THE CORPORATE COLONIZATION OF LATIN AMERICA

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

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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

Executive Summary

This report presents a critical examination of the enduring marginalization and vulnerability of Indigenous peoples 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. Furthermore, colonialism brutally imposed forced labor to extract vast wealth from the region, primarily in the form of precious metals like gold and silver.

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. 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. 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. 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.

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.

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. 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, 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.
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.

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.

**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) and spiritual significance to Indigenous peoples, 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. 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.

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, 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.
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.

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. The ensuing violent clashes prompted Bolivia to revoke the mining concessions to mitigate the unrest.

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.

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.