Remarks by Melinda St. Louis, International Campaigns Director, Public Citizen's Global Trade Watch**, as delivered at UNCITRAL Working Group III Stakeholder Session,** New York, April 23, 2018

Public Citizen is a U.S.-based consumer organization with 400,000 members and has engaged in extensive monitoring and analysis of the International Investment Agreement (IIA) regime, particularly in the context of U.S. IIAs enforced by investor-state dispute settlement (ISDS), and is a founding member of the Transatlantic Consumer Dialogue—a coalition of more than 75 leading organizations representing the consumer interest in the United States and Europe.

Many consumer organizations have been supportive of trade expansion and of cross-border investment, but we have been increasingly concerned about both the procedural and the substantive aspects of investor-state dispute settlement – and have joined the growing global opposition to ISDS among civil society, jurists, small business organizations, policymakers, and more.

UNCITRAL's Working Group III discussions demonstrate recognition among governments that the ISDS status quo is politically untenable. But, as consumer organizations, we caution against attempts to simply tinker with the system at the margins or to further institutionalize flawed substantive provisions in investment treaties. It is time for a global re-think.

We urge governments to not sign new ISDS-enforced IIAs and to exit or renegotiate existing agreements that include ISDS.

First, there is little to nonexistent upside for governments. The empirical research shows no correlation between countries having ISDS-enforced pacts and obtaining increased foreign direct investment (FDI). Public Citizen just completed new research on investment flows to the 5 governments that began to terminate BITs. The findings provide further evidence to an extremely weak or non-existent relationship between BITs and the magnitude of investment inflows. A wide range of factors drives investment flows, and the presence of a BIT is clearly not a determining factor in most cases. Notably, sovereign debt ratings, seen as one driver of FDI inflows, actually improved for four of the five countries **after** they began terminating BITs.

Second, it has become even more politically feasible for governments to eliminate ISDS from their investment policy frameworks. Even the U.S. government, which historically promoted ISDS, is now exiting the regime. In North American Free Trade Agreement (NAFTA) renegotiations, the U.S. is opting out of ISDS coverage altogether, and has proposed revising NAFTA's investment chapter so only direct expropriation of real property is subject to ISDS for countries that choose to be bound by ISDS.

Interests seeking to save the ISDS regime have promoted procedural reforms while expanding investors' substantive rights. This approach, seen in the European Union's investment court

system (ICS) and multilateral investment court (MIC) proposal, do not address the fundamental structural problem inherent to ISDS. One already powerful class of interests – multinational investors/corporations – is granted extraordinary commercial rights not available in domestic legal systems and is elevated to equal status with sovereign nations to privately enforce public treaties in extrajudicial venues. Procedural tweaks could make improvements to ISDS on the margins, but would likely create new dangers for governments by institutionalizing problematic investor rights.

To adequately protect policy space for legitimate public interest regulation, governments need to address not only procedural questions, but should eliminate investor rights beyond compensation for direct expropriation of real property. Terms providing "indirect expropriation" compensation rights and a guaranteed "minimum standard of treatment" (MST) and related "fair and equitable treatment" (FET) rights should be removed – as must enforcement mechanisms that empower foreign investors to avoid exhausting local remedies in domestic courts and instead bring claims in extra-judicial international arbitration venues.

Moving away from ISDS altogether is the wisest course for governments because (1) states have not received tangible benefits from ISDS agreements, while costs have been tangible and substantial, and (2) proposed "reforms" such as the multilateral investment court would not protect governments from mounting ISDS liability or eliminate the structural conflicts of interest inherent in the system.