

# Intelligence MEMOS



*As NAFTA renegotiations proceed through the summer and fall C.D. Howe Institute Intelligence Memos will be looking at what to expect and provide analysis on the latest developments at the table. This post is part of that series.*

From: Jon Johnson  
To: Joshua Bolten, President and CEO, Business Roundtable  
And to: Thomas J. Donohue President, U.S. Chamber of Commerce  
Date: September 13, 2017  
Re: **INVESTOR STATE DISPUTE SETTLEMENT DIES IF US WITHDRAWS FROM NAFTA**

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Three weeks ago you wrote to Ambassador Lighthizer, to Secretaries Ross, Tillerson and Mnuchin, and to Director Cohn affirming the critical importance that your organizations ascribe to the NAFTA investor state dispute settlement procedures (ISDS). If the US withdraws from NAFTA, ISDS will cease to exist and will likely never be resurrected.

Convincing Mexico and Canada to agree to ISDS was one of a number of major achievements of the US negotiators in the NAFTA negotiations. In common with other Latin American countries at the time of the negotiations, Mexico followed the approach to the protection of foreign investors known as the Calvo doctrine that maintained that aliens (read US investors) should not be treated any more favourably than nationals. Thus if a domestic law expropriated the property of nationals without compensation, US investors would receive the same treatment. During the negotiation of NAFTA, Mexico completely reversed this position and agreed to an investment chapter with full ISDS.

This represented a major breakthrough for the US negotiators, not only in protecting investments in Mexico but in other Latin American countries as well. In this, as well as in a number of other respects, NAFTA can be described as the best trade agreement ever for the US.

The Canada-US Free Trade Agreement includes an investment chapter but the Canadian negotiators flatly refused to include ISDS. When Mexico agreed to the inclusion of ISDS in the NAFTA investment chapter, the Canadian negotiators very reluctantly agreed.

Canada has been [at the receiving end](#) of more ISDS claims than the other two NAFTA countries. A number of claims have been frivolous challenges of valid environmental measures. The cost of decisions that actually went against the Canadian government in these cases has been minuscule relative to the amount of trade and investment with NAFTA partners, and Canada has agreed to ISDS in subsequent trade and investment agreements. But the claims have aroused wide opposition in Canada to ISDS by environmental NGOs, labour unions and other influential bodies. Ottawa would have no incentive to restore ISDS if the US walks away from its NAFTA obligations.

Resurrection of ISDS would be even more difficult with Mexico. President Trump seems to have gone out of his way to denigrate and insult Mexico. Mexico would have no incentive whatever to restore the benefit of ISDS for US investors.

The existence of ISDS rights against Canada and Mexico depends entirely on the continued existence of NAFTA, whether in its current or in a renegotiated form. Congress, and not President Trump, has the ultimate authority over any US decision to withdraw from a trade agreement. If you regard ISDS as critically important to US investors with investments in Canada and Mexico, your organizations and their respective member companies should exercise all the influence that they can to ensure that Congress asserts its constitutional authority to prevent the US from withdrawing from NAFTA.

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