Columbia Center on Sustainable Investment
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Comments in Response to Executive Order Regarding Trade Agreements Violations and Abuses

We at the Columbia Center on Sustainable Investment (CCSI) are grateful for the opportunity to provide input to the Office of U.S. Trade Representative (USTR) with respect to its performance review of all the United States' existing international trade and investment agreements.

CCSI, a joint center of Columbia Law School and the Earth Institute at Columbia University, focuses on international investment, including related dispute resolution mechanisms, and the impacts such investment and dispute resolution can have on rights-compliant, inclusive sustainable development in the United States and abroad.

Our comments below focus primarily on the investment aspects of trade and investment agreements, including the substantive provisions and the investor-state dispute settlement (ISDS) mechanism provided therein. While not comprehensive, our comments below briefly highlight some investment-related impacts and effects of the United States' existing trade and investment agreements with respect to the three areas highlighted by USTR's request for public input, and with respect to several additional issues that we believe need to be addressed on a priority basis in future or renegotiated trade and investment agreements in order to rebalance the benefit of these agreements for all Americans. This submission is not meant to be exhaustive. CCSI looks forward to opportunities to further engage in ongoing discussions on priorities and options for revision and reform of US trade and investment agreements and related policies.

We thank you for your consideration of this submission.

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Introduction: The United States should remove ISDS from its trade and investment agreements

By design, trade and investment agreements impose restrictions on government action in the interest of facilitating international trade and investment. There is an urgent need to catalyze international investment to advance sustainable development, and a role for international cooperation to help meet those financing needs. CCSI is in favor of facilitating international investments that promote inclusive, rights-compliant sustainable development. However, the ISDS mechanism included in the US Model Bilateral Investment Treaty, NAFTA, and many other US trade and investment agreements has serious shortcomings and has increasingly raised concerns among governments and civil society groups in the United States and around the world. Concerns about ISDS are mounting as a growing number of ISDS cases involve investors challenging a range of governmental measures taken in good faith and in the public interest, including measures related to environmental protection, public health and safety, and financial stability. Even representatives of multinational enterprises – the purported beneficiaries of ISDS – have voiced concerns about the costs of ISDS proceedings, uncertainty regarding outcomes of disputes, and an absence of rules to ensure the independence and impartiality of arbitrators.

Importantly, the inclusion of the ISDS mechanism in US treaties has a negative impact on the ability of governments at the local, state and federal level to govern in the interest of American citizens and companies, and undermines our nation's institutions and separation of powers.[1] It allows foreign investors to challenge the legal and regulatory systems and policy choices that have been determined by our nation's democratic process. Foreign investors are able to turn to a parallel system of justice that grants greater substantive rights, as well as greater procedural rights that *result in* greater substantive rights,[2] to foreign investors than are held by domestic citizens and companies.

As described in more depth below, given the significant costs imposed by the inclusion of the ISDS mechanism in US trade and investment agreements, the United States should as a first step and at a minimum, remove the ISDS mechanism from renegotiated or future trade and investment agreements. The United States should consider alternatives to ISDS that will promote the interests of the United States and will advance sustainable economic growth and development while eliminating the enormous costs that ISDS imposes on US citizens and companies.[3]

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[1] *See* Lise Johnson, Lisa Sachs and Jeffrey Sachs, "Investor-State Dispute Settlement, Public Interest and US Domestic Law," Columbia Center on Sustainable Investment (2015).

[2] Notably, with respect to the renegotiation of NAFTA, one of the two Investment negotiating objectives set forth by USTR on July 17, 2017, to "[s]ecure for US investors in the NAFTA countries important rights consistent with US legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors," is inherently incompatible with the inclusion of ISDS in that and other US trade and investment agreements. Office of the United States Trade Representative, "Summary of Objectives for the NAFTA Renegotiation," July 17, 2017 at 9.

[3] *See* Lise Johnson, Brooke Güven and Jesse Coleman, "Developing Alternatives to Investor-State Dispute Settlement," Columbia Center on Sustainable Investment (*forthcoming*).

Specific Issues Highlighted by the USTR's Request for Public Input

The inclusion of investor-state dispute settlement in US trade and investment agreements has significant costs to American workers and the American economy and also to our treaty counterparties. Some of these costs are set forth below in response to USTR's specific requests.[4]

"Harm to American workers, including the offshoring of factories and jobs and downward pressure on wage and income growth"

One of the purposes of including ISDS within the investment chapter of US trade and investment agreements is to protect US citizens and companies investing abroad.[5] As such, the investor protections contained in US trade and investment agreements seek to actively promote and facilitate US companies' outward investment.

This outward investment promoted and protected by investment treaties includes investment that occurs when a company shuts down manufacturing in the United States and moves a plant to another country, lured to that new location by generous incentives, low labor costs, lax environmental regulations, the opportunity to reduce tax obligations, or other advantages. These moves may improve the competitiveness of the US firm, enabling it to increase its profitability and invest more in research and development or other high-skilled activities back in the United States. This in turn can have beneficial impacts in the United States in terms of increased tax revenue and creation of high-quality jobs. However, those positive impacts of outward investment by US firms do not necessarily materialize for many reasons, including, for instance, if profits are held offshore in tax havens. Further, US companies choosing to invest elsewhere can place downward pressure on wage and income growth, and environmental and labor standards, and can spur races-to-the-bottom in terms of fiscal policy as US localities try to retain those jobs.

Presently, the investment portion of US trade and investment treaties are largely agnostic on those important issues, protecting international capital flows irrespective of their nature or impacts on the economy, labor, the environment, tax policy, or other issues. In other words, US investment treaties and the ISDS mechanism included within them protect all outward investors even when the act of investing in a foreign country as opposed to within the United States harms American workers and the American economy.[6] Today, governments need to be particularly strategic regarding the signals they send the private sector to catalyze certain types of investments and discourage others; accordingly, it seems anachronistic for governments be holding onto outdated legal instruments that seek to promote investment irrespective of the type of investment and its effects at home or abroad. While evidence of the disparate impacts of globalization has mounted,

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[4] For an additional discussion of the costs and benefits of ISDS *see* Lise Johnson and Lise Sachs, "The Outsized Costs of Investor-State Dispute Settlement," 16 *AIB Insights* 1 (2016).

[5] Office of the United States Trade Representative, "Fact Sheet: Investor-State Dispute Settlement (ISDS)."

[6] US treaties as a whole do not contain strong enough enforceable protections for workers and the environment in treaty counterparties, which in many cases puts pressure on wage and income growth within the United States. For example, in a recent dispute settlement proceeding under CAFTA-DR, the United States demonstrated Guatemala's failure to effectively enforce its labor laws. While in that case the United States did not meet its burden to prove that Guatemala's actions affected international trade, it did acknowledge that Guatemala had failed to protect the rights of workers. This kind of failure on the part of Guatemala and other trade counterparties is emblematic of the problems that the United States encounters with the "race to the bottom" that harms American workers and promotes the offshoring of American jobs. *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR*, Final Report of the Panel (June 14, 2017).

and understanding of the important role of policy in shaping those impacts has improved, the treaties' focus on promoting cross-border investments has not similarly evolved.

Importantly, trade and investment agreements can be tailored to avoid or mitigate these harms. For example, some US government programs supporting and promoting private outward foreign investment only provide assistance to projects in countries complying with certain standards of conduct, including standards on protection of human rights, labor rights, and adherence to the rule of law.[7] Similarly, the US Overseas Private Investment Corporation (OPIC), a US government agency that helps American companies invest in developing and emerging markets, "reviews all potential projects to ensure that they will have no negative impact on U.S. jobs or the U.S. economy" as a part of their eligibility criteria.[8] Further, the financing, political risk insurance, and other investment facilitation products offered by OPIC are paid for by the businesses themselves. ISDS, on the other hand, is an insurance policy offered free of charge to the US companies that are investing overseas even though these same companies may be negatively impacting American workers.[9] American overseas investors can and should be paying for such protections at market rates rather than relying on ISDS, available at the expense of taxpayers and the domestic legal system.[10] While the most effective way in which US treaties can be balanced to protect American overseas investors and American workers and the American economy will require deeper analysis and discussion among stakeholders, the protections offered by current US treaties are doing harm to domestic institutions and American workers, while failing to ensure that the global capital flows they subsidize produce national -- and global -- gains.

"Harm of intellectual property rights, the rate of innovation, or research and development in the United States"

Intellectual Property Rights

Intellectual property rights are an "investment" under US trade and investment agreements. ISDS therefore permits qualifying foreign investors to challenge any US legislative, judicial or executive action that harms an investor's intellectual property rights. In a recent example, Eli Lilly and Company used NAFTA's ISDS provision to challenge the Canadian judiciary's final determination that two of its patents were invalid under Canadian law.[11] While Canada ultimately prevailed,[12] the arbitral tribunal found that it was nonetheless proper for it to review – and potentially hold Canada liable for – the evolution of domestic law interpretations by Canadian courts even in the absence of denial of justice or any hint of corruption in those proceedings. As

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[7] See, e.g., the United States' Millennium Challenge Corporation.

[8] OPIC, "Who We Are," *available at* https://www.opic.gov/who-we-are/faqs.

[9] For example, the Executive Vice President of Sempra Energy, in testimony regarding NAFTA before the Ways and Means Subcommittee on Trade, testified as follows: "Even if a company never files a claim, the existence of these protections, and the availability of ISDS, is an essential insurance policy." (July 18, 2017).

[10] Political risk insurance, available through OPIC, the World Banks's Multilateral Investment Guarantee Agency (MIGA), and private providers, covers events including: expropriation, currency inconvertibility, transfers restriction, political violence (war, terrorism, civil disturbance), breach of contract, arbitration award default, and is also available for certain regulatory risks including material changes to feed-in-tariffs, critical changes to taxation or other regulations affecting the project's ability to operate, and revocation of necessary licenses or permits. *See, e.g.*, OPIC, https://www.opic.gov/what-we-offer/political-risk-insurance/types-of-coverage.

[11] *Eli Lilly and Company v. The Government of Canada*, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award (March 16, 2017).

[12] *Id.,* para. 310.

such, if the tribunal had found that the evolution of Canadian domestic law had violated NAFTA, the effect would be to grant Eli Lilly intellectual property rights where the domestic Canadian courts had determined none existed.[13] The scope given to ISDS arbitrators is of great concern because it has the possibility of creating property rights outside of the democratic process. Further, it permits ISDS tribunals to review domestic court decisions based on how they evolve and the impacts they have on foreign investors, and to second-guess the underlying public policy reasons supporting such evolution.[14]

The ability of foreign investors within the United States to challenge intellectual property rights is not limited to judicial determinations, but could also relate, for example, to decisions made by the US Patent and Trademark Office, a US administrative agency. While the US Administrative Procedures Act limits the ability of individuals and companies to challenge its determinations under US domestic law, such limitations do not apply to ISDS challenges. A NAFTA tribunal has previously permitted a foreign investor in the United States to challenge the determination of a US administrative agency in a context that would likely have been impermissible in US courts.[15]

The ability of foreign corporations to challenge the application or existence of intellectual property rights before arbitral tribunals outside of the democratic process (to which American citizens and companies are bound) threatens to disrupt the balance US law and policy strikes on intellectual property protections.

Research and Development

The investment aspects of US trade and investment agreements impose far-reaching limitations on a variety of performance requirements, including those related to research and development. The limitations contained in the investment chapters of these agreements go significantly beyond those imposed by limitations on performance requirements under the WTO's Agreement on Trade-Related Investment Measures.[16] In addition to prohibitions on requirements to use local goods and on measures that impose quantitative restrictions, investment chapters and agreements also impose, for example, restrictions on technology transfers and requirements to use or accord preferences to local service providers. One ISDS tribunal has interpreted the prohibitions on performance requirements contained in NAFTA's Art 1106 as including prohibitions on research and development as well as education and training requirements, and thus limiting the ability of governments to require these kinds of local expenditures by foreign investors.[17] These limitations strictly curtail the ability of policymakers (including local and state governments) to require foreign investors to make positive contributions to the local economy through, for example, developing high-skilled jobs. States and local governments therefore may find it necessary to provide tax and other incentives to attract or keep businesses in their jurisdictions, but are legally limited in terms of their ability to require in return that companies contribute to local

[13] While the tribunal would not have had power to change Canadian law, a finding that Canada's law violated the NAFTA might have made it cost-prohibitive for Canada to maintain the status quo.
[14] For a discussion of the importance of intellectual property to public policy and development *see* Dean Baker, Arjun Jayadev and Joseph Stiglitz, "Innovation, Intellectual Property and Development: A Better Set of Approaches for the 21st Century," (July 2017).
[15] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (25 Aug 2014). *See also* Lise Johnson, "New Weaknesses: Despite a major win, arbitration decisions in 2014 increase the US's future exposure to litigation and liability" (CCSI 2015).
[16] Agreement on Trade Relate Investment Measures (prohibiting measures prohibited by GATT Article III or Article XI; generally requirements to use local goods and measures that impose quantitative restrictions).
[17] *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, para. 221.

development through the companies' procurement practices, training programs, or other expenditures.

"Unmet predictions on new jobs created, favorable trade balance effects, expanded market access, lowered trade barriers, or increased United States exports"

After roughly ten years of scholarly and practical inquiry, there is no strong evidence that trade and investment agreements impact investment flows. The various empirical studies examining trends in foreign direct investment (FDI) flows establish no clear statistical relationship between signing a treaty and receiving increased investment[18] Similarly, a survey of in-house counsel in large US multinationals revealed that investment agreements do not play a significant role in foreign investment decisions.[19] Some of the largest cross-border investment flows take place in the absence of treaties, including between the United States and China, India, Brazil and the United Kingdom.

While it is well-known that international investment – in particular FDI into the United States or by US outward investors – can produce wide-ranging benefits (e.g., bringing jobs, technology, know-how, and capital across borders), it is also well-known that those positive effects do not always materialize.[20] Research indicates that in certain contexts FDI can crowd-out domestic firms,[21] contribute to inequality,[22] worsen problems of corruption,[23] facilitate tax evasion and

[18] *See, e.g.*, Axel Berger et al., "Do trade and investment agreements lead to more FDI? Accounting for key provisions inside the Black Box," 10 *International Economics and Economic Policy* 247 (2013); Karl Sauvant and Lisa Sachs, eds., *The Effect of Treaties on Foreign Direct Investments* (New York: Oxford University Press 2009).

[19] Jason Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence," 51 *Virginia Journal of International Law* 397 (2010).

[20] Critically, not all studies on investment flows are of the same quality. Lauge N. Poulsen discusses a number of them and their results in Lauge N. Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence," in Karl P. Sauvant (ed), *Yearbook on International Investment Law & Polic*y 2009-2010 (Oxford University Press, 2010) 539-574 (hereafter, Poulsen, "The Importance of BITs"). Most studies on the connection between investment treaties and investment flows have looked specifically at whether the conclusion of such treaties had an impact on flows of foreign direct investment (FDI) (as opposed to other types of international investment). As has been remarked by several scholars, these types of studies are problematic for a number of reasons, including that data on FDI flows is often inaccurate or inadequately disaggregated, and that, even if one were to find correlation between investment treaties and FDI flows, it would be extremely difficult to establish that the treaties actually caused those investments. (*See, e.g.*, Lauge N. Poulsen, "The Importance of BITs"; Emma Aisbett, "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus causation" in Karl P. Sauvant and Lisa E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009) 395; Jason W. Yackee, "Bilateral Investment Treaties, Credible Commitment, and The Rule of (International) Law: Do BITs promote foreign direct investment?" 42 *Law and Society Review* 805 (2008)).

[21] The literature on impacts is too voluminous to cite here. Nevertheless, some research highlighting challenges and complexities in terms of effects on the host country's domestic industry include the following: Sarianna Lundan, Tilo Halaszovich and Fabienne Fortanier, "North-South FDI and Economic Growth in the Host Country: The Effects of Formal and Informal Institutional Distance" (*Investment Conference*, 2015) available at investmentconference.info/wp.../Lundan_North-South_FDI_and_economic_growth.pdf; Nigel Driffield and Dylan Hughes, "Foreign and Domestic Investment: Regional Development or Crowding Out?" 37 *Regional Studies* 277 (2003); George Chen, Yao Yao and Julien Malizard, "Does FDI Crowd In or Crowd Out Private Domestic Investment in China? The Effect of Entry Mode," 61 *Economic Modelling* 409 (2017). Some of the negative impacts of FDI may be felt in the short term, with positive effects materializing over the longer term. *See* Jennifer W. Spencer,

avoidance,[24] and generate food insecurity.[25] Research also shows that the impact of FDI on the environment can be both positive and negative.[26] In some cases, FDI may create "pollution halos" and enable environmental "leapfrogging" – phenomena whereby foreign investors bring newer, cleaner technologies to the host country, thereby improving the environmental performance of companies in that country.[27] But in other cases, FDI may exacerbate environmental challenges and/or discourage environmental policymaking.[28] Depending on factors such as the type of investment, the corporate culture of the investor and the institutional and regulatory framework of the home and host countries, in addition to its potential benefits, FDI can also result in economic, environmental and social damage in the host country and to its citizens, and its foreign origin can make it difficult to secure redress for harms caused.[29]

Even less certain is the extent to which increased *outward* investment by US companies would generate benefits for the United States. As discussed above, while outward investment could result in increased capital income and tax revenues at home, it can also result in outsourcing of jobs and tax structuring to decrease tax liabilities.

"The Impact of Multinational Enterprise Strategy on Indigenous Enterprises: Horizontal Spillovers and Crowding Out in Developing Countries," 33 *Academy of Management Review* 341 (2008).

[22] Florence Jaumotte, Subir Lall and Chris Papageorgiou, "Rising Income Inequality: Technology or Trade and Financial Globalization?" (2008) IMF Working Papers 08/185.

[23] *See, e.g.*, Hassen A. Wako, *FDI, Institutions, Economic Growth and Industrialization in Sub-Saharan Africa* (Vienna Investment Conference, 2016).

[24] *See, e.g.*, Sung Jin Park, et al., "Is Foreign Direct Investment Effective from the Perspective of Tax Avoidance? An Analysis of Tax Avoidance Through the International Transfer Pricing Behaviors of Korean Corporations," 32 *The Journal of Applied Business Research* 917 (2016).

[25] Andreea Michalache-O'Keef and Quan Li, "Modernization vs. Dependency Revisited: Effects of FDI on Food Security in Less Developed Countries," 55 *International Studies Quarterly* 71 (2011); Mehdi Ben Slimane, Marilyne Huchet-Bourdon, Habib Zitouna, "The role of sectoral FDI in promoting agricultural production and improving food security," 145 *International Economics* 50 (2015).

[26] *See, e.g.*, Jiajia Zheng and Pengfei Sheng, "The Impact of FDI on the Environment: Market Perspectives and Evidence from China," 5 *Economies* 8 (2017); Tomasz Kozluk and Christina Timiliotis, "Do Environmental Policies Affect Global Value Chains?" OECD Economic Department Working Papers (2016) (hereinafter, Kozluk and Timiliotis "Do Environmental Policies Affect Global Value Chains"); Steven Poelhekke and Frederick van der Ploeg, "Green Havens and Pollution Havens," 38 *The World Economy* 1159 (2015); Natalia Zugravu-Soilita, "How Does FDI Affect Pollution? Toward a Better Understanding of the Direct and Conditional Effects," 66 *Environmental Resource Economics* 293 (2017).

[27] Kozluk and Timiliotis, "Do Environmental Policies Affect Global Value Chains?" (n 26).

[28] *See*, among others, Matthew Cole and Per Fredricksson, "Institutionalized Pollution Havens," 68 *Ecological Economics* 1239 (2008); Matthew Cole, Robert Elliott and Per. Fredriksson, "Endogenous Pollution Havens: Does FDI Influence Environmental Regulations?" 108 *Scand. J. of Economics* 157 (2006); Kozluk and Timiliotis, "Do Environmental Policies Affect Global Value Chains?" (n 26); Yuquing Xing and Charles D. Kolstad, "Do Lax Environmental Regulations Attract Foreign Investment?" 21 *Environmental and Resource Economics* 1 (2002).

[29] On this point, see, for example, Office of the UN High Commissioner for Human Rights, *Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking* (The Laboratory for Advanced Research on the Global Economy and LSE Human Rights, 2016) 18; OHCHR, Progress Report of the United Nations High Commissioner for Human Rights on Legal Options and Practical Measures To Improve Access to Remedy for Victims of Business-Related Human Rights Abuses, UN doc A/HRC/29/39 (May 7, 2015), available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx.

Other Critical Issues that Should be Addressed in the Context of This Performance Review

In addition to the three specific areas that USTR included in its request for public input (addressed above), CCSI suggests that the following issues should also be reconsidered within the context of USTR's performance review.[30] While we recommend removing the ISDS mechanism from existing and future trade and investment treaties, other reforms should be pursued as a priority matter through, for example, ongoing processes at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) and within the United Nations Commission on International Trade Law (UNCITRAL).

Recognizing and safeguarding the rights and interests of non-parties

Disputes between two litigating parties often impact the rights and interests of those not party to the litigation or arbitration.[31] In recognition of that reality, the US Federal Rules of Civil Procedure (1) provide a mechanism for mandatory or permissive joinder by those interested or affected non-parties, and (2) require dismissal of cases when a non-party's rights will be affected by the dispute resolution proceedings but the non-party cannot join those cases.[32]

The arbitration rules that are provided for in US trade and investment agreements contain no such protections for interested and affected non-parties. The litigation positions adopted in and outcomes of ISDS disputes frequently impact the rights and interests of other natural and legal persons. We thus urge the United States to address this issue within its trade and investment agreements and with the relevant arbitral centers (including ICSID and UNCITRAL) to ensure fairness to non-parties. Specifically, there should be a rule mandating dismissal of claims or cases in which (1) the rights or interests of non-parties will be affected by the arbitration, and (2) those non-parties are not willing or able to join the arbitration as parties.

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[30] In March 2017, CCSI submitted comments to the ICSID Secretariat regarding proposed revisions to ICSID's arbitration rules. Many of the issues contained in this section were contained in CCSI's comments to ICSID. We encourage to the United States to take up these issues, both within that context and independently, as set forth herein.

[31] There are innumerable circumstances in which arbitration/litigation can affect non-parties' rights and interests; this submission does not purport to catalogue them. Nevertheless, they can include situations in which the dispute involves

- a challenge to the validity of a court/arbitral award received by a non-party to the litigation/arbitration in a separate proceeding;
- a claim by shareholders regarding alleged harms to a non-party corporation; and
- a claim by one entity to obtain a permit or other permission to use or occupy land over which there are also competing claims by individuals or communities.

Risks to the rights and interests of non-parties may be particularly acute in cases involving disputes over access to land or resources, in claims for injunctive or declaratory relief, and in cases requiring judgments regarding the legitimacy of non-parties' rights or actions.

[32] US Fed. R. Civ. Proc. R. 19(a) & (b).

Improving transparency of the dispute resolution process

Transparency of ISDS disputes and settlements

The lack of transparency in investor-state dispute settlement has been criticized as one of the features that undermines the legitimacy and accountability of the current system.[33] UN human rights experts, among others, have publicly voiced concern about the impact of investor-state dispute settlement on human rights, pointing to *inter alia* the lack of transparency in the current system.[34]

While Article 29 (Transparency of Arbitral Proceedings) of the 2012 US Model Bilateral Investment Treaty facilitates the public's ability to access filings and to view hearings, some US trade and investment agreements are silent on the issue of transparency or contain less robust language. We urge the USTR to ensure all US trade and investment agreements require public access to all information related to contract and treaty-based ISDS disputes, particularly to all information that may impact the rights and interests of non-parties to the dispute.

Further, we urge the United States to reconsider its domestic rules surrounding the settlement of ISDS disputes and also to ensure that its treaties and arbitral rules clearly require transparency of settlement agreements, including those agreements not entered as awards or orders.[35] While the United States has rules in place for public and judicial oversight of settlement agreements in the domestic judicial context, no such rules are in place with respect to ISDS settlements.[36] These broad powers to settle ISDS disputes can not only significantly impact the rights and interests of non-parties to the dispute, but can act to further undermine the legislatively established rule-making process, frustrate the separation of powers, tread on policy prerogatives of local and state governments, and distort priorities of the US government.[37]

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[33] *See* Lise Johnson and Lisa Sachs, "International investment agreements, 2013: A review of trends and new approaches" in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2013–2014* (Oxford University Press 2015) 59-64.

[34] *See e.g.*, "Investor-State dispute settlement undermines rule of law and democracy, UN expert tells Council of Europe," (April 19, 2016); "International trade: UN expert calls for abolition of Investor-state dispute settlement arbitrations" (October 16, 2015); "UN experts voice concern over adverse impact of free trade and investment agreements on human rights" (June 2, 2015).

[35] For a more in-depth analysis of this issue *see* Lise Johnson and Brooke Skartvedt Guven, "The Settlement of Investment Disputes: A Discussion of Democratic Accountability and the Public Interest," IISD Investment Treaty News (March 13, 2017).

[36] *E.g.* Statutory requirements that apply prior to the formation of a settlement agreement, such as rules requiring the government to give public notice of and an opportunity to comment on proposed agreements. Rules permitting or giving non-parties the right to intervene in disputes and comment on or object to settlements. US Federal Rules of Civil Procedure, Rules 24(a) and 24(b). Requirements for judicial approval of certain proposed settlement agreements. *E.g.*, 42 USC.S. § 9622, retrieved from https://www.gpo.gov/fdsys/pkg/USCODE-2015-title42/html/USCODE-2015-title42-chap103-subchapI-sec9622.htm; United States v. Akzo Coatings of Am., 949 F.2d 1409, 1435 (6th Cir., 1991), retrieved from http://openjurist.org/949/f2d/1409/united-states-v-akzo-coatings-of-america-inc. Doctrines that prevent enforcement of settlement agreements that violate the law.

[37] *See*, US Chamber of Commerce, "Sue and settle: Regulating behind closed doors," p. 3 (May 2013); Michael T. Morley, "Consent of the governed or consent of the government? The problems with consent decrees in government-defendant cases," 16 Journal of Constitutional Law 3 (2014).

Mauritius Convention on Transparency

In addition to taking the above-mentioned steps domestically and within the context of any revised or future trade and investment agreement, we urge the United States to exercise leadership in arbitral transparency by ratifying and acceding to the Mauritius Convention on Transparency.

Nearly four years ago, UNCITRAL, recognizing "the need for provisions on transparency in the settlement of treaty-based investor-state disputes to take account of the public interest involved in such arbitrations," adopted its Rules on Transparency in Treaty-Based Investor-State Arbitration (the "Transparency Rules").[38] The Transparency Rules, which require disclosure of a wide range of information submitted to and issued by tribunals, and facilitate participation by *amicus curiae* and non-disputing state parties, will improve investor-state disputes in situations where the Transparency Rules apply.[39] To ensure application of the Transparency Rules to existing investment treaties, UNCITRAL, in July 2014, finalized and adopted the Mauritius Convention on Transparency. This treaty establishes a mechanism pursuant to which all parties to existing investment treaties can efficiently and effectively implement the Transparency Rules to automatically apply to disputes that arise under treaties that were in force prior to April 1, 2014, and also to disputes under all treaties including those conducted under rules other than the UNCITRAL arbitration rules. In essence, it will encourage transparency of all investor-state disputes to which a signatory state is party, regardless of the applicable arbitration rules and regardless of the date on which the relevant investment treaty entered into force. The Mauritius Convention on Transparency will enter into force on October 18, 2017.[40]

The United States signed the Mauritius Convention on Transparency on March 17, 2015, and representatives of the United States at UNCITRAL sessions have called the Mauritius Convention on Transparency "a convenient tool for applying transparency measures to arbitrations occurring under the thousands of existing investment treaties, without having to amend each treaty separately," and have called on all States to "consider becoming parties to the [Mauritius Convention on Transparency]."[41] We urge the United States to itself take this important step.

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[38] Report of the United Nations Commission on International Trade Law, forty-sixth session (July 8-26, 2013), Gen. Assem., supp. no. 17, para. 128. The Transparency Rules are available at http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf. For more information on the Transparency Rules, *see* Lise Johnson and Nathalie Bernasconi-Osterwalder, "New UNCITRAL arbitration rules on transparency: Application, content and next steps," August 2013, pp. 23-25.

[39] The Transparency Rules do not, on their own, apply to disputes initiated under any treaty that had was concluded prior to the adoption of the rules, and only apply to investor-state arbitrations pursued under UNICITRAL arbitration rules (and not under other arbitration rules) when the treaty under which the dispute arose was entered into after April 1, 2014. With respect to any treaty in force prior to April 1, 2014, or a dispute pursued under arbitration rules other than UNCITRAL's, States and investors must expressly "opt in" to the Transparency Rules.

[40] A status of the Mauritius Convention on Transparency is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

[41] United Nations, *Draft Transparency Convention 'a Powerful Instrument' in Treaty-based Arbitration United Nations International Trade Law Body Tells Sixth Committee*, GA/L/3479, 13 October 2014, *available at* http://www.un.org/press/en/2014/gal3479.doc.htm.

Promoting transparency of ownership

Driven in part by tax planning strategies and regulatory arbitrage, ownership structures for investments are increasingly and infamously complex. One consequence is that the United States as well as its treaty counterparties, when in the role of respondent, may have difficulty assessing whether investor/claimants are actually entitled to protection under the relevant investment treaty that is being invoked. Rather than requiring the United States and treaty counterparties to embark on costly and wasteful efforts to disentangle corporate ownership structures each time they face a case, we urge the United States to include within its treaties or through the applicable arbitration rules requirements for investors to fully disclose their corporate family structures and beneficial owners when filing a request for arbitration. In addition to helping reduce the time and expense of arbitration by clarifying certain issues at the outset of the dispute, such a rule on early disclosure would also likely reduce incentives for companies to abuse the flexibilities afforded by corporate law, and would enable other interested and potentially affected individuals and entities such as creditors and shareholders to be aware of the case.

Preventing abuse of requests for interim measures

In a growing number of cases, investor/claimants in investor-state disputes are seeking interim measures of injunctive relief that aim to compel states to halt their own governmental investigations of or claims against the investor relating to the investor's alleged wrongdoing.[42] In other cases, requests for interim measures of injunctive relief ask for an order compelling the state to halt litigation brought by private parties against the investor, or to stop private parties from collecting sums awarded against the investor through separate legal proceedings.[43]

These types of requests can potentially interfere with legitimate government and private actions to hold investors accountable for harms they cause in the host state. Given the persistent challenges that many host countries and communities face in terms of securing relief for injuries caused by projects involving foreign investment,[44] giving investors these added tools for avoiding responsibility is particularly problematic.

We urge the United States, in its treaties or within the context of applicable arbitration rules, to seek to prevent investors from abusing requests for interim measures through, for example, bans on such requests or rules requiring imposition of financial penalties on investors who seek to shut down any non-frivolous case or investigation against the investor.

[42] *See, e.g*., Luke Eric Peterson, Analysis: Arbitrators Revoke an Interim Measures Decision, But Continue to Offer Little Explanation for How 'Procedural Integrity of Arbitration' Was in Peril, *IA Reporter* (Oct. 18, 2016); Joel Dahlquist, Interim Tax-Related Measures Revealed to Have Been Ordered by Full ICC Tribunal – Constituted on an Expedited Basis – and Later Vacated, *IA Reporter* (March 21, 2016).

[43] *See, e.g., Luke Eric Peterson, ICSID Tribunal Orders State-Owned Companies to Work to Get Local Court Injunction* Lifted, *IAReporter* (July 20, 2016); Luke Eric Peterson, In "Show Cause" Proceeding, Chevron Quantifies Alleged Losses Due to Ecuador's Failure to Block Enforcement of Lago Agrio Judgment, *IAReporter* (Nov. 19, 2013).

[44] *See, e.g*., Guide to Implementing the UN Guiding Principles on Business and Human Rights in Investment Policymaking (The Laboratory for Advanced Research on the Global Economy & the LSE Investment and Human Rights Project, 2016), at 18 (quoting OHCHR Report, UN doc A/HRC/29/39, para 25; *Progress report of the United Nations High Commissioner for Human Rights on legal options and practical measures to improve access to remedy for victims of business-related human rights abuses* (May 2014)).

Preventing actual and apparent conflicts of interest

The independence and impartiality of dispute settlement mechanisms, including investor-state arbitration, is critical for preserving the credibility and viability of such mechanisms. Under current ICSID arbitration rules, however, guarantees of independence and impartiality are inadequate, which has fueled, in part, criticisms as to its legitimacy.

Among the issues that should be addressed in this context is the practice of arbitrators wearing "dual hats" – simultaneously practicing both as arbitrators and counsel in investor-state arbitral disputes. The United States, whether in its treaties or by acting to change applicable arbitration rules or interpretation thereof, should ensure that this practice is prohibited. Similarly, the procedures by which challenges to arbitrators are decided should be revised. The present system, whereby a challenge to one arbitrator is typically resolved by his/her two fellow arbitrators, "does not fulfill the appearance-of-independence requirement, and thus undermines the normative and sociological legitimacy" of arbitral tribunals.[45]

Addressing concerns raised by third-party funding

The apparent rise of third-party funding in investor-state arbitration raises a host of concerns relating to, among other things, potential conflicts of interests,[46] the ability of the United States or other respondent states to recover costs awarded against unsuccessful and insolvent claimants,[47] and the role of third-party funding in impacting the development of legal norms.[48] Depending on the nature of the funding arrangement, third-party funding may also potentially impact the fundamental question of who is the investor/claimant, and whether that investor/claimant is – and should be – protected under international investment treaties and the ICSID Convention given the object and purpose of those instruments.[49]

It is crucial to commence a multi-stakeholder dialogue on the role of third-party funders in investor-state arbitration, and to consider rules for governing whether, in what circumstances, and under what conditions different funding arrangements may be permitted.[50] We urge the United States to lead these efforts.

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[45] Chiara Giorgetti, Between Legitimacy and Control: Challenges and Recusals and Arbitrators in International Courts and Tribunals. 49 *George Washington International Law Review* 205, 208-09 (2016).
[46] These potential conflicts are discussed, e.g., on UNCTAD's Investment Policy Hub in, Ignacio Torterola, Third-Party Funding in International Arbitration, April 8, 2013.
[47] The possibility of such an outcome was recognized by the tribunal in *RSM Production Corporation v. Saint Lucia*, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for Security for Costs, Aug 13, 2014, ¶¶26–37
[48] On the issue of how the presence of third party funding can impact development of the law, *see, e.g.*, Daniel L. Chen, "Can Markets Stimulate Rights? On the alienability of legal claims," 46 *RAND Journal of Economics* 1, 23 (2015).
[49] *See, e.g.*, Luke Eric Peterson, "Argentina liable to pay upwards of $400 million for unlawful expropriation of airlines, but dissenter sees no BIT jurisdiction and questions role of litigation funder that stands to earn nine figure recovery," *IAReporter* (July 23, 2017).
[50]The Singapore Investment Arbitration Centre (SIAC) is the first arbitration institution to include rules expressly addressing third party funding. *See, e.g.*, SIAC Investment Arbitration Rules, Rules 24.1 & 33.1.

Moving Forward: What are the alternatives?

If, as we urge, ISDS is removed from US trade and investment treaties, what recourse would foreign investors have for harm suffered due to host state conduct? Fortunately, there are other less-costly and more appropriate mechanisms that can protect investor rights.

The first place for recourse for foreign investors should remain the domestic law system of the host countries, where all other domestic investors and stakeholders resolve their disputes. Debates around ISDS are premised on the false assumption that domestic systems are inadequate; in fact, many domestic legal systems do function well, particularly when exhaustion is required, giving governments the ability to correct lower level errors. In countries where legal systems and processes are weak, the focus of international agreements should be on strengthening those legal systems to ensure their robust development for *all* users, not undermining their development by creating a parallel process and set of rules for select foreign investors.

Second, as discussed above, investors can purchase additional protections through political risk insurance, which is designed to price political risk on the market, sending a signal to both the investors and the host states about the security of investments in the host jurisdictions.[51] If a particular jurisdiction has a higher cost for political risk insurance, the host government will likely have the incentive to take steps to improve the investment climate for foreign investors, thereby strengthening rule of law incentives.

Third, recourse can be available through US courts. The US Congress has expressly authorized US courts to permit lawsuits against foreign governments for, among other harms, expropriation of the investors' property. Thus, even without recourse to ISDS under an investment treaty, US investors can pursue direct rights of action against foreign governments.

A fourth avenue is through existing human rights mechanisms such as regional mechanisms established in Europe (the European Court of Human Rights), the Americas (the Inter-American Commission and Court for the protection of human rights), and Africa (the African Court and Commission on Human and People's Rights).[52] These mechanisms are available to those aggrieved by government expropriations, discrimination, or denial of justice. To the extent that investors (or states) consider these mechanisms to be inadequate for resolving such claims, then as with inadequate domestic legal systems, the parties should take steps, through treaties and other collaborative means, to strengthen these human rights mechanisms for all stakeholders.

Fifth, as a last resort state parties may agree to treaty-based state-state dispute resolution mechanisms to resolve allegations of discriminatory or egregious treatment.[53] There are plenty of precedents for robust, well-functioning state-state dispute resolution mechanisms including that

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[51] Political risk insurance can be purchased from government and private entities. Government providers include entities established by individual home states (e.g., the US's OPIC) and entities established by multilateral institutions (e.g., the World Bank's Multilateral Investment Guarantee Agency). Private political risk insurance providers include Chartis, Lloyd's, Sovereign, and Zurich. *See, e.g.*, Daniel Wagner, Managing Country Risk: A Practitioner's Guide to Effective Cross-Border Risk Analysis (New York: CRC Press, 2012).
[52] For an overview of these systems *see, e.g.*, http://www.ijrcenter.org/courts-monitoring-bodies/.
[53] While USTR's objective of including ISDS in its trade and investment agreements is to avoid state-to-state dispute settlement, this option could be used as a last resort and in conjunction with the other alternative options set forth.

of the World Trade Organization.[54] Similar legal mechanisms can be used for resolution of investment disputes.

This effort to review the US's trade and investment treaties is laudable. As objection to ISDS is rising around the world, it is a key moment to rethink policies toward this outmoded system. The logic and evidence point to the need to drop ISDS altogether, and instead to strengthen and support national judicial processes and the rule of law, complemented, as necessary, through international human rights protections and state-to-state dispute resolution.

Concluding Remarks: Ensuring legitimacy of any negotiation or renegotiation process

To date, the United States has acted as respondent at least 17 times,[55] whereas American companies have acted as claimant at least 148 times.[56] Further, the United States remains a strong and desirable treaty counterparty, and thus its approach to the substantive and dispute settlement provisions contained in its treaties have significant and growing implications for issues of fundamental importance both within the United States and around the world.

The inclusion of some of the substantive investment protections as well as the ISDS mechanism within US trade and investment agreements has broad, and often negative, implications for American workers and the American economy and are thus important matters of public concern. Thus, it is crucial to internalize lessons about what is/what is not working, identify ways to avoid past mistakes, and develop or improve other approaches to cross-border investment promotion.

As USTR has recognized, the American public needs to be enabled to play a greater role in framing the substantive standards of protection and dispute settlement provisions that are included in these treaties. We therefore commend USTR for enabling public participation in this phase of its process, and emphasize the importance of continued efforts to ensure meaningful participation of diverse stakeholders around the world as this performance review and any subsequent negotiation or renegotiation of new or existing treaties advances.

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[54] For more information on the WTO's dispute settlement mechanism, *see, e.g.*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

[55] Office of the United States Trade Representative, "Fact Sheet: Investor-State Dispute Settlement (ISDS)," *available at* https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.

[56] UNCTAD Investment Policy Hub, "United States of America – as home state," *available at* http://investmentpolicyhub.unctad.org/ISDS/CountryCases/223?partyRole=1.