Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND COLUMBIA CLIMATE SCHOOL

# BREAKING FREE:
STRATEGIES FOR GOVERNMENTS ON TERMINATING INVESTMENT TREATIES AND REMOVING ISDS PROVISIONS

October 2024

## AUTHORS

Written by Ladan Mehranvar, with Martin Dietrich Brauch and contributions by Achyuth Anil, Anna-Sophie Kloppe, Lucas Clover Alcolea, and Madeleine Songy.

## ACKNOWLEDGMENTS

We thank the following reviewers for their helpful comments and guidance on this report: Chris Albin-Lackey, Javier Echaide, Kabir Duggal, and Lorenzo Cotula. We would like to thank Jaena Kim, Max Hoque Kazi, and Nina Russell from TradeLab (University of Ottawa), and their supervisor, Professor Tony VanDuzer, and Joudy Sarraj for their invaluable research, analysis, and discussions around various topics covered in this report. We were privileged to have had insightful conversations on a number of subject matters throughout the research and writing of this report, including with Andrés Arauz, Aurelia Antonietti, Cecilia Olivet, Lea Di Salvatore, Lise Johnson, Mario Osorio, Martin Gronemann, Rob Davies, and Taylor St John.

## SUGGESTED CITATION

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.

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# 1. Executive Summary

As we enter the second half of 2024, the need for a fundamental transformation of the global investment and policy landscape is indisputable. Only ambitious, truly systemic changes can achieve the Sustainable Development Goals of ending extreme poverty, increasing social inclusion, reducing inequality, promoting the environmental sustainability of food systems, ecosystems, and biodiversity, and urgently shifting towards sustainable energy sources.

The transition towards a more sustainable and equitable legal and economic global governance system involves moving away from industries and practices that harm the environment, such as fossil fuel extraction and use, and towards renewable energy sources. It also involves fostering sustainable practices that respect and uphold the rights, needs, and priorities of individuals, local communities, and Indigenous Peoples,[1] as well as respecting governments' sovereign right to regulate in the public interest.

Progress, unfortunately, often clashes with a deeply entrenched status quo. One significant obstacle facing international investment law and policymakers is the investment treaty regime, which consists primarily of a network of bilateral investment treaties (BITs), multilateral investment treaties (MITs), and investment chapters in free trade agreements (FTAs). These international investment agreements (IIAs or investment treaties) dictate the treatment of foreign investment and foreign investors by host States. They contain a broad set of substantive provisions safeguarding investors and their investments, along with a powerful investor-State dispute settlement (ISDS) mechanism that allows foreign investors to seek recourse through international arbitration in order to enforce treaty obligations.

Many concerns about IIAs and the ISDS mechanism stem from the extensive substantive and procedural privileges granted to foreign investors. The ISDS mechanism, which is also found in national investment laws and increasingly in investor-State contracts, allows foreign investors to challenge legitimate regulatory measures taken by governments to achieve more equitable economic growth, address the climate crisis, respond to a global pandemic, or otherwise serve the public interest, if those measures negatively impact the investor's bottom line.

In this way, these treaties and their dispute settlement mechanism enable investors to impose crippling financial penalties on States that attempt to prioritize the public interest over the financial interests of particular investors. Equally significant, the mere threat of such liabilities exerts a profound chilling effect on governments, deterring them from pursuing more ambitious and progressive climate, economic, and sustainable development policies.

The myriad challenges posed by this regime are not only a barrier to achieving the Sustainable Development Goals, but also the economic, social, and environmental objectives of States domestically, including the rights and interests of other stakeholders within those States.[2] These challenges have created momentum for the reassessment of the investment treaty regime.[3]

For many States, progress requires finding a way to extricate themselves from the investment treaty regime. In fact, exiting the regime has drawn significant attention in the past decade or so. By the end of 2023, the total number of effective IIA terminations reached at least 585.[4] About 30% of these terminated treaties, however, have been replaced by new treaties, and roughly 35% are related to the intra-European Union (EU) BIT termination process (discussed below in 6.2.1). While these numbers may not suggest fundamental changes in the global legal infrastructure of the regime, the discourse has clearly shifted.

Many in the investment arbitration community acknowledge the system's flaws and generally support moderate reforms, such as those proposed by the United Nations Commission on International Trade Law (UNCITRAL)[5] and the Organisation for Economic Co-operation and Development (OECD).[6] Unfortunately, these proposals fail to address the substantive issues of these investment treaties, the inherent bias of the ISDS mechanism, and the system's most critical flaw, namely that there is no conclusive evidence that the treaties effectively promote investment flows, let alone sustainable investment flows.[7]

In this report, we present three practical approaches governments can consider in the near term to address their current stock of IIAs with ISDS:

1. Terminating BITs, ideally with an agreement to neutralize the sunset clause.
2. Amending FTAs to remove the investment chapters, ideally with an agreement to neutralize the sunset clause, where applicable.
3. Amending BITs and FTAs to remove the ISDS provisions or to withdraw advance consent to ISDS.

This report is designed to provide policymakers with a comprehensive understanding of the various approaches available to their governments for mitigating the adverse effects of IIAs and ISDS, highlighting the advantages and disadvantages of each. These policy approaches can be implemented unilaterally, bilaterally, or multilaterally, depending on the instrument and the specific context of the State. They should not be viewed as anti-investment, anti-foreigner, or anti-international law. Rather, they reflect a conscientious effort to govern effectively and fairly, ensuring that investment treaties and their dispute settlement mechanism achieve their intended goals, produce legitimate decisions respected by all countries (even those that lose cases), and do not undermine regional and national economic cooperation and sustainable development objectives.[8]

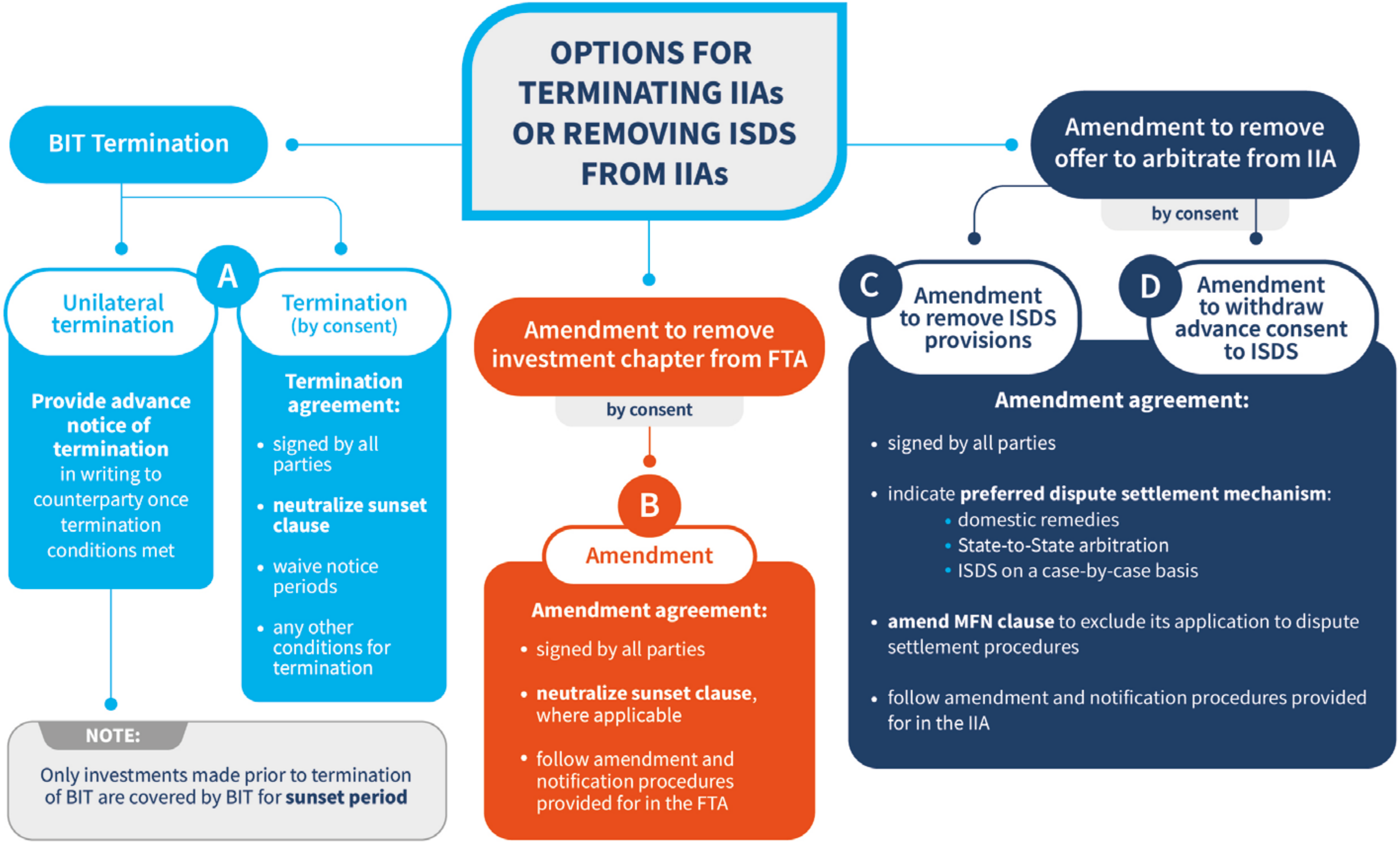
The various approaches, including the options available for implementing those approaches, are detailed in Section 2 of this report.

The most effective option available for implementing the policy approaches presented is a comprehensive multilateral agreement that would take effect among mutually-agreeing States. Section 3 provides more detail on this, including a draft Multilateral Agreement, which is included in the Annex.

The overhaul of the investment treaty regime can be complemented by amending or renegotiating national investment laws and investor-State contracts, respectively, that include substantive protections and procedural rights for foreign investors similar to those in IIAs, which may no longer align with the State's development objectives. This is explained in Section 4 of this report.

In addition, States might consider withdrawing from the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), a legal and institutional framework for resolving investor-State disputes and enforcing ICSID awards, established under the auspices of the World Bank Group. This is discussed in greater detail in Section 5 of this report.

Finally, Section 6 presents examples of exit and reform strategies that various States and regional blocks have adopted over the past decade with respect to their investment treaties.




**Multilateral instrument to effectuate Policy Options A, B, C, and D**
All these policy options can be effectuated by an all encompassing multilateral instrument that would take effect with respect to mutually-agreeing Contracting parties

# 2. Strategies for Exit and Reform[9]

As a general rule in public international law, Contracting States are the 'masters of their treaties.' As such, they are free to define the content of their international agreements, terminate or withdraw from them unilaterally, or terminate, modify, or amend them by mutual consent.[10] These are legitimate and rational options for governments aiming to address the excessive costs and risks associated with the current investment treaty regime.[11]

To eliminate the ongoing liabilities and policy constraints created by investment treaties, governments have three pragmatic options to consider:

1. Terminating BITs, ideally with an agreement to neutralize the sunset clause.
2. Amending FTAs to remove the investment chapters, ideally with an agreement to neutralize the sunset clause, where applicable.
3. Amending BITs and FTAs to remove the ISDS provisions or to withdraw advance consent to ISDS.

Each option is detailed below, including the manner in which they are to be effectuated and the legal consequences that may follow. Once their IIAs are terminated, States can develop and implement policies that take into account evidence on attracting and governing investments in a manner that aligns with their social, environmental, and energy transition objectives, as well as their broader national development goals.[12]

## 2.1. Policy Option A: Termination of BITs, ideally with an agreement to neutralize the sunset clause

Governments can terminate BITs (or MITs) in conformity with their termination provisions or, at any time, with the consent of both (or all) Contracting parties, as codified in Article 54 of the Vienna Convention on the Law of Treaties (VCLT).[13]

### *2.1.1. Three models of termination provisions*

All BITs contain provisions allowing for, and specifying the conditions of, unilateral termination. Many require a period of advance notice before termination becomes effective, as well as specifying consequences for existing and future investments after termination. While the specific wording of such provisions varies among BITs, there are three main models of termination clauses:[14]

(1) Under BITs with a **tacit renewal termination clause**, the BIT is in force for a specified term. At the end of that term, the BIT is automatically renewed for an additional term (once or repeatedly) unless one of the parties terminates it within the specified timeframe. Termination requires prior written notification by the terminating party.[15]

(2) Under BITs with a **fixed-term termination clause**, the BIT enters into force for an agreed period of time that is set out in the BIT. After the expiry of that term, either party can terminate it at any time. Otherwise, the treaty remains in force indefinitely. Termination requires an advanced written notice prior to taking effect, usually one year.[16]

(3) Under BITs with an **open termination clause**, the clause contains no restrictions as to when termination can occur. However, like the other models, termination under this model requires advanced notice prior to taking effect.[17]

### *2.1.2. Implementing the termination of BITs*

Contracting parties have three options when it comes to terminating their BITs:

(1) Contracting parties may opt for **unilaterally terminating their BITs** according to the terms of each particular BIT, as has already been done by certain countries, described below in Section 6.1. For instance, Ecuador unilaterally terminated all of its existing BITs in 2017 and 2018 after they were in force for the specified term required by the termination clause.

Once BITs under the fixed-term termination model are past the initial specified term, either party can unilaterally terminate them at any time with advanced notice prior to taking effect. The same is true for BITs under the open termination model. Contracting parties seeking to terminate BITs under the tacit renewal termination model need to track the relevant dates closely to prevent their automatic renewal for a specified number of years. In these cases, either party to the BIT may unilaterally terminate the treaty at the appropriate time by means of a prior written notification.

Termination clauses generally do not require a Contracting party to justify its decision to unilaterally terminate a BIT. To the contrary, notices of termination are typically short, stylized letters of a few sentences or paragraphs that inform the treaty counterparty or the treaty depository that a Contracting party is terminating a particular agreement, at least six months (or one year, depending on the wording of the termination clause) prior to its termination on a specified future date.

(2) Contracting parties may agree at any time to bilaterally terminate their BITs by mutual consent.[18] For example, Czechia terminated its BITs with Denmark, Italy, Malta, and Slovenia between 2009 and 2010 through a mutual agreement reached via a note verbale (exchange of notes). This exchange was recognized as an official agreement to terminate their respective BITs.[19]

(3) Contracting parties can also adopt a multilateral instrument to terminate multiple BITs at once by mutual consent. This is the approach taken by EU Member States for the termination of their intra-EU BITs, as described below in Section 6.2.1. A somewhat similar approach is taken in the African Continental Free Trade Area (AfCFTA) Investment Protocol, which mandates the termination of all existing intra-African Union BITs.[20] However, unlike the Agreement for the Termination of Intra-EU Bilateral Investment Treaties (Intra-EU BIT Termination Agreement), the AfCFTA Investment Protocol does not directly terminate intra-African Union BITs.

A multilateral instrument to terminate multiple BITs could also take the form of an opt-in agreement.

The advantage of a multilateral instrument is that it does not require individual bilateral terminations or negotiations, which could be time-consuming and inefficient. It might also lessen the pressure on terminating governments, allowing them to coordinate and more persuasively express that their actions are not directed against international investors but against expansive protections and ISDS in BITs, and are taken in accordance with, and with continued respect for, international law.[21]

**BOX 1: WITHDRAWAL FROM A MULTILATERAL TREATY**

While a Contracting party can terminate a BIT unilaterally, or bilaterally with the consent of the other Contracting party, it can also withdraw from a multilateral treaty, such as the Energy Charter Treaty (ECT). When a Contracting party unilaterally withdraws from such a multilateral treaty, the treaty is effectively terminated for that Contracting party. However, it remains in force among the other Contracting parties. For example, when Italy withdrew from the ECT in 2015 (effective 2016), the treaty remained in force among all other Contracting parties.

The termination clause in investment treaties typically outlines the procedures for termination or withdrawal and the associated legal consequences, including the application of the sunset clause (see Section 2.1.3).

Article 70(1) of the VCLT also provides some guidance, i.e., unless a sunset clause is present, parties to a treaty are released from any obligations to perform the treaty after its termination takes effect, except for obligations already underway prior to the termination.[22] This principle applies to both terminations of IIAs and withdrawals from multilateral IIAs.

### *2.1.3. Sunset clauses in BITs*

Most BITs (and MITs) include provisions known as sunset (or survival) clauses. These clauses are unique to investment treaties, allowing for the treaty to continue exerting legal effects for a specified period of time after its termination. These legal effects are applicable to investments made in the host State prior to the termination of the BIT only. In other words, those investors who established their investments before the effective termination date can still use a terminated BIT to initiate an ISDS case against the host State within the sunset period. For example, the Ecuador–United States BIT (1993), effectively terminated in 2018, provides U.S. investors who invested in Ecuador prior to 2018 access to ISDS and the substantive protections within the treaty until 2028 due to the ten-year sunset clause.

Sunset clauses, however, do not confer any rights to investors who establish investments in the host State after the BIT has been terminated.

Many BITs have sunset clauses ranging from five to 20 years. As an example, the sunset clause in the U.S.–Uruguay BIT (2005) appears in Article 22(3) of the treaty and is formulated as follows:

> *3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination […].*

The effectiveness of the termination of a BIT could therefore be delayed due to the sunset clause.

Most termination provisions suggest that sunset clauses apply primarily in cases of unilateral termination.[23] This is designed to offer continued protection to investors when one Contracting party unilaterally terminates the treaty, leaving the other party without control over ongoing investor protection. However, due to variations in the language of each termination provision, sunset clauses could potentially be interpreted to apply to BIT or MIT terminations by mutual consent as well.

### 2.1.4. Neutralization of sunset clauses

While Contracting parties can unilaterally terminate BITs, they cannot unilaterally neutralize the effect of the sunset clause. As a result, unless both Contracting parties to a BIT agree to neutralize the clause, the terminating party (as well as the other party) will remain subject to ISDS claims for a number of years after the BIT has been unilaterally terminated with respect to investments made before the effective termination date. Bolivia, Ecuador, India, Indonesia, South Africa, and other countries that have terminated their BITs unilaterally have found themselves in this position with respect to those treaties.

In the case of termination by consent, the sunset clause may also be neutralized by consent.[24] This can be done in one of two ways.

Contracting parties can adopt a two-step approach by first amending the BIT (by consent) to remove, neutralize, or shorten the sunset clause, and then terminating that BIT.[25] This approach recognizes Contracting parties' prerogative to amend treaties, and by doing so, removing sunset clauses before initiating the termination process. Czechia followed this approach when it terminated its treaties with several EU Member States.[26]

Alternatively, Contracting parties can agree to extinguish the sunset clause at the same time as they agree to terminate a BIT.[27] For example, the Intra-EU BIT Termination Agreement includes the following clause: "[f]or greater certainty, Sunset Clauses […] are terminated […] and shall not produce legal effects."

Article 70(1) of the VCLT may at first glance appear to pose a problem to the neutralization of the sunset clause by consent of the Contracting parties. The article refers to party autonomy as regards the determination of the consequences of termination by stating that:

> 1. *Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:*
>
> *(a) releases the parties from any obligation further to perform the treaty;*
>
> *(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*[28]

The usual consequence of terminating a treaty (i.e., to release "the parties from any obligation further to perform the treaty") can be altered if "the treaty otherwise provides or the parties otherwise agree." Therefore, in the case of a termination by consent of a BIT that includes a sunset clause, the parties' release "from any further obligation to perform the treaty" would be modified (postponed according to the content of the sunset clause). However, this outcome can change when the parties agree to terminate a BIT with the intention of terminating all of its effects, including the sunset clause, whether or not previously agreed upon. The question then arises as to whether it is the pre-agreed sunset clause or the subsequent agreement to terminate the entire BIT (including the sunset clause) that should take precedence.[29] In general treaty law, the latter solution is favored.[30]

However, while a subsequent agreement to terminate the BIT, including the sunset clause, supersedes the earlier text of the BIT,[31] a disputing claimant may argue that the Contracting parties should follow the pre-agreed method of termination (as provided in the BIT), including the application of the sunset clause. Therefore, to ensure that the effects of a sunset clause are neutralized when terminating a BIT by consent, it is recommended that Contracting parties include specific and explicit language in the terminating document stating that the sunset clause—and any rights and obligations conferred by it—no longer apply.[32]

When a BIT is terminated by consent and the sunset clause is extinguished, the investment obligations of the Contracting parties towards foreign investors under that BIT cease to exist, which definitively eliminates the exposure of those Contracting parties to future ISDS claims.

### BOX 2: FUNDAMENTAL CHANGE OF CIRCUMSTANCES

Contracting parties to investment treaties have at least one strategy available to them for unilaterally terminating a BIT or withdrawing from a multilateral IIA without triggering the sunset clause. This strategy involves invoking the fundamental change of circumstances exception, based on the doctrine of *rebus sic stantibus*, which is codified in Article 62 of the VCLT.

Although the principle of *pacta sunt servanda*—which obliges Contracting parties to honor the international commitments they have made[33]—lies at the core of public international law,[34] it is neither absolute nor immutable.[35] A number of exceptions to the binding force of agreements are available to appropriately balance between stability and change, so as to avoid hardship and unfairness to one or both parties to an agreement, when circumstances not anticipated by the parties radically transform the nature of their obligations.[36] These include doctrines of frustration, change of circumstances, impossibility of performance, and force majeure, among others.[37]

The exception, recognized by domestic law, that a Contracting party may no longer be bound by a contract if there has been a fundamental change in the circumstances which existed at the time it was signed, known in common law as the doctrine of frustration, has been acknowledged to apply also to treaties.[38] Article 62 of the VCLT notes such an exception to the principle of *pacta sunt servanda*.[39]

A Contracting party can theoretically invoke a change of circumstances exception to terminate, withdraw, or suspend a treaty if all of the following five conditions are met:

- the change of circumstances must be ‘fundamental’ in nature;
- the fundamental change must apply to circumstances that existed at the time of the conclusion of the treaty;
- the change must not have been foreseen by the parties when they concluded the treaty;
- the circumstances that have changed must have constituted “an essential basis of the consent of the parties to be bound by the treaty;”[40] and
- the effect of the change must “radically … transform the extent of obligations still to be performed under the treaty.”[41]

The application of this exception functions as a strictly circumscribed safety valve in the law of treaties.[42] While it has been invoked a number of times in other contexts, often unsuccessfully,[43] no State has invoked it to terminate an investment treaty. States may, however, consider invoking new developments (or distortions in the investment treaty regime) as a fundamental change in circumstances, in order to unilaterally terminate their IIAs without triggering the effects of the sunset clause.

One new development that could potentially serve as a plausible basis for invoking Article 62 is the urgent need to abandon the protection of fossil fuels and other extractive industries in order to combat the effects of climate change. In this way, the climate crisis represents a fundamental change of circumstances, particularly in terms of its accelerating rate, that was not foreseen at the time many IIAs, especially those signed in the 1960s to 1980s, were concluded.[44]

Contracting parties may also rely on the ways in which investment tribunals have engaged in judicial activism and have therefore fundamentally changed the nature of the investment treaty regime. These may include:

- manufacturing consent to arbitration by creating a system of "arbitration without privity;"[45]
- unduly expanding the interpretation of protected investments under IIAs;[46]
- disregarding the contribution (or lack thereof) that the investment in question actually made to the economic development of the host State;[47]
- permitting claimants to engage in treaty shopping even though this potentially amounts to an abuse of process;[48] and/or
- awarding compensation or damages on spurious grounds and of such sums as State parties could not possibly have conceived when they entered into IIAs.[49]

Although the invocation of Article 62 has been discussed in public forums and academic literature, particularly with respect to its application to the ECT, it is a difficult argument to make.[50] Furthermore, the effectiveness of this strategy is unknown, as it would ultimately be up to an investment arbitration tribunal to interpret whether the circumstances indeed constitute a fundamental change that justifies the termination of the treaty without triggering the sunset clause. The tribunal's interpretation could vary, making the outcome uncertain and potentially ineffective.

Examining these grounds or the potential effectiveness of this strategy is beyond the scope of the present report.

## 2.2. Policy Option B: Amendment to remove the investment chapter from FTAs, ideally with an agreement to neutralize the sunset clause, where applicable

A significant number of IIAs with ISDS are FTAs that include a chapter on investment. These investment chapters offer investor protections similar, or even identical, to those found in BITs. Due to the extensive coverage of an FTA compared to a BIT, including tariff reduction or elimination, trade in goods and services, intellectual property rights, among others, terminating an FTA for the purpose of mitigating ISDS risks may be impractical or undesirable. However, Contracting parties may remove the investment chapter from an FTA through an amendment.

### *2.2.1. Amendment provisions*

An FTA may be amended in accordance with the amendment provisions of the treaty or by consent.[51] Amendment provisions in FTAs are straight-forward.

For example, Article 34.3 of the United States-Mexico-Canada Agreement (USMCA)[52] provides:

1. *The Parties may agree, in writing, to amend this Agreement.*
2. *An amendment shall enter into force 60 days after the date on which the last Party has provided written notice to the other Parties of the approval of the amendment in accordance with its applicable legal procedures, or such other date as the Parties may agree.*

A treaty may therefore be amended by consent among the Contracting parties to the treaty. This general rule regarding the amendment of treaties is codified in Articles 39 and 40 of the VCLT.

In the case of a multilateral FTA, such as the Central America-Dominican Republic FTA (or CAFTA-DR), not all Contracting parties may be keen to amend to remove the investment chapter of the treaty. In such a case, a subset of Contracting parties may agree to modify the FTA only in their reciprocal relations, while the FTA would remain in effect with respect to Contracting parties outside that group.[53] This is done by way of an *inter se* agreement concluded between those Contracting parties only, and intended to modify the agreement between themselves alone.[54]

### *2.2.2. Implementing the removal of the investment chapter from FTAs*

An amendment to remove the investment chapter from an FTA may involve bilateral negotiations or multilateral consultations among the Contracting parties, depending on the FTA, as it cannot be implemented unilaterally. However, it can be formalized either on an agreement-by-agreement basis, or by way of a multilateral instrument, similar to the discussion in Section 2.1.2 regarding the implementation of BIT terminations.

Only some FTAs contain a sunset clause.[55] The sunset clause in these FTAs typically applies only to the protections afforded to foreign investors in the investment chapters and is triggered only after a Contracting party unilaterally terminates the bilateral FTA or withdraws from the multilateral FTA in question. While the sunset clause in such FTAs should not be triggered in the case of an amendment to remove the investment chapter, it is possible that a disputing foreign investor will argue that such an amendment is tantamount to terminating the agreement in question. In order to effectively exit ISDS and remove the investment protections within these types of FTAs, Contracting parties should amend or neutralize the sunset clause (see Section 2.1.4), either before or simultaneously with the amendment to remove the investment chapter from the FTA.

## 2.3. Policy Options C and D: Amendment to remove the ISDS provisions or to withdraw advance consent to ISDS from BITs and FTAs

Contracting parties may amend their IIAs to remove the offer to arbitrate, whether by removing the ISDS provisions altogether or by withdrawing advance consent to ISDS and allowing ISDS only on an ad hoc (case-by-case) basis. Both options require the consent of the Contracting parties to the IIA and are discussed together in this section due to their similar nature.

### *2.3.1. Offer to arbitrate in BITs and FTAs*

Most (if not all) BITs and FTAs with ISDS provisions include a clause by which the Contracting parties to the agreement make a unilateral offer to arbitrate disputes that arise with investors that are nationals of the other Contracting party to the treaty.

Some ISDS provisions explicitly mention consent to arbitration. For example, in the Guatemala–Netherlands BIT (2001), Article 10 provides:

> *Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and an investor of the other Contracting Party concerning an investment of that investor in the territory of the former Contracting Party to [...]*

Some ISDS clauses do not specifically mention consent, but offer formulations to the effect that a dispute may or shall be submitted to an arbitration tribunal if it cannot be settled otherwise. Such formulations have the same effect as those that explicitly mention consent. For instance, in the Guatemala–Switzerland BIT (2002), Article 8(2) provides:

> *If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute for settlement to [...]*

Despite the formulation of the ISDS provision, the consent of both disputing parties is required for investor-State arbitration to proceed.[56] The offer to arbitrate provided in most IIAs reflects the Contracting parties' consent to arbitrate. Once a foreign investor accepts the host State's offer to arbitrate, i.e., through the submission of an ISDS claim or by filing a notice of arbitration, a binding agreement is created between the disputing parties.[57] In that case, consent to arbitrate is said to be "perfected."

Generally, a Contracting party's unilateral offer to arbitrate is revocable and may be withdrawn if it has not yet been accepted.[58] However, once accepted (or perfected), consent cannot be unilaterally withdrawn except under particular circumstances.[59]

There are some ISDS provisions, however, that explicitly provide that the Contracting parties "irrevocably consent in advance" to arbitration. For instance, in the Austria–Croatia BIT (1997), Article 9(2)(a) provides:

> *[…] In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre.*

In these IIAs, withdrawing the offer to arbitrate, even before a dispute arises, may be more challenging.

### *2.3.2. Removal of ISDS provisions from BITs and FTAs*

Contracting parties may remove ISDS provisions from their BITs and FTAs through an amendment. In this case, those parties would still remain bound by the substantive investor obligations set forth in the BITs and FTAs. However, those obligations would now be subject to domestic judicial remedies or to State-to-State dispute settlement (SSDS) mechanisms.

In the case of SSDS, this would mean that the Contracting parties, not individual foreign corporations or investors, would decide what the investor protections require, whether they have been violated, and whether it is in the national interest to seek redress. Depending on the substantive obligations remaining in a BIT or the investment chapter of an FTA, SSDS would be less likely to result in exorbitant and frivolous claims, in challenges of legitimate policy measures, and in outcomes that are contrary to public policy.[60]

An amendment to remove the ISDS provision from these agreements may therefore strike a useful balance between stability and change, continuing to provide investment protections and State-to-State or domestic dispute settlement mechanisms, but tackling the issue of ISDS to reduce the risk of excessive liabilities and costs.

As an example, Annex 1 to the Southern African Development Community (SADC) Finance and Investment Protocol was amended to exclude ISDS in 2016 (see Section 6.3.3). Another example is the amendment removing ISDS in the renegotiated investment chapter of the USMCA between Canada and the U.S. and Canada and Mexico, though in that case, the entire treaty was replaced with a new one (see Section 6.3.4).

One possible complication to implementing the removal of ISDS provisions from a BIT (or an FTA) arises from the most-favored-nation (MFN) clause. The MFN clause may be invoked during a dispute in order to attempt to import ISDS provisions (as well as other provisions) from another BIT or FTA to which the respondent host State is a party. Under an MFN clause, a Contracting party is to provide investors or investments from the other Contracting party the same favorable treatment it has granted to investors or investments from any third State with which it also has an IIA.

MFN clauses in some agreements are bulletproofed against this strategy, because they have an exhaustive list of matters to which the clause applies, and this list often excludes the dispute settlement mechanism.[61] However, in order to prevent unintended consequences, especially for agreements silent on the scope of the clause, Contracting parties should amend the MFN clause of their BITs and FTAs—at the same time as amending their BITs and FTAs to remove the ISDS provisions—by restricting its scope to a limited number of matters, or by providing that it specifically does not apply to dispute settlement mechanisms or to procedural protections more generally.

For example, the Colombia–Switzerland BIT (2006) (Ad Article 4, paragraph 2 (2)) bars the application of the MFN provision to dispute settlement mechanisms by stating that "the most favourable treatment [...] does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements related to investments concluded by the Party concerned."

The Comprehensive Economic and Trade Agreement (CETA) similarly provides more clarity. In that agreement, Canada and the EU specify that the MFN clause of the agreement does not permit importation of procedural standards (and limits substantive ones). The CETA makes clear that, by the mere act of giving investors from one Contracting party the ability to benefit from certain procedural or substantive protections under one investment treaty, the government does not give those investors "treatment" capable of being more or less favorable than what is provided under another investment treaty.[62]

### *2.3.3. Withdrawing advance consent to ISDS from BITs and FTAs*

Another option available to States is to agree with the other Contracting party or parties to withdraw their advance consent to ISDS from their BITs and FTAs. Similar to the removal of ISDS provisions from BITs and FTAs (Section 2.3.2), Contracting parties to these treaties would still remain bound by the substantive investor obligations set forth in those BITs and FTAs, which could be subject to domestic judicial remedies or SSDS. Unlike the option to remove ISDS provisions, however, the withdrawal of advance consent to ISDS could still allow for investor-State arbitration, but only on a case-by-case basis, i.e., when the host State specifically consents to arbitrate with a particular investor once a dispute arises.

Like the amendment to remove ISDS provisions from BITs and FTAs, this option should be accompanied by an amendment to the MFN clause, as described above in Section 2.3.2.

## BOX 3: UNILATERAL WITHDRAWAL OF ADVANCE CONSENT TO ISDS

Since the ISDS clause of a BIT or FTA is typically a unilateral offer by the Contracting parties to arbitrate disputes, one of the Contracting parties may theoretically withdraw that offer unilaterally before it is accepted. However, the effectiveness of such a move is unclear and subject to several risks.

First, a disputing investor's home State could challenge the legality of the withdrawal of consent through a State-to-State procedure. Whether such a unilateral withdrawal constitutes a breach of a Contracting party's obligations under the IIA depends on the language of the relevant ISDS clause. Some IIAs provide firm (or nearly firm) offers of consent to arbitration, while others merely suggest that a Contracting party may consent to arbitration in the future. Either way, the outcome of such an inter-State dispute is not certain and could result in contentious and prolonged legal battles.

Second, even in the unlikely event that the Contracting party that has unilaterally withdrawn its advance consent to ISDS succeeds in the State-to-State proceeding, there is still a risk that a disputing investor will initiate an ISDS claim and challenge the legality of the Contracting party's unilateral decision to withdraw advance consent to arbitration.[63] Given that investment arbitrators are judges of their own jurisdiction, it would not be unreasonable to anticipate that some arbitrators may be reluctant to dismiss jurisdiction over such a claim. They might ultimately find in the investor's favor, potentially ruling that the respondent State has breached its obligations under the relevant IIA or has otherwise failed to uphold its commitments.

Finally, unilateral withdrawal of advance consent to ISDS also poses challenges related to the integrity and separability of treaty provisions.[64] The integrity of a treaty is a fundamental principle of treaty law, meaning that in cases of invalidity, termination, withdrawal, or suspension, the entire treaty is usually affected, unless the treaty specifies otherwise or the parties agree to a different approach.[65] The separability of treaty provisions is an exception to this principle. In the absence of a specific provision allowing for partial withdrawal, a Contracting party can invoke a ground recognized in the VCLT only with respect to the entire treaty, except as outlined in Article 44(3) (separability of treaty provisions) or Article 60 (termination for breach).[66]

Separability can be considered viable if the ground relates solely to specific clauses.[67] It can be invoked for those clauses if all three of the following conditions are met:

The first condition—the clauses in question are separable from the remainder of the treaty with regard to their application—can arguably be met: by withdrawing advance consent to ISDS, the rest of the treaty can remain intact.

The second condition—the clauses do not form an essential basis of the consent of the other parties to be bound by the treaty as a whole—is challenging to apply. It requires examining the subject matter of the clauses, their relationship to other clauses, the *travaux préparatoires*, and the circumstances of the treaty's conclusion.[68] Essentially, this condition aims to determine the Contracting parties' intentions. The test will be whether it is possible to unilaterally withdraw advance consent to ISDS without materially upsetting the balance of interests between the Contracting parties.

The third condition—continued performance of the treaty without the clauses in question would not be unjust—does not ask whether continuing performance of the treaty is just, but whether it is not unjust. Even if the other two conditions are met, there remains a possibility that continuing performance could seem inequitable or unfair to one or more of the Contracting parties. If this is the case, the third condition prevents the separation of the treaty.

The purpose of this Article is to balance the Contracting parties' interest in maintaining the treaty's integrity with their interest in continuing the treaty despite the removal of certain clauses. It is the only provision in the VCLT that provides for the separability of specific treaty provisions. Unilateral withdrawal from a particular clause—in this case, the ISDS clause—under a BIT would fall under Article 44 but is unlikely to succeed due to the second and third conditions. In addition, it would be subject to an investment tribunal's interpretation, which adds further uncertainty. Thus, this option is not without significant risks.

### *2.3.4. Implementing the removal of ISDS provisions and withdrawal of advance consent to ISDS from BITs and FTAs*

Contracting parties interested in removing ISDS provisions or withdrawing advance consent to ISDS may sign an agreement with their treaty partners to do so in their existing BITs and FTAs.[69] This could be implemented by Contracting parties on an agreement-by-agreement basis.

Alternatively, Contracting parties could sign onto a multilateral agreement, which would offer a simpler and more systematic approach to addressing and managing concerns regarding their offer to arbitrate in all of their BITs and FTAs. This approach would consolidate these concerns into a single instrument. This instrument, which may be in the form of an opt-in agreement, could apply to all underlying BITs and FTAs concluded by the Contracting parties that opt in, all BITs and FTAs specifically identified (a positive-list approach), or all BITs and FTAs except those specifically identified (a negative-list approach).

# 3. Multilateral Instrument to Effectuate Policy Options A, B, C, and D

The policy options discussed above can be effectuated by an all-encompassing multilateral instrument that would take effect with respect to mutually-agreeing Contracting parties, and include an agreement to neutralize the sunset clause of each affected IIA. Such a multilateral instrument would allow each participating Contracting party to indicate which of the four options outlined above—termination of a BIT, amendment to remove the investment chapter of an FTA, amendment to remove the ISDS provisions from a BIT or FTA, and amendment to withdraw advance consent to ISDS from a BIT or FTA—would apply to each of its existing IIAs, on a treaty-by-treaty, opt-in list basis. If there is a match between Contracting parties of the same agreement, that option would take effect for that particular BIT, MIT, or FTA. In this way, Contracting parties can effectuate whatever changes they agree to for each of their IIAs.

As an example, if one Contracting party chooses to terminate its BIT with its treaty counterparty (Option A), and that counterparty also chooses to terminate that particular BIT (Option A), there is a match, and therefore, that BIT is terminated. If, on the other hand, there is a mismatch between the Contracting parties with respect to a particular treaty, the option that is less optimal (Option D is less optimal than Options A, B, and C, and Option C is less optimal than Options A and B) will take precedence. For example, if one Contracting party designates a specific BIT for withdrawal of advance consent to ISDS (Option D) but its treaty counterparty designates the same treaty for termination (Option A), then Option D will be the default option for that particular BIT.

In the context of a multilateral FTA, like the CAFTA-DR, if some, but not all, of the Contracting parties choose to implement one of the options presented here, for example, to amend and remove the ISDS provision in that FTA, that would function as an *inter se* agreement between those particular Contracting parties, without impacting the other Contracting parties to the CAFTA-DR.

Working such a multilateral instrument into a regional or global framework would enable an efficient way to deal with all relevant BITs, MITs, and FTAs among interested Contracting parties through a consensual process.

In such an opt-in multilateral instrument, each Contracting Party would:

(1) Specify the BITs it seeks to terminate and the respective dates of termination, according to the terms of each BIT, and the BITs it wishes to terminate with immediate effect;[70]

- For those BITs being terminated, indicate its intention to waive any notice periods or other conditions for termination by its counterparties.[71]
- For those BITs being terminated, indicate its intention to also neutralize the sunset clause.[72]

(2) Specify the FTAs it seeks to amend in order to remove the entire investment chapter;

- For those FTAs being amended, indicate its intention to also neutralize the sunset clause (where applicable), which can operate as an amendment when its counterparties similarly indicate their intention to excise the sunset clause.[73]

(3) Specify the BITs and FTAs it seeks to amend in order to remove the ISDS provisions;

- For those BITs and FTAs being amended, indicate the preferred dispute settlement mechanism available for investor-State disputes.
- For those BITs and FTAs being amended, amend the MFN provision by limiting its scope to certain matters only, or by explicitly excluding dispute settlement mechanisms from its scope.

(4) Specify the BITs and FTAs it seeks to amend in order to withdraw advance consent to ISDS;

- For those BITs and FTAs being amended, indicate the preferred dispute settlement mechanism available for investor-State disputes or that consent to ISDS will be on a case-by-case basis.
- For those BITs and FTAs being amended, amend the MFN provision by limiting its scope to certain matters only, or by explicitly excluding dispute settlement mechanisms from its scope.

Contracting parties could also set forth certain affirmations, including commitments to continue to provide foreign investors and investments treatment required by customary international law and other relevant legal instruments.

See the Annex for a draft Multilateral Agreement.

# 4. Domestic Investment Laws and Contracts

Alongside IIAs, a number of States have implemented national investment laws that offer similar substantive protections and ISDS provisions as those found in IIAs. While some of the provisions in these laws apply to both domestic and foreign investors, others apply only to foreign investors. According to the United Nations Trade & Development (UNCTAD) database, there are currently 143 national investment laws, with the vast majority (128) implemented in developing States. Of the 143 laws, 59 include international arbitration provisions, 48 of which provide the State's advance consent to ISDS.[74] Scholars argue that governments include arbitration provisions in their domestic laws because specialist units in international organizations, such as the World Bank, have labeled these as "international best practice." However, despite being framed as "universal," these recommendations are applied asymmetrically—they are primarily directed at developing States.[75]

In addition to national investment laws and IIAs, foreign investments can also be protected under contracts between investors and host States or a relevant host State agency. Like national investment laws, these contracts may include substantive and procedural protections for investors, similar to those in IIAs.

In national laws and contracts that include ISDS provisions, investors can bring a claim for breaches of investment protections before international arbitration tribunals. While the exact number of ISDS claims under such instruments are unknown, ICSID reports that of all ICSID cases registered up to December 31, 2023, 15% are based on contracts and 7% on national investment laws.[76]

Although these instruments share many similarities with IIAs, there are some differences. First, the scope of their application varies. Investment contracts limit consent to arbitration to investors who are party to the agreement. In IIAs, the offer to arbitrate is broader but still limited to foreign investors and their affiliates from the Contracting parties to the treaty, even though corporate restructuring has expanded this limitation.[77] Domestic investment laws are the broadest, as they apply to all foreign investors (and sometimes domestic investors, depending on the law) regardless of their home State, arguably increasing the risk of ISDS exposure.[78] Furthermore, national laws, or dispute settlement provisions within those laws, that apply only to foreign investors are discriminatory, since they provide access to ISDS only to foreign investors, not domestic ones. This can lead to inconsistent and unfair outcomes in cases with identical facts.[79] As an example, the calculation of damages for expropriation can differ significantly between domestic law, as interpreted by domestic courts, and investment treaty standards, as interpreted by arbitration tribunals, which often award much higher amounts.[80]

To avoid ISDS exposure in national investment laws or contracts and to eliminate a parallel system of dispute resolution that privileges foreign investors over domestic ones, governments may wish to repeal or amend their national laws and renegotiate their contracts with foreign investors. Unlike IIAs, national investment laws can be repealed or amended without the agreement of another Contracting party and are based on the State's domestic legal processes. Contracts can be renegotiated by the host State on a bilateral basis with the appropriate investor. Such changes will not bar access to dispute settlement mechanisms at the domestic level or other applicable international mechanisms, such as SSDS, which can be communicated to the relevant parties.[81]

# 5. Withdrawal from the ICSID Convention

The ICSID Convention, also known as the Washington Convention, is an international agreement negotiated under the auspices of the World Bank. It was signed in Washington, D.C., on March 18, 1965, and entered into force on October 14, 1966. The Convention created the International Centre for Settlement of Investment Disputes (ICSID), which provides an arbitration forum and a set of procedures and rules for settling international investment disputes between Contracting parties and investors from other Contracting parties.[82] Such disputes may arise under investment treaties, national investment laws, or contracts. While the ICSID Convention offers both arbitration and conciliation as methods for resolving disputes, from early on, ICSID encouraged the former procedure, "which is the one that ensures a definitive resolution in terms of an enforceable award binding on both parties."[83]

As of August 25, 2024, the ICSID Convention has 157 Contracting States, committing to the terms and procedures established by ICSID.

So far, four countries have withdrawn from the ICSID Convention: Bolivia in 2007, Ecuador in 2009, Venezuela in 2012, and Honduras in 2024, though Ecuador rejoined in 2021. All four Latin American countries cited concerns that the ICSID Convention undermined their sovereign right to regulate foreign investments and, more broadly, their national interests.[84] Countries in other regions have also expressed their intention to leave the ICSID system.[85]

Several major emerging economies, including Brazil, India, Russian Federation, and South Africa, have been cautious about joining or ratifying the ICSID Convention and have therefore never been ICSID Contracting States.

A key element of the ICSID Convention is that ratification alone does not obligate a Contracting State to submit to arbitration under ICSID. Thus, consent to investor-State arbitration must be given through another instrument. When the Convention was drafted in 1965, these other instruments were primarily investor-State contracts and national investment laws. However, the drafters anticipated that IIAs would increasingly provide consent to ISDS, particularly under the ICSID Convention.[86] Today, the basis of consent for the vast majority of ISDS cases under ICSID is found in IIAs.[87]

The withdrawal from the ICSID Convention has serious limitations since it does not eliminate the ongoing liabilities of investment treaties and the ISDS mechanism. Nevertheless, it is presented here as one strategy that may be considered in conjunction with one or more of the policy options discussed in Section 2.

## 5.1. Implementing the withdrawal from the ICSID Convention

Under the ICSID Convention, a Contracting State may withdraw from the Convention by a written notice.[88] A notice of withdrawal has to be addressed to the World Bank, the depositary of the Convention,[89] which then notifies all other Contracting States.[90] There is no requirement, however, for the withdrawing State to provide any reasons for its withdrawal.

The withdrawal takes effect six months after receipt of the notice. For the period of six months between the receipt of the notice and its taking effect, the rights and obligations arising from the Convention[91] continue to apply to the State. After the six-month period elapses, the State ceases to be subject to the rights and obligations under the Convention. There are, however, some exceptions to this; for example, the recognition and enforcement of ICSID awards (Article 54) remain applicable after the six-month period with respect to those cases initiated before withdrawal took effect.[92]

The withdrawal from the ICSID Convention by a State does not affect pending proceedings, claims initiated before the notice of withdrawal is received, or those initiated during the six-month notice period. Claims are considered to be initiated when a request for arbitration is made.[93] ICSID, however, lacks jurisdiction over any claims filed after the notice period.[94]

These timing rules apply to national investment laws that provide consent to ICSID arbitration as well. By contrast, where consent to ICSID arbitration has been given by the host State in a contract with an investor, ICSID proceedings could potentially be initiated even after the host State withdraws from the Convention, i.e., after the six-month notice period. This is because, unlike IIAs and national investment laws, both parties typically give their advance consent to ISDS in a contract, making it more challenging to unilaterally withdraw consent to ICSID arbitration after it has been perfected.[95] However, in theory, this depends on the applicable law of the contract. If the contract is subject to domestic law, even after withdrawal of the ICSID Convention has taken effect, the option to bring an ISDS case under ICSID should not be available. Arbitration tribunals, however, may not take this approach, preferring instead to recognize ICSID's jurisdiction even after the withdrawal has taken effect in the case of contractual disputes.

## 5.2. Limitations of withdrawing from the ICSID Convention

There are some limitations that must be taken into account for those States that choose to withdraw from the ICSID Convention. First, withdrawing from the ICSID Convention does not necessarily close foreign investors' access to ISDS against the withdrawn State (or State-owned entities) in most cases. Second, ISDS cases that are adjudicated under non-ICSID forums and rules are subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

### *5.2.1. Withdrawing from the ICSID Convention does not reduce exposure to ISDS claims*

The majority of IIAs, national investment laws, and contracts that provide investors with consent to ISDS under the ICSID Convention also offer consent to ISDS under other available and applicable forums and rules. Thus, the risk of ISDS claims is not eliminated once a State withdraws from the ICSID Convention.

The experiences of Bolivia, Ecuador, and Venezuela illustrate this point. Bolivia has faced 16 publicly-known treaty-based ISDS claims since its withdrawal from the ICSID Convention became effective. Venezuela has had about 38 ISDS claims against it since its withdrawal, and Ecuador has faced 10 cases between the effective date of its withdrawal and the date of its re-entry into the ICSID Convention.[96] In almost all of these cases, investors have brought their claims under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules, with the majority being administered by the Permanent Court of Arbitration.

However, withdrawal from the ICSID Convention does have an effect if an IIA specifies the ICSID Convention as the *only* option available for investor-State arbitration. In such a situation, foreign investors may have to resort to domestic courts or, subject to an ad hoc agreement, an alternative arbitration fora not included in the treaty. This exception applies to only a few BITs still in force for those States that have withdrawn from the ICSID Convention but have not terminated their BITs: Chile–Venezuela BIT (1993), France–Venezuela BIT (2001), Germany–Honduras BIT (1995), and Chile–Honduras BIT (1996). These four BITs specify the ICSID Convention as the sole arbitration option for ISDS claims. This is also true in the case of some of Bolivia's BITs, whose protections still remain in effect (due to the sunset clause) for investments made before those BITs were terminated.[97]

Otherwise, the majority of treaties offer multiple arbitration options and forums: 16 of Honduras' BITs and 24 of Venezuela's BITs offer alternative forums, including arbitration under the ICSID Additional Facility Rules, UNCITRAL Rules, International Chamber of Commerce (ICC) Arbitration Rules, or arbitration under the auspices of the International Chamber of the Commercial Court of Paris or the Stockholm Chamber of Commerce.

States with national investment laws that provide advance consent to ISDS under the ICSID Convention, but have withdrawn from the Convention, may wish to review and potentially amend or repeal those national laws. For example, Honduras provides advance consent to both the ICSID Convention and ICSID Additional Facility Rules, among other rules and institutions, in its national investment law for resolving foreign investment disputes.[98] In order to withdraw completely from ICSID, including both the ICSID Convention and ICSID Additional Facility Rules, such governments may wish to amend the dispute settlement provisions within their national laws to ensure their withdrawal is not challenged by foreign investors relying on those laws under ICSID.

Similarly, a State that has withdrawn from the ICSID Convention but remains a party to concession contracts with foreign investors providing consent to ISDS under the ICSID Convention may wish to renegotiate those contracts to amend the dispute settlement provisions and/or provide an alternative dispute settlement mechanism.

### *5.2.2. Withdrawing from the ICSID Convention may or may not significantly impact the enforcement stage of ISDS awards*

While the ICSID Convention establishes a self-contained regime, including the recognition and enforcement of ICSID awards, non-ICSID awards are subject to the New York Convention. Thus, when a State withdraws from the ICSID Convention, any non-ICSID ISDS awards rendered against it may be subject to the New York Convention.

Those emerging economies not party to the ICSID Convention—Brazil, India, Russian Federation, and South Africa—are all parties to the New York Convention.[99]

In the case of an ICSID award, if such an award is not voluntarily complied with, the enforcement mechanism under the ICSID Convention is activated. The investor can seek recognition and enforcement of the award in any other ICSID-Contracting State.[100] Because the Convention does not provide any ground on which to refuse recognition or enforcement, an ICSID award is binding and enforceable in any Contracting State as if it were a final judgment of that State's national court.[101] Therefore, there is no need for internal judicial procedures to enable enforcement.

The execution of an ICSID award is a further procedural step, governed by the domestic laws pertaining to the execution of judgments in effect in the State where such execution is sought.[102] This step may involve the investor applying to the court for execution of the award against certain assets or property of the respondent State within that jurisdiction.[103] The actual process of seizing a State's assets in other jurisdictions, however, depends on whether those assets are protected from execution by domestic sovereign immunity laws and whether the State has waived its immunity from execution.[104]

On the other hand, non-ICSID awards are subject to the recognition and enforcement rules under the New York Convention, which obligates all Contracting States to ensure that their domestic courts will recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the jurisdiction where the award is relied upon.[105] Unlike the ICSID Convention, the recognition and enforcement of a non-ICSID award, however, may be refused by a domestic court under specified grounds provided by the New York Convention.[106] Such grounds include, for instance, where the recognition or enforcement of the award is contrary to the public policy of the jurisdiction where it is sought.[107]

Thus, while ISDS awards may be recognized and enforced under both Conventions, there are some advantages for respondent States when awards are enforced under the New York Convention due to the potential grounds for resisting (and delaying) enforcement of awards.

## 5.3. Other considerations for withdrawing from the ICSID Convention

The withdrawal of States from the ICSID Convention may not solve the problem of foreign investors bringing ISDS claims against them under the majority of IIAs, as well as national investment laws and contracts. However, there may be political reasons for such a strategy.

ICSID is intended to provide a neutral, independent, and impartial forum for investment dispute resolution, but there are concerns about the influence of the World Bank and the appointment process for arbitrators in ICSID proceedings.[108] A key criticism is that the World Bank, a financial institution that provides loans and grants to governments for the purpose of pursuing capital projects, should not also be involved, through ICSID, in settling disputes for those same governments. Indeed, even the proponents of the ICSID Convention, such as the UK Government, noted as early as 1961 that "it is doubtful whether the world's biggest international lender should also be the biggest arbitrator of disputes."[109]

Another criticism concerns the influence that the World Bank has on the appointment process for arbitrators in ISDS proceedings at ICSID. The President of the World Bank, who also serves as the Chairman of the Administrative Council of ICSID,[110] appoints the presiding arbitrator and any members not yet appointed by the disputing parties to an ISDS tribunal (Rule 18). In addition, the President of the World Bank appoints the members of *ad hoc* annulment committees (Rule 71). Traditionally, the President of the World Bank has always been a U.S. citizen, nominated by the U.S. government, the Bank's largest shareholder. This relationship is, therefore, viewed critically by some States, particularly those in Latin America.

# 6. Investment Treaty Exit and Reform Strategies Undertaken by Select States

Not surprisingly, a number of States have launched strategies to exit or reform their investment treaties in order to eliminate or reduce the scope of their treaty obligations over the past decade at the national, bilateral, and multilateral levels. These strategies are driven by various concerns, including the impact of investment treaties on State sovereignty, tensions with climate action, other national development goals, or domestic laws, and the substantial costs associated with ISDS claims and awards.[111]

## 6.1. Unilateral strategies to exit investment treaties

Notable examples of national or unilateral exit strategies include actions by the governments of Bolivia, Ecuador, and South Africa, among others. These governments unilaterally terminated most or all of their BITs over the past decade. The reasons driving each of these are described below.

It is important to emphasize again that unilateral terminations of BITs have limitations in their ability to reduce liability to ISDS claims and potential challenges to public interest policies. This is because such terminations take effect several years after the terminating State notifies its treaty partner, due to the existence of sunset clauses. These clauses ensure that investments made prior to the treaty's termination continue to be protected for a specified period. However, new investments made after the treaty's termination are not covered by the effect of these clauses.

Although unilateral terminations may be imperfect, they are often the only option available for a State seeking to exit—or reject in part—the investment treaty or ISDS regime. Section 2.1 provides a more detailed discussion of the legal consequences of such unilateral terminations and withdrawals, in addition to the technical aspect of such strategies.

### *6.1.1. Bolivia*

In Bolivia, on the eve of President Evo Morales's inauguration on January 19, 2006, representatives of Aguas del Tunari, headed by the Bechtel Corporation of the U.S., visited the country to close an agreement to end the ISDS case they had initiated against Bolivia in 2002 for USD 50 million.[112] Under pressure from the World Bank to privatize some public services, the Bolivian government had granted Bechtel a 40-year concession to provide water services to the city of Cochabamba in September 1999. The concession led to a more than 50% increase in water rates, making it unaffordable for many residents.[113] This sparked widespread civil unrest, and within eight months, the concession was canceled and the company expelled from the country. The situation escalated when Bechtel filed an ISDS case at ICSID in 2002, which triggered a four-year international public outcry aimed at the companies in charge. The investors ultimately dropped their case for a token payment.[114]

When Morales came into office, he said he felt like a "prisoner of the neo-liberal laws"[115] that had been installed by previous administrations, including a number of BITs.[116] At around the same time that Bechtel dropped its case, international gas companies operating in the country warned they would sue the Morales government if he pursued his campaign promises to increase Bolivians' share of natural resource revenues.[117]

In 2007, Bolivia became the first country to withdraw from the ICSID Convention, arguing that the widely-used forum for ISDS was biased in favor of investors.[118] Bolivia's notice of withdrawal from the ICSID Convention was received by the World Bank on May 2, 2007, and took effect on November 3, 2007. Consistent with this stance, the newly drafted 2009 Bolivian Constitution prioritized domestic over foreign investment, and mandated that foreign investment submit to Bolivian jurisdiction, laws, and authorities, and dismissed any diplomatic complaints seeking preferential treatment.[119] The Constitution also barred the use of international arbitration for resolving disputes involving foreign investors in the hydrocarbon sector.[120]

As mandated by the new Constitution, Bolivia initiated a diplomatic task force to review its BITs.[121] The task force aimed to terminate and, where necessary, renegotiate any treaties conflicting with its Constitutional principles.[122] In addition, any new BIT would have to protect the interests of the people, balance public and private interests, safeguard Indigenous, social, human, and environmental rights, and foster socio-economic development in Bolivia.[123]

By May 2013, the Bolivian government collectively terminated all 22 of its existing BITs.[124] At that time, Bolivia had been the subject of at least 11 treaty-based ISDS claims, nearly all brought by investors from Western European countries and the United States. According to the UNCTAD database, Bolivia paid damages to investors in nine of these cases, either as part of a settlement agreement or as a result of an arbitration award.

### *6.1.2. Ecuador*

In neighboring Ecuador, the government terminated its BITs in two phases: the first in 2008–2010 and the second in 2017-2018. The first phase followed the adoption of Ecuador's new Constitution in 2008, whose Article 422 prohibits Ecuador from ceding jurisdiction to international arbitration entities.[125] The inclusion of this article was a response by the newly elected Rafael Correa administration to a domestic outcry over the growing number of ISDS cases against the State. In 2004, Ecuador was found liable in the *Occidental v. Ecuador (I)* case, in which an ISDS tribunal awarded the company USD 71.5 million in damages.[126] Following the adoption of the new Constitution, the Correa government unilaterally terminated its BITs with 10 countries between 2008 and 2010.[127] These countries included other Latin American countries, as well as Finland and Romania, whose investors had not initiated any cases against Ecuador and whose investments in Ecuador were insignificant.[128]

By mid-2008, Ecuador had faced at least 13 treaty-based ISDS claims, with 10 of them brought under ICSID. On July 6, 2009, Ecuador formally notified the World Bank of its decision to withdraw from the ICSID Convention, which took effect on January 7, 2010. From 2010 to 2021, when Ecuador re-entered the ICSID Convention, all ISDS cases against Ecuador were conducted under the UNCITRAL Arbitration Rules and administered by the Permanent Court of Arbitration.

During the following several years, while the government was defending a number of cases brought against it, there was a key moment in October 2012: the decision of the ISDS tribunal in *Occidental v. Ecuador (II)*. The tribunal had found Ecuador liable under the Ecuador–U.S. BIT (1993), awarding Occidental, a U.S. oil company, a record-breaking USD 2.3 billion.[129] This stunning amount was equivalent to 59% of Ecuador's education budget or 135% of its healthcare budget that same year. The tribunal's ruling was particularly surprising given the circumstances leading to the lawsuit. Ecuador had terminated Occidental's oil concession after discovering the company had sold 40% of its production rights without government approval, a breach of its 1999 contract. This award, together with Chevron's 2009 ISDS claim, and seven other ISDS cases that had been initiated since 2009, fueled anti-U.S. sentiments and served as an example of economic injustices perpetrated by the "neoliberal system."[130]

The public's outrage underscored growing discontent among both public and private actors with the existing investment arbitration framework. It was in response to this discontent—as well as Ecuador's successful experience with setting up a debt audit commission in 2007 to investigate the country's nearly USD 11 billion external debt owed to foreign creditors in 2007—that the Correa administration established the Commission for the Audit of Ecuador's Investment Treaties (CAITISA) in May 2013. CAITISA's mission was to comprehensively review and verify the legality and legitimacy of Ecuador's investment treaties, rules, and commitments and to identify inconsistencies and irregularities in ISDS decisions against the State.

The Commission was organized into three working groups. The first group examined the historical and geopolitical context of how Ecuador became party to its BITs, analyzed fundamental clauses within those treaties, and assessed their legal compatibility with other national, regional, and international laws. The second group studied the legal basis and legitimacy of the current ISDS system as it related to cases against Ecuador. They examined procedures, acts, and decisions of foreign jurisdictions; the basis of consent (in treaties and laws) for claims; conflicts of interest; the role of law firms; legal defense strategies; costs; and consequences of the demands. The third group evaluated whether the remaining BITs in fact attracted foreign investment from those treaty parties and whether that investment contributed to the country's development objectives.[131]

Having found a number of irregularities regarding Ecuador's entry into BITs, the numerous vaguely-worded clauses within the treaties, arbitrators' expansive interpretation of those clauses, and the lack of evidence linking BITs to increased foreign investment flows into the country, the government terminated the remaining 16 BITs that were still in force on May 17, 2017.[132] This marked the second phase of mass BIT terminations in Ecuador. Because of the sunset clause in these BITs, however, investments made prior to the terminations continue to be protected for a period of time.

The three presidents elected following the end of Correa's administration have adopted differing approaches to the investment treaty regime, though all have attempted to walk back Correa's withdrawal from the ISDS system. Ecuador, under the Guillermo Lasso administration, re-entered ICSID on September 3, 2021, although whether this is compatible with the Constitution is questionable. Ecuador negotiated an FTA with Costa Rica and another with China in 2022–2023. However, in July 2023, the FTA with Costa Rica was ruled unconstitutional by Ecuador's Constitutional Court because of the inclusion of an ISDS provision.[133] The court upheld the FTA with China, which did not include recourse to ISDS. The FTA with China became effective on May 1, 2024. Ecuador is currently negotiating an FTA with Canada,[134] whose vast mining industry has relied on ISDS in many disputes around the world.[135]

In March 2024, Ecuador's current President, Daniel Noboa, visited Ottawa and Toronto, where it was announced that Ecuador and Canada would begin negotiating an FTA in April 2024.[136] The two governments had announced the launch of exploratory discussions toward a potential FTA back in November 2022.[137] The Canadian government's announcement of its intention to negotiate an FTA with Ecuador prompted parliamentary meetings in February 2024.[138] During these meetings, Canada's Ambassador to Ecuador stated that "the Government of Ecuador wants ISDS as part of this agreement."[139] The Director General at Global Affairs Canada added that investment is a "particular area of interest,"[140] and that ISDS "is a key interest for Canadian industry stakeholders."[141] In the same meeting, Canada's Deputy Director of Investment Trade Policy suggested, despite evidence to the contrary, that ISDS "has proven to be an investment attraction vehicle."[142]

Despite the purported necessity or urgency for ISDS inclusion in the new FTA, the Canadian government has reported that "Canadian Direct Investment in Ecuador, at $2.6 billion in 2022, has tripled in the last 5 years, making Canada the largest foreign investor in Ecuador."[143] This prompts questions about whether the absence of such a mechanism has actually discouraged Canadian investment in Ecuador since the termination of the Ecuador–Canada BIT (1996) in 2018.[144]

Finally, on April 21, 2024, the Noboa administration held a referendum, which included 11 proposed reforms that largely sought to address the country's ongoing security crisis. Among the proposed security reforms, however, was Question D, which read "Do you agree that the Ecuadorian State should recognize international arbitration as a means to resolve disputes in investment, contractual, or commercial matters?" While the majority of the ballot measures on security were approved, 65% of voters rejected the proposed reform on Question D.[145] Thus, Ecuador, at least for now, remains outside the ISDS regime at the investment treaty level.

### *6.1.3. South Africa*

During apartheid, the South African State faced international isolation and economic sanctions, resulting in widespread disinvestment in and divestment from the country. Negotiating IIAs was thus not a priority. However, in the early 1990s, as South Africa transitioned to a democracy, it began signing BITs with the hope of attracting foreign investment. Then President Nelson Mandela emphasized the importance of trade performance and foreign investment for South Africa's development, and at the same time, acknowledged that foreign investment alone would not solve all of South Africa's economic problems.[146] The signing of BITs was intended to signal the country's re-admission to the international community after years of isolation,[147] and to reassure foreign investors that their investments would be protected under the new government. The inclusion of property protection in the domestic bill of rights further bolstered investor confidence.[148] As a result of these efforts and the international community's support, South Africa signed 14 BITs between 1994 and 1997 with various countries from the EU, the Americas, Africa, the Middle East, and Asia.[149] A number of other BITs, 50 in total, were signed until 2009. Only 24 of these, however, ever came into force.

The property clause that was eventually included in the 1996 South African Constitution protects property rights while also requiring land redistribution, restitution, and tenure reform.[150] It allows for exceptions, especially regarding expropriation of assets for land and water reforms, in order to address past racial discrimination.[151] For instance, the property clause enabled the government to enact legislation like the Broad-Based Black Economic Empowerment (BEE) Act, which favors certain South African nationals. However, the BITs being negotiated at that time, driven by European governments concerned about South Africa's redistributive agenda, effectively bypassed these new laws.[152] These treaties broadly followed the text of BITs of major capital-exporting States at that time and did not include provisions to accommodate South Africa's public interest policies.[153]

The South African government's path to reviewing and ultimately terminating some of its BITs was influenced by two key ISDS cases brought against it. The *Foresti v. South Africa* case,[154] initiated in 2007, involved a USD 375 million claim by investors from Italy and Luxembourg, who argued that certain policies inspired by South Africa's BEE program to increase the participation of historically-disadvantaged people led to an unlawful expropriation of their mineral rights.[155] The case, however, was eventually discontinued without a decision on the merits. In an earlier ISDS case, which was kept confidential until some years later and is still not made public, a Swiss investor accused South Africa of failing to provide security for his property during protests, leading to a ZAR 6.6 million payment (nearly USD 1 million at the time), plus interest.[156] These arbitrations highlighted the substantial financial burden on taxpayers and the lack of public accountability for government actions.[157] From the State's perspective, South Africa's social upliftment policies, aligned with its constitutional values, were not considered or balanced appropriately in these disputes.[158]

The South African government, fueled by the disregard these cases displayed to its regulatory authority, established a task force through the Department of Trade and Industry to conduct a comprehensive review of its investment policies. This review, which began in late 2008, aimed to provide policy recommendations to the Cabinet.[159] In assessing the risks and benefits associated with their BITs, the task force found that the investment treaty regime primarily focused on protecting the economic interests of foreign investors, while allowing matters of national interest to be exposed to and scrutinized by an unpredictable system of international arbitration.[160] This undermined the State's ability to regulate its domestic policies and transition to a more just democracy.

The government also noted that while proponents of the regime often argue that IIAs encourage investment and strengthen the rule of law, especially in jurisdictions with weak or biased court systems, there was in fact no correlation between foreign investment inflows and the signing of BITs.[161] For instance, South Africa had not signed an investment treaty with Japan or the U.S., but received significant investment flows from these two countries. On the other hand, although South Africa had BITs with some EU Member States, those treaties did not translate into increased investment flows from those countries.[162]

In 2010, the Cabinet decided to terminate all of South Africa's BITs and refrain from entering new ones, except when there was a compelling economic or political justification.[163] Responding to a parliamentary question on the justification for terminating these treaties, then Minister Rob Davies explained that South Africa's BITs "are poorly drafted and exhibit a range of serious flaws" and "play little, if any, role in investors' decisions to invest or not in any country."[164] As a result, the South African government unilaterally terminated its BITs with EU Member States as they came up for automatic renewal and aimed to terminate additional BITs in the future.[165] According to the UNCTAD database, a few BITs remain in force: South Africa's BITs with China, Cuba, Iran, Russian Federation, and South Korea. Those BITs still in force between South Africa and other African Union States are already, or are expected to be, superseded by regional and continent-wide agreements, such as those under the SADC and the AfCFTA agreements.

After terminating several of its BITs, South Africa enacted the Protection of Investment Act 22.[166] The Act, which came into effect in July 2018 under the leadership of President Cyril Ramaphosa, aims to protect and promote investment in accordance with the South African Constitution by "balanc[ing] the public interest and the rights and obligations of investors." It "affirms [South Africa's] sovereign right to regulate investments in the public interest" and confirms that South Africa's Bill of Rights, Constitution, and domestic laws apply equally to all investors and investments in the country.[167] The Act establishes a mediation and arbitration process facilitated by the South African Department of Trade and Industry, and favors domestic courts as the primary forum for resolving investor-State disputes.[168]

## 6.2. Bilateral and regional strategies to exit investment treaties

Coordinated action among Contracting parties at the bilateral or regional level can be more effective than a unilateral approach, as it can reduce future liabilities by also neutralizing the sunset clause of the terminated treaty. Such efforts can also facilitate the termination (or amendment) of numerous BITs at once. Since 2004, about 214 BITs have been mutually terminated at the bilateral level; 205 of which are among EU Member States and the UK. Around 90% of these bilateral terminations have occurred since 2019.[169]

However, this option is often unavailable to developing countries seeking to terminate IIAs, especially with their developed, capital-exporting counterparts. Geopolitics plays a significant role in promoting and maintaining IIAs, as net capital-exporting States may have incentives to preserve them to allow their investors to continue benefiting from the substantive protections offered in IIAs and the ISDS mechanism used to enforce those protections.

### *6.2.1. Intra-EU bilateral investment treaties*

The largest regional overhaul of BITs has been among EU Member States. In May 2020, 23 EU Member States signed the Intra-EU BIT Termination Agreement. This agreement implemented the 2018 *Achmea* judgment of the Court of Justice of the European Union (CJEU), which ruled that an intra-EU BIT between the Netherlands and the Slovak Republic violated EU law. Following that judgment, in January 2019, EU Member States declared that all intra-EU BITs violated EU law, and committed to terminating their intra-EU BITs. Although some Member States did not sign the Intra-EU BIT Termination Agreement—namely, Austria, Ireland,[170] Finland, and Sweden—they expressed their intention to do so in their 2019 political declarations. Even so, all EU Member States remain under the obligation to terminate their intra-EU BITs due to their incompatibility with EU law.[171] While each individual termination exemplifies a bilateral termination of a BIT (i.e., by mutual consent), the implementation of the Intra-EU BIT Termination Agreement took the form of a multilateral treaty, which allowed the simultaneous termination of a large number of BITs. This strategy is discussed in detail in Section 2.1.2.

In addition, the Intra-EU BIT Termination Agreement, which entered into force on August 29, 2020 and ratified by all its signatories by August 2022, includes a provision that neutralizes all sunset clauses in the relevant BITs, including those terminated before the termination agreement took effect. The neutralization provision stipulates that the arbitration clause in intra-EU BITs cannot be used as a legal basis for any new ISDS proceedings initiated on or after March 6, 2018, the day of the *Achmea* judgment.[172] Proceedings concluded before that date are not affected by the agreement, and those pending on that date are offered the option of a mediated settlement or access to domestic courts.[173] This neutralization took effect at the same time that the termination agreement entered into force.

While the *Achmea* judgment may have catalyzed the Intra-EU BIT Termination Agreement or legitimized the exit strategy, some EU Member States have expressed their dissatisfaction with the ISDS mechanism, at least in their relations with other developed countries, like the U.S. and Canada. A notable example of this discontent is the French National Assembly's resolution rejecting the Canada-EU Trade Agreement in October 2014.

### *6.2.2. The Energy Charter Treaty*

The most recent exit strategy occurred on June 27, 2024, when the Council for the European Union provided written notice to the ECT depositary of the EU and its Member States and EURATOM's withdrawal from the Energy Charter Treaty. This withdrawal is to take effect one year after the depositary receives the notification. The decision to withdraw from the controversial ECT follows a series of announcements from other signatories, including Denmark and Netherlands, of their intention to withdraw. Several countries have already given official notice of their withdrawal, including France, Germany, Luxembourg, Poland, Portugal, Slovenia, Spain, and the United Kingdom.[174] Italy had previously exited the treaty in 2016.

The ECT is a post-Cold War investment agreement with around 50 member States, including the EU and Euratom. It was established in 1994 to protect energy investments in post-Soviet countries.[175] However, it came under fire from civil society, academia, and some government officials for its incompatibility with the European Green Deal, the EU Climate Law, and EU Member States' commitments under the Paris Agreement, primarily due to the treaty's ongoing protections for fossil fuel investments. Several EU Member States have become respondents in a growing number of ISDS claims under the ECT related to energy transition measures taken by their governments. In fact, the ECT has become the most litigated investment treaty in the world, with at least 162 claims initiated by the end of 2023. The ECT Contracting parties began a process of amending and modernizing the treaty in 2017, and reached an agreement in principle on reforms to the ECT in June 2022. However, EU Member States did not find the necessary majority to ratify the modernized treaty, as proposed by the European Commission.

The EU may work with other Contracting parties, that may or may not remain parties to the ECT after the EU's withdrawal, to neutralize the sunset clause. However, in the absence of such an agreement, pursuant to Article 47.3 of the ECT, the provisions of the ECT will continue to apply to investments made in the EU by investors of other Contracting parties, or in other Contracting parties by EU investors, for a period of 20 years after the withdrawal takes effect.[176]

While the EU Commission takes the position that the sunset clause has "no impact on intra-EU relations, to which the ECT has never, does not and will never apply, including its Article 47.3," it does acknowledge that such a risk of legal conflict may not be interpreted in their favor by ISDS tribunals. The appropriate response, according to the Commission, will be "to adopt an instrument that is a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' … among the Member States, the Union and EURATOM." In other words, an *inter se* agreement would be issued between and among the EU and its Member States clarifying that the ECT, including its substantive and procedural provisions, and its sunset clause, did not and will not apply to intra-EU relations.[177]

## 6.3. Strategies to amend investment treaties

Instead of exiting from IIAs, some States may choose to amend their treaties in an attempt to limit their scope, clarify the substantive meaning of treaty standards, remove the ISDS mechanism, or withdraw advance consent to ISDS. However, like bilateral and regional termination strategies, amendments to IIAs require the consent of all treaty parties. This, again, can be challenging for developing countries in their bilateral relations with developed, capital-exporting countries due to asymmetries in political and economic power or other misaligned interests. In such cases, developing country governments may opt to unilaterally terminate some or all of their investment treaties with the hope of renegotiating new ones that better protect their own interests. For regional treaties, where economic relations and political power are more reciprocal or symmetrical, obtaining consent to amend agreements may be easier.

### *6.3.1. India*

The backlash against investment arbitration in India began with the *White Industries v. India* case, the country's first known treaty-based ISDS ruling.[178] In November 2011, an arbitral tribunal found India in breach of the India–Australia BIT (1999), awarding the investor damages of over USD 4 million.[179] This case reportedly opened the floodgates for a number of investment treaty arbitrations against India, challenging various domestic regulations and policy measures.[180] In the five years following the *White Industries* ruling, India faced at least 10 claims, with investors seeking more than USD 11.3 billion total in damages.[181]

The surge in ISDS claims prompted India to undertake a critical review of its BITs, which ultimately resulted in the development of India's Model BIT in 2015, released in early 2016.[182] The Indian Model BIT attempts to strike a balance between protecting foreign investments and the government's right to regulate, and imposes a number of conditions for an investor to meet before accessing ISDS; for instance, it requires that the investor exhaust local remedies for a period of five years before initiating an ISDS claim.[183] India subsequently issued termination notices to more than 57 countries and signed joint interpretative statements with 25 countries with which it had existing BITs.[184] Within five years of introducing the model BIT, India unilaterally terminated 75 of its BITs.[185] India reportedly aims to renegotiate new BITs with many of these countries based on its revised model,[186] but is currently party to about 13 IIAs in force with ISDS provisions, at least one of which is based on its 2015 Model BIT.[187]

Despite India's termination of most of its BITs by 2017, it remains one of the largest recipients of foreign direct investment (FDI), which implies that BITs are not necessary to secure foreign investment. FDI flows into India have increased by about 25% from 2017 to 2022, from USD 39.9 billion to USD 49.4 billion.[188] Similarly, FDI stock in India has doubled between 2010 and 2022.[189]

### *6.3.2. Indonesia*

In Indonesia, a series of ISDS claims prompted the government to take steps to terminate its 67 BITs in force. In 2011, investors from the United Kingdom[190] and Saudi Arabia[191] brought separate claims against Indonesia under their respective investment treaties, alleging the expropriation of their investments in Indonesia's banking sector. The following year, UK investor Churchill Mining and its Australian subsidiary, Planet Mining, lodged a USD 1.3 billion claim against Indonesia, alleging the government had failed to protect their investments in a massive thermal coal mining project.[192] Indonesia's then President Susilo Bambang Yudhoyono criticized multinationals like Churchill for "wanting to pressure developing countries like Indonesia." In 2014, Dutch company Nusa Tenggara Partnership BV also filed an ISDS claim.[193]

In March 2014, the Indonesian government sent the Netherlands a notice of non-renewal of its BIT, which was set to expire on July 1, 2015. This effectively terminated the Indonesia–Netherlands BIT (1994),[194] which was seen by some as symbolic, partly because it was Indonesia's first BIT containing an ISDS provision.[195] However, since the treaty includes a sunset clause, it continues to apply to Dutch investments made before the termination of the BIT for 15 years from the date of effective termination.

Indonesia indicated in its communications with the Netherlands its intention to review and potentially terminate its other 67 BITs.[196] Since then, according to the UNCTAD database, Indonesia has terminated a total of 24 BITs. Of these, it has renegotiated and signed BITs with two countries: Singapore (2018) and Switzerland (2022), though only the former is in force. In 2019, Indonesia also signed a new BIT with the United Arab Emirates.

While these newer BITs continue to include ISDS provisions, they provide more detailed scope and limitations on substantive protections. For instance, in the Indonesia–Singapore BIT (2018), the fair and equitable treatment obligation explicitly excludes the expectations of an investor in its scope (Article 3), and for expropriations, there is an explicit exclusion of speculative or windfall profits from any valuation claimed by the investor (Article 6).

### *6.3.3. Southern African Development Community*

In 2006, Members of the Southern African Development Community (SADC), a regional organization currently comprising 16 Member States, signed the SADC Finance and Investment Protocol. The Protocol outlines SADC's policy on various aspects of investment. In 2016, however, Annex 1 to the Protocol was amended in response to criticism that it failed to adequately balance investor protection with the regulatory autonomy of host governments. The original Protocol included investment protection standards, including recourse to ISDS, which contradicted the recommendations in the SADC 2012 Model BIT template.[197] The amendments to the Protocol limited arbitration to State-to-State disputes only and narrowed the scope of investors' rights.

### *6.3.4. United States-Mexico-Canada Agreement*

Like other FTAs, the investment chapter of the North American Free Trade Agreement (NAFTA) included an ISDS provision. The first high-profile ISDS cases actually emerged under NAFTA, with *Loewen v. U.S.* as the most prominent of those cases.[198] Although that case was dismissed on jurisdictional grounds, it exposed significant shortcomings in the U.S. justice system that could be challenged under international law. It also showed that arbitrators might face considerable political pressure in resolving such disputes.[199] Along with other NAFTA cases against the U.S., Canada, and Mexico, these early ISDS cases underscored a perceived threat to State sovereignty.[200]

Indeed, during the renegotiation of NAFTA, Chrystia Freeland, Foreign Affairs Minister of Canada at the time, described ISDS as "elevat[ing] the rights of corporations over those of sovereign governments. In removing it, we have strengthened our government's right to regulate in the public interest, to protect public health and the environment." Canada has been the second most sued developed country under the investment treaty regime, after Spain, thus far.

The USMCA, which entered into force on July 1, 2020, revised and modernized NAFTA, replacing it with new and amended provisions. The ISDS provision was removed between Canada and the U.S. (and between Canada and Mexico). However, Mexico and Canada remain subject to the ISDS mechanism in their bilateral relations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. For Mexico and the U.S., the ISDS provision in the USMCA applies only to government contracts in five covered sectors—oil and gas, power generation, telecommunications, transportation, and infrastructure—and to other sectors if domestic remedies are exhausted first.[201] Regarding the sunset clause, the USMCA allows legacy investment claims for up to three years after the termination of NAFTA, meaning ISDS claims could have been submitted until June 30, 2023.[202]

# Annex

## AGREEMENT[203]

**For the termination of Bilateral Investment Treaties, amendment to remove investment chapters from Free Trade Agreements, amendment to remove investor-State dispute settlement provisions from Bilateral Investment Treaties and Free Trade Agreements, and amendment to withdraw advance consent to investor-State dispute settlement from Bilateral Investment Treaties and Free Trade Agreements**

### THE CONTRACTING PARTIES,

**RECOGNIZING** the necessity of designing and implementing appropriate investment policies, including transparent and fair investment dispute settlement regimes, to maximize the potential of cross-border investments to contribute to sustainable development within and across States;

CONSIDERING that bilateral investment treaties and investment chapters of free trade agreements commonly contain provisions under which an investor from one Contracting Party may, in the event of a dispute concerning their investments in the territory of the other Contracting Party, bring proceedings against the latter party before an investor-State arbitration tribunal (ISDS proceedings);

MINDFUL that governments have identified a wide range of concerns arising from such ISDS proceedings;

RECOGNIZING that efforts are underway at domestic and international levels to craft effective solutions to address such concerns;

CONSIDERING that the development of such solutions may be a lengthy process and that there is uncertainty regarding the content, scope, implementation, and ultimate effectiveness of such solutions; and

CONSCIOUS of the challenges that may arise by requiring Contracting Parties to bilaterally renegotiate existing bilateral investment treaties and free trade agreements to implement reforms;

**WHEREAS:**

(1) Each Contracting Party has made, or may make, a notification pursuant to the terms of Article 9 [*Notifications*] listing certain bilateral investment treaties (BITs) and free trade agreements (FTAs) to which it is a party (each a “Covered Agreement”);

(2) Each Covered Agreement may contain notice periods or other conditions for amendment, modification, or termination of the agreement;

(3) Each Covered Agreement may provide that investor–State dispute settlement (ISDS) is available for a certain period after withdrawal or termination of the Covered Agreement (each such clause a “sunset clause”);

(4) Investor-State dispute settlement clauses exist in each Covered Agreement;

(5) The commitments to offer to arbitrate, or to arbitrate, are commitments between the Contracting Parties to each Covered Agreement, and do not create rights held by foreign investors;

(6) Due to concerns about the conduct of ISDS proceedings under BITs and FTAs, the Contracting Parties desire to address their concerns by formally terminating in their entirety certain Covered Agreements, amending to remove the investment chapter from certain Covered Agreements, amending to remove the ISDS provisions from certain Covered Agreements, amending to withdraw advance consent to ISDS with respect to certain Covered Agreements, or taking such actions in the future;

(7) Each Contracting Party has made, or may make, a notification pursuant to the terms of Article 1 [*Application of Termination of BIT Provisions, Amendment to Remove Investment Chapter from FTA Provisions, Amendment to Remove ISDS Provisions from BIT and FTA Provisions, or Amendment to Withdraw Advance Consent to ISDS from BIT and FTA Provisions*] designating each Covered Agreement as an Option A Agreement, Option B Agreement, Option C Agreement, or Option D Agreement;

(8) Investors from a Contracting Party that have initiated ISDS prior to the entry into force of this Agreement or its application to a Covered Agreement, and where the outcome of such ISDS proceeding is still pending, may have decided not to pursue a parallel action before the competent domestic court, either due to a provision in the BIT or FTA prohibiting such parallel action or for reasons of opportunity. As a result, domestic actions based on national law may now be time-barred. For reasons of equity, the Contracting Parties consider it appropriate to stipulate in their national legal orders that such investors may still bring actions in national courts, even where they would otherwise be time-barred but would not have been on the date the ISDS proceeding was initiated, within six months from the entry into force of the present Agreement, provided that they formally withdraw their ISDS claim by the time they bring such an action;

**RECOGNIZING** the need for an effective mechanism to amend or terminate, as appropriate, existing BITs and FTAs in a synchronized and efficient manner across the network of Covered Agreements without the need to separately renegotiate each such Covered Agreement;

**HAVE AGREED UPON THE FOLLOWING PROVISIONS:**

***Article 1***

*Application of Termination of BIT Provisions, Amendment to Remove Investment Chapter from FTA Provisions, Amendment to Remove ISDS Provisions from BIT and FTA Provisions, or Amendment to Withdraw Advance Consent to ISDS Provisions*

1. **Option A (Termination of BIT)** – Each Contracting Party may choose to apply all provisions of this Agreement other than Article 5 [*Amendment to Remove Investment Chapter from FTA*] and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*] to any of its Covered Agreements in a notification pursuant to Article 9 [*Notifications*]. For Contracting Parties selecting Option A for certain Covered Agreements (each an "Option A Agreement"), Article 4 [*Termination of BIT*] of this Agreement shall only apply between or among Contracting Parties with respect to their Option A Agreements. All other provisions of this Agreement shall apply between and among all Contracting Parties' Covered Agreements, as applicable.

2. **Option B (Amendment to Remove Investment Chapter from FTA)** – Each Contracting Party may choose to apply all provisions of this Agreement other than Article 4 [*Termination of BIT*] and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*] to any of its Covered Agreements in a notification pursuant to Article 9 [*Notifications*]. For Contracting Parties selecting Option B for certain Covered Agreements (each an "Option B Agreement"), Article 5 [*Amendment to Remove Investment Chapter from FTA*] of this Agreement shall only apply between or among Contracting Parties with respect to their Option B Agreements. All other provisions of this Agreement shall apply between and among all Contracting Parties with respect to their Covered Agreements, as applicable.

3. **Option C (Amendment to Remove ISDS Provisions from BIT and FTA)** – Each Contracting Party may choose to apply all provisions of this Agreement other than Article 4 [*Termination of BIT*] and Article 5 [*Amendment to Remove Investment Chapter from FTA*] to any or each of its Covered Agreements in a notification pursuant to Article 9 [*Notifications*]. For Contracting Parties selecting Option C for certain Covered Agreements (each an "Option C Agreement"), Article 4 [*Termination of BIT*] and Article 5 [*Amendment to Remove Investment Chapter from FTA*] shall not have any force or effect with respect to such Option C Agreements. All other provisions of this Agreement shall apply between and among all Contracting Parties with respect to their Covered Agreements, as applicable.

4. **Option D (Amendment to Withdraw Advance Consent to ISDS from BIT and FTA)** – Each Contracting Party may choose to apply all provisions of this Agreement other than Article 4 [*Termination of BIT*], Article 5 [*Amendment to Remove Investment Chapter from FTA*], and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*] to any or each of its Covered Agreements in a notification pursuant to Article 9 [*Notifications*]. For Contracting Parties selecting Option D for certain Covered Agreements (each an "Option D Agreement"), Article 4 [*Termination of BIT*], Article 5 [*Amendment to Remove Investment Chapter from FTA*], and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*] shall not have any force or effect with respect to such Option D Agreements. All other provisions of this Agreement shall apply between and among all Contracting Parties with respect to their Covered Agreements, as applicable.

**5.** Each Covered Agreement must be designated by the Contracting Party, through a notification pursuant to Article 9 [*Notifications*], as either an Option A Agreement, Option B Agreement, Option C Agreement, or Option D Agreement pursuant to Article [__] [*Entry into Force and Effectiveness*].

**6.** Each Contracting Party may at any time expand its selection of Covered Agreements, and shall designate each additional Covered Agreement as an Option A Agreement, Option B Agreement, Option C Agreement, or Option D Agreement, through a notification pursuant to Article 9 [*Notifications*].

**7.** With respect to Covered Agreements that have been designated as Option C Agreement, each Contracting Party may at any time change the designation of such Covered Agreement to an Option A Agreement or Option B Agreement through a notification pursuant to Article 9 [*Notifications*].

**8.** With respect to Covered Agreements that have been designated as Option D Agreement, each Contracting Party may at any time change the designation of such Covered Agreement to an Option A Agreement, Option B Agreement, or Option C Agreement through a notification pursuant to Article 9 [*Notifications*].

***Article 2***

*Waiver of Notice Periods or Other Conditions for Termination, Amendment, or Modification*

The Contracting Parties hereby waive each and every provision of each Covered Agreement requiring a notice period or other condition precedent to the effectiveness of a termination, amendment, or modification of each such BIT or FTA, other than conditions of mutual ratification, approval, or acceptance.

***Article 3***

*Amendment of Sunset Clause*

Each Covered Agreement is hereby amended to remove each and every sunset clause contained therein.[204]

***Article 4***

*Termination of BIT*

Each Option A Agreement is hereby terminated and has no further legal effect.

***Article 5***

*Amendment to Remove Investment Chapter from FTA*

Each Option B Agreement is hereby amended to remove the investment chapter and the ISDS provision contained therein in its entirety.

***Article 6***

*Amendment to Remove ISDS Provisions from BIT and FTA*

Each Option C Agreement is hereby amended to remove the ISDS provisions contained therein in their entirety.

*Article 7*

*Amendment to Withdraw Advance Consent to ISDS from BIT and FTA*

**1.** Each Option D Agreement is hereby amended to withdraw advance consent to ISDS contained therein.

**2.** For greater legal certainty, each Covered Agreement is hereby amended to withdraw each Contracting Party's advance consent to ISDS contained therein.

*Article 8*

*Grace Period for Bringing Actions before National Courts*

**1.** An investor whose ISDS proceeding is based on a Covered Agreement and was pending on the date of entry into force of this Agreement pursuant to Article [__] (or the addition of the relevant Covered Agreement pursuant to Article 2 and Article [__] hereof, whichever is later in time) may still bring an action in the competent national court, even where it would otherwise be time-barred but would not have been on the date the ISDS claim was initiated, within six months from the date of application of this Agreement in respect of the relevant Covered Agreement, provided that the investor withdraws its ISDS claim by the time it brings such an action.

**2.** Those actions brought in national court pursuant to Article 8(1) shall be limited to the subject matter covered by the ISDS proceedings.

**3.** Those actions shall be directed against the competent authorities of the responding Contracting Party.

*Article 9*

*Notifications*

**1.** All notifications made pursuant to this Agreement shall be made to the Depositary pursuant to the instructions contained in Article [__] [*Depositary*].

**2.** All notifications relating to a Covered Agreement or designating a BIT or FTA as such must include a description of the BIT or FTA, along with any amending or accompanying instruments thereto; each identified by title, names of the parties, date of signature, and, if applicable at the time of the notification, date of entry into force.

**3.** If notifications are made at the time of signature, they shall be confirmed upon deposit of the instrument of ratification, acceptance, or approval, unless the document containing the notifications explicitly states that it is to be considered definitive.

**4.** If notifications are not made at the time of signature, a provisional list of expected notifications may be provided at that time.

*Article [__]*

*Interpretation and Implementation*

*Article [__]*

*Amendments*

***Article [__]***

*Signature and Ratification, Acceptance, or Approval*

**1.** As of [________________], this Agreement shall be open for signature by all signatories.

**2.** This Agreement is subject to ratification, acceptance, or approval.

**3.** The term "Contracting Party" means a signatory for which this Agreement is in force pursuant to Article [__] [*Entry into Force and Effectiveness*].

**4.** The term "Signatory" means a State that has signed this Agreement but for which the Agreement is not yet in force.

***Article [__]***

*Entry into Force and Effectiveness*

**1.** This Agreement shall enter into force on the date when instruments of ratification, acceptance, or approval have been deposited by two Signatories. The instruments of ratification, acceptance, or approval shall be deposited with the Depositary.

**2.** For each Signatory that thereafter deposits its instrument of ratification, acceptance, or approval, this Agreement shall apply from the day following the date of deposit.

**3.** The entry into force and application of this Agreement to any Contracting Party does not require the designation of any Covered Agreement.

**4.** The provisions of this Agreement shall have effect with respect to each Contracting Party with respect to a Covered Agreement from the latest of dates on which this Agreement enters into force for each of the Contracting Parties to the Covered Agreement, if so designated.

**5.** For a new Covered Agreement resulting from notification pursuant under Article 1(6), a redesignation of an Option C Agreement to an Option A Agreement or Option B Agreement pursuant to Article 1(7), or a redesignation of an Option D Agreement to an Option A Agreement, Option B Agreement, or Option C Agreement pursuant to Article 1(8), the provisions of this Agreement shall take effect for each Contracting Party with respect to a Covered Agreement one month from the date the Depositary receives the notification required pursuant to the respective article.

**6.** Without prejudice to the effectiveness of each other provision of this Agreement (other than Article 5 [*Amendment to Remove Investment Chapter from FTA*] and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*], which have no force or effect for such agreements), for each Option A Agreement, Article 2 [*Waiver of Notice Periods or Other Conditions for Termination, Amendment, or Modification*] shall be deemed to have entered into force immediately prior to Article 3 [*Amendment of Sunset Clause*], which shall be deemed to have entered into force immediately prior to Article 7 [*Amendment to Withdraw Advance Consent to ISDS from BIT and FTA*], which shall be deemed to have entered into force immediately prior to Article 4 [*Termination of BIT*].

**7.** Without prejudice to the effectiveness of each other provision of this Agreement (other than Article 4 [*Termination of BIT*] and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*], which have no force or effect for such agreements), for each Option B Agreement, Article 2 [*Waiver of Notice Periods or Other Conditions for Termination, Amendment, or Modification*] shall be deemed to have entered into force immediately prior to Article 3 [*Amendment of Sunset Clause*], which shall be deemed to have entered into force immediately prior to Article 7 [*Amendment to Withdraw Advance Consent to ISDS from BIT and FTA*], which shall be deemed to have entered into force immediately prior to Article 5 [*Amendment to Remove the Investment Chapter from FTA*].

**8.** Without prejudice to the effectiveness of each other provision of this Agreement (other than Article 4 [*Termination of BIT*] and Article 5 [*Amendment to Remove the Investment Chapter from FTA*], which have no force or effect for such agreements), for each Option C Agreement, while all provisions shall be simultaneously effective, Article 2 [*Waiver of Notice Periods or Other Conditions for Termination, Amendment, or Modification*] shall be deemed to have entered into force immediately prior to Article 3 [*Amendment of Sunset Clause*], which shall be deemed to have entered into force immediately prior to Article 7 [*Amendment to Withdraw Advance Consent to ISDS from BIT and FTA*], which shall be deemed to have entered into force immediately prior to Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*].

**9.** Without prejudice to the effectiveness of each other provision of this Agreement (other than Article 4 [*Termination of BIT*], Article 5 [*Amendment to Remove the Investment Chapter from FTA*], and Article 6 [*Amendment to Remove ISDS Provisions from BIT and FTA*], which have no force or effect for such agreements), for each Option D Agreement, while all provisions shall be simultaneously effective, Article 2 [*Waiver of Notice Periods or Other Conditions for Termination, Amendment, or Modification*] shall be deemed to have entered into force immediately prior to Article 3 [*Amendment of Sunset Clause*], which shall be deemed to have entered into force immediately prior to Article 7 [*Amendment to Withdraw Advance Consent to ISDS from BIT and FTA*].

***Article [__]***

*Depositary*

**1.** [____________________] shall be the Depositary of this Agreement.

**2.** The Depositary shall notify the Contracting Parties and Signatories within [*one calendar month*] of:

a. Any signature pursuant to Article [__] [*Signature and Ratification, Acceptance, or Approval*];

b. The deposit of any instrument of ratification, acceptance, or approval pursuant to Article [__] [*Signature and Ratification, Acceptance, or Approval*];

c. Any notifications pursuant to Article 9 [*Notifications*];

d. Any proposed amendment to this Agreement pursuant to Article [__] [*Amendments*];

e. Any other communication related to this Agreement.

**3.** The Depositary shall maintain publicly available lists of:

a. Covered Agreements (including designations of Option A Agreement, Option B Agreement, Option C Agreement, or Option D Agreement); and

b. Notifications made by the Contracting Parties.

In witness whereof the undersigned, being duly authorized thereto, have signed this Agreement.

# Endnotes

1 Martin Dietrich Brauch, Elena Klonsky, Fanny Marie Everard, and Qiaozi Guanglin, with Tyler Alviano, Justin Cuddihey, and Mary Wang, *An International Law Framework for Climate-Aligned Investment Governance* (CCSI Working Paper, New York: Columbia Center on Sustainable Investment (CCSI), 2024), at p 9, https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-international-law-framework-climate-aligned-investment-governance.pdf.

2 Ladan Mehranvar, with Jessica Hennings, Robin Marie Kelly, Lena Raxter and Ana Toimil, *How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders* (CCSI, January 2024), https://ccsi.columbia.edu/sites/default/files/content/docs/ccsi-access-to-justice.pdf; Lorenzo Cotula and Nicolás Perrone, "Reforming Investor-State Dispute Settlement: What About Third-Party Rights?" (International Institute for Environment and Development (IIED), February 2019), at p 2, http://pubs.iied.org/17638IIED; Nicolás Perrone, "The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?" 7(3) *Transnational Legal Theory* (2016), 383.

3 Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law* (CCSI, April 2018), ("*Clearing the Path*"), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf; "Termination of International Investment Agreements and Withdrawal of Consent to Arbitrate," *CCSI* (n.d.), https://ccsi.columbia.edu/content/termination-international-investment-agreements-and-withdrawal-consent-arbitrate; "Overhauling Investment Governance for a Just Zero-Carbon Future," CCSI (n.d.), https://ccsi.columbia.edu/content/investment-governance-climate-energy; Daniel Rangel, Lori Wallach, Ladan Mehranvar, Alvaro Santos, and Mario Osorio, *Turning the Tide: How to Harness the Americas Partnership for Economic Prosperity to Deliver an ISDS-Free Americas* (Washington, D.C.: Center for the Advancement of the Rule of Law in the Americas and CCSI, October 2023), ("*Turning the Tide*"), https://ccsi.columbia.edu/sites/default/files/content/docs/CCSI-americas-partnership-economic-prosperity.pdf.

4 United Nations Trade & Development (UNCTAD), "Chapter II: Investment Policy Trends," in *World Investment Report* (New York: UNCTAD, June 2024), at p 22, https://unctad.org/system/files/official-document/wir2024_en.pdf.

5 "Working Group III: Investor-State Dispute Settlement Reform," UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state.

6 "The Future of Investment Treaties," OECD, https://www.oecd.org/investment/investment-policy/investment-treaties.htm.

7 Karl P. Sauvant and Lisa E. Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York: Oxford University Press, 2009); Lauge N. Skovgaard Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence" in *Yearbook on International Investment Law and Policy 2009/2010* (New York: Oxford University Press, 2010), 539; Josef C. Brada, Zdenek Drabek, and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis," 35(1) *Journal of Economic Surveys* (February 2021), 34 at pp 42-45, 58-59; 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 1, Paris: OECD, 2018), at pp 14-36, 37-39, https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en.

8 *Clearing the Path*, *supra* note 3, at p 2.

9 The strategies presented in this Section have been adapted and modified from two previous reports in which CCSI has authored (*Clearing the Path*) and co-authored (*Turning the Tide*), *supra* note 3.

10 *See* United Nations, *Vienna Convention on the Law of Treaties*, UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679, May 23, 1969, at Articles 39-41, 54, 70 ("VCLT"), https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

11 Brooke Güven and Lise Johnson, "Draft Treaty Language: Withdrawal of Consent to Arbitrate and Termination of International Investment Agreements," (submission to UNCITRAL Working Group III on ISDS Reform, New York: CCSI, IIED, International Institute for Sustainable Development (IISD), July 15, 2019), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/UNCITRAL-submission-Withdrawal-of-Consent-and-Termination.pdf.

12 Lise Johnson, Lisa Sachs, and Nathan Lobel, "Aligning International Investment Agreements with the Sustainable Development Goals," 58(1) *Columbia Journal of Transnational Law* (November 2019), 58.

13 *VCLT*, at Article 54, states:

> The termination of a treaty or the withdrawal of a party may take place:
>
> (a) in conformity with the provisions of the treaty; or
>
> (b) at any time by consent of all the parties after consultation with the other contracting States.

14 Nathalie Bernasconi-Osterwalder, Sarah Brewin, with Martin Dietrich Brauch and Suzy Nikièma, *Terminating a Bilateral Investment Treaty: IISD Best Practices Series* (Winnipeg: IISD, March 2020), https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf.

15 As an example, in the Dominican Republic–Panama BIT (2003), Article XIII provides:

> 1. […]
>
> 2. [This Agreement] will remain in force for an initial period of ten (10) years and will be automatically renewed for periods of equal duration, unless the Agreement has been terminated.
>
> 3. After ten (10) years, each Contracting Party may terminate this Agreement by means of prior written notification, made at least six (6) months prior to its termination. In the event of denunciation, the provisions of Article 1 to Article XII of this Agreement will continue to apply to investments made before the date of denunciation, for an additional period of ten (10) years.

16 *Supra* note 14, at pp 2-3. As an example, in the U.S.–Uruguay BIT (2005), Article 22 provides:

1. This Treaty shall enter into force thirty days after the date of exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

17 For example, in the Barbados–Canada BIT (1996), Article XVIII provides:

1. […]

2. This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVII inclusive of this Agreement shall remain in force for a period of fifteen years.

18 *VCLT*, at Article 54.

19 Tania Voon and Andrew D. Mitchell, "Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law," 31(2) *ICSID Review-Foreign Investment Law Journal* (February 2016), 413.

20 African Union, *Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment* (January 2023), at Article 49(1), https://www.bilaterals.org/IMG/pdf/en_-_draft_protocol_of_the_afcfta_on_investment.pdf.

21 *Clearing the Path*, *supra* note 3, at p 10.

22 *VCLT*, at Article 70(1).

23 Catherine Titi, "Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law," 33(5) *Journal of International Arbitration* (2016), 425 at p 437.

24 Christina Binder, "A Treaty Law Perspective on Intra-EU BITs," 17(6) *The Journal of World Investment & Trade* (November 2016), 964.

25 *Supra* note 14.

26 Luke Eric Peterson, "Czech Republic Terminates Investment Treaties in Such A Way As To Cast Doubt On Residual Legal Protection For Existing Investments," *IAreporter* (February 1, 2011), https://www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/.

27 It remains debatable whether there is any significant distinction between the two approaches. *See* Luke Eric Peterson, "Czech Republic Terminates Investment Treaties in Such a Way As To Cast Doubt on Residual Legal Protection for Existing Investments," *IAReporter* (February 1, 2011), https://www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/; Valerio Letizia, "The EU Termination Agreement and Sunset Clauses: No 'Survivors' on the (Intra-EU) Battlefield?" *Kluwer Arbitration Blog* (June 22, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/22/the-eu-termination-agreement-and-sunset-clauses-no-survivors-on-the-intra-eu-battlefield/.

28 *VCLT*, at Article 70(1). Indeed, States also have the option to shorten or amend the sunset clause when terminating the relevant BIT.

29 August Reinisch and Sara Mansour Fallah, "Post-Termination Responsibility of States?—The Impact of Amendment/ Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors," 37(1-2) *ICSID Review - Foreign Investment Law Journal* (Winter/Spring 2022), 101, at pp 101-113, https://doi.org/10.1093/icsidreview/siab023.

30 *VCLT*, at Article 54, offers the parties a choice either to follow the pre-agreed method of termination (as provided by the termination clause in the BIT) or reach a subsequent agreement. The wording of this provision does not suggest that if a BIT contains provisions regarding its termination, subsequent mutual termination would be prohibited.

31 *Supra* note 29; *VCLT*, at Article 54.

32 Tania Voon, Andrew D. Mitchell, and James Munro, "Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights," 29(2) *ICSID Review - Foreign Investment Law Journal* (April 2014), 451.

33 Thomas Giegerich, "Article 62," in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2018), 1143, at p 1145 ("*Giegerich*"); *VCLT*, at Article 26.

34 Hugh Thirlway, *Sources of International Law* (Oxford: Oxford University Press, 2014), at p 32; *Giegerich, ibid*.

35 Normann Witzleb, "Pacta sunt servanda – a maxim and its exceptions in comparative perspective" in Normann Witzleb (ed), *Contract Law in Changing Times: Asian Perspectives on Pacta Sunt Servanda* (London: Routledge, 2022), 245.

36 *VCLT*, at Article 62(1); Noble Po-kan Lo, "Treaties and pacta sunt servanda: A shared concept for the PRC?" in Normann Witzleb (ed), *Contract Law in Changing Times Asian Perspectives on Pacta Sunt Servanda* (London: Routledge, 2022), 210 at p 212.

37 *Supra* note 35.

38 Anthony Aust, "Treaties, Termination," *Oxford International Public Law* (June 2006), ("*Aust*"), https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1491.

39 *Giegerich*, *supra* note 33, at pp 1145-1146.

40 *VCLT*, at Article 62(1).

41 *Ibid*. *See also* Helionor de Anzizu and Nikki Reisch, *Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims* (Geneva: Center for International Environmental Law (CIEL), 2024), at pp 8-10 for more detail, ("*CIEL Toolkit*"), https://www.ciel.org/wp-content/uploads/2024/01/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf.

42 *Giegerich*, *supra* note 33, at pp 1145-1146.

43 Malgosia Fitzmauric and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Cambridge: Cambridge University Press, 2005), at p 178; Tibisay Morgandi and Lorand Bartels, "Exiting the Energy Charter Treaty under the law of treaties," 34(1) *King's Law Journal* (2023), 145, at p 160 ("*Morgandi and Bartels*").

44 *Morgandi and Bartels, ibid*; *CIEL Toolkit*, *supra* note 41, at pp 9-11.

45 M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2015), at pp 136-190 ("*Sornarajah*"). See also Jan Paulsson, "Arbitration Without Privity," 10(2) *ICSID Review* (1995), 232.

46 *SAIPEM SpA v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ARB/05/07 (2007), at para 110; *Sornarajah, ibid*, at p 164; *White Industries Australia Limited v. India*, Award, UNCITRAL Case No. UN 1169 (November 30, 2011), at paras 7.6.2-7.6.3, 7.6.8., 7.6.10 ("*White Industries*"); *ATA Construction, Industrial and Trading Company v. Jordan*, Award, ICSID Case No. ARB/08/2 (2008), at para 117.

47 *Salini Construttori SPA and ITALSTRADE SPA v. Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4 (2001), at para 52; *Sornarajah*, *supra* note 45, at pp 152-153; Chester Brown, *Evolution in Investment Treaty Law and Arbitration* (Cambridge, UK: Cambridge University Press, 2011), at pp 587, 592-594; *Ceskoslovenska Obchodni Banka, AS v. Slovak Republic*, ICSID Case No. ARB/97/4 (1999), at para 64; *Malaysian Historical Salvors SDN, BHD v. Malaysia*, Award on Jurisdiction, ICSID Case No. ARB/05/10 (2007), at para 68.

48 *Sornarajah*, *supra* note 45, at pp 177, 181; *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, ICSID Case No. ARB/02/18 (April 29, 2004), at paras 21, 28; *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, Dissenting Opinion, ICSID Case No. ARB/02/18 (April 29, 2004), at paras 1, 19, 30; *Aguas del Tunari, SA v. Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3 (October 21, 2005), at para 330; *Mobil Corporation v. Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/07/27 (June 10, 2010), at paras 203–205.

49 George Kahale, III, "Damages in ISDS: Just Compensation or Highway Robbery?" *CCSI Webinar* (November 2, 2020), https://d20qsj1r5k97qe.cloudfront.net/news-attachments/George-Kahale-DAMAGES-IN-ISDS-Nov-2-2020.pdf; Martins Paparinskis, "A Case Against Crippling Compensation in International Law of State Responsibility," 83(6) *Modern Law Review* (2020), 1247; Jonathan Bonnitcha and Sarah Brewin, *Compensation Under Investment Treaties: What are the problems and what can be done?* (Winnipeg: IISD, 2020); Thomas W. Wälde and Borzu Sabahi, "Compensation, Damages, and Valuation," in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), 1049, at pp 1074-1077.

50 *See CIEL Toolkit, supra* note 41, at pp 8-10 and fn 54; and *Morgandi and Bartels*, *supra* note 43.

51 *VCLT*, at Articles 39-40.

52 *Agreement between the United States of America, the United Mexican States, and Canada* (USMCA), (July 1, 2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

53 *VCLT*, at Article 41.

54 Clémentine Baldon and Nikos Braoudakis, "Summary Analysis: Arguments Relating to the Desirability and Feasibility of a Coordinated EU Withdrawal from the ECT and Neutralisation of the Sunset Clause," *Veblen Institute for Economic Reforms* (December 2022), https://www.veblen-institute.org/IMG/pdf/veblen_summary_note_arguments_re__ect_sunset_clause_13122022.pdf. *See also,* Lukas Schaugg and Suzy H. Nikièma, "Model Inter Se Agreement to Neutralize the Survival Clause of the Energy Charter Treaty Between the EU and Other non-EU Contracting Parties," *IISD Brief* (August 2024), https://www.iisd.org/system/files/2024-07/energy-charter-treaty-survival-clause.pdf.

55 For example, the following FTAs contain sunset clauses: Pacific Alliance, Additional Protocol to the Framework Agreement of the Pacific Alliance (2012), at Article 19.6; Mexico–Panama FTA (2014), at Article 20.6; and CARICOM–Dominican Republic FTA (1998), at Article XVIII and the Agreement on the Reciprocal Promotion and Protection of Investments (Annex III).

56 Matthew Porterfield, "Aron Broches and the Withdrawal of Unilateral Offers of Consent to Investor-State Arbitration," *Investment Treaty News*, IISD (August 11, 2014), https://www.iisd.org/itn/en/2014/08/11/aron-broches-and-the-withdrawal-of-unilateral-offers-of-consent-to-investor-state-arbitration/.

57 Laurence Boisson De Chazournes, "Consent in Investment Arbitration: A Few Remarks," *Kluwer Arbitration Blog* (January 13, 2023), https://arbitrationblog.kluwerarbitration.com/2023/01/13/consent-in-investment-arbitration-a-few-remarks/.

58 *ABCI Investments Limited v. Tunisia*, Decision on Jurisdiction, ICSID Case No. ARB/04/12 (February 18, 2011), at paras 93-99; and *supra* note 56.

59 *AES v. Kazakhstan*, Award, ICSID Case No. ARB/10/16 (November 1, 2013), at paras 214-215.

60 *See* discussion in Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority," 55(1) *Harvard Journal of International Law* (Winter 2014), at pp 25-26; *see also* Nathalie Bernasconi-Osterwalder, *State–State Dispute Settlement in Investment Treaties: IISD Best Practices Series* (Winnipeg: IISD, October 2014), https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

61 *See*, e.g., Dominican Republic-Central America FTA (CAFTA-DR), at Article 10.4. Even for those treaties that provide a more open-ended language, the importation of procedural rights through the MFN clause is controversial. *See* Suzy H. Nikièma, *The Most-Favoured-Nation Clause in Investment Treaties: IISD Best Practices Series* (Winnipeg: IISD, February 2017), at pp 13-17, https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-en.pdf.

62 *Comprehensive Economic and Trade Agreement between Canada and the EU and its Member States*, L11/23 (January 14, 2017), at Article 8.7(4), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01).

63 Some treaties, however, appear to prevent investors from challenging withdrawals of consent. In Section B of the investment chapter (Chapter 11) of NAFTA, for instance, the Contracting parties provide their consent to arbitration. Section B, which is the section that provides for ISDS, further specifies that covered investors are only able to bring ISDS claims for breaches of Section A (setting forth Chapter 11's substantive obligations). Thus, NAFTA did not seem to allow investor claims relating to consent or other obligations set forth in Section B.

64 VCLT, at Article 44.

65 VCLT, at Article 44(1).

66 *Aust*, *supra* note 38. Article 60 of the VCLT deals with the termination or suspension of a treaty as a consequence of its breach. If a Contracting party violates a treaty provision essential to achieving its object or purpose, such a breach is considered material. In this situation, the other Contracting party or parties may invoke the breach to suspend or terminate the treaty, either in whole or in part, and may do so either in their relations with the defaulting party or among all the Contracting parties. See Bruno Simma and Christian J. Tams, "Reacting against Treaty Breaches," in Duncan B. Hollis (ed), *The Oxford Guide to Treaties*, 2nd ed., (Oxford: Oxford University Press, 2020), 568. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1224&context=book_chapters.

67 *VCLT*, at Article 44(3).

68 *Aust*, *supra* note 38.

69 *VCLT*, at Articles 39-41.

70 While some treaties, such as certain human rights treaties, may not permit a right of withdrawal, IIAs do not appear to be of such a type. *See* discussion in Laurence R. Helfer, "Terminating Treaties," in Duncan Hollis (ed), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2013), 634 at pp 637-640 ("*Helfer*").

71 For more on unilateral denunciation and withdrawal, *see Helfer, ibid.*

72 *VCLT*, at Articles 30, 40, 41.

73 *Ibid*.

74 There are no developed States that include ISDS provisions or advance consent to ISDS in their investment laws (except for Lithuania). It is important to note that maintaining an accurate and up to date database on national laws is difficult since they may be amended, replaced, or repealed by governments without transmitting that information to organizations, such as UNCTAD, for the purposes of updating their database. Also, because the mapping exercise for such databases may not be accurate, there is the possibility that some national laws that include ISDS provisions or provide advance consent to ISDS may not be captured. For instance, Honduras' national investment law, *Decree 51-2011 Law for the promotion and protection of investments*, is included in the UNCTAD database, but even though it provides advance consent to ISDS, it is not mapped as such and therefore appears not to include such consent. Therefore, this data is approximate at best.

75 Tarald Laudal Berge and Taylor St John, "Asymmetric diffusion: World Bank 'best practice' and the spread of arbitration in national investment laws," 28(3) *Review of International Political Economy* (2021), 584.

76 The World Bank, *The ICSID Caseload – Statistics, Issue 2024–1* (Washington D.C.: ICSID, 2024), at pp 7-8, https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf

77 *See* Ed Poulton, Yarik Kryvoi, Ekaterina Finkel, and Janek Bednarz, "Empirical Study: Corporate Restructuring and Investment Treaty Protections," (London: BIICL/Baker McKenzie, 2020), https://www.biicl.org/documents/89_isds-corporate-restructuring.pdf.

78 H. Suzy Nikièma and Nyaguthii Maina, *The Risk of ISDS Claims Through National Investment Laws: Another "Damocles sword" hanging over governments' COVID-19 related measures?* (Winnipeg: IISD Policy Brief, September 2020), at p 4, https://www.iisd.org/system/files/2020-09/isds-claims-investment-laws-en.pdf.

79 *Ibid*, at pp 4–5.

80 *Ibid*, at p 6.

81 *Ibid*, at p 7.

82 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (2022), at Article 25(1), (*ICSID Convention*), https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf.

83 "Model Clauses Relating to the Convention on the Settlement of Investment Disputes Designed for Use in Bilateral Investment Agreements," 8(6) *International Legal Materials* (November 1969), at p 1343.

84 For instance, Bolivian President Evo Morales said that "[We] emphatically reject the legal, media and diplomatic pressure of some multinationals that […] resist the sovereign rulings of countries, making threats and initiating suits in international arbitration." *See* "Bolivia, Venezuela and Nicaragua withdraw together from the ICSID," *CADTM* (May 2, 2007), http://www.cadtm.org/Bolivia-Venezuela-and-Nicaragua. For its part, Ecuador also cited that the ICSID Convention–similar to BITs that provide consent to ISDS–is in violation of Article 422 of their new Constitution, which forbids the State to cede its sovereign jurisdiction to international arbitration; *see* Luke Eric Peterson, "Ecuador Becomes Second State to Exit ICSID; Approximately

Two-Thirds of Ecuador's BIT Claims were ICSID-Based," *IAReporter* (July 17, 2019), https://www.iareporter.com/articles/ecuador-becomes-second-state-to-exit-icsid-approximately-two-thirds-of-ecuadors-bit-claims-were-icsid-based/. *See also* Luke Eric Peterson, "Venezuelan Exit From ICSID Raises Questions Both Legal And Financial," *IAreporter* (January 31, 2012), https://www.iareporter.com/articles/venezuelan-exit-from-icsid-raises-questions-both-legal-and-financial/; and "Honduras threatens ICSID withdrawal over $11 billion 'neo-colonial' special economic zone claim," *Brettonwoods Project* (July 19, 2023), https://www.brettonwoodsproject.org/2023/07/honduras-threatens-icsid-withdrawal-over-11-billion-neo-colonial-special-economic-zone-claim/#:~:text=over%20an%20%2411%20billion%20claim,zone%20(SEZ)%20in%202021.

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88 *ICSID Convention*, at Article 71.

89 In accordance with Article 73 of the ICSID Convention, the World Bank "shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention."

90 *ICSID Convention*, at Article 75.

91 This includes the State's participation in the Administrative Council (Articles 4–7), the right to nominate individuals to the Panels of Conciliators and Arbitrators (Article 14), the duty to contribute to the Centre's costs (Article 17), the provisions concerning the Centre's immunities and privileges (Articles 18–24), the obligations regarding the recognition and enforcement of awards (Article 54), the right to refer any dispute concerning the interpretation and application of the Convention to the International Court of Justice (Article 64), and the right to propose amendments to the Convention (Article 65).

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100 *ICSID Convention*, at Article 54.

101 *Compliance with and Enforcement of ICSID Awards* (ICSID Background Paper, June 2024), at pp 1-2, https://icsid.worldbank.org/sites/default/files/publications/Enforcement_Paper.pdf.

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II. Every foreign investment shall submit to Bolivian jurisdiction, laws and authorities, and no one may cite an exceptional situation, nor appeal to diplomatic claims to obtain a more favorable treatment.

120 Article 366, Bolivian Constitution (2009) states:

> Every foreign enterprise that carries out activities in the chain of production of hydrocarbons in name and representation of the State shall submit to the sovereignty of the State, and to the laws and authority of the State. No foreign court case or foreign jurisdiction shall be recognized, and they may not invoke any exceptional situation for international arbitration, nor appeal to diplomatic claims.

Article 367, Bolivian Constitution (2009) states:

> The exploitation, consumption and sale of hydrocarbons and its derivatives must be subjected to a policy of development that guarantees internal consumption. The exportation of the excess production shall incorporate the greatest quantity of value added possible.

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198 *The Loewen Group, Inc. and Raymond L. Loewen v. USA*, ICSID Case No. ARB(AF)/98/3 (1998). *Loewen* was the first ISDS case against the U.S., initiated by a Canadian funeral business under NAFTA after a final ruling against it by the Mississippi Supreme Court. The company challenged the Mississippi jury verdict and State civil procedure rules as violations of national treatment, fair and equitable treatment, and expropriation rules. Although the tribunal "criticized the Mississippi proceedings in the strongest terms," it dismissed Loewen's claim on procedural grounds after Loewen had reorganized the company under U.S. bankruptcy laws. As a U.S. company, it no longer qualified as a "foreign investor," resulting in a lack of jurisdiction for the tribunal. *See Loewen*, Award (June 26, 2003), at paras 240-242.

199 One of the arbitrators in *Loewen*, former U.S. judge and congressman Abnver Mikva, said after the case that he recognized that if the tribunal had ruled against the United States it could derail ISDS and NAFTA, and thus he pushed for the procedural dismissal. *See* Chris Hamby, "How a Mississippi Funeral Home Showdown Freaked Out the White House," *BuzzFeed News* (September 1, 2016), https://www.buzzfeednews.com/article/chrishamby/homegrown-disaster; Dirk Pulkowski, "The Final Award in *Loewen v. United States*," in Guillermo Aguilar Alvarez and W. Michael Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (Brill Nijhoff, June 2008), 291.

200 Malcolm Langford and Daniel Behn, "Managing Backlash: The Evolving Investment Treaty Arbitrator?" 29(2) *The European Journal of International Law* (2018), 551 at p 555.

201 Congressional Research Service, "U.S.-Mexico-Canada (USMCA) Trade Agreement," *In Focus* (January 11, 2023), https://crsreports.congress.gov/product/pdf/IF/IF10997.

202 *USMCA*, Chapter 14, Annex 14-C - Legacy Investment Claims and Pending Claims, at para 6, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.

203 The text of this Draft Agreement has been adapted from an earlier version, authored by CCSI's Brooke Güven and Lise Johnson, *supra* note 10.

204 For various reasons (such as political acceptance of termination or amendment of BITs and FTAs), Contracting Parties may wish to retain rights conferred on covered investors under the sunset clauses in their BITs and FTAs (or a subset of them) and thus may not desire to terminate the sunset clause immediately. Parties may alternatively wish to retain but significantly shorten the sunset clause, or may wish to terminate or shorten the sunset clause of some but not all of its Covered Agreements. If so, Article 3 should be removed or altered to indicate the desired amendment to the sunset clause, which of its Covered Agreements it wishes to terminate or amend the sunset clause, and, if relevant, related elements of the treaty language altered throughout.

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**Columbia Center on Sustainable Investment**

Jerome Greene Hall 435 West 116th Street New York, NY 10027

Phone: +1 (212) 854-1830

**ccsi.columbia.edu**