Congress of the United States
Washington, DC 20515

October 11, 2017

The Honorable Robert E. Lighthizer
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Dear Ambassador Lighthizer:

We are writing to express our concerns about the investor-state dispute settlement (ISDS) provisions in U.S. trade agreements. We request that you eliminate the ISDS provisions from the North American Free Trade Agreement (NAFTA) during renegotiations of that pact and take our concerns into consideration as you review other past trade pacts and contemplate future agreements.

The ISDS system empowers foreign investors and corporations to challenge the U.S. government before tribunals of three private-sector lawyers operating outside our domestic legal system. The tribunals can award unlimited compensation to be paid by U.S. taxpayers. Foreign firms need only convince the lawyers that a federal or state law, court ruling, or other government action undermines vaguely defined foreign investor rights granted to them in an agreement. The merits of these rulings, which are fully enforceable against the U.S. government in U.S. courts, are not subject to appeal.

As Chief Justice John Roberts noted in his 2014 dissent in *BG Group PLC v. Republic of Argentina*, ISDS arbitration panels hold the alarming power to review a nation's laws and "effectively annul the authoritative acts of its legislature, executive, and judiciary." These extrajudicial tribunals, he noted, "can meet literally anywhere in the world" and "sit in judgment" on a nation's "sovereign acts."

Under NAFTA, and in the U.S.-China Bilateral Investment Treaty that the Obama Administration almost completed, United Nations or World Bank tribunals that are not bound by U.S. judicial precedent or due process guarantees decide ISDS cases. Many of the attorneys simultaneously sit on tribunals deciding cases against governments and represent investors suing governments, an ethically challenged practice forbidden for U.S. judges. Past tribunals have interpreted the vague substantive rights in ISDS-enforced pacts to extend beyond the carefully fashioned takings and due process jurisprudence established by our Supreme Court under the Fifth and Fourteenth Amendments.

We support expanding trade and elimination of unfair and discriminatory barriers to foreign products and investment. However, ISDS extends beyond disciplining such barriers. Rather, it deeply implicates the fundamental principles of our domestic legal system, undermining our sovereignty and threatening our system of federalism with a form of international preemption. Additionally, the very structure of ISDS provides foreign investors and corporations operating

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here greater rights to pursue claims against the U.S. government than are provided to U.S. citizens and firms under our domestic legal system.

In 2002, the National Association of Attorneys General passed a resolution "In Support of State Sovereignty and Regulatory Authority" raising concerns with NAFTA's ISDS regime and urging that in U.S. agreements "foreign investors shall receive no greater rights to financial compensation than those afforded to our citizens." This standard has not been met. Indeed, the Trans-Pacific Partnership expanded the scope of ISDS claims beyond what was in NAFTA, empowering foreign entities to skirt our courts and bring disputes over contracts with the U.S. government on natural resource concessions, construction projects, and more to these extrajudicial tribunals. The National Conference of State Legislatures has also repeatedly reaffirmed its opposition to ISDS in U.S. trade agreements, including again in 2014 when the group was dominated by majority-Republican state legislatures.

Today, only about 10 percent of foreign direct investment in the United States is subject to ISDS. This is a significant reason why the U.S. government has avoided being ordered to pay compensation so far. Even so, tribunals have ruled against us on important elements of ISDS cases brought under NAFTA against the United States. Moreover, other nations with robust legal systems have had to pay, including Germany and Canada. If ISDS remains in NAFTA or U.S. ISDS liability is expanded via new pacts, it is likely only a matter of time before we lose a case. In addition, because tribunals can order governments to pay costs even when governments' win, merely having more ISDS cases filed against us will require the federal government and states to allocate legal resources to defending challenges.

In addition, NAFTA's investor protections make it less risky and cheaper for U.S. firms to move offshore jobs. As the pro-NAFTA Cato Institute notes, ISDS subsidizes offshoring by lowering the risk premium of relocating. Instead of firms having to factor in the cost of risk insurance when making offshoring decisions, they rely on ISDS to require governments in low-wage nations either to provide them with their special offshored investor protections or compensate them. As a result, U.S. taxpayers not only lose jobs, but our policies and Treasury are exposed to reciprocal ISDS attacks by foreign firms operating here.

We urge you to eliminate ISDS from NAFTA during the pending renegotiations and not to include such terms in any future agreements.

Sincerely,

Daniel M. Donovan, Jr.
Member of Congress

David P. Joyce
Member of Congress

Brian K. Fitzpatrick
Member of Congress