

The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors

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As the Obama Administration promotes trade and investment agreements, we work closely with Congress, stakeholders, and the public to ensure that our trade agenda advances our economic interests and reflects our values. One of our core values is promoting the rule of law. In our agreements, we want to ensure that the United States and partner countries are able to regulate in the public interest as they see fit.

We also seek to ensure that Americans investing abroad are provided the same kinds of basic legal protections that we provide in the United States to both Americans and foreigners doing business within our borders. One element we use to achieve that goal is investor-state dispute settlement (ISDS). ISDS creates a fair and transparent process, grounded in established legal principles, for resolving individual investment disputes between investors and states.

There are a lot of myths out there suggesting that ISDS somehow limits our ability – or our partners' ability – to regulate in the interest of financial stability, environmental protection, or public health. Some have even suggested that a company could sue a government just on the grounds that the company isn't earning as much profit as it wants.

These assertions are false.

The United States promotes provisions in our trade agreements that protect our right to regulate in the public interest while promoting higher standards in many partner countries in areas ranging from labor and environment to transparency to anti-corruption.

Over the last 50 years, nearly 3,200 trade and investment agreements among 180 countries have included investment provisions, and the vast majority of these agreements have included some form of ISDS. The United States entered its first bilateral investment treaty ("BIT") in 1982, and is party to 50 agreements currently in force with ISDS provisions. The United States has been a leader in developing carefully crafted ISDS provisions to protect the ability of governments to regulate, to discourage non-meritorious claims, and to ensure a high level of transparency.

Our approach to ISDS has helped establish higher global standards and strengthen arbitration procedures through clearer legal rules, enhanced safeguards, and transparency throughout the ISDS process. As a country that plays by the rules and respects the rule of law, the United States has never lost an ISDS case. In our current negotiations, we are working to expand upon this approach to ISDS, in ways spelled out in the Model BIT that the Obama Administration released in 2012 following an extensive period of public comment and consultation.

Here are eight facts you should know about the investor-state dispute settlement under U.S. trade agreements. These provisions are different – and stronger – than the provisions in many other investment agreements in which the United States is not a participant. It's important to understand how U.S. agreements differ from other agreements that do not meet the same standards. The investment provisions that the United States is currently negotiating in trade agreements:

1. Provide basic legal protections for American companies abroad that are based on the same assurances the United States provides at home.

Investment protections are intended to prevent discrimination, repudiation of contracts, and expropriation of property without due process of law and appropriate compensation. These are the same kinds of protections that are included in U.S. law. But not all governments protect basic rights at the same level as the United

States. Investment protections are intended to address that fact. Our agreements provide no new substantive rights for foreign investors. Rather, they provide protections for Americans abroad that are similar to the protections we already provide Americans and foreigners alike who do business in the United States.

2. Protect the right of governments to regulate in the public interest.

The United States wouldn't negotiate away its right to regulate in the best interest of its citizens, and we don't ask other countries to do so either. Our investment rules preserve the right to regulate to protect public health and safety, the financial sector, the environment, and any other area where governments seek to regulate. U.S. trade agreements do not require countries to lower their levels of regulation. In fact, in our trade agreements, we require our partners to effectively enforce their environmental and labor laws and to take on new commitments to increase environmental and labor protections.

3. Do not impinge on the ability of federal, state, and local governments to maintain (or adopt) any measure that they deem necessary.

Under our investment provisions, no government can be compelled to change its laws or regulations, even in cases where a private party has a legitimate claim that its basic rights are being violated and it is entitled to compensation.

4. Do not expose state or local governments to new liabilities.

Under our Constitution and laws, investors frequently exercise their rights in U.S. courts. For example, in recent years, the U.S. government has defended hundreds of cases in U.S. courts under the Constitution's "takings clause," which requires compensation for expropriations. State and local governments have likewise defended many such claims. By contrast, the United States has only been sued 17 times under any U.S. investment agreement and has never once lost a case. In some instances, we have even received compensation for having had to defend against a case in the first place. In any disputes arising under our trade agreements, the federal government assumes the cost of defending the United States, even if they relate to state and local issues.

5. Provide no legal basis to challenge laws just because they hurt a company's profits.

Our investment rules do not in any way guarantee a firm's rights to any profits or to its projected financial outcomes. Rather, they only provide basic rights – like non-discrimination and compensation in the event of an expropriation – that are already consistent with U.S. law. Our investment rules seek to promote standards of fairness, not protect profits.

6. Include strong safeguards to deter frivolous challenges to legitimate public interest measures.

The United States has proposed additional safeguards that include stricter definitions than are in most investment agreements of what is required for successful claims, as well as mechanisms for expedited review and dismissal of frivolous claims, payment of attorneys' fees, consolidation of duplicative cases, and transparency. These are some of the strongest safeguards in any of the nearly 3,200 investment agreements around the world.

7. Ensure fair, unbiased, and transparent legal processes.

The United States is committed to ensuring the highest levels of transparency in all investor-state proceedings. Investment arbitration hearings under recent U.S. trade and investment agreements, as well as all key documents submitted to investor-state tribunals and tribunal decisions, are public. Recent U.S. trade and investment agreements also give NGOs and other non-parties to a dispute the ability to participate by filing amicus curiae or “friend of the court” submissions, similar to non-parties’ ability to make filings in U.S. courts.

8. Ensure independent and impartial arbitration.

Investor-state arbitration is designed to provide a fair, neutral platform to resolve disputes. The arbitration rules applied by tribunals under our agreements require that each arbitrator be independent and impartial. These rules permit either party in a dispute to request the disqualification of an arbitrator and the appointment of a new arbitrator if necessary to ensure the independence and impartiality of all tribunal members.

The United States has been a leader in developing ISDS provisions that protect the ability of governments to regulate, discourage frivolous claims, and ensure a high level of transparency. Through extensive work with stakeholders, legislators, and the public we will continue to ensure that the United States remains at the forefront of innovative trade policy.