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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your consideration.

Signed:

Representative Sharon Treat, Maine; Ranking Member, Insurance & Financial Services Committee

Senator Maralyn Chase, Washington; Vice Chair, Economic Development & Trade Committee

Representative Richard Laird, Alabama

---

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

Representative David Guttenberg, Alaska

Representative Lela Alston, Arizona

Representative Kathy Webb, Arkansas

Representative Jim Nickels, Arkansas

Assemblywoman Fiona Ma, California

Representative John Kefalas, Colorado; Ranking Member, Health & Environment Committee

Representative Kevin Ryan, Connecticut; Deputy Speaker

Representative Zeke Zalaski, Connecticut; Co-Chair, Labor and Public Employees Committee

Representative Elizabeth "Betsy" Ritter, Connecticut; Co-Chair, Public Health Committee

Representative John Kowalko, Deleware

Representative Geraldine F. Thompson, Florida

Representative Betty Reed, Florida

Representative Virgil Fludd, Georgia

Representative Pat Gardner, Georgia

Representative Roy Takumi, Hawaii

Representative Della Au Belatti, Hawaii

Representative Wendy Jaquet, Idaho; Former Minority Leader

Representative Constance A. Howard, Illinois; Chair, Judiciary II – Criminal Law Committee

Representative Matt Pierce, Indiana

Representative Chuck Isenhart, Iowa; Ranking Member, Environmental Protection Committee

Representative John Wittneben, Iowa

Senator Joe Bolkcom, Iowa; Assistant Leader

Representative Sydney Carlin, Kansas; Ranking Member, Budget Committee

Representative Joni Jenkins, Kentucky

Representative Patricia Haynes Smith, Louisiana; Chair, Louisiana Legislative Black Caucus

Representative Diane Russell, Maine

Representative Mark Bryant, Maine

Representative Terry Hayes, Maine; Assistant Democratic Leader

Representative Peggy Rotundo, Maine; Ranking Member, Appropriations Committee

Representative Ann E. Peoples, Maine

Representative Chuck Kruger, Maine

Representative Michael Carey, Maine

Representative Anna D. Blodgett, Maine

Representative Ed Mazurek, Maine

Representative Thomas R. W. Longstaff, Maine

Representative Melissa Walsh Innes, Maine

Representative Walter Kumiega, Maine

Representative Sheryl Briggs, Maine

Representative Denise Harlow, Maine

Representative Jon Hinck, Maine; Committee Minority Lead

Representative Peter Stuckey, Maine

Representative Roberta Beavers, Maine

Representative Mark Bryant, Maine

Delegate Tom Hucker, Maryland; Co-Chair, Joint Committee on Federal Relations

Senator Karen S. Montgomery, Maryland

Delegate Carolyn J.B. Howard, Maryland; Deputy Speaker Pro Tem

Representative Denise Provost, Massachusetts

Representative Ellen Cogen Lipton, Michigan

Senator D. Scott Dibble, Minnesota; DFL Lead, Transportation Committee

Representative Carlos Mariani, Minnesota

Representative Linda Slocum, Minnesota

Representative Tina Liebling, Minnesota

Representative Mindy Greiling, Minnesota

Representative Rick Hansen, Minnesota; Assistant Minority Leader

Senator Deborah J. Dawkins, Mississippi; Vice-Chair, Committee on Environmental Protection

Representative Jeanette Mott Oxford, Missouri

Senator Ron Erickson, Montana

Senator Russ Karpisek, Nebraska; Chair, General Affairs Committee

Assemblywoman Maggie Carlton, Nevada; Chair, Natural Resources Committee;
Former Chair, Commerce & Labor Committee

Representative Charles Townsend, New Hampshire

Assemblyman Herb Conaway, M.D., New Jersey

Senator Gerald Ortiz y Pino, New Mexico

Senator Dede Feldman, New Mexico; Chair, Health & Human Services Committee

Representative Gail Chasey, New Mexico; Chair, House Consumer and Public Affairs Committee

Representative Eleanor Chavez, New Mexico; Vice-Chair, Labor and Human Resources Committee

Assemblyman Richard N. Gottfried, New York; Chair, Health Committee

Representative Pricey Harrison, North Carolina

Representative Verla Insko, North Carolina

Representative Alice Bordsen, North Carolina

Representative Lonny B. Winrich, North Dakota

Senator Tim Mathern, North Dakota

Representative Mike Foley, Ohio

Senator Michael J. Skindell, Ohio

Representative Eric Proctor, Oklahoma

Representative Phil Barnhart, Oregon; Assistant Democratic Leader

Representative Brad Witt, Oregon; Chair, Veterans Committee

Representative Michael E. Dembrow, Oregon

Senator Chip Shields, Oregon

Representative Michael Carroll, Pennsylvania

Senator Luz Arce, Puerto Rico; Majority Whip

Representative Art Handy, Rhode Island

Representative Joseph H. Neal, South Carolina

Representative Frank Kloucek, South Dakota

Representative Mike Kernell, Tennessee; Senior Member, Environment Committee

Representative Lon Burnam, Texas

Representative Roberto R. Alonzo, Texas

Representative Veronica Gonzales, Texas; Chair, Border & Intergovernmental Affairs Committee

Senator Karen Morgan, Utah; Minority Whip

Representative Kathleen Keenan, Vermont

Representative Bill Botzow, Vermont; Chair, Commerce and Economic Development Committee

Representative Helen Head, Vermont; Chair, General, Housing & Military Affairs Committee

Representative Suzi Wizowaty, Vermont; Clerk, Judiciary Committee

Representative Kate Webb, Vermont

Representative Patsy French, Vermont

Representative Johannah Donovan, Vermont; Chair, Education Committee

Representative Gale Courcelle, Vermont; Committee Clerk

Representative Linda Waite-Simpson, Vermont

Representative Jim Masland, Vermont

Representative Warren F. Kitzmiller, Vermont

Representative Mitzi Johnson, Vermont; Vice-Chair, Appropriations Committee

Representative Michael Yantachka, Vermont

Representative David Deen, Vermont; Chair, Fish, Wildlife and Water Resources Committee; Member, House Rules Committee

Representative Bill Lippert, Vermont; Chair, House Judiciary Committee

Representative Teo Zagar, Vermont

Representative Chip Conquest, Vermont

Representative Herb Russell, Vermont

Representative Alice Miller, Vermont

Senator Sally Fox, Vermont; Assistant Whip

Representative Joan Lenes, Vermont

Representative Kristy Spengeler, Vermont

Delegate Kaye Kory, Virginia

Senator Jeanne Kohl-Welles, Washington; Chair, Senator Labor, Commerce & Consumer Protection Committee

Representative Chris Reykdal, Washington; Vice Chair, Labor and Workforce Development Committee

Representative Derek Stanford, Washington

Senator Christine Rolfes, Washington

Representative Mike Sells, Washington; Chair, Labor and Workforce Development Committee

Representative Bob Hasegawa, Washington

Senator Kevin Ranker, Washington; Majority Assistant Whip

Representative Sherry Appleton, Washington; Chair, Working Families Caucus

Senator Adam Kline, Washington; Chair, Senate Judiciary Committee

Senator Karen Keiser, Washington; Chair, Health Care Committee

Senator Steve Conway, Washington

Delegate Don C. Perdue, West Virginia; Chair, House Health & Human Rules Committees

Representative Mark Pocan, Wisconsin

Representative Stan Blake, Wyoming

Dated: July 5, 2012