004, Pub. L. No. 109-53, 119 Stat. 462 (2005), at 10-27.

¹⁹ The U.S. government attempted to make clear the narrowness of the “minimum standard of treatment” standard in its official submission in the *RDC* case, stating, “These provisions [in the CAFTA annex] demonstrate the CAFTA-DR Parties’ express intent to incorporate the minimum standard of treatment required by customary international law as the standard for treatment in CAFTA-DR Article 10.5. Furthermore, they express an intent to guide the interpretation of that Article by the Parties’ understanding of customary international law, i.e., the law that develops from the practice and *opinio juris* of States themselves, rather than by interpretations of similar but differently worded treaty provisions. The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets these requirements.” *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Submission of the United States of America (January 31, 2012), at para. 3. Available at: http://italaw.com/sites/default/files/case-documents/ita0709_0.pdf.

²⁰ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), at para. 219. Available at: <http://italaw.com/sites/default/files/case-documents/ita1051.pdf>. For more information, see Lori Wallach and Ben Beachy, “CAFTA Investor-State Ruling: Annex on Minimum Standard of Treatment, Proposed for TPP, Proves Insufficient as Tribunal Ignores Customary International Law Standard, Applies MST Definition from Past NAFTA Award to Rule against Guatemala,” PC memo, July 19, 2012. Available at: <http://www.citizen.org/documents/RDC-vs-Guatemala-Memo.pdf>. And see Lori Wallach and Ben Beachy, “Rebutting Misleading Claims Made by Industry with Respect to *RDC v. Guatemala* Award: CAFTA Tribunal Rejected CAFTA Parties’ and CAFTA Annex 10-B’s Definition of CIL Based on State Practice, Imported Past Tribunal’s MST Standard,” PC memo, November 17, 2012. Available at: <http://www.citizen.org/documents/rdc-v-guatemala-rebuttal.pdf>.

²¹ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013), at para. 455. Available at: <http://italaw.com/sites/default/files/case-documents/italaw3035.pdf>.

²² *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013), at para. 780. Available at: <http://italaw.com/sites/default/files/case-documents/italaw3035.pdf>.

²³ For more information, see Public Citizen, “Loewen’ NAFTA Case: Foreign Corporations Unhappy with Domestic Jury Awards in Private Contract Disputes Can Demand Bailout from Taxpayers,” PC memo, 2012. Available at: <http://www.citizen.org/documents/Loewen-Case-Brief-FINAL.pdf>.

²⁴ Communication from juror Robert Bruce to John Corlew, attorney, November 24, 1995, on file with Public Citizen.

²⁵ This included \$100 million in compensatory damages and \$160 million in punitive damages. However, these two stages were meant to be separate. In the punitive damages phase, the jury returned a corrected award of \$400 million, for a total of \$500 million. See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), at paras. 96 and 101. Available at:

<http://www.state.gov/documents/organization/22094.pdf>.

²⁶ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Counter-Memorial of the United States of America (March 30, 2001), at 144-152. Available at: <http://www.state.gov/documents/organization/7387.pdf>.

²⁷ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Counter-Memorial of the United States of America (March 30, 2001), at 64. Available at:

<http://www.state.gov/documents/organization/7387.pdf>. “Although Loewen values the settlement at \$175 million for present purposes, that amount does not reflect the deferral of payment and tax benefits that Loewen received from the settlement. In statements to the U.S. Securities and Exchange Commission (a federal agency that regulates the securities markets) and in its press releases at the time, Loewen estimated the aftertax, net present value of the settlement to be approximately \$85 million.”

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- ²⁸ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Notice of Claim, (October 30, 1998), at paras. 139, 162 and 187. Available at: <http://www.state.gov/documents/organization/3922.pdf>.
- ²⁹ See *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction (January 5, 2001), at 45, 54. Available at: <http://italaw.com/sites/default/files/case-documents/ita0469.pdf>. And see *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), at 212. Available at: <http://italaw.com/sites/default/files/case-documents/ita0470.pdf>.
- ³⁰ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), at 241. Available at: <http://italaw.com/sites/default/files/case-documents/ita0470.pdf>.
- ³¹ *Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), at para 240. Available at: <http://italaw.com/sites/default/files/case-documents/ita0470.pdf>.
- ³² *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Respondent's Counter-Memorial on Merits (October 5, 2010), at para. 102. Available at: <http://italaw.com/sites/default/files/case-documents/ita0705.pdf>.
- ³³ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), at para. 91. Available at: <http://italaw.com/sites/default/files/case-documents/ita1051.pdf>.
- ³⁴ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012), at para. 221. Available at: <http://italaw.com/sites/default/files/case-documents/ita1051.pdf>.
- ³⁵ *Eli Lilly and Company v. The Government of Canada*, Notice of Arbitration, Ad hoc – UNCITRAL Arbitration Rules (2013), at paras. 48-65. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1582.pdf>.
- ³⁶ For more information, see Public Citizen, “U.S. Pharmaceutical Corporation Uses NAFTA Foreign Investor Privileges Regime to Attack Canada’s Patent Policy, Demand \$100 Million for Invalidation of a Patent,” PC briefing paper, March 2013.
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- ³⁹ See *AAZA v. Doe Run Resources Corp.*, No. 4:07CV1874 CDP, 2008 WL 748328 (E.D.Mo. Mar. 18, 2008) (order granting plaintiff’s motion to remand to state courts). And see *A.O.A. v. Doe Run Resources Corp.*, 2011 WL 2553259 (E.D.Mo. June 22, 2011) (denial of plaintiffs’ motion to remand to state courts).
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- ⁴³ *A.O.A. v. Doe Run Resources Corp.*, 2011 WL 2553259 (E.D.Mo. June 22, 2011) (denial of plaintiffs’ motion to remand to state courts), at 4.
- ⁴⁴ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, Second Interim Award on Interim Measures, Ad hoc – UNCITRAL Arbitration Rules (2012), at para. 3. Available at: http://italaw.com/sites/default/files/case-documents/ita0174_0.pdf.
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- ⁴⁶ *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, First Partial Award on Track I, Ad hoc – UNCITRAL Arbitration Rules (2013). Available at: <http://italaw.com/sites/default/files/case-documents/italaw1585.pdf>.
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- ⁵⁶ For more information on the case, see Public Citizen, “Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. ‘Trade’ Deals,” PC chart, August 2014, at 11. Available at: <http://www.citizen.org/documents/investor-state-chart.pdf>.
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- ⁶⁷ TPP source: Conversation between Public Citizen staff and TPP negotiators, December 2013. TAFTA source: European Commission, “TTIP negotiations: Modified EU draft proposals on trade in services, investment and electronic commerce,” July 2, 2013, Article 64. Available at: http://eu-secretdeals.info/upload/EU-Investment-Text-TTIP-v_July2nd-2013_v1.pdf.
- ⁶⁸ Conversation between Public Citizen staff and TPP negotiators, December 2013.
- ⁶⁹ In the Korea FTA, for example, the general exceptions provisions of Article 23.1 do not apply to the investment chapter. And exceptions related to taxation in Article 23.3 apply only narrowly to the investment chapter, not covering, for-example, claims based on the “minimum standard of treatment” obligation – the most successfully-invoked basis for investor-state claims under U.S. pacts. The investment chapter itself contains no meaningful defense or exception clause for challenged environmental or health measures – only the ineffectual clause addressed in the next paragraph. United States-Korea Free Trade Agreement, U.S.-S. Kor, Chapters 11 and 23, June 30, 2007, 46 I.L.M. 642.
- ⁷⁰ “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is

undertaken in a manner sensitive to environmental concerns.” Italics added. This language is found in the 2012 U.S. model BIT, the leaked TPP investment chapter and past FTAs such as the Korea FTA. 2012 U.S. Model Bilateral Investment Treaty, U.S. Department of State, 2012, at Article 12(5). Available at:

<http://www.state.gov/documents/organization/188371.pdf>. Trans-Pacific Partnership, investment chapter leaked June 2012, at Article 12.15(1). Available at: <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf>. United States-Korea Free Trade Agreement, U.S.-S. Kor, Article 11.10, June 30, 2007, 46 I.L.M. 642.

⁷¹ Office of the U.S. Trade Representative, “Stakeholder Consultations, Investment and the T-TIP,” USTR blog post, March 27, 2014. Available at: <http://www.ustr.gov/about-us/press-office/blog/2014/March/Stakeholder-Consultations-Investment-and-the-TTIP>. “As part of our ongoing consultations, the United States has published and sought public comment on our model investment agreement, which we use as a basis for our international investment agreement proposals.”

⁷² See Andreas Kulick, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012), at 70-71.

⁷³ *S.D. Myers, Inc. v. Government of Canada*, Separate Opinion by Dr. Bryan Schwartz (on the Partial Award), Ad hoc—UNCITRAL Arbitration Rules (2000), at para. 117. Available at: <http://italaw.com/sites/default/files/case-documents/ita0748.pdf>.

⁷⁴ Andreas Kulick, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012), at 70-71.

⁷⁵ Kimberly Ann Elliott, “Labor Standards and the Free Trade Area of the Americas,” Institute for International Economics working paper, August 2003, at 16. Available at: <http://www.iese.com/publications/wp/03-7.pdf>.

⁷⁶ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 1000.

⁷⁷ United States-Korea Free Trade Agreement, U.S.-S. Kor, Article 20.3(b)(i), June 30, 2007, 46 I.L.M. 642.

⁷⁸ Trans-Pacific Partnership, Environment Chapter: Consolidated Text, November 24, 2013. Available at: <https://wikileaks.org/tpp-enviro/>. Italics added.

⁷⁹ See Public Citizen, “Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. ‘Trade’ Deals,” PC chart, August 2014. Available at: <http://www.citizen.org/documents/investor-state-chart.pdf>.

⁸⁰ Earlier ISDS cases resulting in awards of comparably small amounts, include, for example, *Metalclad v. Mexico*, *S.D. Myers v. Canada* and *Feldman Karpa v. Mexico*. See Public Citizen, “Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. ‘Trade’ Deals,” PC chart, August 2014. Available at:

<http://www.citizen.org/documents/investor-state-chart.pdf>. For a summary of recent ISDS awards of much larger amounts, see United Nations Conference on Trade and Development, “Recent Developments in Investor-State Dispute Settlement (ISDS),” IIA Issues Note No. 1, April 2014, at 21. Available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf.

⁸¹ See Lori Wallach and Ben Beachy, “*Occidental v. Ecuador* Award Spotlights Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used “Egregious” Damages Logic to Hit Ecuador with \$2.4 Billion Penalty in Largest Ever ICSID Award,” PC memo, November 21, 2012. Available at: <http://www.citizen.org/documents/oxy-v-ecuador-memo.pdf>.

⁸² World Bank, World DataBank, accessed October 22, 2012. Available at: <http://databank.worldbank.org/ddp/home.do>.

⁸³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October. 5, 2012), at para. 381. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

⁸⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October. 5, 2012), at para. 383. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

⁸⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October. 5, 2012), at para. 416. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

⁸⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October 5, 2012), at para. 748. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

⁸⁷ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October 5, 2012), at paras. 834-835. Available at: <http://italaw.com/sites/default/files/case-documents/italaw1094.pdf>.

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