



## **Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)**

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### *U.S. State and Local Government Officials and Associations*

#### **National Conference of State Legislatures**

“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.”

--[National Conference of State Legislatures’ Policy Directive; Feb. 2016](#)

#### **National Association of Attorneys General**

“WHEREAS, implementation of the standards in Chapter 11 of the North American Free Trade Agreement (NAFTA) raises serious concerns over its potential impact on the power of state or local governments to protect the welfare and environment of their citizens; and NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL: 1. Encourages Congress to ensure that in any new legislation

providing for international trade agreements foreign investors shall receive no greater rights to financial compensation than those afforded to our citizens;”

--[National Association of Attorneys General, “Resolution: In Support of State Sovereignty and Regulatory Authority;” March 2002](#)

### **National Association of Counties**

“[NACo] supports free trade activities that enhance the economic base of local governments and promote county participation in the global economy. NACo, however, opposes the adjudication of disputes arising out of trade agreements in a manner that preempts local government authority, circumvents domestic judicial processes, and grants greater rights to foreign investors than those guaranteed to U.S. citizens by federal, state, and local law.”

--[National Association of Counties’ “American County Platform and Resolutions;” July 25, 2016](#)

### **National League of Cities**

“The U.S. must advocate for trade rules that contain legal standards consistent with the Constitution and applicable case law. International agreements, such as the North American Free Trade Agreement (NAFTA), that define “expropriation of property” to include “indirect expropriation” or “tantamount to expropriation” are ... inconsistent with U.S. Constitutional law. According to U.S. Constitutional law on takings, the term “expropriation” includes only direct expropriations.”

--[National League of Cities’ “National Municipal Policy and Resolutions;” Nov. 19, 2016](#)

### **45 U.S. State Attorneys General**

“As the chief legal officers of our states, we are concerned about any development that could jeopardize the states’ ability to enforce their laws and regulations relating to tobacco products. Experience has shown that state and local laws and regulations may be challenged by tobacco companies that aggressively assert claims under bilateral and multilateral trade and investment agreements, either directly under investor-state provisions or indirectly by instigating and supporting actions by countries that are parties to such agreements. Such agreements can enable these tobacco companies to challenge federal, state, and local laws and regulations under standards and in forums that would not be available under United States law.”

--[National Association of Attorneys General Letter to USTR Froman; Feb. 5, 2014](#)

### **125 U.S. State Legislators Representing All 50 States**

“The ISDS has proven to be extremely problematic, undermining legislative, administrative, and judicial decisions, and threatening the system of federalism established in the U.S. Constitution. It interferes with our capacity and responsibility as state legislators to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment. It should have no place in the Trans-Pacific Partnership.”

--[Open letter from state legislators representing all 50 states; July 5, 2012](#)

## *High Level U.S. Judicial, Executive and Legislative Officials*

### **U.S. Supreme Court Chief Justice John Roberts**

“It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly. Cf. *United States v. Bormes*, 568 U. S. \_\_\_, \_\_\_ (2012) (slip op., at 4) (Congress must “unequivocally express[ ]” its intent to waive the sovereign immunity of the United States (quoting *United States v. Nordic Village, Inc.*, 503 U. S. 30, 33 (1992); internal quotation marks omitted)). But even where a sovereign nation has subjected itself to suit in its own courts, it is quite another thing for it to subject itself to international arbitration. Indeed, “[g]ranted a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation” whose “uniqueness and power should not be overlooked.” Salacuse 137. **That is so because of both the procedure and substance of investor-state arbitration ... Substantively, by acquiescing to arbitration, a state permits private adjudicators to review its public policies and effectively annul the authoritative acts of its legislature, executive, and judiciary.** See Salacuse 355; G. Van Harten, *Investment Treaty Arbitration and Public Law* 65–67 (2007). ... Procedurally, paragraph (3) of Article 8 designates the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) as the default rules governing the arbitration. Those rules authorize the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an “appointing authority” who—absent agreement by the parties—can select the sole arbitrator (or, in the case of a three-member tribunal, the presiding arbitrator, where the arbitrators nominated by each of the parties cannot agree on a presiding arbitrator). UNCITRAL Arbitration Rules, Arts. 6, 8–9 (rev. 2010 ed.). The arbitrators, in turn, select the site of the arbitration (again, absent an agreement by the parties) and enjoy broad discretion in conducting the proceedings. Arts. 18, 17(1) ... **a Contracting Party grants to private adjudicators not necessarily of its own choosing, who can meet literally anywhere in the world, a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts.”**

--[Chief Justice John Roberts' dissent in BG Group PLC v. Argentina \(No. 12-138\), March 2014](#)

### **U.S. Trade Representative (USTR) Robert Lighthizer**

“We’ve had situations where real regulation which should be in place which is bipartisan, in everybody’s interest, has not been put in place because of fears of ISDS ... Why should a foreign national be able to come in and not have the rights of Americans in the American court system but have more rights than Americans have in the American court system? It strikes me as something that at least we ought to be skeptical of and analyze. So a U.S. person goes into a court system, goes through the system and they’re stuck with what they get. A foreign national can do that and then at the end of the day say ‘I want three guys in London to say we’re going to overrule the entire US system.’”

--[USTR Lighthizer at a House Ways and Means Committee hearing; Mar. 21, 2018](#)

“It’s always odd to me when the business people come around and say ‘oh, we just want our investments protected.’ I thought, ‘well so do I.’ I mean don’t we all? I would love to have my investments guaranteed. But unfortunately it doesn’t work that way in the market. It does work that way when you’re talking about special interests. So am I surprised that people on the Hill are

hearing from business? Of course not. All of you cover these things all the time. Have you ever been in a situation where somebody took a special interest away from business and they didn't say something about it? Of course they're going to scream. I've had people come in and say, literally, to me, 'oh but you can't do this, you can't change ISDS... You can't do that, because we wouldn't have made the investment otherwise.' I'm thinking, 'well then why is it a good policy of the United States government to encourage investment in Mexico? My position is if the market makes that decision, then the market should make that decision. It's perfectly reasonable.'"

--[USTR Lighthizer at a press briefing following the fourth round of NAFTA renegotiation talks; Oct. 19, 2017](#)

"It clearly is a balance. There is a legitimate interest in people who go overseas and invest, and the United States has an obligation to do what it can to make sure that those people are treated fairly. On the other hand, as you suggest, Congressman, I am troubled by the sovereignty issue. I am troubled by the fact that anyone – anyone – can overrule the United States Congress, or the President of the United States, when it's passed a law. That is troubling to me."

--[USTR Lighthizer to House Ways and Means Committee members in response to Rep. Lloyd Doggett's \(D-Texas\) question on whether ISDS is necessary; June 22, 2017](#)

"It's an issue that is troubling to me ... on a variety of levels. It's a balancing act. Our investors have a right to have their property protected. On the other hand, there are, in my judgment, at least sovereignty issues. I'm always troubled by the fact that non-elected, non-Americans can make a decision that a United States law is invalid. This, as a matter of principle, I find that offensive. That's what can happen very often in this area ... The most troubling aspect of all this is that it attacks our sovereignty."

--[USTR Lighthizer to Senate Finance Committee members in response to Sen. Sherrod Brown's \(D-Ohio\) question on whether ISDS will be removed from NAFTA; June 21, 2017](#)

### **U.S. Proposal for NAFTA Renegotiation Includes Significant ISDS Reforms**

"U.S. NAFTA negotiators are proposing to essentially do away with the independent tribunals that oversee the trading and investment relationship, either by eliminating them altogether or substantially scaling back their roles, people familiar with negotiations say ... For investor-state dispute settlement, presently laid out in NAFTA's Chapter 11, the U.S. wants a system where nations opt in, effectively allowing each country to decide if it will take part, the people said, speaking on condition of anonymity as talks continue."

--[Bloomberg on the U.S. ISDS proposal for NAFTA renegotiation; Oct. 2017](#)

"The administration's proposal features an "opt-in" provision that would make the entire ISDS process voluntary for countries to observe, according to three sources briefed on the plans. ... First, the U.S. proposal would no longer permit a violation of the "minimum standard of treatment" as grounds for foreign investors to request an independent arbitration panel if they feel government action has diminished the value of their investment. The concept of a minimum standard of treatment, found in customary international law, establishes that governments must generally provide foreign investors with fair and equitable treatment under their laws. It is supposed to serve as a threshold for defining when a company experiences a "denial of justice." But critics of ISDS argue the minimum standard of treatment has become subject to overly broad interpretations by arbitration panels and has become a catch-all argument for foreign companies

that can't successfully argue their case under the more prescriptive investment protections. ... Second, the NAFTA proposal the administration is expected to unveil would also eliminate "indirect expropriation" as an argument a foreign investor could use to file a claim. That would make it harder for a foreign company to win damages based on a government action that has only partially devalued an investment as opposed to a full seizure of the investment without proper compensation. Critics say the concept of indirect expropriation has also broadened interpretations beyond loss of physical property to include harm of other assets, such as intellectual property."

--[Politico on the U.S. ISDS proposal for NAFTA renegotiation; Oct. 2017](#)

### **Democratic Senators Oppose ISDS**

"The renegotiation of NAFTA must ... end the disastrous investor state dispute settlement system that undermines democracy and allows multinational corporations to put corporate profits ahead of workers, the environment, public health, and food safety."

--[Sen. Bernie Sanders \(I-Vt.\) at a Capitol Hill press conference; Dec. 13, 2017](#)

"We urge you to renegotiate NAFTA to deliver a deal that we can support. A transparent negotiating process should result in these essential changes to NAFTA: ... Eliminate NAFTA terms that promote the outsourcing of American jobs. The Investor-State Dispute Settlement (ISDS) system and the foreign investor protections it enforces that make it easier and cheaper to outsource jobs must be eliminated. The investor outsourcing protectionism at the heart of NAFTA incentivizes companies to relocate production to low wage venues by locking in preferential treatment."

--[Letter from Sen. Sanders and five other progressive senators to President Trump; Feb. 2, 2018](#)

"We write to underscore the fundamental flaws of the Trans-Pacific Partnership (TPP) agreement... First and foremost, the agreement includes investor-state dispute settlement (ISDS), which means our country's own public health, worker safety, and environmental standards, among others, are vulnerable to corporate challenges. Recent investigative reporting by BuzzFeed reveals the extent to which ISDS has become an integral part of profit-maximizing strategies for corporations. ISDS challenges, and even mere threats of ISDS challenges, have been used to secure extractive permits over community objections, to get executives out of criminal convictions, and to exonerate managers connected to a factory's lead poisoning of children. Such a corporate handout does not belong in our trade agreements."

--[Letter from Sen. Brown and 11 other Democratic senators to President Obama; Sept. 29, 2016](#)

"ISDS would allow foreign companies to challenge U.S. laws — and potentially to pick up huge payouts from taxpayers — without ever stepping foot in a U.S. court. Here's how it would work. Imagine that the United States bans a toxic chemical that is often added to gasoline because of its health and environmental consequences. If a foreign company that makes the toxic chemical opposes the law, it would normally have to challenge it in a U.S. court. But with ISDS, the company could skip the U.S. courts and go before an international panel of arbitrators. If the company won, the ruling couldn't be challenged in U.S. courts, and the arbitration panel could require American taxpayers to cough up millions — and even billions — of dollars in damages... This isn't a partisan issue. Conservatives who believe in U.S. sovereignty should be outraged that ISDS would shift power from American courts, whose authority is derived from

our Constitution, to unaccountable international tribunals. Libertarians should be offended that ISDS effectively would offer a free taxpayer subsidy to countries with weak legal systems. And progressives should oppose ISDS because it would allow big multinationals to weaken labor and environmental rules.”

--[Sen. Elizabeth Warren \(D-Mass.\) op-ed, “The Trans-Pacific Partnership Clause Everyone Should Oppose,” \*The Washington Post\*; Feb. 25, 2015](#)

“With ISDS, big companies get the right to challenge laws they don’t like, not in courts, but in front of industry-friendly arbitration panels that sit outside of any court system. Those panels can force taxpayers to write huge checks to big corporations—with no appeals. Workers, environmentalists, and human rights advocates don’t get that special right; only corporations do. Most Americans don’t think of keeping dangerous pesticides out of our food or keeping our drinking water clean as trade issues. But all over the globe, companies have used ISDS to demand compensation for laws they don’t like. Just last year, a mining company won an ISDS case when Canada denied the company permits to blast off the coast of Nova Scotia. Now, Canadian taxpayers are on the hook for up to \$300 million – all because their government tried to protect its environment and the livelihood of its local fishermen.”

--[Sen. Warren speech on the Senate floor; Feb. 2, 2016](#)

“We believe that the TPP should not include an investor-state dispute settlement process. Including such provisions in the TPP could expose American taxpayers to billions of dollars in losses and dissuade the government from establishing or enforcing financial rules that impact foreign banks. The consequence would be to strip our regulators of the tools they need to prevent the next crisis.”

--[Letter from Senators Warren, Edward Markey \(D-Mass.\) and Tammy Baldwin \(D-Wis.\) to USTR Michael Froman; Dec. 17, 2014](#)

### **House Financial Services Ranking Member and Democratic Members Oppose ISDS**

“Private foreign investors should not be empowered to circumvent U.S. courts, go before extrajudicial tribunals and demand compensation from U.S. taxpayers because they do not like U.S. domestic financial regulatory policies with which all firms operating here must comply... We believe there will be a great deal of resistance to any agreement that exposes U.S. financial regulations to the interpretations of international tribunals. We strongly urge that the investor-state dispute settlement provision be excluded from [the Transatlantic Trade and Investment Partnership] TTIP, or at the very minimum, that it not apply to the financial sector.”

--[Letter from House Financial Services Committee Ranking Member Maxine Waters \(D-Calif.\) and three Democratic members to Treasury Secretary Jack Lew and USTR Froman; Dec. 3, 2014](#)

### **House Ways and Means Trade Subcommittee Ranking Member and Committee Democrats to President Obama: No ISDS**

“Congress has repeatedly expressed concerns about the investment provisions of U.S. trade agreements. The inclusion of investor-to-state dispute settlement process (ISDS) in previous trade agreements advantages foreign investors over domestic ones and threatens US laws, regulations, and judicial decisions protecting health and public safety. These provisions provide foreign investors the right to either bypass our own courts entirely or to undermine them by challenging

their results before panels of private arbitrators who are not required to protect the public interest or to utilize American legal principles and precedent... Excluding ISDS provisions from the TTIP is more likely to generate broad public support in both the United States and Europe.”

--[Letter from House Ways and Means Committee Democrats to President Obama; Dec. 17, 2014](#)

### **House Democrats’ 2017 Resolution: Eliminate ISDS During NAFTA Negotiations**

“*Resolved*, That it is the sense of the House of Representatives that — (1) the North American Free Trade Agreement (NAFTA) should be replaced with a new trade agreement that — ... (B) should not include protections for foreign investors, including an Investor-State Dispute Settlement (ISDS) process, so to avoid exposure of the United States Government and taxpayers to financial losses, threats to United States and other parties’ laws and sovereignty, the undermining of environmental and health protections in extra-judicial tribunals, or new incentives to offshore jobs;”

-- [House Resolution \(H.R. 132\) introduced by Rep. Peter DeFazio \(D-Ore.\), cosponsored by 20 representatives; Feb.16, 2017](#)

### **House Republicans Urge USTR Lighthizer to Remove ISDS From NAFTA**

“We request that you eliminate the ISDS provisions from the North American Free Trade Agreement (NAFTA) during renegotiations of that pact and take our concerns into consideration as you review other past trade pacts and contemplate future agreements. ... ISDS subsidizes offshoring by lowering the risk premium of relocating. Instead of firms having to factor in the cost of risk insurance when making offshoring decisions, they rely on ISDS to require governments in low-wage nations either to provide them with their special offshored investor protections or compensate them. As a result, U.S. taxpayers not only lose jobs, but our policies and Treasury are exposed to reciprocal ISDS attacks by foreign firms operating here.”

--[Letter from House Republicans to USTR Lighthizer; Oct. 11, 2017](#)

## ***Other Governments***

### **Germany: High Level Officials Speak Out Against ISDS in the TTIP**

“From the perspective of the [German] federal government, the United States and Germany already have sufficient legal protection in the national courts.” The German government “has already made clear its position that specific dispute settlement provisions are not necessary in the EU-U.S. trade deal.”

--[Sigmar Gabriel, Germany’s Economic Minister; Mar. 26, 2014](#)

“It is completely clear that we reject these investment protection agreements.”

--[Sigmar Gabriel, during a parliamentary debate on TTIP; September 25, 2014](#)

“The German Magistrates Association sees no need for the establishment of a special court for investors. The Member States are all constitutional states, which provide and guarantee access to justice in all areas where the state has jurisdiction to all law-seeking parties. It is for the Member

States to ensure access to justice for all and to ensure feasible access for foreign investors, by providing the courts with the relevant resources. Hence, the establishment of an ICS is the wrong way to guarantee legal certainty. In addition, the German Magistrates Association calls on the German and European legislators to significantly curb recourse to arbitration within the framework of the protection of international investors.”

--[Germany's largest professional organization of judges and public prosecutors, the German Magistrates Association \(known by its German acronym, DRB\) in an opinion paper; Feb. 2016](#)

### **France: High Level Officials and Parliament Oppose ISDS**

“France did not want the ISDS to be included in the negotiation mandate. We have to preserve the right of the state to set and apply its own standards, to maintain the impartiality of the justice system and to allow the people of France, and the world, to assert their values.”

--[French Secretary of State for Foreign Trade Matthias Fekl in a speech to the French Senate on the TTIP; Nov. 17, 2014](#)

“France does not agree with the inclusion of such a mechanism. If such a mechanism should be included in the agreement, the Commission must obtain a unanimous vote.”

--[French Senator and Former Minister for Foreign Trade Nicole Bricq on TTIP; March 2014](#)

### **Netherlands: Parliamentary Motion Opposes ISDS in the TTIP**

“The House considering that our constitutional democracy and values such as human dignity, freedom, democracy, equality and protection of environment and human rights must be guaranteed; declares that TTIP may not contain dispute resolution which prejudices our national legal system and our democratic decision-making...”

--[Motion passed by the Dutch Parliament; March 31, 2015](#)

“...whereas inclusion of a dispute settlement mechanism (ISDS) in trade agreements presents undesirable social, financial and environmental risks for the Dutch government; noting that a section on dispute settlement is included in the recently released [Canada-EU Comprehensive Economic and Trade Agreement] CETA agreement ... calls on the Government to speak out against an ISDS clause in TTIP and CETA.”

--[Motion passed by the Dutch Parliament; Nov. 19, 2014](#)

### **Austria: Parliamentary Motion Expresses Skepticism About ISDS in the TTIP and CETA**

“The usefulness of the inclusion of ISDS clauses in agreements with countries with developed legal systems (eg. B. USA and Canada) cannot be seen from today's perspective.”

--[Austrian Parliament resolution passed by majority vote; Oct. 1, 2014](#)

### **Belgium: Province of Wallonia Holds Up EU's Signing of CETA Over Inclusion of ISDS**

“We want absolutely no private arbitration mechanisms,” Paul Magnette, premier of Wallonia province of Belgium, referring to ISDS in casting his “no” vote that held up the EU's signing the CETA agreement with Canada.

--[Paul Magnette, premier of Wallonia province, Oct. 24, 2016](#)

### **Croatia: Government Skeptical of the Validity of ISDS**

“...up to day there has been no clear evidence that the number of concluded international investment agreements (IIAs) has any correlation with the growth of foreign investment. On the contrary, there is a clear growth of investor to state disputes with many evident flaws. Even if we disregard the huge costs of arbitration for the respondent state (especially in case of frivolous claims to which some states are exposed together with lately popular third party funding claims) and reduced policy space, both of which represent a big concern for most states, we cannot disregard the fact that the system we have created is far from legal certainty and stability – what we have today is a number of contradicting awards, problems with enforcing such awards, un-transparent proceedings and insufficient appellate mechanism.”

--[Irena Alajbeg, Head, Trade and Economic Agreements Department; Oct. 16, 2014](#)

### **European Commission: Skeptical of ISDS in the TTIP**

“[ISDS] is indeed a very toxic issue in this parliament and elsewhere... Does this mean that we will include it automatically in the TTIP? No it doesn't mean that. And I don't exclude that in the end it will be taken out.”

--[Cecilia Malmström, incoming EU Trade Commissioner; Sept. 29, 2014](#)

“This ISDS is probably the most toxic acronym in the European Union, it has been for quite some years.”

– [Commissioner Malmstrom at the Atlantic Council, aired on C-SPAN3; June 29, 2016](#)

“However, as Commission President, I will also be very clear that I will not sacrifice Europe's safety, health, social and data protection standards or our cultural diversity on the altar of free trade.... Nor will I accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes.”

--[Jean-Claude Juncker, President-elect of the European Commission; July 15, 2014](#)

“There will be no investor-to-state dispute clause in TTIP if Mr. Timmermans [EU Commission First Vice President] does not agree with it too.”

--[President-elect Juncker; Oct. 22, 2014](#)

### **European Association of Judges (EAJ)**

“The EAJ does not see the necessity for such a court system. The judicial system of the European Union and its member states is well established and able to cope with claims of an investor in an effective, independent and fair way. The European Commission should promote the national systems for investor's claims instead of trying to impose on the Union and the member states a jurisdiction not bound outside the decisions both of the ECJ and the supreme courts of the member states... The European Union and its member states have a well-functioning judicial system which is capable of protecting the rights of an investor in all areas of law. It should be central to an international treaty on trade and investment, to apply this system to investors as the central body to safeguards its rights. ”

--[Statement from the EAJ on the European Commission's insufficient fix for ISDS in TTIP, the "Investment Court System;" Sept. 9, 2015](#)

### **European Parliament: Socialists & Democrats (Second Largest Bloc) Oppose ISDS in TTIP**

“We believe that this mechanism is unnecessary in an agreement between two countries that fully respect the rule of law. Accepting the ISDS would mean opening the door for big corporations to enforce their interests against EU legislation. This would deprive states of crucial policy space in important fields such as health or environment. We don't want the Commission to improve investor-state dispute settlement in the TTIP negotiations, but we request that the Commission drops ISDS within TTIP altogether.”

--[Socialists & Democrats in the European Parliament, position statement; January 21, 2014](#)

### **European Union: Half of Member States Absent on Letter Supporting ISDS in the TTIP**

Fourteen of 28 EU member states did not sign a letter to European Commissioner for Trade Malmström asking for ISDS to be included in the TTIP. Missing from the letter were many key European Union members, including Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Poland, Romania, Slovakia and Slovenia.

--[Letter from EU member states to Commissioner Malmström; Oct. 21, 2014](#)

### **Australia: Opposed Inclusion of ISDS in Free Trade Agreements**

Australia opposed inclusion of ISDS in its FTA with the United States, which was implemented in 2005. In the TPP talks, Australia maintained a position of not having ISDS apply to Australia in the context of that pact, as was evidenced in a leaked copy of the investment chapter in June 2012. Ultimately, due to political tradeoffs, Australia agreed to ISDS in the final TPP text.

--[Leaked copy of the TPP Investment Chapter; June 2012](#)

“Arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states. Questions have been raised about the consistency, openness and impartiality of decisions made in ISDS arbitrations.”

--[Australian High Court Chief Justice Robert Shenton French AC in a paper to the Supreme and Federal Courts Judges' Conference; July 9, 2014](#)

### **Brazil: Model Bilateral Investment Treaty Omits ISDS**

Brazil does not have any international investment agreements in force. While Brazil negotiated 14 agreements in the late 1990s, none has been implemented. Six of these were rejected by the Brazilian Congress because indirect expropriation and ISDS are considered non-compliant with the Constitution. Brazil has begun signing investment treaties again, but without the fair and equitable treatment standard and investor-state arbitration.

--[Columbia Center on Sustainable Investment, “Columbia FDI Perspectives: Perspectives on topical foreign direct investment issues,” No. 159; Oct. 26, 2015](#)

“There are many reasons why Brazil decided not to have ISDS in its agreements, some of them coincide with (the) general critique that many organizations and scholars make regarding ISDS which is the fact that it may be considered discriminatory against national investors who do not have the chance to resort to international arbitration and must tackle any issues within domestic

courts. This is one of the reasons why historically, Brazil has decided not to go down this road. So, from our perspective, ISDS is intrinsically flawed. So, no reforms would be enough to redeem the system ... For us, the best solution is simply throw it out of the window and use something different. What we use, as you know, is SSSS, state-to-state dispute settlement.”

--[Representative of Brazil at UNCITRAL working group on ISDS reform, Dec. 2017](#)

### **South Africa: Begins Process of Withdrawal from BITs**

After a commission of business, labor and government representatives serving on a multi-year commission issued a report noting ISDS had posed serious risks and expenses and had not resulted in more FDI, in 2015 South Africa the process of terminating its BITs with Belgium, Luxembourg, Spain, and the Netherlands and gave notice of termination of its other BITs. “The spike in international investment arbitrations that followed the financial crisis in 2001 laid bare that bilateral investment agreements can pose profound and serious risks to government policy... Our own experience demonstrated that that there was no clear relationship between signing BITs and seeing increased inflows of FDI... The review identified a range of concerns associated with expansive interpretations on the provisions usually found in BITs: definitions of investment and of investor, national treatment, fair and equitable treatment, most favoured nation clause, expropriation, compensation, transfer of funds etc. The review also identified difficulties with respect to international arbitration... This, in our view, opens the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration outcomes and is a direct challenge to constitutional and democratic policy-making...”

--[Xavier Carim, Deputy Director General of the South African Department of Trade and Industry, at the WTO Public Forum in Geneva; Sept. 25, 2012](#)

### **India: Begins Termination/Renegotiation of BITs**

After undertaking a review of its Model BIT, India began sending termination notices to as many as 57 countries (including the UK, France, Germany, Spain and Sweden) with whom the initial duration of the treaty has either expired or will expire soon. For the remaining 25 countries (such as China, Finland, Bangladesh and Mexico) with whom the initial duration of the treaty will expire from July 2017 onward, India has requested them to sign joint interpretative statements to clarify ambiguities in treaty texts so as to avoid expansive interpretations by arbitral tribunals.

--[“Remodeling India’s Investment Treaty Regime,” \*The Wire\*; July 16, 2016](#)

### **Indonesia: Plans to Terminate 60 BITs**

In early 2014, Indonesia announced plans to terminate 60 of its BITs. Indonesia has informed the Netherlands of its intention to terminate their BIT in July of 2015.

--[Ben Bland and Shawn Donnan, “Indonesia to terminate more than 60 bilateral investment treaties,” \*Financial Times\*; March 26, 2016](#)

### **Mercosur: Excludes ISDS**

Mercosur — the trading bloc that includes Argentina, Brazil, Paraguay and Uruguay — has approved a new Protocol for the Cooperation and the Facilitation of Investment within the Mercosur countries that explicitly excludes investor-state arbitration.

--[Damien Charlotin and Luke Eric Peterson, "Analysis: In New Mercosur Investment Protocol, Brazil, Uruguay, Paraguay and Argentina Radically Pare Back Protections, and Exclude Investor-State Arbitration," \*IARReporter\*; May 4, 2017](#)

### **Ecuador: Rejects ISDS, Exits BITs**

Ecuador began terminating ISDS-enforced treaties in 2008 and withdrew from the ICSID convention in 2009. After creating a "Citizen's Audit Commission," which evaluated and reviewed all its international investment pacts to determine if they were in the country's national interest, Ecuador followed the audit's recommendations and terminated its 16 remaining investment treaties in 2017, including its treaty with the United States.

--["Ecuador Denounces Its Remaining 16 BITs and Publishes CAITISA Audit Report," \*Investment Treaty News\*; June 12, 2017](#)

### **Bolivia & Venezuela: Withdraw From the International Centre for Settlement of Investment Disputes (ICSID) Convention**

In 2007 and 2012 respectively, Bolivia and Venezuela officially submitted their withdrawal from the ICSID convention. In 2008, Venezuela also terminated its BIT with the Netherlands.

--[Nicolas Boeglin, "ICSID and Latin America: Criticisms, withdrawals and regional alternatives," \*bilaterals.org\*; June 2013](#)

### **South African Development Community (SADC) Amends Treaty to Remove ISDS**

In August 2016, the 15 member states of the SADC agreed to remove the investor-state dispute settlement mechanism from its Finance and Investment Protocol.

--[Luke Eric Peterson, "In Aftermath of Investor Arbitration Against Lesotho, SADC Member-States Amend Investment Treaty to Remove ISDS, Limit Protections," \*IARReporter\*; Feb. 20, 2017](#)

### **Namibia: Doubts Correlation between FDI and Investment Treaties**

"A number of recent economic studies regarding the potential benefits and costs of investment protection provided in treaties, including ISDS have shown there is no correlation between investment flows and the prevalence of BITS, and therefore questioning the rationale for States to commit to them. It is a known fact that there is a significant risk inherent to ISDS for host countries, particularly developing host countries, while statistics show that claimants are predominantly investors from industrialized countries. More worrying of course, is that legal and arbitration costs are significant and are especially posing challenges to developing states. The resulting awards and the high cost of ISDS proceedings, including important legal counsel and arbitrator fees, can pose a significant budgetary threat for many developing countries. Typical provisions within BITs such as national treatment and pre-establishment rights impose contractual obligations on Governments that limit their right to regulate and for developing countries hampers their ability to act in their own interest. While the entire process of arbitration and dispute resolution remains less than transparent, the future continuation of investment treaties and arbitration as tools to protect and promote foreign investment is questionable."

--[Malan Lindeque, Permanent Secretary, Namibian Ministry of Trade; Oct. 16, 2014](#)

## **Sri Lanka: Considering “Moving Away” from BITs**

“...due to reasons such as a) tenuous relationship between BITs and increased inward investment, b) bitter lessons learned from international arbitrations and c) the tendency for BITs to constrain domestic policy space, Sri Lanka considered to “move away from BITs” to “establish appropriate domestic legislation to protect inward FDI.”

--[Champika Malagoda, Director of Research & Policy Advocacy Department, Board of Investment of Sri Lanka; Oct. 16, 2014](#)

## ***International Organizations***

### **United Nations Commission on International Trade Law (UNCITRAL) Working Group on ISDS Reform Discusses Substantive and Political Problems With ISDS**

“Views also differed as to whether the discussion should ... respond to “perceptions” of a wider public that often takes a dim view of ISDS ... Australia saw the UNCITRAL process as an opening for ensuring “social license” for a process that many ordinary Australians looked at disdainfully due to the protracted and expensive arbitration launched against that country by the Philip Morris company. Similarly, Mauritius noted that investor-state arbitration was meant to depoliticize disputes, but that it has come under attack so much in the mainstream media that it has itself become a “highly politicized” mechanism that may be no longer suited to achieve its legal and developmental goals due to its crippled legitimacy.”

--[IAReporter analysis of UNCITRAL Vienna session audio recordings, Jan. 2018](#)

### **United Nations Conference on Trade and Development (UNCTAD): No Clear Evidence That BITs, Many of Which Contain ISDS Provisions, Boost FDI**

“The current state of the research is unable to fully explain the determinants of FDI, and, in particular, the effects of BITs on FDI. Thus developing-country policymakers should not assume that signing up to BITs will boost FDI. Indeed, they should remain cautious about any kind of recommendation to actively pursue BITs.”

--[UNCTAD, “Trade and Development Report, 2014;” Aug. 2014](#)

### **UNCTAD: Developed Economies May Face ISDS Attacks From Developing Country Investors**

“Higher income countries, and even developed market economies, are sometimes faced with unexpected consequences of their own treaties. As more and more countries with sound and credible domestic legal systems and stable investment climates continue to conclude IIAs [international investment agreements] granting high levels of investor protection, they risk being confronted themselves with investor-state dispute settlement (ISDS) rules originally intended to shield their investors abroad. This risk is exacerbated by the changing investor landscape, in which more and more developing countries, against whose policies the IIA protective shield was originally directed, are becoming important outward investors in their own right, turning the tables on the original developed country IIA *demandeurs*.”

--[UNCTAD, “Investment Policy Framework for Sustainable Development;” May 2015](#)

## **UNCTAD: Broadly Shared View That Current Dispute Settlement System Needs Reform**

“In recent years, many countries (developing and increasingly developed countries alike) have experienced first-hand that IIAs [international investment agreements] are not ‘harmless’ political declarations, but do ‘bite’. Broad and vague formulations of IIA provisions have enabled investors to challenge core domestic policy decisions – for instance, in environmental, financial, energy and health policies. They have also generated unanticipated, and at times inconsistent, arbitral interpretations of core IIA obligations, resulting in a lack of predictability as to the kinds of State measures that might violate a specific IIA provision. As a result, there is today a broadly shared view that treaty provisions need to be more clear and more detailed, drafted on the basis of thorough legal analysis of their actual and potential implications, and that the current system of settling investment disputes needs to be reformed. Recent treaty drafting practice has started to take account of this view for new agreements, and the same lessons should be applied with respect to the stock of existing treaties during the next phase of IIA reform.”

--[UNCTAD, “Chapter 3: Recent Policy Developments and Key Issues,” \*World Investment Report 2017: Investment and the Digital Economy\*; May 9, 2017](#)

## **Organisation for Economic Co-operation and Development (OECD): ISDS Landscape Has Been Transformed by ‘Arbitration Industry’**

“Some ISDS cases raise important public policy issues – e.g. claims involving health-motivated regulation of cigarette marketing brought against Australia and Uruguay. Moreover, in some cases, the amount of claimed compensation is high enough – hundreds of millions or even billions of dollars – to seriously affect a respondent country’s fiscal position. The ISDS landscape has also been transformed in recent years by new participants. An arbitration industry has emerged, led by entrepreneurial lawyers advising potential clients about options for resolving investment disputes through international arbitration that would not have been considered only a few years ago. The EUR 1.4 billion claim brought by power generation company Vattenfall against Germany in 2009 involved German lawyers from the expanding German arbitration bar on both sides of the case. A more recent and related development is the emergence of third party financing (TPF) of claims, linked to the high costs and high potential damages awards characteristic of arbitral awards in investment disputes. These developments have increased the likelihood that government action will be subject to heightened scrutiny in the ISDS system in the future.”

--[OECD, \*Investor-State Dispute Settlement Public Consultation: May-July 2012; Aug. 8, 2012\*](#)

## ***Business and Pro-Free Trade Voices Against ISDS***

### **Removing ISDS Is Smart Politics**

“Moreover, it may be time for policymakers to rethink certain traditional disciplines of FTAs. In particular, they could focus on aspects that have become the most polarizing and, substantively, do not necessarily generate sufficient positive impact to justify this degree of divisiveness. In this regard, no provision has been as controversial and polarizing in so many economies involved in trade negotiations as ISDS. ... Now is the time to explore other methods to protect foreign

investments that are effective but less polarizing. Certain long-standing provisions of trade agreements, specifically ISDS, are worthy of reconsideration, particularly if doing so would help rebuild support for trade.”

--[Asia Society Policy Institute \(ASPI\) issue paper, written by an ASPI “Trade Forum” chaired by Wendy Cutler, former Acting Deputy USTR, and comprised of former trade ministry officials from Australia, Japan, New Zealand and South Korea; Jan. 2018](#)

“The vast majority of U.S. companies doing business in Mexico and Canada have not used or benefited from the ISDS provisions, while the inclusion of ISDS raises significant concerns for other stakeholders. Given the development levels of the countries involved (i.e., members of Organization for Economic Cooperation and Development), we believe including ISDS provisions in NAFTA is unnecessary.”

--[American Automotive Policy Council submission to the Federal Register, June 15, 2017](#)

“IF YOU wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS.”

--[“The Arbitration Game,” \*The Economist\*; Oct. 11, 2014](#)

“[ISDS] does help protect US investment abroad, which is valuable in countries where the rule of law and judicial processes are substandard. But most countries today are trying to attract investment, so have an incentive to avoid indirect expropriations that could harm their reputation and discourage new investors. In short, this useful process is now not worth the political baggage it imposes on trade agreements and could be deleted from the TPP.”

--[Jeffrey J. Schott, Peterson Institute for International Economics \(PIIE\); Dec. 5, 2016](#)

“ISDS is a significant reason why trade agreements engender so much antipathy. Yet, ISDS is not even essential to the task of freeing trade. So why burden the effort by carrying needless baggage? Purging both the TPP and the TTIP of ISDS makes sense economically and politically, would assuage legitimate concerns about those negotiations, splinter the opposition to liberalization, and pave the way for freer trade.”

--[Daniel Ikenson, Cato Institute, Cato Free Trade Bulletin No. 57, March 4, 2014](#)

### **Substantive Critique of ISDS**

“These provisions, formally known as Investor-State Dispute Settlement (ISDS), grant greater rights to foreign corporations than to domestic businesses such as ours, while exposing important local, state, and federal policies to challenge... We urge you to eliminate ISDS from past U.S. trade deals – beginning with the NAFTA renegotiation – and to withdraw from any and all negotiations that would expand ISDS, namely the China Bilateral Investment Treaty and the Transatlantic Trade and Investment Partnership.”

-- [Letter to President Trump from 100 small business leaders and Ben Cohen and Jerry Greenfield \(co-founders of Ben & Jerry’s ice cream company\); July 12, 2017](#)

“ISDS should be removed from free trade agreements because it undermines how the free market is supposed to work. It is protectionism that socializes investment risk. Multinational companies that invest internationally should be savvy enough to conduct the appropriate cost-benefit analysis for their investments. The U.S. government should not be subsidizing outsourcing through ISDS.”

--[Daniel Ikenson, Cato Institute, in an ISDS press forum \(video\)](#); [Oct. 25, 2017](#).

[See also: [Ikenson in Forbes, “To Save NAFTA, Kill Its Controversial Dispute Settlement Provisions,” Oct. 24, 2017](#)]

“An important pillar of trade agreements is the concept of “national treatment,” which says that imports and foreign companies will be afforded treatment no different from that afforded domestic products and companies... But ISDS turns national treatment on its head, giving privileges to foreign companies that are not available to domestic companies. If a U.S. natural gas company believes that the value of its assets has suffered on account of a new subsidy for solar panel producers, judicial recourse is available in the U.S. court system only. But for foreign companies, ISDS provides an additional adjudicatory option. This inequality of treatment seems to run afoul of the investment provisions in the Baucus-Hatch-Camp legislation (to extend fast-track trade promotion authority to the president), which state that the principal U.S. negotiating objectives regarding foreign investment are to: “[R]educe or eliminate artificial or trade distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States... Foreign investors having recourse to the U.S. legal system and then, if that produces unsatisfactory results, to third-party ISDS procedures arguably constitutes greater substantive rights for them than for domestic investors, whose options are confined to the U.S. legal system.”

--[Daniel Ikenson, Cato Institute, Cato Free Trade Bulletin No. 57, March 4, 2014](#)

“... a growing number of critics point to a surge in cases over the past decade arguing the system has morphed from a legitimate way for foreign investors to challenge extreme injustices such as expropriations, into a way for them to threaten, or influence, government regulations and even policy ... There is also a legitimate question over just how much investment treaties – and investor protection clauses – do to lure foreign investors. Neither Brazil nor China have many treaties in place, yet both have attracted enormous amounts of foreign direct investment.”

--[“Trade deals: Toxic Talks,” Financial Times; October 6, 2014](#)

## *Law Professors and Economists*

### **Law and Economics Professors**

“Through ISDS, the federal government grants foreign investors – and foreign investors alone – the ability to bypass the robust, nuanced, and democratically-responsive U.S. legal framework. Foreign investors are able to frame questions of domestic constitutional and administrative law as treaty claims, and take those claims to a panel of private international arbitrators, circumventing local, state, or federal domestic administrative bodies and courts. ISDS thus undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law... We urge you to stop any expansion of ISDS – namely

through the China BIT and the TTIP – and to eliminate ISDS from past U.S. trade deals, beginning with NAFTA.”

--[230 U.S. law and economics professors in a letter to President Trump; Oct. 25, 2017](#)

“We... urge you to protect the rule of law and our nation’s democratic institutions and sovereignty by rejecting this TPP as long as ISDS is included. While there is still time, we urge you to pressure the United States Trade Representative (USTR) to change course in the TTIP negotiations and in negotiations of other prospective agreements, such as the Bilateral Investment Treaty (BIT) between the United States and China, to ensure that ISDS is not included in any of those pacts.”

--[223 U.S. law and economics professors in a letter to Congress; Sept. 7, 2016](#)

### **Legal Scholars**

“ISDS is completely wrongheaded and unconstitutional. According to the appointments clause of our constitution, private individuals who are not accountable to our legislative or executive branch have no authority to interpret and render final judgment over U.S. laws.”

--[Bruce Fein, constitutional law expert and former associate deputy attorney general under President Ronald Reagan in an ISDS press forum \(video\); Oct. 25, 2017](#)

“ISDS weakens the rule of law by removing the procedural protections of the legal system and using a system of adjudication with limited accountability and review. It is antithetical to the fair, public, and effective legal system that all Americans expect and deserve. Proponents of ISDS have failed to explain why our legal system is inadequate to the task... we urge you to uphold the best ideals of our legal system and ensure ISDS is excluded from upcoming trade agreements.”

--[Prominent U.S. legal scholars in letter to congressional leadership; April 30, 2015](#)

“ISDS threatens domestic sovereignty by empowering foreign corporations to bypass domestic court systems and privately enforce terms of a trade agreement. It weakens the rule of law by removing the procedural protections of the justice system and using an unaccountable, unreviewable system of adjudication. For the above reasons, we urge you to ensure ISDS is not included in the TPP and TTIP.”

--[More than 100 U.S. legal scholars in a letter to congressional leadership; March 13, 2015](#)

“[W]hy consider including investor-state arbitration in the TTIP at all? ... Investor-state arbitration delivers undue structural advantages to foreign investors and risks distorting the marketplace at the expense of domestically-owned companies. The benefits to foreign investors include their exclusive right of access to a special adjudicative forum, their ability to present facts and arguments in the absence of other parties whose rights and interests are affected, their exceptional role in determining the make-up of tribunals, their ability to enforce awards against states as sovereigns, the role of appointing bodies accountable directly to investors or major capital-exporting states, the absence of institutional safeguards of judicial independence that otherwise insulate adjudicators in asymmetrical adjudication from financial dependence on prospective claimants, and the bargaining advantages that can follow from these other benefits in foreign investors’ relations with legislatures, governments, and courts. At root, the system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to

democratic processes and judicial institutions.”

--[120 legal scholars from the around the world in a public statement; July 2014](#)

### **Prominent Economists**

“South Africa has decided to stop the automatic renewal of investment agreements that it signed in the early post-apartheid period, and has announced that some will be terminated. Ecuador and Venezuela have already terminated theirs. India says that it will sign an investment agreement with the US only if the dispute-resolution mechanism is changed. For its part, Brazil has never had one at all. There is good reason for the resistance. Even in the US, labor unions and environmental, health, development, and other nongovernmental organizations have objected to the agreements that the US is proposing. The agreements would significantly inhibit the ability of developing countries’ governments to protect their environment from mining and other companies; their citizens from the tobacco companies that knowingly purvey a product that causes death and disease; and their economies from the ruinous financial products that played such a large role in the 2008 global financial crisis. They restrict governments even from placing temporary controls on the kind of destabilizing short-term capital flows that have so often wrought havoc in financial markets and fueled crises in developing countries. Indeed, the agreements have been used to challenge government actions ranging from debt restructuring to affirmative action.”

--[Joseph E. Stiglitz, Nobel Laureate Economist, in \*Project Syndicate\*; Nov. 5, 2013](#)

“The alleged goal of ISDS is to increase security for investors in states without an adequate “rule of law.” But the fact that the U.S. is insisting on the same provisions in Europe, where legal safeguards are as strong as they are in the U.S., suggests another motive: the desire to make it harder to adopt new financial regulations, environmental laws, worker protections, and food and health safety standards.”

--[Joseph E. Stiglitz in “Beware of TPP’s Investor–State Dispute Settlement Provision” for the \*Roosevelt Institute\*, March 23, 2016](#)

“ISDS is a disgrace and it is becoming a sham as well because it is being gamed massively now by hedge funds and by law firms that see this as even more than venue shopping – just absolute harassment and pressure of governments all over the world.”

--[Jeffrey Sachs, world-renowned professor of economics, in a press call; Sept. 7, 2016](#)

“ISDS therefore leads to two separate tracks of rights and remedies. Domestic citizens must play by the rules established by Congress, which give us the important right to challenge government action, but also set democratically determined limits on our ability to bring claims, balancing the need for policy space of the government with the rights of domestic constituents. But with ISDS, foreign companies don't have to follow those rules. When government action -- even action taken for a legitimate and important public purpose -- hurts foreign companies' economic interests, those companies can sue the government for their lost profits. This distorts the rules of the legal system and makes the economic interests of some foreign corporations much more powerful than the interests of domestic constituents.”

--[Op-ed in CNN.com by Lise Johnson \(Columbia Center on Sustainable Investment \(CCSI\)\), Lisa Sachs \(CCSI\) and Jeffrey Sachs \(Columbia University’s Earth Institute\); Feb. 19, 2016](#)

## *Civil Society Organizations*

### **Civil Society Organizations Demand the Removal of ISDS in NAFTA**

“Growing public opposition to the expansive corporate privileges at the heart of the North American Free Trade Agreement (NAFTA) took center stage as the fourth round of NAFTA talks began today in Washington, D.C. U.S., Mexican and Canadian civil society organizations delivered more than 400,000 petitions demanding that NAFTA’s expansive corporate rights and protections and Investor-State Dispute Settlement (ISDS) be eliminated during renegotiations.”

--[Press release for delivery to Congress of 400,000 petition signatures, sponsored by 40 civil society organizations; Oct. 11, 2017](#)

“To create good-paying jobs, eliminate threats to our communities and otherwise benefit the majority, NAFTA must...eliminate rules that incentivize the offshoring of jobs and that empower corporations to attack democratic policies in unaccountable tribunals. NAFTA was the first U.S. trade agreement to include special privileges for investors and the Investor-State Dispute Settlement (ISDS) regime that make it less risky for employers to relocate jobs offshore, while simultaneously threatening democratic policymaking at home and abroad. ISDS grants new rights to multinational corporations to sue governments before panels of corporate lawyers. These lawyers can award the corporations unlimited sums to be paid by taxpayers, including for the loss of expected future profits. The corporations need only convince the lawyers that a law or safety regulation violates their broad NAFTA rights. Their decisions are not subject to appeal. Already, corporations have used ISDS to challenge bans on toxic chemicals, land use policies, forestry and water policies, financial regulation, court rulings that support access to medicine and protections for our climate. Broad corporate rights, including ISDS, must be eliminated from NAFTA in order to eliminate offshoring incentives and to safeguard nations’ right to democratically determine their own public interest policies.”

--[Letter from the Citizens Trade Campaign \(coalition of labor, environmental, consumer and other organizations representing 12 million people\) to President-elect Trump; Jan. 13, 2017](#)

“To transform NAFTA from a polluter-friendly deal into one that supports environmental protection, any renegotiation must...eliminate rules that empower corporations to attack environmental and public health protections in unaccountable tribunals. NAFTA’s investor-state dispute settlement (ISDS) system has empowered multinational corporations like ExxonMobil to bypass our courts, go to private tribunals, and demand money from taxpayers for policies that affect corporate bottom lines. Corporations have used NAFTA to challenge bans on toxic chemicals, the decisions of environmental review panels, and protections for our climate. They have extracted more than \$370 million from governments in these cases, while pending NAFTA claims total more than \$35 billion. The cases are heard not by judges, but by corporate lawyers outside the normal court system. Broad corporate rights, including ISDS, must be eliminated from NAFTA to safeguard our right to democratically determine our own public interest protections.”

--[Statement signed by 15 environmental and other organizations, \*Replacing NAFTA: Eight Essential Changes to an Environmentally Destructive Deal\*; April 2017](#)

“Stop corporate giveaways in trade agreements. NAFTA has consolidated corporate control over many aspects of agriculture in ways that are unfair to farmers, farmworkers and consumers. It was the first trade deal signed by the U.S. to include the controversial investor-to-state dispute settlement (ISDS) mechanism, which allows foreign companies to sue for damages over laws, rules or actions that allegedly undermine their profits. ISDS dispute in NAFTA have already been used to challenge rules on softwood lumber, high fructose corn syrup and pesticides. U.S. trade policy should: Remove ISDS provisions in NAFTA and other trade agreements. Investment disputes should be dealt with under existing national legal systems.”

--[Statement endorsed by six agriculture and food safety organizations; Jan. 27, 2017](#)

### **U.S. Organizations Opposed ISDS in TPP**

“The TPP’s Investment Chapter and its ISDS system would grant foreign firms greater rights than domestic firms enjoy under U.S. law. One class of interests — foreign firms — could privately enforce this public treaty by skirting domestic laws and courts to challenge U.S. federal, state and local decisions and policies on grounds not available in U.S. law and do so before extrajudicial tribunals authorized to order payment of unlimited sums of taxpayer dollars. Under the TPP, compensation orders could include the “expected future profits” a tribunal determines that an investor would have earned in the absence of the public policy it is attacking.”

--[1,500 civil society organizations in letter to Congress; Jan. 7, 2016](#)

“The Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), as proposed, would empower an unprecedented number of fossil fuel corporations, including some of the world’s largest polluters, to challenge U.S. policies in tribunals not accountable to any domestic legal system. There, the firms could use the trade pacts’ broad foreign investor rights to demand compensation for U.S. fossil fuel restrictions. These “investor-state dispute settlement” (ISDS) cases would be decided not by judges, but by lawyers who typically represent corporations. We strongly urge you to eliminate this threat to U.S. climate progress by committing to vote no on the TPP and asking the U.S. Trade Representative to remove from TTIP any provision that empowers corporations to challenge government policies in extrajudicial tribunals.”

--[450 environmental organizations in letter to Congress; June 6, 2016](#)

“Consumers Union and Consumer Federation of America urge you not to support approval of the Trans-Pacific Partnership (TPP) trade agreement if presented to you this year, or if presented at any time in its current form. ... The risk that the TPP will become a vehicle for undermining important consumer protections is further exacerbated by the inclusion of the Investor-State Dispute Settlement procedure, or ISDS. This procedure allows industry to bypass the established regulatory agencies and courts, and to demand compensation from governments in private arbitration tribunals based on claims that consumer protection rules are reducing foreign corporate profits. ... ISDS does not belong in the TPP, and its inclusion is a fatal flaw.”

--[Letter to Congress from Consumers Union and Consumer Federation of America; Sept. 6, 2016](#)

“Reject investor-state dispute settlement. In the TPP and TTIP, U.S. negotiators have favored ‘investor-state’ dispute resolution procedures that would give foreign banks the power to skirt domestic courts, drag the U.S. government before extrajudicial tribunals, and directly challenge domestic financial safeguards as violations of TPP or TTIP-created commitments. These

tribunals, typically comprised of three private attorneys, would be authorized to order unlimited taxpayer compensation for financial regulations seen as threatening banks' 'expected future profits.' Such extreme 'investor-state' rules have already been included in a series of U.S. 'free trade' agreements, leading to billions of dollars in corporate claims around the globe. We urge Congress to ensure that the numerous cross-registered financial institutions from TPP and TTIP countries will not have the ability to bypass U.S. courts to argue that U.S. taxpayers should compensate them for complying with U.S. financial regulations."

--[Letter to Congress from Americans for Financial Reform coalition of 250 groups; Dec. 19, 2013](#)

"...we have deep concerns about ISDS because it would allow global pharmaceutical firms to challenge mechanisms that state legislatures, the Congress and public agencies use to manage pharmaceutical costs in public programs...It would be irresponsible to risk the health security of millions of Americans by subjecting health programs to ISDS challenges."

--[Letter to USTR Froman from AARP and 13 other organizations; Sept. 4, 2014](#)

### **Civil Society Organizations on Both Sides of the Atlantic Opposed ISDS in TTIP**

"For the following reasons, we strongly urge you to exclude ISDS from TTIP: ISDS forces governments to use taxpayer funds to compensate corporations for public health, environmental, labor and other public interest policies and government actions: ISDS has been used to attack clean energy, mining, land use, health, labor, and other public interest policies....ISDS undermines democratic decision-making: ISDS grants foreign corporations the right to directly challenge government policies and actions in private tribunals, bypassing domestic courts and creating a new legal system that is exclusively available to foreign investors and multinational corporations ... European and U.S. legal systems are capable of handling investment disputes: The United States and the EU have very strong domestic court systems and property rights protections. Inclusion of ISDS in TTIP would only provide corporations a new means to attack domestic policies deemed permissible by domestic courts."

--[Letter to EC Commissioner for Trade Karel de Gucht from 178 U.S. and EU civil society organizations; Dec. 16, 2013](#)

"Moreover, the proposed inclusion of investor-state dispute settlement (ISDS) terms in TTIP would undermine stronger chemical regulations by empowering corporations to circumvent domestic courts and directly challenge such protections before extrajudicial tribunals."

--[111 U.S. & EU civil society organizations in a letter to USTR Froman and Commissioner de Gucht; July 10, 2014](#)

"TACD [the Trans Atlantic Consumer Dialogue] recommends that the U.S. and EU exclude investor-state dispute settlement in any form – whether it is based on the U.S. Model Bilateral Investment Treaty or the European Commission's "Investment Court System" (ICS) proposal — from any trade agreement. Existing levels of protection in the EU and the US are surely enough to guarantee legal security for investors."

--[TACD Resolution: Response to European Commission ISDS "Reform" Proposal; Jan. 2016](#)

## ***Press Accounts Indicate Rising Opposition to ISDS***

### **Pulitzer Finalist *BuzzFeed* Investigative Series**

“...an 18-month BuzzFeed News investigation, spanning three continents and involving more than 200 interviews and tens of thousands of documents, many of them previously confidential, has exposed an obscure but immensely consequential feature of these trade treaties, the secret operations of these tribunals, and the ways that business has co-opted them to bring sovereign nations to heel. The BuzzFeed News investigation explores four different aspects of ISDS. ... it will show how the mere threat of an ISDS case can intimidate a nation into gutting its own laws, how some financial firms have transformed what was intended to be a system of justice into an engine of profit, and how America is surprisingly vulnerable to suits from foreign companies.”

--[Four-part exposé from Pulitzer Prize-winning journalist Chris Hamby for \*BuzzFeed\*; Sept. 2016](#)

### **The Economist**

“IF YOU wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as “investor-state dispute settlement”, or ISDS.”

--[“The Arbitration Game,” \*The Economist\*; Oct. 11, 2014](#)

### **Financial Times**

“... a growing number of critics point to a surge in cases over the past decade arguing the system has morphed from a legitimate way for foreign investors to challenge extreme injustices such as expropriations, into a way for them to threaten, or influence, government regulations and even policy ... There is also a legitimate question over just how much investment treaties – and investor protection clauses – do to lure foreign investors. Neither Brazil nor China have many treaties in place, yet both have attracted enormous amounts of foreign direct investment.”

--[“Trade deals: Toxic Talks,” \*Financial Times\*; Oct. 6, 2014](#)

### **Wall Street Journal**

“Dispute-resolution boards have become a lightning rod for opponents of globalization from across the political spectrum. Millions of citizens, from the U.S. to the U.K., Germany and New Zealand, have rallied against trade deals that include such entities. They argue that supranational tribunals have thwarted the power of elected policy makers, citing the hundreds of millions of dollars in fines such bodies have levied against governments in a series of highly politicized cases in recent years.”

--[“Trade Tribunals Draw Ire Outside Nafta, Too,” \*Wall Street Journal\*, Aug 16, 2017](#)

## **Huffington Post**

“Instead of helping companies resolve legitimate disputes over seized assets, ISDS has increasingly become a way for rich investors to make money by speculating on lawsuits, winning huge awards and forcing taxpayers to foot the bill. Here’s how it works: Wealthy financiers with idle cash have purchased companies that are well placed to bring an ISDS claim, seemingly for the sole purpose of using that claim to make a buck. Sometimes, they set up shell corporations to create the plaintiffs to bring ISDS cases. And some hedge funds and private equity firms bankroll ISDS cases as third parties.”

--“[The Big Problem with the Trans-Pacific Partnership’s Super Court That We’re Not Talking About,](#) *Huffington Post*, Aug. 29, 2016

## **Book by Time Magazine Journalist**

“In *Shadow Courts: The Tribunals that Rule Global Trade*, investigative journalist Haley Sweetland Edwards makes a devastating case that [ISDS] tribunals, which were designed 50 years ago to protect foreign investors' property rights abroad, are now being exploited by multinational corporations at the expense of sovereign nations and their citizens.”

--[\*Shadow Courts: The Tribunals that Rule Global Trade\* by Time Magazine journalist Haley Sweetland Edwards;](#) Sept. 6, 2016