

Press Call Transcript:
**As White House Spotlights Conflict With Democratic Presidential
and Congressional Candidates by Escalating Toward TPP Lame-
Duck Vote, Sen. Warren and Hundreds of Academics Urge
Rejection**

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Speakers:

- **The Honorable Elizabeth Warren**, Senator from Massachusetts
- **Professor Jeffrey D. Sachs**, Director, Earth Institute, Columbia University – world-renowned professor of economics, leader in sustainable development, senior UN advisor, bestselling author and syndicated columnist
- **Professor Cruz Reynoso**, Professor of Law Emeritus, University of California Davis – former Associate Justice of the California Supreme Court, former Vice Chair of the U.S. Commission on Civil Rights and member of the Select Commission on Immigration and Human Rights
- **Professor Alan Morrison**, Associate Dean, George Washington University Law School – Lerner Family Associate Dean for Public Interest & Public Service at George Washington Law School; has argued 20 cases before the U.S. Supreme Court
- **Lori Wallach**, Director, Public Citizen’s Global Trade Watch (moderator)

Lori Wallach

Hello, everyone. Lori Wallach here from Public Citizen’s Global Trade Watch. I’ll be moderating our call today. Thank you very much for joining. We’re going to have our speakers and then we will unmute the phones so that you can ask questions after our speakers. Today, Columbia University’s Center for Sustainable Investment sent to Congress a [letter](#) signed by more than 200 distinguished law and economics professors, many devout free-traders, calling on Congress to oppose the TPP because it includes the investor-state dispute resolution system. The ISDS provision at the heart of the TPP would newly empower thousands of multinational corporations to challenge U.S. policies before extrajudicial panels of private lawyers to demand taxpayer compensation for U.S. federal, state, local, laws, court decisions, regulations, other government actions they claim violate the new investor rights the TPP would grant them. So, last year when a few dozen law professors joined Senator Warren and others in Congress calling on the Obama Administration to exclude ISDS from TPP, President Obama scorned ISDS critics that they were “making stuff up,” “were absolutely wrong.” Since then, there have been a string of ISDS decisions and challenges that make the point, and now we have over 200 of the nation’s

top law and economics professors, including President Obama's Harvard Law School mentor Larry Tribe, calling on Congress to oppose the TPP simply because ISDS is included.

As I begin to introduce our speakers, let me simply add that as the White House has been escalating towards a TPP lame duck vote, and nothing has made the political conflict with the presidential ticket, the Democratic presidential ticket, or Congressional Democrats now running, of that plan for a vote, or that the White House is all in to have a lame duck vote more clear, than Vice President Biden and vice presidential nominee Kaine yesterday on CNN in that awkward interview where they ended up at the same event, and were asked about TPP and Vice President Biden said that they would make some changes to get the votes they needed and go in the lame duck. So as I introduce Senator Warren, I suspect that she will be clearly answering President Obama's challenge from Laos yesterday, about somebody being able to describe for him how the TPP would NOT be an improvement on the status quo. It is my honor to introduce Senator Elizabeth Warren, Senator from Massachusetts, herself a former Harvard Law School professor and someone who has helped bring the investor-state issue to the public and help everyone understand what the implications are by finally talking about it in a clear way. Senator Warren, please.

Sen. Elizabeth Warren

Thank you very much, Lori. I appreciate the introduction. This is complex to talk about, but I want to make sure we get through this. I am very glad to have this chance to be on a call with Professor Sachs and Cruz Reynoso and Alan Morrison, and I know they are going to talk about the letter they signed with more than 200 members of the legal community in just a minute. This is a really important letter because it highlights the unique threat posed by investor-state dispute settlement that is the big part of the TPP. So, I just want to talk about this for a sec. First, what is ISDS? It allows companies to challenge foreign laws they don't like, and potentially win millions or even billions of dollars from taxpayers. These cases are not heard by courts, but instead are heard by a private panel of arbitrators who are usually corporate attorneys. And the decisions from these panels cannot be appealed or reviewed by any actual court. Today's letter goes through this, and it explains how ISDS shifts power from courts to unaccountable international tribunals that undermine our legal system and the legal systems of countries all around the world.

So let me start by giving just a tiny little history of ISDS. Why do we create these rigged, pseudo-courts in the first place? ISDS was something that was conceived after World War II to appease investors who were worried about plunking down their money in developing countries where legal systems were not dependable. So to encourage foreign investment with weak legal systems, the United States and other nations began to include ISDS in trade agreements so that investors from those countries had some recourse if a dictator seized a factory or froze their assets. But, those justifications don't make sense anymore, if they ever did. U.S. investors today

can get insurance if they are so concerned about investing in a foreign country. And the big countries in the TPP – Australia, Canada Japan – all have well-developed legal systems that American companies are quite familiar with. So that brings us to the present.

What is ISDS used for now? The answer is, it's about leverage. Leverage for big companies to threaten and intimidate governments who might dare take action that threatens their profits. For example, a U.S. company just won an ISDS claim against Canada. What had the Canadian government done? It had denied the company a blasting permit for environmental reasons. The company filed an ISDS claim and won, and now Canadian taxpayers are potentially on the hook for \$300 million because Canada was trying to protect its environment. So what will Canada do the next time it considers denying a permit on environmental grounds? And that's just one of the many examples of countries backing off on public health or environmental or labor laws because of the threat of a massive taxpayer payout. ISDS advocates argue that so far, this process hasn't hurt the United States. Let's underline so far, because it's only a matter of time until it does. And, I hope you all saw, there has been a recent series of investigative reports on ISDS that reveals that ISDS cases have exploded in the last several years, and lawyers are now getting far more creative and aggressive about bringing claims. One recent example: the Keystone Pipeline. Right now, a foreign oil company is using the ISDS provision in NAFTA to demand more than \$15 billion in damages from the United States, all because President Obama turned down the Keystone Pipeline on environmental grounds. In fact, a recent investigation by BuzzFeed, which I highly recommend to all of you, uncovered a memo from our own Justice Department saying that ISDS gives foreign investors more rights than our own U.S. companies. And, it gives our foreign competitors an advantage.

The TPP would expand the reach of ISDS to cover countries like Australia and Japan. These are countries that have big companies that operate in the U.S., which exposes us to many more potential claims. Now, our trade negotiators claim that they have fixed some of the problems with ISDS. The changes they have made are window dressings. Here's all you need to know. The version of ISDS in TPP excludes challenges to tobacco control laws. Think about that. So they have carved out one special kind of litigation. But everything else can go forward, but not tobacco. Why? That's because big tobacco companies have used ISDS to stop tough anti-smoking laws in Australia and New Zealand. Look, I'm glad the TPP includes this carveout. But the carveout implicitly concedes that ISDS can be used by big companies to stop laws they don't like. And while the anti-smoking laws are important, so are any pollution laws, financial regulations or food safety laws. All of which are still subject to ISDS challenges. So, the bottom line is that giving foreign corporations special rights to challenge laws outside of the legal system is a bad deal for everyone except those corporations. That is why I oppose ISDS, why Secretary Clinton and Senator Kaine oppose ISDS, and why over 220 law professors oppose ISDS. Thank you all, and I am going to turn this back over to Lori.

Lori Wallach

Thank you very much, Senator Warren. And as I turn to introduce Professor Sachs, let me just flag for reporters that we have a map of the 9,000+ corporations from TPP countries with subsidiaries here, that do not currently have investor-state rights, that would be newly empowered to use ISDS against the U.S. if the TPP went into effect. That's at www.tradewatch.org. This huge expansion of ISDS exposure would basically reverse the reasons largely that we have avoided losing an ISDS case to date, because they are not many foreign investors under our existing agreements situated to use it. It is my honor to introduce Professor Jeffrey D. Sachs. He is a university professor at Columbia University, who holds the title of University Professor and is the director of the Center for Sustainable Development at Columbia. He is also a special advisor to the United Nations Secretary General on sustainable development goals, and as we all know, a best-selling author and syndicated columnist. Professor Sachs, please.

Professor Jeffrey D. Sachs

Lori, thank you very much. And it is an honor to follow Senator Warren in this discussion. ISDS is a disgrace and it is becoming a sham as well because it is being gained 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. Senator Warren referred to advocates of ISDS. I don't know of any advocates of ISDS among legal scholars, among economists. In fact, as I travel around the world, which I do nonstop, there are no advocates of ISDS other than U.S. corporate lobbies. This provision was jammed down the throats of the TPP partners, it has led to a firestorm of protests in Europe right now. It is going to sink TTIP, and it is absolutely a disgrace for President Obama to be pushing it at his last moment. More than that, he should recognize that his own party, in the Democratic Party Platform adopted on July 21, is absolutely explicit about this point. The party platform says that any future trade agreements “must not undermine democratic decision-making through special privileges and private courts for corporations”. And it could not be more clear, he is trying to push this through in the dead of night, in a lame duck session of Congress at the moment of least Democrat scrutiny in this country. If he continues this, he will absolutely jeopardize votes, massively, for Hillary Clinton. This is politically disastrous and substantively disastrous. He is fighting with fire right now, and not just after the election, he is fighting with fire, with the elections. Lori, back to you.

Lori Wallach

Thank you very much, Professor Sachs. Now, I'd like to introduce Professor Cruz Reynoso. He is the Professor of Law Emeritus at the University of California Davis, and in his distinguished career, he has served as an Associate Justice of the California Supreme Court, Vice Chair of the U.S. Commission on Civil Rights, and as a member of the Select Commission on Immigration and Human Rights. Professor Reynoso, please.

Professor Cruz Reynoso

Thank you very much. Mine is a continuation of explaining how the ISDS can hurt the laws and practices in our states and in our country. I'll just give you an example. Assume that the California Legislature has passed a law prohibiting oil fracking. The oil company then appeals to the California Supreme Court, the California Supreme Court affirms the legality of that statute, they go to the U.S. Supreme Court, the U.S. Supreme Court affirms again the constitutionality of that statute. Nonetheless, the foreign corporations and investors can file a complaint under the ISDS alleging that their expectations of profits have been hurt. In that situation, the matter then goes, as Senator Warren has indicated, to arbitration. The process of arbitration, and I know because I've been an arbitrator, is one where lawyers, in this case, three lawyers, will hear the case and make a decision. They are not bound by laws or practices, so their decision is final, it cannot be appealed, nor can it be used as a precedent. In our own legal system, as we know, one case follows another, and as practices change, the courts can change their own rulings to keep up with the realities of our economic system, of our civil rights system, and so on. That has no relationship to an arbitration, where the arbitration simply resolves that one issue, and has no precedent at all. So we are basically replaced the American judicial system by an arbitration system that has all of the weaknesses I have just indicated.

This is not a matter of just a hypothetical statement on my part, in fact, corporations have already challenged, and the Senator mentioned some of these matters. They've mentioned matters dealing with loss and practices dealing with the environment, with health, with safety regulations, with a ban on toxics, even with privatization of prisons. So, it seems to me that, sad to say, the ISDS is clearly a frontal attack on our judicial system. The further problem is, that thus far we do have the ISDS applied to ten percent of the trade the U.S. is involved in, but if the TPP were to become law, it would increase that by another 70 percent, so we have a very serious consequence if in fact Congress passes the TPP. It is for those reasons that I as a lawyer and a judge, feel that it would be a disaster for this country, and therefore oppose it. Lori?

Lori Wallach

Thank you very much, Professor Reynoso. I'd now like to introduce Professor Alan Morrison, who is the associate dean of public interest and public service at GW, George Washington Law School. He's also had an illustrious career as a public interest litigator, including as the director of Public Citizen Litigation Group for many years, and has argued 20 cases before the U.S. Supreme Court. Professor Morrison, please.

Professor Alan Morrison

Thank you Lori. Among other things now I teach constitutional law with a special focus on separation of powers, especially those cases where Congress and the President attempt to rearrange our traditional system. That is what ISDS is all about. For these purposes I'm going to assume that the substantive rules of the TPP are fine, although I know there's a debate about that. They apply to U.S. investors and other investors, and I recognize we have to have some kind of

enforcement system. But we have a perfectly good one right now. It's called the Federal Court System and our U.S. Supreme Court. But apparently that's not good enough for ISDS. So instead the idea is to turn the whole matter over to private arbitrators.

And my basic Constitutional claim is that the Constitution does not allow that to happen. No law and no decision of the Supreme Court allows the assignment of judging the conduct of our government officials to be turned over to private decision-makers. And these are not just any old private arbitrators – there are many more problems with them. First, as was pointed out earlier, many of the people who serve as arbitrators are lawyers who in similar cases wear two or more hats.

The main problem is one day they are doing an arbitration and the next day they are advising investors in different arbitration. Second, there is, as has been pointed out, no right of appeal. A claim can arise from the argument that a Federal statute or a decision of cabinet officers or even the President violated the TPP. Corporations are even allowed to appeal, if that's the right word, final court decisions to arbitrators. These three arbitrators get the final word. Moreover, although Congress and the president are going to approve TPP if they do, TPP applies to state and local laws. Surely no state will have consented to this extra-Constitutional process, and yet that what's going to happen.

So what's wrong with U.S. courts? Well we can look at a comparable situation right now involving the Keystone Pipeline. The Canadian company that sought the permits here has filed a case in Federal court claiming all kinds of violations of Federal laws. There's no reason why that case can't go forward. But it's also seeking to invoke NAFTA, which is the similar kind of three-arbitral process to that in ISDS. Now I understand that there's a problem for U.S. investors in some foreign courts although I doubt that those apply to TPP countries. We think ours are okay, but others may not be. And the ISDS idea is to take the process away from local courts no matter where they are. But there's a simple answer to that question which is fairer and I believe Constitutional. The EU has proposed that the treaty establish international tribunals with real judges coming from all countries that are subject to the agreement, not part-timers and they would be forbidden from sitting if their country is involved in the dispute. There are many variations of that that would be fair and constitutional. What is clear to me however, is that the ISDS process is neither fair nor constitutional and for that reason I urge that it be deleted from TPP. Thank you Lori.