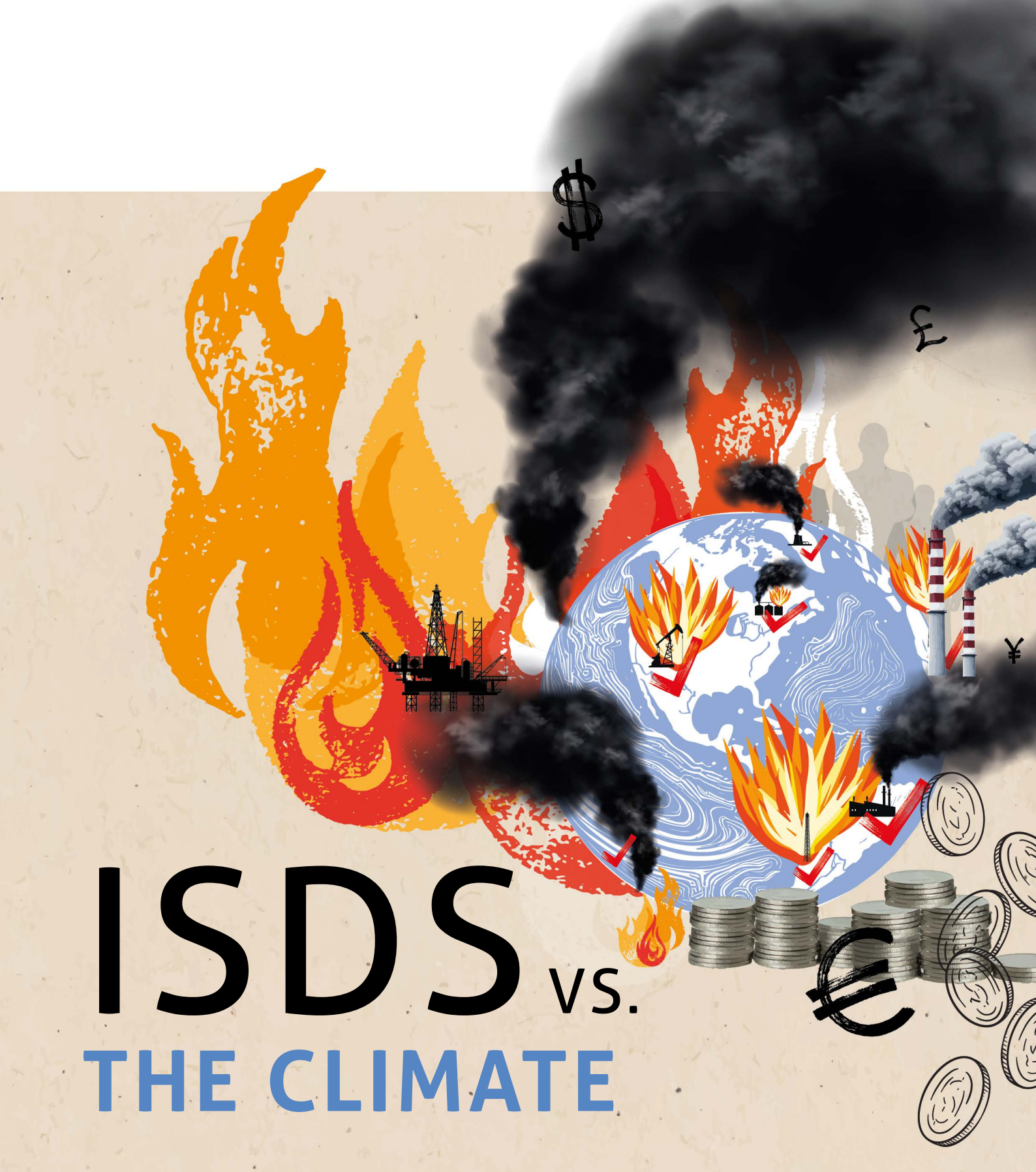




ISDS vs. THE CLIMATE

HOW A COLONIAL-ERA INVESTMENT MECHANISM
JEOPARDISES A JUST TRANSITION

ISDS ^{vs.} THE CLIMATE

HOW A COLONIAL-ERA INVESTMENT MECHANISM
JEOPARDISES A JUST TRANSITION

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EXECUTIVE SUMMARY

Phasing out fossil fuels is urgent to prevent disastrous climate breakdown. But there's a problem. A little-known yet powerful legal mechanism is undermining the energy transition, by enabling fossil fuel companies to sue countries that take climate action. **This little-known mechanism is called Investor-State Dispute Settlement (ISDS).**

ISDS is a mechanism in trade and investment agreements that enables foreign investors, including fossil fuel companies, to sue countries over climate policies, including phasing out fossil fuels. For example, ExxonMobil is suing the Netherlands, demanding billions following the closure of a gas field,¹ and the UK faces a claim from an investor in a proposed coal mine, which was cancelled when a British High Court ruled against it on climate grounds.²

ISDS is included in more than 2,600 trade and investment agreements. Using ISDS, companies can sue governments in secretive tribunals for millions and billions of dollars. Some cases are never made public.

Companies can sue governments over any area of policy, not just climate. Governments have been sued over introducing health warnings on cigarettes, and over reversing the failed privatisation of water services. The number of known ISDS claims has more than doubled in the last ten years,³ and the sums claimed are bigger than ever. **Fossil fuels and mining projects make up the largest proportion of all ISDS claims.**

¹ ExxonMobil v Netherlands

² Woodhouse Investment PTE Ltd v UK, 2025

³ UNCTAD [Facts and Figures on Investor-State Dispute Settlement Cases](#) - IIA Issues Note, No. 3, 2024.



Investors often don't even have to actually bring an ISDS case to get what they want; they can also threaten states with ISDS claims. **This "regulatory chill" happens when a state responds to threats of ISDS claims by reversing, withdrawing, weakening, or not enforcing legitimate regulatory measures.** The impact of regulatory chill on climate policy has been warned against by the UN's International Panel for Climate Change (IPCC).

The ISDS regime is stacked against Global South countries, which face a majority of claims, while most investors (claimants) come from a small number of wealthy countries. **It perhaps comes as little surprise then that this mechanism finds its roots in colonialism.**

The tide is, however, slowly turning against ISDS. The inclusion of ISDS in trade deals has become increasingly controversial, and some countries have taken measures to reduce the threat of corporate claims. Still, for the most part, international agreements that allow corporations to continue to wield this weapon against Global South countries remain in force. Bolder steps to eliminate the threat of ISDS from undermining the energy transition are needed.

This paper sets out what is wrong with ISDS, explores the colonial origins of this regime and proposes that States take decisive action to move away from ISDS. **Action to address the planetary environmental crisis and its catastrophic consequences for human rights cannot wait.**

LIST OF ACRONYMS

BIT:	Bilateral Investment Treaty
ECT:	Energy Charter Treaty
FET:	Fair and Equitable Treatment
FTA:	Free Trade Agreement
ICSID:	International Centre for Settlement of Investment Disputes
IIA:	International Investment Agreements
IPCC:	Intergovernmental Panel on Climate Change
ISDS:	investor-state dispute settlement
NAFTA:	North American Free Trade Agreement
UNCITRAL:	United Nations Commission on International Trade Law
UNCTAD:	UN Trade and Development
USMCA:	United States-Mexico-Canada Agreement





With global temperatures soaring, the window to avert the catastrophic consequences of climate change is rapidly closing. Transitioning away from fossil fuels and tackling biodiversity loss and environmental damage are key elements of any climate-just future. Yet a powerful legal mechanism, called investor-state-dispute settlement (ISDS), stands in the way.

WHAT IS ISDS?

Investor-State-Dispute-Settlement (ISDS) clauses are found in trade and investment agreements that enable foreign investors to sue countries over policies that affect their investments. Under ISDS, investors seek compensation from governments for supposed breaches of their rights in the context of their investment in that country. In other words, if an investor makes an investment in a foreign country, in the event that government policy changes, an investor can sue that government over the impact that policy change has or may have on their profits. ISDS is included in more than 2,600 Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) between countries all over the world.

This mechanism is at the core of the Energy Charter Treaty, the climate-wrecking multilateral agreement intended to protect investments in the energy sector in post Soviet states, which CAN Europe and allies successfully campaigned against.

Investors can claim compensation far exceeding the level of their investment. The sums demanded can be astronomical, with claims over USD 1 billion no longer uncommon. Cases are decided by a panel of three highly paid commercial lawyers, in mostly private, closed-door sessions. This is a highly opaque and undemocratic system, often with little or no information on cases disclosed to the public.



ISDS is a threat to our climate goals because if countries enact climate and environmental policies (as required under the Paris Agreement) that affect the profits of foreign investors, fossil fuel companies can sue those countries for the loss of the money they might have gained if the climate-damaging investment had gone ahead. Therefore, fossil fuel companies could claim billions of taxpayers' money if governments pass or enforce climate and environmental laws.

The mere threat of such claims can also have the effect of discouraging the introduction of progressive climate and environmental policies and can force governments into permitting extractive mining and fossil fuel projects.

The ISDS regime is heavily stacked against Global South countries, which also bear the brunt of the climate crisis, despite historically contributing to it the least. An overwhelming majority of ISDS claims are brought by investors from the Global North against states in the Global South.⁴ **Most extractive-related ISDS cases have been brought by companies headquartered in just five wealthy countries.**⁵ An investor from a Least Developed Country has never brought a case.⁶ The system effectively supports the transfer of wealth from public to private hands, and from the Global South to the Global North. It perhaps comes as little surprise then that the ISDS system is rooted in the laws, policies and practices of colonialism.

The tide is slowly turning against ISDS, as more countries recognise the threat to public policy-making and the public purse. Some countries have taken steps to remove or reduce the risk of ISDS claims. However, the rate of change is too slow. Bolder steps are needed.

This paper explains what ISDS is, how it is stopping climate action, and its role in an extractive economic model that has devastating consequences for Global South countries. It explores the colonial origins of this unjust system, argues that rejecting ISDS is a critical element of any climate-just future, before turning to recommendations for how countries can escape ISDS.



⁴ UNCTAD. (2022). Treaty-based investor–state dispute settlement cases and climate action. IIA Issues Note International Investment Agreements Issue 4. United Nations.

⁵ Manuel Perez Rocha, Foreign Policy in Focus, “[Missing from the Climate talks: corporate powers to sue governments that limit pollution](#)”, 2021.

⁶ UNCTAD, [Investment Dispute Settlement Navigator](#).





ISDS GRANTS EXCLUSIVE PRIVILEGES TO CORPORATIONS

ISDS is a unique privilege in international law. International investors, often multinational corporations, have exclusive access to this parallel legal system. **Only companies can sue governments. States cannot initiate claims in ISDS and can only rarely submit counterclaims.** ISDS is also not available to domestic businesses. Treaties with ISDS provide corporations with protection, but do not impose binding obligations to protect human rights or the environment. An investor can win a case even if it violates domestic law or international human rights, or environmental norms.

More typically, under international law, people bring their complaints to domestic courts, exhausting all local remedies, before they could bring an international case against another state. The rule of exhausting local remedies is fundamental to ensure that a state's bodies can carefully consider the issue, and domestic courts have the opportunity to revise the matter according to domestic law.⁷ This protects state sovereignty, ensuring that nobody interferes in a state's domestic affairs unless there is no other alternative to protect basic individual rights. However, investment treaties with ISDS enable investors to sidestep this norm.

Unlike decisions by domestic courts, ISDS awards cannot be appealed, and an investor can seek to have the award enforced in almost any other country in the world. Other countries (that are members of the relevant conventions)⁸ are obliged to assist in securing payment through the seizure of any assets belonging to the respondent state.

It is a highly undemocratic system: it privileges multinational investors over local entrepreneurs, citizens and communities who do not have access to this parallel legal system.⁹

THE ISDS SYSTEM IS CLOAKED IN SECRECY

ISDS cases are cloaked in secrecy. **Claims need never be made public, hearings are often conducted behind closed doors, documents are often confidential, and both awards and negotiated settlements can be kept secret.** Under the International Centre for Settlement of Investment Disputes (ICSID) rules (the most frequently used forum for ISDS cases), information about a case is only published where both parties agree to do so. This means that the true figure for ISDS awards is likely far higher than publicly known. **An investigation by the Guardian found that in 31% of cases where a payout or settlement was made, the size of the award was not disclosed.¹⁰**

The number of known ISDS claims has more than doubled in the last ten years.¹¹ However, the lack of transparency makes it impossible to assess precisely how many cases exist or the content of those cases. UN Trade and Development (UNCTAD) counts known cases, but the actual number could be considerably higher. Even more difficult to quantify is the number of ISDS claims that have been threatened but not filed, and that have successfully pressured states to weaken existing or withdraw proposed environmental and climate laws, regulations, taxes or other policies.

Lack of transparency is a particular problem in ISDS cases related to fossil fuels, which are often completely confidential, meaning that no details about the case are made public.¹² **Almost one third of known fossil fuel arbitrations are settled before reaching final decisions, and all settlement documents are confidential.¹³**

CHILLING EFFECT: PHILIP MORRIS THREATENS TOGO

One such threat that we do know about was made by tobacco giant Philip Morris against the Government of Togo, which was considering introducing images to health warnings on cigarettes, as a public health measure. In 2013, Philip Morris, which had already pursued ISDS cases against Australia and Uruguay for attempting to introduce similar measures, wrote to the government of Togo threatening to bring an ISDS case. The threat was successful – Togo backed down from introducing the warning images.

⁷ Shaw, M. N. *International law*, 2008, Cambridge University Press, 819; Okowa, P. *Issues of Admissibility and the Law on International Responsibility*, 2010, In Evans, M. D. (Ed.), *International law*. Oxford University Press, 2010, p. 500.

⁸ The New York Convention on the Enforcement of Arbitral Awards.

⁹ Sornarajah, M. (2017). *The international law on foreign investment*. Cambridge University Press, p. 257.

¹⁰ Patrick Greenfield and Phoebe Weston, *Revealed: how Wall Street is making millions betting against green laws*, The Guardian, 5 Mar 2025.

¹¹ UNCTAD *Facts and Figures on Investor-State Dispute Settlement Cases* - IIA Issues Note, No. 3, 2024.

¹² Di Salvatore, L., Cotula, L., Nanda, A., Wang, C. (2023). *Investor-State Dispute Settlements: A Hidden Handbrake on Climate Action*, CCSI & IIED, London.

¹³ *ibid.*

IMPARTIALITY AND DOUBLE HATTING OF ISDS ARBITRATORS

The ISDS legal system is different to domestic legal systems. The ISDS legal system does not use publicly appointed, independent judges, but instead usually relies on a tribunal of three private, often commercial lawyers who are paid per case, with one appointed by each of the disputing parties, and the third mutually agreed.¹⁴

In a one-sided system where only the investor can bring claims, **there is a strong incentive for arbitrators to side with investors**, because investor-friendly rulings pave the way for more cases and more income in the future. The impartiality of arbitrators has been highly criticised, as some engage in double-hatting—acting sequentially or even simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary for the same claimant, creating a potential conflict of interest.¹⁵ An analysis of the cases brought so far under the most used ISDS treaty found that in a significant number of cases, an individual who had previously acted as an arbitrator appointed by an investor in one case was appointed to act as counsel (or advocate) for a party in another similar case.¹⁶

Individuals having the privilege of choosing their own private judges in disputes involving environmental, human rights or sustainable development considerations is an unheard-of privilege under domestic and international law. In most jurisdictions, only contractual disputes can be subject to arbitration. Arbitration is a dispute resolution methodology whereby parties agree to submit their dispute to a third party who has the deciding power. **Using arbitration to resolve investment disputes gives these arbitrators authority to decide on issues of public importance, including climate action.**

ISDS practitioners normally come from large multinational law firms. The pool of arbitrators is very limited and consists largely of wealthy white male Western attorneys—Europeans and North Americans.¹⁷ At ICSID, arbitrators make US\$500 per hour worked.¹⁸

ISDS UNDERMINES SOVEREIGNTY

Among the standards of protection owed to foreign investments under international investment agreements (IIAs) is the obligation to provide “fair and equitable treatment” (FET). FET is one of the most controversial standards included in most (nearly 95%) of IIAs.¹⁹

FET is a vague provision that lacks a clear definition. As a result, tribunals have, when interpreting the provision, expanded its scope and content over time. Several tribunals have identified investors’ “legitimate expectations” as a key element of the FET standard. As a result of **regulatory changes, such as new laws or taxes introduced in a respondent state that diminish private profits, may be seen as breaches of an investor’s “legitimate expectations”, even if those regulatory changes are necessary to protect the rights and well-being of citizens.**

By interpreting the extremely vague IIA standards, arbitral tribunals are prescribing how governments have to treat foreign investors. By doing so, they are in effect taking over functions belonging to the state, functions which rightly belong to democratically elected lawmakers or to regulatory bodies accountable to the public. This is particularly dangerous as these tribunals tend to treat the cases prioritising minimal state intervention in private property, not from the point of view of the state’s obligation to protect, respect and fulfil the human rights of its population, nor from governments’ obligation to guarantee financial stability, to control corporate conduct, to foster social inclusion and protect the environment.²⁰



¹⁴ Van Harten, G. (2007). *Investment treaty arbitration and public law*. Oxford University Press.

¹⁵ Langford, Behn and Lie, *The Revolving Door in International Investment Arbitration*, 2017

¹⁶ Arthur Neslen, *Revealed: secret courts that allow energy firms to sue for billions accused of 'bias' as governments exit*, The Guardian, 2022.

¹⁷ Puig, S. (2014). Social capital in the arbitration market. *European Journal of International Law*, 25(2), 387–424.

¹⁸ ICSID, *Memorandum on the Fees and Expenses*, July 1, 2022.

¹⁹ 'Fair and Equitable Treatment' is included in nearly 95% of investment treaties. Nearly 83% of all treaty-based investor–state arbitration claims (with data available) have involved claims based on FET. UNCTAD, (2022), *Investment Policy Hub*.

²⁰ UNCTAD Trade and Development Report 2014: *Global governance and policy space for development*, New York/Geneva, p. 138.

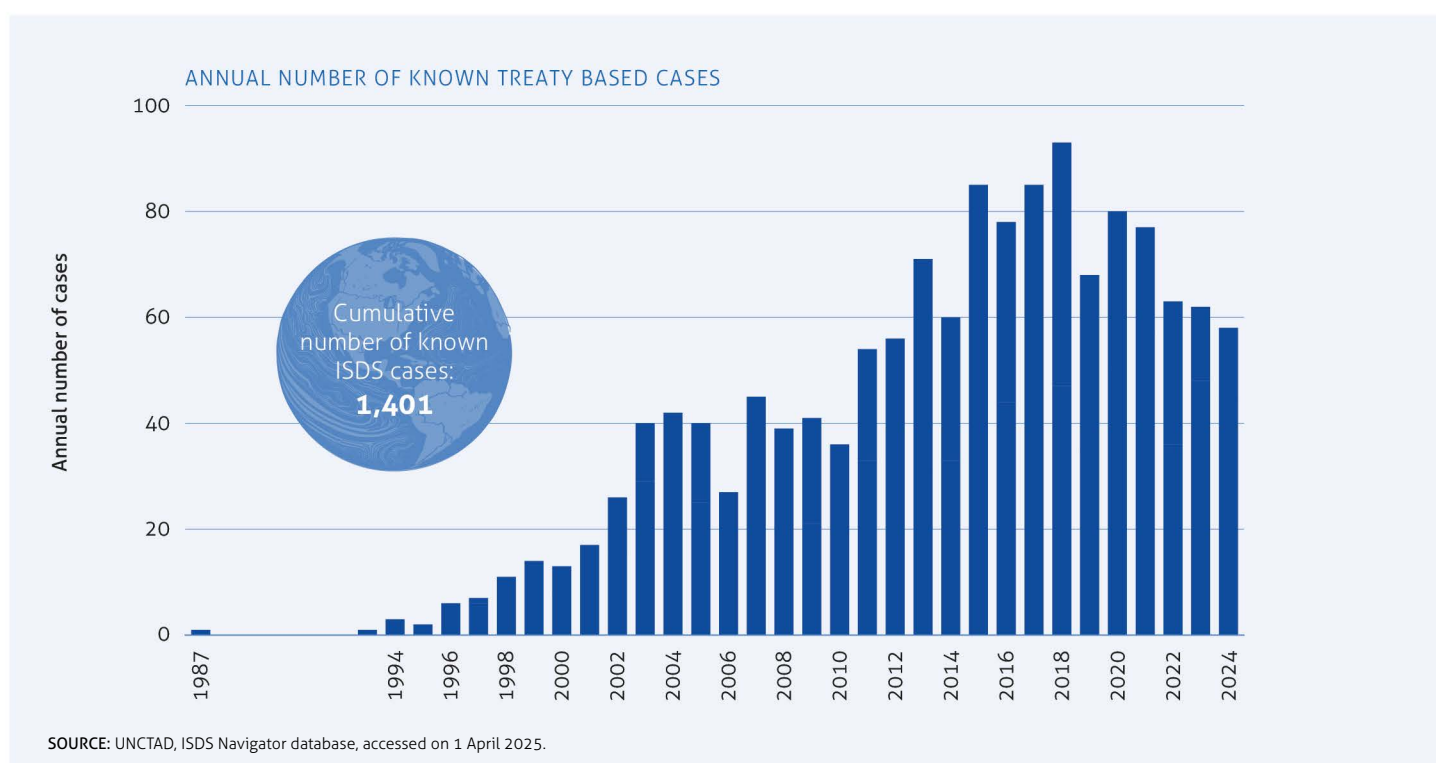


GOLDEN PROFITS UNDERMINING PEOPLE'S RIGHT TO CLEAN WATER: CANADIAN MINING COMPANY ECO ORO V COLOMBIA

The Eco Oro case is one example of an unjust interpretation of the FET provision. In this case, a Canadian mining company acquired exploration rights for gold mining in an environmentally sensitive area of Colombia, but was later denied permission to develop the mine by the Constitutional Court of Colombia, as it would threaten the drinking water supply of 2 million Colombians. The ISDS tribunal found that Colombia breached the company's right to fair and equitable treatment,²¹ even though the ISDS agreement supposedly included provisions to ensure that the parties had adequate regulatory space for environmental protection. The case undermines the argument that ISDS can be rebalanced in any way by including explicit safeguards to protect a state's right to regulate.²²

ASTRONOMICAL AWARDS, ENFORCEABLE ANYWHERE, EVEN AFTER TREATY TERMINATION

FIGURE 01: THE BULK OF INVESTOR-STATE DISPUTE SETTLEMENT CASES EMERGED BETWEEN 2010 AND 2024

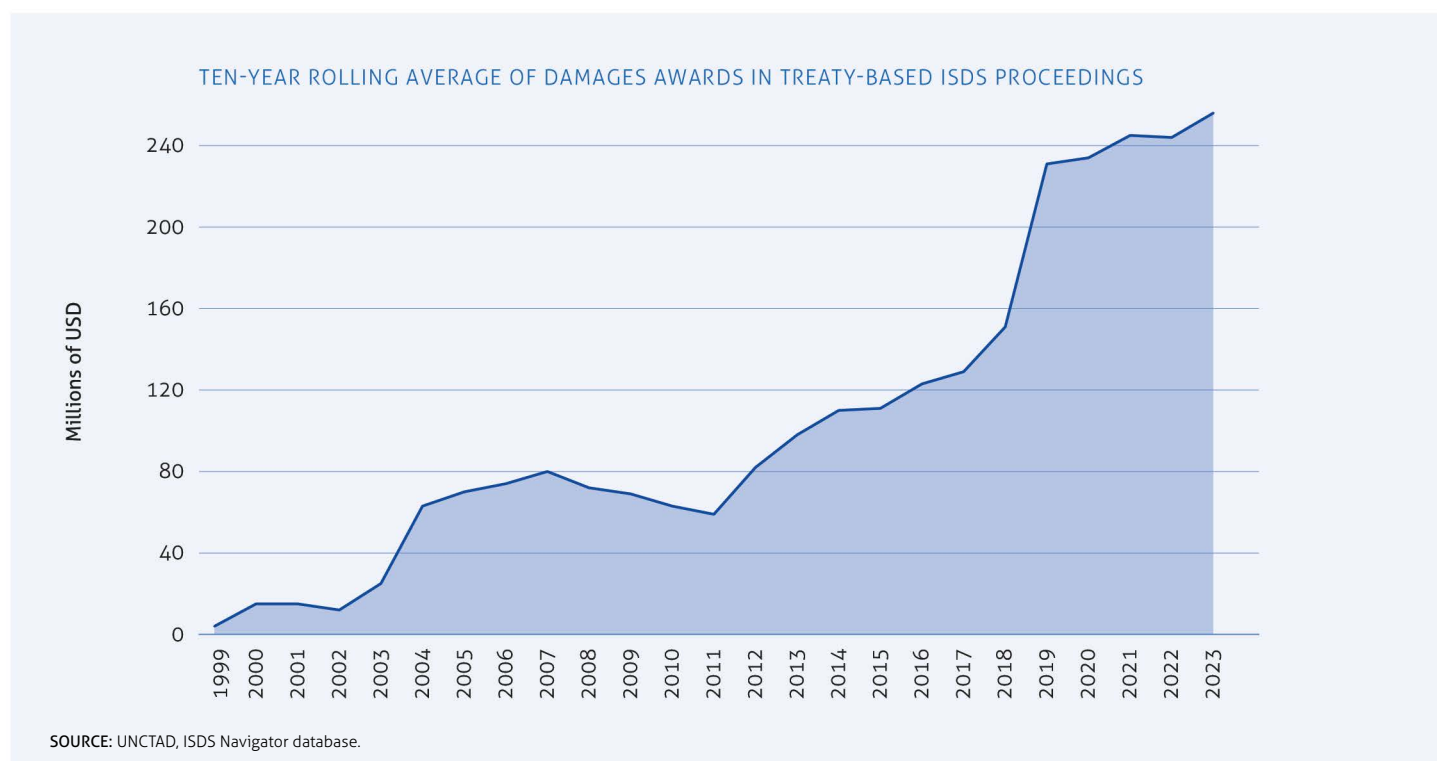


Governments can't really 'win' ISDS cases; the best case scenario for states is that they don't lose, and have some of their legal costs covered. Investors, on the other hand, stand to reap massive financial sums from bringing ISDS claims. Damages awarded

against states in ISDS claims have risen significantly since 2010, with damages per claim awarded now amounting to 250 million USD. There are no limitations on the size of the claims investors may put forward.

²¹ Eco Oro v. Colombia, Decision on jurisdiction, liability and directions on quantum, 9 September 2021.

²² UNCTAD, *Treaty-based ISDS cases and climate action*, IIA Issues Note, September 2022, p. 2.

FIGURE 02: ISDS DAMAGES AWARDS ARE GROWING

Awards can be billions of dollars. There are 12 known cases in which investor compensation exceeded 1 billion USD.²³ Most of these awards in excess of 1 billion dollars have been against Global South countries.²⁴ A 2020 IISD report indicates that out of the 50 awards of USD 100 million or more, only one was against a Western European country, seven were against Eastern European countries, and the rest were against Global South countries.²⁵ In some cases, the compensation awarded has been equal to the entire budgets for health or education, hindering the achievement of the Sustainable Development Goals (SDGs) and climate change goals.²⁶

ISDS awards have the potential to cripple the economies of Global South countries, many of which are already facing the worst debt crisis in history.²⁷ In 2012, Ecuador was ordered to pay a US oil company more than 1.5 billion USD, which represented almost 9% of Ecuador's 2012 annual budget, 59% of its annual education budget, and 135% of the country's annual healthcare budget.²⁸

These large payments can be financially devastating for Global South countries, depriving public budgets of funds desperately needed to combat poverty, finance education, public health and climate actions in the region.

MASSIVE ISDS AWARD AGAINST A COUNTRY IN CRISIS: TETHYAN COPPER V PAKISTAN

Another egregious example is that of Tethyan Copper v Pakistan. Pakistan was ordered to pay an award of US\$5.8 billion to a mining company. To put the magnitude of this award into perspective, it is larger than the grants and loans Pakistan received in 2022 following the disastrous climate-related floods that covered one-third of the nation and affected tens of millions of people.

²³ OHCHR Special Rapporteur on human rights and the environment David Boyd, [Annex 1 to A/78/168](#), July 2023.

²⁴ Ibid.

²⁵ Jonathan Bonnitcha and Sarah Brewin, *Compensation Under Investment Treaties*, International Institute for Sustainable Development, 2020.

²⁶ Colombia Center on Sustainable Investment 2024: *Breaking Free: Strategies For Governments On Terminating Investment Treaties And Removing Isds Provisions*, Page 28, and UN report by Boyd:

²⁷ Larry Elliot, *Developing countries face worst debt crisis in history, study shows*, The Guardian, July 2024.

²⁸ IISD, *Ecuador Referendum Rules Out ISDS Return, Underlining Public Support for a Sustainable Path*, April 2024.



How do tribunals arrive at these massive sums? Many of the highest award sums are reached using the 'Discounted Cash Flows' method,²⁹ which estimates the worth of a business as equal to the present value of the income it is expected to generate in the future. This enables investors to claim **hypothetical future profits**. That means that an investor can sue a country not only for the amount they might have invested (say in an oil rig), but the amount they might have hypothetically made if the oil rig had functioned successfully for another 50 years, or the whole lifetime of the project. This method relies on speculative assumptions about future profits and risks, with little basis in the original investment.

There have been cases where the investor has not invested a single cent—and yet has been able to bring an ISDS claim for lost profits. The vast majority, 90%, of ISDS claims are made on the basis of old IIAs, where the compensation guidance is poorly defined, leaving considerable scope for the types of cases investors can bring.

But countries 'lose' even if the tribunal doesn't award the investor damages, due to the costs of arbitration. A recent study finds that states spend on average USD 4.7 million per case on legal expenses.³⁰

Most treaties with ISDS provisions also include **sunset clauses**. These mean that even if a party to a treaty or agreement decides to leave or terminate the treaty, the ISDS provisions can remain in force for an existing investment for a stated period of time after the termination/exit date, often between 10 and 20 years. This means that claims can be brought against a country long after it has decided to leave an investment agreement, locking states into obligations that do not allow for changing political, economic and environmental circumstances. Some BITs even include **unlimited or permanent sunset clauses** (e.g. France-Indonesia BIT 1973, the France-Egypt BIT 1974). This means that the agreement offers investors a guarantee that the national law applicable to their investments will not change in a way that would be less favourable to them, seriously restricting the regulatory capacity of states.³¹

Most countries against which awards are issued end up paying them. For countries that resist, the award can be enforced almost anywhere in the world (in contracting states of the ICSID Convention or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, each has over 150 member states). The system enables the investor to claim by demanding the seizure of the state's property (e.g. by seizing valuable state assets such as planes, or freezing bank accounts held abroad).³²

A LUCRATIVE BUSINESS

With big payouts on the increase, ISDS litigation has become a lucrative business for multinational law firms and third-party funders. Third-party funding involves an entity with no prior financial interest in a dispute providing finance to a claimant in an ISDS claim, in return for a percentage of the awarded compensation if the claim is successful.

Third-party funding of ISDS claims happens if an investor does not have the financial means to bring a case, or where the investor wants to offload the risk of bringing a claim. Third-party funding is driving the growth of speculative claims. Financial firms increasingly fund and even recruit investors to bring ISDS cases, advertising their services to foreign investors, identifying potential to seek compensation for the impact of governments acting in response to pressing global problems, such as urgent measures to address the Covid-19 pandemic.³³ Numerous law firms also encourage their clients to consider ISDS claims in response to climate and environmental actions taken by states.³⁴

Arbitration tribunals also routinely allow "mailbox companies" to initiate ISDS claims. A mailbox company is one that has no employees or real economic activity in the country in question, just an address so that its owner can benefit from the investor privileges the host country offers. An estimated \$100 billion in ISDS claims have been filed under Netherlands investment treaties by investors based in other states using Dutch mailbox companies.³⁵



²⁹ Tony Marzal, *Against DCF valuation in ISDS: on the inflation of awards and the need to rethink the calculation of compensation for the loss of future profits* January 26, 2021.

³⁰ Josef Ostřanský, Florencia Sarmiento, and Suzy Nikiema, *Why Is Investment Treaty and Investor-State Dispute Settlement Reform Needed? Questions & answers*, IISD, March 2025.

³¹ Mathilde Dupré, Stéphanie Kpenou, *Les accords de protection des investissements français : un obstacle à la transition écologique*, Veblen Institute, July 2025.

³² Examples of such instances include *Micula and others v Romania*, *Achmea v Slovakia*, and *Eco Development v Tanzania*.

³³ Public Citizen, *Law Firms Are Recruiting Corporations to Attack COVID-19 Policies in ISDS 'Corporate Courts,' Warn 600-Plus Civil Society Groups From 90 Nations*, July 2020.

³⁴ See, for example, *Climate Change and Investor-State Dispute Settlement*, Newsletters, Jones Day, February 2022.

³⁵ Roos van Os, *Fifty years of ISDS: more than \$US 100 billion claimed via the Netherlands*, Centre for Research on Multilateral Corporations (SOMO), 13 January 2018.

REGULATORY CHILL

One of the most pernicious ways in which ISDS is used is when investors threaten states with ISDS claims in order to get what they want, often blocking the introduction of regulations and laws that would affect their profits. This is called “regulatory chill”, for example, when a state responds to perceived or actual threats of ISDS arbitration—and the potentially high costs—by reversing, withdrawing, weakening or not enforcing legitimate regulatory measures, for instance, to address the climate crisis, protect the environment or fulfil human rights.

This means both potential and actual arbitrations can shape regulation. Given that nearly half of claims brought under ICSID rules (the most used forum for ISDS claims) are awarded in favour of the investor in full or in part, the ISDS regime creates an incentive for investors to attempt to prevent new regulation and discourages governments from implementing ambitious legislation.

CHILLING EFFECT IN ACTION

In 2017, when France announced plans to phase out all fossil fuel extraction by 2040, Vermilion, a Canadian corporation that is the largest oil producer in France, threatened a billion-dollar arbitration claim. France responded by implementing weaker, much less ambitious regulations.³⁶

In another case, when Australian mining company Newcrest threatened to use ISDS to challenge an Indonesian law aimed at limiting environmentally destructive mining, the Indonesian Government decided not to risk being sued for what could have been \$22.7 billion, about half of Indonesia’s entire annual budget. Instead, the President issued an emergency decree exempting Newcrest from the law. The lawyer who drafted the decree said “arbitration is the only reason” for the volte-face, adding that “under the circumstances, we had no choice”.³⁷

Evidence of chilling events is hard to come by, as the decisions taken in response to threatened ISDS claims are often not in the public eye. In the Global South, this is more scarce than in the Global North, although examples exist. In Colombia, for instance, researchers identified how ISDS slowed down and even prevented land restitution in the context of the peace process.³⁸

A BARRIER TO A CLIMATE JUST FUTURE

The ISDS system is deeply incompatible with a climate-just future. Governments face claims in the millions and billions from fossil fuel companies over government decisions to phase out fossil fuels and curb environmentally destructive mining projects. When successful, these ISDS awards deprive the public purse of funds that could otherwise be used for vital public services and a just transition. **But the cost isn’t just financial. Climate policy is also being undermined by the chilling effect.** The threat of ISDS claims by investors can lead governments to reverse, delay or cancel the introduction of climate policies.

UN bodies have also raised fundamental concerns with ISDS. The 2022 Intergovernmental Panel on Climate Change (IPCC) report highlighted the risks of ISDS being used to challenge climate policies.³⁹ Another report by a UN Special Rapporteur concludes that ISDS is delaying progress on climate change and other environmental crises and has “enormous impacts on human rights”.⁴⁰

The recent landmark advisory opinion by the highest UN court, the International Court of Justice (ICJ), on states’ obligations with respect to climate change, underlined in a separate opinion that investment treaties must not be interpreted in isolation, but in harmony with international climate law, referring to IPCC’s recognition that ISDS can deter climate regulation.⁴¹

THE COST OF ISDS CLIMATE CLAIMS

Claims around extractive fossil fuel and mining projects make up the largest proportion of all ISDS claims. The fossil fuel industry is the most litigious industry in the ISDS system, accounting for almost 20% of the total known ISDS cases (UNCTAD 2023a, 92). Fossil fuel companies have historically secured at least US\$82.8 billion in damages, and large sums continue to be invested in fossil fuels worldwide.⁴²

³⁶ CEO, FoE and TNI, *Vermilion vs. France: Blocking climate change laws with ISDS threats*, April 2021.

³⁷ Hamby, C., *The Billion Dollar Ultimatum. The Secret Threat That Makes Corporations More Powerful Than Countries*, 2016.

³⁸ Prieto-Rios, E., Soto Hoyos, J. F., & Pontón-Serra, J. P. (2022). Foreign concerns: the impact of international investment law on the ethnic-based land restitution programme in Colombia. *The International Journal of Human Rights*, 27(1), 1–21.

³⁹ IPCC. (2022). *Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. United Nations.

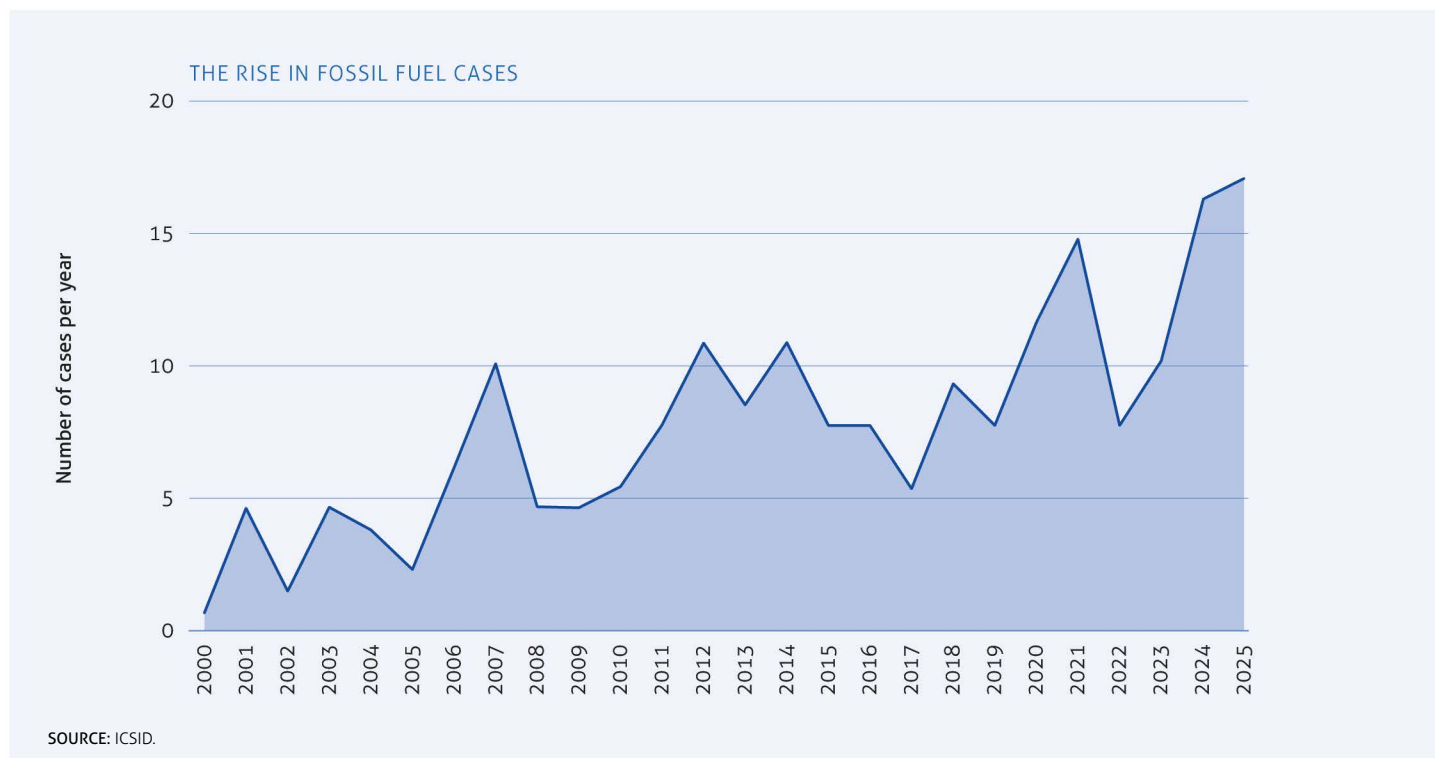
⁴⁰ UN OHCHR Report, “*Paying Polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*”, 2023.

⁴¹ International Court of Justice, Advisory Opinion, *Obligations of States in respect of Climate Change*, July 2025.

⁴² Colombia Center of Sustainable Investment, Briefing: *Investor-state dispute settlements: a hidden handbrake on climate action*, 2023.



FIGURE 03: CASES FILED AT ICSID BY GAS, OIL AND MINING FIRMS
NUMBER OF CLAIMS UNTIL 28 AUGUST, 2025



With countries committing to transition away from fossil fuels, the number of ISDS cases is expected to rise.⁴³ An E3G report from 2024 uncovered that globally, 2 gigatonnes (Gt) of carbon dioxide equivalent (CO₂e) of potential annual greenhouse gas emissions are protected via investment treaties, an amount equivalent to 58% of the greenhouse gas (GHG) emissions created by all of the continent of Europe's fossil fuel operations in 2022.⁴⁴ Their analysis also revealed that most companies that own ISDS-protected fossil fuel assets are concentrated in the richest countries (including the United Kingdom, Japan, France, and the United States).⁴⁵

States could face paying billions in compensation if they were to cancel exploration permits in line with a "Net Zero" scenario because of the protection provided by ISDS.⁴⁶ The five countries most exposed to ISDS litigation are Mozambique (\$7–31 billion), Guyana (\$5–21 billion), Venezuela (\$3–21 billion), Russia (\$2–16 billion), and the United Kingdom (\$3–14 billion). A further 33 states could be exposed to paying billions in compensation if they terminate existing oil and gas projects.⁴⁷



⁴³ Ibid.

⁴⁴ Eunjung Lee & Jordan Dilworth *Investment Treaties Are Undermining The Global Energy Transition Mapping The Global Coverage Of Isds- Protected Fossil Fuel Assets*, E3G, July 2024.

⁴⁵ Ibid.

⁴⁶ Tienhaara, K., Thrasher, R., Simmons, B. A., & Gallagher, K. P. (2022). *Investor-state dispute settlement: obstructing a just energy transition*. *Climate Policy*, 23(9), 1197–1212.

⁴⁷ Ibid.

Some prominent ISDS claims directly arising from specific climate and environment policy measures include:

BARRICK GOLD V PAPUA NEW GUINEA

Canadian mining company Barrick Gold brought a case in 2020 against Papua New Guinea after the country declined to extend Barrick's mining license, citing environmental and human rights concerns. There were long-standing and well-documented environmental impacts on water sources, and human rights abuses, including killings, torture, arbitrary arrest, and beatings allegedly perpetrated by mine security and police. The arbitration forced the government to agree to reopen the mine in 2023.⁴⁸

CHEVRON V ECUADOR

For over a decade, US oil firm Texaco dumped billions of gallons of toxic waste and crude oil into the Amazon rainforest in Ecuador, creating an environmental disaster that destroyed communities and livelihoods. In 2011, the Ecuadorian Courts ordered Chevron-Texaco to pay 9,500 million US dollars for contamination. Chevron hit back with an ISDS claim, suing Ecuador for damages, but also seeking to have the court order for environmental damage overturned. In August 2018, a private arbitration panel ruled in favour of Chevron, ordering Ecuador to overturn the sentence it had passed in favour of the affected communities. The case set a dangerous precedent, subverting the course of justice by overruling Ecuador's domestic justice system.⁴⁹

ROCKHOPPER V ITALY

British oil company Rockhopper successfully sued the Italian government over the banning of an offshore oil rig. Italy was ordered to pay Rockhopper approximately €190 million plus interest. The award was annulled due to one of the arbitrators failing to disclose his earlier involvement in criminal proceedings, but Rockhopper has launched another arbitration case and has cashed in on annulment insurance to the tune of 31 million euro.⁵⁰ The money it won from the case is being used to fund further oil extraction.

EXXONMOBIL V NETHERLANDS

ExxonMobil is suing the Netherlands under the Energy Charter Treaty (ECT), demanding billions in compensation from the Dutch government following the closure of the Groningen gas field. The company is attempting to shift the financial costs of decades of gas extraction and earthquake damage onto the public.⁵¹ The case shows that fossil fuel companies are increasingly weaponising arbitration to obstruct government efforts to transition and avoid accountability.⁵²

SHELL AND ENI V NIGERIA

Fossil fuel giants Shell and Eni have used Nigeria's investment treaty with the Netherlands to pressure the Nigerian government into allowing their polluting and profitable projects. Shell's initial \$1.8 billion ISDS claim helped Shell and Eni secure a license that disproportionately benefited the companies for one of the country's richest oil fields in 2011. The deal deprived Nigeria of its share in future profits from the oil. In 2023, a later government succumbed to further pressure from a second ISDS lawsuit, dropping corruption claims against Shell and Eni. As a result, Nigerians could lose out on billions in oil tax revenue.⁵³

WOODHOUSE INVESTMENT PTE LTD V UK

The UK faces a claim from a company invested in a proposed coal mine in Cumbria, which was cancelled when a British High Court ruled against it on climate grounds.



⁴⁸ Mining Watch, *Barrick Gold vs. Papua New Guinea: Mining giant forces hand of government in reopening toxic project*, in Bilaterals, May 2021.

⁴⁹ War on Want, ISDS Files Investigating the Impact of corporate courts on the ground, *Chevron v Ecuador*.

⁵⁰ Erik Brouwer, IA Reporter, *Rockhopper cashes in on ICSID annulment insurance coverage and finalises preparation of new arbitration against Italy, following annulment of 2022 award*, Sep 01, 2025.

⁵¹ SOMO, *Aftershock in Groningen*, July 2025.

⁵² Verbeek, Bart-Jaap, *ExxonMobil sues the Netherlands over gas field closure*, SOMO, October 2024.

⁵³ ETJC et al, Red Carpet Courts, *Shell and Eni vs Nigeria*, 2025.



DEBUNKING THE MYTH THAT ISDS IS GOOD FOR RENEWABLES

Proponents of ISDS claim that investment protection can encourage investment in renewable projects. However, renewable energy investors do not take into account the presence of investment agreements in their decision-making.⁵⁴

RENEWABLES ISDS CLAIMS AGAINST SPAIN

Spain is the most sued country under the Energy Charter Treaty, largely because of changes to its renewable subsidy schemes. The Spanish government's Feed-in-Tariff created a highly lucrative environment for investment in solar energy, attracting capital from international investors and financial institutions. However, the government amended the Feed-in-Tariff in 2008 due to the financial crisis, leading to a wave of ISDS cases. The primary beneficiaries of these claims are not renewable energy companies. Instead, 89 per cent of the claimants are financial institutions and investment funds, for whom the energy transition is little more than a source of profit. In half of the cases, the companies suing Spain also had investments in the coal, oil, gas, and nuclear energy sectors.⁵⁵ Getting renewable energy schemes right will need to allow governments a degree of flexibility in order to get the regulation right, and that taxpayers should not foot the bill for this regulatory experimentation.⁵⁶

NEW FRONTIERS

ISDS also creates a grave threat to communities at the front lines of the fossil fuel and critical minerals extractive sectors. As case after case has shown, ISDS claims often arise from local opposition to a proposed extractive site, such as a coal mine, an oil rig, or a gold mine. These communities are often engaged in protracted battles against companies, security firms, and sometimes their own governments, facing violence, threats and intimidation, as well as the risk of displacement and environmental damage to their local area. ISDS claims create additional pressure on governments to side with the investors and undermine the rights of communities at the coalface of ISDS disputes.

The second most litigious industry is the mining sector, accounting for 11% of publicly known ISDS cases.⁵⁷ Communities resisting the corporate exploitation of critical minerals may be at the forefront of a new wave of ISDS claims linked to critical minerals, given the importance of critical minerals to the green transition. There is an expectation that most of the critical minerals necessary for the low-carbon energy transition will come from the Global South, most notably, lithium, cobalt, and graphite.⁵⁸ Increased geopolitical competition for these minerals might prompt some governments in the Global South to grant exploration or extraction rights, which is concerning because an estimated 54% of energy transition minerals are located on or near indigenous peoples' land.⁵⁹ Critical mineral-related ISDS cases may well be the next frontier for ISDS arbitration, as attempts to review or reconsider these exploration or extraction entitlements for social or environmental considerations may trigger ISDS litigation.



⁵⁴ Columbia Center on Sustainable Investment, *THE ROLE OF INVESTMENT TREATIES AND INVESTOR-STATE DISPUTE SETTLEMENT IN RENEWABLE ENERGY INVESTMENTS*, 2022.

⁵⁵ Lucía Bárcena, Fabian Flues, *From solar dream to legal nightmare*, TNI, 2022.

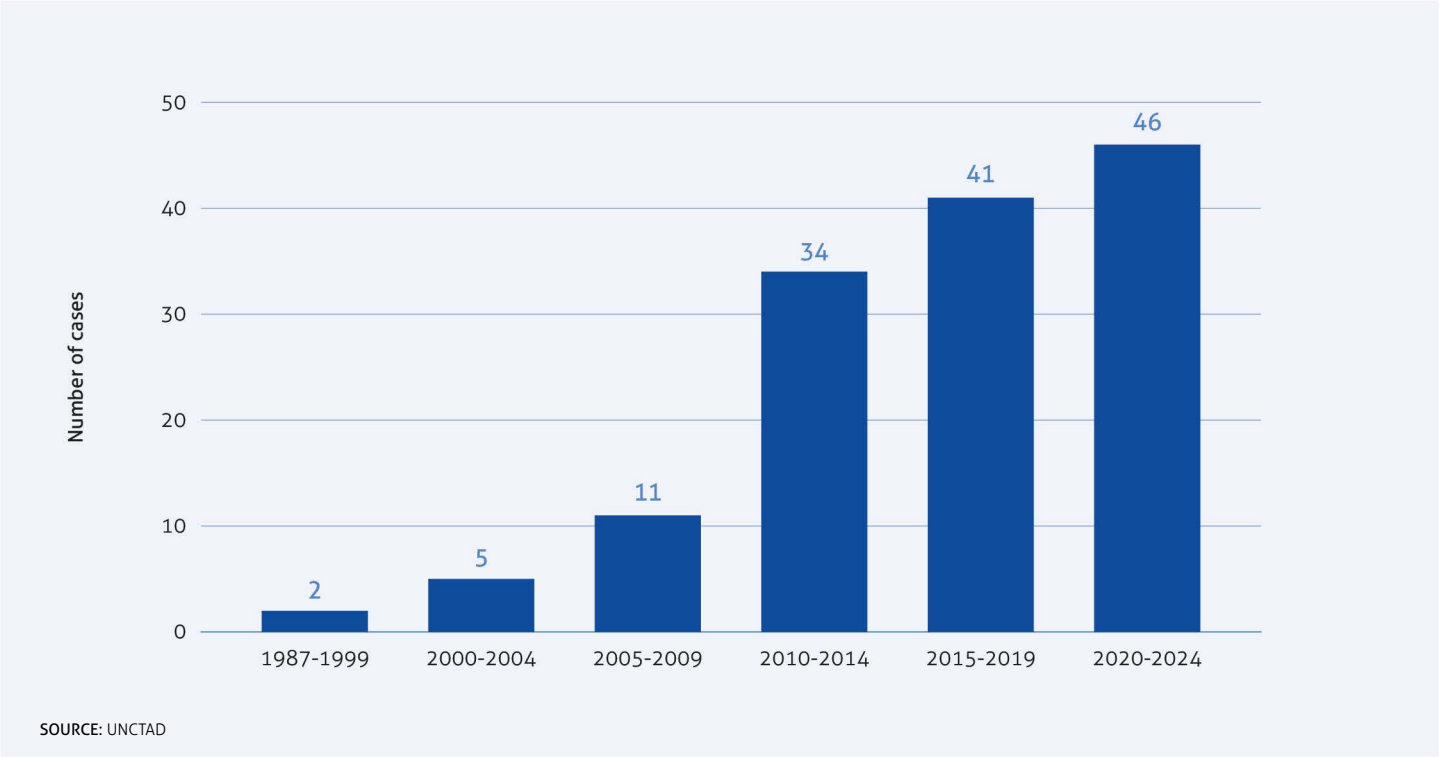
⁵⁶ Josef Ostřanský, Florencia Sarmiento, Suzy Nikiema, *Why Is Investment Treaty and Investor-State Dispute Settlement Reform Needed?*, IISD, 2025.

⁵⁷ Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry*, IISD, December 2021.

⁵⁸ UNCTAD, Technical note on critical minerals. Supply chains, trade flows and value addition, 2023, United Nations, 8-20.

⁵⁹ IRENA (2023), *Geopolitics of the energy transition: Critical materials*, International Renewable Energy Agency, Abu Dhabi, p. 20.

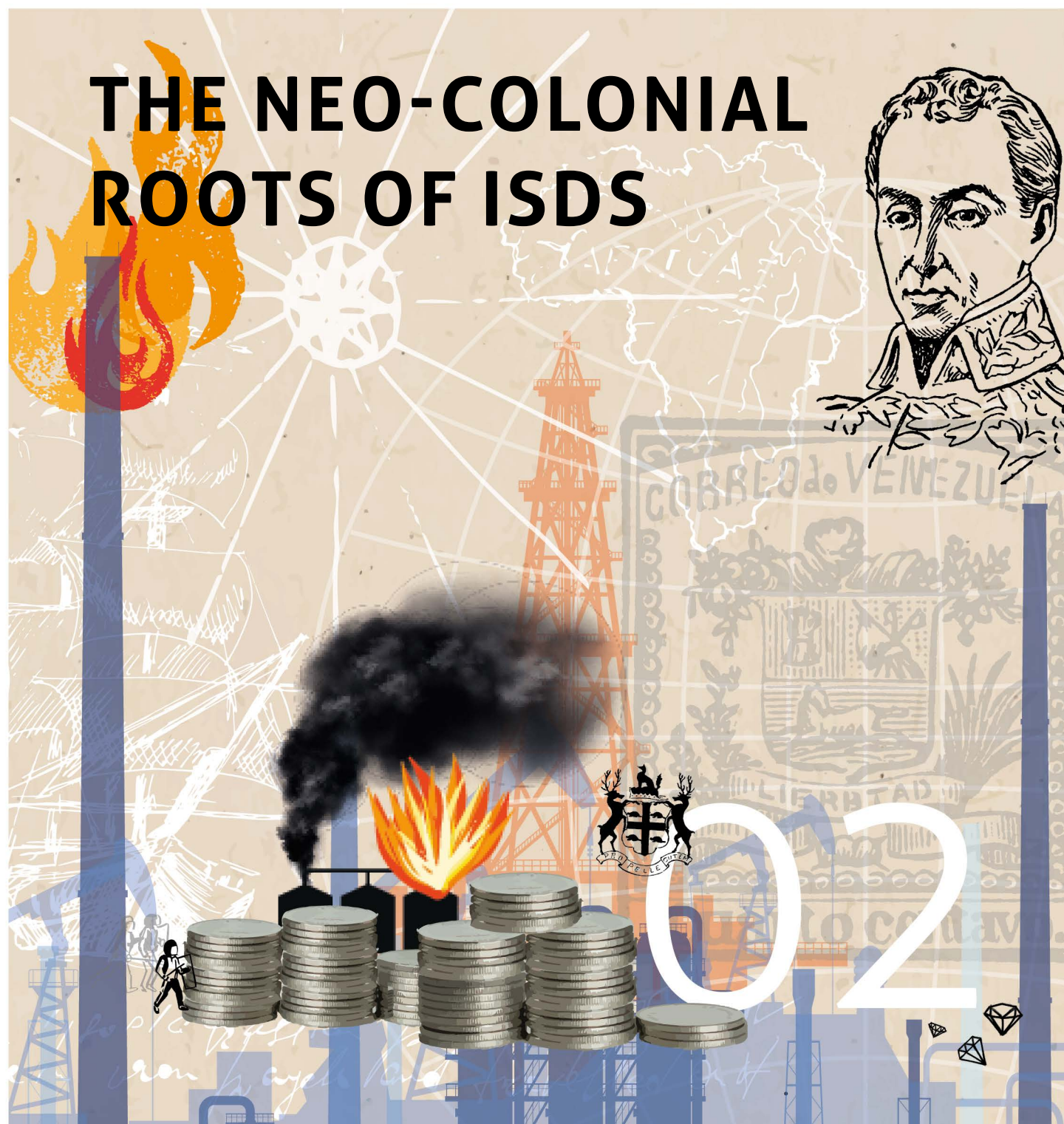
FIGURE 04: INVESTOR-STATE CASES INVOLVING CRITICAL MINERALS ARE ON THE RISE



ISDS-like protections for investors are also being included in ‘sponsorship agreements’ between deep-sea mining companies and Pacific island developing states of Nauru and Tonga. Deep-sea mining is highly contested in the Pacific with many states asking for an outright ban due to the risk of irreversible harm to the unique and little-understood deep-sea ecosystem. The Sponsorship Agreements include standards typically seen in ISDS provisions, and require the state to compensate the investor for any changes in law that adversely affect their financial burden⁶⁰ (such as the banning of deep sea mining). The investment protection provisions in the Agreements create a significant financial and regulatory risk for the countries involved.



60 Silva-Send, Nilmini, *Small Island Developing States as Deep Seabed Mining Sponsors - Another Source of Investor-State Liability* (July 22, 2025). San Diego Legal Studies Paper No. 25-029, Available at SSRN.



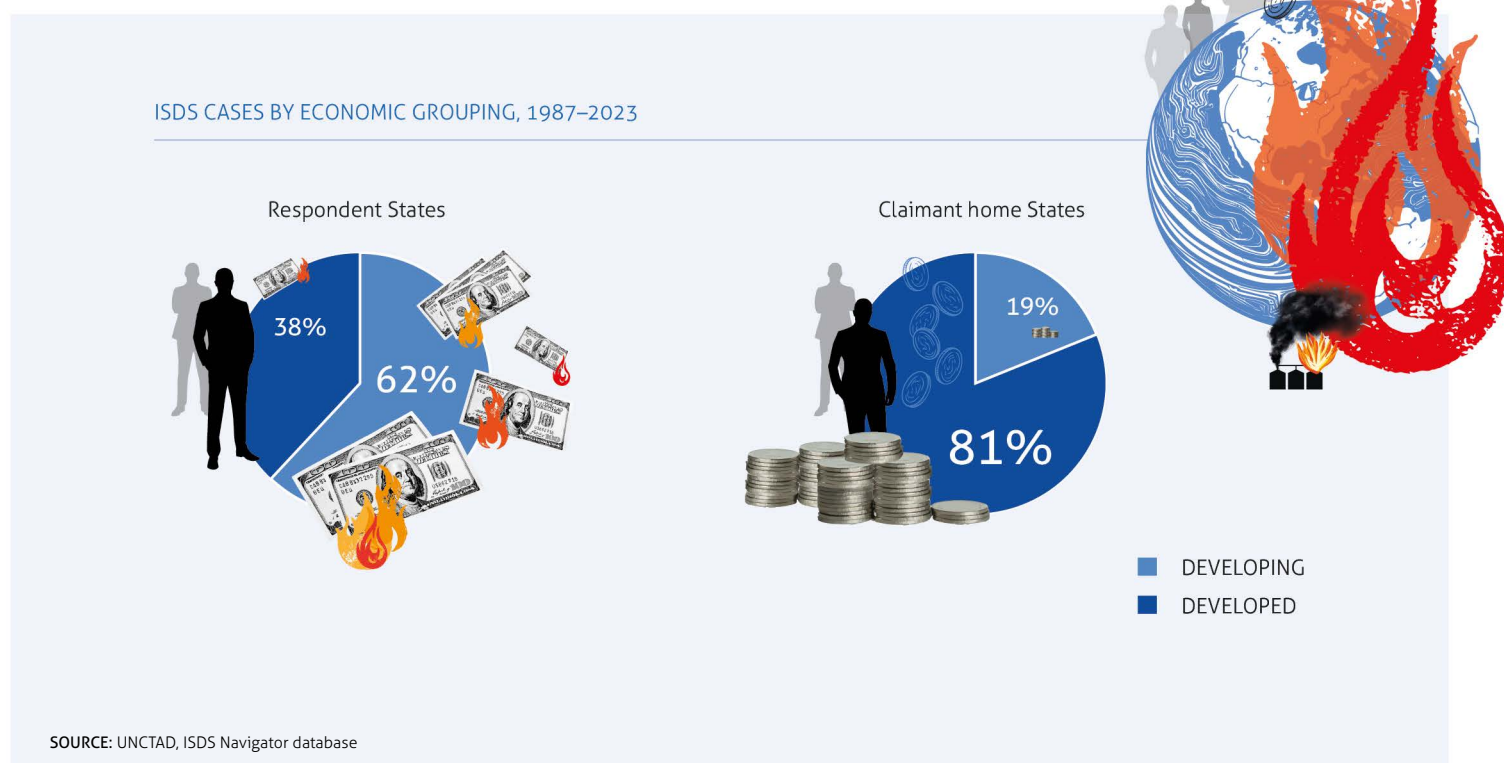
The asymmetry between the Global North and Global South in the ISDS system is tremendous. The investors benefiting from ISDS are usually based in the Global North, while the majority of respondent countries, many of which have to pay exorbitant sums to those investors, are Global South countries.⁶¹ **This asymmetry between investor claims in the Global North and countries in the Global South can only be understood in the historical context of colonial trade relations and the neo-colonial origins of ISDS.** From the start, ISDS was designed to serve the interests of rich countries in the Global North and facilitate the continuation of an extractivist model in former colonies.⁶²

During colonialism, investments were required to extract resources, such as minerals and crops, or to build infrastructure and operate utilities. These investments were protected by imperial legal systems, which were transplanted into the colonies.⁶³ Western colonising powers wanted to exercise economic control over their colonial territory and make sure their investors would not suffer damage.⁶⁴

Measures that colonising states took in order to protect property in colonies included:

- Granting sovereign powers and privileges to major colonial companies to carry out their activities in conquered territories.⁶⁵ Spanish Viceroyalties, the East India Company, the Dutch East India Company, and the Hudson's Bay Company enjoyed economic privileges in Africa, Asia and Latin America that were only enjoyed by sovereign states in Europe, including notably the use of military force.⁶⁶
- Colonial powers applied their national legislation in the colonies, as local laws were not deemed 'civilised' enough.⁶⁷ Disputes, often overseen by European judges, would typically be settled in favour of the coloniser who had made the investment.

FIGURE 05: DEVELOPING COUNTRIES FACE MAJORITY OF INVESTOR-STATE DISPUTES



⁶¹ UNCTAD IIA Issues Note *Investor–State Dispute Settlement: Review Of Developments In 2017*, and UNCTAD IIA Issues Note 2021, *Facts On Investor–State Arbitrations In 2021*.

⁶² Wegmann, V., & Hall, D. (2021). *The unsustainable political economy of investor–state dispute settlement mechanisms 1. International Review of Administrative Sciences*, 87(3), 480–496, 2021.

⁶³ Nicolas Roux, *How colonialism shaped free trade agreements: from colonies to neoliberalism (part 3/3)*, *bilaterals.org* 2023.

⁶⁴ Arnulf Becker Lorca, *Mestizo International Law – A Global Intellectual History 1842–1933*

(Cambridge University Press, 2014), p. 46. Richard B. Lillich, *The human rights of aliens in contemporary international law* (Manchester University Press, 1984).

⁶⁵ Gregory A. Barton, *Informal Empire and the Rise of One World Culture*, Palgrave Macmillan, 2014.

⁶⁶ Miles 2013, 33 and Sornajah, M., *Resistance and change in the international law on foreign investment*, Cambridge University Press, 2015.

⁶⁷ Love Ronnelid and Baron A. Heyking, "L'exterritorialité et ses applications en extrême-orient", 7 *Recueil des cours de l'Académie de droit international de La Haye* 237 (1925).



→ Unequal treaties, or capitulation treaties, were unilateral legal instruments used by colonial powers to ensure that their 'freedom to trade' was an internationally recognised and legally binding right, and that the use of force was justified in the event of violation.⁶⁸ These agreements essentially allowed European foreign investors to invest overseas while being governed and ruled by their home state laws.⁶⁹ As a result, foreign investors took their domestic laws and courts with them wherever they invested.

→ Colonial powers intervened ad hoc where there was no treaty establishing specific investor rights to protect commercial interests. These interventions often used violent means, or 'gunboat diplomacy', which usually resulted in an unequal treaty being imposed on the non-European state.⁷⁰ There were more than 40 armed interventions to protect economic interests by the British alone between 1820 and 1914.⁷¹ One such instance of gunboat diplomacy was that by Britain, Germany, and Italy. The countries bombarded the coast of Venezuela in 1902–1903 in order to force arbitration of claims against the country for damages to investors caused during the civil war. It was followed by 10 arbitral claims commissions awarding damages to foreign subjects to be paid by the Venezuelan government.⁷²

The multiple colonial ways of using international law to protect foreign investors and investments mark the origin of modern international investment law.⁷³ Initially, investment treaties were concluded between developed and developing countries, "usually at the initiative of the developed country in order to secure additional and higher standards of legal protection and guarantees for its investment firms than those offered under national laws".⁷⁴ African states, for instance, had very few investments in the Western world when the investment treaties were concluded with them and therefore stood to benefit far less from the investment treaties.⁷⁵

Many of the provisions used in investment treaties today are rooted in those historical colonial contracts and continue to perpetuate colonial inequalities. For example, 'stabilisation clauses' in early treaties required colonised states to refrain from using their legislative or administrative rights in a way that might adversely affect the investment and colonial companies' activities in the respective state.

Investor-state arbitration could be used to resolve disputes. Contract-based arbitration bypassed local legal systems and enabled private individuals to create systems of rules within the international legal regime that suited their interests. In this sense, it is the forerunner of investment treaty arbitration that would emerge years later.⁷⁶

DECOLONISATION AND THE EXTRACTIVE AND BANKING INDUSTRY'S PUSH FOR ISDS

The creation of ISDS coincided with decolonisation across Asia and Africa in the 1960s. The independence of former colonies, along with resistance movements in developing nations, posed a threat to companies that profited from colonial rule.

During colonialism, companies could rely on military force and authoritarian rule to ensure that their investments were protected by colonial legal systems. Decolonisation, however, meant that companies could no longer enjoy these privileges or the favourable investment conditions granted by colonial powers. **Decolonisation presented a grave risk for colonial-era companies whose wealth flowed from direct colonial rule.**⁷⁷ Decolonisation pushed many industrialised countries to think of new ways to maintain control over their investments in former colonised countries. France, the Netherlands and the United States concluded agreements to guarantee that rights established during the colonial era should be respected after independence.⁷⁸ Britain similarly attempted to insert clauses protecting their property in the constitutions of countries that were about to become independent, in an attempt to preserve the privileges established under the colonial period.⁷⁹

68 Nicolas Roux, *How colonialism shaped free trade agreements: from colonies to neoliberalism (part 3/3)*, bilaterals.org, 2023.

69 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005.

70 Ibid.

71 Love Ronnelid - Richard B. Lillich, *The human rights of aliens in contemporary international law*, Manchester University Press, 1984, P 15.

72 Lionell M. Summers, "Arbitration and Latin America", *California Western International Law Journal* 1 1972, P9; Michael Tomz 2006.

73 Miles, K. (2013). *The origins of international investment law: empire, environment and the safeguarding of capital*. Cambridge University Press.

74 UNCTAD *Bilateral investment treaties 1959–1999*, UN doc UNCTAD/ITE/IIA/2, 2000, P1.

75 Dominic Npoanlari Dagbanja, *Hegemony in Investor State Dispute Settlement: How African States Need to Approach Reforms – A Response* – published in *Afronomics law*, September 2020.

76 Nicolas Roux, *How colonialism shaped free trade agreements: from colonies to neoliberalism (part 3/3)*, bilaterals.org, 2023.

77 Gus van Harten: *The Trouble with Foreign Investor Protection*, 2020, P20.

78 Love Ronnelid, Research Report: *An Evaluation of the Proposed Multilateral Investment Court System*, 2018, The reference he uses (nr. 62) is 62. See Okon Udokang, *Succession of New States to International Treaties* (Oceana Publications, Inc., 1972), p. 465 et seq. See also, Zemanek, *supra*, p. 194 et seq.

79 Zemanek, *supra*, pp. 191–2. Karl Zemanek, "State Succession after Decolonization", 116 *Recueil des cours de l'Académie de droit international de La Haye* 181 (1965) [hereinafter referred to as "Zemanek"], p. 283, discussing the meaning of this term. For the discussions on this doctrine in the International Law Commission, see Matthew Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford University Press, 2007), pp. 80–92.

Foreign investors in the oil and finance sectors, however, still felt that the efforts of former colonial powers were not enough to protect their investments. They feared the nationalisation of sectors and assets in former colonies. In the wake of a wave of nationalisations in the Global South, Western investors united to ensure that their foreign investments were protected and remained under their control.⁸⁰

An alliance of European and US investors was formed - the Association Internationale pour la Promotion et la Protection des Investissements Privés en Territoires Étrangers (APPI), the Society to Advance the Protection of Foreign Investments. It was led by a German banker with previous Nazi connections,⁸¹ Hermann Josef Abs, and Royal Dutch Shell's lawyer and former British Labour politician, Hartley Shawcross. Created in 1959, it was an influential alliance including major oil and gas firms like Royal Dutch Shell, Total Energies, Rio Tinto, ExxonMobil and bankers from Deutsche Bank, BNP Paribas, ABN AMRO.⁸²

Under the umbrella of this powerful alliance, a group of German, British, Swiss, and Dutch lawyers prepared the most important antecedent to ISDS: The Abs-Shawcross Draft Convention in 1959. This document was submitted to the OECD for consideration, and although it never came into force, it became an influential document and reference to any discussion about the future of international investment law.⁸³ It recognised the idea that disputes between an individual and the state in respect of violations of international law could be arbitrated at the international level.⁸⁴

Their efforts were met with success most clearly at the World Bank in the 1960s to resolve disputes between investors and countries, especially newly independent ones, which became the International Centre for Settlement of Investment Disputes (ICSID). Today, ICSID is one of the leading arbitration houses, which hears the majority of known ISDS cases.⁸⁵

This is a regime that was created by and for Western extractive and finance investors, and has primarily served their interests. For decades, the World Bank and United Nations Conference on Trade and Development (UNCTAD) put themselves at the forefront of efforts to promote investment treaties and ISDS under the banner of economic development for countries in the Global South.

The World Bank promoted investor rights as a kind of rule of law or 'good governance',⁸⁶ and recommended that states sign IIAs to attract foreign investment. However, there is no empirical evidence that shows ISDS actually attracts FDI flows or has a positive impact on Global South economies.⁸⁷

In 1969, the first IIAs with ISDS were concluded.⁸⁸ Most IIAs signed since then have included ISDS.

ISDS not only emerged during the colonial era. Claims have even been made against exactly the kinds of measures meant to redress historical injustices of the colonial era:

FORESTI AND OTHERS V SOUTH AFRICA

This ISDS case related to historical reparations measures affecting the mining sector. In early 2007, Italian and Luxembourgish investors brought an ISDS case challenging South Africa's Black Empowerment Act. In order to redress injustices of the Apartheid regime, mining companies were required to transfer a portion of their shares to historically disadvantaged South Africans. Specifically, it required companies that benefited from the apartheid regime to sell 26% of their investment to historically marginalised and disadvantaged South Africans. The investors claimed that this law amounted to expropriation and a breach of the "fair and equitable treatment" standard. The case generated a backlash against ISDS in South Africa, prompting South Africa to terminate its bilateral investment treaties and implement a domestic regime for foreign investment protection.

Although the case was settled, foreign investors reportedly managed to secure a deal whereby the firms only had to transfer 5% of their shares to black South Africans.⁸⁹

⁸⁰ Abs, H. J. (1958). The Safety of Capital. In James Daniel (ed.). *Private Investment: The Key to International Industrial Development: A Report of the San Francisco Conference*, October 14- 18, 1957. McGraw Hill, 69; Batsele, F. (2023). *Foreign investors of the world, unite! The International Association for the Promotion and Protection of Private Foreign Investments (APPI) 1958-1968*. *European Journal of International Law*, 34(2), 415-447. Hafner, N. S. H. (2022). *Attempting to write the rules of international investment law: how private corporations sought to protect their interests abroad (the untold story of the APPI)*.

⁸¹ Erik Roll, *A Life in Focus: Hermann Abs, German banker and stalwart of German postwar reconstruction with Nazi ties*, July 2018, The Independent

⁸² Perrone, N. M. (2021). *Investment treaties and the legal imagination: How foreign investors play by their own rules*. Oxford University Press. Chimni (eds.), *TWAIL Handbook* (Edward Elgar), Available at SSRN

⁸³ (Hafner 2022, 47, 107)

⁸⁴ Yuliya Chernykh, *The gust of wind: the unknown role of Sir Elihu Lauterpacht in the drafting of the Abs-Shawcross Draft Convention*, 2018.

⁸⁵ UNCTAD issues Note November 2024, [Facts and Figures on Investor-State Dispute Settlement Cases](#).

⁸⁶ Ibrahim F. J. Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* (Martinus Nijhoff Publishers, 1993. For an important discussion, see Tor Krevier, "The Legal Turn in Later Development Theory: The Rule of Law and the World Bank's Development Model", 52 *Harvard International Law Journal* 288 (2011).

⁸⁷ Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence", OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris, pp. 14-36, 37-39; Johnson et al., *Costs and Benefits of Investment Treaties: Practical considerations for States* (CCSI 2018).

⁸⁸ St John, Taylor, *The Rise of Investor State Arbitration*, Oxford University Press, May 2018.

⁸⁹ Transnational Institute, *Foresti vs. South Africa: Measures to remedy discrimination and inequalities*, (edited by [bilaterals.org](#)), May 2021.



UNCTAD supported the establishment of Bilateral Investment Treaties,⁹⁰ and began to argue in the aftermath of the international debt crisis that investor rights should be a key part of the World Bank's structural adjustment programmes.⁹¹

The World Bank and UNCTAD campaign was successful. More than 1,500 international investment treaties were concluded in the 1990s—a rate of four per day between 1994 and 1996.⁹²

It's important to underline here that, aside from the lack of evidence to support ISDS as a means of encouraging investment, the advice given by the World Bank and UNCTAD to Global South countries did not reflect the manner in which Western countries had industrialised. This happened largely behind tariff walls and with the autonomy to regulate investors within their jurisdictions,⁹³ not through structural adjustment programmes that privatised sectors and opened markets. Moreover, during and after World War II, many European countries seized and nationalised property, paying no or only partial compensation.⁹⁴

The colonial origins of legal rights for international investors are invaluable in understanding the reaction of EU governments when ISDS cases started to be brought against EU/Western countries — the mechanism was intended to be used by investors from these Western European countries, not by other investors against them.

Notably, no investor from a low-income country has ever initiated a treaty-based ISDS case. Reflecting its origins as a "safeguard against decolonisation," ISDS remains predominantly a tool utilised by corporations from the Global North against countries in the Global South.⁹⁵



GLOBAL SOUTH HIT WITH A FIRST WAVE OF ISDS CLAIMS WHILE GLOBAL NORTH REAPS BENEFITS

In the 1990s, the states targeted by **initial ISDS claims were African and Latin American, and the perils of ISDS did not attract much attention in Europe or the United States, where countries largely did not face ISDS claims.**

In the case of **UK investor AAPL v. Sri Lanka in 1990**, arbitrators decided that Sri Lanka had to compensate the UK-based investor for physical damage despite the ongoing civil war. According to the investors, the government had fallen below what was expected from a 'modern state'.

In the 1997 case of the **US investor Santa Elena v. Costa Rica**, arbitrators ruled that even if a state's ultimate aims (in this case, expanding a national park) were environmental or in the public interest, the government still had to compensate the investor. Some of these first cases characterise the 'neo-colonial' power that ISDS tribunals give foreign investors over the policies of sovereign Global South states.

Aguas del Tunari v. Bolivia remains one of the most emblematic ISDS disputes, linked to the Cochabamba Water War. In 1999, the Bolivian city of Cochabamba privatised the city's water utilities. The deal was governed by a 40-year concession between Bolivia and a multinational consortium comprised of the US company Bechtel and the Spanish company Abengoa, named Aguas del Tunari (AdT). Following privatisation, Bechtel raised the prices it charged consumers by 50%, triggering the outbreak of the "Water War" in 2000. Protests erupted across the country. This forced the Bolivian government to cancel the water contract, leading Bechtel and Abengoa to file a US\$50 million ISDS compensation claim to recover their costs and obtain damages for loss of expected profits. The investors changed their corporate domicile to the Netherlands (from the Cayman Islands) so that they could make use of the Bilateral Investment Treaty between the Netherlands and Bolivia.⁹⁶ Although Aguas del Tunari was ultimately not settled in the investors' favour, Bolivia spent US\$1.6 million in public money in legal fees for its defence.⁹⁷

⁹⁰ Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*. Cambridge University Press, 2015.

⁹¹ Ivaros Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" pp. 253–300.

⁹² Perrone, N. M. (2021). *Investment treaties and the legal imagination: How foreign investors play by their own rules*. Oxford University Press. and UNCTAD 2013.

⁹³ Lee Ha-Joon Chang, *Kicking away the Ladder: Development Strategy in Historical Perspective* Anthem Press, 2003, p. 53. Western tariffs at the time were considerably higher, see, p. 17, table 2.1. and 27 Id., p. 40, table 3.3. With respect to the regulation of foreign direct investment, see Chang.

⁹⁴ Schwarzenberger, G. (1969). *Foreign Investments and International Law*. Stevens & Sons. Shaffer, G., Elsig, M., & Puig, S. (2017). *The law and politics of WTO dispute settlement*. University of California – Irvine. Legal Studies Research Paper Series No. 2016-10, 40.

⁹⁵ Global ISDS tracker, <https://www.globalisdstracker.org/>

⁹⁶ Roos van Os & Roeline Knottnerus, *Dutch Bilateral Investment Treaties SOMO 2011 and UNCTAD ISDS navigator*.

⁹⁷ Norris A, Metzidakis K (2010) *Public protests, private contracts: Confidentiality in ICSID arbitration and the Cochabamba water war*. *Harvard Negotiation Law Review* 15(1): 31–76.

TURNING POINT: ISDS BECOMES A LEGAL NIGHTMARE FOR GLOBAL NORTH COUNTRIES

ISDS came to be included in most Bilateral Investment Treaties, including those between capital-exporting countries in Europe and North America, and in the 2000s, Global North countries started to receive ISDS claims.

PHILIP MORRIS V AUSTRALIA

When Australia became the first country in the world to introduce plain packaging for cigarettes as a public health measure, Philip Morris, the US tobacco giant, brought an ISDS claim against the Australian government, demanding a reversal of the law, and threatening a claim in the order of billions of dollars. Although Philip Morris lost the case on a technicality, it created an awareness of the threat of ISDS to public policy in Global North countries.⁹⁸

Concern also grew over the use of ISDS mechanisms to block and chill environmental regulations.⁹⁹ ISDS in NAFTA (the former free trade agreement between the United States, Canada and Mexico) attracted particular attention. Cases against Mexico, following the refusal of a hazardous waste landfill, and the development of a national park, and against a Canadian decision to restrict the transport of hazardous materials in line with an environmental agreement, triggered concerns among environmentalists.¹⁰⁰



In Europe, ISDS remained relatively unknown until the 2000s, when cases were initiated against countries in Eastern Europe. In the late 2000s, ISDS claims under the Energy Charter Treaty were made against Western European countries, including Italy and Germany.

- In *Vattenfall v Germany*, Swedish energy company Vattenfall sued Germany over its nuclear phase-out after the Fukushima disaster, and demanded €4.7 billion in compensation (over €6.1 billion including interest).
- The German coal firms RWE and Uniper sued the Netherlands for €2.4bn over the Netherlands' coal phase-out.¹⁰¹
- The British oil company Rockhopper was awarded €190 million plus interest under the ECT after Italy banned offshore oil drilling, following a decade of struggle by Italian coastal communities who fought against the oil production on their coasts.¹⁰²

The inclusion of ISDS mechanisms in the deeply controversial proposed EU-US Transatlantic Trade and Investment Partnership (TTIP) deal increased public concern and was a key reason the deal became politically untenable. Concerns over the inclusion of investment protection provisions (the rebranded ISDS, Investment Court System, ICS) in the Canada-EU Comprehensive Economic Trade Agreement (CETA) have led many EU member states to refuse to ratify the deal.

The Energy Charter Treaty remains the single treaty under which the largest number of ISDS claims have been taken. Following a campaign by trade and climate NGOs across Europe, decision-makers realised that not only was the ECT supporting enormous financial payouts over climate measures, but that it could chill environmental and climate measures in the European Union, or make regulation extremely difficult in the context of severe economic crises.¹⁰³ Ongoing membership was found to be incompatible with the European Green Deal. From late 2022, European countries began to announce their departure from the ECT. More recently, developed countries have started to move away from ISDS, with New Zealand committing to exclude ISDS from future FTAs,¹⁰⁴ and Australia decided in 2022 to exclude ISDS from future trade deals.

Nevertheless, there are still around 2600 international investment agreements with ISDS in force, which typically protect investors from the Global North in the Global South. **The moves away from ISDS in the Global North have not been met with a similar enthusiasm to terminate the thousands of IIAs that bind Global North and Global South countries, fuelling claims of hypocrisy.**¹⁰⁵

⁹⁸ War on Want, ISDS Files, *Philip Morris v Australia*.

⁹⁹ Von Moltke 2000; IISD and The Royal Institute of International Affairs, 2003.

¹⁰⁰ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

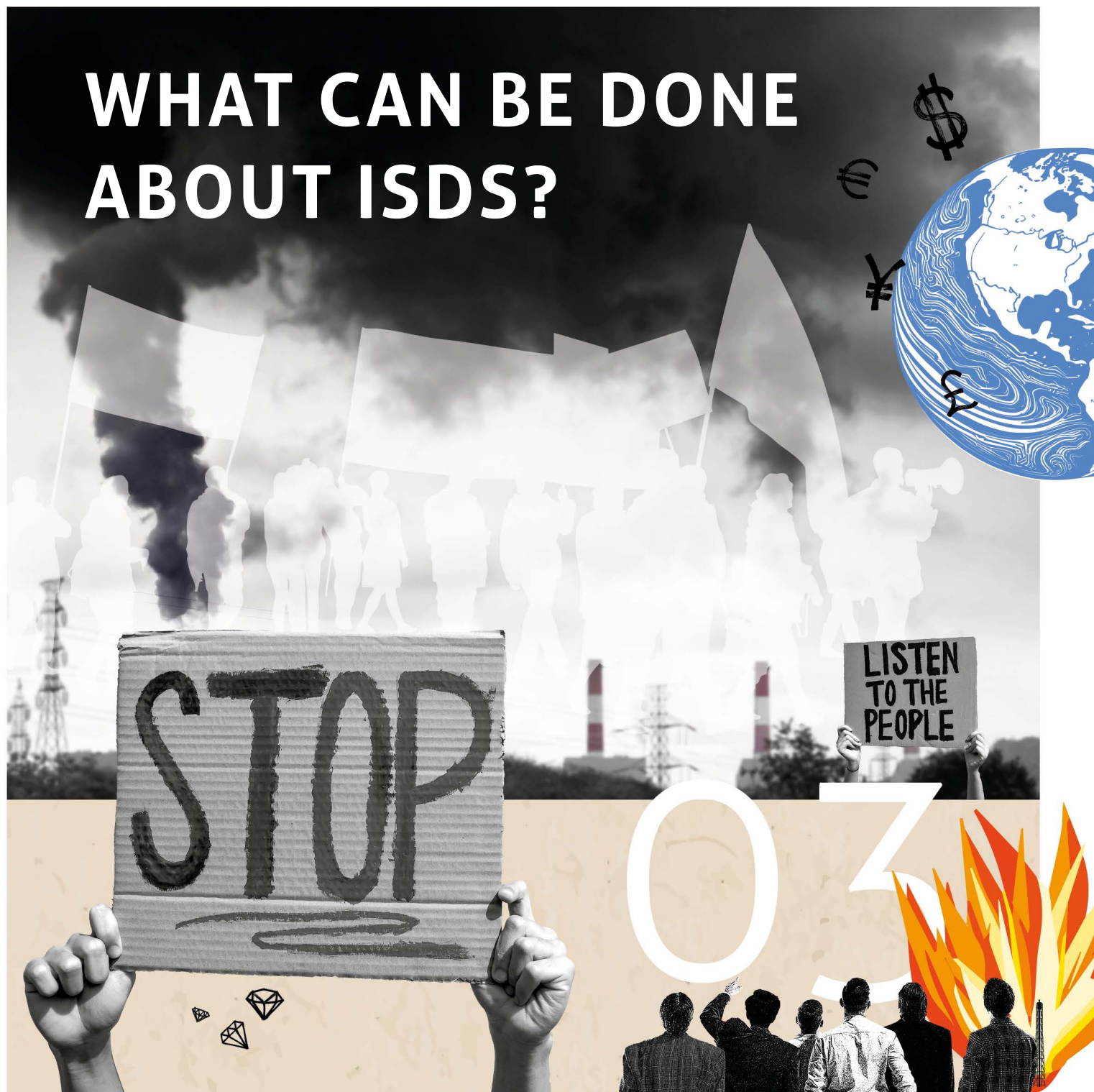
¹⁰¹ Federica di Sario, *EU moves to quit energy investment treaty*, Politico, July 2023.

¹⁰² This award has been since annulled on a technicality, because the failure of one of the arbitrators involved to disclose his previous involvement in criminal proceedings. Rockhopper is seeking to file another claim.

¹⁰³ Flues, F., Eberhardt, P., & Olivet, C. (2020). *Busting the myths around the Energy Charter Treaty A guide for concerned citizens, activists, journalists and policymakers.*; Reisch, N. & de Anzizu, H. (2022). *Investors v. Climate Action. What recent case law and treaty reforms may mean for the future of investment arbitration in the energy sector.* Center for International Environmental Law.

¹⁰⁴ New Zealand government *An ISDS Protocol*.

¹⁰⁵ Weiler, J. H. (2014). Guest Editorial: *Ten Years of ESIL—Reflections; European Hypocrisy: TTIP and ISDS.* *European journal of international law* 25(4), 961-975., 964-965; OHCHR Special Rapporteur on human rights and the environment David Boyd, *Annex 1 to A/78/168*, July 2023.



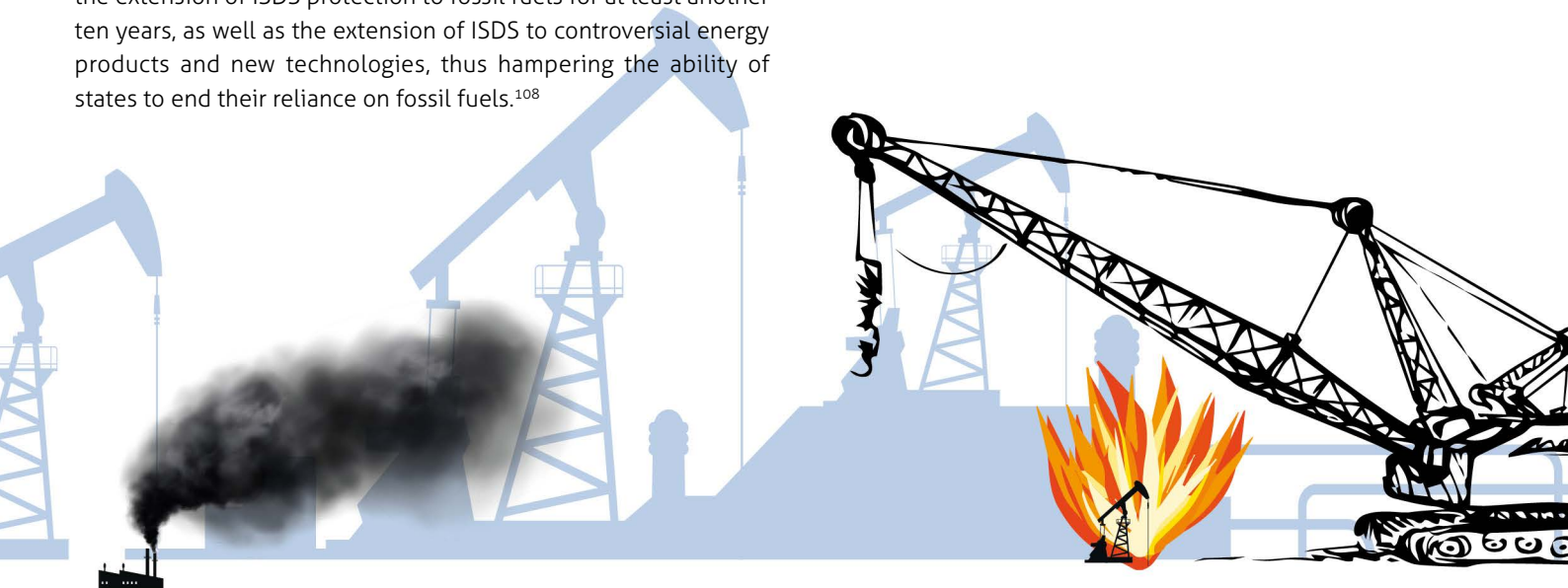
SO-CALLED “REFORMS” ARE NOT ENOUGH

In recognition of the problems, there have been attempts to ‘modernise’ or ‘reform’ ISDS. However, the effectiveness of attempts to achieve a greater balance between investor rights and the state’s right to regulate in the “new generation” of IIAs has been questioned. One examination of awards rendered under new-generation agreements concludes that new treaties produce old outcomes as they are interpreted in the same way as the old treaties.¹⁰⁶ Some of the most recent controversial awards, *Bear Creek v. Peru* and *Eco Oro v. Colombia*, were rendered applying so-called modern treaties.

In 2015, the EU presented a proposal for an “Investment Court System” (ICS), which in theory aims to resolve some key controversies of ISDS. This mechanism has been incorporated in the modernised EU-Mexico and EU-Chile Free Trade Agreements, and is under discussion at the UN. **However, ICS is ultimately a rebranding of ISDS that retains the major problems, with a few cosmetic changes.** It still allows foreign investors to sue states without exhausting local remedies, and allows arbitrators to render awards against states for public interest measures.¹⁰⁷ While the EU and many European countries have now taken some steps to protect themselves from ISDS claims by withdrawing from the Energy Charter Treaty, those states remaining in the treaty face the extension of ISDS protection to fossil fuels for at least another ten years, as well as the extension of ISDS to controversial energy products and new technologies, thus hampering the ability of states to end their reliance on fossil fuels.¹⁰⁸

At the multilateral level, the United Nations Commission on International Trade Law (UNCITRAL) is discussing changes to some of the issues resulting from investment arbitration, such as the lack of consistency, the manner in which compensation in ISDS is calculated, the lack of transparency, and conflicts of interest. However, this process has been criticised over a lack of ambition in its scope and a lack of progress,¹⁰⁹ and the resistance of certain developed countries to discussing substantive change. High-income countries dominate the process, while the ability of Global South countries to participate meaningfully is “constrained by resource disparities, language and expertise gaps, delegation instability and limited access to regional preparatory processes.”¹¹⁰

Such reforms appear doomed to failure because they fail to address what is fundamentally problematic about ISDS—the power it gives private investors over nation states, public interest policies, climate action plans and budgets of governments. In the words of former UN expert Alfred de Zayas: **“ISDS cannot be reformed. It must be abolished.”**¹¹¹



¹⁰⁶ Wolfgang Alschner, *Investment Arbitration and State-Driven Reform, New Treaties, Old Outcomes*, 2022.

¹⁰⁷ Olivet Cecilia, *The Investment Court System put to the Test*, Transnational Institute, 2016.

¹⁰⁸ Centre for International Environmental Law, (CIEL), *A back door for fossil fuel protection: how extending ECT coverage to CCUS, hydrogen, and ammonia will lock-in oil & gas*, 2022.

¹⁰⁹ Van Harten, G., & Vastardis, A. Y. (2023). *Special Issue: Critiques of Investment Arbitration Reform: An Introduction*. *The Journal of World Investment & Trade*, 24(3), 363–371.

¹¹⁰ Ladan Mehranvar, Lea Di Salvatore, *Structural Barriers and Power Dynamics in UNCITRAL WGIII: Upholding the Status Quo?*, *The Journal of World Investment & Trade*, July 2025.

¹¹¹ Statement by Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order at the 70th session of the General Assembly October 2015.



A CHANGING TIDE?

The inclusion of ISDS in trade deals has become increasingly controversial, with some states (South Africa, Tanzania, India, Brazil, Ecuador, Indonesia, Venezuela, Bolivia, Honduras, Australia, New Zealand, the US and Canada, and the European Union) taking some measures to address the threat of ISDS, though many such measures are partial and only reduce the threat as opposed to eliminating it. However, for the most part, international agreements that allow corporations to continue to wield this weapon against Global South countries remain in force.

A number of countries in the Global South have terminated, renegotiated or rejected BITs altogether;¹¹²

- Ecuador withdrew from most of its investment treaties, and changed its Constitution to prevent Ecuador from using international arbitration to settle disputes.^{113,114}
- In 2015, South Africa terminated all of its BITs with European countries and passed a law that requires the exhaustion of domestic remedies.¹¹⁵
- Brazil refused to sign any BITs and has proposed alternatives involving mediation, possibly backed by state-state dispute settlement processes instead of ISDS.¹¹⁶

- India has, since 2016, terminated around 58 of its 83 BITs, and has a model of investment that requires investors to exhaust domestic remedies and leaves out “fair and equitable treatment” provisions.¹¹⁷ However, India unfortunately reportedly aims to weaken this more progressive approach to investment protection.¹¹⁸
- Indonesia has terminated its BITs with 25 countries.¹¹⁹
- Tanzania has resisted a number of ISDS claims, passed a law¹²⁰ that prohibits international arbitration with respect to Public Private Partnership agreements, particularly those projects relating to natural resources, and terminated its BIT with the Netherlands.¹²¹
- Bolivia, Ecuador and Venezuela have also withdrawn from the ICSID Convention (though Ecuador has since rejoined).



¹¹² Sattorova M (2016) *Reassertion of control and contracting parties' domestic law responses to investment treaty arbitration: Between reform, reticence and resistance*. In: Kulick A (ed.) *Reassertion of Control over the Investment Treaty Regime*. Cambridge: Cambridge University Press, pp 53–80

¹¹³ Josef Ostřanský, Florencia Sarmiento, and Suzy Nikiema, *Why Is Investment Treaty and Investor-State Dispute Settlement Reform Needed? Questions & answers*, IISD, March 2025

¹¹⁴ *ibid*

¹¹⁵ *Ibid*

¹¹⁶ Puig, S. (2014). *Social capital in the arbitration market*. *European Journal of International Law*, 25(2), 387–424.

¹¹⁷ Baraka Thomas, *Transforming Tanzania: A Call for Reform in Investor-State Dispute Settlement Mechanisms* (ISDS), 2023

¹¹⁸ Meghna Mittal, India to revamp bilateral investment treaty framework: CEA, Money Control, March 2025, <https://www.bilaterals.org/?india-to-revamp-bilateral>

¹¹⁹ Lucas Jun Hao Wong, *Indonesia's Termination Of Bilateral Investment Treaties*, 2022, SMU ASEAN Perspectives.

¹²⁰ Dilini Pathirana, 2023, *Sovereign Rights to Natural Resources as a Basis for Denouncing International Adjudication of Investment Disputes: A Reflection on the Tanzanian Approach, Public-Private Partnership (Amendment) Act enacted in 2018*.

¹²¹ Aisha Ally Sinda, *Investor-state dispute settlement in Tanzania* 11 February 2019.

WHAT CAN STATES DO TO DISMANTLE THE ISDS REGIME?

To foster urgent and ambitious climate and environmental action and fulfil their human rights obligations, including those related to the right to a clean, healthy and sustainable environment, all states should eliminate their exposure to ISDS claims through some combination of the following actions:

- 🌐 Ideally, **through a multilateral forum**. Countries could collectively agree to a reform option and create a plurilateral instrument to modify or terminate bilateral treaties among themselves. Once a group of countries sets a norm, it is likely that more countries might join such an instrument.¹²²
- 🌐 **Plurilateral action:** A group of countries could work together to collectively terminate treaties. **Countries could establish new or existing climate clubs to address the incompatibility of the investment regime with the energy transition**, helping to entrench new norms around investment and potentially internationalising national initiatives, while also supporting ongoing reform efforts in other fora.¹²³
- 🌐 **Unilateral or bilateral actions:** Just as states signed up to IIAs and ISDS, states can dismantle or reimagine this regime according to their evolving needs and priorities, and can act unilaterally and bilaterally. International law provides multiple ways to terminate IIAs and remove ISDS from IIAs. For example, they could: 1. Terminate BITs, ideally with an agreement to neutralise the sunset clause. 2. Amend FTAs to remove ISDS mechanisms, ideally with an agreement to neutralise the sunset clause, where applicable, and 3. Amend BITs and FTAs to remove the ISDS provisions or to withdraw advance consent to ISDS.¹²⁴
- 🌐 **Withdrawal of consent to ISDS**, either in combination with treaty termination or on its own, could provide a simpler and more systemic way for states to address their concerns about ISDS.¹²⁵
- 🌐 States can also **refuse to include ISDS in new agreements**.

There are other options that could mitigate ISDS risks, although not eliminate them:

- 🌐 Some actors propose **'carve-outs'**, or specific provisions to exempt certain sectors or measures (the fossil fuel sector and climate measures, for example) from the scope of a treaty or from ISDS protection. Carving out mining, fossil fuel-related investment or climate measures from the coverage of investment treaties could be a way to quickly address ISDS risks to the energy transition, given the climate urgency.¹²⁶ However, such carve-out approaches could result in the use of ISDS against other public interest policies.
- 🌐 **Withdrawal from ICSID:** So far, four countries, Bolivia, Ecuador, Honduras and Venezuela have withdrawn from the ICSID Convention, signalling their dissatisfaction with the ISDS regime and desire to protect their countries from claims (although Ecuador has since rejoined). Withdrawing from ICSID has serious limitations in that it does not affect ongoing claims or claims that are made within six months of the date of withdrawal. Countries withdrawing from ICSID can also remain exposed to the threat of ISDS claims in other fora.¹²⁷ It may only offer benefits in combination with other ISDS exit approaches.
- 🌐 Other options include limiting ISDS damages or adopting environmental exception clauses. **Capping the maximum amount of compensation** that can be awarded could reduce the impact of ISDS on states' fiscal space.¹²⁸ States could reintroduce the rule that foreign investors need to **exhaust domestic courts** before accessing international tribunals, or that only home states can bring claims on behalf of foreign investors under international law. As a minimum, negotiators should agree to independent **audits of international investment treaties** that include ISDS or ICS clauses, with meaningful public participation. On the basis of these audits, these agreements should either be cancelled or rewritten in terms that put people's rights and the environment first.

¹²² Eunjung Lee & Jordan Dilworth *Investment Treaties Are Undermining The Global Energy Transition Mapping The Global Coverage Of Isds- Protected Fossil Fuel Assets*, E3G, JULY 2024.

¹²³ Kyla Tienhaara, Harro van Asselt, Peter Newell 2025, *Radical Reform of the International Investment Treaty Regime: A Role for Climate Clubs?*, 28 August 2025.

¹²⁴ For more, see Ladan Mehranvar, with Martin Dietrich Brauch, Achyuth Anil, Anna-Sophie Kloppe, Lucas Clover Alcolea, and Madeleine Songy, *Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions*. New York: Columbia Center on Sustainable Investment (CCSI), October 2024. Available at: https://scholarship.law.columbia.edu/sustainable_investment/48

¹²⁵ Josef Ostřanský, Florencia Sarmiento, and Suzy Nikiema, *Why Is Investment Treaty and Investor-State Dispute Settlement Reform Needed? Questions & answers*, IISD, March 2025.

¹²⁶ Eunjung Lee & Jordan Dilworth *Investment Treaties Are Undermining The Global Energy Transition Mapping The Global Coverage Of Isds- Protected Fossil Fuel Assets*, E3G, JULY 2024 <https://www.e3g.org/wp-content/uploads/E3G-Report-Investment-treaties-are-undermining-the-global-energy-transition-2.pdf>

¹²⁷ For more on the limitations of ICSID withdrawal, see Ladan Mehranvar, with Martin Dietrich Brauch, Achyuth Anil, Anna-Sophie Kloppe, Lucas Clover Alcolea, and Madeleine Songy, *Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions*. New York: Columbia Center on Sustainable Investment (CCSI), October 2024. Available at: https://scholarship.law.columbia.edu/sustainable_investment/48

¹²⁸ Eunjung Lee & Jordan Dilworth *Investment Treaties Are Undermining The Global Energy Transition Mapping The Global Coverage Of Isds- Protected Fossil Fuel Assets*, E3G, JULY 2024 <https://www.e3g.org/wp-content/uploads/E3G-Report-Investment-treaties-are-undermining-the-global-energy-transition-2.pdf>



The ISDS system, with its roots in colonialism and extractivism, is not fit for purpose in the 21st century because it prioritises the interests of foreign investors over the rights of states, human rights and the environment. ISDS claims and their crippling costs have already had enormous impacts by deterring, delaying and watering down states' climate and environmental policy decisions. As concerning as the astronomical costs associated with ISDS arbitration, are the chilling effects that threats of such proceedings have on climate and environmental action.

ISDS can be seen as a post-colonial mechanism institutionalising and continuing the asymmetrical global power relations developed in the colonial period. This explains why ISDS cases brought against EU countries from about 2010 created great political consternation.

Until then, 'it was deemed somewhat inconceivable that international investment treaties could be deployed against the very states that championed them'.¹²⁹

¹²⁹ Sattorova, 2016; Kulick A, ed. *Reassertion of Control over the Investment Treaty Regime*. Cambridge University Press; 2016. 57

WHAT'S AT STAKE IF WE DON'T STOP ISDS?

The growing magnitude of ISDS claims is delaying the clean and just energy transition and driving up the costs, often to the benefit of the very corporations responsible for causing the climate crisis. Compensating fossil fuel corporations for actions that exacerbate the climate emergency is perverse, particularly in the light of their immense profits and the glaring lack of compensation available to victims of the climate crisis for the devastating losses and damages they have suffered. Countries in Europe, the birthplace of the contemporary investment protection regime and, for decades, the primary beneficiaries of it, bear a responsibility to facilitate the phase out of fossil fuels and support a just transition by acting decisively to bring an end to ISDS.

While a number of states have already taken steps to eliminate ISDS from their trade deals, many of those commitments refer to ISDS in future trade deals only, leaving the stock of existing Agreements including ISDS untouched. If states don't reject ISDS, claims will continue to perpetuate an already unequal system in which Global North countries reap the economic benefits while resource-rich countries, particularly in the Global South, bear the environmental and social costs.

Communities will also pay the price. Communities at the frontlines of the climate and environmental crises are often at the heart of ISDS claims through struggles against destructive extractive projects. These communities have already been disproportionately affected by the detrimental social, environmental and climate impacts of extractivist sectors in their territories while having contributed least to the planetary crisis.

However, resistance to the use of ISDS has been growing and has been increasingly successful. Social movements have mobilised against ISDS and its injustices – as much in the Global North as in the Global South.¹³⁰ But the pace of change is far too slow, and progress risks being reversed. **Action to address the planetary environmental crisis and its catastrophic consequences for human rights cannot wait.**



¹³⁰ Luciana Ghiotto, *Ecuador holds the line on ISDS* TNI, 2024.





CO-LAUNCHING ORGANISATIONS

