TRADING AWAY OUR CLIMATE

How Corporations Use Trade and Investment Agreements to Undermine Action on Climate Change

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Acronyms

BIT	Bilateral Investment Treaty
CCSI	Columbia Center on Sustainable Investment
FTA	Free Trade Agreements
GHG	Greenhouse Gas
IEA	International Energy Agency
IISD	International Institute for Sustainable Development
ISDS	Investor-State Dispute Settlement
LNG	Liquefied Natural Gas
NAFTA	North American Free Trade Agreement
USMCA	U.S.-Mexico-Canada Agreement
USTR	United States Trade Representative
WTO	World Trade Organization

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Executive Summary

In 2023, global ocean heat content rose to a record high, Antarctic sea ice coverage dropped to a record low, and global temperatures reached approximately 1.4 degrees Celsius above pre-industrial levels–dangerously close to the threshold that scientists state risks irreversible loss of some ecosystems and catastrophic consequences for vulnerable people and societies.

Governments across the globe, with the United States and other developed countries taking the lead, must quickly take the bold steps needed to dramatically reduce emissions in line with the global goal of limiting warming to well below 2°C and preferably 1.5°C above pre-industrial levels.

Whether the global community meets that goal hinges largely on one question: are governments willing to put in place the policies needed to stop the expansion of fossil fuels, which account for over 75% of greenhouse gas emissions and nearly 90% of all carbon dioxide emissions?

Tragically, in a moment when governments need all tools in the toolbox to limit the use of fossil fuels and slash greenhouse gas emissions, outdated trade and investment deals written under the advisement of fossil fuel corporations are threatening a just clean energy transition–and therefore threatening the prospects of averting the most catastrophic impacts of climate change.

Free trade agreements (FTAs) with investment chapters and bilateral investment treaties (BITs) provide the fossil fuel industry, among other industries, with broad protections for their investments–including the right to bypass domestic courts and sue governments in an ad hoc arbitration tribunal over laws and policies that companies allege reduce their profits or alter their stable regulatory environment. In this system, called the investor-state dispute settlement (ISDS) system, tribunals composed of three arbitrators can order a government to pay the claimant (often corporations, but at times wealthy individuals) the expected future profits it might have earned without the new policy. Often, this amounts to billions of dollars. ISDS, therefore, indemnifies fossil fuel companies for most risks associated with making polluting investments and transfers those risks to the government making the policy and, more specifically, the taxpayers in those countries who could be forced to foot the bill.

The threat of big polluters using ISDS to challenge policies designed to limit production and use of fossil fuels is not hypothetical. Of the 1,206 known treaty-based ISDS arbitrations across all sectors, nearly 20% were initiated by fossil fuel corporations. As just two recent examples, TC Energy of Canada is using ISDS provisions under the North American Free Trade Agreement to sue the United States for more than $15 billion over rejection of the Keystone XL pipeline. And U.S. energy company Ruby River is using ISDS provisions to challenge Canada's rejection of a liquefied natural gas facility in Québec.

ISDS challenges are dangerous for myriad reasons. Governments might be less likely to make a policy decision in the public interest for fear of being ordered to pay a foreign investor billions of dollars if a tribunal were to rule against them. Moreover, even the defense of a case costs millions of dollars and takes years of work. And the implications of settling a case can be even more dangerous; while an investment arbitration tribunal can order a government to compensate a foreign investor for the losses of its expected future profits, settlements can lead to the government weakening or rolling back a policy or decision in order to avoid paying the investor.

Importantly, the dangers of ISDS are stark not just for climate change, but for a broad swath of public interest policies including ones related to public health, labor protections and workers' rights, green jobs policies, and more.

For this reason, while this paper focuses on the impacts of ISDS on climate change, the Sierra Club supports the elimination of ISDS in its entirety–not just for policies related to climate change. ISDS is a system that not only puts polluters over people and the planet, it also perpetuates myriad inequities so the privileged few can maintain the status quo.

Recognizing the threats of ISDS to climate, workers, and public interest policies, civil society movements across the globe have been fighting against this undemocratic system. And, due in part to decades of campaigning and the strong evidence of the threats of ISDS to climate and other public interest policies, the tides are beginning to turn.

For example, countries across the globe are terminating their BITs, which include ISDS provisions. And in the U.S., ISDS has lost considerable support. Administrations from both major political parties have recognized the dangers of ISDS and have taken steps to limit the system. The Biden Administration has committed to not pursue any trade or investment agreements that would establish ISDS.

This is a critical step forward, but additional action is needed to end the threats of ISDS to climate and other public interest policies once and for all.

To that end, this paper makes several core recommendations:

The U.S. government must help stop the expansion of ISDS. The first step to ending the threats of ISDS to climate and other public interest policies is to stop the expansion of the system. Moving forward, President Biden and any future U.S. administration must publicly announce their strong opposition to ISDS and commitment to not negotiate or enter into any new agreements that contain ISDS and use their diplomatic power to encourage other countries to not enter into new agreements with ISDS.

The U.S. government must take steps to remove ISDS from existing FTAs and BITs. The United States–which is party to over 50 agreements with ISDS–has an opportunity to take great leadership at the intersection of trade and climate change and reduce its own and other countries' liability to ISDS claims by:

- **Terminating BITs to which it is a party.** The process by which a country can terminate a BIT is determined by international law, as laid out in the Vienna Convention (Article 54) and typically in the BIT itself. Importantly, most BITs include what is referred to as a sunset, or survival, clause. The survival clause specifies a time period in which the legal effects of the investment provisions continue even after agreement has been terminated. Therefore, any commitment to terminate a BIT must also come along with an agreement to neutralize the sunset clause.

- **Removing ISDS provisions from its FTAs and BITs.** This can happen through renegotiation of the agreement or, for example, through side agreements or letters between the governments.

- **Withdrawing consent to ISDS claims from BITs and FTAs.** Withdrawal of consent essentially means that a government or governments suspend the application of ISDS by explicitly withdrawing consent to arbitration. This could happen unilaterally, bilaterally, or via a multilateral instrument, which could take the form of a declaration or opt-in agreement.

With public and policy-maker sentiment against ISDS rising, there is only one sensible choice to protect our planet and its people: end the era of ISDS once and for all by both stopping its expansion and eliminating its existing threats.

I. Introduction

In 2023, global ocean heat content rose to a record high,[1] Antarctic sea ice coverage dropped to a record low,[2] and global temperatures reached approximately 1.4°C above pre industrial levels[3] – dangerously close to the 1.5°C threshold that scientists state risks "crisis after crisis for the vulnerable people and societies" and "irreversible loss of the most fragile ecosystems."[4]

These numbers are not just statistics; they have real-life implications for communities across the globe – especially for historically marginalized and vulnerable groups, including communities of color and low-income communities. In just a few examples of the dangers of climate change from 2023:

- The United States experienced 25 weather and climate disasters which cumulatively resulted in nearly 1,000 lives lost;[5]
- In Phoenix, Arizona, communities experienced a record 31 consecutive days above 110 degrees; the heatwave was partly responsible for more than 500 heat-related deaths in Maricopa County;[6]
- Intense rainstorms flooded Vermont's capital, destroying thousands of people's homes and businesses;[7]
- Historic wildfires in Maui caused over 100 deaths[8] and displaced thousands of people;[9]
- Florida's Gulf Coast was hit by its second major hurricane in two years,[10] causing widespread destruction.[11]

These climate-induced disasters reinforce the need for governments across the globe, with the United States and other developed countries taking the lead, to meet the goal they committed to in the Paris Climate Agreement: limiting global warming to well below 2°C and preferably 1.5°C above pre-industrial levels.

Whether the global community meets that goal hinges largely on one question: are governments willing to put in place the policies needed to stop the expansion of fossil fuels, which account for over 75% of greenhouse gas emissions and nearly 90% of all carbon dioxide emissions?[12]

According to the International Energy Agency (IEA), limiting global temperature rise to 1.5°C will require no new oil, gas, or coal development beyond existing fields.[13] World leaders are echoing that message in calls to action. United Nations Secretary-General Antonio Guterres, for example, has been calling on governments to phase out fossil fuels in order to avoid climate catastrophe. "The

world must phase out fossil fuels in a just and equitable way – moving to leave oil, coal, and gas in the ground where they belong – and massively boosting renewable investment in a just transition," Guterres stated.[14]

Reversing over a century of inertia and decoupling our society from fossil fuels is a herculean task. However, in a moment when governments need all tools in the toolbox to limit the use of fossil fuels and slash greenhouse gas emissions, outdated trade and investment deals written under the advisement of fossil fuel corporations[15] are threatening a just clean energy transition – and therefore threatening the prospects of averting the most catastrophic impacts of climate change.

Free trade agreements (FTAs) with investment chapters and bilateral investment treaties (BITs) provide the fossil fuel industry, among other industries, with broad protections for their investments. In the case of the fossil fuel industry, these investments are often related to the exploration or extraction of fossil fuels or the building of infrastructure such as pipelines or export terminals that help extend the life of the fossil industry. Among the protections afforded to investors in FTAs and BITs is the right to bypass domestic courts and sue governments in an ad hoc arbitration tribunal over laws and policies that companies allege reduce their profits or alter their stable regulatory environment. In this system, called the investor-state dispute settlement (ISDS) system, tribunals composed of three arbitrators can order a government to pay the claimant (most often corporations, but at times wealthy individuals) the expected future profits it might have earned without the new policy.

Although investors understand that making an investment is inherently risky, ISDS perverts who has to pay the price when a decision does not pan out as expected. ISDS essentially indemnifies fossil fuel investors for most risks associated with their polluting investments, and transfers the risk from the polluter to the government making the policy and, more specifically, the taxpayers in those countries who ultimately have to foot the bill. In other words, when a private corporation's bet on government inaction on climate falls through, ISDS puts the public on the hook for paying.

Fossil fuel corporations like Chevron, Exxon, and Occidental Oil, have become very adept at using ISDS to challenge environmental policies that impact their fossil fuel investments. According to a December 2021 analysis from the International Institute for Sustainable Development (IISD), the fossil fuel industry is the most litigious industry in the ISDS system; of the 1,206 known treaty-based ISDS arbitrations across all sectors, initiated up to December 31, 2020, 231 cases (or nearly 20%) were initiated by fossil fuel corporations.[16] By the end of 2023, that number rose to 349 investor–state disputes related to fossil fuel projects, constituting 20.3% of all arbitrations reviewed.[17]

And the fossil fuel industry is winning. At the merits stage, fossil fuel corporations succeeded in 72% of all cases, meaning that the vast majority of arbitration tribunals agreed that the fossil fuel companies had enough evidence to demonstrate they had been wronged. The average amount awarded to fossil fuel corporations that win ISDS cases is over $600 million– nearly five times the amount awarded in non-fossil fuel cases.[18] And, as we discuss in case studies below, these corporations are not above suing governments for billions of dollars over public interest policies.

Finally, it is important to note that over 90% of fossil fuel arbitrations are related to the oil and gas industry and "the great majority of claims within fossil fuel arbitrations are related to investments

in the upstream sector, which includes all the operations for the exploration."[19] This protection of upstream investments is at odds with the goal of ensuring no new oil, coal, or gas development, which, as noted above, is critical to addressing climate change.

The implications of the investor-state dispute settlement system are stark not just for climate change but for a broad swath of public interest policies including ones related to public health, labor protections and workers' rights, green jobs policies, and more.

For this reason, while this paper focuses on the impacts of ISDS on climate change, the Sierra Club supports the elimination of ISDS in its entirety – not just for policies related to climate change. ISDS is a system that not only puts polluters over people and the planet, it also perpetuates myriad inequities so the privileged few can maintain the status quo.

Governments, for example, might be less likely to make a policy decision in the public interest for fear of being ordered to pay a foreign investor billions of dollars if a tribunal were to rule against them. Moreover, even the defense of a case costs millions of dollars [20] and years of work.[21] The implications of settling a case can be even more dangerous; while an investment arbitration tribunal can order a government to compensate a foreign investor for the losses of its expected future profits, settlements can lead to the government weakening or rolling back a policy or decision in order to avoid paying the investor.[22]

On top of the cost and policy implications, it is important to note that the protections granted through investment treaties are only for investors; ISDS does not offer governments any recourse if a foreign investor were to act against the country's interest. Therefore, ISDS is a one-way street that benefits corporations at the expense of the consumers, taxpayers, and, more broadly, the public, which is systematically disempowered by the status quo.

Due to these and other reasons, there is an increasing recognition of the threats of ISDS to climate action. For example, in 2023, David Boyd, Special Rapporteur on human rights and the environment issued a report to the United Nations General Assembly arguing that "Investor-State dispute settlement has become a major obstacle to urgent actions needed to address the planetary environmental, and human rights crises." He further noted that "foreign investors use the dispute settlement process to seek exorbitant compensation from States that strengthen environmental protection, with the fossil fuel and mining industries already winning over $100 billion in awards."[23]

The Intergovernmental Panel on Climate Change (IPCC), too, has recognized these threats. In the IPCC Sixth Assessment Report from Working Group III: Mitigating Climate Change, the IPCC stated that:

> "While international investment agreements hold potential to increase low-carbon investment in host countries (PAGE 2018), these agreements have tended to protect investor rights, constraining the latitude of host countries in adopting environmental policies (Miles 2019). Moreover, international investment agreements may lead to 'regulatory chill', which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels (Tienhaara 2018)."[24]

Recognizing the threats of ISDS to climate, workers, and public interest policies, civil society movements across the globe have been fighting against this undemocratic system. And, due in

part to decades of campaigning and the strong evidence of the threats of ISDS to climate and other public interest policies, the tides are beginning to turn.

South Africa, Indonesia, India, Ecuador, and Bolivia have all begun to terminate their BITs, which include ISDS provisions.[25] In 2019, European Union member states agreed to terminate all intra-EU BITs. [26] States have also taken major decisions related to the Energy Charter Treaty (ETC) – the investment treaty generating the highest number of fossil fuel arbitrations. Germany, France, and Poland recently withdrew from the ECT.[27] The United Kingdom, Spain, the Netherlands, and other European countries have also announced an exit from the embattled agreement, and a withdrawal of the EU seems only a matter of time.[28]

In the U.S., ISDS has also lost considerable support. Administrations from both major political parties have recognized the dangers of ISDS and have taken steps to limit the system. For example, the U.S.-Mexico-Canada Agreement (USMCA), which entered into force on July 1, 2020 and effectively replaced the North American Free Trade Agreement (NAFTA), substantially narrowed NAFTA's broad investor protections. While the deal preserved ISDS rights for legacy investments under NAFTA until July 1, 2023,[29] the USMCA terminated ISDS between Canada and the U.S. after that date. Unfortunately, it leaves a more narrow ISDS in place between the U.S. and Mexico, and grants substantial investor rights specifically to oil and gas firms[30] –one of several reasons that the Sierra Club and other major environmental organizations opposed the deal.[31]

The Biden Administration has taken an even stronger position against ISDS by committing to not pursue any trade or investment agreement that would establish ISDS, opposing "the ability of private corporations to attack labor, health, and environmental policies through ISDS."[32] Importantly, none of the Biden Administration trade initiatives that are currently under negotiation, such as the Indo-Pacific Economic Framework, the U.S.-Kenya Strategic Trade and Investment Partnership, or the Americas Partnership for Economic Prosperity, have included ISDS.

Opposition to ISDS is building in the U.S. Congress, as well. In late 2023, prominent U.S. policy makers such as Senators Elizabeth Warren (D-MA), and Sheldon Whitehouse (D-RI) and Representative Steve Cohen (D-TN) led a letter with over 35 lawmakers calling on U.S. Trade Representative (USTR) Katherine Tai and Secretary of State Antony Blinken to remove investor-state dispute settlement from the U.S.'s existing trade and investment agreements.[33] And, in March 2024, U.S. Congresswoman Linda T. Sánchez (D-CA), Congressman Lloyd Doggett (D-TX), and 45 members of Congress wrote a letter calling on the Biden Administration to work to remove ISDS from the Central America – Dominican Republic Free Trade Agreement (CAFTA-DR).[34]

With this shift in sentiment comes a major opportunity to end investor-state dispute settlement both by ensuring that no new agreements with ISDS are negotiated and by eliminating ISDS from the thousands of existing trade and investment agreements worldwide.

In order to contribute to the ongoing work to help protect climate and other public interest policies by eliminating the ISDS system in FTAs and BITs, this paper:

- Describes the broad investor protections and ISDS system included in FTAs and BITs;
- Offers case studies which highlight how fossil fuel corporations use ISDS to challenge climate policies; and
- Offers a set of recommendations for how to eliminate the ISDS system once and for all.

II. Investor-State Dispute Settlement: Extreme Rights for Corporate Polluters

ISDS originated in the 1950s, ostensibly to protect investors from government actions such as direct expropriation of investments. It has evolved into a system that essentially protects investors from any legal, regulatory, or policy changes that could diminish the value of their investments – such as rejections of fossil fuel permits or requirements on fossil fuel corporations. This section describes the investor-state dispute settlement system and some of the most often used investor protections that are now enshrined in thousands of treaties.[35]

Investor-State Dispute Settlement

ISDS allows foreign investors to bypass domestic courts and challenge climate and other public interest policies before private tribunals.[36] The tribunals are not composed of judges, but three private arbitrators. ISDS tribunals are not bound by precedent or meaningful requirements to ensure impartiality. In fact, many arbitrators serve as both legal counsel for corporations initiating ISDS claims against governments and as arbitrators deciding similar cases – therefore creating a perverse incentive to expand the interpretation of investor rights.[37] The arbitrators are empowered to order governments to pay corporations compensation for what they deem to be in violation of the broad foreign investor rights enshrined in trade and investment agreements, as explained below. There is no cap on the amount of taxpayer money that tribunals can order a government to pay and their rulings are not subject to appeal.[38] Finally, it is important to note that the treaty-based ISDS system operates in one direction: only foreign investors can sue governments in trade tribunals over alleged breaches of their rights – states have no such recourse to challenge the actions of foreign investors in their countries. In essence, ISDS serves as free political risk insurance provided by governments for corporate investments – including the polluting investments of fossil fuel firms.

Minimum Standard of Treatment; Fair and Equitable Treatment

Trade and investment deals typically guarantee foreign investors a “minimum standard of treatment” and “fair and equitable treatment.” A number of ISDS tribunals have interpreted these vague obligations as requiring governments to ensure “the stability of the legal and business framework,”[39] and to avoid policy changes that investors could see as “arbitrary.”[40] This means that a government could face costly ISDS challenges for changing its policies around fossil fuel production or development, for example, if doing so frustrates the expectations that multinational corporations held when investments were made. Such broad interpretations of investors’ right to a “minimum standard of treatment” help explain why this obligation has been so commonly used in the ISDS challenges and cited in successful rulings.

Indirect Expropriation

Status quo trade and investment deals obligate governments to compensate foreign investors for “indirect” expropriation. ISDS tribunals have interpreted this broad obligation as allowing multinational corporations to demand compensation for government policies or actions that have the effect of merely reducing the value of an investment.[41] By contrast, in most domestic legal systems, governments typically are not required to provide compensation unless they actually seize

private property or completely and permanently destroy its value.[42] This expansive foreign investor right allows corporations, for example, to challenge new environmental regulations if they diminish the value of their polluting projects.

In sum, rather than making corporations accept that adapting to changes are part of the cost of doing business, ISDS provides fossil fuel companies a cudgel to bully into the legal and policy landscapes that work best for them.

III. How Fossil Fuel Giants have Used ISDS to Attack Climate Policies

Fossil fuel firms are among the most ardent users and beneficiaries of the ISDS system; there is no shortage of examples of fossil fuel firms using ISDS provisions in FTAs and BITs to recover losses – real or anticipated – associated with fossil fuel projects. Below are several case studies that illustrate the types of policies being challenged, which are likely to expand as more countries put in place the policies needed to phase out fossil fuels and, therefore, reduce greenhouse gas emissions.

1. Ruby River Capital v. Canada: U.S. Energy Company Challenges Canada's Rejection of a Liquefied Natural Gas facility in Québec

In 2014, Symbio Infrastructure Partnership Limited began the process to obtain the permits for the construction and operation of a liquefied natural gas (LNG) facility and export terminal located in the district of Saguenay City, Québec. As required by Québec and Canadian law, both the Province of Québec and federal government of Canada performed environmental assessments of the project. The assessment from Québec cited "concerns regarding GHG emissions, cumulative effects of related projects, uncertainty regarding LNG demand, effects on marine mammals, the energy transition of LNG purchasers, and the social acceptability" of the Project.[43]

Canada's Federal Impact Assessment also identified numerous environmental impacts of the potential project, including:

- *"Significant effects resulting from greenhouse gas emissions . . . ;*
- *Significant direct and cumulative effects on marine mammals, including the beluga whale, particularly based on the effects of underwater noise on the St. Lawrence beluga, which is contrary to the objectives of the recovery programs for marine mammals at risk in the St. Lawrence Estuary as well as the protection mandate of the protected area; and*
- *Significant effects on the cultural heritage of the Innu First Nations, given the disturbance of marine mammals that would be caused by the increase in marine traffic."* [44]

In 2021[45] and in 2022,[46] the Governments of Québec and Canada, respectively, rejected the project based on these environmental assessments. In response, in February 2023, Ruby River Capital LLC, the American parent company of Symbio, filed an ISDS claim for "no less than $20 billion"[47] against Canada under the NAFTA legacy provisions in the USMCA, despite the fact that Symbio had only invested an estimated $120 million in the project.[48]

In its Notice of Arbitration, Ruby River stated that all of its efforts towards the LNG facility and related pipeline project "came to naught when the Québec Government radically altered its longstanding stance towards the Projects" and "Québec Cabinet unlawfully instrumentalized the applicable environmental review process to accomplish its political agenda, imposing criteria devised solely to negatively target the Projects."[49] By rejecting the projects, Ruby River claimed, "Canada and Québec acted in a manifestly arbitrary and discriminatory manner, contrary to the legitimate expectations of the Claimant ...."[50] More specifically, Ruby River claimed that Canada had breached numerous provisions of NAFTA that give corporations preferential treatment, including on minimum standard of treatment and indirect expropriation.

The case is pending. [51]

2. TC Energy v. United States: Canadian energy firm challenges U.S. rejection of Keystone XL Pipeline

In November 2015, Indigenous Peoples, farmers, ranchers, and communities across the U.S. successfully highlighted the many environmental and climate impacts of the pipeline, President Obama rejected the Keystone XL pipeline proposed by Canada-based TransCanada Corporation. The Keystone XL pipeline would have transported tar sands oil – among the most carbon-intensive fuels on the planet[52] – from Alberta to refineries in the U.S. Gulf. The controversial pipeline would have jeopardized U.S. climate change targets, exposed Indigenous Peoples and thousands of landowners to increased risk of oil spills, and exacerbated the toxic health impacts of tar sands extraction and refinery pollution on communities of color. In response, in 2016 TransCanada used NAFTA to launch a $15 billion ISDS case against the United States to cover its costs and the revenues it expected to have earned if it had been allowed to build the dangerous pipeline.[53]

More specifically, TransCanada claimed that the pipeline denial, which is consistent with both climate science and U.S. commitments under the Paris Climate Agreement, was based on an "arbitrary political calculation."[54] TransCanada further argued that the government's decision to act in line with widespread demands for the pipeline's rejection violated the corporation's broad NAFTA rights of its guarantee of a minimum standard of treatment in addition to its trade deal protections

against discrimination and indirect expropriation.[55] TransCanada dropped its ISDS case shortly after President Trump approved the Keystone XL pipeline in early 2017.[56] But the case didn't end there. In January 2021, shortly after coming to office, President Biden revoked the Presidential Permit for the KXL pipeline.[57] In retaliation, TransCanada – now named TC Energy – filed its second ISDS against the U.S., "seeking to recover more than US$15 billion in damages that it has suffered as a result of the U.S. Government's breach of its NAFTA obligations."[58] In January 2023, the U.S. moved to dismiss TC Energy's claim, arguing that the administration did not breach NAFTA rules because USMCA, not NAFTA, was in effect when it revoked the permit for the pipeline.[59]

The case is still pending.[60]

3. Lone Pine v. Canada: U.S. investor challenges Québec's Moratorium on Fracking

In 2011, the Canadian province of Québec passed a law prohibiting oil and gas activities, including hydraulic fracturing, or "fracking," under the St Lawrence River.[61] Fracking is the process of extracting natural gas and/or oil from tight rock formations below the surface using fluids, gases, chemicals, and proppants at high pressure to break apart and release hydrocarbons present in the rock, which poses significant risks to communities, the environment and the climate.[62] According to the government of Canada, "The Act was passed in response to the findings of a strategic environmental study on hydrocarbon development in the maritime estuary basin and the northwestern Gulf of St. Lawrence, which concludes that this environment is not conducive to hydrocarbon development activities. This study was preceded by numerous other studies that, since 2003, have been analyzing the impact of hydrocarbon exploration and exploitation activities on the biophysical and human environment of the St. Lawrence River."[63] The review also concluded that fracking in the area could pollute the air and water and have "major impacts" on local communities.[64]

Per the law, the government of Québec revoked mining exploration licenses located in the St. Lawrence River. One of the licenses revoked had been granted to U.S. oil and gas firm Lone Pine to explore for shale gas under the St. Lawrence River.

In response, in September 2013 Lone Pine launched its ISDS case against Canada under NAFTA.[65] In its notice of arbitration, Lone Pine stated that "The dispute is in relation to the Government of Québec's arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under the St. Lawrence River in violation of Chapter Eleven of NAFTA."[66] Stating that "Suddenly, and without any prior consultation or notice, the Government of Québec introduced Bill 18 into the Quebec National Assembly on May 12, 2011 to revoke all permits pertaining to oil and gas resources beneath the St. Lawrence River without a penny of compensation," Lone Pine claimed that Canada's revocation of Lone Pine's mining rights was a violation of the government's obligation under NAFTA to provide fair and equitable treatment, a minimum standard of treatment, and protection from indirect expropriation. Finally, Lone Pine argued that it was owed CDN $250 million in damages.[67]

The arbitration panel issued its final ruling in November 2022.[68] As members of the Boston University Global Development Policy Center stated:

> *Although a Majority of the Tribunal dismissed all the claims, its reasons for doing so were extremely narrow. On expropriation, the Tribunal was unanimous that no "substantial deprivation" had occurred because only part of the investment (the river exploration license) was affected by the ban. If Québec had passed a total ban on all oil and gas development (as it did in 2022), the outcome might have been different. On the minimum standard of treatment, the Tribunal stressed that "the standard to be met for a breach of NAFTA Article 1105 is a very high one", which suggests that the same conclusions might not have been drawn had the case occurred prior to the Notes of Interpretation or under a different treaty with a vague [fair and equitable treatment] provision. Even with this high standard, one dissenting arbitrator concluded that the failure to provide the company with compensation, which he viewed as politically expedient and therefore not justifiable, was enough to create a breach.*[69]

Therefore, while the Government of Québec was not ordered to pay Lone Pine in this case, the narrow tribunal decision indicates that a similar case could be decided in favor of the fossil fuel company.

4. Vattenfall v. Germany: Swedish Energy Utility Challenges Coal Power Plant Standards in Germany

In 2007, the government of Hamburg, Germany, granted Swedish energy firm Vattenfall a preliminary permit to begin construction of a new coal-fired power plant.[70] In the context of strong concerns from policymakers and the public that the plant would contribute to climate change and could pollute the adjacent Elbe River and, as Vattenfall itself noted in its Request for Arbitration, due to "the reports of the Intergovernmental Panel on Climate Change having alerted the public to the impending climate change," the government of Hamburg required Vattenfall to comply with environmental requirements to protect the river.[71] After elections in 2008, the Green Party, which opposed the coal-fired power plant, formed a coalition with the Christian Democrats,[72] which issued permits to Vattenfall in late 2008, but with requirements to protect the Elbe River.[73]

Instead of complying with those requirements, however, Vattenfall launched an ISDS case against Germany under the Energy Charter Treaty. Vattenfall stated that "the combined effect of the delay in issuing the required permits and the restrictions on the use of cooling water destroys the economic value of the plant."[74] It launched a EUR 1.4 billion case, claiming that the environmental rules constituted an expropriation of its investment and a violation of its right to "fair and equitable treatment."[75]

To avoid a potentially costly ruling, the German government reached a settlement with Vattenfall in 2010 that required Hamburg to abandon its environmental requirements for the coal-fired plant, including protections for the Elbe River, and issue the permits required for Vattenfall to build the plant.[76] Vattenfall's coal plant began operating in 2015, and was operational through July 2021.[77]

5. Ecuador: A Court Order to Pay for Oil Pollution in the Amazon

Between 1964 and 1992, Texaco, which was acquired by Chevron in 2001, performed oil operations in the Ecuadorian Amazon. In 1993, over 30,000 Indigenous People brought a class action lawsuit to the highest court in Ecuador against Texaco, arguing that during its operations in Ecuador, the company "had caused massive environmental impacts, ultimately leading to several adverse effects on the local population, including higher-than-normal morbidity and mortality rates."[78]

The legal battle, which spanned over two decades, resulted in a ruling that upheld prior rulings against Chevron for contaminating a large section of Ecuador's Amazon. Ecuador's court ordered Chevron to pay more than $9 billion to provide desperately needed clean-up and health care to afflicted Indigenous communities.[79]

Instead of complying with the ruling, Chevron used the ISDS provisions in the US-Ecuador BIT to sue the government of Ecuador in order to avoid liability for its dumping of toxic water and the digging of hundreds of open oil pits in Ecuador. In its ISDS case, Chevron claimed that they "have no liability or responsibility for environmental impact" and that the government of Ecuador violated Chevron's right to "fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment [and] non-discriminatory treatment..."[80]

In 2013, the ISDS tribunal took a step toward honoring Chevron′s request to undermine the Ecuadorian court rulings against the oil corporation. Using creative legal interpretations, the tribunal decided that a 1995 agreement between Texaco and Ecuador had effectively extinguished Ecuadorians' collective rights to sue over damage caused by Texaco, calling into question the legal basis for the case that resulted in more than $9 billion ruling against Chevron.[81] However, the 1995 agreement did not actually mention Ecuadorians′ collective rights,[82] and a prior agreement between the government and the company expressly preserved Ecuadorians′ ability to sue over the pollution.[83] Moreover, Ecuadorians′ right to take such collective legal action is enshrined in Ecuador's Constitution and has been confirmed by the country′s highest court.[84]

In 2018, the investment tribunal found in favor of Chevron and ordered Ecuador to compensate Chevron for alleged economic and moral damages caused to the company.[85] The specific amount of damages Ecuador must pay Chevron is still pending.[86]

6. Ecuador: Restrictions on Oil Exploration in the Amazon

In 1999, Occidental Petroleum Corporation signed a 20-year contract with Ecuador for oil exploration and production rights in the Amazon rainforest.[87] In accordance with Ecuador's laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government approval.[88] This legal requirement provided the government the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to exercise caution: for decades, Texaco, which Chevron later acquired, dumped billions of gallons of toxic water into Ecuador's Amazon region while drilling for oil.[89]

Just one year after signing its contract, Occidental violated it (and Ecuadorian law) when the corporation sold 40 percent of its production rights to Alberta Energy Company without formally informing, or seeking authorization from, the Ecuadorian government.[90]

In response, Ecuador terminated Occidental's contract and investment, which prompted Occidental to launch an ISDS case against Ecuador under the U.S.- Ecuador BIT. Although the ISDS tribunal agreed that Occidental broke the law and that Ecuador was within its legal rights to terminate the contract and investment,[91] the tribunal used a broad interpretation of Occidental's right to "fair and equitable treatment" to rule against Ecuador.[92] Using logic that a dissenting tribunalist described as "egregious," and "full of contradictions"[93] two of the tribunalists ordered Ecuador to pay more than $2 billion to Occidental[94]—the largest ISDS penalty at the time. A later, partial annulment of the decision left the ruling largely intact and left Ecuador with a penalty of more than $1 billion.[95]

In each of these examples, a government has made a decision or adopted a policy in line with the public interest – to protect the environment, human health, precious biodiversity, and more – only to be met with staunch opposition from foreign fossil fuel companies. These cases are driven by the desire of big polluters to protect the status quo and line their corporate coffers despite the threats to the public and our climate.

BOX 1

Protecting Climate Policy with a Climate Peace Clause

In addition to the investor-state dispute settlement system, outdated rules in aging trade agreements are increasingly being used by governments to directly challenge other governments' climate policies at the World Trade Organization (WTO). At particular risk are policies that aim to address climate change while creating green jobs in domestic manufacturing and clean energy industries. Such policies are critical to building up renewable energy industries in a broad array of countries – therefore increasing competition and lowering costs over the medium-long term while preventing supply-chain bottlenecks.

Most recently, for example, China initiated a WTO dispute challenging U.S. tax credits for electric vehicles and renewable energy production in the Inflation Reduction Act.[96] The tax credits China is challenging incentivize electric vehicles and clean energy production while creating U.S. clean energy jobs. The European Union[97] and South Korea[98] have also threatened to bring similar cases. Similarly, Japan and the European Union used trade rules to successfully challenge parts of Ontario, Canada's renewable energy program that incentivized the use of clean energy and the creation of green jobs.[99] The U.S. successfully challenged a similar component of India's national program that incentivized local solar production,[100] and India responded by challenging similar renewable energy programs in eight U.S. states that included "buy-local" rules.[101] (Fortunately, India and the United States agreed to drop both of these cases as part of a larger agreement to end six outstanding WTO disputes.[102]) Therefore, in addition to eliminating the ISDS system, there are growing calls and a growing need for a Climate Peace Clause – a time-bound, self enforcing commitment from governments to refrain from using state-to-state dispute settlement mechanisms in international trade agreements to challenge other countries' climate mitigation and/or clean energy transition measures.[103]

A Climate Peace Clause is needed to help eliminate:

Direct threats to climate policies: Because governments are obligated under trade-agreement rules to ensure their domestic policies conform with trade-pact rules, governments may be required to weaken or remove climate measures should a dispute settlement body find them in violation of a country's trade obligations.

Legal uncertainty and delay: The increasing number of cases creates significant legal uncertainty and attendant delay for governments contemplating climate measures, and does so at a moment when delayed action poses catastrophic and shared global risks.

The chilling effect: The mere threat of timely and costly trade litigation may deter governments from adopting climate measures or move policy makers to shape policies in a way that they think will make them less likely to be challenged and/or more defensible on trade grounds. As a result, governments may fail to adopt policies altogether or may undermine their effectiveness for climate purposes.

A Climate Peace Clause could be proposed unilaterally by countries ready to show leadership at the intersection of trade and climate. However, a Peace Clause will be most effective with multiple signatories. Therefore, a Climate Peace Clause should be established in multiple fora, including between a coalition of countries of the willing, through joint declarations between countries, and within the texts of pending bilateral and regional trade agreements.

Finally, it is important to note that developed countries which are the largest historic emitters of greenhouse gas emissions should be first to commit to a Climate Peace Clause. If a Climate Peace Clause were established between a developed and developing country, the Peace Clause should include commitments from the developed country to provide support, such as technical assistance, new and additional funding, and/or transfer of green technologies, to the developing country.

BOX 2

The Americas Partnership for Economic Prosperity

The Americas Partnership for Economic Prosperity (APEP) was officially launched in January 2023 with twelve countries: Barbados, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Mexico, Panama, Peru, Uruguay, and the United States. According to the White House,"the Americas Partnership will foster regional competitiveness, resilience, shared prosperity, and inclusive and sustainable investment, while tackling the climate crisis...."[104] Moreover, the Joint Statement of APEP countries states: "In line with our collective efforts to combat the climate crisis, we intend to seek opportunities to address climate change through mitigation, adaptation, and resilience, as well as through clean and renewable energy and energy efficiency."[105]

Notably, the United States has agreements that include ISDS with all APEP partners except for Canada and Barbados, and APEP countries have signed 43 BITs and FTAs in force with ISDS among themselves.[106] This is important, as agreements with ISDS in the Americas clearly undermine the stated objectives of APEP. To date, countries across the Americas have faced over 400 ISDS cases, and claimants have sought over $1.58 trillion in compensation.[107] An October 2023 analysis by the Center for Advancement of the Rule of Law in the Americas at Georgetown Law, the Columbia Center on Sustainable Investment at Columbia University, Rethink Trade of the American Economic Liberties Project found that "just the 12 countries now participating in APEP have either been ordered or have agreed to pay foreign investors a substantial total of $2.7 billion," and that the "12 APEP governments are currently facing at least 73 pending disputes, with a combined claimed sum of $46.9 billion."[108]

The analysis finds that that sum of money:

- Exceeds Ecuador's entire national health budget for 2021 by nearly 17 times;
- Surpasses more than half of Colombia's current national budget;
- Accounts for about 13% of the entire budget authorized by the U.S. Congress through the 2022 Inflation Reduction Act for climate action and clean energy investments to be distributed over the next decade.[109]

Given that ISDS is antithetical to the stated objectives of APEP, there is a major opportunity to eliminate ISDS from trade and investment agreements among APEP partners. This could be accomplished either within APEP itself or via a distinct legal instrument among APEP countries. Among the options to eliminate ISDS from trade and investment agreements among APEP partners including:

1. Terminating BITs with an agreement to neutralize sunset clauses (which guarantee that investments made prior to the termination of a treaty continue to be protected);
2. Amending the FTAs to remove the investment chapter or the ISDS provision specifically, with an agreement to neutralize the sunset clause where applicable;
3. Withdrawing consent to ISDS arbitration from the BITs and FTAs.[110]

U.S. leadership to advocate for the elimination of ISDS through APEP negotiations would represent a significant step towards eliminating ISDS in existing agreements and set a powerful precedent for further dismantling this undemocratic and anti-climate system.

IV. Recommendations

Given the severe risks that ISDS poses to climate policies, in addition to other public interest policies not discussed in this paper, it is critical that the United States government works to stop the expansion of ISDS and to eliminate ISDS from existing agreements. Each of these recommendations are expanded upon below.

1. The U.S. government must help stop the expansion of ISDS

The first step to ending the threats of ISDS to climate and other public interest policies is to stop the expansion of the system. The Biden Administration has been negotiating various trade partnerships, such as the Americas Partnership for Economic Prosperity (Box 2) the Indo-Pacific Economic Framework,[111] and a number of bilateral arrangements such as the U.S.-Kenya Strategic Trade and Investment Partnership[112] – all without any investment protections or ISDS system. Moreover, as noted above, President Biden has stated his opposition to ISDS in recent letters to the USTR and the State Department. Moving forward, President Biden and any future U.S. administration must:

- Publicly announce their strong opposition to ISDS;
- Commit to not negotiate or enter into any new agreements that contain ISDS; and
- Use their diplomatic power to encourage other countries to not enter into new agreements with ISDS.

2. The U.S. government must take steps to remove ISDS from existing FTAs and BITs

The United States – which is party to over 50 agreements with ISDS – has an opportunity to take great leadership at the intersection of trade and climate change and reduce its own and other countries' liability to ISDS claims by:

A. Terminating BITs to which it is a party. As noted above, many countries have already begun the process of terminating their BITs – which are entirely focused on investor protections. In fact, in 2017, for the first time, the number of terminations exceeded the number of new treaties signed, and by the end of 2019, governments terminated over 300 BITs.[113]

The process by which a country can terminate a BIT is determined by international law, as laid out in the Vienna Convention (Article 54)[114] and typically in the BIT itself. Importantly, most BITs include what is referred to as a sunset, or survival, clause. The clause specifies a time period in which the legal effects of the investment provisions continue even after agreement has

been terminated. Therefore, any commitment to terminate a BIT must also come along with an agreement to neutralize the sunset clause.[115]

B. Removing ISDS provisions from its FTAs and BITs. Another way for the U.S. to limit the liability of ISDS is to work with other governments to renegotiate or otherwise remove (e.g., through side letters or agreements between the governments) ISDS provisions from its existing FTAs and BITs. ISDS between Canada and the U.S., for example, was eliminated in the renegotiation of NAFTA. As described in Box 2, APEP provides a major opportunity for the U.S. and other APEP countries to eliminate ISDS in existing agreements.

C. Withdrawing consent to ISDS claims from BITs and FTAs. Another way to reduce ISDS liability is for the United States to withdraw consent to ISDS from BITs and FTAs. Withdrawal of consent essentially means that a government or governments suspend the application of ISDS by explicitly withdrawing consent to arbitration.[116] This could happen unilaterally, bilaterally, or via a multilateral instrument, which could take the form of a declaration or opt-in agreement.[117] The Columbia Center on Sustainable Investment has drafted treaty language that could be used by governments to amend existing international investment agreements to withdraw consent to investor-state arbitration.[118]

V. Conclusion

It is beyond time to make the investor-state dispute settlement system a relic of the past. The ISDS system:

- Provides the fossil fuel industry with a safety net for their polluting investments;
- Transfers the risk associated with fossil fuel investments to governments – and more specifically taxpayers; and
- Could dissuade governments from putting in place the policies needed to address climate change.

While this paper focused on the impacts of ISDS on climate change and, specifically, on fossil fuels, ISDS has equally dire consequences for environmental, public health, workers, and other public interest policies.

With more and more countries exiting or otherwise terminating agreements with ISDS, and with public and policy-maker sentiment against ISDS rising, there is only one sensible choice to protect our planet and its people: end the era of ISDS once and for all by both stopping its expansion and eliminating its existing threats.

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