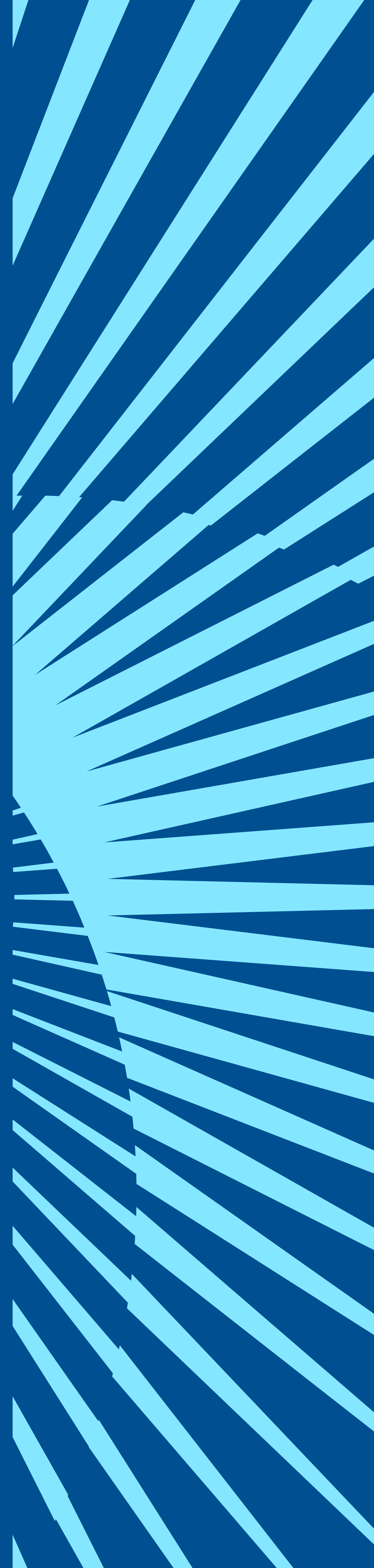
U.S. Chamber of Commerce



Securing the Benefits of Cross-Border Investment:

International Agreements and Dispute Settlement

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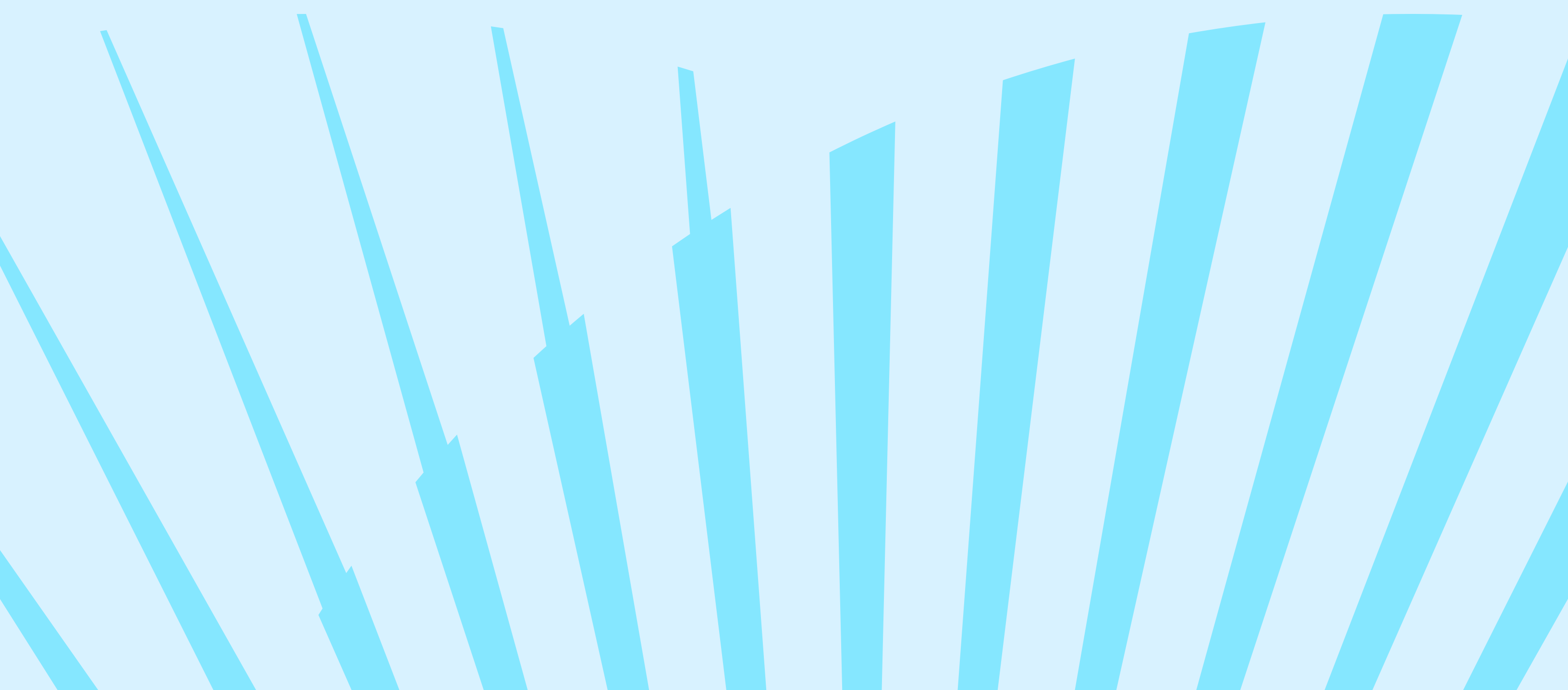
Cross-border investment is a powerful driver of the U.S. economy, playing an essential role in economic growth and job creation at home and among America's allies and partners. Worldwide, the stock of foreign direct investment (FDI) reached an estimated $44.3 trillion in 2022, according to UNCTAD's World Investment Report. The stock of FDI in the United States topped $5.3 trillion that same year, according to data from the Commerce Department, and U.S. companies have invested $6.5 trillion overseas.

The Biden administration has doubled down on international investment as a key tool of its economic statecraft. "The needs in the developing world are overwhelming," as then-Deputy National Security Advisor Mike Pyle said in June 2023, referring to the need for investment in infrastructure, the energy transition, and the diversification of supply chains. "How do we build a toolkit that's going to allow us to facilitate investment to meet the overwhelming needs in that part of the world? That to me is the business of the moment." Signature initiatives of the Biden administration such as the Indo-Pacific Economic Framework (IPEF) and the Americas Partnership for Economic Prosperity (APEP) are framed with the goal of promoting U.S. investment in partner economies.

Foreign investment is generally welcomed and even wooed, and it's easy to see why. In the United States, for example, foreign-headquartered companies employ nearly 8 million Americans, reports the U.S. Department of Commerce. These are good jobs that generally pay excellent wages. U.S. affiliates of foreign-headquartered multinationals tend to attract more job applicants than controversy.

Similarly, when U.S. companies invest abroad, they bring with them high wages as well as high labor and environmental standards. Far from a race to the bottom, U.S. companies have directed more than



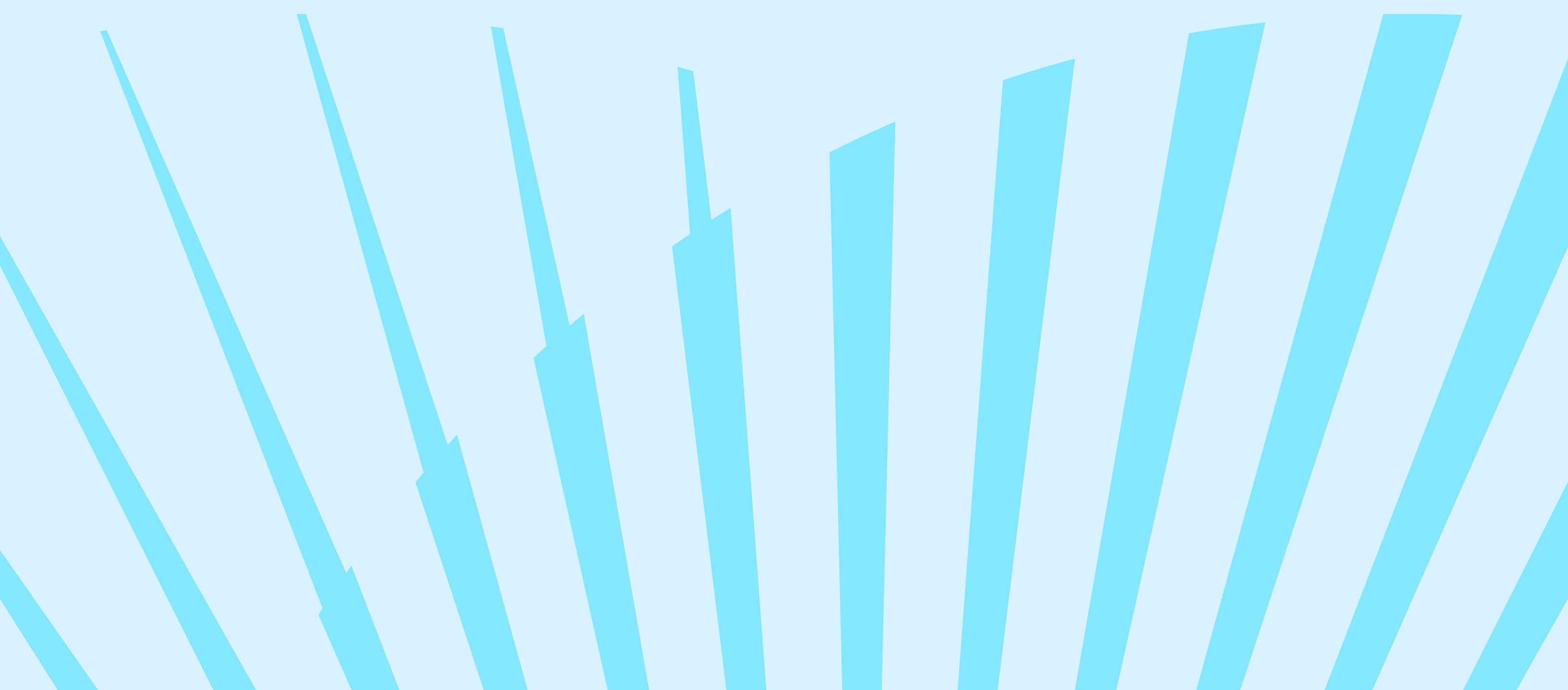
75% of their investments abroad to Europe, Canada, Japan, and other high-income nations, reports the U.S. Department of Commerce. Working for a U.S.-headquartered company is an aspiration for many people in both developed and developing economies.

To safeguard international investments and establish rules against discriminatory treatment and expropriation, countries enter into bilateral investment treaties (BITs). Today, approximately 3,000 such treaties are in force around the world, and BITs—as they are called—have become a cornerstone of international law.

Investment treaties ensure that foreign investors are not subject to discrimination, are treated fairly, and are compensated in the event of expropriation. These investment protections are also included in many trade agreements.

Inevitably, investment disputes arise from time to time. BITs include provisions to resolve disputes called investor-state dispute settlement (ISDS). In recent years, anti-trade activists have called attention to ISDS in an effort to undermine the trade and investment agreements that include these provisions.

In this context, the U.S. Chamber of Commerce is issuing this paper to provide background information on the benefits of cross-border investments. It also includes information on BITs and trade agreements, including ISDS. The principal message is that international investment—both inbound and outbound—brings significant benefits, and agreements to safeguard such investments play a valuable role in enhancing the rule of law to the advantage of workers, consumers, and companies around the globe.



Benefits of Inbound Investment

The United States is home to more investment from abroad than any other country in the world. Across the nation, companies such as Toyota, Siemens, and Samsung have been welcomed for the contributions they make to the local economy. Foreign companies have invested $5.3 trillion in the United States and employ nearly 8 million Americans, according to data from the U.S. Department of Commerce.

U.S. affiliates of foreign-headquartered companies support an annual payroll of $690 billion, with wages that top $86,000 on average. These firms support 2.8 million manufacturing jobs, accounting for 23% of total U.S. manufacturing employment, according to a report by the Global Business Alliance.

It's impressive that these U.S. affiliates annually spend nearly $80 billion on research and development, driving innovation and technical progress.

U.S. affiliates of foreign-headquartered companies generate hundreds of billions of dollars in merchandise exports. Coupled with homegrown capital and ingenuity, these investments give the United States extraordinary access to cutting-edge technology and productivity tools.

Most FDI comes from other developed economies. Five countries accounted for more than half of the total FDI in the United States position at the end of 2022, led by Japan, the United Kingdom, the Netherlands, Canada, and Germany. Other developed countries made up another quarter or so of the total. However, firms from such countries as Brazil and India are increasingly investing in the United States.

Clearly, America benefits hugely from these investments from abroad. As a nation, the United States must keep the welcome mat out and attract more job-creating investments from overseas.

Benefits of Outbound Investment

Americans also derive important benefits from U.S. investment abroad. In addition to exporting, U.S. corporations can access new customers in foreign markets by investing abroad, creating foreign affiliates and becoming multinationals in the process. Sales by these foreign affiliates topped $7.3 trillion in 2021—a sum representing nearly one-third of U.S. multinational corporations' total sales. Many of America's largest companies earn more than half their revenue in this way.

Why do companies invest in other countries instead of simply exporting? Most of these overseas investments are in sectors that cannot be served by means of exports from the United States. This includes many services as well as manufacturing operations for goods, such as detergent, cement, or potato chips, which generally cannot be shipped over long distances due to high transportation costs or barriers to trade.

Overwhelmingly, U.S. companies invest in foreign markets to serve those markets—not as a substitute for domestic production. More than 90% of the production of foreign affiliates of U.S. multinationals is sold abroad.

Meanwhile, the overseas investments of U.S. companies deliver significant benefits to the United States. The earnings generated by U.S. multinationals' overseas sales—which top $7 trillion annually—help fund their research and development activities, 85% of which continue to be performed in the United States, according to the U.S. Department of Commerce. U.S. multinational corporations also generate more than half of all merchandise exports, with their foreign affiliates purchasing one-fifth of the total.

American companies that invest abroad tend to be excellent employers at home. Not only do U.S. multinational companies employ more than 29.5 million Americans, the compensation they offer is nearly 20% higher than the U.S. private sector average. They also tend to create more jobs in the United States than companies focused solely on the domestic market, reports show. U.S. multinationals have continued to concentrate their high-wage, high-skill jobs in the United States.

Investing abroad also makes U.S. companies more resilient. The U.S. Department of Commerce reports that U.S. multinational corporations added 289,000 U.S. jobs between 2007 and 2009 even as the sharpest recession in a generation caused the U.S. economy to shed more than 8 million jobs overall.

U.S. Investment Agreements

To secure the benefits of international investment, the U.S. Chamber believes that the United States should make it a priority to secure legal protections for the investments American companies make overseas. The rule of law, sanctity of contracts, and respect for property rights are the touchstones of respect for international investment, and the United States should fight for these principles in markets around the globe.

Investment agreements are an essential part of these efforts. For more than three decades, the United States has negotiated bilateral investment treaties (BITs) to protect U.S. investments abroad, and similar provisions are included in U.S. trade agreements negotiated over the past 25 years. It is a top priority of the U.S. business community to ensure that these investment protections are maintained and expanded to new geographies.

BITs and trade agreements contain three basic parts. First, they include market access provisions to allow companies from one country to invest in the other's territory. BITs can unlock foreign markets by eliminating outright prohibitions on ownership in particular sectors as well as limitations on ownership of a controlling interest in a firm.

Second, BITs include investment protections. Investment treaties contain four core obligations that reflect these fundamental rule of law traditions, including promises that governments—

- will not discriminate against an investment on the basis of its national origin, i.e., it will provide national treatment, except as specifically provided in the treaty;
- will at a minimum provide investments of the other party fair and equitable treatment and full protection and security;
- will refrain from expropriation except for a public purpose, in accordance with due process, and upon payment of prompt, adequate and effective compensation; and
- will permit free transfers of funds relating to investments.

In short, U.S. investment agreements echo the U.S. Constitution's protections against arbitrary government actions and against taking of property without compensation. They uphold contract and property rights and help ensure transparency with respect to investment-related laws and regulations.

Investor-State Dispute Settlement

The third element in an investment agreement consists of provisions to enforce its investment protections. BITs include two forms of dispute settlement: state-state dispute settlement and investor-state dispute settlement (ISDS). State-state dispute settlement is at time workable, and investment agreements in general require the investor to consult with the government regarding a dispute as a first step. Only if such consultation fails may the investor pursue ISDS.

ISDS is included in most of the world's 3,000 BITs, the earliest of which were concluded more than four decades ago. The United States today has BITs or trade agreements that include investment protections and ISDS in force with more than 50 countries.

In practice, governments often find it convenient to grant recourse to investors via ISDS. One reason they do so is because a dispute involving a single company may be viewed as less important than bilateral issues involving national security or other priorities. From the perspective of governments, ISDS is often a convenient way to depoliticize an investment dispute and leave it in the hands of neutral arbiters.

Particularly in some developing countries where local judiciaries may be slow, ineffective, or corrupt, U.S. companies have benefited significantly from recourse to ISDS. Even though these provisions are invoked infrequently, they serve as a positive admonition to governments to avoid arbitrary actions with regard to foreign investment.

In keeping with the Golden Rule, American officials have long recognized that the United States must accept the same obligations in investment agreements, including ISDS, that they ask of other governments. Further, forgoing enforceable investment protections in a given agreement—even with a country where the rule of law is strong—heightens the difficulty of securing such protections and enforcement remedies in future negotiations with other countries.

ISDS cannot overturn the policy decisions, laws, or regulations of any country. Indeed, all ISDS panels can do is award compensation when a government expropriates property, discriminates against investors on the basis of their nationality, or otherwise tramples on the rule of law.

Investment Agreements Worldwide

As noted, approximately 3,000 investment agreements are in force today around the globe. Germany, China, the United Kingdom, and France have each entered into BITs with more than 100 nations, and nearly all include ISDS. By contrast, the United States has entered into BITs or trade agreements that include ISDS with 54 countries.

In the Chamber's analysis, the 10 countries with the most extensive investment treaty networks have entered into BITs with more than 100 countries where the United States has no investment agreement of any kind. Because investment agreements often serve to open previously closed industry sectors to investment from abroad, the absence of U.S. investment agreements with major economies at times places U.S. companies at a competitive disadvantage relative to firms from third countries.

Indeed, the United States hit pause on new BITs years ago. The last BITs negotiated by the United States were with Uruguay and Rwanda, and they entered into force in 2006 and 2012, respectively, and no further negotiations of this kind have taken place. The last FTAs with investment protections negotiated by the United States were with Colombia, Panama, and South Korea, and they entered into force in 2012.

America's continued prosperity in a highly competitive world demands that we negotiate additional treaties and agreements with high-standard investment protections. As other countries around the globe pursue their own BITs, decision makers in Washington should be wary of how these may tilt the playing field against U.S. companies should the United States lag in its own negotiations.

Conclusion

International investment is a powerful driver of the U.S. economy, playing an essential role in economic growth and job creation. The United States secures significant benefits from both inbound and outbound investment, and agreements to protect such investments play a key role in enhancing the rule of law for the benefit of workers, consumers, and companies. For the sake of American competitiveness, it is crucial that U.S. policymakers continue to uphold these principles and commitments in future legislation as well as investment and trade agreements.

13 Myths About Investment Agreements and Investor-State Dispute Settlement (ISDS)

× Myth 1

ISDS is a novel and exotic way to settle investment disputes.

✓ Fact

ISDS is neither new nor exotic. Provisions for international arbitration for the settlement of investment disputes have been included in approximately 3,000 investment treaties signed by scores of countries over the past four decades. ISDS allows for neutral arbitrators to enforce the basic rights of investors as established in investment agreements.

× Myth 2

ISDS allows corporations to overturn laws and regulations.

✓ Fact

Arbitrators in ISDS disputes have no power to overturn laws or regulations. On the contrary, they are charged with upholding the same kind of fundamental rule of law protections that appear in the U.S. Constitution. In the event a government breaches its obligations under an investment treaty, the only recourse ISDS arbitrators can provide is to require compensation to the investor for losses incurred.

Myth 3

ISDS heightens the taxpayer's jeopardy in investment disputes.

Fact

If the United States were to engage in discriminatory or unfair actions against foreign investors, an arbitral panel might require compensation. However, of the two dozen or so ISDS cases brought against the United States over the past 30 years, the United States has never lost a case.

Foreign investors in the United States are far more likely to seek redress via U.S. domestic courts than ISDS because U.S. law affords greater protections to assure fair and equitable treatment of foreign investors than any international investment treaty. This reality incentivizes foreign investors to seek redress in domestic courts whenever possible.

U.S., state, and local governments routinely pay compensation and awards in domestic court cases to both domestic and foreign investors in such disputes. In fact, the federal government judgment fund paid out more than $3 billion in 2014 to settle cases or pay judgments in domestic litigation while it has never paid a dollar in an ISDS case.

× Myth 4

ISDS isn't necessary because domestic courts can handle investment disputes.

✓ Fact

Foreign investors in the United States usually have good reasons to take their disputes to U.S. courts and not to ISDS. However, domestic law in other countries at times provides inadequate protections for U.S investments; for instance, it often fails to bar discrimination against foreign investors on the basis of their nationality. This important national treatment obligation, which is a hallmark of investment agreements, would be meaningless without an enforcement mechanism such as ISDS.

× Myth 5

Use of ISDS is exploding.

✓ Fact

Few disputes are brought to arbitration under ISDS. According to the United Nations Conference on Trade and Development (UNCTAD), a total of 512 investor-state disputes were filed between 1987 and 2012. This is a remarkably small number of disputes given the following:

- The stock of foreign direct investment worldwide is estimated at $25.5 trillion.
- The number of investment agreements worldwide is approximately 3,000.
- A 25-year period was examined.

Susan Franck of the Washington and Lee University School of Law found that the ISDS provisions of 97% of all bilateral investment treaties (BITs) have never been used.

× Myth 6

ISDS gives investors an unfair advantage.

✓ Fact

Under ISDS, investors usually lose. One-third of disputes end in a settlement, and governments win twice as often as investors in cases that go to arbitration. Even when an investor prevails, the compensation awarded tends to be a small fraction of the amount originally sought.

Myth 7

ISDS limits governments' ability to regulate.

Fact

ISDS does not limit the ability of governments to issue regulations to protect public health, the environment, and worker and consumer safety. The commitments governments make in investment agreements are straightforward. Governments agree (1) not to discriminate on the basis of the nationality of the investor; (2) to afford fair and equitable treatment and full protection and security; (3) to expropriate an investment only for a public purpose, with due process and upon payment of prompt, adequate, and effective compensation; and (4) to guarantee freedom of transfers related to an investment.

Myth 8

ISDS confers special rights for corporations.

Fact

There is nothing "special" about ensuring fair treatment of cross-border investment under international law or arranging for neutral arbitration of a dispute. Moreover, since 2004, the U.S. Model BIT has expressly stated that investment agreements do not create greater rights for foreign investors than those enjoyed by domestic investors.

× Myth 9

ISDS undermines sovereignty.

✓ Fact

Investment treaties are an expression of sovereignty, not a limitation on it. Governments always retain the right to impose nondiscriminatory measures to protect public health, the environment, and worker and consumer safety, and ISDS panels cannot overturn those regulations.

× Myth 10

ISDS lets multinational corporations sue governments anytime they fail to make a profit.

✓ Fact

Investment agreements and ISDS uphold standards of fairness, not profits. If a government breaches obligations it has undertaken in an investment agreement, an arbitration panel may award compensation for harm to investments. Breaches of an investment agreement occur only where there is corrupt, biased, or arbitrary application of regulation that harms an investment. Further, arbitration panels have an exemplary track record of determining appropriate levels of compensation. According to Public Citizen—an organization that actively cultivates fear of international investment agreements—the average recovery is approximately 15% of the original claim in instances in which the investor prevailed.

× Myth 11

ISDS is just for big business.

✓ Fact

Most ISDS cases are not brought by big companies. The Organization for Economic Cooperation and Development (OECD) has found that only 8% of all ISDS claims were brought by multinational corporations. Rather, the companies that bring ISDS cases tend to be small businesses seeking protection against discrimination and other unfair practices.

Myth 12

Arbitration under ISDS is conducted in secret tribunals.

Fact

There is nothing secret about investor-state arbitration. Proceedings are open and documents are available to the public under rules established in U.S. investment treaties. Interested parties such as environmental organizations and public interest groups can and do file amicus submissions.

Myth 13

Pending ISDS cases promise shocking outcomes.

Fact

The arguments of anti-ISDS activists tend to rely on hypothetical scenarios or cases that have been initiated but not yet decided. By contrast, the real-world record shows that when a government has acted in a nondiscriminatory manner and affords investors due process, it always wins.

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