

# Más de 300 profesores de derecho y economía instan a Biden a eliminar el ISDS en los acuerdos comerciales de EE. UU.

15 de abril de 2024

Presidente Joseph R. Biden  
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cc: Katherine Tai, Representante Comercial de Estados Unidos

Estimado Presidente Biden:

Como profesores de derecho y de economía de los EE. UU. profundamente comprometidos con el estado de derecho y el bienestar económico tanto a nivel nacional como global, aplaudimos su oposición expresa al sistema de solución de controversias inversionista-Estado (ISDS por sus siglas en inglés) y lo instamos encarecidamente a eliminar las disposiciones ISDS de los acuerdos comerciales y de inversión existentes en los EE. UU.

Las disposiciones de ISDS incluidas en los Tratados de Libre Comercio (TLC) y los Tratados Bilaterales de Inversión (TBI) permiten a las corporaciones e individuos extranjeros eludir los tribunales nacionales e iniciar procedimientos contra gobiernos soberanos ante tribunales compuestos por tres abogados del sector privado. En estos procedimientos, los inversionistas extranjeros buscan compensación de los contribuyentes por medidas nacionales, como leyes, regulaciones y decisiones judiciales, que supuestamente violan obligaciones vagamente definidas que los gobiernos soberanos deben a las inversionistas extranjeras. Los méritos de esos fallos no están sujetos a apelación, pero los laudos a menudo son ejecutables contra los gobiernos en los tribunales nacionales.

Además del problema central de crear un conjunto paralelo y privilegiado de derechos legales y recursos para entidades económicas extranjeras que operan dentro de nuestras fronteras, los procedimientos ISDS carecen de muchas de las salvaguardias y procedimientos fundamentales típicamente disponibles en un tribunal de justicia. No existen mecanismos para que los ciudadanos o entidades nacionales afectados intervengan o participen significativamente en las disputas ISDS. No existen vías efectivas para apelar y, por lo tanto, no hay forma de rectificar errores de hecho o de derecho en las decisiones arbitrales. Tampoco existe supervisión ni rendición de cuentas para los abogados privados que actúan como árbitros, muchos de los cuales alternan entre las funciones de árbitros que deciden casos y abogados que representan a inversionistas en casos contra gobiernos.

Durante la última década, cientos de expertos legales y económicos han resaltado las fallas sustantivas y procesales del sistema ISDS y han presentado evidencia que sugiere que tal sistema no es necesario para promover la inversión extranjera o conducir a objetivos de desarrollo sostenible de los países anfitriones.

Apreciamos [su oposición](#) a “la capacidad de las corporaciones privadas de atacar las políticas laborales, de salud y ambientales a través del proceso [ISDS]” y a “la inclusión de tales disposiciones en futuros acuerdos comerciales”. Sin embargo, a pesar de su compromiso de excluir las disposiciones ISDS de las recientes negociaciones económicas internacionales, es importante señalar que docenas de acuerdos comerciales y de inversión existentes en Estados Unidos aún conservan el mecanismo ISDS. Por lo tanto, estos acuerdos continúan permitiendo a las empresas privadas desafiar las políticas de interés público, lo que resulta en un despilfarro de ingresos fiscales y un enfriamiento regulatorio.

En todo el mundo, los gobiernos están reevaluando sus tratados de inversión y alejándose de la ISDS. Por ejemplo, en el Acuerdo renegociado entre Estados Unidos, México y Canadá, se eliminó el ISDS entre Estados Unidos y Canadá, y su alcance se redujo significativamente en relación con México. Del mismo modo, los estados miembros de la Unión Europea han [rescindido sus tratados bilaterales de inversión](#) (TBI) dentro de la UE, y varios de ellos se han [retirado oficialmente del Tratado sobre la Carta de la Energía](#) (TCE) o han anunciado su intención de hacerlo principalmente debido a preocupaciones sobre su protección de las inversiones en combustibles fósiles a través del mecanismo ISDS. Varios otros países, como Sudáfrica, India e Indonesia, han rescindido sus TBI y han modernizado sus marcos de gobernanza de inversiones en consecuencia.

Como destacaron expertos de las universidades de Georgetown y Columbia, las estrategias viables para eliminar la responsabilidad ISDS incluyen: rescindir los TBI ya sea unilateral o bilateralmente; modificar los TLC para eliminar el capítulo de inversión o eliminar sólo la disposición ISDS de forma bilateral o multilateral; y retirar el consentimiento al arbitraje ISDS de TBI y TLC.

Para alinear las políticas comerciales existentes con el consenso bipartidista de que la ISDS ya no es una característica adecuada para los acuerdos comerciales y de inversión, le instamos a trabajar con los gobiernos contrapartes para eliminar la ISDS de los acuerdos existentes.

Gracias por su consideración.

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