

# Congress of the United States

Washington, DC 20515

May 2, 2023

The Honorable Katherine Tai  
U.S. Trade Representative  
Office of the U.S. Trade Representative  
600 17<sup>th</sup> Street NW  
Washington, D.C. 20508

The Honorable Antony Blinken  
Secretary of State  
Department of State  
2201 C Street NW  
Washington, D.C. 20520

Dear Ambassador Tai and Secretary Blinken:

We are writing regarding our concerns about the Investor-State Dispute Settlement (ISDS) system that has been a fixture of the United States' trade and investment agreements with foreign nations. Large corporations have weaponized, and continue to weaponize, this faulty and undemocratic dispute settlement regime to benefit their own interests at the expense of workers, consumers, and small businesses globally. We were pleased to see President Biden's commitment not to include ISDS in any future trade deals,<sup>1</sup> and Ambassador Tai, you have indicated that you will pursue a trade agenda in line with that commitment.<sup>2</sup> We therefore ask that your agencies investigate any and all options at your disposal to eliminate ISDS liability from existing trade and investment agreements.

Large multinational corporations have successfully lobbied to include ISDS in past trade deals to give themselves special rights and privileges that ordinary citizens do not receive.<sup>3</sup> Under ISDS, disputes are handled not through the judicial system but by industry-friendly arbitration tribunals that can require taxpayers to shell out massive sums to big corporations, with no opportunity to appeal.<sup>4</sup>

Unlike the courts, "tribunals have no set procedures or precedents. Standards of evidence are nonexistent, and mistruths or exaggerations go unpunished."<sup>5</sup> These provisions tilt the playing

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<sup>1</sup> United Steelworkers endorsement questionnaire for Joe Biden, May 17, 2020, <https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf>.

<sup>2</sup> Responses to Questions for the Record for Ambassador Katherine Tai from members of the Senate Finance Committee, February 25, 2021, p. 4, <https://www.finance.senate.gov/imo/media/doc/Katherine%20Tai%20Senate%20Finance%20Committee%20QFRs%202.28.2021.pdf>.

<sup>3</sup> See e.g., Public Citizen, "At Hill Forum, Conservative and Progressive Trade and Legal Experts Support Removal of ISDS From NAFTA, Revealing Isolation of Corporate Lobby Defending NAFTA Job Outsourcing Incentives," press release, December 5, 2017, <https://www.citizen.org/news/at-hill-forum-conservative-and-progressive-trade-and-legal-experts-support-removal-of-isds-from-nafta-revealing-isolation-of-corporate-lobby-defending-nafta-job-outsourcing-incentives/>.

<sup>4</sup> Public Citizen, "More Information on Investor-State Dispute Settlement," <https://www.citizen.org/article/more-information-on-investor-state-dispute-settlement/>.

<sup>5</sup> The American Prospect, "How Biden Can End Secretive Corporate Tribunals," Sarah Lazare, February 2, 2023, <https://prospect.org/world/2023-02-02-investor-state-dispute-settlement/>.

field even further in favor of large corporations, incentivizing offshoring<sup>6</sup> and undermining the sovereignty of the United States and other governments.

Furthermore, ISDS is not needed to promote positive investment and in fact continues to harm human rights and hinder efforts to address climate change. A pending ISDS case recently launched against Honduras illustrates the need for your administration to take action to remove this problematic corporate handout from existing agreements. Late last year, U.S. company Honduras Próspera launched an ISDS claim under the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) against the newly elected government of Honduras, seeking nearly \$11 billion,<sup>7</sup> equal to roughly two-thirds of the country’s entire national budget this year.<sup>8</sup>

The jaw-dropping sum sought by Próspera is not the only reason that this case raises serious concerns. Honduran President Xiomara Castro secured a major victory for democracy last year when the National Congress of Honduras repealed the country’s *Zonas de Empleo y Desarrollo Económico* law (ZEDE, or “Economic Development and Employment Zones”).<sup>9</sup> The legal name misleadingly implies that ZEDEs constitute standard special economic zones, areas within a country’s borders that, while politically and fiscally part of the host nation, are governed by separate economic regulations as “a mechanism for attracting foreign direct investment, accelerating industrialization, and creating jobs.”<sup>10</sup> However, the legislation enabled the creation of far more radical private governance zones, which have “functional and administrative autonomy” from the national government.<sup>11</sup>

The zones allowed investors to create their own governance systems and regulations and establish separate courts.<sup>12</sup> And investors have used the law to create jurisdictions where companies can propose their own regulations and where most Hondurans cannot enter without authorization. In the case of Próspera, a ZEDE located largely on the Honduran island of Roatán, investors have created a governing council where 44 percent of members are appointed by the private company and 22 percent are elected by landowners in a system where their number of

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<sup>6</sup> Green America and American Sustainable Business Council, “Small Business Leaders to Trump: End Advantage for Multinationals Over U.S. Small Businesses in NAFTA,” press release, July 12, 2017, [https://www.citizen.org/wp-content/uploads/small\\_business\\_letter.pdf](https://www.citizen.org/wp-content/uploads/small_business_letter.pdf).

<sup>7</sup> Letter from White & Case representing Honduras Próspera to the Dirección General de Integración Económica y Política Comercial of Honduras, September 16, 2022, <https://cms.prospera.hn/uploads/2022-09-16-Pr%C3%B3spera-Notice-of-Intent-under-Art.-10.16-ENG-signed.pdf>.

<sup>8</sup> Latina Republic, “Government of Honduras Approves National Budget for the Fiscal Period 2022-2023,” Soledad Quartucci, September 14, 2022, <https://latinarepublic.com/2022/09/14/government-of-honduras-approves-national-budget-for-the-fiscal-period-2022-2023/>.

<sup>9</sup> Reuters, “Honduran Congress unanimously nixes special economic zones,” Gustavo Palencia, April 21, 2022, <https://www.reuters.com/world/americas/honduran-congress-unanimously-nixes-special-economic-zones-2022-04-21/>.

<sup>10</sup> The World Bank, “Special Economic Zones,” <https://www.worldbank.org/content/dam/Worldbank/Event/Africa/Investing%20in%20Africa%20Forum/2015/investing-in-africa-forum-special-economic-zones.pdf>.

<sup>11</sup> Constitute, “Honduras’s Constitution of 1982 with Amendments through 2013,” April 27, 2022, [https://www.constituteproject.org/constitution/Honduras\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Honduras_2013.pdf?lang=en).

<sup>12</sup> NACLA, “A Private Government in Honduras Moves Forward,” Beth Geglia and Andrea Nuila, February 15, 2021, <https://nacla.org/news/2021/02/12/private-government-honduras-zede-prospera>.

votes is proportional to the size of their property.<sup>13</sup>

This antidemocratic policy, approved under the leadership of previous officials, including former president Juan Orlando Hernández, who have since been indicted on drug trafficking and firearms charges,<sup>14</sup> was highly controversial. Honduran labor unions, small farmers, Indigenous organizations, and even the nation's largest business groups expressed vehement opposition.<sup>15</sup> According to the U.S. State Department, the zones "were broadly unpopular, and viewed as a vector for corruption."<sup>16</sup> The Honduran Congress unanimously approved President Castro's proposal abolishing this policy.<sup>17</sup>

Próspera has repeatedly threatened to initiate ISDS arbitration under CAFTA-DR to bully the Honduran government into allowing them to continue operating under the abolished ZEDE framework.<sup>18</sup> In December 2022, the company announced that it filed a CAFTA-DR claim with the International Centre for Settlement of Investment Disputes (ICSID),<sup>19</sup> which will force the government of Honduras to potentially spend millions of dollars defending itself for responding to the will of its people and asserting its sovereignty over these special governance jurisdictions operating in its territory.

This case is just the most recent example of the worrying trend of increased ISDS use in the Americas, both in the number of cases and the sky-high value of the claims. Governments throughout Latin America have paid billions of dollars in compensation to foreign companies at their taxpayers' expense, simply for putting in place sound public policy to protect the environment and the health and economic well-being of their communities.<sup>20</sup> Governments—and therefore taxpayers—throughout the region have been ordered by ISDS tribunals to pay close to \$28 billion to corporations, with far more in pending ISDS claims.<sup>21</sup>

We urge you to uphold your commitment and refrain from negotiating new trade agreements with ISDS, and also to address the existing ISDS mechanisms that corporations continue to exploit. Your administration has begun to negotiate a new agreement in the region, the Americas Partnership for Economic Prosperity, and has announced its intention to update existing

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<sup>13</sup> *Id.*

<sup>14</sup> U.S. Department of Justice, "Juan Orlando Hernández, Former President of Honduras, Indicted on Drug-Trafficking and Firearms Charges, Extradited to the United States from Honduras," press release, April 21, 2022, <https://www.justice.gov/opa/pr/juan-orlando-hern%C3%A1ndez-former-president-honduras-indicted-drug-trafficking>.

<sup>15</sup> U.S. Department of State, "2022 Investment Climate Statements: Honduras," <https://www.state.gov/reports/2022-investment-climate-statements/honduras/>.

<sup>16</sup> *Id.*

<sup>17</sup> Reuters, "Honduran Congress unanimously nixes special economic zones," Gustavo Palencia, April 21, 2022, <https://www.reuters.com/world/americas/honduran-congress-unanimously-nixes-special-economic-zones-2022-04-21/>.

<sup>18</sup> Global Arbitration Review, "Honduras sees DR-CAFTA disputes loom," Susannah Moody, November 11, 2022, <https://globalarbitrationreview.com/article/honduras-sees-dr-cafta-disputes-loom>.

<sup>19</sup> Próspera, "\$10.775 Billion Claim Filed Against Government of Honduras," press release, December 20, 2022, <https://prospera.hn/news/press-releases/10-775-billion-claim-filed-against-government-of-honduras>.

<sup>20</sup> Georgetown Law Center for the Advancement of the Rule of Law in the Americas, "Investor-State Dispute Settlement in Latin America and the Caribbean," <https://isdsrlac.georgetown.edu/>.

<sup>21</sup> *Id.*

agreements.<sup>22</sup> Eight of the 11 recently announced APEP partner countries already have agreements with the United States that include ISDS provisions.<sup>23</sup>

The U.S. government and Congress have already acknowledged, to some extent, the problems with the ISDS system. We worked on a bipartisan basis to significantly reduce ISDS liability in the renegotiated U.S.-Mexico-Canada Agreement (USMCA), though it left an unacceptable loophole for U.S. fossil fuel companies in Mexico.<sup>24</sup> We request that you intervene—through a statement of support, amicus brief, and any other means at your disposal—in support of Honduras’ defense in the Próspera ISDS case and to ensure that such egregious cases can no longer disrupt democratic policymaking by working to eliminate ISDS liability in preexisting agreements in our hemisphere.

The broken ISDS system has time and time again worked in favor of big business interests while infringing on the rights and sovereignty of our trading partners and their people. We urge you to investigate and pursue an effective path to removing consent to ISDS arbitration by the U.S. and our treaty partners in existing bilateral investment treaties and free trade agreements. And we look forward to working with you to remove these outdated provisions from trade and investment agreements, foreclosing the possibility of future attacks against the U.S. and signaling to trading partners that they will not be penalized for prioritizing the public interest.

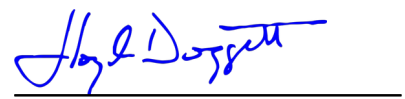
Thank you for your attention to this matter.

Sincerely,



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Elizabeth Warren  
United States Senator



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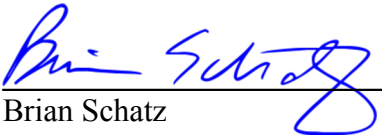
Lloyd Doggett  
Member of Congress

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<sup>22</sup> The White House, “FACT SHEET: President Biden Announces the Americas Partnership for Economic Prosperity,” press release, June 8, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/08/fact-sheet-president-biden-announces-the-americas-partnership-for-economic-prosperity/>; Inside U.S. Trade, “USTR official: Administration wants to update FTAs alongside APEP,” Brett Fortnam, December 14, 2022, <https://insidetrade.com/daily-news/ustr-official-administration-wants-update-ftas-alongside-apep>.

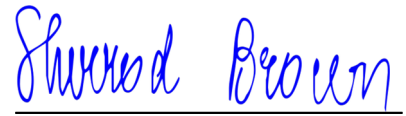
<sup>23</sup> The White House, “Joint Declaration on The Americas Partnership for Economic Prosperity,” press release, January 27, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/27/joint-declaration-on-the-americas-partnership-for-economic-prosperity/>; Office of the U.S. Trade Representative, “Free Trade Agreements,” <https://ustr.gov/trade-agreements/free-trade-agreements>.

<sup>24</sup> Rice University Baker Institute for Public Policy, “The United States-Mexico-Canada Agreement: Settlement of Disputes,” David A. Gantz, May 2, 2019, <https://www.bakerinstitute.org/research/united-states-mexico-canada-agreement-settlement-disputes>.



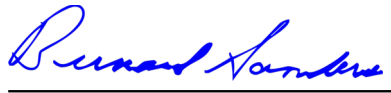
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Brian Schatz  
United States Senator



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Sherrod Brown  
United States Senator



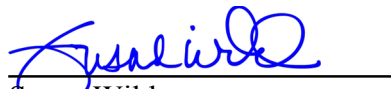
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Bernard Sanders  
United States Senator



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Sheldon Whitehouse  
United States Senator



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Susan Wild  
Member of Congress



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Rosa L. DeLauro  
Member of Congress



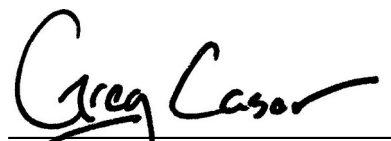
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Jamie Raskin  
Member of Congress



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Raúl M. Grijalva  
Member of Congress



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Greg Casar  
Member of Congress



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Jesús G. "Chuy" García  
Member of Congress



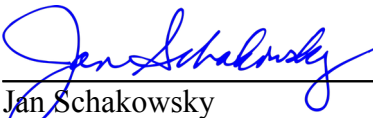
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Jamaal Bowman, Ed.D.  
Member of Congress



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Paul D. Tonko  
Member of Congress



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Jan Schakowsky  
Member of Congress



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Pramila Jayapal  
Member of Congress



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Mark Pocan  
Member of Congress



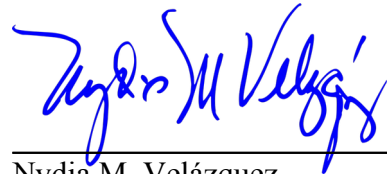
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Brad Sherman  
Member of Congress



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Veronica Escobar  
Member of Congress



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Nydia M. Velázquez  
Member of Congress



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Eleanor Holmes Norton  
Member of Congress



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James P. McGovern  
Member of Congress



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Rashida Tlaib  
Member of Congress



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Cori Bush  
Member of Congress



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Jared Huffman  
Member of Congress



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Summer Lee  
Member of Congress



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Donald Norcross  
Member of Congress



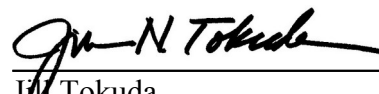
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Ilhan Omar  
Member of Congress



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Barbara Lee  
Member of Congress



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Jm Tokuda  
Member of Congress



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Ro Khanna  
Member of Congress



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Henry C. "Hank" Johnson, Jr.  
Member of Congress

A handwritten signature in black ink that reads "Marcy Kaptur". The signature is fluid and cursive, with the first name "Marcy" and last name "Kaptur" clearly distinguishable.

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Marcy Kaptur  
Member of Congress