

US Benefits of Investor-State Dispute Settlement (ISDS)

ISDS is a dispute settlement and enforcement mechanism that works for US interests. The US has a perfect track record in ISDS cases brought against it under NAFTA by Canadian and Mexican interests, and US companies have won or favorably settled all of the cases they have brought against Canada and Mexico.

- In the past 22 years since the inception of NAFTA, the United States has not lost a single ISDS claim brought against it.
- Under NAFTA, US investors have won or favorably settled many of the 40 claims against Canada and Mexico.
- ISDS is also critical to gaining leverage to induce reasonable actions and favorable settlements from foreign governments, enhancing the bargaining and deal-making power of U.S. firms.
- *See the attached Annex that describes illustrative legal cases of ISDS brought under NAFTA.*

ISDS safeguards US Foreign Direct Investment (FDI) in Canada and Mexico across industries and especially in oil and natural gas, which creates jobs in the United States.

- US investment in oil and natural gas in Canada is mature, significant, creates US jobs, and saves consumers money.
 - In 2015, US companies' foreign direct investment (FDI) in Canada totaled \$4.52B for oil and gas extraction and \$8.80B in petroleum refining.
 - For every two jobs created in Canada from oil sands development, one is created in the US.
- US investment in oil and natural gas in Mexico is just opening after being mostly closed for 70+ years, and this offers the same opportunities as in Canada to create jobs.
 - In 2015, US companies' FDI in Mexico totaled \$420M for oil and gas extraction, \$1.96B for support activities for oil and gas extraction
 - Houston is the oil and natural gas capital of the world, and many companies' new investments in Mexico will be managed out of Houston. For example, BHP's global headquarters for its Petroleum unit is in Houston, which will lead BHP's expected \$11B investment in the Trion project in Mexico.
- US industries with investments in Canada and Mexico employed 2.8 million workers in the US in 2014. Overall, nearly 9 million jobs in the US depend on trade and investment with Canada.
- US manufacturers with investments in Canada and Mexico employed 1.2 million workers in the United States in 2014, a 46 percent increase since 1997.

US trade partners with abundant oil and natural gas will not offer ISDS to US investors without reciprocity from the US. Natural resources – especially oil and natural gas – are geopolitically important and often highly politicized, especially in emerging economies where the state owns all the rights to oil and gas and where political leaders come under domestic pressures of “resource nationalism” to retain as much national control as possible. These emerging economy US trade partners reluctantly accept foreign direct investment in oil and natural gas to access capital and know-how; US investors in these markets need ISDS protection. Without it, private American investments could be – and have been – seized by hostile foreign governments.

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ISDS has provided successful dispute resolution for API member companies for expropriation of their oil and natural gas assets.

- Since 1960 there have been 179 cases globally of expropriation of oil and natural gas assets.
- Since 1996, 19 of the 64 cases of oil and natural gas expropriation globally involved API member companies and were covered by ISDS protections.
 - For these 19 cases, ISDS was afforded by nine different free trade agreements or bilateral investment treaties, including NAFTA.
 - Eleven of these 19 cases were settled or decided in favor of the investor (the API member company), with five cases still pending, one discontinued and two for which data are not available.

Without ISDS – or with weakened investment protection and ISDS – Mexico can turn to more Chinese energy investment instead of US energy investment.

- In Mexico's December 2016 bid round of deepwater blocks, US companies were successful in capturing five of the eight blocks awarded. One block was won by a venture led by the Malaysian state-owned oil company Petronas, and the other two blocks were won by CNOOC, the Chinese state-owned oil company. CNOOC's two blocks – Blocks 1 and 4 in the Perdido Fold Belt – are considered especially promising because they are located near an already-discovered field.

NAFTA’s Investor-State Dispute Settlement (“ISDS”) Provides Vital Protection for American Investments Overseas and Ensures Continued Growth of Our Economy

A robust and effective Investor-State Dispute Settlement (“ISDS”) mechanism is essential for the continued growth of the US economy. Unlike a company choosing where to locate a manufacturing facility, US oil and gas companies must go to where oil and gas reserves exist. Some overseas markets often present unique challenges, including discrimination that favors local stakeholders, lack of a transparent or stable regulatory regime, and, at times, outright nationalization of investments worth billions of dollars. Faced with these risks, ISDS provides an essential forum for enforcing investment protections that the US has bargained for.

For decades, ISDS has played a critical role in protecting US interests overseas. In the past 22 years since the inception of NAFTA, the United States has not lost a single claim brought against it. In contrast, US investors have much more successfully used ISDS against Canada and Mexico to protect their foreign investments. Natural resources are often highly politicized, even in developed countries. ISDS provides a neutral forum through which US actors can seek the compensation they deserve if they are unfairly treated in these markets. This possibility of recovering damages for unfair treatment is critical to our industry.

1. ISDS provides vital protection for US investors against unfair, discriminatory and arbitrary measures adopted by foreign governments.

US investors have been active *and* successful in using ISDS to protect their investments and continue to contribute to the growth of our economy. Under NAFTA, US investors have brought more than 40 claims against Canada and Mexico in the past 22 years. The cases below are just several examples of US investors’ using ISDS to successfully protect their investments and, by extension, American jobs. Each highlights how ISDS is vital to leveling the playing field.

- In *Clayton/Bilcon v. Government of Canada*, US investors’ project was denied by Canadian government based on the finding that the project would undermine a subjective and undefined standard – the so-called “core community values” of a neighboring town. Only US investors, not Canadian ones, were held to this subjective standard. The investors challenged the decision as being arbitrary, discriminatory and unfair in violation of various NAFTA provisions. In March 2015, the Tribunal found Canada liable for having breached its obligations under NAFTA Articles 1105 (minimum standard of treatment) and 1102 (national treatment). Among others, the Tribunal found that the government’s reliance on “core community values,” a standard found nowhere in Canadian law, resulted in deprivation of due process for the claimant. The Tribunal also found that the decision was discriminatory, noting that the standard had never been applied to Canadian investors. This case also demonstrates how ISDS can extend US sovereignty protections to firms overseas, because had a similar claim been brought in a US court, the court may have had to defer to foreign law under comity principles.

Annex: Illustrative Legal Cases of ISDS brought under NAFTA

- In *Mobil Investments Inc. and Murphy Oil Corporation v. Government of Canada*, Newfoundland Offshore Petroleum Board unilaterally imposed a new condition on oil companies to pay fees in exchange for the authorization for Hibernia and Terra Nova offshore oil projects. The claimants, US oil corporations, relied on NAFTA's ISDS to challenge this action, arguing the new condition has caused, and would cause in the future, approximately \$66 million in damages. In May 2012, the Tribunal ruled in favor of the US claimants, finding that the condition was a prohibited performance requirement under NAFTA. The Tribunal ordered Canada to pay the claimants approximately \$17 million in total, plus interest.
- In *Cargill Inc. v. United Mexican States*, a US producer of high fructose corn syrup (HFCS) was faced with a discriminatory tax imposed by Mexican government. Specifically, the tax was levied on beverages sweetened with HFCS, which had been primarily imported from the United States, but not those sweetened with cane sugar, which had been primarily produced domestically. Cargill brought an ISDS claim challenging the tax. The Tribunal agreed with Cargill, awarding \$77.3 million. The Tribunal further ordered Mexico to pay for half of Cargill's legal fees, an award that likely would have been unavailable in US courts.

2. ISDS provides US investors with leverage to successfully resolve problems with foreign governments.

The use of ISDS as an enforcement tool can be critical to gaining leverage to induce reasonable actions and favorable settlements from foreign governments, enhancing the bargaining and deal-making power of US firms.

- In *AbitibiBowater Inc. v. Government of Canada*, ISDS played a critical role in inducing a favorable settlement from Canada. In 2008, AbitibiBowater, a paper company, was faced with financial difficulties, which ultimately led to the closing of its mills in Canada and the layoff of local workers. In December 2008, AbitibiBowater announced that it would close its last remaining active mill. Within a few days of the announcement, the Newfoundland and Labrador legislature reacted by passing the Abitibi-Consolidated Rights and Assets Act, which not only cancelled AbitibiBowater's economic rights in the area and expropriated its facilities, but also foreclosed its recourse to Canadian courts. In February 25, 2010 AbitibiBowater served a Notice of Arbitration alleging violation of NAFTA obligations. In August 2010, six months after the filing, the case settled with Canada agreeing to pay \$130 million CAD.

3. The United States has a perfect track record when it comes to successfully defending itself against foreign investors' ISDS claims.

The US has never lost an ISDS case. Of 18 cases brought under NAFTA against the United States, the United States has won every single case. Such favorable rulings, in many cases, granted the United States with legal costs. Equally important, even if any of those challenges would have succeeded, the US would not have had to change any of its laws or policies. ISDS cases can only result in monetary damages. They are not a means to change US law. ISDS is fully protective and respectful of US sovereignty and, as some of the above examples illustrate, even enhance it.

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- In *ADF Group Inc. v. United States of America*, a Canadian steel company challenged the federal Surface Transportation Assistance Act of 1982 and a federal agency's implementing regulations, which required that federally-funded state highway projects use only domestically produced steel. ADF Group claimed that the Act and the regulations were discriminatory and arbitrary and sought \$90 million in damages. On January 9, 2003, the Tribunal dismissed ADF's claims in their entirety. The Tribunal found that ADF Group could not use ISDS to challenge a government procurement issue, which is expressly carved out of NAFTA's investment protections.
- In *Methanex Corp. v. United States of America*, a Canadian marketer and distributor of methanol brought an ISDS claim against the United States, challenging California's ban on the gasoline additive MTBE. Methanex contended that a California's ban on MTBE was an unlawful expropriation and was also discriminatory and arbitrary. In August 2005, the Tribunal dismissed all of the claims raised by Methanex and ordered Methanex to pay the United States' legal fees and arbitral expenses in the amount of approximately \$4 million (an award likely unavailable in US courts).
- In *Glamis Gold Ltd. v. United States of America*, a Canadian mining corporation brought an ISDS claim against the United States alleging, among others, that a California law requiring backfilling and restoration of open-pit mines in the vicinity of Native American sacred sites was arbitrary and expropriatory. In June 2009, the Tribunal dismissed Glamis Gold's claim in its entirety and ordered Glamis to pay two-thirds of the arbitration costs in the case.

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A robust and effective ISDS system has proven essential for US extractive and other industries as they locate and develop vital energy resources and other valuable commodities around the world. ISDS provides strong protections for US investors (frequently stronger than those afforded in US or foreign courts) and gives teeth to investment protections that industry can then enforce. At the same time, the United States has been completely successful in defending its own policy priorities and ensuring that foreign investors cannot challenge the United States' ability to develop rules as it sees fit. In short, ISDS has been a boon to American industry, jobs, strength and sovereignty.