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POLICY PROFILE 5.10

ENDING INVESTOR-STATE DISPUTE SETTLEMENT MECHANISMS

A contribution to the Roadmap for Eradicating Poverty Beyond Growth

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The Roadmap for Eradicating Poverty Beyond Growth and additional policy profiles are available at neep-poverty.org

This proposal aims to prevent foreign corporations from bypassing domestic courts and challenging regulations pursuing public interest objectives that threaten corporate profitability. Embedded in thousands of trade and investment treaties, investor-State dispute settlement (ISDS) mechanisms allow foreign investors to sue States before international arbitration tribunals for policies that may reduce their investment profits – in some cases, even when such national policies are non-discriminatory and enacted in the public interest. The UN Special Rapporteur on the human right to a clean, healthy and sustainable environment warned in his 2023 report to the UN General Assembly that foreign investors "use the dispute settlement process to seek exorbitant compensation from States that strengthen environmental protection," with fossil fuel and mining corporations alone already having secured over US$100 billion in awards. The resulting regulatory chill constrains States, particularly in the Global South, from pursuing ambitious climate policies, phasing out fossil fuels, or fighting poverty. In response, the Roadmap proposes an end to ISDS and encourages the withdrawal of Global South nations from this asymmetrically designed mechanism. Several countries, including South Africa, India, Indonesia, Ecuador, and Bolivia, have already terminated or lapsed most or all of their investment treaties containing ISDS provisions after concluding that these arrangements did not align with their national interests. As this Roadmap was being finalised, 220 prominent economists and legal scholars wrote a letter to the Colombian government, emphasising this proposal, and urging withdrawal from ISDS. These instances provide openings that should engender collective action by other Member States.

These proposals share a common objective: to give agency to Global South governments to take action and pursue independent development strategies oriented toward human needs rather than external demand, and to transform the background conditions in which sovereignty can be exercised. These proposals recognise that redistribution within national boundaries will require removing the external strings that are obstacles to the transformative domestic agendas driven by local movements.

1. POLICY GOAL

This policy seeks to end **investor-State dispute settlement (ISDS)**—a mechanism embedded in over 2,600 bilateral investment treaties (BITs) and investment chapters of free trade agreements (FTAs) (together, "investment treaties") that allows foreign companies to sue sovereign States before private international arbitration tribunals, bypassing domestic legal systems entirely, whenever they claim that a State measure has allegedly harmed their profits.[1] The goal is to remove ISDS from investment treaties and to restore States' full right to regulate in the public interest, without the threat of multi-million-(or billion-)dollar liability adjudicated by private arbitral tribunals that operate without democratic mandate or meaningful appellate oversight.

The structural problem runs deeper than any design flaw amenable to reform. Investment treaties emerged in the post-war period as capital-exporting States, predominantly from the Global North, sought to entrench the privileged position of their investors in the territories of host States, predominantly from the Global South.[2] These instruments grant foreign investors protections that go beyond the property rights protections in most advanced domestic legal systems: compensation not merely for outright expropriation but for any government measure allegedly reducing the profitability of an investment, including speculative future lost profits;[3] shareholder claims for reflective loss;[4] the right to invoke deliberately vague standards—"fair and equitable treatment," "legitimate expectations," "indirect expropriation"—that arbitrators have interpreted ever more expansively to encompass regulatory decisions by elected parliaments and constitutional courts on climate, health, and labour policy;[5] and the right to have disputes adjudicated by ad hoc tribunals of three privately appointed arbitrators, with no permanent bench, no binding appeal mechanism, and no democratic mandate.

As of the end of 2025, known ISDS cases numbered over 1,460, with 18 publicly known awards exceeding US$1 billion.[6] In *Tethyan Copper v. Pakistan*, a tribunal awarded US$6 billion for a mining project that had never been operational, holding Pakistan liable for the full value of speculative profits never earned.[7] In 2023, UN Special Rapporteur David Boyd called ISDS "a

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[1] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2022, UNCTAD/WIR/2022. As of 31 December 2025, known ISDS cases numbered over 1,460.

[2] Nicolas M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford: Oxford University Press, 2021).

[3] Ladan Mehranvar and Lisa Sachs, "The Role and Relevance of Investment Treaties in Promoting Renewable Energy Investments," in Anja Ipp and Annette Magnusson (eds) *Investment Arbitration and Climate Change* (Kluwer Law International, 2023); Martins Paparinskis, "Crippling Compensation in the International Law Commission and Investor–State Arbitration," 37(1-2) I*CSID Review – Foreign Investment Law Journal* (2022) 289.

[4] David Gaukrodger, "Investment treaties and shareholder claims for reflective loss: Insights from advanced systems of corporate law," OECD Working Paper No. 2014/02 (2014).

[5] See, e.g., *Glamis Gold Ltd. v. United State*s, Award (UNCITRAL 2009); *Bilcon of Delaware et al. v. Canada*, Award on Damages (PCA 2019); *Vattenfall AB and others v. Germany*, Award (ICSID ARB/12/12, 2021).

[6] United Nations Conference on Trade and Development (UNCTAD), Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

[7] *Tethyan Copper Company Pty Ltd. v. Pakistan*, ICSID Case No. ARB(AF)/12/1, Award (2019). The US$6 billion award included US$4 billion in lost profits from a project that had never commenced operations.

major obstacle to the urgent actions needed to address the planetary environmental and human rights crises," noting that fossil fuel and mining industries alone had secured over US$82.8 billion in ISDS awards at the time of his report.[8]

Beyond direct financial burdens, ISDS exerts a pervasive **chilling effect**: governments have delayed, weakened, or abandoned legitimate public-interest regulation not because it was unlawful, but because the fiscal cost and legal uncertainty of arbitration made it politically untenable. France softened a proposed law banning fossil fuel exploration after an oil company threatened to sue.[9] New Zealand delayed tobacco plain-packaging legislation for years pending the outcome of Philip Morris's challenge against Australia.[10] Guatemala, Indonesia, Ghana, and Costa Rica each reversed or weakened environmental regulations on resource extraction projects following explicit investor threats.[11] This is not a mechanism that protects development; it is one that disciplines democratic governance in the interests of transnational capital.

This policy does not leave investors without recourse. ISDS is not the foundation of investor protection or the only enforcement mechanism upholding such protections; it is a privileged parallel track layered on top of the ordinary legal mechanisms that already govern cross-border economic activity. Ending it returns foreign investors to the same robust avenues available to domestic investors, workers, and communities—avenues that can and should be further strengthened. **First**, domestic remedies: national courts, administrative review, and commercial arbitration apply domestic law under judicial oversight and democratic accountability and must always be the primary forum. **Second**, political risk insurance (PRI), national export credit agencies, private insurers, and comparable institutions, offers investors direct financial protection against non-commercial risks, including expropriation and breach of contract, without creating a mechanism that overrides domestic legal systems. **Third**, as a last resort and only in cases of direct expropriation without adequate compensation or the most egregious and sustained denial of justice through domestic proceedings, the investor's home State may espouse the claim before an international tribunal on a State-to-State basis under the customary international law of diplomatic protection. This restores political accountability over international proceedings, allows for claims against investor breaches of labour, environmental, and human rights obligations,

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[8] Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate, A/78/168; and *See also*: Lea Di Salvatore, Lorenzo Cotula, Anirudh Nanda, and Chloe Yuqing Wang, "Investor-State Dispute Settlements: A Hidden Handbrake on Climate Action" (London: IIED, 2023).

[9] "Blocking Climate Change Laws with ISDS Threats: Vermilion vs France," Red carpet courts: 10 stories of how the rich and powerful hijacked justice, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International (June 2019), https://10isdsstories.org/wp-content/uploads/2019/06/Vermilion-vs-France.pdf.

[10] "New Zealand to act on tobacco packaging," BBC News (19 February 2013), https://www.bbc.com/news/world-asia-21501889#:~:text=New%20Zealand%20will%20%22wait%20and,%22%2C%20the%20government%20statement%20said.

[11] Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," 7(2) *Transnational Environmental Law* (2018) 229.

and reserves international adjudication for the genuine, exceptional cases it was always meant to address.

2. POLICY FORMULATION

The policy has several core design features, each directed at dismantling the structural asymmetry of the current regime while maintaining a coherent legal framework for investment governance.

Termination of ISDS in investment treaties

With respect to BITs, termination of the entire treaty—including both substantive investor protections and the ISDS mechanism—is the preferred approach. This is best achieved by mutual consent of all contracting parties, which simultaneously neutralises the sunset clause that would otherwise preserve ISDS rights for 10–20 years after unilateral notice. Where mutual termination is not agreed, States may terminate unilaterally after giving the contractually required notice. With respect to FTAs and other agreements containing investment chapters, contracting parties should negotiate the removal of the investment chapter, including the ISDS mechanism, while keeping the remainder of the agreement intact and expressly waiving or limiting any sunset clause.[12] Where possible, terminating parties should issue an explicit declaration confirming that the sunset clause no longer protects claims arising from post-termination measures, foreclosing attempts by tribunals to extend jurisdiction beyond what the parties intend.

Domestic law as the primary framework for governing investments

The legal framework governing any investment should rest primarily on domestic laws of general application and sector-specific regulation—tax, environmental, zoning, labour, mining, and energy law—supplemented by regulations that operationalise those legislative requirements. This is already the prevailing approach in most developed countries.[13] It reflects the foundational principles of sovereign equality and non-discrimination: foreign investors should be subject to, and protected by, the same legal system that governs domestic investors, workers, and communities. ISDS departs from this baseline by granting a narrow class of foreign investors privileged access to an exclusive international forum unavailable to anyone else. Reliance on domestic law eases negotiating burdens on governments, makes investor rights and obligations more transparent and consistent, facilitates enforcement, and reduces opportunities for corruption.

Domestic investment law

[12] Ladan Mehranvar et al., "Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions" (New York: CCSI, October 2024), pp. 37–43.
[13] Arnaud de Nanteuil, "The Laws Governing Foreign Investments: Getting the Relationships Right," in *International Investment Law* (Edward Elgar Publishing, 2020) 71, https://www.thecommonwealth-ilibrary.org/index.php/comsec/catalog/download/11/1/50?inline=1.

Where States choose to enact dedicated investment legislation, it should be designed around specific governance functions: for e.g., admission and screening, investment facilitation, legal guarantees within the domestic system, and investor obligations. The relevant question is whether a domestic investment law is the right instrument for the function being considered. Some functions may be better addressed through other tools: investment incentives are often more appropriately placed in general tax law; investor obligations can be reinforced through sector-specific regulation or environmental licensing regimes. The absence of an investment law is not a regulatory gap; it is often a deliberate and defensible choice.

Investment contracts

While domestic law provides the primary legal framework, investment contracts—e.g., concession agreements, production sharing agreements, public-private partnership contracts—can specify the particular terms and conditions of an individual project, including fiscal arrangements, performance obligations, and dispute settlement clauses. Such contracts should be subject to transparency requirements, standardised drafting guidance, public interest safeguards, and coordinated interministerial review to prevent policy incoherence and ensure adequate public value capture. The governing law should ordinarily be the law of the host State. Investor-facing contractual dispute settlement should refer disputes to domestic procedures—courts, administrative agencies, or commercial arbitration—not international investment arbitration.

Exhaustion of domestic remedies and State-to-State dispute settlement as a last resort

The requirement that a foreign national exhaust available and effective local remedies before recourse may be had to international procedures is a long-standing rule of customary international law, reflected in decisions of the International Court of Justice,[14] codified in Article 14 of the ILC's 2006 Draft Articles on Diplomatic Protection,[15] and consistently affirmed in State practice and jurisprudence for over a century.[16] Contemporary investment treaties—by conferring a direct right of action before international tribunals with no prior exhaustion requirement—mark a sharp departure from this customary rule and from the structure of international law more broadly. This policy does not create a new procedural hurdle; it reaffirms and gives effect to the customary rule, restoring coherence between the investment regime and the rest of international law, and incentivising States to maintain well-functioning, independent domestic courts capable of delivering effective justice to all parties.

Where domestic proceedings have been exhausted without adequate redress, and only in cases of direct, uncompensated expropriation or systematic, egregious denial of justice, the investor's home State may espouse the claim diplomatically and, if necessary, submit it to a

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[14] *Interhandel (Switzerland v. United States of America)*, ICJ, Judgment of 21 March 1959; and *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment of 20 July 1989.

[15] International Law Commission, Draft articles on Diplomatic Protection, A/61/10 (2006).

[16] Edward M. Borchard, *The Diplomatic Protection of Citizens Abroad"* (New York: The Banks Law Publishing Company, 1915); James Crawford, *Brownlie's Principles of Public International Law (9th Ed)* (Oxford University Press, 2019), 591.

State-to-State international body. This is the traditional mechanism of diplomatic protection—reflected in the same ILC Draft Articles and recognised since the Permanent Court of International Justice's *Mavrommatis* judgment—and it governs both the exhaustion requirement and any eventual inter-State recourse within a single coherent legal framework. Unlike ISDS, it does not grant private actors a direct right of action against sovereign States; it places the decision to proceed in the hands of the home State, preserving the possibility of negotiated diplomatic resolution and allowing for counterclaims regarding investor misconduct, including breaches of labour, environmental, tax, and human rights obligations.

Political Risk insurance

Political risk insurance (PRI) offers investors direct financial protection against the non-commercial risks that investment treaties were originally designed to address—expropriation, political violence, currency inconvertibility, and breach of contract by the host State—without creating a mechanism that overrides domestic legal systems or places open-ended contingent liability on host State treasuries. PRI is available through public providers, principally the World Bank Group's Multilateral Investment Guarantee Agency (MIGA), national export credit agencies, and development finance institutions, as well as private underwriters. MIGA alone issued over US$8 billion in new guarantees in FY2024, bringing its gross exposure to US$31.5 billion across 124 countries. Critically, PRI is structured differently from ISDS in ways that matter for regulatory sovereignty: coverage and price are fixed at the moment of investment, so the host State's subsequent regulatory choices do not retrospectively expand its exposure; premiums are commercially priced and borne by the investor or the home State, not the host treasury; and the investor's counterparty is the insurer, not the State, so PRI creates no direct right of action against a sovereign.

Implementation pathways

States have multiple legal pathways, individually or in combination:[17] (a) bilateral termination by mutual consent, with express neutralisation of the sunset clause; (b) unilateral termination after the expiry of the notice period; (c) bilateral renegotiation to remove investment chapters from FTAs; and (d) adoption of a plurilateral termination instrument modelled on the 2020 Agreement for the Termination of Bilateral Investment Treaties between EU Member States, allowing multiple States to terminate simultaneously and collectively exclude the operation of sunset clauses.[18]

3. EXPECTED BENEFITS

Ending ISDS produces gains that are mutually reinforcing rather than discrete: regulatory space enables climate action; climate action depends on democratic legitimacy; democratic

[17] Ladan Mehranvar et al., "Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions" (New York: CCSI, October 2024).

[18] European Union, "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union" (2020), Official Journal of the European Union 169/1 (29 May 2020), https://eur-lex.europa.eu/eli/agree_internation/2020/529/oj/eng.

legitimacy in turn rests on fiscal capacity and the integrity of the rule of law. The benefits below should be read as a single system of effects.

Restoring regulatory autonomy

The most immediate effect of ending ISDS is the recovery of the State's ability to regulate in the public interest without a private right of action hanging over every regulatory decision. The danger is not only the awards ultimately rendered; it is the regulatory chill that precedes them—the quiet narrowing of policy options inside ministries and legislatures once the cost of being sued enters the calculus. Denmark's Climate Minister has publicly acknowledged that phasing out fossil fuels at the pace required for climate neutrality before 2050 would leave the country liable for "incredibly expensive" compensation to foreign fossil fuel companies under ISDS,[19] a striking admission that the threat of an award, long before any claim is filed, is already shaping climate ambition. New Zealand delayed plain-packaging tobacco legislation while observing Australia's ISDS defence against Philip Morris;[20] France reportedly scaled back provisions of its 2017 Hydrocarbons Law in response to investor threats.[21] These episodes are not outliers. They are the system working as designed. Ending ISDS removes the external veto and returns the authority to govern to those who are democratically accountable for governing.

Fiscal savings and debt relief

ISDS awards, settlements, and legal and arbitration costs are a growing drain on public treasuries, and the burden falls disproportionately on countries least able to bear it. Investors have collectively sought more than US$1.2 trillion from States,[22] of which over US$123 billion has already been awarded,[23] a figure that exceeds the total climate finance provided by developed countries to developing countries in 2022.[24] Even defending a claim typically costs a respondent State at least US$5 million in legal and arbitration fees,[25] regardless of outcome. Pakistan reportedly bore approximately US$70 million in legal and arbitration costs in

[19] Elizabeth Meager, "Cop26 targets pushed back under threat of being sued" (14 January 2022), https://www.capitalmonitor.ai/analysis/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/?cf-view.
[20] *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction (2015); Eric Crosbie and George Thomson, "Regulatory Chills: Tobacco Industry Legal Threats and the Politics of Tobacco Standardised Packaging in New Zealand," 131(1473) *New Zealand Medical Journal* (2018) 25.
[21] "Blocking Climate Change Laws with ISDS Threats: Vermilion vs France," Red carpet courts: 10 stories of how the rich and powerful hijacked justice, by Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/International (June 2019), https://10isdsstories.org/wp-content/uploads/2019/06/Vermilion-vs-France.pdf.
[22] This includes only the claimed amounts that are publicly available, covering 986 out of 1,463 treaty-based ISDS cases as reported in the UNCTAD database, 23 April 2026.
[23] This includes only the awarded or settled amounts that are publicly available, covering 361 out of 508 treaty-based ISDS cases in which the investor either won or settled, as reported in the UNCTAD database, 23 April 2026.
[24] Natalia Alayza and Gaia Larsen, "How to Reach $300 Billion — and the Full $1.3 Trillion — Under the New Climate Finance Goal," *World Resources Institute* (5 November 2025), https://www.wri.org/insights/ncqg-climate-finance-goals-explained.
[25] Matthew Hodgson, Yarik Kryvoi, Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration' (BIICL and Allen & Overy, 2021).

Tethyan Copper alone.[26] For lower-income countries, the stakes are of a different order of magnitude. In *Próspera v. Honduras,* US-based investors in a libertarian "Charter City" project are pursuing approximately US$11 billion after the government moved to repeal the legislation authorising special jurisdiction zones—a sum equivalent to roughly two-thirds of the entire Honduran national budget and close to one-third of annual GDP.[27] A single adverse award on that scale would not merely strain public finances; it would functionally foreclose the State's capacity to deliver basic services, meet human rights obligations, or service its sovereign debt. The *Tethyan Copper* award itself—US$6 billion ordered against Pakistan for a mine that had not yet been constructed—was approximately the size of the IMF loan the country had just negotiated.[28]

Ecuador's CAITISA audit found no demonstrable correlation between BIT ratification and increased investment inflows, but documented substantial and recurring fiscal costs from the country's prior treaty network.[29] These are resources diverted from hospitals, schools, climate adaptation, and social protection—and, increasingly, into the hands of speculative third-party litigation funders who hold no stake in the underlying investments.[30] Ending ISDS is, among other things, a debt-relief measure that a State can adopt unilaterally, without the consent of any creditor.

Democratic legitimacy and the rule of law

Returning investment disputes to domestic proceedings restores democratic accountability over the adjudication of public policy. Under ISDS, regulatory measures adopted by elected legislatures and upheld by constitutional courts can be effectively overturned in their financial consequences by ad hoc private tribunals operating without transparency, a standing bench, an appellate mechanism, or democratic mandate. The recent award in *Telefónica v. Colombia*[31] illustrates the problem starkly: an arbitration tribunal found that Ruling C-555/13 of Colombia's Constitutional Court—which had held that a 2011 statutory clarification of spectrum-reversion obligations could not apply retroactively—breached the fair and equitable treatment standard in the Colombia–Spain BIT.[32] A binding judgment of the highest constitutional authority in Colombia, interpreting Colombian law on Colombian concessions, was converted into liability of approximately US$380 million (plus compound

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[26] *Tethyan Copper v. Pakistan* (ICSID Case No. ARB/12/1), Award (12 July 2019), paras 1824, 1858. Pakistan not only had to pay its own legal and arbitration costs, it was responsible for the US$60 million legal bill of the investor as well.

[27] *Próspera v. Honduras* (ICSID Case No. ARB/21/40). The claimed amount of approximately US$11 billion was reported in filings and press coverage as of early 2025.

[28] Asif Khan, Dmytro Cherneha, and Stephanie Triefus, "More Than a Verdict: Local Perspectives on the Pakistan Reko Diq Dispute," *Business and Human Rights Journal Blog* (1 May 2025), https://bhrj.blog/2025/05/01/more-than-a-verdict-local-perspectives-on-the-pakistan-reko-diq-dispute/.

[29] CAITISA, "Audit Report on Ecuador's Bilateral Investment Treaties" (Quito, 2017), https://dolarizacion.org/2025/10/10/informe-ejecutivo-de-la-comision-para-la-auditoria-integral-ciudadana-de-los-tratados-de-proteccion-reciproca-de-inversiones-y-del-sistema-de-arbitraje-en-materia-de-inversiones-en-ecuador/.

[30] Frank Garcia, "Third-Party Funding as Exploitation of the Investment Treaty System," 59 *Boston College Law Review* (2018) 2911.

[31] *Telefónica, S.A. v. Colombia*, ICSID Case No. ARB/18/3, Award (12 November 2024).

[32] Colombian Constitutional Court, Ruling C-555/13 (2013), https://www.corteconstitucional.gov.co/relatoria/2013/c-555-13.htm.

interest) against the Colombian treasury. The problem, however, is structural: even when a tribunal rules in favour of the State, it entrenches the legitimacy of a parallel legal track available only to foreign investors. The rule of law depends on the law applying equally. Ending ISDS reintegrates foreign investors into the same legal system that governs everyone else.

Alignment with climate and sustainable development obligations

Removing ISDS eliminates a structural legal barrier to climate action. The duty of States in this area is not merely a right to regulate but an affirmative obligation. The Paris Agreement and the UNFCCC, together with Article 6 of the ICCPR—which the UN Human Rights Committee has read to encompass protection against foreseeable climate harm (§62)[33]—and the ICESCR require States to take effective measures to prevent climate harm and to regulate the private conduct that drives it. The Committee on Economic, Social and Cultural Rights has warned that failure to do so may itself constitute a breach of State obligations.[34] The International Court of Justice, in its Advisory Opinion of 23 July 2025 on the Obligations of States in Respect of Climate Change, confirmed that these duties are binding under international law.[35]

The fossil fuel industry alone has made at least 260 known treaty-based ISDS claims—one-fifth of all known cases—and has secured at least US$82.8 billion in awards and settlements, roughly equivalent to the combined GDP of the world's 45 smallest economies.[36] Global action to meet Paris Agreement targets could generate over US$340 billion in additional ISDS claims from fossil fuel investors.[37] States are thus squeezed from both sides: held accountable by domestic and regional courts for inadequate climate action—as in *Urgenda*[38] and related rulings in Germany, France, and Belgium[39]—while simultaneously facing investor claims when they do act, as in the arbitrations brought by *Uniper* and *RWE* against the Dutch coal phase-out under the Energy Charter Treaty (ECT)[40] and by *Shell* and *ExxonMobil* over the closure of the Groningen gas field.[41] Ending ISDS removes this obstruction and allows States to honour obligations under the Paris Agreement, ILO Convention 169, UNDRIP, and the

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[33] Human Rights Committee, General Comment No. 36 on Article 6 (Right to Life), CCPR/C/GC/36.
[34] Committee on Economic, Social and Cultural Rights (CESCR), Statement on Climate Change and the ICESCR (October 2018).
[35] International Court of Justice, Advisory Opinion on the Obligations of States in Respect of Climate Change (23 July 2025) para 427, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf.
[36] Lea Di Salvatore, Lorenzo Cotula, Anirudh Nanda, and Chloe Yuqing Wang, "Investor–State Dispute Settlements: A Hidden Handbrake on Climate Action" (London: IIED, November 2023).
[37] Kyla Tienhaara, Rachel Thrasher, Blake Alexander Simmons, and Kevin Gallagher, "Investor-State Disputes Threaten the Global Green Energy Transition," 376 (6594) *Science* (5 May 2022) 701.
[38] *Urgenda Foundation v. Netherlands*, Supreme Court of the Netherlands (20 December 2019).
[39] See related climate rulings in *Oxfam v. France* (Conseil d'État, 2021), *Klimaatzaak v. Belgium* (2021), and *Neubauer et al. v. Germany* (Federal Constitutional Court, 2021).
[40] *Uniper SE v. Netherlands* (ICSID Case No. ARB/21/22); *RWE AG v. Netherlands* (ICSID Case No. ARB/21/4).
[41] Bart-Jaap Verbeek, "Aftershock in Groningen: How Shell and ExxonMobil use arbitration to offload the costs of closing the Netherlands' largest gas field," (SOMO, 2 July 2025), https://www.somo.nl/aftershock-in-groningen/; Bart-Jaap Verbeek and Fernando Hernandez, "Phasing out ISDS in the Netherlands: A Roadmap Pathways for ending Investor-State Dispute Settlement to strengthen policy space for a just transition" (Policy briefing, April 2026), https://www.bothends.org/uploaded_files/inlineitem/5Phasing-out-ISDS-in-the-Netherlands-A-Roadmap.pdf/.

ICESCR—obligations which, as the UN Working Group on Business and Human Rights has observed, have too often been subordinated to investor protection in arbitral practice.[42]

4. EVIDENCE, EXAMPLES & BEST PRACTICES

The systemic failings of ISDS are documented across multiple dimensions: the commodification of sovereign liability into a speculative financial market; the well-evidenced absence of any link between ISDS and foreign direct investment (FDI); the regulatory chill that distorts public policy across jurisdictions; and a body of case law in which legitimate public-interest decisions have generated massive awards. The examples below illustrate these dynamics at scale.

A commodified and extractive dispute architecture

ISDS was originally defended as a depoliticised rule-of-law mechanism to protect investors from arbitrary State conduct. It has in practice developed into a speculative financial market in sovereign liability—and nowhere is this more starkly illustrated than in the renewable energy cases brought against Spain. In 89% of the over fifty ECT claims filed against Spain, the claimant was not a renewable energy company per se but an equity fund or financial investor that had acquired existing installations on the secondary market rather than building or operating any energy infrastructure.[43] These were leveraged bets on above-market feed-in tariffs, not productive investments. In fact, some claimants had already sold their assets at a profit before filing their claims. For example, in *Watkins v. Spain*, the claimants purchased their wind portfolio for €91 million in 2011, saw it appreciate, and sold it for €133 million in 2016—a return of 11.2%—yet were still awarded a further €77 million in compensation for an investment that had not been destroyed but profitably exited. In at least 42% of the concluded cases in which investors prevailed against Spain, the claimants had acquired their interests after Spain's Supreme Court had already signalled that regulatory change was foreseeable.[44] Thus, the ECT did not function as protection against State wrongdoing; it functioned as a guarantee of speculative returns, awarding compensation far exceeding what any ordinary domestic legal system would have countenanced.

The rapid growth of third-party funding (TPF)—in which specialised funds finance claims in exchange for a share of any eventual award—has compounded this dynamic. Claims are actively sourced, underwritten, and portfolio-managed by financial institutions whose business model is the extraction of public revenue through arbitration, and ISDS awards have

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[42] Helionor de Anzizu and Nikki Reisch, "Investor-State Disputes, the Climate Emergency, and the Duty to Regulate Fossil Fuels: A Human Rights Perspective," in Ipp and Magnusson (eds), Investment Arbitration and Climate Change (Wolters Kluwer, 2023).

[43] Lucía Bárcena and Fabian Flues, "From solar dream to legal nightmare. How financial investors, law firms and arbitrators are profiting from the investment arbitration boom in Spain," Transnational Institute (TNI) and PowerShift *(2022)*, https://www.tni.org/en/publication/from-solar-dream-to-legal-nightmare.

[44] Ladan Mehranvar and Lisa Sachs, "The Role and Relevance of Investment Treaties in Promoting Renewable Energy Investments," in Anja Ipp and Annette Magnusson (eds) *Investment Arbitration and Climate Change* (Kluwer Law International, 2023).

themselves become tradable assets. Such funders also distort the developmentalist narrative on which these treaties rest. TPF adds nothing to the host State's development, and the funder is not necessarily a covered investor, which becomes problematic once it becomes the beneficial owner of the claim—the claim itself being the asset in which it has invested. Specialised vehicles such as Blasket Renewable Investments have acquired and pursued enforcement of multiple awards against Spain, in what amounts to a secondary market for awards at the enforcement stage, with a significant share now owned by actors who had no role in, and bore no risk from, the underlying investments.[45] The system is therefore less about adjudicating bona fide disputes than about financial intermediaries mining public treasuries, a dynamic compounded by the concentration of counsel and arbitrators within a small repeat-player elite[46] and the near-total absence of disclosure obligations regarding funding arrangements.[47]

No evidence of harm to FDI from termination

Empirical evidence does not support the claim that ISDS is necessary to attract investment, the main justification offered for the proliferation of investment treaties. Brazil has never ratified a traditional BIT nor joined ICSID—the World Bank Group institution that is the most widely used forum for ISDS claims—yet it ranked fifth globally for FDI inflows in 2023, attracting US$65.9 billion with a total inward FDI stock approaching US$1 trillion.[48] Brazil achieved this while developing its own model of investment governance through Cooperation and Facilitation Investment Agreements (ACFIs)—instruments focused on dispute prevention, transparency, and domestic institutional capacity, with no investor-State arbitration mechanism. In the 1990s, Brazil's National Congress refused to ratify the 14 BITs it had signed on the basis that they were incompatible with constitutional provisions on expropriation, access to domestic justice, and sovereign policy space.[49] The ACFI covers only foreign direct investment with genuine developmental impact, establishes a national focal point or ombudsperson to resolve investor concerns proactively, and provides for State-to-State arbitration only as a genuine last resort—with health, environment, labour, and social responsibility policies entirely excluded. Brazil has remained one of the world's top FDI

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[45] Toby Fisher, "ICSID creditor targets Spain's national football team," *Global Arbitration Review* (14 April 2026), https://globalarbitrationreview.com/article/icsid-creditor-targets-spains-national-football-team.

[46] Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil, and Emilia Onyema, "The Diversity Deficit in International Investment Arbitration," Academic Forum on ISDS Concept Paper 2020/1 (21 January 2020), https://www.jus.uio.no/ior/english/research/projects/copiid/academic-forum/papers/2020/5-diversity.pdf.

[47] Rachel Denae Thrasher, "The Regulation of Third Party Funding: Gathering Data for Future Analysis and Reform," Boston College Law School Law and Justice in the Americas Working Paper No. 9 (2018); Frank J. Garcia, "Third-Party Funding as Exploitation of the Investment Treaty System" 59 *Boston College Law Review* (2018) 2911.

[48] UNCTAD, World Investment Report 2024, UNCTAD/WIR/2024. Brazil has never ratified a traditional BIT nor acceded to the ICSID Convention.

[49] Felipe Hees, Pedro Mendonça Cavalcante, and Pedro Paranhos, "The Cooperation and Facilitation Investment Agreement (CFIA) in the context of the discussions on the reform of the ISDS system," South Centre Investment Policy Brief (May 2018), https://www.southcentre.int/wp-content/uploads/2018/04/IPB11_The-Cooperation-and-Facilitation-Investment-Agreement-CFIA-in-the-context-of-the-discussions-on-the-reform-of-the-ISDS-system_EN.pdf.

destinations ever since, demonstrating that investment arbitration is not a prerequisite for investment flows.

Bolivia, Ecuador, South Africa, India, and Indonesia each terminated all or a substantial portion of their BIT networks and none experienced the predicted collapse in foreign investment. South Africa terminated its BITs with European countries as they came up for renewal between 2012 and 2020 and enacted the Protection of Investment Act 2015, channelling disputes through domestic courts.[50] Ecuador terminated over 16 BITs between 2008 and 2017, following the CAITISA audit's finding of no causal link between BITs and FDI. India terminated or declined to renew over 70 BITs between 2017 and 2021 after facing a wave of claims, adopting a new Model BIT with narrowed investor rights and a mandatory exhaustion-of-local-remedies requirement.[51] Multiple econometric studies have found no significant relationship between ISDS provisions in BITs and increased FDI inflows.[52] For example, a 2021 meta-analysis of seventy-four studies looking at the effects of investment treaties on FDI found that investment treaties "have an effect on [FDI] that is so small as to be considered as negligible or zero."[53] Investors' decisions are driven by market size, political stability, legal quality in domestic courts, and infrastructure—not by the availability of international arbitration against the host State.[54]

Documented regulatory chill

The chilling effect of ISDS is neither anecdotal nor confined to a small number of high-profile cases; it is a structurally embedded feature of the international investment regime. Cross-border regulatory chill—the delay or abandonment of regulation in one State in response to ISDS proceedings filed against another State for a comparable measure—is among the most pernicious effects. When Philip Morris filed ISDS claims against Australia and Uruguay over

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[50] Mills Soko and Mzukisi Qobo, "SA's cancellation of bilateral investment treaties - strategic or hostile?" News 24 (28 September 2018), https://www.news24.com/business/sas-cancellation-of-bilateral-investment-treaties-strategic-or-hostile-20180928-3.

[51] Ladan Mehranvar et al., "Breaking Free: Strategies for Governments on Terminating Investment Treaties and Removing ISDS Provisions" (New York: CCSI, October 2024), pp 26-36.

[52] See 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); Christian Bellak, "Economic Impact of Investment Agreements," Department of Economics Working Paper Series No. 200 (2015); Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence," OECD Working Papers on International Investment 2018/01 (2018).

[53] Josef C. Brada, Zdenek Drabek, and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis," 35(1) *Journal of Economic Surveys* (2021) 34 at p 58.

[54] Kyla Tienhaara and Christian Downie, "Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes," 24(3) Global Governance: A Review of Multilateralism and International Organizations (2018) 451; Mithatcan Aydos, Perrine Toledano, Martin Dietrich Brauch, Ladan Mehranvar, Theodoros Iliopoulos, and Sunayana Sasmal, "Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers" (New York: Columbia Center on Sustainable Investment, December 2022); Fernando Mistura and Caroline Roulet, "The determinants of Foreign Direct Investment: Do statutory restrictions matter?" OECD Working Papers on International Investment 2019/01 (2019); Mehmet Nasih Tag, "Judicial institutions of property rights protection and foreign direct investment inflows," 65 *International Review of Law and Economics* (2021).

tobacco plain-packaging legislation, New Zealand explicitly acknowledged that it was delaying equivalent legislation pending the outcomes of those cases.[55] When Spain changed its renewable energy feed-in tariff regime, a cascade of over fifty ISDS claims followed, prompting other States to abandon or modify renewable energy support schemes they had been considering. A second, more direct form of chill operates within the very State an investor targets. Here regulators weaken or reverse measures in response to threats alone, either before or after a claim is filed. Environmental regulators in Guatemala, Indonesia, and Ghana each reversed or weakened resource extraction regulations following explicit investor threats.[56] Peer-reviewed studies confirm that pending ISDS claims are statistically associated with reduced domestic environmental regulation in respondent States with high bureaucratic capacity—the very States most capable of responding purposefully to legal risk signals. The mechanism thus chills regulation precisely where regulatory capacity is greatest.

Key cases

***Zeph Investments (Clive Palmer) v. Australia* (PCA Case No. 2023-40).** Australia-based mining magnate Clive Palmer filed four related claims under the ASEAN–Australia–New Zealand FTA (AANZFTA), claiming approximately A$300 billion for an iron-ore project and a further A$120 billion for refused coal-mining leases in Queensland—refusals informed by climate and human-rights grounds. The tribunal unanimously dismissed the flagship claim in September 2025, finding that the late-stage restructuring of investments into a Singapore shell company constituted an abuse of process and ordering Palmer to pay A$13.6 million in costs. The cases nonetheless consumed years of litigation and public resources, and the remaining three Queensland claims were still pending as of early 2026. They illustrate both treaty shopping through corporate nationality planning and the weaponisation of ISDS to challenge climate-motivated refusals of fossil fuel projects.

***First Quantum Minerals v. Panama* (ICSID Case No. ARB/25/18).** After Panama's Supreme Court ruled the concession agreement for the Cobre Panamá copper mine unconstitutional in November 2023—a decision triggered by mass public protests—Canada's First Quantum Minerals filed multiple ISDS claims against Panama. The reported exposure runs into the tens of billions of dollars for a concession whose closure was endorsed by both the country's highest court and an overwhelming popular mandate. This case illustrates how ISDS can be deployed to challenge decisions that have been democratically and judicially validated, placing governments in the impossible position of owing compensation for complying with their own constitutional order.

***Próspera v. Honduras* (ICSID Case No. ARB/23/2).** US-based investors in a libertarian "Charter City" project on Roatán island filed a CAFTA-DR claim of approximately US$10.8 billion after Honduras's Congress unanimously repealed the legislation authorising special

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[55] *Philip Morris Asia Ltd. v. Australia*, PCA Case No. 2012-12 (2015); *Philip Morris Brand Sàrl v. Uruguay*, ICSID Case No. ARB/10/7 (2016). New Zealand explicitly cited these cases in delaying its own legislation.

[56] Tarald Laudal Berge and Axel Berger, "Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity," 12(1) *Journal of International Dispute Settlement* (2021) 1; Manuel Pérez-Rocha and Julia Paley, "What 'Free Trade' Has Done to Central America," Foreign Policy in Focus (21 November 2014), https://fpif.org/free-trade-done-central-america/.

economic and development zones (ZEDEs) in April 2022—a repeal carried out by President Xiomara Castro on an explicit electoral mandate and subsequently upheld as constitutional by the Supreme Court. The claimed amount equates to roughly one-third of Honduras's annual GDP and two-thirds of its national budget. The tribunal dismissed Honduras's preliminary objection in February 2025; no final award had issued as of April 2026. The case has become the paradigmatic illustration of ISDS overriding democratic mandates and apex-court constitutional rulings, while imposing existential fiscal exposure on one of the Western hemisphere's poorest States.

Chevron Corporation and Texaco Petroleum Company v. Ecuador (II) **(PCA Case No. 2009-23).** Following three decades of oil extraction in Ecuador's Lago Agrio region, Texaco—acquired by Chevron in 2001—left behind catastrophic environmental contamination affecting approximately 30,000 Indigenous and campesino community members. After a decades-long legal battle, Ecuadorian courts upheld a judgment of approximately US$9.5 billion against Chevron in favour of the affected communities. Rather than pay, Chevron brought an ISDS claim under the US–Ecuador BIT and, in 2018, obtained a tribunal order directing Ecuador to render the domestic judgment unenforceable both within its territory and abroad—effectively nullifying a final ruling of the country's Constitutional Court on behalf of communities who had no standing in the arbitration. In December 2025, a further award ordered Ecuador to pay Chevron approximately US$221 million in damages and legal costs. The case is the clearest illustration of ISDS being weaponised to deny justice to investment-affected communities: the mechanism that was supposed to protect investors was used to shield a corporation from accountability for one of the worst environmental disasters in Latin American history.

Rockhopper v. Italy **(ICSID Case No. ARB/17/14).** Italy reinstated a ban on offshore hydrocarbon drilling within 12 nautical miles of its coast for environmental and public health reasons, leading in 2016 to the denial of Rockhopper's production concession for the Ombrina Mare oil field off the Abruzzo coast. Despite having invested approximately €30–40 million, Rockhopper was awarded €190.7 million in 2022—roughly five times its actual sunk investment—based on discounted cash-flow (DCF) projections for a field that had never operated and, under Italy's environmental policy, never would. The award was annulled in June 2025 on a narrow procedural ground (non-disclosure of an arbitrator's prior criminal conviction), leaving the substantive critique entirely intact. Rockhopper resubmitted its claim in September 2025. The original case catalysed the EU-coordinated ECT withdrawal and remains the most cited example of ISDS penalising States for legitimate fossil-fuel phase-out measures, with DCF-based damages systematically inflating awards far beyond any genuine investor loss.

Treaty and ISDS withdrawals

The ECT—the most frequently invoked investment treaty globally—enabled hundreds of ISDS claims against energy transition policies, with fossil fuel and energy companies seeking over US$82.8 billion under the treaty alone. The incompatibility between the ECT and States' climate commitments ultimately prompted a wave of withdrawals: Italy (2016), France, Germany, Spain, the Netherlands, Poland, Luxembourg, Slovenia, Denmark, the United Kingdom, and the European Union as a whole all withdrew. The fact that these are developed, capital-exporting States that have historically been the architects and principal beneficiaries of the investment treaty system makes their withdrawal especially significant: it reflects a political judgment that the ISDS mechanism has become incompatible with the public interest obligations they are democratically accountable to fulfil.

The renegotiation of the North American Free Trade Agreement (NAFTA) tells a parallel story for investor-State arbitration in North America. NAFTA became one of the most heavily used ISDS treaties worldwide, and Canada—the second most sued developed country under the investment treaty system globally—bore the brunt of claims challenging public-interest measures. During the negotiations of the successor agreement, Canada's Foreign Affairs Minister Chrystia Freeland described ISDS as "elevat[ing] the rights of corporations over those of sovereign governments," and argued that removing it had "strengthened our government's right to regulate in the public interest, to protect public health and the environment."[57] The revised NAFTA eliminated ISDS entirely between Canada and the United States, while significantly narrowing it between the United States and Mexico. The new agreement provided for legacy claims under NAFTA for up to three years from its termination—a finite sunset period rather than the indefinite exposure that might otherwise have followed.

The EU BIT Termination Agreement: a multilateral template

The 2020 Agreement for the Termination of Bilateral Investment Treaties between EU Member States provides a proven multilateral instrument for simultaneous collective termination.[58] Twenty-three Member States terminated their intra-EU BITs through a single coordinated instrument, expressly excluding the application of sunset clauses. It resolved the legal uncertainty created by divergent national approaches and established a precedent for a plurilateral termination instrument at the global level. Modelling a broader multilateral termination treaty on this instrument—open to all States—is both legally and politically feasible, and would address the principal practical obstacle to rapid reform.

UNCITRAL Working Group III: the limits of procedural reform

Since 2017, UNCITRAL Working Group III (WGIII) has been conducting a multilateral reform process on ISDS.[59] Almost nine years later and over twenty formal sessions, the process has produced two finalised outputs: a Code of Conduct for Arbitrators (adopted July 2023), and a Statute for an Advisory Centre on International Investment Dispute Resolution (adopted in principle June–July 2024) to provide capacity-building and legal support to States, particularly

[57] "Prime Minister Trudeau and Minister Freeland speaking notes for the United States-Mexico-Canada Agreement press conference" (1 October 2018), https://www.pm.gc.ca/en/news/speeches/2018/10/01/prime-minister-trudeau-and-minister-freeland-speaking-notes-united-states.

[58] European Union, "Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union" (2020), Official Journal of the European Union 169/1 (29 May 2020), https://eur-lex.europa.eu/eli/agree_internation/2020/529/oj/eng.

[59] United Nations Commission on International Trade Law (UNCITRAL), Working Group III: Investor-State Dispute Settlement Reform, https://uncitral.un.org/en/working_groups/3/investor-state.

those in the Global South, facing ISDS claims. Both are useful; neither is transformative. The Advisory Centre's headquarters remained unresolved as of April 2026, with its statute pending formal adoption. Proposals on a Multilateral Investment Court, substantive reforms to the right to regulate, damages rules, and third-party funding remain under negotiation, with deep divisions between capital-exporting States favouring incremental procedural refinements and developing countries and civil society pressing for structural change.

The Working Group's mandate was from the outset interpreted to exclude reform of substantive investor protections—for e.g., the fair and equitable treatment standard or indirect expropriation clause—meaning that the very provisions driving regulatory chill and generating the largest awards fall outside the scope of what is being reformed. Even if all pending proposals were adopted in their most ambitious form, the result would be an ISDS system with improved arbitrator ethics, a standing appellate mechanism used by a dozen States, and respondent States' ability to bring counterclaims, but one that still permits private investors to sue sovereign States in international proceedings for public-interest regulatory decisions, still generates multi-billion-dollar awards based on speculative future profits, still imposes the fiscal and regulatory discipline that this policy seeks to end, and still sidelines any investment-affected communities from having standing in the proceedings.[60] WGIII is a forum for legitimising incremental adjustment, not systemic change.[61] States that seek to restore full regulatory autonomy cannot treat it as their primary vehicle for reform.

5. OBJECTIONS, POTENTIAL BARRIERS & COUNTERARGUMENTS

Objection 1: Ending ISDS will deter foreign investment

This is the most frequently cited objection and the least supported by evidence. Systematic econometric studies find no significant relationship between the ISDS mechanism and increased FDI inflows. Brazil, the world's fifth-largest FDI recipient, has never had a BIT with ISDS in force. Bolivia, Ecuador, South Africa, India, and Indonesia all terminated significant portions of their treaty networks and continued to receive investment.[62] In fact, 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."[63] Yet, Ecuador terminated its BIT with Canada in 2017. Investors' decisions are driven by market size, rule-of-law quality in domestic courts, regulatory stability, and infrastructure—not by the availability of international arbitration against the host State. What ISDS provides is a risk subsidy to a narrow class of investors—disproportionately large extractive-industry

[60] Ladan Mehranvar et al., "How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders" (New York: CCSI, January 2024), https://ccsi.columbia.edu/sites/ccsi.columbia.edu/files/content/docs/ccsi-access-to-justice.pdf.
[61] See Ladan Mehranvar, "ISDS Reform Without Remedy: A Report from the 51st Session of UNCITRAL WGIII" (New York: CCSI, June 2025), https://ccsi.columbia.edu/news/part-i-isds-reform-without-remedy-l-report-51st-session-uncitral-wgiii/.
[62] Mehranvar et al., "Breaking Free" (2024).
[63] Government of Canada, "Canada-Ecuador relations" (23 April 2024), https://www.international.gc.ca/country-pays/ecuador-equateur/relations.aspx?lang=eng#a2.

corporations from the Global North—at the expense of host State budgets and regulatory authority. Removing that subsidy is not the same as reducing FDI attractiveness.

Objection 2: Domestic courts are unreliable—international protection is necessary

This argument may have had historical validity in specific authoritarian contexts. It does not justify a global default mechanism that bypasses the courts of established constitutional democracies—including Australia, Chile, Colombia, India, South Africa, and Spain, among others—all of which have been respondents in ISDS cases brought against public-interest regulation. The alternative framework retains a genuine safety net: mandatory exhaustion of domestic remedies, followed by political risk insurance for commercial risks, and State-to-State proceedings as a last resort for direct expropriation without compensation or systematic denial of justice. This is tailored to the genuine problem—the rare cases in which domestic courts fail egregiously—without creating a structural mechanism dedicated to a privileged class of investors for disciplining public regulations.

Objection 3: Sunset clauses mean termination takes 10–20 years

Sunset clauses are a real constraint on the pace of termination, but they are not an argument against beginning—and they are frequently misunderstood in ways that overstate their significance. Two points are worth clarifying at the outset. First, triggering a sunset clause by giving notice of termination actually sets a definitive end date for treaty protection: without termination, protections remain in force indefinitely. Inaction does not avoid the sunset clause problem; it simply ensures there is no end in sight. Second, once a treaty is terminated and the sunset period begins, no new investments acquire treaty protection. Only investments existing at the moment of termination remain covered during the survival period—a far more limited exposure than the open-ended liability that continuing treaty membership entails.

Beyond these structural points, several strategies can reduce or eliminate exposure during the sunset period itself. Bilateral termination by mutual consent—the preferred approach—allows the State parties to expressly neutralise the sunset clause, avoiding the survival period entirely; this is precisely what the 2020 EU BIT Termination Agreement achieved across twenty-three Member States simultaneously. A plurilateral termination instrument modelled on that agreement could do the same at a broader scale.[64] Where unilateral termination is the only option available, a moratorium on the registration of new ISDS claims from the date of notice can further limit exposure during the intervening period. Sunset clauses require careful planning; they do not make reform impossible, and they are far less daunting than the indefinite continuation of a system that has no end date at all.

Objection 4: Reform through UNCITRAL WGIII is ongoing and sufficient

[64] Mehranvar et al., “Breaking Free” (2024), pp. 37–43 (sunset clause strategies); EU BIT Termination Agreement (2020).

The WGIII reform process addresses procedural grievances—the lack in older generation treaties of certain rules common in newer treaties like the denial of benefits, conflicts of interest among arbitrators, counsel, and legal experts, the absence of an appeal mechanism—while leaving the structural asymmetry entirely intact. Even a fully reformed ISDS with a standing mechanism, appellate review, and a code of conduct for adjudicators would still permit private foreign investors to directly sue sovereign States for public-interest regulatory decisions whenever such decisions impact their returns despite the benefit to the public more generally. Procedural improvements do not eliminate regulatory chill, do not remove the fiscal risk of large awards, and do not restore democratic accountability over investment adjudication. States that rely on WGIII as a substitute for termination are deferring the problem, not solving it.[65]

Barrier: Vested interests in the investment arbitration industry

The investment arbitration community—specialist law firms, arbitrators who sit on multiple simultaneous tribunals, and third-party litigation funders with a direct financial stake in maximising the volume and value of claims—constitutes a powerful and well-resourced lobby against systemic reform. Third-party funders invest in claims as commercial assets and have an explicit interest in treaty networks remaining in force. States pursuing termination must build countervailing coalitions with other like-minded States, affected communities, environmental organisations, trade unions, public health advocates, and Indigenous peoples' organisations—whose interests are directly and systematically harmed by ISDS and who have both the standing and the motivation to sustain a political campaign for reform.

6. IMPLEMENTATION STEPS

Short-term (2–3 years — national and global level)

- **Treaty review:** Conduct a review of the State's existing BIT and FTA network, identifying the scope of ISDS exposure: sunset clause durations, the volume and value of pending and potential claims, and priority treaties for termination.

- **Public declaration and moratorium:** Issue a public declaration of intent to terminate ISDS commitments, notify treaty partners to trigger relevant notice periods, and impose an immediate moratorium on signing or ratifying new investment agreements containing ISDS provisions.

- **Domestic dispute settlement legislation:** Adopt legislation to channel investment disputes through national courts—including specialist investment chambers where appropriate—with clear procedures for exhaustion of local remedies and access to domestic arbitration for purely commercial disputes or strategic sectors.

[65] Ladan Mehranvar and Lea Di Salvatore, "Structural Barriers and Power Dynamics in UNCITRAL WGIII: Upholding the Status Quo?" 26(6) *Journal of World Investment & Trade* (December 2025).

- **Interministerial coordination:** Build sustained coordination across the ministries of trade, finance, environment, justice, and climate to align the treaty reform programme with the State's regulatory, human rights, and climate obligations.

- **Establish a standing working group:** Create a State-led working group—with substantive input from academics, affected communities, vulnerable groups, public interest organisations, and Indigenous Peoples, etc.—to collectively address ISDS as a barrier to the realisation of human rights and sustainable development goals. The establishment of this group is a short-term action, but the group itself is intended to operate continuously until a global termination process is achieved. It will meet periodically, track implementation, and report back on progress at relevant global conferences.

Medium-term (3–6 years — national and global level)

- **Treaty terminations:** Complete the termination of priority BITs and the renegotiation of investment chapters in existing FTAs, beginning with treaties generating the greatest ISDS exposure and those with the least tangible economic benefit.

- **Regional investment agreements:** Engage regional partners—within the African Union, ASEAN, CELAC, CARICOM, and comparable frameworks—to develop regional investment agreements that replace investment protections and ISDS with regulation of investments, domestic court access, investment facilitation mechanisms, and State-to-State dispute settlement strictly limited to direct expropriation and denial of justice.

- **Model investment contracts:** Develop a model investment contract incorporating narrowed substantive protections governed by domestic law; access to and mandatory exhaustion of local remedies; transparency requirements for all contract terms; and State and third-party standing to bring claims against investors for breaches of labour, environmental, and human rights obligations.

- **Multilateral coalition-building:** Continue and deepen the work of the standing working group by building intergovernmental coalitions among Global South and North States to present a unified position in multilateral and plurilateral fora — including at UNCITRAL, the G20, the G77, CELAC, COP and TAFF conferences — using the working group as the connective tissue between national efforts and collective action.

Long-term (7–10 years — national and global level)

- **Multilateral termination treaty:** Pursue adoption of a multilateral termination treaty modelled on the 2020 EU instrument, open to all States, allowing simultaneous termination of BITs and ISDS clauses with a collective exclusion of sunset clause operation. The standing working group should serve as the principal vehicle for negotiating, drafting, and building accession to this instrument.

- **Investor obligations framework:** Integrate binding investor obligations—e.g., human rights due diligence, environmental standards, and climate targets—into any retained international or domestic investment framework, as the counterpart to any procedural protections that may be preserved.
- **New generation of domestic investment instruments:** Develop domestic investment governance instruments that prioritise sustainable development, technology transfer, and local value creation over investor protection.

The policy is highly relevant across all income levels. For low-income and middle-income countries, ISDS poses the greatest and most immediate fiscal and regulatory risk, given limited legal capacity, concentrated exposure to extractive industry claims, and the disproportionate impact of large awards on public budgets. For high-income countries—particularly in Europe—the Energy Charter Treaty experience demonstrates that ISDS is not only a development problem but a governance problem for all States. While reform should ideally be driven by Global South leadership, it requires political commitment from major capital-exporting States to become systemically effective.

7. INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND INTERNATIONAL COMMITMENTS

Ending ISDS is directly relevant to multiple international human rights obligations. The UN Special Rapporteur on human rights and the environment has concluded that ISDS has become a major obstacle to the urgent action required to address environmental and human rights crises, particularly because foreign investors may use arbitration to challenge stronger environmental, climate, health, and resource-governance measures. This concern is reinforced by the recognition of the right to a clean, healthy and sustainable environment by the UN General Assembly, which confirms that States must be able to regulate private actors and economic activities that threaten environmental integrity and human well-being.[66] The threat of ISDS liability chills the very regulatory actions that States are obliged to take under these commitments.

States parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) are obliged to take steps, individually and through international assistance, to the maximum of their available resources, with a view to achieving progressively the full realisation of the ESCR (Art. 2(1)). ISDS-induced restraint on climate, health, and labour regulation—the documented regulatory chill—is structurally inconsistent with this obligation. The CESCR has clarified that States should identify potential conflicts between their Covenant obligations

[66] Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate, A/78/168; United Nations General Assembly (UNGA), The human right to a clean, healthy and sustainable environment, A/RES/76/300 (2022).

and trade or investment treaties before entering into them and requires human rights impact assessments of trade and investment treaties, regular reassessment of their effects, and the interpretation of investment treaties in light of human rights obligations (§13).[67]

This policy is also supported by the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements proposed by the former Special Rapporteur on the right to food. These principles state that human rights impact assessments should be prepared before concluding trade and investment agreements and should ensure that such agreements are consistent with human rights obligations (these must prevail). States should not enter into agreements that create inconsistent obligations, and that termination and other measures should be considered where incompatibility is found (Principles 1.1, 1.3 and 3).[68]

In the same vein, the UN Guiding Principles on Business and Human Rights establish that States have a duty to protect against human rights abuses by third parties, including corporations, through effective policies, and that they should ensure policy coherence across all governmental bodies (Principles 1, 3 and 8). Principle 9 requires States to maintain adequate domestic policy space to meet their human rights obligations when pursuing investment-related objectives through investment treaties or contracts.[69] A legal architecture that makes it financially and politically costly for a State to regulate an investor found to have violated human rights or environmental standards is incompatible with the State's foundational obligations under international human rights law.

In the investment context, the Independent Expert on the promotion of a democratic and equitable international order has also identified ISDS as incompatible with democratic governance, regulatory space, and the primacy of human rights obligations, calling for its abolition and replacement by ordinary domestic or inter-State mechanisms (before the International Court of Justice or by domestic courts that comply with the fair trial guarantees of Article 14 of the ICCPR).[70]

The rights of Indigenous peoples are directly engaged. The Special Rapporteur on the rights of Indigenous Peoples has examined the impact of international investment and free trade regimes and identified risks where investment protections undermine consultation, participation, land rights, territorial protection and free, prior and informed consent (FPIC).[71] ISDS cases have been brought to challenge the decisions of national courts and regulatory

[67] CESCR, General comment No. 24 (2017) on State obligations in the context of business activities, E/C.12/GC/24.
[68] Report of the Special Rapporteur on the right to food, Olivier De Schutter, Guiding principles on human rights impact assessments of trade and investment agreements*, A/HRC/19/59/Add.5, Annex, https://docs.un.org/en/A/HRC/19/59/Add.5.
[69] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, Annex, https://docs.un.org/en/a/hrc/17/31.
[70] Report of the Independent Expert on the promotion of a democratic and equitable international order, A/70/285, para. 60, https://docs.un.org/en/A/70/285.
[71] Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, A/70/301, para. 59, https://docs.un.org/en/A/70/301; Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42, paras. 26, 28, 32 and 74–76, https://docs.un.org/en/A/HRC/33/42.

bodies implementing FPIC requirements under ILO Convention 169 and UNDRIP. [72] Cases involving mining in protected and Indigenous territories in Colombia, Peru, Ecuador, the United States and Canada illustrate how ISDS can be deployed to undermine the legal protections that domestic and international law have established for Indigenous communities.

Beyond the obligations noted above, the ICJ Advisory Opinion of 23 July 2025 placed these duties on the firmest possible legal footing and drew out their implications for investment law directly. The Court held that States bear a "stringent" due-diligence obligation under customary international law—independent of, and not displaced by, the UNFCCC or the Paris Agreement framework—to prevent significant harm to the climate system, including through regulation of fossil fuel production, licensing, consumption, and subsidies.

Critically, the Court confirmed that States have a duty to regulate private actors: failure to adopt adequate legislative and regulatory measures to limit emissions by entities under State jurisdiction may itself constitute an internationally wrongful act. These obligations are owed *erga omnes*—to the international community as a whole—meaning they cannot be subordinated to the bilateral investor protection commitments found in investment treaties. The Court further affirmed that the human right to a clean, healthy, and sustainable environment is inherent in the enjoyment of other established human rights, and that States must respect and ensure that right through effective climate regulation.[73] A regime that makes such regulation financially and legally costly—precisely the effect of ISDS—is structurally at odds with what international law now unambiguously requires.

For these reasons, the policy restores coherence between investment governance and international human rights law by ensuring that measures related to public health, labour, the environment, climate, and the rights of Indigenous Peoples are not subordinated to private arbitration claims for lost profits.

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[72] ILO Convention No. 169 (1989); United Nations General Assembly (UNGA), United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007).
[73] International Court of Justice, Advisory Opinion on the Obligations of States in Respect of Climate Change (23 July 2025), paras. 94, 138, 246, 268, 282, 393, 426–428 and 440–442, https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf

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10. REMARKS

Three points merit emphasis beyond what the preceding sections address.

First, this policy profile argues for the termination of ISDS, not of investment governance. The two must be clearly distinguished in political communication. Opponents of reform routinely conflate ending ISDS with ending all legal protection for investors, or with unilateral expropriation. This conflation is false and should be rebutted directly. Domestic law—constitutional protections, administrative law, commercial law, judicial review—provides a comprehensive and accountable framework for investment protection in all jurisdictions with functioning rule-of-law systems. The alternative framework proposed here (domestic courts, PRI, State-to-State proceedings as a last resort) is not a vacuum; it is the framework that exists for domestic investors and that should apply equally to foreign ones.

Second, the political economy of reform requires honest assessment. The most powerful capital-exporting States have historically been the architects and principal beneficiaries of the ISDS system—and many have now drawn the obvious conclusion. The ECT withdrawals and the removal of ISDS between Canada and the United States reflect a growing recognition, among developed States, that the mechanism is too costly and too politically damaging to sustain among themselves. Yet most of these same States continue to negotiate and maintain ISDS-containing treaties with countries in the Global South—the very States least equipped to bear the fiscal and regulatory burdens the system imposes, and whose populations are most acutely exposed to its consequences. The implicit logic is difficult to defend: a mechanism that capital-exporting States have deemed unacceptable in their own relationships is actively preserved, and in some cases expanded, in their relationships with lower-income partners. The interests being served are identifiable: the extractive industries that are among the heaviest users of ISDS, and the arbitration, legal, and third-party funding industries whose profitability depends directly on the volume and value of claims. Reform coalitions must therefore look beyond governments and include the domestic constituencies in capital-exporting States whose own interests are harmed by the system—public health ministries constrained by tobacco and pharmaceutical claims, environment agencies chilled by fossil fuel litigation threats, investment-affected populations, and democratic legislatures whose regulatory mandate is compromised by private arbitral override.

Third, at the time of drafting, over 220 prominent economists and legal scholars had written to the Colombian President, Gustavo Petro, urging withdrawal from ISDS—a signal of the breadth of expert consensus that the current system is economically unjustified, legally asymmetric, and politically unsustainable. These instances of expert mobilisation provide openings for States that are ready to lead: by acting first, building coalitions, and demonstrating that a post-treaty-based-ISDS world is not only possible but already functioning in Brazil, South Africa, Bolivia, Ecuador, and elsewhere.