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230+ Law and Economics Professors Urge President to Remove ISDS from NAFTA

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230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts

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Dear President Trump:

Last year, more than 200 U.S. law professors and economics professors sent a letter urging Congress to oppose the Trans-Pacific Partnership (TPP) because it included the controversial Investor-State Dispute Settlement (ISDS) regime that is also at the heart of the North American Free Trade Agreement (NAFTA). The letter included prominent supporters of "free trade" who considered the negative consequences that ISDS poses for our legal system as overriding grounds to oppose the TPP.

We are writing to urge you to remove ISDS from NAFTA, as well as to leave ISDS out of any future trade or investment pact.

ISDS grants foreign corporations and investors rights to skirt domestic courts and instead initiate proceedings against sovereign governments before tribunals of three private-sector lawyers. In those proceedings, foreign investors can demand taxpayer compensation for laws, court rulings and other government actions that the investors claim violate loosely-defined rights provided in a trade agreement or investment treaty. The merits of those rulings are not subject to appeal, but are fully enforceable against the U.S. government in U.S. courts.

As Chief Justice John Roberts noted in his dissent in BG Group PLC v. Republic of Argentina, ISDS arbitration panels hold the alarming power to review a nation's laws and "effectively annul the authoritative acts of its legislature, executive, and judiciary." ISDS arbitrators, he continued, "can meet literally anywhere in the world" and "sit in judgment" on a nation's "sovereign acts."

The problem with ISDS is not that it allows private corporations to sue the government for conduct that harms the corporations' economic interests. Indeed, U.S. domestic law already recognizes the importance of granting private citizens and entities (including foreign corporations) the power to take legal action against the government in order to help promote effective implementation of the law and adherence to the Constitution.

However, 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.

Over the past two centuries, the United States has established a framework of rules that govern lawsuits against the government and continually refines them through democratic processes. These include rules on court procedures and evidence, which are designed to ensure the fairness, legitimacy and reliability of proceedings; on who may bring lawsuits and under what circumstances, which are designed to balance the right to sue with the need to ensure that government action is not made impossible due to unlimited litigation; on the power of courts, which are designed to ensure that judges do not overly intrude on legitimate policy decisions made by elected legislatures or executive officials; on appropriate remedies, which are crafted to achieve policy aims such as deterrence, punishment, and compensation; and on the independence and accountability of judges.

Freed from the rules of U.S. domestic procedural and substantive law that would have otherwise governed their lawsuits against the government, foreign corporations can succeed in lawsuits before ISDS tribunals even when domestic law would have clearly led to the rejection of those companies' claims. Corporations are even able to re-litigate cases they have already lost in domestic courts. It is ISDS arbitrators, not domestic courts, who are ultimately able to determine the bounds of proper U.S. administrative, legislative, and judicial conduct.

In addition to the central problem of establishing a parallel and privileged set of legal rights and recourse for foreign economic actors operating here, ISDS proceedings lack many of the basic protections and procedures normally available in a court of law. There are no mechanisms for domestic citizens or entities affected by ISDS cases to intervene or meaningfully participate in the disputes; there is no appeals process and therefore no way of addressing errors of law or fact made in arbitral decisions; and there is no oversight or accountability of the private lawyers who serve as arbitrators, many of whom rotate between being arbitrators and bringing cases for corporations against governments.

Currently, NAFTA is the only ISDS-enforced agreement in force between the United States and a major capital exporting nation. That means that only a relatively small share of foreign direct investment in the United States – roughly 10 percent – is subject to ISDS claims. Yet ISDS is included in the draft text for the Transatlantic Trade and Investment Partnership (TTIP) and in the U.S. Model Bilateral Investment Treaty (BIT), which is the template for the U.S.-China BIT, both of which were being negotiated by the previous administration. The TTIP and China BIT would expand dramatically the share of foreign direct investment subject to ISDS claims in the United States – by at least 360 percent. While we have avoided losing an ISDS case to date, tribunals have ruled against the United

States on important elements of these cases, meaning it is only a matter of time before we lose a case, especially if ISDS remains in NAFTA and is further expanded in new agreements.

The United States has typically agreed to supranational adjudication only in exceptional cases and after resolving a range of complex considerations about the scope and depth of supranational authority over domestic policies and the available remedies to aggrieved parties. The inclusion of ISDS in U.S. trade and investment deals brushes aside these complex concerns and threatens to dilute constitutional protections, weaken the judicial branch, and outsource our domestic legal system to a system of private arbitration that is isolated from essential checks and balances.

Scholars across the political spectrum – from the Cato Institute's Daniel Ikenson to former Vice President Joe Biden's chief economist Jared Bernstein – have noted that there is no need for ISDS. U.S. firms that seek to offshore their investment to venues that do not have reliable domestic legal systems can purchase risk insurance or look for safer jurisdictions; remaining issues can be addressed through state-state dispute resolution, as is the norm under all other areas of international economic law. Moreover, they note, exposing the U.S. Treasury and our legal system to ISDS liability also has the perverse effect of subsidizing offshoring to or investing in countries with riskier or less developed legal systems by lowering the risk premium of relocating investment there.

For these reasons, 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.

Thank you for your consideration.

Organizational affiliation for all signatories is included for identification purposes only; individuals represent only themselves, not the institutions where they are teaching or other organizations in which they are active.

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