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INVESTOR – STATE DISPUTE SETTLEMENT AND ITS IMPACT ON STATE'S REGULATION AND PUBLIC SECTOR FISCAL FOUNDATIONS

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Investor-State Dispute Settlement (ISDS) and its Impact on States' Regulation and Public Sector Fiscal Foundations

Introduction

Investor-State Dispute Settlement (ISDS) mechanisms, through the financial obligations they cause, systematically erode the fiscal foundations underpinning public sector spending and thus the quality of essential public services, particularly in developing economies. This paper explores the contested neocolonial nature of the arbitration process, and how the substantial financial commitments arising from ISDS awards reroute already insufficient public resources, thereby reducing available government expenditure on critical sectors such as education, healthcare, social protections, and infrastructure development, which are key for sustainable national development.[1] Fear of ISDS litigation also drives regulatory chill, loosening consumer protections.[2] As ISDS cases are predominantly related to minerals and fossil fuels, and as substantial deposits of such raw materials are based in the developing world, they are left vulnerable at the hands of large international conglomerates operating from the Global North.[3] For instance, African governments, from 1993 onwards, have been targeted by 171 ISDS claims, primarily from investors headquartered in the Global North.[4] As such, the analysis will explore the colonial dimensions of ISDS and their payouts. It will also focus generally on the experiences of Africa and Kenya and Egypt specifically, scrutinizing some of their budgets line items and expenditure patterns to ascertain possible causal links between ISDS claim settlements and reductions in funding for crucial public services. Furthermore, this study will interrogate the extent to which these often-unplanned fiscal burdens undermine a government's capacity as well as will,[5] to respond effectively to emergent and existing public needs, consequently exacerbating the strain on public sector workers and their citizens.

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[1] Penelope Milsom et al., "International Investment Liberalization, Transnational Corporations and NCD Prevention Policy Non-Decisions: A Realist Review on the Political Economy of Tobacco, Alcohol and Ultra-Processed Food," Globalization and Health 17, no. 134 (2021): 12, https://doi.org/10.1186/s12992-021-00784-3.

[2] Alison Giest, "Interpreting Public Interest Provisions in International Investment Treaties," *Chicago Journal of International Law* 18, no. 1 (2017): Article 9, https://chicagounbound.uchicago.edu/cjil/vol18/iss1/9.

[3] UNCTAD, "Recent Trends in Investor–State Arbitration Cases (2025). "https://unctad.org/system/files/official-document/diaepcbinf2025d4_en.pdf

[4] Iza Camarillo and Sarah Stevens, "The Scramble for Africa Continues: Impacts of Investor-State Dispute Settlement on African Countries," Public Citizen (2025). https://www.citizen.org/article/the-scramble-for-africa-continues-impacts-of-investor-state-dispute-settlement-on-african-countries/

[5] Giest, "Interpreting Public Interest Provisions".

What is ISDS?

Investor-State Dispute Settlement (ISDS) is the pathway established in International Investment Agreements (IIAs), which may be bilateral or multilateral, through which investors, individuals or companies, can address alleged violations of treaty terms by bringing a claim directly against a State before an international tribunal.[6] This is considered "extraordinary and unusual".[7] This legal/arbitration mechanism allows foreign investors to contest local policies that may be undermining their investment and helps them circumvent local courts that may favor the country against whom the claim is being made. For instance, at the WTO, only states are able to bring claims against other states. Even when states are pitted against each other, the power differentials are enormous between those countries with significant economic heft and those without. When investors have inordinate power to appeal directly to tribunals without having exhausted locally available recourse to justice, states are immediately at a disadvantage in a system that privileges the interests of global multinationals.[8] There is evidence to reveal that ISDS is a problematic mechanism that prioritizes corporate interests over public welfare.[9] By allowing investors to sue governments for regulations affecting their profits, critics state that ISDS creates a "quasi-legal arena" that subjects public policy to market rationality.[10]

Currently over 3350 IIAs exist with ISDS provisions.[11] While states enter into IIAs on the premise that investment safeguards and special rights will encourage investment streams leading to sustainable economic development with the benefits accrued outweighing the associated costs for the state and its citizens, empirical evidence does not bear this out.[12] A 2020 meta-analysis concluded that the effect of IIAs on foreign direct investment (FDI) to be "so small as to be considered zero".[13] Yet another meta-analysis found that the impact of IIAs on increases of FDI was overall below one percent.[14] So for developing countries, the gains from IIAs are already non-existent to begin with; however, being party to IIAs, if they run afoul of investors, it would mean that large allocations of funds are directed towards arbitration processes that would otherwise be used on public goods. Additionally, if they lose an arbitration process, they will also have to bear the cost of awards to the investor party as well as their arbitration costs. The Columbia CCSI primer, citing aggregated research, reports that, as of mid-2021, the average amount sought per

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[6] CCSI. "Primer on International Investment Treaties and Investor-State Dispute Settlement | Columbia Center on Sustainable Investment." https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement

[7] Ibid.

[8] Ibid.

[9] Pablo Ciocchini and Stefanie Khoury, "Investor State Dispute Settlement: Institutionalising 'Corporate Exceptionality,'" *Oñati Socio-Legal Series*, vol. 8, n. 6 (2018), https://ssrn.com/abstract=3194643

[10] Ibid.

[11] UNCTAD, "International Investment Agreements Navigator | UNCTAD Investment Policy Hub."

[12] "Primer on International Investment Treaties and Investor-State Dispute Settlement | Columbia Center on Sustainable Investment." https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement

[13] Josef C. Brada, Zdenek Drabek, and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis," *Journal of Economic Surveys* 35, no. 1 (2021): 45, https://doi.org/10.1111/joes.12392.

[14] L. Reiter and C. Bellak, "Effects of BITs on FDI: The Role of Publication Bias," in *Handbook of International Investment Law and Policy*, ed. J. Chaisse, L. Choukroune, and S. Jusoh (Singapore: Springer, 2020), https://doi.org/10.1007/978-981-13-5744-2_123-1.

claim was about US$1.16 billion and the average award for a successful claim was US$437.5 million.[15] While outliers drive averages up, even excluding them, in 2021, losing states were required to pay an average of US$315.5 million by tribunals.[16]

ISDS and Fiscal and Development Implications

Overview

The literature widely documents how IIAs, particularly through their ISDS provisions, can impose significant fiscal costs on developing countries, often through direct awards and the chilling effect on regulatory policy, i.e. when states become reticent about regulation.[17] Disputes can be extremely costly, with governments facing substantial financial risks,[18] and the system effectively giving investors special access to public funds, enabling them to threaten governments with billion-dollar claims.[19] The financial burden is further intensified by the vague and expansive nature of foreign investment protection provisions and the unpredictability of dispute outcomes, which can deter states from enacting public health, pharmaceutical, or environmental regulations for fear of costly litigation.[20] Such concerns are exemplified by the increasing number of ISDS cases initiated by fossil fuel companies against governments implementing policies to regulate carbon emissions, alongside a surge in claims related to public health measures, especially during the COVID-19 pandemic which laid bare how ISDS serve as barriers to respond effectively and equitably to health crises.[21] Moreover, the substantial legal and arbitration costs associated with defending against ISDS claims, even when states are ultimately successful, further strain public budgets, diverting funds that could otherwise be allocated to essential public services.[22] The magnitude of these costs is significant, with investors in 2017 seeking awards ranging from USD 15 million to 1.5 billion, underscoring the potential for substantial fiscal repercussions for respondent states.[23] By the close of 2018, states across the world had been bidden to or had consented to reimburse investors in public ISDS cases to the tune of USD 88 billion.[24] These

[15] CCSI. “Primer on International Investment Treaties and Investor-State Dispute Settlement | Columbia Center on Sustainable Investment.” https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement
[16] Ibid.
[17] Cristina Bodea, Fangjin Ye, and Andrew Kerner, “Global Treaties and Domestic Politics: Do BITs Constrain Fiscal Policy in Developing Countries?,” *Journal of Conflict Resolution* 62, no. 5 (2018): 1083–1107. http://dx.doi.org/10.2139/ssrn.3288100
[18] Srividya Jandhyala. "Why Do Countries Commit to ISDS for Disputes with Foreign Investors?" AIB Insights 16, no. 1 (2016): 7–9. https://insights.aib.world/article/16892-why-do-countries-commit-to-isds-for-disputes-with-foreign-investor
[19] Gus Van Harten, "Special Access to Public Funds," in *The Trouble with Foreign Investor Protection* (Oxford: Oxford University Press, 2020), https://doi.org/10.1093/oso/9780198866213.003.0005
[20] Deborah Gleeson et al., “Analyzing the Impact of Trade and Investment Agreements on Pharmaceutical Policy: Provisions, Pathways and Potential Impacts,” *Globalization and Health* 15 (2019): 1–16. https://doi.org/10.1186/s12992-019-0518-2
[21] Joshua Yang et al., “COVID-19 and a Window of Opportunity: Guiding Principles for a Health-Promoting Trade Agenda,” International Journal of Health Policy and Management 11, no. 8 (2020): 1604–1607. https://www.ijhpm.com/article_3977.html#R9
[22] Milsom et al., “International Investment Liberalization.”
[23] Gleeson et al., “Analyzing the Impact of Trade and Investment Agreements on Pharmaceutical Policy.”
[24] Yang et al, “COVID-19 and a Window of Opportunity”.

financial diversions operate as a parallel taxation system, at times even undermining states' rights to tax its citizens, compelling states to reallocate funds away from vital public sector employment and infrastructure toward satisfying foreign investor claims.[25]

ISDS as a Parallel Legal System

The literature reveals ISDS as a fundamentally problematic mechanism that creates what Ciocchini and Khoury describe as "a privatised quasi-legal arena" that is "incompatible with the rule of law, human rights and socially emancipatory practices."[26] This system institutionalizes what they term "corporate exceptionality" by subjecting "public regulation to the rationality of the market. International arbitration is usually governed by the rules set up by the International Center for Settlement of Investment Disputes (ICSID) or the UN Commission on International Trade Law (UNCITRAL).[27] While these fora for arbitration may be considered neutral third party settings,[28] the arbitrators who decide upon awarding or not awarding compensation to an investor have clear financial interests in doing so, as they depend on investors for future business.[29] Weghmann and Hall also provide extensive evidence of how ISDS functions as a post-colonial mechanism, noting that "ISDS cases have overwhelmingly been brought by companies from the Global North against Global South countries."[30] Their analysis shows that "investors from the European Union (EU15), US and Canada have initiated over 600 cases, they have been the target of only 109 claims." [31]

Financial Burden on Public Resources

The financial costs of ISDS are considerable and drain public resources. In 2016, it was recorded that the average cost of defending a case approached USD 5 million, and even states that emerged victorious were often left to bear those fees.[32] Further to that, ISDS awards can reach astounding sums, such as the USD 50 billion combined award in three closely related cases against Russia and the USD 1.8 billion award in Occidental v. Ecuador.[33] In 2015, Ecuador reportedly paid USD 1.1 billion to Occidental.[34] To compare, the total Ecuadorian budget was USD 29.8 billion in 2016.[35] Meanwhile, Honduras, which faces 11 claims (as of early 2025), has

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[25] Madeleine Songy, "Reforming International Investment Law to Advance Tax Justice" (Brief, International Institute for Sustainable Development, 2024). https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?params=/context/sustainable_investment/article/1035/&path_info=ccsi_reforming_international_investment_law_tax_justice_May_2024___Reet_Chatterjee.pdf

[26] Ciocchini and Khoury, "Investor State Dispute Settlement."

[27] Jandhyala. "Why Do Countries Commit to ISDS for Disputes with Foreign Investors?"

[28] Ibid.

[29] Van Harten, "Special Access to Public Funds."

[30] Vera Weghmann and David Hall. "The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms." *International Review of Administrative Sciences* 87, no. 3 (2021): 480–96. https://doi.org/10.1177/00208523211007898.

[31] Ibid.

[32] Lise Johnson and Lisa E. Sachs, "The Outsized Costs of Investor–State Dispute Settlement," 16(1) *AIB Insights* 10 (2016): https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/114

[33] Ibid.

[34] Phoebe Weston and Patrick Greenfield. "Why Fear of Billion-Dollar Lawsuits Stops Countries Phasing out Fossil Fuels." *The Guardian*, March 6, 2025. https://www.theguardian.com/environment/2025/mar/06/isds-fear-of-billion-dollar-lawsuits-stops-countries-phasing-out-fossil-fuels-aoe.

[35] Ibid.

one among them seeking restitution amounting to 30 percent of the country's GDP.[36] The Tethyan Copper v. Pakistan case which awarded the company USD 5.9 billion (including interest) is another one which raises concern about the inordinate amounts to be borne by developing countries.[37] This award on its own was almost equal to the USD 6 billion bailout loan that Pakistan negotiated for with the IMF in 2018, illustrating how the state was strapped for cash to the amount[38] that it needed to pay out. This outflow of public funds entails that public goods are being cut to some measure to accommodate investors. Thus, investors have "special access to public funds," enabling them to "invoke billion-dollar risks to threaten governments."[39] This creates the equivalent of a parallel taxation system whereby public resources are diverted to satisfy investor claims rather than fund essential services.

Regulatory Chill

According to the CCSI Primer on IIAs and ISDS, states have been contested by investors on a number of accounts. They include: a) attempts to fight tax evasion and money laundering; b) action to implement and strengthen environmental safeguards and their enforcement; c) efforts to tackle climate change and limit extractive industries; d) state price and quality control of essential public goods such as water and energy; e) state regulation of healthcare; f) state attempts to set up intellectual property safeguards that reflect private and public needs; g)
State efforts to implement redress mechanisms for historic discrimination; h) state attempts to guarantee foreign investment speeds up local development.[40] All of these signify entry points for regulatory chill, when governments fear that they may have to foot awards and arbitration costs.
It is especially concerning that "pro-public health or pro-public interest measures" are "prone to challenge by corporations if they negatively impact their profits," specifically affecting "access to essential medicines," "tobacco control regulations," and "protection of the environment."[41]

In examples of regulatory chill, the government of New Zealand held up its tobacco plain packaging legislation for nearly seven years until an ISDS case initiated by Philip Morris against Australia was resolved, the Indonesian government backpedalled on its open-cast mining ban in protected areas in response to threats of arbitration, and the government of Romania asked that a World Heritage Site nomination be referred back following an arbitration claim brought by a Canadian mining company with gold-mining interests in the area.[42]

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[36] Ibid.
[37] Stop Investor-State Dispute Settlement . "The Surge in ISDS Damages Paid to Global Corporations, Mostly by Poor Countries," 2024. https://www.isds.bilaterals.org/?the-surge-in-isds-damages-paid-to.
[38] Stephanie Triefus. "The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor–State Arbitration?" Business and Human Rights Journal 8, no. 3 (2023): 329–51. https://doi.org/10.1017/bhj.2023.45.
[39] Van Harten, "Special Access to Public Funds."
[40] CCSI. "Primer on International Investment Treaties and Investor-State Dispute Settlement | Columbia Center on Sustainable Investment." https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement
[41] Muhammad Zaheer Abbas and Shamreeza Riaz. "Investor-state dispute settlement mechanism and its ramifications for public health: An analysis." Australasian Dispute Resolution Journal, 28, no. 4, (2018): 244-251. https://eprints.qut.edu.au/223962/

[42] Laurens Ankersmit, "Regulatory autonomy and regulatory chill in Opinion 1/17"
Europe and the World: A law review, 4, 1/7 (2020). https://doi.org/10.14324/111.444.ewlj.2020.25.

The environment, as can be seen, emerges as a primary victim in ICSD battles. In 2011, the Colombian government banned mining in a significant biodiversity hotspot termed the *páramos,* but with the caveat: "anyone who already had a mining licence could continue until it expired".[43] This partial regulatory chill was followed by the country's judicial process instilling a complete ban, but as a result Colombia has been hit with ISDS claims.[44] A Guardian investigation into ISDS has revealed USD 84 billion in payouts from states to fossil fuel companies.[45] Moreover, it states that an excess of USD 120 billion in public money has been apportioned to private investors across all industries since 1976 with the average payment for a fossil fuel claim being USD 1.2 billion.[46] These mind-bogglingly high numbers highlight the payouts to be had in the arena of fossil fuels and extractive industries, throwing into sharp relief questions of whether Global North movement towards environmental regulation and climate action are in good faith or merely aspirational eyewash to assuage crises.

ISDS and Africa: Neocolonial Extraction?

ISDS mechanisms have emerged as a significant concern for African states at the crossroads of foreign investment, sovereignty, and development. A 2024 Public Citizen report, "The Scramble for Africa Continues," documents how ISDS has permitted multinationals, overwhelmingly from the Global North, to bring claims against African governments for public interest policy measures. Since 1993, African states have faced 171 ISDS claims, largely instigated by investors based in Europe, the United States, and Australia, with known awards in excess of USD 5.7 billion, with additional pending claims of close to USD 19.5 billion.[47]

The report argues, much like Weghmann and Hall, that ISDS act as a form of "corporate colonization", a neocolonial encroachment enabling private investors, many of whom are former colonial powers, to exercise a degree of coercion and control by challenging the regulatory autonomy of postcolonial states. Nearly 40 percent of cases filed by European multinationals happen to target their former colonies, which is redolent of colonial structural hierarchies and the logics of colonial economic relations.[48] A noteworthy example is von Pezold v. Zimbabwe, in which a Swiss-German family successfully contested Zimbabwe's post-independence land reform policies, winning over USD 64 million in damages plus "moral compensation."[49] In similar cases, such as Veolia v Egypt, a French firm sued Egypt on account of an increase in its minimum wage, and Italian mining investors sued South Africa for recompense over its black empowerment policies introduced to remedy some of the injustices perpetrated under apartheid in South Africa.[50]

[43] Anna Sands. "Unpacking Regulatory Chill: The Case of Mining in the Santurbán Páramo in Colombia." International Institute for Environment and Development, December 2020. https://www.iied.org/unpacking-regulatory-chill-case-mining-santurban-paramo-colombia.
[44] Ibid.
[45] Weston and Greenfield. "Why Fear of Billion-Dollar Lawsuits Stops Countries Phasing out Fossil Fuels."
[46] Ibid.
[47] Camarillo and Stevens, "The Scramble for Africa Continues."
[48] Ibid.
[49] Ibid.
[50] Weghmann and Hall, "The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms."

Three Australian mining corporations are currently seeking USD 37 billion from the Congo, which amount is thrice as much as the country's 2021 GDP of USD 13.3 billion, warranting the epithet placed on ISDS by Stiglitz: "litigation terrorism".[51]

Such exorbitant claims and outcomes stress the asymmetric power built into ISDS tribunals, which often favor investor protection over local welfare, historical justice, or level of development. Unlikely to help dissipate controversies surrounding ISDS is the fact that practitioners of arbitration have pointed out the lack of representation within arbitral panels beyond gender imbalances, in particular, a dearth of representation from Africa itself.[52]

Scholars broadly concur that ISDS has restrained governments' in Africa from pursuing social and environmental policies without fear of litigation. Uche Ofodile's empirical review of selected African cases before the International Centre for Settlement of Investment Disputes (ICSID) finds that, while African states do not lose more frequently than others, or have any peculiarity to the awards as African states, the costs and procedural burdens of arbitration are disproportionately heavy for developing economies:

> "…many countries in Africa are dissatisfied with the system and concerns about the system are growing. There are concerns about intrusion in domestic regulatory space, regulatory chill, the economic and social cost of involvement in ISDS, and Africa's underrepresentation in international investment arbitration more generally, which suggests a growing rejection of ISDS."[53]

The associated costs can deter states from enacting or enforcing policies on public health, labour standards, and natural resource management, the aforementioned "regulatory chill." Ofodile writes further, noting that although "ICSID tribunals appear to be guided primarily by the provisions of applicable texts (IIAs, contracts, and legislation) and ICSID case law rather than by the status of a Respondent State as developing or least developed," it raises "important questions about the development dimension of the ISDS system or the lack thereof."[54] Some countries like South Africa, Australia, Venezuela, Indonesia and Ecuador have withdrawn from treaties with ISDS provisions citing that they impede government legislation.[55] [56]

The prevalence of extractive sector disputes reveals another pattern: ISDS cases in Africa are concentrated in mining, oil, and gas, reflecting how investment treaties have become tools for preserving foreign control over resource-rich sectors.[57] In many cases, communities in resource

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[51] United Nations General Assembly. "Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights." Un.org, 2023. https://docs.un.org/en/A/78/168.
[52] Théobald Naud, Ben Sanderson, and Maxime Desplas, *GAR Middle Eastern and African Arbitration Review*, 2021, https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2021/article/investment-arbitration-in-africa
[53] Uché Ewelukwa Ofodile, African States, *Investor–State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges , ICSID Review - Foreign Investment Law Journal,* 34, 2, (2019): 296–364, https://doi.org/10.1093/icsidreview/siz03.
[54] Ibid.
[55] Weston and Greenfield. "Why Fear of Billion-Dollar Lawsuits Stops Countries Phasing out Fossil Fuels." (2025)
[56] Mmiselo Qumba, "Africa and investor-state dispute settlement: Mixed reactions, uncertainties and the way forward." *South African Journal of International Affairs.* 28, (2021): 1-24. 10.1080/10220461.2021.1907220.
[57] Naud, Sanderson, and Desplas. "*GAR Middle Eastern and African Arbitration*

rich areas that are indigenous and rural populations are excluded from proceedings although they have to bear the brunt of the social and environmental consequences of questionable investments.[58] This exclusion propagates colonial patterns of dispossession under the guise of a "neutral" and lawful arbitration, entrenching the criticism that ISDS operates as a neocolonial tool embedded in international economic law.

Mmiselo Qumba and Naud et al. write of how the ambivalence towards any merits of the ISDS system has led to the Africanization of arbitration with regional instruments springing up.[59] [60] The legal reform proposals from within Africa are a response to calls for regional dispute mechanisms that prioritize transparency, state accountability, and development outcomes over investor privileges. Initiatives such as the Pan-African Investment Code and the African Continental Free Trade Area (AfCFTA)'s Protocol on Investment adopted in 2023 reflects this need to achieve a balance between protecting investors, the rights of states, and sustainable development, aiming to harmonize rules and introduce safeguards for public policy.[61] [62] [63]

Overall, advocacy reports and academic studies merge on the key insight that ISDS has created indelible structural dependencies between African states and foreign capital, constraining the domestic policy space and reinforcing unequal power relations in global governance. Most importantly, African stewardship of Africa's resources remains to be fully in the hands of the continent and its people. While reform efforts are advancing, the current ISDS regime continues to raise fundamental questions about economic sovereignty, justice, and the unfinished decolonization of African economies.

Possible Clash of the EU's Carbon Border Adjustment Mechanism (CBAM) and ISDS related outcomes

With more climate related regulations coming into force in trade, such as the CBAM, the effects of ISDS need to be discussed in how they actively disincentivize positive climate action and create regulatory clashes. In 2023, a Report of the Special Rapporteur on "the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment", titled "Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights" was shared with the UN General Assembly

Review. (2021).

[58] Rolland, Sonia Elise, "The Return of State Remedies in Investor-State Dispute Settlement: Trends in Developing Countries" *Loyola University Chicago Law Journal*, 49, no. 2, (2017): 390. https://ssrn.com/abstract=3171510

[59] Mmiselo Qumba. (2020). "Assessing African Regional Investment Instruments and Investor–State Dispute Settlement." *International and Comparative Law Quarterly*. 70, (2020): 1-36. 10.1017/S0020589320000457.

[60] Naud, Sanderson, and Desplas. "*GAR Middle Eastern and African Arbitration Review*. (2021).

[61] Ibid.

[62] Makane Moïse Mbengue and Stefanie Schacherer. "The 'Africanization' of international investment law: The Pan-African Investment Code and the reform of the international investment regime." (2017). *Journal of World Investment and Trade.* 18, no. 3, (2017). 414-448.

[63] Samuel Kahura. "ICCA Kigali 2025: Saving ISDS through Modernization - the AfCFTA Protocol on Investment as a Blueprint for Drafting of Investment Treaties." *Kluwer Arbitration Blog*, 2025. https://legalblogs.wolterskluwer.com/arbitration-blog/icca-kigali-2025-saving-isds-through-modernization-the-afcfta-protocol-on-investment-as-a-blueprint-for-drafting-of-investment-treaties/.

underscoring how dire a problem ISDS have become. It explicitly states that "The ISDS system has especially devastating consequences for the global South, perpetuating extractivism and economic colonialism."[64] The report explains how states satisfying their Paris Agreement commitments on climate change may be liable to fossil fuel companies for USD 340 billion in anticipated ISDS cases, which poses a substantive barrier for meaningful climate action.[65] The Energy Charter Treaty, an investment agreement with 158 known investment arbitration cases as of May 2023, exemplifies how investment law can be instrumentalized by fossil fuel companies to challenge national climate policies, potentially leading to claims exceeding US$340 billion.[66]

The regulatory chill associated with these ISDS costs and awards will have consequences for African extractive industries when the CBAM comes into effect. The EU's CBAM requires companies to adjust financial payments as per the greenhouse gas (GHG) emissions embedded in their imports of aluminum, steel, fertilizers, electrical energy, hydrogen and cement.[67] While not directly a tax, it will act as one. It is an EU mechanism "to put a fair price on carbon emitted during the production of carbon-intensive goods that are entering the EU, and to encourage cleaner industrial production in non-EU countries."[68] However, as there is a very real potential of substantial financial penalties for countries enacting policies to encourage cleaner environmental laws, these countries may end up having to just succumb to high CBAM payments. The CBAM and the ISDS have the ability to create a vicious cycle in the African context dominated by extractive industries. Domestic regulatory failure can effectively drive up CBAM charges and despite CBAM charges, countries may not regulate as the costs arising from ISDS can be in excess of CBAM concessions.

ISDS and Kenya

Up to 2019, according to the Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI), Kenya was reportedly spending at least KES 500 million (USD 3.9 million) to defend a single ISDS case making treaties with ISDS provisions a substantial drain on Kenyan state coffers, diverting funds from essential services.[69]

Kenya has a relatively successful record of defending ISDS claims brought against it. Cortec Mining had brought on a case against Kenya for its expropriation of their Special Mining License in 2013 after they had invested millions into the project. Kenya's respondent claim was that the mining company's license had been obtained illegally by the Mining Commissioner in

[64] United Nations General Assembly. "Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights." Un.org, 2023. https://docs.un.org/en/A/78/168.
[65] Ibid. 4.
[66] Endrius Cocciolo and Leonie Reins. "A Critical Review of the Energy Charter Treaty from an Earth System Law Perspective." *Transnational Environmental Law* 14, no. 1 (2025): 94–120. https://doi.org/10.1017/S2047102524000244.
[67] Carbon Chain. "EU Carbon Border Adjustment Mechanism (CBAM) | CarbonChain." Carbonchain.com, 2024. https://www.carbonchain.com/cbam.
[68] European Commission. "Carbon Border Adjustment Mechanism." European Commission, 2025. https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en.
[69] Kivuva, Elizabeth. "Kenya's Foreign Trade Disputes Costly - Experts." Bilaterals.org, 2019. https://www.isds.bilaterals.org/?kenya-s-foreign-trade-disputes.

contravention of state law. The tribunal ruled in 2015 in Kenya's favor.[70] Choiniere and Maksimove write that the case "demonstrates the potential dangers to the state from adopting sustainability legislation."[71] Moreover, even with Cortec required to pay Kenya USD 3,226,429 plus USD 322,561 in ICSID costs,[72] Kenya would have spent close to USD 4 million in arbitration costs making the gains from the process marginal. Over the years a case drags on, the arbitration costs present a major diversion of funds. So, within the presence of claims, legal costs and possibility of settlements Kenya's fiscal exposure to ISDS is real. For instance, the Kenya Ministry of Health budget for 2021/22 was KES 121.09 billion (or USD 1.0bn).[73] Therefore, a single large award, should that come to pass, of about USD 100-400 million can contribute to fiscal drain, potentially taking away from a large share of the Ministry's annual spending or causing comparable budget disruption elsewhere. Furthermore, since tax revenues as a segment of GDP is usually much lower in developing countries than in developed countries,[74] coupled with the potential for large, unexpected ISDS payouts, this places considerable strain on the national budget, often leading to reduced allocations for public sector salaries and essential social programs. This fiscal pressure in turn will have consequences for the quality and availability of public services, as the government is forced to reallocate funds or implement measures that inordinately affect the most vulnerable in society. However, as specific line items on budgets do not disclose ISDS payments, it is difficult to directly gauge where cuts have been made. Nonetheless, opportunity cost projections can be made with available payouts measured against budget items.

ISDS and Egypt

If Kenya has been relatively fortunate with ISDS mechanisms, Egypt has not been so lucky. In 2022, it ranked as first in the Arab world and fourth internationally for ISDS proceedings.[75] On the lower range of payouts, in ICSID arbitration case No. ARB/11/32 in 2011 by Indorama, an Indonesian company, received a settlement of USD 50 million from the Egyptian government in 2015. The 2015/16 draft budget of Egypt projected a total of USD 56.34 billion in expenditure on social programmes.[76] A payment, then, such as the one to Indorama is potentially only a nearly 0.10 percent deduction in social programming, but it is nonetheless a deduction that the vulnerable in Egypt can probably ill afford.

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[70] Haden Choiniere and Vladislav Maksimov. "Investor–State Dispute Settlement and Sustainable Development: Negative Externalities and a Need for Reform." *AIB Insights*, 22(1). https://insights.aib.world/article/32976-investor-state-dispute-settlement-and-sustainable-development-negative-externalities-and-a-need-for-reform

[71] Ibid.

[72] Jaqueline Waihenya. "Investor State Dispute Settlement in Kenya in the Wake of the Global Clarion Call for Reform." Jusmundi.com, 2021. https://jusmundi.com/en/document/publication/en-investor-state-dispute-settlement-in-kenya-in-the-wake-of-the-global-clarion-call-for-reform.

[73] The University of Nairobi Women Economic Empowerment Hub and Partners. "2021-2022 Budget Analysis." 2022. https://weehub.uonbi.ac.ke/sites/default/files/cluster3-project2/final-20212022-budget-analysis-report.pdf.

[74] Emmanuelle Auriol and Michael Walters. "Taxation Base in Developing Countries." *Journal of Public Economics*. 89. (2005): 625-646. 10.1016/j.jpubeco.2004.04.008.

[75] Safa'a Ashour. "Settlement of Arbitration Cases against Egypt: Losses, Privileges and Lack of Accountability." Arij.net, 2022. https://arij.net/investigations/arbitration-cases-egypt-en/?tztc=1.

[76] BBK. "Egypt Drafts 2015-16 Budget, Forecasts 9.9 Percent Deficit." BBK, June 20, 2015. https://www.bbkonline.com/egypt-drafts-2015-16-budget-forecasts-9-9-percent-deficit/.

For instance, Egypt's 2022/23 budget's allotment for appointments of teachers, doctors and pharmacists, for essential services was EGP 5 billion.[77] A USD 100 million settlement would equal about EGP 1.92 billion which would be a very substantial share of targeted hiring and specific social allocations Hence, while a USD 100 million may be seen as a small share of the total budget, it is large relative to distinct human-resource or program lines and can meaningfully crowd out hiring or other investments. The USD 2.013 billion awarded against Egypt in Unión Fenosa Gas v. Egypt was by no means a small amount which disproportionately impacted national budgets, potentially exceeding 12 percent of a nation's allocations for health and education.[78] With these diversions often, the public are the casualties with curtailments to the public sector and essential social programs, which in turn again undermine the quality and accessibility of fundamental services for the most needy.

Conclusion

ISDS are then highly controversial and have neocolonial dimensions in how predominantly Global North countries operating out of multinationals extract resources and awards from states for purported non-compliance. ISDS costs and payouts are substantial, often equivalent to percentages of developing states' budget line items. While it is difficult to know where governments decided to make cuts and as line items for international arbitration costs and payments are not part of budgets, it is not possible to directly connect ISDS to the breakdown of public services. However, as payments *are* made and they derive from national budgets, it is apparent that they are a use of funds for awards and costs that could otherwise be utilized by the state for public services. In how arbitration and fear of arbitration leads to regulatory chill another facet of ISDS is laid bare. In areas where regulation is most needed to ensure health, safety and the wellbeing of citizens such as the environment and healthcare, states may choose to defer regulation or deregulate. The costs associated with such regulatory failures for the Global South can illustrate how the Global North may not be entirely sincere regarding environmental and climate regulations. While they may be trying to offset the carbon footprint in their backyard and force regulation through measures such as the CBAM, their actions in the Global South actively deter environmental protections as testified to by even the UN.

As a resource-rich continent, Africa has a tenuous relationship with IIAs and their ISDS provisions. This has entailed that attempts to Africanize trade relations have come about which are emblematic of larger currents operative in the world to find alternatives and reform the existing systems. The call for African stewardship of African resources is now a rallying cry, and in the realm of ISDS reform, Africa appears to be leading the way.

[77] Government of Egypt . "Executive Summary Latest Economic Developments FY 2022/23," 2022. https://budget.gov.eg/wp-content/uploads/2023/09/The-Executive-Summary-74.pdf.
[78] Triefus. "The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor–State Arbitration?"

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