

April 30, 2015

Dear Majority Leader McConnell, Minority Leader Reid, Speaker Boehner, and Minority Leader Pelosi:

We write out of grave concern about a document we have not been able to see. Although it has not been made available publicly, we understand that the Trans-Pacific Partnership (TPP) trade agreement currently being negotiated includes Investor-State Dispute Settlement (ISDS) provisions. ISDS allows foreign investors—and only foreign investors—to avoid the courts and instead to argue to a special, private tribunal that they believe certain government actions diminish the value of their investments.

Courts are central institutions in the rule of law. Americans have much to be proud of in the evolution of our court system, which has evolved over the centuries and now provides equal access for all persons. Courts enable the public to observe the processes of development of law and to watch impartial and accountable decision-makers render judgments.

We write because of our concern that what we know about ISDS does not match what courts can provide. Those advocating using this alternative in lieu of our court system bear the burden of demonstrating why such an exit is necessary, and how the alternate system will safeguard the ideals enshrined in our courts. Thus far, the proponents of ISDS have failed to meet that burden. Therefore, before any ISDS provisions are included in the TPP or any future agreements, including the Transatlantic Trade and Investment Partnership (TTIP), their content should be disclosed and their purposes vetted in public so that debate can be had about whether and if such provisions should be part of proposed treaties. Below, we detail the ways in which ISDS departs from the justice opportunities that U.S. courts provide.

Our legal system rests on the conviction that every individual, regardless of wealth or power, has an equal right to bring a case to court. To protect and uphold the rule of law, our ideals of fairness and justice must apply in all situations and equally to everyone. ISDS, in contrast, is a system built on differential access. ISDS provides a separate legal system available only to certain investors who are authorized to exit the American legal system. Only foreign investors may bring claims under ISDS provisions. This option is not offered to nations, domestic investors, or civil society groups alleging violations of treaty obligations. Under ISDS regimes, foreign investors alone are granted legal rights unavailable to others – freed from the rulings and procedures of domestic courts.

ISDS also risks undermining democratic norms because laws and regulations enacted by democratically-elected officials are put at risk in a process insulated from democratic input. Equal application of the law is another critically important hallmark of our legal system—one that is secured through the orderly development of law. Court decisions are subject to appeal, ensuring that conflicting lower court decisions are resolved by a higher authority. Judges also must follow legal precedent. The goal is uniform application of the law regardless of which judge or court hears a case. This law development allows people, entities, and nations alike to order their behavior according to well-established legal principles.

In contrast, ISDS does not build in the development of the law. An ISDS arbitral panel's decision cannot be appealed to a court. The ISDS provisions of which we are aware provide

only limited— private—review through a process called annulment that does not permit decisions to be set aside based even on a “manifest error of law.”¹ Moreover, ISDS arbitrators, like other arbitrators, do not make law because their decisions have no precedential value, and ISDS arbitrators in turn are not obliged to follow precedent in reaching their own decisions.

None of the hallmarks of our court system would be possible without a fair and independent judiciary. Federal judges take an oath to uphold the Constitution and are nominated and confirmed by our democratically elected representatives. State judges likewise commit themselves to upholding the constitutional order. In contrast, ISDS arbitrators are not public servants but private arbitrators. In many cases, there is a revolving door between serving on ISDS arbitration panels and representing corporations bringing ISDS claims. Yet, although such a situation would seem to call for more—not less—oversight and accountability, ISDS arbitrators’ decisions are functionally unreviewable.

As noted at the outset, we have not been able to read the terms of the proposed ISDS chapters for the upcoming TPP and TTIP treaties. But what we know from the past gives us many grounds for concern. During the past few years, foreign investors have used ISDS to challenge a broad range of policies aimed at protecting the environment, improving public health and safety, and regulating industry. These challenges have been around the world, including under trade agreements to which the United States is a party. The publicly available information about these challenges raises serious questions as to whether the United States should be entering into more ISDS agreements with a broad array of nations.

Pharmaceutical giant Eli Lilly’s pending ISDS proceedings against Canada provide an example of how corporations have used ISDS to challenge a nation’s laws outside the courtroom. After a Canadian court invalidated one of Lilly’s patents, the company initiated ISDS proceedings against Canada under Chapter 11 of the North American Free Trade Agreement (NAFTA).² In seeking \$500 million (Canadian), Lilly has challenged as violative of NAFTA the standard the nation uses for granting patents.

Although ISDS tribunals are not empowered to order injunctive relief, the threat and expense of ISDS proceedings have forced nations to abandon important public policies. In the third ISDS proceeding brought under NAFTA, Ethyl Corporation brought an ISDS proceeding against Canada for \$251 million for implementing a ban on a toxic gasoline additive. The proceeding took place not in a court, but before an arbitration panel of the International Centre for the Settlement of Investment Disputes (ICSID). After the arbitration panel rejected Canada’s argument that Ethyl lacked standing to bring the challenge, Canada settled the suit for \$13 million. Moreover, Canada lifted the ban on the toxic additive as part of the settlement.³

¹ *Impregilo S.P.A. v Argentine Republic*, ICSID Case No. ARB/07/17 (Annulment Proceeding), Jan. 24, 2014, at ¶ 132. <http://www.italaw.com/sites/default/files/case-documents/italaw3044.pdf> (“[T]here is a difference between a failure to apply the proper law and the misapplication of the applicable law, and that the latter *does not constitute grounds for annulment, even if it is a ‘manifest error of law’ ...*”) (emphasis added).

² *Eli Lilly and Company v. The Government of Canada*, Notice of Intent to Submit a Claim to Arbitration under NAFTA (Nov. 7, 2012). Available at: <http://italaw.com/sites/default/files/case-documents/italaw1172.pdf>.

³ Michelle Sforza & Mark Vallianatos, “Ethyl Corporation v.s. Government of Canada: Now Investors Can Use NAFTA to Challenge Environmental Safeguards,” *available at* http://www.citizen.org/trade/article_redirect.cfm?ID=6221.

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It is particularly noteworthy that the three NAFTA countries are each in the top 11 most-challenged countries under the ISDS system. This high rate of challenge in our view has little to do with a rule of law deficit in the U.S. and Canada. Instead, it represents investors taking advantage of easy access to a special legal right available only to them in an alternate legal system.

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. For the reasons cited above, we urge you to uphold the best ideals of our legal system and ensure ISDS is excluded from upcoming trade agreements.

Sincerely,

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Former Associate Justice of the California Supreme Court

Honorable H. Lee Sarokin
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cc: Ambassador Froman and Chairs & Ranking Members of Finance & Ways & Means
Committees

Please note: 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.