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API: NAFTA Must Include Investor-State Dispute Settlement (ISDS)

Strong Investment Protections, including ISDS, promote US interests and enforce fair trade and investment practices by US trade partners. The investment chapter of US free trade agreements (FTAs) such as NAFTA contains a core commitment by the host country to accord investors of the other FTA countries a *basic standard of protection* that includes *non-discrimination*, *fair and equitable treatment* and *limits and rules for expropriation*. This commitment to a basic standard of protection is backed up by a commitment to ISDS, which allows investors to seek a remedy for alleged violations of that standard in a neutral forum.

ISDS is a dispute settlement and enforcement mechanism that works for US interests. API is not aware of any adverse decisions among the handful of ISDS cases ever brought against the US. US companies have won or favorably settled many of the approximately 35 cases they have brought against Canada and Mexico.

API members believe NAFTA must include a strong Investor-State Dispute Settlement (ISDS) mechanism, which is consistent with nearly all US FTAs and bilateral investment treaties (BITs) since 1994. ISDS strengthens the enforceability of commitments in the agreements and the principles of contract sanctity, anti-corruption and protection from arbitrary asset confiscation. For oil and natural gas companies, ISDS is especially important because it provides the right to companies, as investors, to go to international arbitration to pursue compensation for expropriation or when there is a denial of justice in local courts – see cases below.

Why is ISDS Important for the Oil & Natural Gas Industry?

1. **Mechanism to Pursue Compensation for Expropriation.** ISDS provides US companies recourse if their assets are expropriated without compensation. For example, recently a US oil and natural gas company's assets were nationalized by a foreign government. The ISDS mechanism in a BIT to which the country was signatory allowed the company to pursue a claim that eventually resulted in a ruling for the country to pay compensation for the nationalized assets.
2. **International Arbitration for Denial of Justice in Local Courts.** ISDS provides US companies protection against abuses of due process. For example, recently a US oil and natural gas company used ISDS under a US BIT when a host country's local courts allowed the company's contract claims to languish – with no process, let alone due process, accorded – for years. The company successfully showed that the host country had breached the BIT's "effective means" obligation and was awarded monetary compensation.

ISDS in a Nutshell

ISDS is a neutral, international arbitration procedure. The investor-state arbitration provided by ISDS is necessary to ensure that, when US oil and natural companies invest abroad, they can seek protection for their investments if they do not have access to developed and independent court systems. **In FTAs or BITs, ISDS protections are important because they make substantive investment protections enforceable**.

ISDS does not provide an unprecedented right to challenge governments. ISDS achieves a balance between protection of investors abroad and retention of sovereignty for governments, such as for regulations in the public interest. The US and other countries have agreed to ISDS in FTAs and BITs for over half a century.

A narrowing of the scope or watering down of ISDS in future investment treaties and trade agreements is as problematic as outright exclusion of ISDS. The 2012 US Model BIT recognizes the importance of strong investment protection supported by ISDS. **API members believe it is critical that a high standard of investment protection and ISDS be retained in NAFTA and in future US FTAs and BITs.**