

300+ Professors of Law and Economics Urge Elimination of ISDS in U.S. Trade and Investment Agreements

April 15, 2024

President Joseph R. Biden
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

cc: Katherine Tai, United States Trade Representative

Dear President Biden:

As U.S. law professors and economics professors deeply committed to the rule of law and economic well-being both domestically and globally, we applaud your expressed opposition to Investor-State Dispute Settlement (ISDS) and strongly urge you to remove ISDS provisions from existing U.S. trade and investment agreements.

ISDS provisions included in Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) allow foreign corporations and individuals to bypass domestic courts and initiate proceedings against sovereign governments before tribunals composed of three party-appointed lawyers from the private sector. In these proceedings, foreign investors seek taxpayer compensation for domestic measures, such as laws, regulations, and court decisions, that allegedly violate vaguely defined obligations owed by sovereign governments to foreign investors. The merits of those rulings are not subject to appeal, but awards are often enforceable against governments in domestic courts.

In addition to the central problem of creating a parallel and privileged set of legal rights and recourse for foreign economic entities operating within our borders, ISDS proceedings lack many of the fundamental safeguards and procedures typically available in a court of law. There are no mechanisms for affected domestic citizens or entities to intervene or meaningfully participate in ISDS disputes. There are no effective avenues for appeals and, therefore, no way to rectify legal or factual errors in arbitral decisions. There is also no oversight or accountability for the private lawyers who serve as arbitrators, many of whom alternate between the roles of arbitrators deciding cases and counsel representing investors in cases against governments.

Over the past decade, hundreds of legal and economic experts have highlighted the substantive and procedural flaws of the ISDS system and have presented evidence that suggests such a system is unnecessary to promote foreign investment or lead to sustainable development objectives of host countries.

We appreciate your [opposition to](#) “the ability of private corporations to attack labor, health, and environmental policies through the [ISDS] process” and to “the inclusion of such provisions in future trade agreements.” Despite your commitment to exclude ISDS provisions from recent international economic negotiations, however, it is important to note that dozens of existing U.S. trade and investment agreements still retain the ISDS mechanism. These agreements thus continue to enable private companies to challenge public interest policies, resulting in squandered tax revenue and regulatory chill.

Around the world, governments are reassessing their investment treaties and stepping back from ISDS. For instance, in the renegotiated U.S.-Mexico-Canada Agreement, ISDS between the U.S. and Canada was eliminated, and its scope was significantly curtailed in relation to Mexico. Likewise, European Union member states have [terminated their intra-EU bilateral investment treaties](#) (BITs), and a number of them have either [officially withdrawn from the Energy Charter Treaty](#) (ECT) or announced their intention to do so

predominantly due to concerns over its protection of fossil fuel investments via the ISDS mechanism. Various other countries, such as South Africa, India, and Indonesia, have terminated their BITs and modernized their investment governance frameworks accordingly.

As [highlighted by experts from Georgetown and Columbia Universities](#), viable strategies for eliminating ISDS liability include: terminating BITs either unilaterally or bilaterally; amending FTAs to remove the investment chapter or to remove only the ISDS provision bilaterally or multilaterally; and withdrawing consent to ISDS arbitration from BITs and FTAs.

To align existing trade policies with the bipartisan consensus that ISDS is no longer a suitable feature of trade and investment agreements, we urge you to work with our trading partners to eliminate ISDS liability from existing agreements.

Thank you for your consideration.

Sincerely,

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