

# THE CORPORATE COLONIZATION OF LATIN AMERICA

How Investor-State Dispute Settlement (ISDS)  
Harms Indigenous Communities



By Iza Camarillo  
June 2024

*Photo: Jerónimo Zuñiga / Amazon Frontlines*

# Acknowledgements

This report was authored by Iza Camarillo. Special thanks to Melinda St. Louis and Melanie Foley for overseeing this project, and Matthew McCarty for his legal research contributions.

I extend my sincere gratitude to Carla García-Zendejas, Helionor de Anzizu, and Melissa Blue Sky from the Center for International Environmental Law (CIEL) for reviewing the report, providing invaluable feedback, and their remarkable efforts in amplifying Indigenous Peoples' and community voices in ISDS proceedings.

Finally, I am profoundly appreciative of my colleague Sarah Stevens for their unwavering support, encouragement, and wealth of knowledge on ISDS and the rest of the Global Trade Watch team, Andi Petrovic, Rishab Bailey, Ryan Harvey, and Sarah Grace Spurgin for their dedication to global trade advocacy.

## Author's Note

*This report is dedicated to the Indigenous peoples who bravely defend their land, territory, and way of life in the face of threats, violence, and criminalization by oppressive forces and corporate greed.*

Prior to joining Public Citizen's Global Trade Watch as Research Director and advocate, I represented Latin American governments in ISDS arbitration. My time as an ISDS defense attorney exposed me to the plight of Indigenous peoples in these proceedings and their unique challenges and obstructions to justice. Despite "winning" notable cases, the governments sued were still forced to line the pockets of greedy foreign investors with millions of taxpayer dollars at the expense of their citizens.

Consequently, the damage caused to Indigenous peoples and their territories was irreparable. Yet, the secretive nature of ISDS meant the world remained largely unaware, while the system continued the usual cycle of more cases and egregious awards for corporations, the affected communities suffered lasting scars with limited recourse to justice.

This experience led me to conclude that meaningful change requires moving away from ISDS and amplifying the voices that the system has long silenced and marginalized.

## Suggested Citation

Iza Camarillo, "The Corporate Colonization of Latin America: How Investor-State Dispute Settlement (ISDS) Harms Indigenous Peoples," Public Citizen, June 2024.



# Table of Contents

## **Executive Summary 5**

- Indigenous Peoples' Rights in International Law 6
- The Conflict of ISDS and Indigenous Peoples' Rights 6
- ISDS Amounts to Corporate Colonialism 7
- ISDS Marginalizes Indigenous Peoples' Voices 7
- Policy Recommendations 9

## **I. From Spanish Colonialism to Neo-Colonial Structures: The Emergence of ISDS 12**

- Spanish Conquest and Revolutions 12
- The Emergence of the United States in Latin America 13
- Banana Republics 14
- Institutionalized Neo-Colonialism: "Protecting Foreign Investment" 16
  - Metalclad v. Mexico* 17
- Bullseye on Latin America 18
  - CMS Gas v. Argentina* 20
  - Infinito Gold v. Costa Rica* 20

## **II. Corporate Colonialism 21**

- The Chilling Effect on Protective Measures 21
  - Uber v. Colombia* 21
  - Philip Morris v. Uruguay* 22
- States Never Win 23
  - Álvarez y Marín and others v. Panama* 23
- Power Imbalances 25
  - Occidental Petroleum v. Ecuador* 25
  - Azurix v. Argentina* 26
  - TCW v. the Dominican Republic* 26
  - Lupaka Gold v. Peru* 27
- Lack of Transparency 27
  - Odyssey v. Mexico* 28
- Conflict of Interest and 'Double-Hatting' 28

Third-Party Funding	29
Additional Challenges and Concerns	30

### **III. The Conflict between Investor Protection and Indigenous Rights 31**

Right to Free, Prior, and Informed Consent	31
The Conflict between Investor Protection and Indigenous Rights	32
<i>Bear Creek v. Peru</i>	33
ISDS Marginalizes Indigenous Voices	35

### **IV. The Harms of ISDS on Indigenous Peoples in Latin America 37**

Triple Losing	37
<i>Pac Rim v. El Salvador</i>	38
Foiled Land Conservation Efforts	40
<i>Cosigo Resources v. Colombia</i>	41
<i>Crystallex v. Venezuela</i>	41
<i>Eco Oro v. Colombia &amp; Red Eagle v. Colombia</i>	42
<i>Abengoa v. Mexico</i>	43
Attacks on Sovereignty	44
<i>Prospera v. Honduras</i>	44
Environmental Harm	45
<i>Legacy Vulcan v. Mexico</i>	46
<i>Chevron v. Ecuador</i>	47
Fueled Social Unrest	48
<i>South American Silver Limited v. Bolivia</i>	48
<i>KCA v. Guatemala</i>	49
<i>Copper Mesa v. Ecuador</i>	50
<i>Burlington Resources v. Ecuador</i>	50

### **V. Policy Recommendations 51**

Adopting a 'Do No Further Harm' Approach	51
Removing ISDS From Existing Agreements	52
Interim Steps Toward Safeguarding Indigenous Peoples' Rights	55

### **Conclusion 56**

### **Endnotes 57**



# Executive Summary

This report presents a critical examination of the enduring marginalization and vulnerability of Indigenous peoples<sup>1</sup> and local communities in Latin America, tracing its roots to centuries of colonial exploitation and its perpetuation through the **Investor-State Dispute Settlement (ISDS)** system.

Under colonialism by the Spanish crown, Indigenous peoples in Latin America were subjected to violence, exploitation, and diseases brought from Europe, causing a catastrophic loss of life and culture.<sup>2</sup> Furthermore, colonialism brutally imposed forced labor to extract vast wealth from the region, primarily in the form of precious metals like gold and silver.<sup>3</sup>

The extractive industries established during this era continue to shape the economic disparities within Latin American nations and contribute to issues of inequality and underdevelopment.

The indelible scars of Spanish colonialism continue to mar Latin America.<sup>4</sup> Large corporate interests based in former colonial powers feared that newly independent states would nationalize or expropriate foreign investments as they sought to reclaim their natural resources and key industries.

As a result, Western nations established the ISDS system — predominantly characterized by arbitration proceedings aimed at resolving disputes between foreign investors and host states under the auspices of international law — and convinced former colonies that including ISDS provisions in trade and investment agreements was essential to attract foreign direct investment (FDI).

In the post-colonial era, ISDS has continued the legacy of injustice, particularly impacting Indigenous peoples by favoring foreign corporations at the expense of Indigenous lands and resources, mirroring colonial power dynamics. ISDS acts as an extension of colonialism, prioritizing influential nations and corporations over the sovereignty and development of post-colonial Latin American states.

Furthermore, ISDS harms the environment in numerous ways, including by serving as a tool for corporations that pollute countries to demand payment from governments regulating public health and the environment, causing the taxpayers to suffer from pollution and the deviation of public funds to lining corporations' pockets.

Latin America faces a disproportionate number of ISDS treaty-based disputes, with 360 out of 1,303 (over one-fourth) of known global cases, despite being home to less than 10 percent of the world's population.<sup>5</sup> Latin American governments have been ordered to pay over USD 33.2 billion in taxpayer money by ISDS tribunals, diverting critical resources away from social needs.

## **Indigenous Peoples' Rights in International Law**

The recognition of Indigenous rights achieved a significant victory through international instruments like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization's (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples.<sup>6</sup>

In addition to numerous substantive rights, these international instruments enshrined a set of participatory rights designed to structure the interaction between state decision-making bodies and Indigenous communities in ways that require governments and investors to attend to Indigenous perspectives in pursuing their objectives.<sup>7</sup>

The right to Free, Prior, and Informed Consent (FPIC) is a cornerstone of Indigenous rights. It recognizes their inherent authority to agree to or reject proposals that may impact their lands, resources, or territories. This right underscores the sovereignty and self-determination of Indigenous communities, acknowledging them as primary stakeholders and authorities in matters affecting their people and environment.<sup>8</sup>

## **The Conflict of ISDS and Indigenous Peoples' Rights**

The ISDS system, designed to safeguard foreign investors and ensure the stability of international investments, often puts Latin American governments in precarious situations, especially when ISDS cases intersect with Indigenous peoples' rights.

**Lack of Enforceability:** While Indigenous rights to land, resources, and sovereignty are recognized by international declarations, they frequently lack the enforceability of obligations under international investment agreements in both domestic and international law.<sup>9</sup> This disparity places governments in a challenging position, having to choose between defending Indigenous rights, with the risk of facing expensive ISDS lawsuits, and favoring foreign investments, which might lead to the degradation of these rights and provoke social unrest.

For example, in the Bear Creek v. Peru ISDS case, despite Peru being a signatory to the ILO's Convention No. 169, requiring consent from impacted communities,<sup>10</sup> an ISDS tribunal ordered Peru to give a Canadian mining company USD 30 million for halting a silver mining project after local indigenous communities vehemently opposed the project that threatened to contaminate Lake Titicaca and vital surrounding waterways.<sup>11</sup>





## ISDS Amounts to Corporate Colonialism

**Regulatory Chill:** The mere threat of launching an ISDS case can deter government regulation, known as regulatory chill. Wary of the financial and legal ramifications, governments may become reluctant to enact policies essential for protecting public health, safety, and the environment.<sup>12</sup>

For example, in Uber v. Colombia, after the U.S. company threatened and then filed an ISDS claim against the government of Colombia, the government backed down from a regulation to ensure fair competition between Uber and local taxi companies.

**Only Investors Can Launch a Case:** Governments cannot initiate ISDS cases against investors; only investors can sue governments in ISDS, which means corporations are not held accountable for wrongful actions or omissions that harm host countries.

In the case of Occidental Petroleum v. Ecuador, a tribunal ordered Ecuador to pay USD 1.2 billion to the company while acknowledging that the company had broken the law and violated the terms of its contract. In Azurix v. Argentina, after failing to provide potable water services as per its contract, Azurix still won a USD 165 million ISDS claim against the Argentine government.

**Conflict of Interest by Arbitrators:** The practice of “double-hatting,” where a legal professional serves as arbitrator and legal counsel in different cases, creates an incentive structure that benefits corporations at the expense of governments. For instance, one Swiss arbitrator served as the corporation’s appointed arbitrator, when only shortly before accepting the role, they had been appointed director at an international bank whose investment portfolio included an interest in one of the claimants.



## ISDS Marginalizes Indigenous Peoples’ Voices

**Limited Participation:** In ISDS arbitrations, the primary parties are the investing entity (often a multinational corporation) and the host state. Indigenous communities, even if directly impacted, are not formal parties to these disputes. Their participation, when permitted, comes in forms like intervenor status or *amicus curiae* submissions. However, tribunals are not required to consider these submissions, they often have minimal influence in the final rulings.<sup>13</sup>

**Triple Losing:** ISDS cases present formidable challenges to Indigenous rights, particularly concerning land, sovereignty, and environmental protection, often leaving Indigenous communities in precarious positions due to the economic interests of foreign investors threatening their ancestral lands and heritage. Indigenous communities involved in ISDS cases often experience a “triple-losing scenario,”

in addition to the initial social and environmental loss from a damaging project by a foreign company, ISDS claims layer on additional legal and financial losses.

**Foiled Land Conservation:** ISDS has enabled corporations to challenge governmental conservation efforts to protect vital ecosystems and Indigenous lands. In Cosigo Resources v. Colombia, American and Canadian mining companies demanded USD 16.5 billion in damages for the establishment of the Yaigojé Apaporis National Park within the Amazon rainforest, a move to preserve biodiversity and protect Indigenous communities.

Similarly, Colombia's decision to safeguard the Santurbán Páramo, crucial for its water-absorbing capabilities that provides water to approximately 2.5 million people in 68 surrounding municipalities (85% of the country's water supply)<sup>14</sup> and spiritual significance to Indigenous peoples,<sup>15</sup> prompted USD 700 million and 118 million lawsuits from Eco Oro and Red Eagle, respectively.

These ongoing ISDS cases spotlight the tension between environmental conservation efforts and corporate interests, underlining the system's potential use to penalize countries for prioritizing ecological and Indigenous protections over mining concessions.

**Attacks on Sovereignty:** ISDS poses a significant threat to government sovereignty by enabling foreign investors to contest host country laws, regulations, and policies, including those protecting Indigenous rights. This dynamic places international corporate interests over national sovereignty, restricting a government's capacity to legislate and implement policies for public welfare.

The Prospera v. Honduras dispute exemplifies such corporate colonialism, with a U.S. company seeking USD 10.7 billion in damages after Honduras repealed a law facilitating the creation of private cities, which granted investors unprecedented autonomy and was criticized as a corruption conduit. This law, unpopular among Hondurans for undermining national sovereignty and promoting social unrest, particularly affected the Black-English, Garifuna, and Indigenous Miskito communities in Roatán.

**Environmental Degradation:** The mining industry's extractive operations significantly harm natural ecosystems, contaminating water bodies with toxic substances, releasing harmful air particulates, destroying habitats, and contributing to global climate change through greenhouse gas emissions.<sup>16</sup> Investors may use ISDS to challenge environmental regulations implemented to mitigate these harms, leading to government hesitation in enacting or enforcing stringent environmental standards for fear of costly legal disputes.<sup>17</sup>

This dynamic facilitates ecological degradation by allowing lower environmental standards and lax enforcement. Cases like Legacy Vulcan v. Mexico, where a U.S. company sued Mexico under NAFTA for implementing environmental protections that interfered with its limestone quarry operations,<sup>18</sup> and Chevron v. Ecuador, where the U.S. oil giant sought to avoid paying for pollution damages in the Amazon, demonstrates how extractive industries utilize ISDS to challenge sovereign environmental measures to protect ecosystems.<sup>19</sup>



**Fuels Social Unrest:** The intersection of foreign investments with Indigenous land rights, sovereignty, and environmental concerns, coupled with repeated violations of Indigenous rights, has frequently led to social unrest and protests within Indigenous communities. These communities often ally with activists and civil society organizations to strengthen their advocacy against projects that infringe upon their rights, leading to significant protests and campaigns.<sup>20</sup>

A stark example of such conflict is the case of South American Silver Limited v. Bolivia, where a Bermuda-based mining company faced accusations from Indigenous communities of polluting sacred lands and committing violent abuses, including sexual assaults.<sup>21</sup> The ensuing violent clashes prompted Bolivia to revoke the mining concessions to mitigate the unrest.<sup>22</sup>

Despite the company's failure to positively engage with or even recognize the Indigenous communities, it pursued an ISDS claim and was awarded USD 18.7 million by the tribunal.<sup>23</sup>

## **Policy Recommendations**

### **Adopting a 'Do No Further Harm' Approach**

Governments across the globe are critically evaluating the inclusion of ISDS provisions in trade and investment agreements, recognizing their potential to limit regulatory autonomy. President Biden's campaign promise to omit ISDS clauses from new trade agreements highlights a broader governmental shift towards safeguarding legislative and regulatory freedom.

Nevertheless, many other countries around the world are still negotiating numerous FTAs and Bilateral Investment Treaties (BITs) with ISDS provisions, underscoring the challenge of excluding ISDS to preserve governmental capacity to prioritize citizen, environmental, and public welfare interests. This approach aligns with evolving international investment law towards a fairer balance of investor and state rights and responsibilities.

### **Avenues for Governments to Remove ISDS from Existing Agreements**

#### **✓ *Unilateral Termination of Bilateral Investment Treaties***

Bolivia, Ecuador, and Venezuela have each unilaterally terminated BITs with distinct motivations. Desiring greater state control over natural resources and economic policies, this move aimed to safeguard sovereignty and regulatory freedom, particularly in critical sectors such as mining, gas, and water, prompted by the liabilities posed by ISDS claims.

Ecuador began exiting its BITs in 2009 after a commission found that these treaties compromised the country's sovereignty without significantly attracting foreign investment.

Adverse ISDS rulings that led to substantial financial liabilities for Ecuador further fueled this decision. In seeking to renegotiate treaties on more equitable terms, Ecuador emphasized the state's regulatory autonomy and a balanced approach to investment protection.

The persistence of 'survival clauses'—which allow for ISDS claims post-treaty termination—remain formidable obstacles. Addressing these clauses is crucial for reclaiming full regulatory authority.

There is contention over neutralizing survival clauses, with some experts suggesting unanimous agreement among treaty parties can invalidate these provisions, a critical step towards reinforcing national sovereignty and regulatory autonomy against future legal challenges.

### ✓ ***Amending Free Trade Agreements to Remove ISDS***

Governments can amend free trade agreements to remove or severely limit ISDS provisions. The United States-Mexico-Canada Agreement (USMCA), which replaced NAFTA in 2020, serves as a prominent example, as ISDS was eliminated between the U.S. and Canada and largely curtailed between those countries and Mexico.

### ✓ ***Multilateral Termination***

The collective termination of BITs within the European Union (EU) in 2020, where 23 member states agreed to end 190 intra-EU BITs, exemplifies a coordinated approach to reforming investment treaty frameworks.

Drawing inspiration from the EU's approach, a collaborative effort in Latin America to terminate or renegotiate BITs, particularly those including ISDS provisions, could reinforce national regulatory autonomy and sovereignty, emphasizing sustainable development and the protection of public policy objectives over investor protection.

The EU's concerted action underlines the potential for regional cooperation in realigning investment treaties with modern legal, economic, and policy considerations.

### ✓ ***Termination by Mutual Consent***

Article 54(b) of the Vienna Convention on the Law of Treaties facilitates the consensual termination of international treaties, including FTAs and BITs, by allowing for termination "at any time by consent of all the parties after consultation with the other contracting States."

This provision underscores the importance of mutual agreement and consultation, ensuring that any decision to end a treaty reflects the collective will of all parties involved, allowing states to adapt their treaty obligations to current priorities and objectives.

Recent examples of its application include the Czech Republic's termination of its BITs with Denmark, Italy, Malta, and Slovenia, and the mutual agreement between Argentina and Indonesia to terminate their BIT, illustrating the practical use of Article 54(b) in facilitating the orderly reevaluation and termination of international agreements.



## **Interim Measures to Safeguard Indigenous People**

### **✓ *Comprehensive Reviews of Existing Treaties***

As governments contemplate strategies to mitigate the implications of ISDS provisions within existing FTAs and BITs, an immediate and necessary step involves a comprehensive review of these treaties. Given that many of these agreements were signed over two decades ago, it's imperative to reassess their relevance and efficacy against today's economic and political backdrops.

This comprehensive review aims to ensure these agreements align with modern-day challenges and priorities, including the safeguarding of Indigenous communities against potential adversities stemming from international investments.

### **✓ *Incorporating Indigenous Peoples Rights in Investment Agreements***

The incorporation of Indigenous peoples rights within FTAs, BITs, and even private treaties between governments and corporations demands a nuanced approach. It involves the integration of principles and rights, including social license and, from the UNDRIP, FPIC, to ensure the protection and respect of Indigenous communities. Such treaties or contracts should mandate explicit obligations for investors to honor Indigenous rights as a prerequisite to claiming their rights under the agreements.

### **✓ *Facilitating Direct Indigenous Peoples Participation in ISDS***

As long as ISDS remains in effect in any existing agreement, it is critical to facilitate meaningful participation by Indigenous peoples in arbitration processes. Traditional reliance on amicus briefs, which tribunals can disregard, does not suffice. Indigenous peoples must be granted the unequivocal right to participate in ISDS cases that concern them, including the ability to submit evidence and arguments directly.

Furthermore, the composition of tribunals adjudicating these cases should reflect expertise not only in investment law but also in Indigenous rights, ensuring informed and sensitive adjudication.

In summary, the historical and contemporary challenges faced by Indigenous communities in Latin America underline the profound effects of colonial legacies and the modern exacerbations perpetuated by the ISDS system. The echoes of colonial exploitation through the ISDS framework continue to disadvantage Indigenous populations, reinforcing old hierarchies by prioritizing foreign investment over indigenous rights and environmental sustainability.

The documented cases and the staggering sums involved in ISDS disputes highlight an urgent need for a reassessment of international investment agreements, emphasizing the importance of aligning them with the fundamental rights of Indigenous peoples and the ecological imperatives of our times.

# I. From Spanish Colonialism to Neo-Colonial Structures: The Emergence of ISDS

## Spanish Conquest and Revolutions

The history of Latin America is marked by a legacy of colonialism that has had profound and enduring impacts on its Indigenous peoples. Indigenous peoples are the original inhabitants of a particular land, predating the arrival of colonizers, settlers, or other external groups. They are defined as ethnic groups or distinct societies with a historical and ancestral connection to a specific territory or region, and often have unique languages, cultures, traditions, and governance systems.<sup>24</sup>

In the Latin American region, spanning territories in North, Central, and South America and the Caribbean, many Indigenous civilizations thrived for centuries before European conquest began.<sup>25</sup> Sponsored by the Spanish Crown, Christopher Columbus arrived in the Caribbean islands in 1492, kicking off a series of voyages that led to the exploration and eventual conquest of vast territories by European powers.<sup>26</sup>



*The Torture of Cuauhtémoc, by Leandro Izaguirre (1892). Cuauhtémoc was the last Aztec ruler, and the conquistadors tortured him to find out where the remaining deposits of gold in the city of Tenochtitlan were located. (National Museum of Art, Mexico City)*

Spain sought territorial control by establishing new colonies and forcing its culture, language, and religion on the native population. The Catholic missions were instrumental in this cultural imposition, leading to the erosion of Indigenous languages, belief systems, and traditions.<sup>27</sup>

To subjugate the population, Indigenous peoples were subjected to violence, exploitation, and diseases brought by the colonizers, causing a catastrophic loss of life and culture.<sup>28</sup> The near annihilation of Indigenous peoples and the erasure of their histories and languages remain profound and painful legacies of colonialism in Latin America.<sup>29</sup>

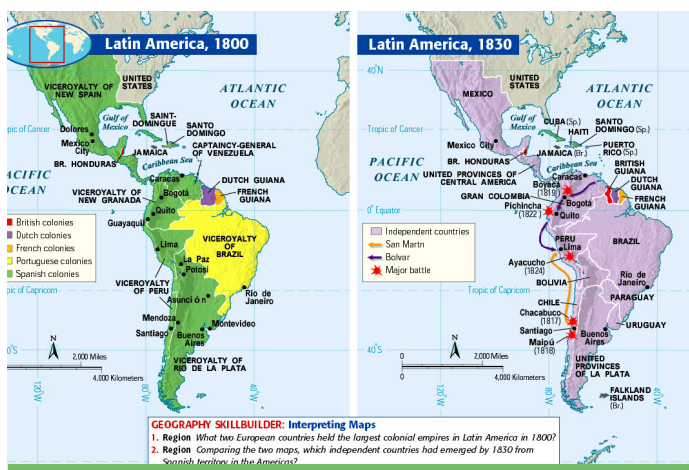
Furthermore, colonialism extracted vast wealth from the region, primarily in the form of precious metals like gold and silver.<sup>30</sup> The conquistadors often seized these resources through brutal methods and shipped them to Europe, enriching colonial powers while impoverishing the colonies.<sup>31</sup> The extractive industries established during this era continue to shape the economic disparities within Latin American nations and contribute to issues of inequality and underdevelopment.

After nearly three centuries of Spanish rule, the colonies of Latin America gained their independence in the early 19th century, as internal and external factors spurred the struggle for freedom. Internally, there was growing discontent among Indigenous peoples and mestizos (people of mixed European and Indigenous parentage), who were often sidelined from political power and economic benefits by the Spanish-born 'elite'.<sup>32</sup>

Externally, the weakening of Spain's global dominance, particularly following the Napoleonic Wars in Europe, created an opportune moment for revolutionary movements.<sup>33</sup>

## The Emergence of the United States in Latin America

The wars of independence, which spanned from the early 1800s to around 1825, were marked by political and military struggles as the residents of the Spanish colonies fought to overthrow the Spanish military. Ultimately, Spain retreated, and with the exception of Cuba and Puerto Rico,<sup>34</sup> the former colonies gained independence, forming sovereign nations.<sup>35</sup>



Comparative maps of Latin America pre and post colonial Independence.

However, the post-independence period was far from stable as the newly formed nations grappled with defining their identities and constructing functional political systems. The power vacuum left by Spain led to internal conflicts and power struggles as various factions vied for control, and a new external power saw an opportunity to engage with these fledgling nations: the United States.<sup>36</sup>

In the 19th century, the United States asserted its dominance in the Western Hemisphere through key events such as the Monroe Doctrine of 1823 and the Mexican-American War in 1846. The Monroe Doctrine declared the region off-limits to

further European colonization, positioning the U.S. as the protector of Latin American sovereignty.<sup>37</sup> This assertion of influence paved the way for American economic involvement, particularly in cash crop cultivation, at the expense of European competitors.<sup>38</sup>

The Mexican-American War saw the U.S. expand significantly, acquiring approximately 55 percent of Mexico's territories, including California, Utah, Nevada, parts of Arizona, New Mexico, Colorado, and Wyoming. This expansion deeply impacted Mexico, causing political divisions and economic hardships due to losing a significant portion of its revenue-generating territories.<sup>39</sup>

Subsequently, the Spanish-American War of 1898 solidified the U.S. as a major global player, resulting

in the acquisition of territories like Puerto Rico and the Philippines while pushing European powers out.<sup>40</sup>

This marked a shift in power dynamics, with the U.S. asserting its dominance in Latin America and intervening militarily to protect its interests, exemplified by the construction of the Panama Canal for strategic naval purposes that led to significant impacts on trade and transportation in the region.<sup>41</sup>

## **Banana Republics**

Privately, American corporations began expanding their reach in Latin America as well. In the late 19th and early 20th centuries, the advent of the United Fruit Company and Standard Fruit Company in Latin America marked the beginning of a new era of economic imperialism, reminiscent of the colonial rule of European powers. These American corporations embarked on an expansive venture that promised infrastructural development and employment opportunities through the construction of railroads and ports.<sup>42</sup>

However, this development was a double-edged sword, as it came with conditions that entrenched the companies' monopolistic control over the economies and political systems of host countries, including Colombia, Costa Rica, Ecuador, Guatemala, Honduras, and Nicaragua.<sup>43</sup> This pervasive influence led to the coining of the term "banana republics," highlighting the transformation of sovereign nations into entities primarily serving foreign corporate interests, often at the expense of their own development and autonomy.



"The Making of America"

The exploitation of these countries was multifaceted, extending beyond economic dominance to political manipulation and significant social and labor unrest. The companies became notorious for their vast landholdings, which were used not just for agricultural production but also as a means of political leverage, making them the largest employers and landowners in their respective regions.<sup>44</sup>

This corporate overreach was met with significant resistance, exemplified by the 1934 Great Banana Strike in Costa Rica and the General Strike of 1954 in Honduras, as workers protested against unfair labor practices and demanded better conditions.<sup>45</sup>



The companies' operations were marked by unethical practices, including bribery, worker exploitation, tax evasion, and environmental degradation, further intertwining their interests with American foreign policy through connections with influential political figures such as John Foster Dulles, who served as United States Secretary of State under President Dwight D. Eisenhower from 1953 to 1959 and his brother, Allen Dulles, who served as the head of the Central Intelligence Agency (CIA) from 1953 to 1961.<sup>46</sup>

The harms caused by these corporations were extensive, resulting in economic dependency, environmental damage, and a suppression of labor rights within the host countries. Their monopolistic practices not only stifled economic diversity and development but also discouraged local governments from pursuing infrastructure improvements that could have diminished the companies' control.<sup>47</sup>

The environmental impact was particularly devastating, with widespread deforestation and chemical pollution affecting the region's biodiversity and public health.<sup>48</sup> Moreover, the political interference by these corporations supported undemocratic regimes and contributed to political instability, most notably through the CIA-backed coup in Guatemala in 1954, which served to protect United Fruit's interests.<sup>49</sup>

The downfall of these banana republics was precipitated by a combination of internal resistance and external pressure. Labor movements and strikes brought about greater awareness of workers' rights and led to the strengthening of labor unions, challenging the companies' exploitative practices.<sup>50</sup> Growing awareness and activism around human rights and environmental issues brought international scrutiny, while legal challenges, including antitrust investigations in the United States, aimed to dismantle their monopolies.<sup>51</sup>

Additionally, the Cold War's geopolitical dynamics saw the Soviet Union supporting nationalist movements in Latin America, opposing American corporate interests in the region.<sup>52</sup> This period also witnessed a strategic shift in U.S. foreign policy towards promoting human rights and democracy, further isolating the corporations<sup>53</sup>.

By the late 20th century, the traditional model of the banana republic had significantly declined. Countries began to assert control over their resources and industries, redistributing land and breaking up foreign monopolies.<sup>54</sup> Despite this, the legacy of exploitation and intervention by these fruit companies has left deep and lasting impacts on the region's development, political landscape, and labor rights movements. The companies continue to thrive as present-day Chiquita and Dole, respectively.<sup>55</sup>





## **Institutionalized Neo-Colonialism: “Protecting Foreign Investment”**

As Latin American nations moved away from banana republics, they encountered the dual challenge of engaging with the global economy and protecting their national interests. In an effort to address economic vulnerabilities stemming from their colonial past, such as underdeveloped economic structures, dependence on a limited selection of primary commodities for export, and the need for modernization, these countries sought to draw in foreign direct investment (FDI).<sup>56</sup>

FDI was championed by countries from the Global North and various international bodies as a key mechanism for delivering essential capital required for building infrastructure, fostering industrialization, and stimulating overall economic development in countries of the Global South.<sup>57</sup>

However, attracting FDI often involved signing trade and investment agreements that, in hindsight, were not always favorable. Former colonies faced economic vulnerability, lacked expertise in negotiating complex international agreements, and encountered internal political pressure to stabilize and grow their economies.<sup>58</sup>

Meanwhile, large corporate interests based in former colonial powers feared that newly independent states would nationalize or expropriate foreign investments as they sought to reclaim their natural resources and key industries. As a result, in the 1960s, Western nations established the Investor-State Dispute Settlement (ISDS) system<sup>59</sup> — predominantly characterized by arbitration proceedings aimed at resolving disputes between foreign investors and host states under the auspices of international law — and convinced former colonies that including ISDS provisions in trade and investment agreements was essential to attract FDI.<sup>60</sup>

Thus, ISDS provisions became standard components of Bilateral Investment Treaties (BITs) and the investment chapters of Free Trade Agreements (FTAs). In some instances, ISDS provisions were incorporated directly into contracts between investors and host governments, a practice that continues today.

In ISDS arbitration proceedings, corporations bypass domestic courts and only have to convince a closed-door panel, often consisting of three corporate lawyers, that the host state’s actions violated a breach of the international agreement or contract.<sup>61</sup>

In this one-way system, governments are not able to sue corporations for wrongdoings through ISDS.<sup>62</sup> In fact, there are few avenues available for states to hold multinational corporations accountable. Even within the Inter-American human rights system, often regarded as the forefront in recognizing and enforcing Indigenous rights norms, cases are prone to delays due to the overwhelming influx of claims and limited resources.<sup>63</sup>

Paradoxically, despite arguments by ISDS proponents that the system encourages FDI, studies do not provide any supporting evidence.<sup>64</sup> Instead, studies show that countries with ISDS provisions in their investment agreements have not experienced substantial increases in FDI.<sup>65</sup> In contrast, Brazil, which does not have such provisions, remains among the top ten FDI destinations globally, without the restraints of ISDS on their ability to implement laws and regulations that suit their nation's needs.<sup>66</sup>

ISDS empowers corporations with the unprecedented right to challenge host states if they believe a change in law or regulation would adversely affect their current or projected future profits, even if that change is in the public interest.<sup>67</sup> Governments have incurred billions in compensatory payments to foreign corporations. These payments, borne by taxpayers, are often the result of simply putting in place sound public policy.<sup>68</sup>

As a result, ISDS is a major obstacle to countries addressing environmental harms since foreign investors use it to seek compensation for taking action to protect the environment. Even when corporations pollute the environment, arbitral tribunals force governments to pay polluters instead of making them pay for their activities and the impacts they have on biodiversity and livelihoods in the countries where they operate.

Since 2009, there have been 21 ISDS cases launched against governments around the world in response to climate actions, causing many of the regulatory measures to be abandoned and taxpayers to pay billions in awards to fossil fuel and mining companies on top of having to live with the environmental degradation they caused.<sup>69</sup>

## Metalclad v. Mexico

Metalclad v. Mexico is one of the earliest and most notorious ISDS cases involving a Latin American country. In 1997, Metalclad Corporation, a U.S. waste management firm, claimed that a Mexican municipality's denial of permits to operate a toxic waste facility amid concerns of water contamination and other environmental and health hazards violated its rights under the North American Free Trade Agreement (NAFTA).<sup>70</sup>



*The Guadalcázar toxic waste facility. (Unknown)*

The local government had already denied similar permits to the Mexican firm from which Metalclad acquired the facility, citing environmental concerns.<sup>71</sup> However, since Metalclad was a foreign investor operating under NAFTA, it was able to argue that the decision to reject their permit amounted to expropriation.<sup>72</sup>

The tribunal sided with the corporation and ordered Mexico to pay over USD 16.6 million.<sup>73</sup> This case drew attention to the potential implications of ISDS for host governments' regulatory authority and their ability to implement environmental policies.<sup>74</sup>

Expropriation is legally defined as the action by the state or an authority of taking property from its owner for public use or benefit. Governments most often expropriate properties to build highways, railroads, airports, or other infrastructure projects. However, in ISDS, the definition of expropriation is broadened to allow corporations to sue governments for "indirect expropriation" of their investment but there is no widely accepted definition of it. As such, arbitration tribunals have often interpreted it as any government action that could potentially affect a corporation's future profits.<sup>75</sup>

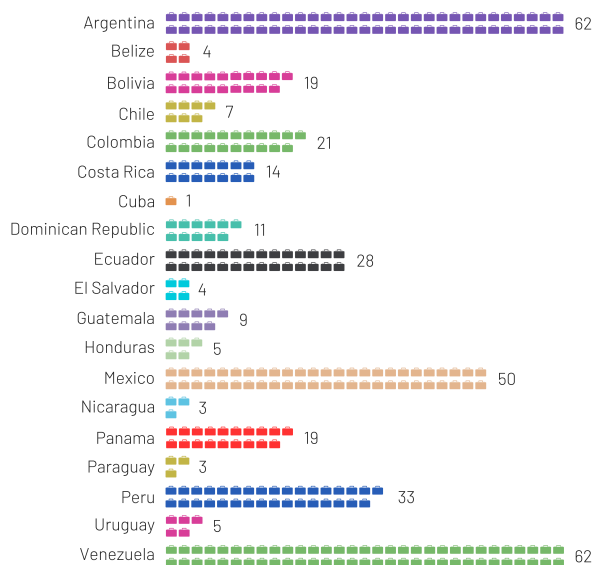
## Bullseye on Latin America

The convergence of environmental, economic, legal, and social factors has made Latin America uniquely vulnerable to corporate attacks via ISDS. Latin America faces a disproportionate number of ISDS treaty-based disputes, with 360 out of 1,303 (over one-fourth) of known global cases, despite being home to less than 10 percent of the world's population.<sup>76</sup>

These disputes have led to substantial financial liabilities, ultimately borne by taxpayers. To date, ISDS tribunals have ordered Latin American governments to pay over USD 32.5 billion in known award and settlement compensations.<sup>77</sup> However, the sum is likely much higher due to the secretive nature of ISDS proceedings and the option to leave award amounts undisclosed to the public. At present, Latin American governments are being sued for tens of billions more in pending cases.<sup>78</sup>

According to the United Nations Conference on Trade and Development's (UNCTAD) World Investment Report 2022, the United States was the second largest investor in the Latin American region between 2016 and 2020.<sup>79</sup> While many investors that have launched cases against Latin American countries hail from Europe or Canada, American corporations initiate most of these corporate attacks.<sup>80</sup>

**Number of ISDS Cases Per Country**



Source: UNCTAD, Investment Dispute Settlement Navigator, As of May 2024

Arbitration proceedings can be costly and lengthy, often taking years to resolve and requiring significant financial resources, substantially burdening countries, especially small and developing nations, diverting funds from essential public services.<sup>81</sup> Furthermore, because tribunals can order unlimited amounts of “damages” if they determine the state violated the broad investor rights, some ISDS rulings have resulted in enormous payouts by cash-strapped governments to wealthy investors.<sup>82</sup>

## Several factors contribute to the prevalence of ISDS claims in this region:

### Natural Resources

Latin America is abundant in natural resources and has attracted substantial foreign investment, especially in the mining and oil and gas sectors.<sup>83</sup> However, the investments often lead to environmental harm and local community exploitation, reminiscent of the resource looting during the Spanish conquest.

### Colonial Legacy

The legacy of colonization and the subsequent structural inequities have led to social unrest and conflicts over land and resources.<sup>84</sup> The region is home to approximately 50 million Indigenous people, who belong to 500 different ethnic groups whose rights, including land and cultural rights, are often central to ISDS disputes.<sup>85</sup> Indigenous communities often live on resource-rich land sought after by foreign investors.<sup>86</sup> Indigenous peoples have been pushed to the least desirable land on the outskirts, where there are many resources but considerably less infrastructure and political power to refuse development, further accentuating their vulnerability.

### Legal and Regulatory Changes

Latin American governments are relatively new compared to Global North nations and may change legal and regulatory frameworks to address gaps, including social and environmental issues.<sup>87</sup> Countries can thus be vulnerable to challenges for enacting safeguards common in more established governments, and corporations can argue these changes amount to direct or indirect expropriation, among other claims, leading to ISDS disputes.<sup>88</sup>

Country	Indigenous Population
Argentina	955,032
Belize	56,146
Bolivia	4,674,000
Chile	2,185,792
Colombia	48,258,494
Costa Rica	114,000
Ecuador	1,100,000
Guatemala	6,500,000
Mexico	23,200,000
Nicaragua	566,500
Panama	122,461
Peru	5,972,603
Venezuela	724,592

The Indigenous World Report 2023, 37th Edition

## CMS Gas v. Argentina

For example, Argentina faced a slew of ISDS cases in the aftermath of its financial crisis in the early 2000s as it implemented measures to stabilize its economy when more than half of its population plunged below the poverty line.<sup>89</sup>



*Unrest From Argentina's 2001 to 2002 Economic, Financial And Social Crisis. (Pablo Cuarterolo)*

In *CMS Gas v. Argentina*, a U.S. energy company launched an ISDS case in response to Argentina passing emergency measures to mitigate the financial crisis, including freezing utility rates and converting dollar-denominated tariffs into pesos.<sup>90</sup>

Despite Argentina's government arguing that the measures were necessary and justified under the BIT's economic emergency provisions,<sup>91</sup> the tribunal sided with the corporation and ordered Argentina to pay USD 133.2 million plus interest.<sup>92</sup>

## Political Instability and Corruption

Political instability and corruption are ongoing issues in Latin America and linked to the colonial legacy of authoritarian rule and power concentration. Examples include the cycle of coups, dictatorships, military interventions, or the enduring challenges of corruption and political turmoil.<sup>93</sup>

## Infinito Gold v. Costa Rica

In 2014, Canadian mining firm Infinito Gold sued Costa Rica for USD 94 million after domestic courts upheld the unanimous legislative action to ban open-pit mining due to environmental concerns,<sup>94</sup> even though the process through which they obtained their original license was so corrupt it resulted in a criminal investigation of the then-President.<sup>95</sup>

The local communities protested the use of open-pit metallic mining in the tropical rainforests and the damage caused to the different species and water sources at the site of industrial activity.<sup>96</sup>



*Demonstrations against the Crucitas mining project in Costa Rica. (Bilaterals.org)*



## II. Corporate Colonialism

### The Chilling Effect on Protective Measures

The mere threat of launching an ISDS case can have severe and far-reaching consequences for host states. One of the most palpable impacts is the deterrence of regulation, known as regulatory chill. Wary of the financial and legal ramifications, governments may become reluctant to enact policies essential for public health, safety, and environmental conservation.<sup>97</sup> This dynamic can lead to a regulatory environment that shields corporate interests and prevents the enactment of policies necessary for Indigenous peoples and public welfare.

The threat of ISDS disputes can lead governments to not just temporarily pause but potentially dilute or completely abandon critical regulations. Anticipating potential ISDS claims, governments may redirect human and financial capital toward legal preparations, consultations, and negotiations, a reallocation at the expense of pressing public needs, especially in sectors like healthcare, environmental protection, and infrastructure.<sup>98</sup> The chilling effect thus creates a barrier, as governments must weigh the imperative to safeguard public interest against the looming threat of legal disputes with foreign investors.<sup>99</sup>

#### Uber v. Colombia

The case of Uber v. Colombia provides an example of regulatory chill. In 2019, Colombia sought to regulate the operation of the U.S.-based ride-sharing app Uber within its territory.<sup>100</sup> This regulation was aimed at ensuring fair competition with traditional taxi services and compliance



*Taxi Drivers protest Uber in Colombia's capital of Bogota, 2017. (Raul Arboleda/AFP/ Getty Images)*

with local transportation laws following protests from taxi drivers claiming Uber had an unfair advantage since they did not pay the same licensing fees traditional cabs are subject to.<sup>101</sup>

A Colombian judge ruled that Uber failed to operate within the country's laws and rules, and the regulatory agency for commerce and trade ordered Uber to cease operations.<sup>102</sup> In response, Uber issued a letter to Colombia's president, threatening to initiate an ISDS claim under the U.S.-Colombia Trade

Promotion Agreement, arguing that the Colombian government's actions were unfairly targeting the company and adversely affecting its investments,<sup>103</sup> reportedly seeking upwards of USD 250 million in damages if an agreement was not reached.<sup>104</sup>

On February 3, 2020, the threatening letter was followed by a notice of dispute, officially registering the case.<sup>105</sup> After a brief pause, Uber resumed its activities in Colombia, but the corporation did not withdraw its notice of dispute, allowing it to serve as a lingering reminder of what could happen if the Colombian government suspends its right to operate in the future.<sup>106</sup>

## Philip Morris v. Uruguay



John Oliver and 'Jeff the diseased lung' share stories of tobacco companies' ISDS attacks on public health measures.

The Philip Morris v. Uruguay case also created a regulatory chilling effect. In 2010, Philip Morris, a Swiss global tobacco company, launched an ISDS dispute against Uruguay, challenging the country's anti-smoking laws.<sup>107</sup>

These laws, which included graphic health warnings on cigarette packages and restrictions on branding, logos, and promotional elements, were part of Uruguay's public health campaign to reduce smoking rates – one of the highest in Latin America.<sup>108</sup>

Philip Morris argued that these measures expropriated its investments and infringed on its intellectual property rights.<sup>109</sup> Six years later, only after Michael Bloomberg bankrolled the Uruguayan government's defense,<sup>110</sup> the ISDS tribunal ruled in favor of Uruguay.<sup>111</sup>

However, the regulatory chill effect spilled over to New Zealand, which had planned on implementing similar measures to protect public health but delayed doing so in fear of Philip Morris launching disputes against them as well.<sup>112</sup>



Anti-tobacco installation in Montevideo, Uruguay. (Pablo La Rosa/Reuters)

When Uruguay increased the size of its warnings from 50% to 80% of the surface of the pack there existed a considerable body of experimental and survey evidence... suggesting that larger warnings are more legible and noticeable and, therefore, better at informing smokers and non-smokers of risk.

– Written Submission by the World Health Organization and the WTO Framework Convention on Tobacco Control Secretariat.<sup>113</sup>

Both cases illustrate the chilling effect of ISDS on domestic regulation. While the outcomes of these disputes can vary, the process itself can be daunting and costly for states, especially for smaller or developing countries with limited resources. The fear of potential ISDS claims can lead governments to exercise caution or restraint in enacting regulations that might provoke litigation, even when such measures are in the public interest.

ISDS is a major obstacle to countries addressing environmental harms since foreign investors use it to seek compensation for taking action to protect the environment. Even when corporations pollute the environment, arbitral tribunals force governments to pay polluters instead of making them pay for their activities and the impacts they have on biodiversity and livelihoods in the countries where they operate.<sup>114</sup>

Since 2009, there have been 21 ISDS cases launched against governments around the world in response to climate actions, causing many of the regulatory measures to be abandoned and taxpayers to pay billions in awards to fossil fuel and mining companies on top of having to live with the environmental degradation they caused.<sup>115</sup>

## States Never Win

Sometimes, ISDS tribunals side with states and dismiss the investor's claims. However, this is far from a victory. In many cases, governments are still responsible for paying millions of dollars in legal and arbitration fees, wasting the resources spent defending themselves in lawsuits.

### **Álvarez y Marín and others v. Panama**

In Álvarez y Marín and others v. Panama, a group of Dutch and Costa Rican investors sued Panama over a tourism project in an Indigenous-protected reserve known as Comarca Ngöbe-Buglé. According to the claimants, the project was frustrated due to local opposition and a governmental report.



The Comarca is a special territorial regime in which the Indigenous communities have collective ownership of the lands in the reserve. Therefore, third-party ownership is limited.

Panama argued that the investors illegally acquired the farms in the Comarca area through acquisitive prescription (so-called “squatter’s rights”) proceedings that had produced judgments granting ownership to third parties. It alleged that such proceedings were tainted by fraud and irregularities.



*Ngöbe-Bugle leaders protest on the Pan-American highway for their rights to have free, prior, and informed consent on mining and hydroelectric projects. (Cultural Survival)*

After more than three years, the tribunal sided with Panama but ordered each party to bear its own costs and ordered Panama to bear the onsite inspection costs, resulting in millions of taxpayer dollars spent on the case, once again proving that even when states “win,” they lose.<sup>116</sup>



*Protest against the World Bank outside of the DC headquarters, April 2024. (Public Citizen)*

## Power Imbalances

ISDS arbitration proceedings are increasingly scrutinized for their lack of transparency and potential bias toward corporate interests. These mechanisms, primarily conducted in international arbitration forums such as the World Bank's International Centre for Settlement of Investment Disputes (ICSID), reveal a complex web of confidentiality, limited public participation, and legal uncertainty.

The structural and procedural aspects of ISDS arbitration contribute to these challenges, with harmful implications for state sovereignty and marginalized communities, particularly in the Global South.

### Only Investors Can Launch a Case

As previously mentioned, governments cannot initiate ISDS cases against investors; only investors can sue governments in ISDS, which means corporations are not held accountable for wrongful actions or omissions that harm host countries.<sup>117</sup>

### Occidental Petroleum v. Ecuador

The Occidental Petroleum v. Ecuador case serves as an example of wrongful corporate actions, highlighting how ISDS enables investors to evade accountability for breaking domestic laws and profit by suing governments. In 2006, U.S. oil corporation Occidental Petroleum Corporation



*Demonstrations against the Oxy project. (Rainforest Action Network)*

(Oxy) launched a case against Ecuador under the Ecuador-United States BIT after the government terminated an oil concession due to the company's breach of contract and breaking Ecuadorian law.<sup>118</sup>

Oxy illegally sold 40 percent of its production rights to another firm without government approval, despite a provision in the concession contract stating that the sale of Oxy's production rights without government pre-approval would terminate the contract.<sup>119</sup>

The contract explicitly enforced Ecuador's hydrocarbons law, which protects the government's prerogative to vet companies seeking to produce oil in its territory, a particular concern in the environmentally sensitive Amazon region where Oxy was operating.<sup>120</sup>



Although the ISDS tribunal acknowledged that Oxy had broken the law and the government's response was lawful, they concocted a new obligation for the government (not included in the BIT) that its response must be "proportional" to the corporation's violation of the law.<sup>121</sup>

They determined that Ecuador violated this newly fabricated obligation, ordering Ecuador to pay USD 2.3 billion (including compound interest),<sup>122</sup> rendering it one of the highest awards to date.<sup>123</sup> The award was later reduced to USD 1.4 billion, still a ludicrous amount for a government to pay an investor for breaking the law.<sup>124</sup>

## **Azurix v. Argentina**

Azurix v. Argentina is a case that demonstrates how ISDS allows investors to fail to meet their contractual obligations, endanger the public, and exploit the crises they create. U.S. water company and Enron subsidiary, Azurix Corp., won a concession to provide clean drinking water and sewage treatment to 2.5 million people in Argentina.

Within a few months, residents complained of foul odors coming from the water. Local governments advised against drinking or paying for tap water.<sup>125</sup> After identifying the problem as algae contamination of a reservoir, Azurix alleged the algae was the government's responsibility and claimed it harmed the company by preventing rate increases (increasing their profits while failing to provide potable water).<sup>126</sup>

Ultimately, the tribunal sided with the investor and ordered the Argentine government to pay USD 165 million plus interest, in addition to covering almost all of the tribunal's costs.<sup>127</sup>

## **TCW v. the Dominican Republic**

In another example, during a nationwide energy crisis in the Dominican Republic, TCW Group – a U.S. investment management corporation that jointly owned with the government one of three electricity distribution firms – claimed that the government violated the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) by failing to raise electricity rates and prevent electricity theft by poor residents.<sup>128</sup>

TCW also argued that the government did not subsidize electricity rates, which would have diminished electricity theft by poor residents, despite such subsidization being impossible for the cash-strapped government still recovering from a banking crisis.<sup>129</sup>

TCW demanded USD 606 million from the Dominican Republic for the alleged CAFTA-DR

violations despite spending just USD 2 million to purchase the business from another U.S. investor.<sup>130</sup> The company also admitted to having “not independently committed additional capital” to the electricity distribution firm after its purchase in 2004.<sup>131</sup> The government paid TCW USD 26.5 million to drop the case, reasoning that it was cheaper than continuing to pay legal fees.<sup>132</sup>



*The Dominican Republic's Punta Catalina power plant. (Unknown)*

## **Lupaka Gold v. Peru**

Similarly, in Lupaka Gold v. Peru, a Canadian mining company refused to make efforts towards social license from the community to operate a mining project and, when met with resistance from the local communities, deployed extrajudicial force against them and then sued Peru for over USD 100 million over disputes arising from a precious metals mining project.<sup>133</sup>

The company claimed Peru failed to dissolve the violent invasions and blockades from the surrounding communities that opposed the mining project, destroying their investment.<sup>134</sup>

Peru responded that the investors not only failed to obtain a social license, but they actively ignored the environmental concerns expressed by the communities over the project and demanded forceful intervention from the government against the Indigenous population.<sup>135</sup> The Peruvian government has likely already had to spend millions in legal defense in this ongoing ISDS case.<sup>136</sup>

## **Lack of Transparency**

ISDS proceedings are often characterized by closed-door arbitration, limiting public accountability and awareness. This confidentiality, intended to protect sensitive commercial information, frequently extends to areas of public interest.

As a result, tribunals make decisions with far-reaching implications for public policy and finances without adequate public insight or input. ICSID, along with other institutions like the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and ad hoc tribunals in the Permanent Court of Arbitration (PCA), operate under varying procedural norms but share common criticisms regarding transparency.

The lack of transparency in ISDS cases has significant implications for host states, investors, and the public. Host states may face challenges in defending public policy decisions, while investors may exploit the confidential nature of proceedings to their advantage. Affected communities and the general public are often left uninformed and excluded from meaningful participation in disputes that have direct implications for their environment, public resources, and societal well-being.<sup>137</sup>

## Odyssey v. Mexico

For example, in Odyssey v. Mexico, a U.S. deep-ocean mining company sued Mexico after being denied environmental approval to mine one of the largest sedimentary phosphate sand deposits discovered off the coast of the Americas, demanding USD 3.5 billion.<sup>138</sup>



*An Odyssey-owned ship engaging in deep-sea mining.  
(Reuters)*

Mexico denied Odyssey's request due to the projected impact on the Gulf of Ulloa's ecosystem, specifically on endangered species such as loggerhead turtles, citing concerns over Odyssey's lack of experience, technical expertise, or data on risky deep-sea mining, which could cause catastrophic impacts on the Gulf of Ulloa.<sup>139</sup>

The Puerto Chale Fishing Cooperative, whose fishing grounds would have been devastated by the mining project, requested permission to introduce an amicus brief to provide factual information on the project's effects on the ocean. However, the tribunal rejected their petition, stating it "does not consider Cooperativa as having a significant interest in this dispute."<sup>140</sup> The case is pending.

## Conflict of Interest and 'Double-Hatting'

A significant ethical concern within ISDS is the practice of 'double-hatting,' where a legal professional serves as arbitrator and legal counsel in different cases. This duality raises questions about impartiality and independence, eroding public trust in the ISDS system.<sup>141</sup>

One illustrative example of double-hatting involved the prominent Swiss arbitrator and attorney Gabrielle Kaufmann-Kohler. Kaufmann-Kohler faced scrutiny for her participation as an arbitrator in several cases involving Latin America.

In Vestey v. Venezuela, she served as president of the tribunal,<sup>142</sup> wielding the highest power over the case.<sup>143</sup> Simultaneously, Kaufmann-Kohler was also a partner in a law firm that advised corporations

and governments on matters related to international arbitration, including ISDS disputes.<sup>144</sup>

In another case, AWG Group v. Argentina, Kaufmann-Kohler served as the corporation's appointed arbitrator. Argentina sought to disqualify her appointment on several grounds, including that Kaufmann-Kohler had, shortly before accepting her role as arbitrator, been appointed director at an international bank whose investment portfolio included an interest in one of the claimants.<sup>145</sup>

Nevertheless, the two other members of the tribunal, long-time colleagues of Kaufmann-Kohler, decided her impartiality.<sup>146</sup> Such dual roles could compromise the fairness and integrity of the ISDS process, as arbitrators might be incentivized to issue rulings favorable to the interests of potential future clients or aligned with their legal arguments in cases where they serve as counsel. Furthermore, legal professionals who serve as arbitrators often have relationships with the law firms representing the parties and other experts involved in ISDS disputes.



*Gabrielle Kaufmann-Kohler. (WWA Latam)*

Notably, in the Eiser v. Spain case, the USD 128 million award was annulled because the claimant-appointed arbitrator, Dr. Stanimir Alexandrov,<sup>147</sup>

omitted to disclose a professional relationship with the claimants' damages expert, which led to an unfairly constituted tribunal.<sup>148</sup> As a result, the total costs of the proceedings, including Spain's legal fees and expenses, were shifted to the Luxembourg-based corporation Eiser.

It is important to note that this annulment is a rarity due to the lack of uniformity in ISDS proceedings. Applications for annulment on the ground of improper constitution of the tribunal have been scarce and, up until the decision in this case, unsuccessful.<sup>149</sup>

Following this and similar cases, there have been calls for reforms in the ISDS system to address these ethical concerns, including stricter disclosure requirements and limitations on the roles individuals can simultaneously hold within the ISDS framework, but to date, the reforms have been insufficient.<sup>150</sup>

## **Third-Party Funding**

Another significant ethical issue in the ISDS system is the practice of third-party funding. This is where external entities cover the costs of arbitration for a claimant, absolving companies from the financial responsibility of initiating disputes against governments.<sup>151</sup> This arrangement enables companies to pursue expensive legal battles without worrying about costs.<sup>152</sup>

As a result, these corporations may be less inclined to settle disputes outside arbitration since they do not face the financial strain of legal fees like small and developing countries do.<sup>153</sup>

This situation places a heavy burden on governments, which must use public funds to defend against these suits. Although ICSID has recognized the detrimental effects of third-party funding, efforts to limit this practice have been minimal. Currently, the involvement of a third-party funder only needs to be disclosed if specifically requested by the arbitration tribunal.<sup>154</sup>

The case of South American Silver Limited v. Bolivia (explained in greater detail in the Fueled Social Unrest section below) illustrates these concerns. In this instance, the tribunal ordered the disclosure of the identity of the third-party funders, but when Bolivia sought information about the funding agreement itself, the tribunal denied the request.<sup>155</sup> This decision highlighted that the tribunal's primary concern was identifying potential conflicts of interest with tribunal members rather than addressing broader ethical issues related to third-party funding.

## Additional Challenges and Concerns

ISDS tribunals are not bound by legal precedent and frequently leave their decisions unpublished, resulting in inconsistent rulings and legal unpredictability for governments and investors. This lack of legal clarity undermines states' confidence in formulating and implementing policies, increasing legal uncertainty.<sup>156</sup>

Additionally, ISDS arbitrations lack an appellate mechanism. There are limited options for review for purely egregious procedural issues but no opportunity to review the substantive determinations.<sup>157</sup> This absence means that once an arbitration panel makes a decision, there is no ability to appeal that decision, raising questions about the quality and consistency of legal determinations.

Moreover, the influence of powerful corporate interests in ISDS proceedings is a significant issue. The composition and incentive structure of ISDS panels can allow for undue influence from corporations, as arbitrators may have a financial incentive to rule in favor of investors or interpret treaty obligations broadly to the benefit of corporations. Arbitrators also have an interest in the ISDS system continuing. As such, although the company and the country must agree on the third arbitrator, this individual will be an expert in international investment law and often predisposed to prioritize the claims of the company over national laws intended to benefit people and the environment.

This dynamic can lead to outcomes that prioritize multinational corporations over other stakeholders, undermining a host state's ability to regulate in the public interest.



# III. The Conflict between Investor Protection and Indigenous Rights

The corporate power-grab in Latin America and the resulting ISDS cases are especially concerning because there are many Indigenous communities in the region.



*Indigenous groups protesting for FPIC. (World Rainforest Movement)*

Following the newly gained independence from colonial rule, Indigenous peoples in Latin America engaged in ongoing efforts to assert their rights and secure land titles, protect natural resources, and gain recognition for their cultural heritage.<sup>158</sup> Globally, countries vary greatly in the extent to which they have made progress in recognizing and addressing the rights and needs of Indigenous populations.<sup>159</sup>

The recognition of Indigenous rights achieved a significant victory through international instruments like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization's (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples.<sup>160</sup> In addition to numerous substantive rights, these international instruments enshrined a set of participatory rights designed to structure the interaction between state decision-making bodies and Indigenous communities in ways that require governments and investors to attend to Indigenous perspectives in pursuing their objectives.<sup>161</sup>

## ■ Right to Free, Prior, and Informed Consent

The right to Free, Prior, and Informed Consent (FPIC) is a cornerstone of Indigenous rights. It recognizes their inherent authority to agree to or reject proposals that may impact their lands, resources, or territories. This right underscores the sovereignty and self-determination of Indigenous communities, acknowledging them as primary stakeholders and authorities in matters affecting their people and environment.<sup>162</sup>

Sometimes FPIC is used interchangeably with "social license" but the concept pertains to the broader community's acceptance of development projects within their regions. It is a concept stemming from corporate social responsibility rather than a legal mandate, including but not limited to Indigenous peoples.<sup>163</sup>



The right to FPIC is fundamentally a protective mechanism, mandating that consent from Indigenous communities must be obtained before initiating any projects or developments in their surroundings. Indigenous communities must consent freely, devoid of coercion or manipulation, and based on comprehensive and accurate information about the potential impacts, benefits, and risks of the proposed actions.<sup>164</sup>

The FPIC process actively involves Indigenous communities in decision-making about proposed initiatives. It goes beyond mere consultation by ensuring these communities receive complete information and play a central role in decisions. This process includes thorough briefings about the proposed initiatives, empowering communities to make informed decisions within a culturally sensitive and inclusive framework. After making their decisions, it is essential to document and respect them. FPIC also encompasses ongoing monitoring of approved projects and establishing mechanisms for addressing any grievances that may arise.<sup>165</sup>

## **The Conflict between Investor Protection and Indigenous Rights**

ISDS and the rights of Indigenous peoples are inevitably at odds. ISDS primarily aims to protect foreign investors to ensure stability for international investments, while Indigenous peoples' rights are rooted in the protection of their lands, resources, and sovereignty. Latin American governments are often placed in difficult, no-win situations when ISDS cases infringe on Indigenous people.

A significant challenge for Indigenous communities in Latin America is that governments might determine it is not in their best interest to enforce FPIC requirements if they believe they will benefit from FDI.<sup>166</sup> In such cases, states may lean towards foreign investors' interests, potentially participating in or ignoring rights violations, especially when considering investments paramount for economic development and revenue.

Despite Indigenous Peoples' right to FPIC, few environmental permits in Latin America result from proper consultation, particularly in mining, where recorded consultations are alarmingly low.<sup>167</sup> This neglect has severe consequences for Indigenous peoples and their lands.<sup>168</sup>

Another challenge is enforceability. Indigenous rights are enshrined in international law and enforced by the Inter-American Court of Human Rights (IACHR). Additionally, governments are increasingly adopting them into national law. However, the enforceability in practice is often insufficient as rulings issued by the IACHR are at times not adequately respected.<sup>169</sup>

In the Mayaga (Sumo) Awas Tingi community v. Nicaragua IACHR case, the Indigenous community brought the case against the Nicaraguan government for granting logging and mining concessions on their ancestral lands without their consent. The court ruled in favor of the community, but when it came

time to enforce the award, the process took over eight years, and the compensation was minimal.<sup>170</sup>

In stark comparison, obligations in international investment agreements and any awards issued by ISDS tribunals are both binding and highly enforceable in domestic and international law.<sup>171</sup> If a government refuses to comply with an ISDS award, the foreign investor can enforce it through the domestic courts of a jurisdiction where assets are available to seize against the ruling or find other creative enforcement measures.<sup>172</sup>

For example, in the 2000s, Argentina lost five ISDS cases under ICSID brought by American investors and did not pay the awards promptly. As a result, the U.S. government intervened on the investors' behalf by withdrawing trade benefits, and President Obama publicly stated Argentina needed to "pay up."<sup>173</sup>

The U.S. government went as far as voting against the World Bank and Inter-American Development Bank making loans to Argentina. The World Bank and Inter-American Development Bank dispersed loans to Argentina only after the five awards were paid to the American corporations by selling deeply discounted bonds.<sup>174</sup> Although the awards were not enforced through domestic courts, the foreign investors found a way to force Argentina to pay.

The very existence of an investment treaty susceptible to this interpretation cements a state's incentives to favor the rights of investors over Indigenous peoples, as it directly places investor prerogatives into conflict with the ability of Indigenous peoples to seek redress for violations of protected rights.

## Bear Creek v. Peru

Bear Creek v. Peru is a striking example of how ISDS proceedings can disregard the right to FPIC. In this case, despite Peru being a signatory to the ILO's Convention No. 169, requiring consent from impacted communities,<sup>175</sup> an ISDS tribunal ordered Peru

to give a Canadian mining company USD 30 million for halting a highly unpopular silver mining project that threatened to contaminate Lake Titicaca and vital surrounding waterways.<sup>176</sup>



Lake Titicaca. (Shutterstock)

In the lapse after approving the project but before mining commenced, Peruvian lawmakers faced strong opposition to the mining project in the form of regional protests and large-scale social unrest due to concerns about the environmental impacts of mining and the threat of contamination in the surrounding waterways, especially to the Indigenous communities in the area that rely on Lake Titicaca for fishing and farming.<sup>177</sup>

These facts were never explained to the peasant communities and population in the area who only heard through third parties and through the news in the Official Gazette El Peruano that rights had been granted over their lands...increas[ing] the population's suspicions and fears regarding the real intentions of Bear Creek.

– Amicus Curiae from The Association of Human Rights and the Environment.<sup>178</sup>



Indigenous people peacefully protesting against Bear Creek's mining project over concerns of environmental harm to their community. (Aizar Raldes/Getty Images)



The protests turned violent as the government deployed armed forces on the Indigenous community to protect Bear Creek's foreign investment. (Diario Los Andes/AFP/Getty Images)



Lake Titicaca, once worshiped by the Incas, is now littered with trash. (AP Photo/Rodrigo Abd.)



However, the tribunal sided with the investors.<sup>179</sup> One arbitrator issued a partial dissent, condemning the company for failing to obtain FPIC and abstaining from harmful actions against the Indigenous communities, but Peruvian taxpayers still had to pay the mining company millions of dollars in compensation.<sup>180</sup>

## ISDS Marginalizes Indigenous Voices

In addition to the challenges outlined in the previous section, ISDS poses additional vulnerabilities for Indigenous communities by sidelining their participation. Their involvement is typically limited to indirect roles, not direct participation. These communities often encounter barriers, including financial limitations, language differences, and a lack of legal expertise, impeding their ability to influence ISDS outcomes effectively.<sup>181</sup>

In ISDS arbitrations, the primary parties are the investing entity (often a multinational corporation) and the host state. Indigenous communities, even if directly impacted, are not formal parties to these disputes. Their participation, when permitted, comes in forms like intervenor status or amicus curiae submissions. However, tribunals are not required to consider these submissions, and if they do, the impact on the final rulings is often minimal.<sup>182</sup>

Some ISDS arbitration rules allow for third-party interventions, where non-disputing parties, such as Indigenous communities, can submit amicus curiae or ‘friend of the court’ briefs to provide information, expertise, or perspectives on issues relevant to a case,<sup>183</sup> like in Bear Creek v. Peru, where the Indigenous peoples’ voice was permitted and they explained the violation of FPIC and subsequent damages caused by the company.<sup>184</sup>

These contributions can assist arbitrators in understanding the broader implications of the dispute, especially concerning Indigenous rights or environmental concerns. However, amicus briefs have inherent limitations:

**Limited Influence:** Not all ISDS tribunals accept amicus briefs, and those that do often have stringent criteria for their admissibility. Even when accepted, amicus briefs are advisory and do not have binding authority on the tribunal or court.<sup>185</sup> Thus, their influence is inherently limited, and there is no guarantee that the tribunal will consider the insights or perspectives presented in their award.

**Lack of Direct Participation:** While amicus briefs allow Indigenous communities to express their perspectives, they do not grant these communities direct participation in the proceedings. Consequently, Indigenous peoples remain third parties, with their voices still marginalized. The format does not facilitate a dynamic exchange, limiting Indigenous communities’ ability to respond to developments and arguments presented during the trial.

**Resource Intensive:** Preparing and submitting amicus briefs can be resource-intensive. Indigenous communities often lack the financial resources to engage qualified legal professionals to draft compelling briefs. The need for legal expertise to effectively communicate complex issues within the formal legal framework can also be a barrier.<sup>186</sup>

**Complexity and Accessibility:** Amicus briefs often need to adhere to complex legal jargon and standards, potentially diluting the authenticity and immediacy of Indigenous voices and narratives.<sup>187</sup> Tribunals and courts are not always accessible, and the process of accepting and considering amicus briefs is not universally standardized.<sup>188</sup>

**Cultural Considerations:** The formal legal ISDS environment is not designed to grasp and respect Indigenous communities' cultural nuances and traditional knowledge. Given the indirect nature of participation, adequate consent and representation issues can arise.

And, as mentioned, tribunals do not always allow the submission of amicus briefs, further marginalizing the affected communities.



# **IV. The Harms of ISDS on Indigenous Peoples in Latin America**

## **Triple Losing**

ISDS cases pose significant challenges to Indigenous rights, particularly those related to land, sovereignty, and environmental protection. Often, these disputes create precarious situations for Indigenous communities, as the economic interests of foreign investors can threaten their ancestral lands and heritage.<sup>189</sup>

As a result, ISDS cases create a ‘triple losing’ situation for Indigenous communities, involving a range of adverse consequences that they endure due to these cases. This scenario, explained in a 2020 study from the National Institutes of Health, encompasses three main dimensions of loss: social and environmental, legal, and financial.<sup>190</sup>

### **Social and Environmental Loss**

The circumstances leading to an ISDS dispute can have detrimental social and environmental impacts on Indigenous communities. These impacts may include pollution of water sources, soil contamination, deforestation, and disruption of ecosystems critical to Indigenous livelihoods, cultures, and spirituality.<sup>191</sup> The outcomes of ISDS cases may exacerbate these adverse effects, leaving communities with a sense of injustice and inadequate compensation for their damages.

### **Legal Loss**

Indigenous communities often find their concerns inadequately addressed or marginalized within ISDS proceedings. As discussed in previous sections, the legal environment in ISDS is typically dominated by investors and states, which may not consider the unique perspectives, cultural nuances, and ethical considerations of Indigenous peoples.

Furthermore, ISDS tribunals often undermine national legal frameworks and international instruments, such as the ILO Convention No.169 and the UNDRIP, that enshrine hard-fought Indigenous rights.<sup>192</sup> As a result, the decisions made in ISDS cases may not adequately protect Indigenous rights or respect their traditional knowledge.

### **Financial Loss**

ISDS cases can impose a significant financial burden on the host country, which affects its ability to allocate resources for social spending and public welfare. This financial loss occurs primarily

due to the substantial compensations that host countries may be required to pay investors due to ISDS rulings. Even in cases where investors do not win, the cost of legal representation and arbitration fees can still be substantial, diverting resources from essential social programs and public services.<sup>193</sup>

Nowhere is this tug of war between corporate gains and public welfare more apparent than in Latin America. When corporations secure financial gains through ISDS rulings, a government's capacity to protect its citizens and the environment can be compromised. This dynamic exacerbates inequalities and social injustices, particularly impacting marginalized groups and Indigenous communities.

For example, Peru is facing 18 pending ISDS cases, amounting to a liability of at least USD 2.23 billion in known potential owed damages for only seven of the cases, as the remaining 11 cases are withholding amounts sought.<sup>194</sup> The sum equals over 3.5 percent of Peru's national budget, meaning that if tribunals find in favor of companies, the government must allocate to corporations funds intended for public education, healthcare, infrastructure, and social programs.<sup>195</sup>

Looked at another way, the amount could cover all of the costs of transport, water sanitation, forestry, social investment, private and SME development, education, health, and housing projects currently approved by the World Bank and the International Development Bank's portfolio of Peru, with money left to spare.<sup>196</sup>

Even ISDS cases that states "win" can impose a significant financial burden on host countries due to the high cost of legal representation and arbitration fees. Although the specific cost of cases is often unknown, governments spend USD 4.7 million on average to defend themselves in ISDS disputes.<sup>197</sup>

The following ISDS case demonstrates how Indigenous people bear the triple burden of losses, emphasizing their challenges in land conservation, sovereignty, environmental protection, and the resulting social unrest:

### **Pac Rim v. El Salvador**

In Pac Rim Cayman LLC v. El Salvador, the tribunal dismissed a claim and ordered the company to pay some of the country's legal fees, but the government still spent years and millions of dollars defending itself against a spurious claim. In this conflict, Pac Rim, a Canadian mining company, sued El Salvador when it halted their mining project, demanding over USD 300 million.<sup>198</sup>

El Salvador halted the project in response to concerns from local communities and environmental organizations regarding the project's potential harm to water resources and intensification of the country's water crisis. The mine had already heavily polluted the water, and Pac Rim planned to use cyanide as the project continued.<sup>199</sup>

Indigenous communities, particularly the Lenca and Kakawira tribes in Cabañas, were at the forefront of opposition to the project.<sup>200</sup> Grassroots organizations and activists formed the National Roundtable (“Mesa”) to campaign for a mining moratorium, which was eventually passed. Tragically, two community leaders were murdered, and local activists, politicians, and other protesters faced death threats, violent attacks, and even kidnapping.<sup>201</sup>

Although the tribunal considered an amicus brief at the jurisdictional stage, ultimately narrowing PacRim’s case by excluding claims under CAFTA,<sup>202</sup> the tribunal refused to consider an amicus brief from the perspective of local communities to inform the tribunal of the severe risks associated with the mining project. First, the Parties refused to disclose facts of the case to the



*Protestors against Pacific Rim in El Salvador. (Garry Rissman)*

non-disputing parties and second, the tribunal did not find the issue of community participation relevant to the claim, effectively silencing the voices of the Cabañas in a case regarding their water and soil.<sup>203</sup>

The ensuing cross-border media and public education campaign highlighted the egregious nature of the case, and in the end El Salvador’s vigorous legal defense was successful. The ISDS tribunal dismissed all

of PacRim’s claims on the merits and ordered the company to pay El Salvador USD 8 million (out of the reported USD 12 million spent) in legal fees.<sup>204</sup> On the surface, this may appear as a victory, yet it is crucial to recognize that this outcome does not equate to a win for El Salvador.

The lawsuit, filed in 2009 (three years after the denial of a permit), resulted in civilian deaths and the potential threat of El Salvador being forced to pay over 2% of its GDP.<sup>205</sup> Furthermore, while the tribunal ruled in favor of El Salvador in this instance and ordered Pac Rim to pay El Salvador’s legal fees, in many similar ISDS cases, states are not as fortunate and end up losing millions in legal fees alone.<sup>206</sup>

The failure of an international mining company’s attempt to wrongfully sue a sovereign state does not erase the lawsuit itself or the legal mechanisms that legitimized and enabled such behavior. El Salvador was grappling with a water crisis, and the democratic consensus was unequivocally against constructing another mine that would exacerbate water pollution and scarcity.<sup>207</sup> In defiance of the democratic will of a sovereign nation, this Canadian-owned enterprise resorted

to violence.<sup>208</sup> Even though they lost in arbitration, the battle is far from over. Other corporations may attempt similar actions against other countries, and institutions like ISDS continue to legitimize such behavior.

It is uncontroverted that opposition to Pac Rim's plans for El Salvador arose organically from the first-hand experiences of affected local communities and their commendable efforts to organize and protect themselves... the first stirrings of opposition were engendered by Pac Rim itself when in 2003 and 2004, as it ramped up exploratory drilling work, its technicians and engineers trespassed on the private property of local residents, drilling exploratory wells without permission and in a manner that was both "suspicious and arrogant" and people living near mining exploration activities began to notice environmental impacts from the mining exploration – reduced access to water, polluted water, impacts to agriculture, and health issues.

– Amicus Curiae Brief from the Center for International Environmental Law.<sup>209</sup>



Salvadorans protest against ICSID as a response to the Pac Rim Mining case. (Center for International Environmental Law)

## Foiled Land Conservation Efforts

The Amazon rainforest holds immense global and local significance as it is a crucial resource for people worldwide. It provides not only sustenance in the form of food, water, wood, and medicines, but also plays a pivotal role in climate stabilization, with the Amazon rainforest storing an astonishing 150-



200 billion tons of carbon. Yet when Colombia enacted protective measures for its rainforest through national legislation, it faced swift retaliation from foreign investors.<sup>210</sup>

## Cosigo Resources v. Colombia

In *Cosigo Resources, Ltd. et al. v. Colombia*, American and Canadian mining companies joined forces to punish Colombia for protecting part of the Amazon rainforest by establishing the Yaigojé Apaporis National Park, demanding USD 16.5 billion in damages, despite having spent only USD 11 million on its investment.<sup>211</sup>

In 2008, the companies were granted interests in a gold mining concession by the Alvaro Uribe administration in the Taraira region of Colombia, near the Brazilian border.<sup>212</sup> Before they reached a final agreement, Colombia created a national park in the proposed locations of the mines to protect the biodiversity of the Amazon and seven main Indigenous peoples in the area: the Macuna, Tanimuka, Letuama, Cabiyaí, Yauna, Barazano, and Yujup Macú groups, which have an approximate population of 1,536 people spread across 19 communities.<sup>213</sup>

In this ongoing case, the investors have claimed that creating the national park was “illegitimate,” and denying their concession due to the park constituted an expropriation of their investment.<sup>214</sup>



*Yaigojé Apaporis Indigenous Reserve and Natural National Park. (Fundación GAIA Amazonas)*

## Crystallex v. Venezuela



*Damage left behind in the Imataca National Rainforest Reserve by Crystallex. (randomvariableintheuk/bilaterals.org)*

*Crystallex v. Venezuela* is another example of ISDS infringing on government-protected lands. Crystallex, a Canadian mining company, launched an ISDS claim against Venezuela for denying the environmental approval required for a gold mining project following protests concerning ecological impacts and potential effects on Indigenous lands.<sup>215</sup>

Although Crystallex acquired rights to explore a gold mine in the Imataca National Rainforest Reserve in Venezuela, after assessing potential



environmental impacts, especially the impacts on local Indigenous communities in the Imataca region, the Venezuelan government refused to allow Crystallex to begin mining operations and denied the necessary environmental permit.<sup>216</sup> Crystallex then used the Canadian-Venezuelan BIT to bring suit against Venezuela.<sup>217</sup>

The tribunal held that Venezuela unlawfully expropriated the investment and awarded the company USD 1.2 billion plus interest.<sup>218</sup> After the tribunal issued the award, the parties opted to settle the dispute privately, and the final sum paid by Venezuela is unknown.<sup>219</sup>

## **Eco Oro v. Colombia & Red Eagle v. Colombia**

In recent years, Colombia has taken steps to protect the Santurbán Páramo, a high-mountain ecosystem that plays a central role in maintaining biodiversity. It also provides water to approximately 2.5 million people in 68 surrounding municipalities (85% of the country's water supply)<sup>220</sup> and holds spiritual significance to the Indigenous communities in the region.<sup>221</sup>

Eco Oro Minerals Corp. and Red Eagle Exploration Limited launched ISDS cases against Colombia for creating a natural reserve in the region and prohibiting mining activities, seeking USD 700 million<sup>222</sup> and 118 million, respectively.<sup>223</sup>



*Colombia's pristine páramos, threatened by mining exploits. (The Bogotá Post)*

## Abengoa v. Mexico

Even international organizations, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), cannot protect Indigenous communities' ancestral lands from ISDS attacks. UNESCO designates regions as World Heritage Sites for having cultural, historical, or other significance considered of outstanding value for humanity.<sup>224</sup>

In *Abengoa v. Mexico*, a Spanish company sued Mexico and won when the government denied authorization for a controversial hazardous waste facility, as it posed a significant risk to Indigenous communities.<sup>225</sup>

The plant was to be built on a geological fault line across from a dam and the Sierra Gorda biosphere reserve, a UNESCO World Heritage site and home to Nahu and Otomi Indigenous communities. Previous mining operations had already contaminated the region with arsenic, and the community contended that building a waste facility on a fault line, by a dam, in an area contaminated with arsenic near Indigenous communities and an environmental reserve posed a significant environmental threat.<sup>226</sup>



*Protesters with the Todos Somos Zimapán movement.  
(Community Peacemaker Teams)*

As a result of substantial public opposition, Abengoa's land use permit was not renewed in December 2007, although construction continued anyway.<sup>227</sup> In April 2009, clashes broke out between a group from Zimapán and the Mexican federal police over the plant.<sup>228</sup>

The locals were protesting under the "Todos Somos Zimapán" ("We Are All Zimapán") movement, citing concerns about the plant's potential health effects and other negative impacts on the two dozen Indigenous communities and 20 freshwater springs located within a five-kilometer radius of the waste facility. As a result, Mexico revoked the company's operating license several days later.<sup>229</sup>

The situation escalated as Mexican federal police were accused of abuses against the Indigenous population, and federal government officials declared the plant could open without municipal authority.<sup>230</sup> In March 2010, the municipality of Zimapán declared that the operating license was invalid because the city council did not collectively issue it and did not comply with the public interest.<sup>231</sup> Abengoa alleged that the government actions impeding the operation of its waste plant violated its BIT-protected investor rights.<sup>232</sup> Ultimately, the tribunal sided with the investor and ordered Mexico to pay over 586 million pesos (USD 31 million) plus interest in 2013.<sup>233</sup>



## Attacks on Sovereignty

ISDS undermines government sovereignty by allowing foreign investors to challenge and potentially override a host country's laws, regulations, and policies, even Indigenous rights. When disputes arise, ISDS tribunals can make decisions that compel governments to pay significant compensation to investors or avoid large payouts by weakening domestic laws and regulations.<sup>234</sup>

This authority can effectively erode a nation's ability to govern in its citizens' best interests and protect its sovereignty, as it places international corporate interests above national laws and regulations, limiting the government's ability to enact and enforce policies in the public interest.<sup>235</sup>

### Prospera v. Honduras

A U.S. company is seeking as much as USD 10.7 billion from Honduras in an ISDS case under CAFTA-DR for revoking a law that allowed investors to establish private cities in the country, even in protected, ancestral territories inhabited by Mixed Descent-Indigenous people.<sup>236</sup>

*"The Prospera ZEDE cropped up out of nowhere one day and we have seen devastating environmental harm to our community ever since. We were not consulted, no one asked if they had permission to build or what the project would entail. We have been in this territory for centuries and the [foreign investors] keep expanding. Since they arrived, the environment has changed. We are experiencing floods for the first time, our river has dried up, threatening many species of plants and animals."*

- Luisa Connor and Venessa Cardenas, Black-English and Afro-Indigenous members of the Crawfish Rock community in Honduras.



Local residents of the Crawfish Rock community speaking out against the ZEDES.  
(Public Citizen)

In 2013, Honduras passed the Organic Law of the Employment and Economic Development Zones (ZEDEs Organic Law), which appeared to designate areas as special employment and economic development zones (“ZEDEs” in their Spanish acronym). The legislation allowed investors to establish their own laws, create an independent justice system, and have administrative and fiscal autonomy.<sup>237</sup>



*The Crawfish Rock community, March 2024.  
(Ladan Mehranvar)*

The ZEDEs were very unpopular with Hondurans and viewed as a “vector for corruption,” garnering widespread criticism and social unrest.<sup>238</sup> Since the National Congress of Honduras unanimously voted to repeal the ZEDEs law in 2022, Próspera has continued its operations even as it pursues its ISDS case seeking USD 10.7 billion, two thirds of the country’s annual budget.

The Próspera ZEDE, located in Roatán, a Caribbean island off the coast of Honduras, is of particular concern to the Black-English, Garifuna, and

Indigenous Miskito people who have inhabited the island since the 18th century; they worry that interference with their land, water, and marine environment will worsen.<sup>239</sup>

In March 2023, 33 U.S. lawmakers urged the U.S. Trade Representative and State Department to intervene on behalf of Honduras in this egregious ISDS case.

They cited violations of the nation’s sovereignty and democracy and called for the removal of ISDS from existing trade agreements.<sup>240</sup> The case is currently pending.



*The unfinished Próspera ZEDE “investment.”  
(Public Citizen)*

## Environmental Harm

Mining operations can contaminate nearby water bodies with toxic substances like heavy metals and sulfuric acid, endangering aquatic life and making water unsafe for human use.<sup>241</sup> Additionally, mining activities, especially those involving explosives and heavy machinery, release harmful particulate



matter and gasses into the air, leading to respiratory problems and air quality deterioration.<sup>242</sup> The destruction of habitats and pollution can result in biodiversity loss as many species struggle to survive in the altered environment.<sup>243</sup> Furthermore, the energy-intensive processes and transportation associated with mining contribute to greenhouse gas emissions, exacerbating global climate change.<sup>244</sup>

Fossil fuel extraction, integral to the mining industry, inflicts severe environmental harm. This process, encompassing coal, oil, and natural gas extraction, disrupts ecosystems through land disturbance, drilling activities, and habitat destruction. Moreover, it contaminates groundwater and surface water sources with toxic chemicals.

The combustion of fossil fuels exacerbates climate change, causing rising sea levels, extreme weather events, and biodiversity loss. Additionally, oil spills during extraction and transportation devastate both terrestrial, as well as marine environments and coastal communities.<sup>245</sup>

Efforts to mitigate these environmental harms include implementing responsible mining practices, adopting sustainable mining techniques, limiting fossil fuel extraction, and adhering to environmental regulations and best practices. However, investors often use ISDS to prevent them. Knowing they could face costly challenges, governments may hesitate to enact or enforce environmental regulations, resulting in weaker environmental standards and less stringent enforcement, allowing for more ecological harm.<sup>246</sup>

## Legacy Vulcan v. Mexico

In Legacy Vulcan v. Mexico, a U.S. mining company launched an ISDS case against Mexico under NAFTA, claiming the government interfered with its limestone extraction and exportation operations on the Yucatan Peninsula in the coastal state of Quintana Roo,<sup>247</sup> seeking an estimated USD 500 million.<sup>248</sup>

In 1986, the investor acquired a limestone quarry lot and in 1996, acquired two more.<sup>249</sup> The investor claims it entered into an agreement with the Mexican federal government and local state government of Quintana Roo, receiving authorization “from an environmental standpoint” to exploit the limestone reserves.<sup>250</sup> Upon learning that the company had extracted limestone from



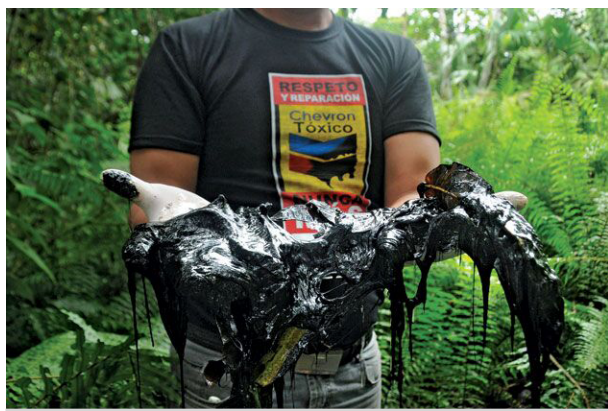
*Legacy Vulcan's resource extraction scarring the Mexican landscape.  
(The Global Atlas of Environmental Justice)*



a greater area and at a faster pace than agreed upon, the Mexican government implemented measures to safeguard the environment and prevent further damage. The company claimed these were “adverse measures” that unfairly targeted them.<sup>251</sup> The case is pending.<sup>252</sup>

## Chevron v. Ecuador

Similarly, pollution stemming from oil operations can cause irreparable harm to the environment. In 2009, Chevron Corporation – one of the largest U.S. oil corporations – launched an ISDS case against Ecuador under the U.S.-Ecuador BIT, seeking to evade payment of a multibillion-dollar court ruling against the company for widespread pollution of the Amazon rainforest.<sup>253</sup>



Toxic sludge. (Teun Voeten/Reporters/Redux)

For 26 years, Texaco Petroleum Corporation, later acquired by Chevron, performed oil operations in Ecuador. Domestic courts found that during that period, the company dumped billions of gallons of toxic water and dug hundreds of open-air oil sludge pits in Ecuador’s Amazon, poisoning the communities of some 30,000 Amazon residents, including the entire populations of six Indigenous groups (one of which is now extinct).<sup>254</sup>

The Indigenous communities in the Amazon experienced devastating social and environmental impacts. The pollution of water sources, soil contamination, and deforestation led to health issues and disrupted the ecosystems vital for their livelihood, culture, and spirituality.<sup>255</sup> The ISDS case compounded these impacts, with the communities feeling the absence of justice and adequate compensation for the damages suffered.

Chevron was sued in domestic courts, a legal battle spanning two decades and two countries. In November 2013, Ecuador’s highest court upheld prior rulings against Chevron for contaminating a large section of Ecuador’s Amazon and ordered the corporation to pay USD 9.5 billion to provide desperately needed cleanup and healthcare to afflicted Indigenous communities.<sup>256</sup>

Instead of abiding by the rulings, Chevron launched an ISDS suit to challenge the decision produced by Ecuador’s legal system. Chevron asked the tribunal to order Ecuador’s taxpayers to hand over to the corporation any of the billions in damages it might be required to pay to clean up the still-devastated Amazon, plus all the legal fees incurred by the corporation in its ISDS case.<sup>257</sup>

The tribunal declared that rights granted by Ecuadorian law do not exist and ordered Ecuador’s government to violate its own Constitution by overturning a ruling in its domestic court system.<sup>258</sup>

The tribunal issued a partial award in favor of the investors, but the final award on damages is pending.<sup>259</sup>

*"If protecting nature, protecting our rights, and the climate threatens a company's investment, then that's a problem. Companies like Chevron should be punished for contamination and rights abuses, not rewarded. They shouldn't be given a get out of jail free card by some arbitration court. We are paying the price with our lands, lives, and our culture."*

- Donald Moncayo, President of the UDAPT (Union de Afectados por Texaco) and Consuelo Piaguage, Siekopai Indigenous Leader

## Fueled Social Unrest

Foreign investors and the ISDS system have been associated with social unrest and protests in Indigenous communities for several reasons. Since foreign investments often intersect with Indigenous land rights, sovereignty, and environmental harms, it is unsurprising that social unrest in Indigenous communities is a common element in these cases.<sup>260</sup>

Indigenous communities often form alliances with activists and civil society organizations to amplify their voices and advocate for their rights, resulting in larger-scale protests and campaigns against problematic projects.<sup>261</sup>

### South American Silver Limited v. Bolivia

Perhaps the worst case of violent clashes and social unrest is illustrated in South American Silver Limited v. Bolivia, where a Bermuda-based mining company was accused of heinous acts.



The South American Silver Limited mine. (Martin St-Amant)

The company had been granted mining concessions in Bolivia, all located in areas inhabited by Indigenous communities.<sup>262</sup>

These communities accused the mining

company of polluting sacred lands and ardently protested. Indigenous communities further accused the company of abusing authority and other heinous acts, including violent sexual attacks against women.<sup>263</sup> Eventually, the protests turned violent, and clashes became increasingly hostile and frequent. To quell the unrest, Bolivia intervened and reversed the ownership of the mining concessions.<sup>264</sup>

The company launched an ISDS case against Bolivia under the United Kingdom-Bolivia BIT. Despite the noted failure to establish any positive relationship with the Indigenous communities or even acknowledge their existence, the tribunal sided with the company and ordered Bolivia to pay USD 18.7 million.<sup>265</sup>

## KCA v. Guatemala

In *KCA v. Guatemala*, a similar situation occurred regarding local communities' protests over a copper mine. Guatemala passed a law suspending the American investors' mining operations for violating domestic and international law by failing to consult with local, affected communities. Kappes responded with a USD 350 million ISDS case.<sup>266</sup>



*Guatemalan police tear gas protestors of the case. (James Rodríguez)*

La Puya, an environmental justice movement in Guatemala that had been fighting for community consultation from foreign investors for years, applied to file an amicus curiae on behalf of the impacted Indigenous communities.<sup>267</sup>

Despite numerous attempts, the tribunal denied their participation.<sup>268</sup> By

marginalizing the voices of the Indigenous peoples and civil societies fighting against corporate overreach, the company's use of private security forces who brutalized peaceful protesters with beatings, tear gas, and arrests went unanswered. The Guatemalan government revoked the rights to the project due to the violence deployed against the protestors, launching the dispute.<sup>269</sup>

The tribunal's refusal to hear this crucial aspect of the situation underlines the preferential treatment investors receive.



## Copper Mesa v. Ecuador

In Copper Mesa v. Ecuador, a Canadian mining company sued Ecuador after the revocation of a mining concession due to violent clashes between its security personnel and local communities, including Indigenous people opposing mining on their lands.<sup>270</sup>

Ecuador's decision to revoke it was driven by concerns about the environmental impact of mining and the threat of contamination to the surrounding waterways, which were crucial for Indigenous communities' fishing and farming activities.<sup>271</sup> Despite the tribunal ruling that Copper Mesa was negligent, they still ordered Ecuador to pay USD 26.5 million in addition to their legal and arbitration fees.<sup>272</sup>

## Burlington Resources v. Ecuador

Similarly, in Burlington Resources v. Ecuador, a U.S. company and its consortium partner, Perenco, Inc., were engaged in various oil development sites in Ecuador. The Kichwa Indigenous people, whose land was directly affected, organized protests throughout the region against the foreign oil company.<sup>273</sup>

Following a substantial rise in oil profits, Ecuador raised a "windfall tax" of 50% on profits received by oil companies resulting from increased prices. Burlington paid the taxes from 2006 to 2009, then stopped altogether.<sup>274</sup> To continue enforcing the tax, Ecuador seized portions of Burlington's production.<sup>275</sup> Burlington then launched an ISDS case against Ecuador, alleging wrongful expropriation.<sup>276</sup>

The Tribunal ruled in favor of Ecuador because the company breached domestic environmental law but ordered Ecuador to pay a whopping USD 379 million for seizing the oil facility.<sup>277</sup>



*The oil facility seized by the Ecuadorian government after Burlington Resources stopped paying taxes.*



# V. Policy Recommendations

As demonstrated in the cases above, ISDS is used by corporations as a tool to undermine national sovereignty and the rights of Indigenous People in Latin America. The following policy recommendations aim to rectify these imbalances in the current ISDS framework, focusing on reforming existing and future FTAs and BITs and safeguarding the interests of Indigenous peoples.

## Adopting a ‘Do No Further Harm’ Approach

Governments worldwide are increasingly scrutinizing the inclusion of ISDS provisions in trade and investment agreements, with a view that such clauses can impinge on their regulatory autonomy.<sup>278</sup> For instance, President Biden made a campaign promise to exclude ISDS provisions in any new trade agreements his administration negotiates.<sup>279</sup> Similarly, other governments are thinking twice before inking new ISDS-enforced pacts.

Despite these efforts, FTAs and BITs with ISDS provisions continue to be negotiated or pending ratification. Governments participating in such negotiations should change course and exclude ISDS clauses.

This exclusion is pivotal for enabling governments to reclaim their legislative and regulatory autonomy, empowering them to enact laws and regulations in the best interest of their citizens, the environment, and the public good. It also promotes the evolution of international investment law toward a more equitable framework where the rights and obligations of investors and states are clearly defined and upheld.

However, whether governments ink new ISDS pacts or not, the presence of thousands of ISDS-enforced agreements that remain in effect poses a significant challenge. Terminating existing agreements with ISDS mechanisms and addressing “survival clauses” — provisions that allow ISDS claims to be brought even after a treaty’s termination — is necessary for policymakers to regain full regulatory control. These clauses, unless neutralized, can undermine national sovereignty and regulatory autonomy by allowing investors to challenge regulations.

Policymakers must prioritize the elimination of survival clauses to prevent future legal challenges to national sovereignty, regulatory autonomy, and the public interest.

Although there are differing legal opinions on the various mechanisms to neutralize survival clauses, many academics and practitioners believe that if all parties to the agreement give consent, then the clause is neutralized.<sup>280</sup>



## Removing ISDS From Existing Agreements

There are several possible avenues for governments to remove ISDS liability from existing agreements:

### Unilateral Termination

Many countries have terminated BITs unilaterally, including the Latin American countries of Bolivia, Ecuador, and Venezuela. Each of these countries has approached the termination of BITs with specific motivations and objectives.

Bolivia's move to withdraw from its BITs and the ICSID Convention in 2007 was part of a broader shift toward greater state control over natural resources and economic policy under President Evo Morales. Bolivia's government argued that BITs and ISDS mechanisms infringed on its sovereignty and ability to govern in the interests of its people, particularly in sectors like mining, gas, and water.

The decision was also influenced by specific, egregious disputes highlighting the potential liabilities and constraints of ISDS claims. By exiting the ICSID Convention and terminating its BITs, Bolivia sought to protect its regulatory freedom and prioritize national development objectives over the interests of foreign investors.

Ecuador's withdrawal from its BITs began in 2009, during the presidency of Rafael Correa, following a comprehensive review by a special commission, which concluded that these treaties did not deliver on their promise of attracting significant foreign investment and were, instead, a threat to the country's sovereignty and regulatory autonomy.

Ecuador's termination of its BITs was also influenced by adverse ISDS rulings, which resulted in substantial financial liabilities for the country. In response, Ecuador has sought to renegotiate its investment treaties on more favorable terms, emphasizing the state's right to regulate and aiming for a more balanced approach to investment protection and public interest. Ecuador rejoined the ICSID Convention in 2021, under President Guillermo Lasso,<sup>281</sup> but efforts to reinstate ISDS have failed to date even as certain interests in Ecuador continue to push for their return.<sup>282</sup>

However, there are risks to unilateral termination. Sunset clauses, oftentimes referred to as survival or grandfather clauses, serve as guarantees that the ISDS provisions in an agreement still apply for a period after its termination. Therefore, even if governments terminate BITs unilaterally, foreign investors may still use it to launch ISDS cases for a period of time after (anywhere from 5 to 20 years, depending on the treaty).<sup>283</sup>

### Amending Free Trade Agreements to Remove ISDS

Governments can amend free trade agreements to remove or severely limit ISDS provisions. The United

States-Mexico-Canada Agreement (USMCA), which replaced NAFTA in 2020, serves as a prominent example. This revision marked a significant shift in how disputes between investors and states would be addressed under the new agreement, reflecting changing attitudes towards ISDS mechanisms among the member states.

Under NAFTA, ISDS provisions allowed investors from one member country to initiate disputes against another if they believed their investments were adversely affected by that country's policies or actions. The negotiation of the USMCA provided an opportunity to substantially modify the ISDS framework as follows:

**Between the US and Mexico:** The USMCA significantly curtailed the scope of ISDS mechanisms. It introduced stricter criteria and a narrower set of circumstances under which investors can bring forth claims.

For five “covered sectors”: (i) oil and gas; (ii) power generation; (iii) telecommunications; (iv) transportation; and (v) infrastructure, the ISDS regime remains largely the same as it was under NAFTA for investors from the US or Mexico operating in the other country and party to a covered government contract.

For other sectors, ISDS claims are now largely limited to direct expropriation (government seizure of property) and discrimination against foreign investors in favor of domestic ones. Additionally, before resorting to ISDS, investors must attempt to resolve their disputes through local courts for at least 30 months. This provision aims to respect member states' judicial systems and reduce reliance on international arbitration.

**Between the US and Canada:** The USMCA entirely eliminated the ISDS mechanism. This means that investors cannot use ISDS to challenge government measures they believe adversely affect their investments, relying instead on domestic legal systems and state-to-state dispute resolution mechanisms.

**Between Canada and Mexico:** The ISDS provisions were also eliminated, with Canada and Mexico agreeing to resolve any investment disputes through alternative mechanisms provided within the USMCA or other existing treaties between the two countries.

## **Multilateral Termination**

The multilateral termination of BITs within the European Union (EU) serves as a significant example of how countries can collectively address and reform their investment treaty network to align with broader legal and policy frameworks. On May 5th, 2020, 23 EU member states signed an agreement to terminate 190 intra-EU BITs.<sup>284</sup>

This decision was prompted by the 2018 Achmea ruling by the CJEU, which found ISDS mechanisms in intra-EU BITs incompatible and inconsistent with EU law. This ruling highlighted that such mechanisms

could threaten the autonomy of the EU legal system and the supremacy of EU law. Following Achmea, the European Commission recommended ending intra-EU BITs to maintain the integrity of the EU's single market, arguing it already provided adequate investment protection. This agreement marked a unified step towards eliminating legal discrepancies and conflicting obligations within the EU framework.

Following the EU's footsteps, Latin American countries could orchestrate a multilateral termination of BITs. A Latin American approach to multilateral termination could involve countries in the region coming together to jointly exit from or renegotiate their BITs with ISDS provisions, aligning them more closely with regional development goals and protecting sovereign rights.

Such a collective action would require a consensus on the principles and objectives guiding the renegotiation or termination of BITs, focusing on safeguarding the right to regulate, promoting sustainable development, and ensuring that investment protection does not come at the expense of public policy objectives.

The Americas Partnership for Economic Prosperity (APEP), launched in January 2023 by President Biden, could present an opportunity to execute the multilateral termination of BITs with ISDS provisions with members, nine of which are Latin American countries (Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Mexico, Panama, Peru, and Uruguay). Notably, the APEP countries have signed 43 BITS and FTAs in force with ISDS provisions among themselves. The APEP partners could terminate the BITs with each other and by agreeing to neutralize sunset clauses, they would effectively prevent foreign investors from launching ISDS cases against the governments under those treaties.<sup>285</sup>

## **Termination by Mutual Consent**

Article 54(b) of the Vienna Convention on the Law of Treaties (VCLT) provides a mechanism for terminating international treaties through a mutual agreement among the parties involved. This article is a part of the framework that governs the creation, enforcement, and dissolution of international treaties, offering a structured approach to the international legal order.

The VCLT, as a cornerstone document, sets forth the principles for international treaty law and has been instrumental in facilitating orderly relations between states by providing clear rules on how treaties are to be applied, interpreted, and terminated.<sup>286</sup>

Name	Parties	Date of Entry Into Force
USMCA (2018)	CANADA, MEXICO, UNITED STATES OF AMERICA	1/7/2020
ARGENTINA - UNITED STATES TIFA (2016)	ARGENTINA, UNITED STATES OF AMERICA	23/03/2016
CARICOM - UNITED STATES TIFA (2013)	CARICOM (CARIBBEAN COMMUNITY), UNITED STATES OF AMERICA	28/05/2013
PANAMA - UNITED STATES FTA (2007)	PANAMA, UNITED STATES OF AMERICA	31/10/2012
US-URUGUAY TIFA (2007)	UNITED STATES OF AMERICA, URUGUAY	25/01/2007
COLOMBIA - UNITED STATES TPA (2006)	COLOMBIA, UNITED STATES OF AMERICA	15/05/2012
PERU UNITED STATES FTA (2006)	PERU, UNITED STATES OF AMERICA	1/2/2009
UNITED STATES OF AMERICA - URUGUAY BIT (2005)	UNITED STATES OF AMERICA, URUGUAY	1/11/2006
CAFTA-DR (2004)	COSTA RICA, DOMINICAN REPUBLIC, EL SALVADOR, GUATEMALA, HONDURAS, NICARAGUA, UNITED STATES OF AMERICA	1/3/2006
CHILE - US FTA (2003)	CHILE, UNITED STATES OF AMERICA	1/1/2004
HONDURAS - UNITED STATES OF AMERICA BIT (1995)	HONDURAS, UNITED STATES OF AMERICA	11/7/2001
ARGENTINA - UNITED STATES OF AMERICA BIT (1991)	ARGENTINA, UNITED STATES OF AMERICA	20/10/1994
PANAMA - UNITED STATES OF AMERICA BIT (1982)	PANAMA, UNITED STATES OF AMERICA	30/05/1991



Specifically, Article 54(b) states that a treaty may be terminated “at any time by consent of all the parties after consultation with the other contracting States.” This provision implies that if all parties to an international investment treaty agree, they can decide to end the treaty. The requirement for mutual agreement ensures that the termination is consensual and reflects the shared interests of all parties involved.

In the context of FTAs or BITs, Article 54(b) of the VCLT offers a legal basis for the parties to these treaties to terminate their agreement if they believe it no longer serves their mutual interests or if they wish to renegotiate the terms to reflect their current priorities and objectives better.

Recent instances of termination by mutual agreement include the Czech Republic terminating its BITs with Denmark, Italy, Malta, and Slovenia. Additionally, Argentina and Indonesia reached an agreement to terminate their BITs.<sup>287</sup>

## **Interim Steps Toward Safeguarding Indigenous Peoples’ Rights**

### **Comprehensive Reviews of Existing Treaties**

As governments work to remove ISDS from existing agreements immediately, one necessary intermediate step is a comprehensive review of all existing FTAs and BITs. Twenty years after most of these treaties were signed, there is a clear need to carry out comprehensive reviews of agreements, assessing the risks of these agreements vis a vis the benefits.

Notably, the experiences of countries like South Africa and Ecuador, which have undertaken public reviews of their investment treaties,<sup>288</sup> reveal a consensus: the detriments of ISDS provisions often surpass their benefits, prompting recommendations against future ISDS commitments.

This realization, juxtaposed with the fact that the United States still maintains 13 international investment agreements with ISDS provisions in Latin America, underscores the urgency for policy reformation.

Policymakers must undertake a comprehensive review of existing agreements that include ISDS provisions to determine if they are fit for purpose in the modern era of international trade and investment. The global economic and political landscape has evolved significantly since many of the agreements were signed.

Policymakers must assess whether these agreements’ original goals and provisions remain relevant

and effective in addressing contemporary challenges. A critical aspect of this reassessment involves examining the agreements' alignment with protecting Indigenous rights, an area historically overlooked in traditional investment treaties.

### **Incorporating Indigenous Rights in Investment Agreements**

As they work towards terminating or renegotiating BITs and FTAs with ISDS provisions, governments can incorporate Indigenous peoples' rights within them and even private agreements with corporations. Governments can integrate the right to FPIC, as detailed in the ILO's No. 169 Convention and the UNDRIP, requiring corporations to obtain consent from Indigenous peoples when planning projects that would impact them.

Such provisions should mandate explicit obligations for corporations as a prerequisite to claiming their rights as investors under the agreements, making the legality of any investment contingent upon its adherence to Indigenous peoples rights, including obtaining consent after effectively employing FPIC. It is important to note that while this effort alone will not fix the underlying issues, it is a helpful interim step while governments work towards terminating or renegotiating BITs and FTAs backed by ISDS provisions.

### **Facilitating Direct Indigenous Participation in ISDS**

As long as ISDS remains in effect in any existing agreement, it is critical to facilitate meaningful participation by Indigenous peoples in arbitration processes. Traditional reliance on non-disputing party submissions, which tribunals are increasingly narrowing the interpretation of admissibility conditions and often disregard,<sup>289</sup> does not suffice.

Indigenous peoples must be granted the unequivocal right to participate in ISDS cases that concern them, including the ability to submit evidence and arguments directly.

Furthermore, the composition of tribunals adjudicating these cases should reflect expertise not only in investment law but also in Indigenous rights, ensuring informed and sensitive adjudication. Integrating Indigenous rights into FTAs and BITs represents a critical juncture in the evolution of international trade and investment agreements.

By conducting comprehensive reviews of existing treaties, explicitly incorporating Indigenous rights based on UNDRIP principles, and ensuring the participation of Indigenous peoples in ISDS processes, policymakers can reconcile economic development objectives with the imperative to protect social justice and human rights.

Short of exiting from treaties with ISDS provisions, this approach could potentially help address current economic and political challenges and affirms the dignity and rights of Indigenous peoples globally, marking a significant advancement in the evolution of international agreements.

# **Conclusion**

In summary, the historical and contemporary challenges faced by Indigenous communities in Latin America underline the profound effects of colonial legacies and the modern exacerbations perpetuated by the ISDS system.

The echoes of colonial exploitation through the ISDS framework continue to disadvantage Indigenous populations, reinforcing old hierarchies by prioritizing foreign investment over indigenous rights and environmental sustainability.

The documented cases and the staggering sums involved in ISDS disputes highlight an urgent need for a reassessment of international investment agreements, emphasizing the importance of aligning them with the fundamental rights of Indigenous Peoples and the ecological imperatives of our times.

The path forward, as proposed in this report, involves a robust realignment of international legal frameworks, by removing or drastically amending ISDS provisions within FTAs and BITs.

Further, while governments are working on removing ISDS provisions from international treaties, they can take interim steps to include Indigenous rights in FTAs and BITs, ensuring FPIC is a respected right integrated into the fabric of international investment law, and ensures their active participation in dispute resolution.

While ISDS exists, the institutions themselves must adapt to permit and adequately understand the participation of Indigenous communities affected by foreign investment. This shift is essential not only for rectifying historical injustices but also for preventing the continuation of these injustices under modern guises.

Thus, the call to action is clear: reform investment treaties to ensure they serve as tools for sustainable development rather than instruments of economic exploitation and corporate colonialism.

# Endnotes

1. Indigenous peoples, numbering over 370 million across 70 countries, maintain distinct social, cultural, economic, and political identities separate from the dominant societies they live within. These communities, ranging from the Arctic to the South Pacific, are descendants of the original inhabitants of their regions, predating the arrival and dominance of other ethnic groups through conquest or settlement. Examples include the Lakota in the USA, Mayas in Guatemala, Aymaras in Bolivia, and the Aborigines and Torres Strait Islanders of Australia, among others. Despite the lack of an official UN definition, Indigenous peoples are characterized by self-identification, historical continuity before colonial or settler times, distinct social systems, languages, and cultures, and a special connection to their ancestral lands and natural resources. They face common challenges such as political and economic marginalization, but fiercely strive to preserve their identities, traditions, and rights to their lands and resources. See “Permanent Forum on Indigenous Issues,” United Nations, Factsheet. Available at: [https://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf)
2. Kristina Charleston, “Reframing the Debate: Spain’s Colonization of the New World as Genocide,” Indiana University South Bend Graduate Research Journal, Vol. 2 (2015). Available at: <https://scholarworks.iu.edu/journals/index.php/iusbgrj/article/view/18104/24229>
3. Eduardo Galeano, “Open Veins of Latin America” Five Centuries of the Pillage of a Continent,” Monthly Review Press, 1971.
4. For the purposes of this report, Latin America is comprised of the nations in North, Central, and South America and the Caribbean that were conquered by Spain in the late 15th century, including Argentina, Belize, Bolivia, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.
5. Georgetown Law Center for Advancement of the Rule of Law in the Americas, Investor-State Dispute Settlement in Latin America and the Caribbean, visited on May 7, 2024. Available at: <https://isdslac.georgetown.edu/>
6. International Labour Organization, Indigenous and Tribal Peoples Convention, No. 169, (1989). Available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) and The United Nations Declaration on the Rights of Indigenous People, United Nations Office of the High Commissioner, Asia Pacific Forum for the Advancement of Human Rights, August 2013. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf>
7. “Consultation and Consent Norms under ILO Convention No. 169 and the UN Declaration Rights of Indigenous People Compared,” United Nations Office of the High Commissioner, visited on May 7, 2024. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/FPIC/RomboutsSJ.pdf>
8. “What is Free, Prior, and Informed Consent (FPIC)?,” Institute for Human Rights and Business, December 13, 2022. Available at: <https://www.ihrb.org/explainers/what-is-free-prior-and-informed-consent-fpic>
9. Chao Wang, Jing Ning, Xiaohan Zhang, “International Investment and Indigenous Peoples’ Environment: A Survey of ISDS Cases from 2000 to 2020,” International Journal of Environmental Research and Public Health, Vol. 18(15), August 2021. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8345368/>
10. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction, (October 6, 2015), at para. 62. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw4466.pdf>
11. Matthew Levine, “Canadian mining company awarded sunk costs only in compensation for Peruvian expropriation,” Investment Treaty News, December 21, 2017. Available at: <https://www.iisd.org/itn/en/2017/12/21/canadian-mining-company-awarded-sunk-costs-only-compensation-peruvian-expropriation-bear-creek-mining-corporation-republic-peru-icsid-case-arb-14-21-matthew-levine/>
12. “Investor-State dispute settlements have catastrophic consequences for the environment and human rights: UN expert,” United Nations Human Rights Office of the High Commissioner, October 20, 2023. Available at: <https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences>
13. “Third-Party Rights in Investor-State Dispute Settlement: Options for Reform,” Columbia Center on Sustainable Development, July 15, 2019. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus%20extractive%20industries/uncitral-submission-third-party-participation-en.pdf>
14. Héctor Serrera Santoyo, “Páramos: Defending Water in Colombia,” Interamerican Association for Environmental Defense, March 4, 2015. Available at: <https://aida-americas.org/en/blog/p%C3%A1ramos-defending-water-colombia>



15. Daniel Henryk Rasolt, "They Cannot Keep Us Silent," Earth Island Journal, February 24, 2020. Available at: <https://www.earthisland.org/journal/index.php/articles/entry/cannot-keep-us-silent-paramos-colombia-indigenous-rights/##>
16. The Future of Strategic Natural Resources, Environmental Risks of Mining, visited on January 1, 2024. Available at: <https://web.mit.edu/12.000/www/m2016/finalwebsite/problems/mining.html>
17. Tarald Laudal Berge, Axel Berger, "Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity," Journal of International Dispute Settlement, Vol. 12, (2021). Available at: <https://academic.oup.com/jids/article/12/1/1/6261107>
18. Legacy Vulcan, LLC v. United Mexican States, ICSID Case No. ARB/19/1, Request for Arbitration, December 3, 2019. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16246.pdf>
19. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, Ad hoc – UNCITRAL Arbitration Rules (2009), Claimants' Notice of Arbitration September 23, 2009. Available at: [https://italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](https://italaw.com/sites/default/files/case-documents/ita0155_0.pdf)
20. Amnesty International, Indigenous Peoples, visited on January 3, 2024. Available at: <https://www.amnesty.org/en/what-we-do/indigenous-peoples/>
21. South American Silver, Ltd. v. Plurinational State of Bolivia, Award, November 22, 2018, at para. 87-89. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf>
22. South American Silver, Ltd. v. Plurinational State of Bolivia, Award, November 22, 2018, at para. 114. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf>
23. South American Silver, Ltd. v. Plurinational State of Bolivia, Award, November 22, 2018, at para. 938. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf>
24. World Bank, "Indigenous Peoples Overview," April 6, 2023. Available at: <https://www.worldbank.org/en/topic/indigenouspeoples>
25. Karl W. Butzer, "The Americas before and after 1492: An Introduction to Current Geographical Research," Annals of the Association of American Geographers, Vol. 82, Issue 3, March 15, 2010. Available at: <https://www.tandfonline.com/doi/abs/10.1111/j.1467-8306.1992.tb01964.x>
26. Columbus made four transatlantic voyages: 1492-93, 1493-96, 1498-1500, and 1502-04. He traveled primarily to the Caribbean, including the Bahamas, Cuba, Santo Domingo, and Jamaica, and in his latter two voyages traveled to the coasts of eastern Central America and northern South America.
27. Carol L. Higham, "Christian Missions to American Indians," Oxford Research Encyclopedia of American History, February 12, 2024. Available at: <https://oxfordre.com/americanhistory/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-323>
28. Kristina Charleston, "Reframing the Debate: Spain's Colonization of the New World as Genocide," Indiana University South Bend Graduate Research Journal, Vol. 2 (2015), April 23, 2015. Available at: <https://scholarworks.iu.edu/journals/index.php/iusbgrj/article/view/18104/24229>
29. Charles Gibson, "Colonial Institutions and Contemporary Latin America: Social and Cultural Life," Hispanic American Historical Review; Vol. 43 (3): 380-389, August 1, 1963. Available at: <https://read.dukeupress.edu/hahr/article/43/3/380/159343/Colonial-Institutions-and-Contemporary-Latin>
30. Eduardo Galeano, "Open Veins of Latin America" Five Centuries of the Pillage of a Continent," Monthly Review Press, 1971.
31. Camden Eckler, "Prevailing facets of Spanish colonialism: the roots of exploitation and inequality in Latin America," University of Tennessee at Chattanooga, Honors Theses, May 2020. Available at: <https://scholar.utc.edu/cgi/viewcontent.cgi?article=1289&context=honors-theses>
32. Camden Eckler, "Prevailing facets of Spanish colonialism: the roots of exploitation and inequality in Latin America," University of Tennessee at Chattanooga, Honors Theses, May 2020. Available at: <https://scholar.utc.edu/cgi/viewcontent.cgi?article=1289&context=honors-theses>
33. The John Carter Brown Library, Setting the Stage. Available at: [https://www.brown.edu/Facilities/John\\_Carter\\_Brown\\_Library/exhibitions/spanishsetting/pages/crisis.html](https://www.brown.edu/Facilities/John_Carter_Brown_Library/exhibitions/spanishsetting/pages/crisis.html)
34. Cuba and Puerto Rico gained their independence from the Spanish crown following the Spanish-American war in 1898. However, Spain ceded Puerto Rico to the United States that same year and it became American territory. See The Spanish-American War, 1898, United States Department of State, visited on May 7, 2024. Available at: <https://history.state.gov/milestones/1866-1898/spanish-american-war>
35. Rafe Blaufarb, "The Western Question: The Geopolitics of Latin American Independence," The American Historical

- Review, Volume 112, Issue 3, June 2007, at p. 742–763. Available at: <https://academic.oup.com/ahr/article/112/3/742/27590>
36. Robert H. Bates, John H. Coatsworth, Jeffrey G. Williamson, “Lost Decades: Lessons from Post-Independence Latin America for Today’s Africa,” National Bureau of Economic Research, Working Paper 12610, October 2006. Available at: [https://wcfia.harvard.edu/files/wcfia/files/bates\\_lostdecades.pdf](https://wcfia.harvard.edu/files/wcfia/files/bates_lostdecades.pdf)
37. U.S. Department of State, Monroe Doctrine, 1823. Available at: <https://history.state.gov/milestones/1801-1829/monroe>
38. Peace History, “Yankee Imperialism,” 1901–1934. Available at: <https://peacehistory-usfp.org/yankee-imperialism/>
39. Library of Congress, Land Loss in Trying Times. Available at: <https://www.loc.gov/classroom-materials/immigration/mexican/land-loss-in-trying-times/>
40. U.S. Department of State, The Spanish-American War: 1898. Available at: <https://history.state.gov/milestones/1866-1898/spanish-american-war>
41. U.S. Department of State, Building the Panama Canal, 1899–1914. Available at: <https://history.state.gov/milestones/1899-1913/panama-canal>
42. Richard Alan White, “The Morass : United States intervention in Central America,” Harper & Row, 1944.
43. Marcelo Bucheli, Luciano Ciravegna, Luis Felipe Saenz, “The octopus that shrank: a historical analysis on how multinationals address policy and contractual uncertainty in a global value chain,” Strategic Management Journal, Vol. 44, pages 3289–3323 June 17, 2023. Available at: <https://onlinelibrary.wiley.com/doi/pdf/10.1002/smj.3537>
44. Matthew Wilson, “What’s a banana republic? A political scientist explains,” University of Southern California, October 4, 2022. Available at: [https://sc.edu/uofsc/posts/2022/09/conversation\\_banana\\_republic.php](https://sc.edu/uofsc/posts/2022/09/conversation_banana_republic.php)
45. Marlies Glasius, “One hundred years of authoritarian practices: United Fruit and its banana plantation workers,” Journal of International Relations and Development, 26(2):245–271, April 2023. Available at: [https://www.researchgate.net/publication/373436418\\_One\\_hundred\\_years\\_of\\_authoritarian\\_practices\\_United\\_Fruit\\_and\\_its\\_banana\\_plantation\\_workers](https://www.researchgate.net/publication/373436418_One_hundred_years_of_authoritarian_practices_United_Fruit_and_its_banana_plantation_workers)
46. David Talbot, “The Devil’s Chessboard: Allen Dulles, the CIA, and the Rise of America’s Secret Government,” Harper Perennial, 2016, at pages 251–66.
47. Olufemi O. Taiwo, “When the United Fruit Company tried to Buy Guatemala,” The Nation, December 7, 2021. Available at: <https://www.thenation.com/article/economy/united-fruit-guatemala/>
48. John Soluri, “Empire’s Footprint: The Ecological Dimensions of a Consumer’s Republic,” Organization of American Historians’ Magazine of History, Vol. 24 Issue 4, October 2011, pages 15–20. Available at: <https://academic.oup.com/maghis/article/25/4/15/1037442>
49. David Talbot, “The Devil’s Chessboard: Allen Dulles, the CIA, and the Rise of America’s Secret Government,” Harper Perennial, 2016, at pages 251–66.
50. Marlies Glasius, “One hundred years of authoritarian practices: United Fruit and its banana plantation workers,” Journal of International Relations and Development 26(2):245–271, April 2023. Available at: [https://www.researchgate.net/publication/373436418\\_One\\_hundred\\_years\\_of\\_authoritarian\\_practices\\_United\\_Fruit\\_and\\_its\\_banana\\_plantation\\_workers](https://www.researchgate.net/publication/373436418_One_hundred_years_of_authoritarian_practices_United_Fruit_and_its_banana_plantation_workers)
51. Marlies Glasius, “One hundred years of authoritarian practices: United Fruit and its banana plantation workers,” Journal of International Relations and Development 26(2):245–271, April 2023. Available at: [https://www.researchgate.net/publication/373436418\\_One\\_hundred\\_years\\_of\\_authoritarian\\_practices\\_United\\_Fruit\\_and\\_its\\_banana\\_plantation\\_workers](https://www.researchgate.net/publication/373436418_One_hundred_years_of_authoritarian_practices_United_Fruit_and_its_banana_plantation_workers)
52. “The United States and Latin America: The New Agenda,” Institute of Latin American Studies, University of London, and David Rockefeller Center for Latin American Studies, Harvard University, 1999. Available at: [https://wcfia.harvard.edu/files/wcfia/files/jd\\_us\\_latam.pdf](https://wcfia.harvard.edu/files/wcfia/files/jd_us_latam.pdf)
53. “Democracy and Human Rights in U.S. Foreign Policy: Tools and Considerations for Congress,” Congressional Research Service, January 4, 2024. Available at: <https://crsreports.congress.gov/product/pdf/R/R47890>
54. Traci Carl, “Era Ends in Latin America As Banana Industry Slides,” The Washington Post, December 2, 2001. Available at: <https://www.washingtonpost.com/archive/politics/2001/12/02/era-ends-in-latin-america-as-banana-industry-slides/2868679d-d261-46a4-a3d0-8ca3b940c9b3/>
55. Andreas Schotter and Mary Teagarden, “Blood Bananas: Chiquita in Colombia,” Thunderbird School of Global Management, 2013. Available at: [https://d1wqtxts1xze7.cloudfront.net/36494488/CASO\\_1\\_Blood\\_bananas-libre.pdf?1422927191=&response-content-disposition=inline%3B+filename%3DCASO\\_1\\_Blood\\_bananas.pdf&Expires=1715194205&Signature=KUPyW~BdoPgyruBr2o5n0V~xryMI5adXIBEMGhDIIJlIo07pxmEdhVa9GL8q-E8jteFiaNRM0XWaubnja6yz0E1kdpaIrBHA38leMJFmJxcvEzS~0sp0kQ~N6mEHC0t0WZR~xVKBPftIHdvYvMyJkExm0ig9pbBbJx2x3Rp0g0zvcfjJfseiSulvtNXmz5fdF4UVbD0IDfrK-K9HAXMSGthR5iwXfzwrGEoipclU-Uuy80aagpTus8iGUu8a2hn93adSI3Ai2Dnn-jk37EadGqnhJAGGS6cUxJxI9IHCrpnlJ2IXUxL2R82s7Wwhs~syixqmLvP~rxwm2g1DsYBEkQ\\_\\_&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA](https://d1wqtxts1xze7.cloudfront.net/36494488/CASO_1_Blood_bananas-libre.pdf?1422927191=&response-content-disposition=inline%3B+filename%3DCASO_1_Blood_bananas.pdf&Expires=1715194205&Signature=KUPyW~BdoPgyruBr2o5n0V~xryMI5adXIBEMGhDIIJlIo07pxmEdhVa9GL8q-E8jteFiaNRM0XWaubnja6yz0E1kdpaIrBHA38leMJFmJxcvEzS~0sp0kQ~N6mEHC0t0WZR~xVKBPftIHdvYvMyJkExm0ig9pbBbJx2x3Rp0g0zvcfjJfseiSulvtNXmz5fdF4UVbD0IDfrK-K9HAXMSGthR5iwXfzwrGEoipclU-Uuy80aagpTus8iGUu8a2hn93adSI3Ai2Dnn-jk37EadGqnhJAGGS6cUxJxI9IHCrpnlJ2IXUxL2R82s7Wwhs~syixqmLvP~rxwm2g1DsYBEkQ__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA)

56. Padma Mallampally, Karl P. Sauvant, "Foreign Direct Investment in Developing Countries," Finance & Development, Vol. 36, No. 1, March 1999. Available at: <https://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm> and International Monetary Fund, "Missed Opportunities: the Economic History of Latin America," IMF News, October 5, 2017. Available at: <https://www.imf.org/en/News/Articles/2017/10/05/NA100517-Missed-Opportunities-The-Economic-History-of-Latin-America>
57. Prakash Loungani, Assaf Razin, "How Beneficial is Direct Foreign Investment for Developing Countries?," Finance & Development, Vol. 38, No. 2, June 2001. Available at: <https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm#:~:text=FDI%20allows%20the%20transfer%20of,in%20the%20domestic%20input%20market>
58. Michael DaCosta, "Colonial Origins, Institutions and Economic Performance in the Caribbean: Guyana and Barbados," International Monetary Fund, Working Paper, Vol. 2007, Issue 043, February 1, 2007. Available at: <https://www.elibrary.imf.org/view/journals/001/2007/043/article-A001-en.xml>
59. Investor-State Dispute Settlement, "UNCTAD Series on Issues in International Investment Agreements II," UNCTAD, 2014, at p.23. Available at: [https://unctad.org/system/files/official-document/diaeia2013d2\\_en.pdf](https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf)
60. Srividya Jandhyala, Witold J. Henisz, and Edward D. Mansfield, "Three Waves of BITs: The Global Diffusion of Foreign Investment Policy" Journal of Conflict Resolution, 55(6): 1047-1073, August 23, 2011. Available at: <https://doi.org/10.1177/0022002711414373>
61. "The Worst of the Worst: Egregious Corporate Attacks on Public Interest Policies," Public Citizen, visited on February 2, 2024. Available at: <https://gtwaction.org/egregious-isds-cases/>
62. Sergio Puid, Anton Strezhnev, "The David Effect and ISDS," European Journal of International Law, May 3, 2017. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2829006](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2829006)
63. Harvard Law Review, The Double Life of International Law: Indigenous Peoples and Extractive Industries, Vol. 119(6), April 2016. Available at: <https://harvardlawreview.org/print/vol-129/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/>
64. Saad Ahmad, Ben Liebman, Heather Wickramarachi, "Disentangling the Effects of Investor-State Dispute Settlement Provisions on Foreign Direct Investment," U.S. International Trade Commission, Economic Working Paper Series, Working Paper 2022-11-A, November 2022. Available at: [https://www.usitc.gov/publications/332/working\\_papers/alw\\_isds\\_itcwp.pdf](https://www.usitc.gov/publications/332/working_papers/alw_isds_itcwp.pdf)
65. Saad Ahmad, Ben Liebman and Heather Wickramarachi, "Disentangling the Effects of Investor-State Dispute Settlement Provisions on Foreign Direct Investment," U.S. International Trade Commission November 2022. Available at: [https://www.usitc.gov/publications/332/working\\_papers/alw\\_isds\\_itcwp.pdf](https://www.usitc.gov/publications/332/working_papers/alw_isds_itcwp.pdf)
66. United States Department of State, Investment Climate Statements: Brazil, 2023. Available at: [https://www.state.gov/reports/2023-investment-climate-statements/brazil/#:~:text=Brazil%20was%20the%20world's%20sixth,Trade%20and%20Development%20\(UNCTAD\)](https://www.state.gov/reports/2023-investment-climate-statements/brazil/#:~:text=Brazil%20was%20the%20world's%20sixth,Trade%20and%20Development%20(UNCTAD))
67. Bilaterals.org, The Basics, visited on March 21, 2024. Available at: <https://isds.bilaterals.org/the-basics>
68. United Nations Office of the High Commissioner, "A/78/168: Paying polluters: the catastrophic consequences of investor-state dispute settlement for climate and environment action and human rights," July 13, 2023. Available at: <https://documents.un.org/doc/undoc/gen/n23/205/29/pdf/n2320529.pdf?token=CaF64tnVWP9F6AMPXh&fe=true>
69. United Nations Office of the High Commissioner, "A/78/168: Paying polluters: the catastrophic consequences of investor-state dispute settlement for climate and environment action and human rights, Annex 2: Examples of ISDS Claims Launched in Response to Climate Action," July 13, 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/reports-annex/Annex2-to-A-78-168.pdf>
70. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Notice of Arbitration, January 2, 1997, at para. 4. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7814.pdf>
71. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Respondent's Counter-Memorial, May 22, 1998, at para. 37. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7809.pdf>
72. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Notice of Arbitration, January 2, 1997, at para. 4(c). Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7814.pdf>
73. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, at para. 131. Available at: <http://italaw.com/sites/default/files/case-documents/ita0510.pdf>
74. Lucien J. Dhooge, (2001) "The North American Free Trade Agreement and the environment: the lessons of Metalclad

Corporation v. United Mexican States.” Minnesota Journal of International Law, 10:2, at p. 273-274 (document pages 66-67). Available at: <https://core.ac.uk/download/pdf/217210348.pdf>

75. This interpretation is extreme as corporations can be awarded many times over their actual investment. See “A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for Achieving the 2030 Sustainable Development Agenda,” International Institute for Sustainable Development, visited on January 11, 2024. Available at: <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-4-indirect-expropriation-regulatory-taking/>

76. Transnational Institute, “ISDS in Numbers: Impacts of Investment Arbitration in Latin America and the Caribbean,” December 2017, at page 3. Available at: <https://www.tni.org/en/publication/impacts-of-investment-arbitration-against-latin-america-and-the-caribbean>

77. United Nations Conference on Trade and Development, Policy Investment Hub, as of May 2024. Available at: <https://investmentpolicy.unctad.org/>

78. Transnational Institute, “ISDS in Numbers: Impacts of Investment Arbitration in Latin America and the Caribbean,” December 2017, at page 5. Available at: <https://www.tni.org/en/publication/impacts-of-investment-arbitration-against-latin-america-and-the-caribbean>

79. “World Investment Report 2023,” United Nations Conference on Trade and Development, 2023. Available at: <https://unctad.org/publication/world-investment-report-2022>

80. Transnational Institute, “ISDS in Numbers: Impacts of Investment Arbitration in Latin America and the Caribbean,” December 2017, at page 7. Available at: <https://www.tni.org/en/publication/impacts-of-investment-arbitration-against-latin-america-and-the-caribbean>

81. Geneva Center for International Dispute Settlement, “Duration of Proceedings,” ISDS Economic Forum - Working Group 2, visited on October 20, 2023. Available at: [https://www.cids.ch/images/Documents/Academic-Forum/2\\_Duration\\_-\\_WG2.pdf](https://www.cids.ch/images/Documents/Academic-Forum/2_Duration_-_WG2.pdf)

82. United Nations Office of the High Commissioner, “Investor-State dispute settlements have catastrophic consequences for the environment and human rights: UN expert,” United Nations Press Release, October 20, 2023. Available at: <https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences>

83. Georgetown Law Center for Advancement of the Rule of Law in the Americas, Industries Involved in Disputes, visited on September 8, 2023. Available at: <https://isdslac.georgetown.edu/industries-most-involved-2/>

84. “Racism, Discrimination are Legacies of Colonialism,” United Nations Human Rights Office of the High Commissioner, visited on September 16, 2023. Available at: <https://www.ohchr.org/en/get-involved/stories/racism-discrimination-are-legacies-colonialism>

85. Martín de Deos, “The situation of Latin America’s indigenous population and the impact of COVID-19,” United Nations Development Programme, May 14, 2020. Available at: <https://www.undp.org/latin-america/blog/situation-latin-americas-indigenous-population-and-impact-covid-19#:~:text=The%20indigenous%20population%20of%20Latin.%2C%20Guatemala%2C%20Peru%20and%20Bolivia. f>

86. “Territorial Self-Governance,” International Work Group for Indigenous Affairs, visited on May 10, 2024. Available at: <https://www.iwgia.org/en/land-rights.html>

87. P. Michael McKinley, “Inflection Point: The Challenges Facing Latin America and U.S. Policy in the Region,” Center for Strategic & International Studies, September 7, 2023. Available at: <https://www.csis.org/analysis/inflection-point-challenges-facing-latin-america-and-us-policy-region>

88. Marta Latek, Laura Puccio, “Investor State Dispute Settlement (ISDS): State of play and prospects for reform,” European Parliamentary Research Service, January 2015. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS\\_BRI%282015%29545736\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/545736/EPRS_BRI%282015%29545736_EN.pdf)

89. Julia Calvert, “State Strategies for Defence of Domestic Interests in Investor-State Arbitration,” Investment Treaty News, February 29, 2016 Available at: <https://www.iisd.org/itn/en/2016/02/29/state-strategies-for-the-defence-of-domestic-interests-in-investor-state-arbitration-julia-calvert/>

90. Fiona Marshall, “CMS v. Argentina,” Investment Treaty News, October 18, 2018. Available at: <https://www.iisd.org/itn/en/2018/10/18/cms-v-argentina/>

91. CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005, at paras. 332 and 344. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>

92. CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005), at paras.



- 468 and 470. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf>
93. P. Michael McKinley, "Inflection Point: The Challenges Facing Latin America and U.S. Policy in the Region," Center for Strategic & International Studies, September 7, 2023. Available at: <https://www.csis.org/analysis/inflection-point-challenges-facing-latin-america-and-us-policy-region>
94. Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Request for Arbitration, February 6, 2014, at para. 6. Available at: <http://italaw.com/sites/default/files/case-documents/italaw3118.pdf>
95. "Former President Oscar Arias faces criminal charge over Crucitas case," The Tico Times, August 23, 2018. Available at: <https://ticotimes.net/2018/08/23/former-president-oscar-arias-faces-criminal-charge-over-crucitas-case>
96. Infinito Gold v. Costa Rica, ICSID Case No. ARB/14/5, Petition for Amicus Curiae Status, September 15, 2014, at page 4. Available at: <https://italaw.com/sites/default/files/case-documents/italaw4014.pdf>
97. "Investor-State dispute settlements have catastrophic consequences for the environment and human rights: UN expert," United Nations Human Rights Office of the High Commissioner, October 20, 2023. Available at: <https://www.ohchr.org/en/press-releases/2023/10/investor-state-dispute-settlements-have-catastrophic-consequences>
98. "How ISDS damages public interests around the world," Friends of the Earth, June 24, 2019. Available at: <https://friendsoftheearth.eu/news/how-isds-damages-public-interest-around-the-world/>
99. Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," Transnational Environmental Law, Vol. 7, Issue 2, December 22, 2017. Available at: <https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investor-state-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84>
100. Lauren Feiner, "Uber to end service in Colombia after regulatory crackdown," CNBC, January 10, 2020. Available at: <https://www.cnbc.com/2020/01/10/uber-to-end-service-in-colombia-after-regulatory-crackdown.html#:~:text=Colombian%20authorities%20ordered%20Uber%20to,rules%2C%20Reuters%20reported%20in%20December.>
101. "Bogota taxi drivers block streets in Uber protest," BBC, October 24, 2017. Available at: <https://www.bbc.com/news/world-latin-america-41731109>
102. Lisa Bohmer, Luke Eric Peterson, "Uber Threatens Colombia with Treaty-Based Arbitration after Ban on Use of Its Ride-sharing App," Investment Arbitration Reporter, January 9, 2020. Available at: <https://www.iareporter.com/articles/uber-threatens-colombia-with-treaty-based-arbitration-after-ban-on-use-of-its-ride-sharing-app/>
103. Uber Technologies, Inc. and Uber Colombia, S.A.S. v. Colombia, Notice of Dispute, December 30, 2019. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw11118.pdf>
104. "Uber ready to take dispute with Colombia to international arbitration: regional manager," Reuters, February 3, 2020. Available at: <https://www.reuters.com/article/idUSKBN1ZX2E1/>
105. Lisa Bohmer, "Colombia round-up: A New Notice of Dispute, Imminent Public Hearings, and an Update on Other Arbitration-Related Developments Regarding the State," Investment Arbitration Reporter, September 25, 2020. Available at: <https://www.iareporter.com/articles/colombia-round-up-a-new-notice-of-dispute-imminent-public-hearings-and-an-update-on-other-arbitration-related-developments-regarding-the-state/>
106. "Uber returns to Colombia less than a month after exit," Reuters, February 20, 2020. Available at: <https://www.reuters.com/article/idUSKBN20E2KD/>
- Lisa Bohmer, "Colombia round-up: A New Notice of Dispute, Imminent Public Hearings, and an Update on Other Arbitration-Related Developments Regarding the State," Investment Arbitration Reporter, September 25, 2020. Available at: <https://www.iareporter.com/articles/colombia-round-up-a-new-notice-of-dispute-imminent-public-hearings-and-an-update-on-other-arbitration-related-developments-regarding-the-state/>
107. Philip Morris Products S.A. and Abel Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Request for Arbitration, February 19, 2020, at para 2. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0343.pdf>
108. Stefanie Schacherer, "Philip Morris v. Uruguay," Investment Treaty News, October 18, 2018. Available at: <https://www.iisd.org/itn/en/2018/10/18/philip-morris-v-uruguay/>
109. Philip Morris Brands SÀRL, Philip Morris Products, S.A. and Abal Hermosa S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, at para 180. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>

110. Wyre Davies, "Michael Bloomberg fights big tobacco in Uruguay," BBC News, April 7, 2015. Available at: <https://www.bbc.com/news/world-latin-america-32199250>
111. Philip Morris Brands SÀRL, Philip Morris Products, S.A. and Abal Hermosa S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, July 8, 2016, at para. 590. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf>
112. "Philip Morris vs. Uruguay: Big Tobacco vs. anti-smoking legislation," Bilaterals, last modified April 2021. Available at: <https://www.isds.bilaterals.org/?philip-morris-vs-uruguay-big>
113. Philip Morris Brands SÀRL, Philip Morris Products, S.A. and Abal Hermosa S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Written Submission by the World Health Organization and the WTO Framework Convention on Tobacco Control Secretariat, January 28, 2015, at para. 26. Available at: <https://italaw.com/sites/default/files/case-documents/italaw7422.pdf>
114. United Nations Office of the High Commissioner, "A/78/168: Paying polluters: the catastrophic consequences of investor-state dispute settlement for climate and environment action and human rights," July 13, 2023. Available at: <https://documents.un.org/doc/undoc/gen/n23/205/29/pdf/n2320529.pdf?token=CaF64tnVWP9F6AMPXh&fe=true>
115. United Nations Office of the High Commissioner, A/78/168: Paying polluters: the catastrophic consequences of investor-state dispute settlement for climate and environment action and human rights, Annex 2: Examples of ISDS Claims Launched in Response to Climate Action, July 13, 2023. Available at: <https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/reports-annex/Annex2-to-A-78-168.pdf>
116. Juan Carlos Herrera-Quenguan, "ICSID tribunal upholds Panama's plea of illegality in the making of an investment in a tourism project located in an Indigenous area," Investment Treaty News, (June 27, 2019). Available at: <https://www.iisd.org/itn/en/2019/06/27/icsid-tribunal-upholds-panamas-plea-of-illegality-in-the-making-of-an-investment-in-a-tourism-project-located-in-an-indigenous-area-juan-carlos-herrera-quenguan/>
117. Lauge N. Skovgaard Poulsen and Geoffrey Gertz, "Reforming the investment treaty regime," Brookings, March 17, 2021. Available at: <https://www.brookings.edu/articles/reforming-the-investment-treaty-regime/>
118. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012, at paras. 105-106. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>
119. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 120. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>
120. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 121. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>
121. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 416. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>
122. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 748. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>
123. Tai-Heng Cheng, "ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v the Republic of Ecuador," Kluwer Arbitration Blog, December 19, 2012. Available at: <https://arbitrationblog.kluwerarbitration.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/#:~:text=On%20October%205th%2C%202012%2C%20a.issued%20by%20an%20ICSID%20tribunal>
124. Luke Eric Peterson, "Ecuador Must Pay \$1.76 Billion US to Occidental for Expropriation of Oil Investment; Largest Award Ever in Bilateral Investment Treaty Case at ICSID," Investment Arbitration Reporter, October 5, 2012. Available at: <http://www.iareporter.com/articles/20121005>
125. Johanna Braun, "Looking Back: Azurix v. Argentina Tribunal Grappled with the Distinction Between Contractual and Treaty Claims, Discussed Legitimate Expectations, and Found that the State's Behaviour Towards A Water Concessionaire Amounted to a Treaty Violation," Investment Arbitration Reporter, June 16, 2021. Available at: <https://www.iareporter.com/articles/looking-back-azurix-v-argentina-tribunal-grappled-with-the-distinction-between-contractual-and-treaty-claims-discussed-legitimate-expectations-and-found-that-the-states-behaviour-towards/>

126. Elizabeth Whitsitt, "NEWS: Ad Hoc Committee Confirms Argentina is on the Hook to Azurix for US\$165 Million," Investment Treaty News, October 2009, at p. 1. Available at: [https://www.iisd.org/itn/wp-content/uploads/2009/10/ITN\\_October\\_2009.pdf](https://www.iisd.org/itn/wp-content/uploads/2009/10/ITN_October_2009.pdf)
127. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, July 14, 2006, at paras. 441-442. Available at: <http://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>
128. Luke Eric Peterson, "UNCITRAL Tribunal Rules that Electricity Claim Can Proceed against Dominican Republic; Parallel CAFTA Claim Also Afoot," Investment Arbitration Reporter, October 9, 2008. Available at: <https://www.iareporter.com/articles/uncitral-tribunal-rules-that-electricity-claim-can-proceed-against-dominican-republic-parallel-cafta-claim-also-afoot/>
129. TCW Group, Inc., et. al v. the Dominican Republic, Ad hoc—UNCITRAL Arbitration Rules, Notice of Arbitration and Statement of Claim, June 17, 2008, at p. 47. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0832.pdf>
130. Luke Eric Peterson, "Dominican Republic Settles Trio of Electricity Arbitrations," Investment Arbitration Reporter, September 19, 2009. Available at: [http://www.iareporter.com/articles/20091008\\_12](http://www.iareporter.com/articles/20091008_12)
131. TCW Group, Inc., et. al v. the Dominican Republic, Ad hoc—UNCITRAL Arbitration Rules, Claimants' Counter-Memorial on Jurisdiction, February 13, 2009, at p. 18. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0848.pdf>
132. Luke Eric Peterson, "Dominican Republic Settles Trio of Electricity Arbitrations," Investment Arbitration Reporter, September 19, 2009. Available at: [http://www.iareporter.com/articles/20091008\\_12](http://www.iareporter.com/articles/20091008_12)
133. Lupaka Gold Corp. v. Republic of Peru, ICSID Case No. ARB/20/46, Request for Arbitration, 2020. Available at: [https://lupakagold.com/site/assets/files/5170/2020\\_10\\_29\\_arbitration\\_files.pdf](https://lupakagold.com/site/assets/files/5170/2020_10_29_arbitration_files.pdf)
134. Lupaka Gold Corp. v. Republic of Peru, ICSID Case No. ARB/20/46, Claimant's Memorial, October 1, 2021, at paras. 98-100. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16506.pdf>
135. Lupaka Gold Corp. v. Republic of Peru, ICSID Case No. ARB/20/46, Republic of Peru's Memorial on Jurisdiction and Counter-Memorial on Merits, March 24, 2022, at para. 10. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw170376.pdf>
136. Costs for governments to defend against ISDS claims are generally USD 4.7 million, with the cost likely rising every year. See Deborah Ruff, Jenna Lim, Charles Golsong, Julia Kalinina Belcher, "Financing a Claim or Defense," Global Arbitration Review, January 14, 2022. Available at: <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/financing-claim-or-defence>
137. "The Impacts of ISDS on Non-Parties and Options for Reform: Comments by Lise Johnson on Day 2 of UNCITRAL Working Group III's Fourth Intersessional Meeting," Columbia Center on Sustainable Investment, September 3, 2021. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/S%20Korea%20intersessional%20comment%20-%20final%20L%20Johnson.pdf>
138. Odyssey Marine Exploration, Inc. v. United Mexican States, ICSID Case No. UNCT/20/1, Notice of Intent to Submit a Claim to Arbitration, January 4, 2019, at paras. 1, 2, and 126. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10442.pdf>
139. Odyssey Marine Exploration, Inc. v. United Mexican States, ICSID Case No. UNCT/20/1, Rejoinder Memorial, October 19, 2021, at paras. 210-221. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16422.pdf>
140. "Dissent in Odyssey v. Mexico," Investment Treaty News, March 30, 2022. Available at: <https://www.iisd.org/itn/en/2022/03/30/dissent-in-odyssey-v-mexico/>
141. Khan Khalid Adnan, "The Double Hatting Paradox in Investment Arbitration: Justification for Abolition," Kluwer Arbitration Blog, December 29, 2023. Available at: <https://arbitrationblog.kluwerarbitration.com/2023/12/29/the-double-hatting-paradox-in-investment-arbitration-justification-for-abolition/#:~:text=Concerns%20Regarding%20Double%20Hatting,with%20reference%20to%20Emmanuel%20Gaillard>
142. Vestey Group Ltd v. the Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award, April 15, 2016. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7230.pdf>
143. Zhang Tianshu, "Tribunal's Chair," Jus Mundi, June 5, 2023. Available at: <https://jusmundi.com/en/document/publication/en-tribunals-chair>
144. Global Arbitration Review, Lévy Kaufmann-Kohler. Available at:

<https://globalarbitrationreview.com/organisation/levy-kaufmann-kohler>

145. Ximena Araya, Diego Luis Alonso Massa, "Republic of Argentina vs. AWG Group Ltd – Civil Action No. 15-1057 (BAH) Date: 09/30/16 – United States District Court for the District of Columbia," School of International Arbitration, Queen Mary, University of London International Arbitration Case Law, visited on September 6, 2023. [https://www.transnational-dispute-management.com/downloads/17005\\_case\\_report\\_argentina\\_v\\_awg\\_-\\_september\\_2016.pdf](https://www.transnational-dispute-management.com/downloads/17005_case_report_argentina_v_awg_-_september_2016.pdf)
146. Antonia Eliason, "Evident Partiality and the Judicial Review of Investor-State Dispute Settlement Awards: An Argument for ISDS Reform," Georgetown Journal of International Law, Vol. 50, June 21, 2019. Available at: <https://www.law.georgetown.edu/international-law-journal/wp-content/uploads/sites/21/2019/06/GT-GJIL190015.pdf>
147. Eiser Infrastructure Limited and Energia Solar Luxembourg S.Á.R.L. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, May 4, 2017, at para 9. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>
148. Dina Prokic, "The Annulment of Eiser v. Spain: A Call for Improvements to the System," Kluwer Arbitration Blog, May 6, 2021. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/05/06/the-annulment-of-eiser-v-spain-a-call-for-improvements-to-the-system/>
149. Dina Prokic, "The Annulment of Eiser v. Spain: A Call for Improvements to the System?," Wolters Kluwer Arbitration Blog, May 6, 2021. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/05/06/the-annulment-of-eiser-v-spain-a-call-for-improvements-to-the-system/>
150. Ajoo Kim, "2023 Year in Review: ISDS Reforms – Milestone Achieved, Uncertainties Persist," Kluwer Arbitration Blog, (Feb. 20, 2024). Available at: <https://arbitrationblog.kluwerarbitration.com/2024/02/20/2023-year-in-review-isds-reforms-milestone-achieved-uncertainties-persist/>
151. "The Case Against Third-Party Funding in Investment Arbitration," International Institute for Sustainable Development, July 30, 2018. Available at: <https://www.iisd.org/itn/en/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/>
152. Frank J. Garcia, "The Case Against Third-Party Funding in Investment Arbitration," Investment Treaty News, July 30, 2018. Available at: <https://www.iisd.org/itn/en/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/>
153. Brooke Güven and Lise Johnson, "Third-Party Funding and the Objectives of Investment Treaties: Friends or foes?," Investment Treaty News, June 27, 2019. Available at: <https://www.iisd.org/itn/en/2019/06/27/third-party-funding-and-the-objectives-of-investment-treaties-friends-or-foes-brooke-guven-lise-johnson/>
154. International Centre for Settlement of Investment Disputes, "Working Paper #6: Proposals for Amendment of the ICSID Rules," November 2021, at para. 38. Available at: [https://icsid.worldbank.org/sites/default/files/documents/ICSID\\_WP\\_Six.pdf](https://icsid.worldbank.org/sites/default/files/documents/ICSID_WP_Six.pdf)
155. South America Silver Limited v. the Plurinational State of Bolivia, PCA Case No. 2013-15, Procedural Order No. 10 January 11, 2016, at para. 85. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7176.pdf>
156. Julian Arato, Chester Brown, Federico Ortino, "Parsing and Managing Inconsistency in ISDS," Academic Forum on ISDS Concept Paper 2020/1, January 21, 2020. Available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1214&context=other>
157. Dr. Margie-Lys Jaime, "Could an Appellate Review Mechanism 'Fix' the ISDS System?," Kluwer Arbitration Blog, February 11, 2021. Available at: <https://arbitrationblog.kluwerarbitration.com/2021/02/11/could-an-appellate-review-mechanism-fix-the-isds-system/>
158. "Indigenous Latin America," The World Bank, visited on February 7, 2024. Available at: <https://www.worldbank.org/en/region/lac/brief/indigenous-latin-america-in-the-twenty-first-century-brief-report-page>
159. "Indigenous Peoples Overview," The World Bank, April 6, 2023. Available at: <https://www.worldbank.org/en/topic/indigenouspeoples>
160. International Labour Organization, Convention No. 169, (1989). Available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169) and see also: The United Nations Declaration on the Rights of Indigenous People, United Nations Office of the High Commissioner, Asia Pacific Forum for the Advancement of Human Rights, August 2013. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf>
161. "Consultation and Consent Norms under ILO Convention No. 169 and the UN Declaration Rights of Indigenous People



- Compared,” United Nations Office of the High Commissioner, visited on February 14, 2024. Available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/FPIC/RomboutsSJ.pdf>
162. “What is Free, Prior, and Informed Consent (FPIC)?,” Institute for Human Rights and Business, December 13, 2022. Available at: <https://www.ihrb.org/explainers/what-is-free-prior-and-informed-consent-fpic>
163. Kathleen M. Willburn, Ralph Willburn, “Achieving Social License to Operate Using Stakeholder Theory,” *Journal of International Business and Ethics*, Vol. 4, No. 2, (2011). Available at: <http://americanscholarspress.us/journals/JIBE/pdf/JIBE-2-2011/v4n211-art1.pdf>
164. “What is Free, Prior, and Informed Consent (FPIC)?,” Institute for Human Rights and Business, December 13, 2022. Available at: <https://www.ihrb.org/explainers/what-is-free-prior-and-informed-consent-fpic>
165. “Free, Prior, and Informed Consent: an Indigenous Peoples Right and a Good Practice for Local Communities,” United Nations Department of Economic and Social Affairs, October 14, 2016. Available at: <https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/>
166. Columbia Center on Sustainable Investment, Human Rights and Investment, visited on April 3, 2024. Available at: <https://ccsi.columbia.edu/content/human-rights-and-investment>
167. Scott Sellwood, Chelsea Hodgkins, Tim Hirschel-Burns, “Recharging Community Consent: Mining Companies, Battery Minerals, and the Battle to Break from the Past,” Oxfam, (2023). Available at: [https://webassets.oxfamamerica.org/media/documents/2023\\_OXF\\_Recharging\\_Community\\_Consent\\_Report\\_v3\\_fnl\\_01\\_POSTING.pdf](https://webassets.oxfamamerica.org/media/documents/2023_OXF_Recharging_Community_Consent_Report_v3_fnl_01_POSTING.pdf)
168. Business & Human Rights Resource Center, “Community Consent Index evaluates 38 extractive companies’ positions on free, prior & informed consent,” Oxfam, August 7, 2015. Available at: <https://www.business-humanrights.org/en/latest-news/oxfam-community-consent-index-evaluates-38-extractive-companies-positions-on-free-prior-informed-consent/>
169. “El derecho a la consulta previa, libre e informada de los pueblos indígenas,” Due Process of Law Foundation and OXFAM, March 2011. Available at: <https://dplf.org/sites/default/files/1301680587.pdf>
170. “Mayagna (Sumo) Awas Tingni Community v. Nicaragua,” *Loyola Law Schol*, p. -1132 - 1138, visited on April 13, 2024. Available at: [https://iachr.ils.edu/sites/default/files/iachr/Cases/Mayagna\\_Sumo\\_Awas\\_Tingni\\_Community\\_v\\_Nicaragua/mayagna\\_sumo\\_awas\\_tingni\\_community\\_v.\\_nicaragua.pdf](https://iachr.ils.edu/sites/default/files/iachr/Cases/Mayagna_Sumo_Awas_Tingni_Community_v_Nicaragua/mayagna_sumo_awas_tingni_community_v._nicaragua.pdf)
171. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959. Available at: [https://uncitral.un.org/en/texts/arbitration/conventions/foreign\\_arbitral\\_awards](https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards) and Daniel Ashborn Mundeve, “Social license to operate and the government’s role: A case study from Tanzania,” Simon Fraser University, May 30, 2016. Available at: <https://summit.sfu.ca/item/16385>
172. “Enforcement and Recognition of ICSID awards,” *Jus Mundi*, December 18, 2023. Available at: <https://jusmundi.com/en/document/publication/en-enforcement-and-recognition-of-icsid-awards#:~:text=In%20practice%2C%20where%20a%20State,the%20award%20may%20be%20executed>
173. “Obama tells Argentina to pay up,” *Global Arbitration Review*, November 16, 2011. Available at: <https://globalarbitrationreview.com/article/obama-tells-argentina-pay>
174. Emmanuel Gaillard y Ilija Mitrev Penushliski, *State Compliance with Investment Awards*, 35 *ICSID Review – Foreign Investment Law Journal* 540, 552, February 15, 2021. Available at: <https://academic.oup.com/icsidreview/article/35/3/540/6135471>
175. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction, October 6, 2015, at para. 62. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw4466.pdf>
176. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, at para. 738. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>
177. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, at paras. 171-174 and 219. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>
178. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment (Non-Disputing Party), May 9, 2016, at page 5. Available at: <https://italaw.com/sites/default/files/case-documents/italaw7517.pdf>
179. *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017, at para. 738. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9381.pdf>

180. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Partial Dissenting Opinion Professor Philippe Sands QC, November 30, 2017, at para. 4. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10107.pdf>
181. Chao Wang, Jing Ning, Chaohan Zhang, "International Investment and Indigenous People's Environment: A Survey of ISDS Cases from 2000 to 2020," International Journal for Environmental Research and Public Health, Vol. 18, (July 22, 2021). Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8345368/#:~:text=With%20respect%20to%20international%20judicial,the%20necessary%20capacity%20to%20participate>
182. "Third-Party Rights in Investor-State Dispute Settlement: Options for Reform," Columbia Center on Sustainable Development, July 15, 2019. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/our%20focus/extractive%20industries/uncitral-submission-third-party-participation-en.pdf>
183. Jaroslavsky Pablo, Blasco Juan Pablo, "Amici Curiae in Investment Arbitration," Jus Mundi, last updated on Oct. 3, 2023. Available at: <https://jusmundi.com/en/document/publication/en-amici-curiae-in-investment-arbitration>
184. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment, May 9, 2016, page 2. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7517.pdf>
185. International Institute for Sustainable Development, Center for International Environmental Law, ClientEarth, "Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment," International Institute for Sustainable Development, June 15, 2023. Available at: <https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-environment-submission-2023>
186. Katia Fach Gómez, "Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest," Fordham International Law Journal, Vol. 35, Issue 2, (2012). Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2429&context=ilj>
187. "International and national forums neglect indigenous land rights," European Center for Constitutional and Human Rights, visited on March 14, 2024. Available at: <https://www.ecchr.eu/en/case/human-rights-inapplicable-in-international-investment-arbitration/>
188. Maxime Somda, "Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A smokescreen against third parties?," Investment Treaty News, April 23, 2019. Available at: <https://www.iisd.org/itn/en/2019/04/23/protecting-social-rights-using-the-amicus-curiae-procedure-in-investment-arbitration-a-smokescreen-against-third-parties-maxime-somda/>
189. "Report of the Special Rapporteur on the rights of indigenous peoples," United Nations Human Rights Council, August 11, 2016. Available at: [https://www.ohchr.org/Documents/Issues/IPeoples/SR/A\\_HRC\\_33\\_42\\_en.docx](https://www.ohchr.org/Documents/Issues/IPeoples/SR/A_HRC_33_42_en.docx)
190. Chao Wang, Jing Ning, Xiaohan Zhang, "International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020," International Journal of Environmental Research and Public Health, Vol. 18(15), (Aug. 2021). Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8345368/>
191. Please see the Bear Creek v. Peru and Chevron v. Ecuador cases highlighted in this report.
192. "Violations of rights of indigenous peoples in the world," Official Journal of the European Union, 2018. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52018IP0279>
193. "ISDS in Numbers: Impacts of Investment Arbitration in Latin America and the Caribbean," Transnational Institute, December 2017, at page 4. Available at: <https://www.tni.org/en/publication/impacts-of-investment-arbitration-against-latin-america-and-the-caribbean>
194. United Nations Conference on Trade and Development, Investment Dispute Settlement Navigator - Peru. Accessed on February 15, 2023. Available at: <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/165/peru>
195. Marcelo Rochabrun, "Peru Approves 2024 Budget Amid Recession and Weaker Tax Revenue," Bloomberg, November 30, 2023. (2.23 out of 64.5 billion). Available at: <https://www.bloomberg.com/news/articles/2023-11-30/peru-approves-2024-budget-amid-recession-and-weaker-tax-revenue>
196. Carlos José Valderrama, Investor-State Dispute Prevention: The Perspective of Peru. Public Actors in International Investment Law, European Yearbook of International Economic Law, 2021, at p. 117-131, Available at: [https://link.springer.com/chapter/10.1007/978-3-030-58916-5\\_7](https://link.springer.com/chapter/10.1007/978-3-030-58916-5_7)

197. "Investor-state dispute settlements: a hidden handbrake on climate action," International Institute for Environmental Development, Briefing, November 2023. Available at: <https://www.iied.org/sites/default/files/pdfs/2023-11/21971iied.pdf>
198. Stefanie Schacherer, "Pac Rim v. El Salvador," Investment Treaty News. October 18, 2018. Available at: <https://www.iisd.org/itn/en/2018/10/18/pac-rim-v-el-salvador/>
199. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/212, Submission of Amicus Curiae on the Merits of the Dispute, July 25, 2014, at page 4. Available at: [https://www.ciel.org/wp-content/uploads/2014/06/PacRim\\_AmicusEng\\_25Jul2014.pdf](https://www.ciel.org/wp-content/uploads/2014/06/PacRim_AmicusEng_25Jul2014.pdf)
200. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/212, Submission of Amicus Curiae on the Merits of the Dispute, July 25, 2014, document pages 10-12. Available at: [https://www.ciel.org/wp-content/uploads/2014/06/PacRim\\_AmicusEng\\_25Jul2014.pdf](https://www.ciel.org/wp-content/uploads/2014/06/PacRim_AmicusEng_25Jul2014.pdf)
201. "Empowering People and Protecting Rights in El Salvador: Pac Rim Mining," Center for International Environmental Law (CIEL). Visited on March 4, 2024. Available at: <https://www.ciel.org/project-update/pacific-rim/>
202. Marcus Orellana, Saúl Baños, and Theirry Berger, "Bringing community perspectives to investor-state arbitration: the Pac Rim case," International Institute for Environment and Development, 2015, at p. 7. Available at: [https://www.ciel.org/wp-content/uploads/2015/09/Community\\_Amici\\_ICSID\\_IIED\\_Jul2015.pdf](https://www.ciel.org/wp-content/uploads/2015/09/Community_Amici_ICSID_IIED_Jul2015.pdf)
203. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/212, Award, October 16, 2016, at para 3.30. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7640\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf)
204. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/212, Award, October 16, 2016, at para. 11.20. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7640\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf)
205. The World Bank. GDP (current US\$) - Ecuador. Available at: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=EC>
206. Raphael Lenucha, "Is It Time to Say Farewell to the ISDS System?" International Journal of Health and Policy Management, 6(5), September 13, 2016, p. 289-291. Available at: [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5417151/#:~:text=The%20average%20cost%20of%20an,range%20of%20US\\$2430%20million.&text=This%20cost%20does%20not%20include,which%20averages%20US\\$2410%20million.&text=The%20procedural%20cost%20is%20estimated,\(WTO\)%20dispute%20settlement%20system](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5417151/#:~:text=The%20average%20cost%20of%20an,range%20of%20US$2430%20million.&text=This%20cost%20does%20not%20include,which%20averages%20US$2410%20million.&text=The%20procedural%20cost%20is%20estimated,(WTO)%20dispute%20settlement%20system)
207. Stefanie Schacherer, "Pac Rim v. El Salvador," Investment Treaty News, October 18, 2018. Available at: <https://www.iisd.org/itn/en/2018/10/18/pac-rim-v-el-salvador/#:~:text=The%20Pac%20Rim%20case%20attracted,major%20source%20of%20drinking%20water>
208. Claire Provost, "El Salvador groups accuse Pacific Rim of 'assault on democratic governance,'" The Guardian, April 10, 2014. Available at: <https://www.theguardian.com/global-development/2014/apr/10/el-salvador-pacific-rim-assault-democratic-governance>
209. Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/212, Submission of Amicus Curiae Brief, May 20, 2011, at page 3. Available at: <https://italaw.com/sites/default/files/case-documents/italaw1208.pdf>
210. Cosigo Resources, Ltd. v. The Republic of Colombia, Notice of Demand to Arbitrate and Statement of Claim of Tobie Mining and Energy, Inc., February 19, 2016, at para 31. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7172.pdf>
211. Cosigo Resources, Ltd. v. The Republic of Colombia, Notice of Intent to Arbitrate and Statement of Claim of Tobie Mining and Energy, Inc., August 5, 2015, at paras 7-11. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7828\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7828_0.pdf)
212. Cosigo Resources, Ltd. v. The Republic of Colombia, Notice of Intent to Arbitrate and Statement of Claim of Tobie Mining and Energy, Inc., August 5, 2015, at para. 24. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7828\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7828_0.pdf)
213. Martín von Hildebrand, "Creation and Planning of the Yaigojé Apaporis Indigenous Reserve and Natural National Park from an Indigenous Cosmovision," Panorama, visited on November 14, 2023. Available at: <https://panorama.solutions/fr/solution/creation-and-planning-yaigoje-apaporis-indigenous-reserve-and-natural-national-park>
214. Cosigo Resources, Ltd. v. The Republic of Colombia, Notice of Intent to Arbitrate and Statement of Claim of Tobie Mining and Energy, Inc., August 5, 2015, at para. 24. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7828\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7828_0.pdf)
215. Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Claimant's Complaint re Transfer of Respondent's Assets from US to Venezuela, November 13, 2015, at paras. 3-5, 170. Available at:

[https://www.italaw.com/sites/default/files/case-documents/italaw9201\\_1.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw9201_1.pdf)

216. Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, at para. 44. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf>

217. Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, at para 426. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf>

218. Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, at para 961(d). Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf>

219. Marianna Parraga, "Venezuela pursues debt settlements with Crystallex, Conoco, bondholders," Reuters, June 30, 2022. Available at: <https://www.reuters.com/markets/venezuela-pursues-debt-settlement-with-crystallex-conoco-bondholders-2023-06-30/>

220. "Paramos: Defending Water in Colombia," AIDA, March 4, 2015. Available at: <https://aida-americas.org/en/blog/p%C3%A1ramos-defending-water-colombia>

221. Daniel Henryk Rasolt, "They Cannot Keep Us Silent," Earth Island Journal, February 24, 2020. Available at: <https://www.earthisland.org/journal/index.php/articles/entry/cannot-keep-us-silent-paramos-colombia-indigenous-rights/##>

222. Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, at para. 76(b). Available at: <https://jsumundi.com/en/document/decision/en-eco-oro-minerals-corp-v-republic-of-colombia-decision-on-jurisdiction-liability-and-directions-on-quantum-thursday-9th-september-2021>

223. Red Eagle Exploration Limited v. Republic of Colombia, ICSID Case No. ARB/18/12, Request for Arbitration, March 21, 2018. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10949.pdf> and Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, at para. 76. Available at: <https://jsumundi.com/en/document/decision/en-eco-oro-minerals-corp-v-republic-of-colombia-decision-on-jurisdiction-liability-and-directions-on-quantum-thursday-9th-september-2021>

224. World Heritage, United Nations Educational, Scientific and Cultural Organization, visited on September 6, 2023. Available at: <https://whc.unesco.org/en/about/>

225. Fernando Cabrera Diaz, "Spanish firms launch ICSID dispute against Mexico over stalled toxic waste disposal project," Investment Treaty News, January 13, 2010. Available at: <https://www.iisd.org/itn/en/2010/01/12/spanish-firms-launch-icsid-dispute-against-mexico-over-stalled-toxic-waste-disposal-project/>

226. Katia Fach Gomez, "ICSID Claim by Spanish Companies Against Mexico over the Center for the Integral Management of Industrial Resources," Spain Arbitration Review, August 2010, at p.7. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1631835&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631835&download=yes)

227. Abengoa S.A. y COFIDES S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013, at paras. 208 and 211. Available at: <http://italaw.com/sites/default/files/case-documents/italaw3187.pdf>

228. Abengoa S.A. y COFIDES S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013, at paras. 253-254. Available at: <http://italaw.com/sites/default/files/case-documents/italaw3187.pdf>

229. Fernando Cabrera Diaz, "Spanish firms launch ICSID dispute against Mexico over stalled toxic waste disposal project," Investment Treaty News, (Jan. 13, 2010). <https://www.iisd.org/itn/en/2010/01/12/spanish-firms-launch-icsid-dispute-against-mexico-over-stalled-toxic-waste-disposal-project/>

230. Katia Fach Gomez, "ICSID Claim by Spanish Companies Against Mexico over the Center for the Integral Management of Industrial Resources," Spain Arbitration Review, August 2010, at p. 9-10. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1631835&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631835&download=yes)

231. Abengoa S.A. y COFIDES S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013, at para. 281. Available at: <http://italaw.com/sites/default/files/case-documents/italaw3187.pdf>

232. Luke Eric Peterson, "Local Opposition to Toxic Waste Treatment Facility Lands Mexico in Yet Another International Arbitration," IA Reporter, December 21, 2009. Available at: <https://www.iareporter.com/articles/local-opposition-to-toxic-waste-treatment-facility-lands-mexico-in-yet-another-international-arbitration/>

233. Filip Balcerzak And Luke Eric Peterson, "Newly-Obtained Mexican BIT Award Reveals that Arbitrators Disagreed on Jurisdiction Over State-Owned Claimant; Details Emerge of Final Settlement Sum," IA Reporter. May 21, 2014. Available at: <https://www.iareporter.com/articles/newly-obtained-mexican-bit-award-reveals-that-arbitrators-disagreed-on-jurisdiction-over-state-owned-claimant-details-emerge-of-final-settlement-sum/>

234. "Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable



Environment,” International Institute for Sustainable Development, CIEL, and Client Earth, June 15, 2023. Available at: <https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-environment-submission-2023>

235. Tarald Laudal Berge, Axel Berger, “Does investor-state dispute settlement lead to regulatory chill? Global evidence from environmental regulation,” *Journal of International Dispute Settlement*, Vol. 12, Issue 1, pages 1-41, March 2021. Available at: <https://academic.oup.com/jids/article/12/1/1/6261107>

236. “\$10.775 Billion Claim Filed Against Government of Honduras,” Próspera Newsroom, December 20, 2022. Available at: <https://www.prospera.co/news/10-775-billion-claim-filed-against-government-of-honduras>

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

238. “2022 Investment Climate Statement: Honduras”, U.S. Department of State, 2022. Available at: <https://www.state.gov/reports/2022-investment-climate-statements/honduras/>

239. Jeff Ernst, “‘Go home’: Honduran islanders fight against crypto colonialists,” *The Guardian*, July 5, 2022. Available at: <https://www.theguardian.com/world/2022/jul/05/honduras-land-rights-fight-crypto-colonialists>

240. Congress Letter to the Office of the U.S. Trade Representative and Department of State, May 2, 2023. Available at: <https://www.warren.senate.gov/oversight/letters/senator-warren-representative-doggett-call-for-elimination-of-investor-state-dispute-settlement-system-action-on-behalf-of-honduran-government>

241. “Mining and Water Pollution,” Safe Drinking Water Foundation, visited on October 31, 2023. Available at: <https://www.safewater.org/fact-sheets-1/2017/1/23/miningandwaterpollution>

242. “Mining Topic: Respiratory Diseases,” Center for Disease Control and Prevention, visited on October 31, 2023. Available at: <https://www.cdc.gov/niosh/mining/topics/respiratorydiseases.html>

243. “Habitat Loss,” National Wildlife Federation, visited on November 5, 2023. Available at: <https://www.nwf.org/en/Educational-Resources/Wildlife-Guide/Threats-to-Wildlife/Habitat-Loss>

244. “Biodiversity – our strongest natural defense against climate change,” United Nations, visited on November 3, 2023. Available at: <https://www.un.org/en/climatechange/science/climate-issues/biodiversity>

245. “Fossil Fuels: The Dirty Facts,” NRDC, June 1, 2022. Available at: <https://www.nrdc.org/stories/fossil-fuels-dirty-facts#sec-what-is>

246. Tarald Laudal Berge, Axel Berger, “Does investor-state dispute settlement lead to regulatory chill? Global evidence from environmental regulation,” *Journal of International Dispute Settlement*, Vol. 12, Issue 1, pages 1-41, March 2021. Available at: <https://academic.oup.com/jids/article/12/1/1/6261107>

247. *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Request for Arbitration, December 3, 2018, at paras 1-10, 14. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16246.pdf>

248. The exact amount claimed by the investors has not been made public, but the Mexican government previously estimated the compensation sought at in damages. See “Mexico seeks to settle \$1.1 bln Vulcan suit over limestone mine closure,” Reuters, February 3, 2022. Available at: <https://www.reuters.com/world/americas/mexico-seeks-settle-11-bln-vulcan-suit-over-limestone-mine-closure-2022-02-03/>

249. *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Request for Arbitration, December 3, 2018, at para. 41. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16246.pdf>

250. *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No.7, July 11, 2022, at para. 38. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16247.pdf>

251. *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Claimant’s Memorial, May 18, 2020, at para. 25. Available at: [https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7613/DS17835\\_En.pdf](https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7613/DS17835_En.pdf)

252. *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Claimant’s Memorial, May 18, 2020, at para.166. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw16247.pdf>

253. *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, Ad hoc – UNCITRAL Arbitration Rules (2009), Claimants’ Notice of Arbitration, September 23, 2009, at para 76. Available at: [https://italaw.com/sites/default/files/case-documents/ita0155\\_0.pdf](https://italaw.com/sites/default/files/case-documents/ita0155_0.pdf)

254. *Aguinda v. ChevronTexaco*, No. 2003-0002, Ecuadorian Superior Court of Nueva Loja, February 14, 2011, at para. 33. Available at: <http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgement-English.pdf>

255. Alexandra Valencia, “Ecuador High Court Upholds Chevron Verdict, Halves Fine,” Reuters, November 13, 2013. Available at: <http://www.reuters.com/article/2013/11/13/us-chevron-ecuador-idUSBRE9AC0YY20131113>

256. Alexandra Valencia, "Ecuador High Court Upholds Chevron Verdict, Halves Fine," Reuters, November 13, 2013. Available at: <http://www.reuters.com/article/2013/11/13/us-chevron-ecuador-idUSBRE9AC0YY20131113>
257. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, Ad hoc – UNCITRAL Arbitration Rules (2013), First Partial Award on Track I, September 17, 2013, at para. 48. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1585.pdf>
258. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, Ad hoc – UNCITRAL Arbitration Rules (2012), Second Interim Award on Interim Measures, February 16, 2012, at para. 3. Available at: [https://www.italaw.com/sites/default/files/case-documents/ita0174\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf)
259. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, Ad hoc – UNCITRAL Arbitration Rules (2012), Second Interim Award on Interim Measures, February 16, 2012, at para. 3. Available at: [https://www.italaw.com/sites/default/files/case-documents/ita0174\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0174_0.pdf)
260. "About indigenous peoples and human rights," United Nations, visited on January 7, 2024. Available at: <https://www.ohchr.org/en/indigenous-peoples/about-indigenous-peoples-and-human-rights>
261. "Indigenous Peoples," Amnesty International, visited on April 21, 2024. Available at: <https://www.amnesty.org/en/what-we-do/indigenous-peoples/>
262. South American Silver, Ltd. v. Plurinational State of Bolivia, Award, November 22, 2018, at para. 87-89. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf>
263. South American Silver, Ltd. v. Plurinational State of Bolivia, Award, November 22, 2018, at para. 114. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf>
264. Trishna Menon, "Tribunal finds expropriation of investment by Bolivia due to non-payment of compensation but awards only sunk costs to British investor," Investment Treaty News, April 23, 2019. Available at: <https://www.iisd.org/itn/en/2019/04/23/tribunal-finds-expropriation-of-investment-by-bolivia-due-to-non-payment-of-compensation-but-awards-only-sunk-costs-to-british-investor-trishna-menon/>
265. South American Silver, Ltd. v. Plurinational State of Bolivia, Award November 22, 2018, at para. 938. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf>
266. "Victory for La Puya: Guatemala's Supreme Court Suspends License for El Tambor Mine," Guatemala Human Rights Commission, February 25, 2016. Available at: <http://www.ghrc-usa.org/resources/press-room/victory-for-la-puya-guatemalas-supreme-court-suspends-licence-for-el-tambor-mine/> and Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala, ICSID Case No. ARB/18/43, Notice of Arbitration November 9, 2018, at para. 78. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw10806.pdf>
267. "Guatemalans demand right to say no to a Nevada-owned gold mine," Earthworks, February 27, 2023. Available at: <https://earthworks.org/blog/guatemalans-demand-right-to-say-no-to-a-nevada-owned-gold-mine/>
268. Lisa Bohmer, "ICSID Tribunal Find that 'Environmental Justice Movement' Without Legal Personality or Identified Representative Cannot Submit Amicus Curiae," International Arbitration Reporter, March 3, 2021. Available at: <https://www.iareporter.com/articles/icsid-tribunal-finds-that-environmental-justice-movement-without-legal-personality-or-identified-representative-cannot-submit-amicus-curiae-brief/>
269. Luis Solano, Ellen Moore, Jen Moore, "Mining Injustice through International Arbitration: Countering Kappes, Cassiday & Associates' claims over a gold mining project in Guatemala," Institute for Policy Studies, August 24, 2020 at pages 16-20. Available at: <https://earthworks.org/assets/uploads/2020/08/ENG-Guatemala-Mining-Injustice-Report.pdf>
270. Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, March 15, 2016, at para. 1.10. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf>
271. Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, Mar. 15, 2016, at paras.4.25. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf>
272. Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-2, Award, Mar. 15, 2016, at para.10.7-10.9. Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf>
273. Christina Binder, Jane Hofbauer, "Case Study: Burlington Resources Inc. v Ecuador/Kichwa Indigenous People of Sarayaku v Ecuador," Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association, July 15, 2017. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2810062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810062)
274. Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, February 7, 2017, at para. 32. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw1094\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf)
275. Burlington Resources, Inc. v. Republic of Ecuador, Decision on Liability, February 7, 2017, at para. 56-66. Available at:

[https://www.italaw.com/sites/default/files/case-documents/italaw1094\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw1094_0.pdf)

276. Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, June 29, 2009, at para.16. Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0104.pdf>

277. Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Award, February 7, 2017, at para. 635. Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw8208\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw8208_0.pdf)

278. "Selected Statements and Actions Against Investor-State Dispute Settlement (ISDS)," Public Citizen, last updated on March 2024. Available at: [https://www.citizen.org/wp-content/uploads/Quote-Sheet\\_Selected-Statements-and-Actions-Against-ISDS\\_March-2024.pdf](https://www.citizen.org/wp-content/uploads/Quote-Sheet_Selected-Statements-and-Actions-Against-ISDS_March-2024.pdf)

279. United Steelworkers Letter to Joe Biden, 2020. Available at: <https://www.uswvoices.org/endorsed-candidates/biden/BidenUSWQuestionnaire.pdf>

280. "Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims," Center for International Environmental Law (CIEL), February 2024. Available at: <https://www.ciel.org/wp-content/uploads/2024/02/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf>

281. "Ecuador rejoins the ICSID Convention," Investment Treaty News, October 7, 2021. Available at: <https://www.iisd.org/itn/en/2021/10/07/ecuador-rejoins-the-icsid-convention/#:~:text=In%202009%2C%20during%20the%20administration,which%20it%20was%20a%20signatory>

282. "Ecuador Referendum Rules Out ISDS Return, Underlining Public Support for a Sustainable Path," International Institute for Sustainable Development, April 22, 2024. Available at: <https://www.iisd.org/articles/statement/ecuador-referendum-rules-out-isds-return-underlining-public-support-sustainable>

283. "Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims," Center for International Environmental Law (CIEL), February 2024. Available at: <https://www.ciel.org/wp-content/uploads/2024/02/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf>

284. European Commission, visited on December 21, 2023. Available at: [https://commission.europa.eu/documents\\_en](https://commission.europa.eu/documents_en)

285. "Turning The Tide: How To Harness the Americas Partnership For Economic Prosperity To Deliver An ISDS-Free Americas," Georgetown Law's Center for the Advancement of the Rule of Law in the Americas, Columbia Center on Sustainable Investment, and Rethink Trade, October 2023. Available at: <https://ccsi.columbia.edu/sites/default/files/content/docs/CCSI-americas-partnership-economic-prosperity.pdf>

286. United Nations Vienna Convention on the Laws of Treaties, January 27, 1980. Available at: [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en)

287. "Terminating a Bilateral Investment Treaty," International Institute for Sustainable Development, March 2020. Available at: <https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf>

288. "Bilateral Investment Treaty Policy Framework Review," Republic of South Africa, June 2009, Available at: <https://static.pmg.org.za/docs/090626trade-bi-lateralpolicy.pdf> and "Implementación y funcionamiento de la Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones," Secretaría Nacional de Planificación y Desarrollo, May 2015. Available at: <https://www.planificacion.gob.ec/wp-content/uploads/2015/05/Documento-Caitisa.pdf>

289. "Overcoming International Investment Agreements as a Barrier to Climate Action: A Toolkit to Safeguard Fossil Fuel Measures from Investment Treaty Claims," Center for International Environmental Law (CIEL), February 2024. Available at: <https://www.ciel.org/wp-content/uploads/2024/02/Overcoming-International-Investment-Agreements-as-a-Barrier-to-Climate-Action.pdf>