



General Assembly

Distr.: General
13 July 2023

Original: English

Seventy-eighth session

Item 73 (b) of the provisional agenda**

Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives

Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, in accordance with Human Rights Council resolution [46/7](#).

* Reissued for technical reasons on 19 March 2024.

** [A/78/150](#).



Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd

Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights

Summary

In the present report, the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, chronicles the compelling evidence that a secretive international arbitration process called investor-State dispute settlement has become a major obstacle to the urgent actions needed to address the planetary environmental and human rights crises. Foreign investors use the dispute settlement process to seek exorbitant compensation, with the fossil fuel and mining industries already winning over \$100 billion in awards. These cases create regulatory chill. The Special Rapporteur identifies specific actions that States must take to avoid future claims under the investor-State dispute settlement process and fulfil their human rights obligations.

I. Introduction

1. At a time when it is imperative that States accelerate the pace and ambition of climate and environmental action to prevent planetary catastrophe and fulfil their human rights obligations, a daunting obstacle has emerged. Foreign investors have weaponized a secretive international arbitration process, known as investor-State dispute settlement (ISDS), that is embedded in thousands of international investment agreements (IIAs), mostly bilateral investment treaties. Claims under the ISDS process are used to challenge climate and environmental actions taken by States and to demand billions of dollars in compensation. These cases are decided not by independent judges but by arbitration lawyers, many of whom work for law firms that represent investors. This unjust, undemocratic and dysfunctional process has sparked a legitimacy crisis in the international investment regime.

2. State measures vulnerable to the threat of ISDS claims include actions to enact, strengthen and implement climate and environmental laws, regulations, standards and policies. For example, refusing to grant oil and gas exploration permits, the phasing out of coal-fired power plants, denying permits for large mines, introducing fracking bans and strengthening laws to protect water supplies have all resulted in arbitration claims. The number of known ISDS cases targeting actions taken by States to protect the environment has skyrocketed, from 12 initiated prior to 2000 to 37 in the period 2000–2010 and 126 in the period 2011–2021.¹

3. ISDS cases are conducted not in domestic courts but through international arbitration between the foreign investor and the State where investments were made. If a State is found to be in breach of investment treaty obligations, arbitral tribunals have the power to grant massive monetary awards. The explosion of ISDS claims in recent years, and the threat of such claims, is led by fossil fuel, mining and other extractive industry corporations, resulting in exorbitant damages awards against States, permits granted for environmentally destructive activities and the rollback of vital rules addressing climate change, biodiversity loss and pollution.

4. The United Nations Conference on Trade and Development (UNCTAD) reports more than 127 ISDS claims have been filed that seek \$1 billion or more in damages.² Billion-dollar ISDS claims are becoming routine in climate and environmental cases, representing a gold mine for foreign investors and an economic nightmare for low- and middle-income States. Examples of ISDS claims and awards include:

(a) Singapore-based Zeph Investments suing Australia for \$200 billion because the Government refused to approve a proposed mine;³

(b) Three Australian mining corporations seeking \$37 billion from the Congo, three times the State's 2021 gross domestic product of \$13.3 billion;⁴

¹ United Nations Conference on Trade and Development, "Treaty-based investor-State dispute settlement cases and climate action", IIA Issues Note, No. 4, September 2022.

² UNCTAD Investment Dispute Settlement Navigator (see <https://investmentpolicy.unctad.org/investment-dispute-settlement>).

³ See letter from counsel for Zeph Investments addressed to the Minister for Foreign Affairs of Australia, available at www.italaw.com/sites/default/files/case-documents/italaw170014.pdf; and Rory Cross, "What you need to know about Clive Palmer's \$300bn lawsuit against Australia", University of New South Wales Newsroom, 6 April 2023, available at <https://newsroom.unsw.edu.au/news/business-law/what-you-need-know-about-clive-palmers-300bn-lawsuit-against-australia>.

⁴ Australian Fair Trade and Investment Network Ltd., "Australian mining companies launch claims for over US \$35 billion against Republic of Congo", 21 June 2021, available at <http://aftinet.org.au/cms/node/2027>.

(c) A \$20 billion claim by United States of America-based Ruby River Capital against Canada for refusing to approve a liquified natural gas project (seeking \$167 in compensation for every \$1 invested);⁵

(d) A \$15 billion claim by TransCanada Energy against the United States for refusing to approve an oil pipeline;⁶

(e) A \$6 billion award against Nigeria related to a proposed natural gas processing plant;⁷

(f) A \$3.5 billion claim against Mexico involving a proposed undersea phosphate mine;⁸

(g) A claim of undisclosed magnitude by Glencore against Colombia, related to a conflict between expanding one of the world's largest coal mines and protecting a vital river for Indigenous Peoples.⁹

5. The fossil fuel industry is extremely litigious, leading to the filing of ISDS claims asserting that government actions intended to address the climate crisis have decreased the value of its investments. These cases come with a high cost for States. The average claim in arbitrations concerning fossil fuels is \$1.4 billion, double the average claim in arbitrations related to non-fossil fuels.¹⁰ At the merits stage, fossil fuel investors win 72 per cent of cases, forcing Governments to pay more than \$77 billion in compensation to date.¹¹ The average award in published arbitration awards concerning fossil fuels is \$600 million – five times the average amount awarded in arbitrations related to non-fossil fuels.¹² The calculation of this figure excludes the largest award in investment arbitration history – \$40 billion awarded in an arbitration related to fossil fuel investments in the Russian Federation.¹³

6. Governments fulfilling their commitments under the Paris Agreement on climate change may be liable to oil and gas corporations for \$340 billion in future ISDS cases, which is a major disincentive for ambitious climate action.¹⁴ The surge in fossil-fuel ISDS claims could not come at a worse time. Humanity has reached the now or never point for achieving the Paris Agreement objective of limiting global warming to 1.5°C, a goal that requires reducing CO₂ emissions by 45 per cent by 2030 and achieving net zero emissions by 2050, and is incompatible with new coal, oil or

⁵ *Ruby River Capital LLC v. Canada*, International Centre for Settlement of Investment Disputes (ICSID), Case No. ARB/23/5. For information on the case, see www.italaw.com/cases/10270.

⁶ *TC Energy Corporation and TransCanada Pipelines v. United States of America*, ICSID, Case No. ARB/21/63. For information on the case, see www.italaw.com/cases/9339. See also Pete Evans, “Keystone XL owner TC Energy seeking \$15B from US for costs of cancelling pipeline”, CBC News, 23 November 2021.

⁷ William Clowes, “Nigeria cries foul again over gas company’s \$11 billion award”, Bloomberg, 3 November 2022.

⁸ *Odyssey Marine Exploration, v. United Mexican States*, ICSID, Case No. UNCT/20/1. For information on the case, see www.italaw.com/cases/7261.

⁹ *Glencore International A.G. v. Republic of Colombia*, ICSID, Case No. ARB/21/30. For information on the case, see www.italaw.com/cases/9760.

¹⁰ Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (Winnipeg, International Institute for Sustainable Development, 2002) pp. 17–19.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*, Permanent Court of Arbitration, Case No. 2005-03/AA226. For information on the case, see www.italaw.com/cases/544.

¹⁴ Kyla Tienhaara and others, “Investor-state disputes threaten the global green energy transition”, *Science*, vol. 376, No. 6594 (May 2022).

gas developments.¹⁵ Action must be taken immediately to accelerate the transformation of the global energy system.¹⁶

7. By slowing, weakening and in some cases reversing climate and environmental actions, ISDS claims have devastating consequences for a wide range of human rights, exacerbating the disproportionate harms suffered by vulnerable and marginalized populations. Yet international investment and trade agreements rarely incorporate effective provisions for environmental protection, while human rights obligations are ignored. Not one of the thousands of IIAs currently in force mentions the right to a clean, healthy and sustainable environment. ISDS arbitration tribunals routinely prioritize foreign investment and corporate interests above environmental and human rights considerations.

8. The ISDS system has especially devastating consequences for the global South, perpetuating extractivism and economic colonialism. The overwhelming majority of fossil fuel and mining ISDS claims are brought by investors from the global North against respondent States in the global South.¹⁷ In fact, the majority of fossil fuel and mining ISDS claims filed between 1995 and 2021 were brought by investors from just five States (Australia, Canada, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the United States).¹⁸ States in Latin America have been subject to 327 ISDS claims, with a growing number from extractive industries, especially mining, oil and gas. In 62 per cent of these cases investors were successful, resulting in damages or negotiated settlements worth more than \$33 billion.¹⁹ ISDS is also increasingly being utilized to enforce debt payments, forcing States to prioritize repayments at the expense of financing public services, addressing the climate crisis, achieving the Sustainable Development Goals and fulfilling human rights obligations (see [A/72/153](#)).

9. The Special Rapporteur's interest in this topic was sparked by the revelation during his 2022 country visit to Slovenia that the State was being sued for €500 million by a British corporation for refusing to permit fracking for gas (see [A/HRC/52/33/Add.2](#)). A call for inputs was issued in April 2023, resulting in 17 submissions, including from Czechia, the Dominican Republic, El Salvador, the European Union, Germany, Italy, Poland, Slovakia, Spain and Switzerland and academics and civil society. An expert workshop was co-hosted by the Special Rapporteur with the Columbia Center on Sustainable Investment in June 2023, gathering insights from many leading authorities on international investment law.

II. The fundamental flaws of the investor-State dispute settlement system

10. ISDS was established in the 1960s to protect investors, based in colonial powers, from the expropriation of their assets, without compensation, by newly independent States. Oil company executives and their lawyers exerted substantial influence on the development of the ISDS system.²⁰ Allowing foreign investors to sue States directly through international arbitration was an extraordinary and unwarranted concession of

¹⁵ Intergovernmental Panel on Climate Change, *Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 2023.

¹⁶ International Energy Agency, *Net-Zero by 2050: a Roadmap for the Global Energy Sector*, 2021.

¹⁷ UNCTAD, "Treaty-based ISDS cases and climate action".

¹⁸ Manuel Perez-Rocha, "Missing from the climate talks: corporate powers to sue Governments that limit pollution", *Foreign Policy in Focus* (Institute for Policy Studies, November 2021).

¹⁹ See <https://isds-americalatina.org>.

²⁰ Nicolás M. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (Oxford, Oxford University Press, 2021).

sovereignty to transnational corporations. The purported justification was that the rule of law was weak or unreliable in these States, whose domestic legal systems lacked competence or independence. However, the majority of ISDS cases today challenge legitimate public policies enacted by democratic governments in States with independent judiciaries. Few ISDS claims involve complaints about direct expropriation. Instead, the vast majority of claims involve regulatory or permitting actions taken by States, strategically framed by foreign investors as “indirect expropriation” or unfair treatment. Other potential claims include undermining the investor’s “legitimate expectations” of regulatory stability or introducing a measure that is “disproportionate” to a legitimate policy objective. Legitimate expectations have been misconstrued by investors and tribunals as precluding States from taking actions to address climate change, despite these actions being necessary and foreseeable for decades.

11. Among the many concerns expressed by States and critics are the incompatibility of ISDS with international human rights law, crippling damages awards, secrecy, lack of public participation, restrictions on States’ ability to regulate, the one-sided system, inconsistent tribunal decisions, the high costs of defending arbitration claims and conflicts of interest or the perceived bias of arbitrators in favour of investors (see [A/76/238](#)). The Parliamentary Assembly of the Council of Europe and the European Parliament have both warned about the serious consequences of ISDS for human rights, democracy, national sovereignty, climate policies and the just transition.²¹ The Nobel prize-winning economist Joseph Stiglitz described ISDS claims as “litigation terrorism.”²²

A. One-sided and incompatible with international human rights law

12. There is a fundamental tension between the ISDS system and human rights. IIAs are asymmetrical, or one-sided, creating enforceable rights for foreign investors without any enforceable responsibilities. The interests of elite foreign investors are prioritized over domestic investors, the State, human rights, a healthy environment, including a safe climate, and local communities that are affected by active and proposed projects. Foreign investors enjoy preferential access to justice because they can bring ISDS claims against Governments, but neither Governments nor adversely affected communities and individuals can bring claims against foreign investors (although States can file counterclaims in limited circumstances). Foreign investors help to select the tribunal that will adjudicate their case. Rights holders are relegated to possibly participating in arbitration cases as *amicus curiae* (friends of the court), but this is at the discretion of the tribunal, without recourse to appeal, and rights holders cannot pursue remedies. Unlike victims of human rights violations, foreign investors are not required to exhaust domestic remedies before pursuing an ISDS case. These discriminatory and disproportionate privileges, described by critics as “justice bubbles for the privileged”, are incompatible with the fundamental human rights principles of equality and non-discrimination.²³

²¹ Parliamentary Assembly of the Council of Europe, resolution 2151 (2017), “Human rights compatibility of investor-State arbitration in international investment protection agreements”; and motion for a European Parliament resolution on the future of European Union international investment policy (2021/2176(INI)).

²² Sebastien Malo, “UN reform needed to stop companies fighting climate rules”, Reuters, 28 May 2019.

²³ Anil Yilmaz Vastardis, “Investment treaty arbitration as bubbles”, in *The Oxford Handbook of International Arbitration*, Thomas Schultz and Federico Ortino, eds. (Oxford, Oxford University Press, 2020).

13. According to the Working Group on the issue of human rights and transnational corporations and other business enterprises, international investment agreements, especially the old-generation treaties that represent the majority of agreements in force, not only embody imbalance and inconsistency but also incentivize investor irresponsibility (A/76/238, para. 74). The ISDS system has the highest average claim for damages and the highest average awards of any legal system in the world.²⁴ Another major advantage for foreign investors is that ISDS awards are enforceable in more than 180 States, in contrast to human rights decisions by courts and tribunals that face major implementation challenges. As for claims that international investment treaties provide economic benefits, a comprehensive review by the Organisation for Economic Co-operation and Development (OECD) concluded that little robust evidence has been generated to date and a systematic review of 74 studies found the effects were negligible or zero.²⁵

14. It is clear from developments over the past decade that the ISDS system is incompatible with States' international human rights obligations.²⁶ The Charter of the United Nations establishes the duty of all States to cooperate towards the full realization of human rights, but makes no mention of international investment. The Charter specifies in Article 103 that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter are to prevail. As the Working Group on the issue of human rights and transnational corporations and other business enterprises concluded, human rights are *primus inter pares*, or first among equals, meaning they must be prioritized over other international law obligations (A/76/238, para. 58). The former Special Rapporteur on the right to food clarified that human rights are *jus cogens* norms, accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted, so that treaties or provisions within these treaties inconsistent with human rights should be considered void and terminated (A/HRC/19/59/Add.5, p. 6).

15. The majority of IIAs concluded between 1990 and 2009 represent first-generation agreements that provide significant protection for foreign investors, with few if any corresponding human rights or environmental responsibilities (A/76/238, para. 15). Only 0.5 per cent of over 2,000 investment treaties reviewed in a major survey even mention human rights.²⁷ By not including responsibilities for foreign investors in IIAs, States are failing to comply with their obligation to protect human rights from the adverse impacts of business activities (CCPR/C/21/Rev.1/Add.13, para. 8). In theory, the lack of explicit human rights provisions in IIAs should not prevent arbitral tribunals from considering international human rights law, but in practice most tribunals ignore, minimize or dismiss human rights arguments (A/72/153, para. 22).

²⁴ OECD, "Investment treaties and climate change: the alignment of finance flows under the Paris Agreement", background note for the seventh annual Conference on Investment Treaties, 10 May 2022, footnote 42.

²⁵ Joachim Pohl, "Societal benefits and costs of international investment agreements: a critical review of aspects and available empirical evidence", OECD Working Papers on International Investment, No. 2018/01 (Paris, OECD Publishing, 19 January 2018), p. 1; and Josef Brada, Zdenek Drabek and Ichiro Iwasaki, "Does investor protection increase foreign direct investment?: a meta-analysis", *Journal of Economic Surveys*, vol. 35, No. 1 (2021).

²⁶ Surya Deva and Tara Van Ho, "Addressing (in)equality in redress: human rights-led reform of the investor-State dispute settlement mechanism", *Journal of World Investment and Trade*, vol. 24, No. 3 (June 2023).

²⁷ Kathryn Gordon, Joachim Pohl and Marie Bouchard, "Investment treaty law, sustainable development and responsible business conduct: a fact finding survey", OECD Working Papers on International Investment, No. 2014/01 (Paris, OECD Publishing, 2014).

16. Ignoring human rights considerations sabotages the rule of law, one of the central pillars of the international legal order. The rule of law requires all entities to be accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards. Replacing domestic courts with arbitration tribunals to adjudicate disputes between foreign investors and States removes important safeguards against human rights violations, including transparency, public participation, equality and non-discrimination. The ISDS system also undermines democracy by subordinating important policy decisions to arbitration tribunals that are unaccountable, whose decisions are not subject to appeal and that have no duty to consider domestic law.

B. Investor-State dispute settlement perpetuates colonial extractivism and exacerbates inequality

17. ISDS empowers wealthy investors (largely based in the global North) to sue States (largely in the global South) over democratically chosen policies and get paid a king's ransom in public funds for not beginning or not continuing environmentally destructive activities. For example, Canadian investors in the mining and oil and gas sectors have won 59 per cent of their ISDS claims, averaging almost one billion dollars (\$929 million) per award.²⁸ The States that have settled or lost ISDS cases to Canadian investors are predominantly low-income States, including Bolivia (Plurinational State of), the Democratic Republic of the Congo, Ecuador, Kyrgyzstan, Mongolia, the Niger, Pakistan, Peru and Venezuela (Bolivarian Republic of).²⁹

18. Low-income States are particularly vulnerable because they have older IIAs that contain strong foreign investor protections and no environmental or human rights provisions, often need to enact or strengthen environmental laws, regulations and standards, may lack the legal expertise to evaluate the risks of threatened ISDS claims and have limited financial resources available to defend against ISDS claims or pay adverse awards.³⁰ The high cost of defending against such claims and awards potentially running into billions of dollars exacerbate the challenges facing their fragile financial systems and complicate efforts to restructure sovereign debt. Small island developing States are particularly vulnerable.³¹ For example, the Dominican Republic has been targeted by ISDS claims related, inter alia, to mining, a landfill, electricity reforms and a major real estate project. According to the Dominican Republic, "Unfortunately, due to decisions taken in defence of our environmental legislation and the protection of the environment, through the trade agreements to which we are party we have been subjected to international arbitration. It is a high price to pay, especially for developing countries."³²

19. Wealthy States are now taking steps to protect themselves from ISDS claims. In the renegotiated trade agreement between Canada, the United States and Mexico, which entered into force in 2020, the ISDS mechanism was eliminated between Canada and the United States. Canada's then Minister for Foreign Affairs, Chrystia Freeland, said that ISDS had cost Canadian taxpayers more than 300 million dollars

²⁸ Hadrian Mertins-Kirkwood, *On the Offensive: How Canadian Companies Use Trade and Investment Agreements to Bully Foreign Governments for Billions* (Ottawa, Canadian Centre for Policy Alternatives, May 2022).

²⁹ Ibid.

³⁰ Roslyn Ng'eno, "Preserving regulatory space for sustainable development in Africa", *Southviews*, No. 246 (South Centre, 5 April 2023).

³¹ Alicia Nicholls, "Caribbean and African SIDS' international investment agreements and climate change", Policy Brief No. 5 (Shridath Ramphal Centre, June 2023). Available at <https://shridathramphalcentre.com>.

³² Submission from Dominican Republic.

in penalty and legal fees and that ISDS elevated the rights of corporations above those of sovereign Governments. She further stated that in removing ISDS, Canada had strengthened its right to regulate in the public interest, to protect public health and the environment.³³ International arbitration claims between the 27 European Union member States have been eliminated, following decisions of the Court of Justice of the European Union.³⁴

20. The inequality, injustice and hypocrisy are staggering. Wealthy States – Canada, the United States and members of the European Union – are eliminating their exposure to ISDS claims but preserving the ability of their investors to continue extracting wealth and exploiting the global South through the continued use of ISDS claims and threats.

C. Secrecy

21. Access to information is a human right and is integral to the full enjoyment of other human rights, including the right to a healthy environment. Unlike domestic legal procedures, ISDS cases are cloaked in secrecy. Claims never need to be made public, hearings are often conducted behind closed doors, documents are often confidential and both awards and negotiated settlements can be kept secret. Unlike arbitration between two private parties where confidentiality might be justified, the participation of States means that ISDS arbitration often involves important public policy issues and can have huge economic implications.

22. The number of known ISDS claims has risen in recent years, but the lack of transparency makes it impossible to assess precisely how many cases exist, or the content of those cases. Even more difficult to quantify is the number of ISDS claims that have been threatened by foreign investors but not filed and that have successfully pressured States to weaken existing or withdraw proposed environmental and climate laws, regulations, taxes or other policies.

23. Lack of transparency is a particular problem in ISDS cases related to fossil fuels, which are often completely confidential, meaning that party submissions, procedural orders and awards are not made public.³⁵ For example, databases indicate that Clara Petroleum Ltd. filed an ISDS claim against Romania in 2022.³⁶ None of the documents associated with the case are available, so the basis of the complaint and the quantum of damages sought are unknown. Almost one third of known fossil fuel arbitrations are settled before reaching final decisions and all settlement documents are confidential.³⁷

D. Obstacles to public participation

24. Public participation and access to justice with effective remedies are fundamental rights in and of themselves, but they are also integral to the full enjoyment of other human rights. Inclusive public participation improves the quality of decision-making, enhances rights holder support for projects and fulfils human

³³ Speaking notes for the United States-Mexico-Canada agreement, press conference, 10 October 2018. Available at <https://pm.gc.ca/en/news/speeches/2018/10/01/prime-minister-trudeau-and-minister-freeland-speaking-notes-united-states>.

³⁴ See, for example, Court of Justice of the European Union, *Slovak Republic v. Achmea BV*, Case No. C-284/16.

³⁵ Di Salvatore, *Investor-State Disputes*.

³⁶ See UNCTAD, Investment Dispute Settlement Navigator (<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1218/clara-petroleum-v-romania>).

³⁷ Di Salvatore, *Investor-State Disputes*.

rights obligations. Yet the ISDS system poses major barriers to participation by affected communities, human rights defenders, Indigenous Peoples and civil society, who have no right to participate as parties and only the possibility of making non-party submissions, called *amicus curiae* briefs. Foreign investors are granted the privilege of being able to bypass domestic court systems and move directly to binding international arbitration. In contrast, victims of human rights violations must generally exhaust their domestic remedies before pursuing justice through international courts and tribunals.

25. Arbitration tribunals have absolute discretion regarding whether to accept amicus briefs. Criteria include whether an applicant has a significant interest in the proceedings and particular knowledge or insight that would assist the panel.³⁸ Tribunals also ensure that amicus submissions would not disrupt the proceeding or unduly burden or unfairly prejudice either party.³⁹ Amicus briefs are often rejected by ISDS tribunals, meaning that affected communities, human rights defenders, Indigenous Peoples and civil society are unable to participate and thus unable to highlight the devastating impacts of environmental degradation on the right to a healthy environment and other human rights.⁴⁰ The exclusive focus of ISDS claims on investors and States routinely results in public participation, community concerns and human rights being ignored at all stages of the process. Even if admitted, amicus briefs represent a limited, one-off form of participation. Applicants often lack access to other case documents, have their submissions limited in scope and length and are not permitted to participate in oral hearings.

26. *Eco Oro v. Colombia* and *von Pezold v. Zimbabwe* are examples where directly affected communities were excluded from ISDS processes. In *Eco Oro*, a foreign investor filed a claim based on Colombia's refusal to grant permits for a mine expected to cause significant environmental damage and jeopardize water supplies. Communities and civil society organizations opposing the project applied to submit an amicus brief, arguing that the actions taken by Colombia were justified by the State's human rights obligations, including protection of the right to a healthy environment. The tribunal refused to admit the proposed submissions.⁴¹ In *von Pezold*, a case about land reform, the tribunal rejected an application from Indigenous Peoples, concluding that Indigenous rights were outside the scope of the dispute.⁴²

E. Revolving doors and double hatting

27. The ISDS system has been severely criticized because decisions are not made by judges but by lawyers who are often perceived to have conflicts of interest or pro-investor biases. ISDS tribunals are usually composed of three arbitrators. The investor and the State each choose one arbitrator, who jointly choose the third arbitrator, who serves as the president of the panel. Arbitrators are supposed to be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.⁴³ In practice, arbitrators are predominantly white, male, business-friendly

³⁸ ICSID, Arbitration Rules, rule 67.

³⁹ *Ibid.*, rule 67 (4).

⁴⁰ *Kappes v. Guatemala*, ICSID, Case No. ARB/18/43, Procedural order No. 2; *Odyssey Marine Exploration v Mexico*, ICSID, Case No. UNCT/20/01, Procedural order No. 6; and *Bear Creek v. Peru* ICSID, Case No. ARB/14/21.

⁴¹ *Eco Oro v. Colombia*, ICSID, Case No. ARB/16/41, Procedural order No. 6.

⁴² *Bernhard von Pezold and Others v. Zimbabwe*, ICSID, Case No. ARB/10/15, Procedural order No. 2.

⁴³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, arts. 14 (1) and 40 (2).

investment law attorneys from the global North, many of whom litigate ISDS cases for clients or work for firms that do so.

28. Allowing foreign investors to shape their own panels creates obvious risks of bias, conflict of interest, potential misconduct and other abuses of power. The system has been criticized for creating revolving doors and allowing double hatting.⁴⁴ Revolving doors describes the situation in which individuals serve, sequentially, in various roles – as a lawyer in one case, an arbitrator in another and an expert in yet another case. Double hatting describes the practice of acting as a lawyer and an arbitrator in two or more cases at the same time, raising serious concerns about the ability to adjudicate cases fairly. For example, a lawyer advocates on behalf of a client for a broad, investor-friendly interpretation of indirect expropriation in one ISDS case, but addresses the same legal issue as an arbitrator in another ISDS case, creating an obvious conflict of interest.

29. Most arbitrators lack human rights and environmental law expertise. There have been modest efforts to take into account the unique features of environmental issues in arbitration. For example, in 2001 the Permanent Court of Arbitration published specialized rules tailored for environmental disputes and lists of specialized environmental arbitrators, scientists and technical experts.⁴⁵ However, both the specialized rules and the appointment of specialized individuals are optional and, in practice, are rarely used.

F. Pro-investor bias leads to massive damages awards

30. The perception that ISDS tribunals are plagued by pro-investor bias is borne out by a substantial body of evidence. A telling example of pro-investor bias is that ISDS tribunals calculate compensation using inconsistent approaches that depart from generally accepted principles of international law and contradict approaches commonly employed by domestic courts.⁴⁶ For example, in two ISDS cases involving mines proposed by foreign investors that were not approved by States, tribunals used different valuation methods to reach wildly different conclusions. Pakistan was ordered to pay Tethyan Copper \$4.1 billion in damages (plus interest for a total of \$5.8 billion) by a tribunal using the discounted cash flow method, despite the investor's sunk costs being only \$300 million.⁴⁷ Peru was ordered to pay Bear Creek \$18 million by a tribunal using the more conservative cost-based method that reflects an investor's actual expenditures. The discounted cash flow approach widely employed by tribunals uses speculative, often exaggerated projections of expected future income across an investment's lifespan as the basis for determining compensation, resulting in excessive awards.⁴⁸

31. A review of all published ISDS cases decided on their merits between 1987 and 2017 revealed that 61 per cent of cases were decided in favour of investors, with an average award of \$504 million (not including settlements, which often are favourable

⁴⁴ Malcolm Langford, Daniel Behn and Runar Hilleren Lie, "The revolving door in international investment arbitration", *Journal of International Economic Law*, vol. 20, No. 2 (June 2017).

⁴⁵ See https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf; and <https://pca-cpa.org/en/about/structure/panels-of-arbitrators-and-experts-for-environmental-disputes/>.

⁴⁶ Jonathan Bonnitcha and Sarah Brewin, "Compensation under investment treaties" Best Practices Series (Winnipeg, International Institute for Sustainable Development, 23 November 2020).

⁴⁷ Toni Marzal, "Against DCF valuation in ISDS: on the inflation of awards and the need to rethink the calculation of compensation for the loss of future profits", EJIL:Talk!, blog of the European Journal of International Law, 26 January 2021.

⁴⁸ See NERA Economic Consulting, "The discounted cash flow method of valuing damages in arbitration", Lexology, 27 April 2020.

to investors).⁴⁹ Foreign investors would be unlikely to achieve such astronomical awards in domestic courts. Domestic courts in both civil and common law jurisdictions award damages as a mechanism for returning the injured party to the position they would have been in had the wrong not occurred, which limits the amounts awarded.

32. Gargantuan ISDS awards can be financially devastating for respondent States, impairing their ability to dedicate the required maximum available resources to fulfilling their human rights obligations. Funds used to defend against claims made by foreign investors, as well as funds used to pay settlements and damages awards, come from public budgets at the expense of other priorities, including health care, education, environmental protection and climate action. A compelling example is *Tethyan Copper v. Pakistan*, a case described above about a rejected mine that resulted in a \$5.8 billion award.⁵⁰ To put the magnitude of this award into perspective, it is larger than the grants and loans Pakistan received in 2022 following the disastrous climate-related floods that covered one third of the nation and affected tens of millions of people.⁵¹ Pakistan applied to stay the enforcement of the award, arguing that being forced to pay would have an immediate and potentially devastating effect on Pakistan's fragile economy and would lead to removal of funding for health, social and welfare programmes that would have disastrous impacts for the people of Pakistan, particularly the most disadvantaged and vulnerable.⁵² With interest accruing so that the arbitral award was valued at \$11 billion in 2022, Pakistan capitulated, allowing the mine to proceed.⁵³

G. Inconsistency and incoherence

33. International arbitration tribunals do not consider themselves bound by domestic law, international human rights law, international environmental law, or the decisions of other tribunals, even in cases raising similar factual or legal issues. The result is an inconsistent, unpredictable and often incoherent jurisprudence that generates extensive uncertainty and has enormous consequences for human rights and the environment. As a result of the uncertainty, States are unable to discern precisely what types of actions, policies or other measures may result in an ISDS claim being filed against them. Tribunals have made decisions that contradict the interpretation of both parties to a bilateral investment treaty, undermining State sovereignty.⁵⁴

34. Arbitrators tend to treat IIAs as an autonomous regime that prevails over other regulatory regimes, prioritize objectives such as encouraging investment, protecting investments and increasing economic competitiveness and disregard important contextual factors, such as States' rationales for adopting measures related to climate action, human rights and environmental protection (A/76/238, para. 17). There is generally no appeal from a tribunal's decision, which undermines credibility and trust, especially where there are serious factual or legal errors. At a meeting on reforming international investment treaties, the representative of Germany stated that the lack

⁴⁹ UNCTAD, "Investor-State dispute settlement: review of developments in 2017", IIA Issues Note, No. 2, June 2018.

⁵⁰ *Tethyan Copper v. Pakistan*, ICSID, Case No. ARB/12/1.

⁵¹ Ijaz Nabi, "Responding to Pakistan floods", Brookings Blogs, 10 February 2023. See also Tanupriya Singh, "\$10 billion in aid has been promised to Pakistan's flood survivors but many questions remain", Peoples Dispatch, 23 January 2023.

⁵² *Tethyan Copper v. Pakistan*, Decision on stay of enforcement of the award, 17 September 2020, para. 143.

⁵³ Sadiksha Waiba, "Imran Khan's Reko Diq deal is malicious for Balochistan", Bilaterals.org, 11 April 2022.

⁵⁴ See *Eco Oro v. Colombia*, Non-disputing party submission of Canada.

of consistency and coherence in ISDS decisions “screams for a systematic revision of the system”.⁵⁵

H. Gaming the system

35. Numerous law firms encourage their clients to consider ISDS claims in response to climate and environmental actions taken by States.⁵⁶ A prominent arbitration lawyer acknowledged that ISDS undoubtedly has a chilling effect on all kinds of policies and “Investor-state arbitration is the biggest stick that investors have”.⁵⁷ Another international arbitration lawyer said “even just the threat of such a suit is enough to halt or roll back [environmental] efforts by host States”. He added that “because of structural flaws in the way these disputes are adjudicated, the ease of enforcing any resulting awards, and the scale of the awards relative to host country financial resources, the threats can be very effective even if they lack legal merit.”⁵⁸

36. Foreign investors and law firms have identified creative ways to access the immense power available through ISDS provisions in IIAs. For example, it is common for foreign investors located in State A that does not have an IIA with State B where an investment is proposed, to incorporate a related enterprise in State C that does have an IIA with State B. The foreign investor may have few if any employees or activities in State C, but merely through the act of incorporating there, is able to access the benefits of that State’s IIAs. Arbitration tribunals routinely allow these “mailbox companies” to initiate ISDS claims. For example, it is estimated that over \$100 billion in ISDS claims have been filed under Netherlands investment treaties by investors based in other States, using mailbox companies in the Kingdom of the Netherlands.⁵⁹ A recent ISDS claim against Peru illustrates the problem, as the foreign investor relying on the Kingdom of the Netherlands-Peru bilateral investment treaty is the subsidiary of a Japanese corporation with only one employee in the Kingdom of the Netherlands.⁶⁰

37. The gigantic ISDS awards of the past decade have motivated law firms and venture capital firms to finance ISDS claims that would not otherwise be brought by foreign investors. This third-party financing is contributing to the surge in claims related to mining and fossil fuels by reducing the risks and costs for foreign investors to bring these cases.⁶¹

I. Survival clauses

38. Survival clauses, sometimes called sunset clauses, allow IIAs to continue protecting investments for a specified period even after being terminated by one or more parties. Survival clauses may be for periods up to 20 years, locking States into

⁵⁵ United Nations Commission on International Trade Law (UNCITRAL), Working Group III (Investor-State Dispute Settlement Reform), 34th session, 27 November-1 December 2017.

⁵⁶ See, for example, www.jonesday.com/en/insights/2022/02/climate-change-and-investorstate-dispute-settlement.

⁵⁷ Baldon Avocats, 2022, Summary Note on Regulatory Chill, p. 21. Available at www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab.

⁵⁸ *Ibid.*, p. 24.

⁵⁹ Roos van Os, “Fifty years of ISDS: more than \$US 100 billion claimed via the Netherlands”, Centre for Research on Multilateral Corporations (SOMO), 13 January 2018. Available at www.somo.nl/fifty-years-of-isds-more-than-us-100-billion-claimed-via-the-netherlands/.

⁶⁰ *SMM Cerro Verde Netherlands v. Peru*, International Centre for Settlement of Investment Disputes, Case No. ARB/20/14.

⁶¹ Brooke Guven and Lise Johnson, “The policy implications of third-party funding in investor-State dispute settlement” (Columbia Center on Sustainable Investment, May 2019).

obligations that do not allow for changing political, economic, scientific and environmental circumstances. This is deeply worrisome in the context of the climate emergency.

39. For example, the survival clause in the Energy Charter Treaty⁶² is for a period of 20 years (art. 47 (3)). Italy announced its withdrawal from the Treaty in 2015, ceasing to be a party in 2016. Pursuant to the survival clause, ISDS claims related to investments made prior to Italy's withdrawal may be brought until 2036. Italy has faced multiple claims, seeking hundreds of millions of dollars in damages since its withdrawal from the Treaty.⁶³ In 2017, in response to the climate crisis, the Government of Italy banned oil drilling within 12 miles of its shoreline. The British oil company Rockhopper launched an ISDS claim because the prohibition stopped its planned offshore oil drilling project. Italy lost the case and was ordered to pay \$290 million to Rockhopper as compensation.⁶⁴ The award was calculated using the discounted cash flow method and is approximately six times more than Rockhopper invested. Rockhopper announced it would use this windfall payment of public funds from Italy to finance oil exploration activities off the coast of the Falkland Islands (Malvinas).^{65,66}

III. Environmental and human rights consequences

40. Hundreds of ISDS claims involve projects, either active or proposed, that are antithetical to sustainable development because of their adverse consequences for the environment and human rights. Public opposition to unsustainable development, including protests led by Indigenous Peoples, local communities, environmental human rights defenders and civil society, generates pressure on Governments to regulate, reject or close down these projects. Examples include mines in Australia, Colombia, Costa Rica, El Salvador, Guatemala, Mexico, North Macedonia, Pakistan, Peru, Serbia and Türkiye; coal-fired power plants in Germany and the Kingdom of the Netherlands, fracking in Slovenia, offshore oil exploration in Italy and fossil fuel projects in Canada, Slovakia, Tunisia and the United States.

41. In recent years, ISDS has been transformed from a shield against unlawful State action into a weapon wielded to bully Governments by investors seeking windfall profits. The polluter pays principle, widely accepted in international environmental law, has been turned upside down, as polluters get paid. Of the 12 largest ISDS awards to date, 11 involve cases brought by fossil fuel and mining investors (see annex I⁶⁷). These 12 awards alone total more than \$95 billion, although investors in these cases sought more than \$200 billion in compensation. To put this massive figure in context, the \$95 billion awarded in a dozen ISDS cases likely exceeds the total amount of damages awarded by all courts to victims of human rights violations in all States worldwide, ever.

⁶² United Nations, *Treaty Series*, vol. 2080, No. 36116.

⁶³ Nathalie Bernasconi-Osterwalder, "Energy Charter Treaty reform: why withdrawal is an option", *Investment Treaty News* (International Institute for Sustainable Development, 24 June 2021). Available at www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/.

⁶⁴ Arthur Nelson, "Oil firm Rockhopper wins £210m payout after being banned from drilling", *The Guardian*, 24 August 2022. Available at www.theguardian.com/business/2022/aug/24/oil-firm-rockhopper-wins-210m-payout-after-being-banned-from-drilling.

⁶⁵ A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

⁶⁶ See <https://rockhopperexploration.co.uk/2022/08/successful-arbitration-outcome/>.

⁶⁷ Available at www.ohchr.org/en/special-procedures/sr-environment.

42. The magnitude of ISDS awards is rapidly escalating. A comprehensive analysis of published awards from 1990 to 2020 found six awards between 1990 and 1999, with damages averaging \$3.8 million, 51 awards between 2000 and 2009, averaging \$67.1 million, and 142 awards between 2010 and 2019, averaging \$246.1 million (excluding the three decisions on the Russian Federation and Yukos Oil worth \$50 billion).⁶⁸ Governments spend an average of \$5 million to defend ISDS claims, even when they are successful.⁶⁹

43. Some States continue to deny the reality of liability caused by ISDS claims challenging legitimate climate and environmental actions. For example, Switzerland alleges that the “State is not liable to pay damages for measures taken to combat climate change, provided that they are proportionate and non-discriminatory”.⁷⁰ This is directly contradicted by OECD, which acknowledged that “some of the first non-discriminatory OECD government policies directed at gradual exits from coal have generated major claims in ISDS, or multi-billion-euro payments reportedly in part in exchange for release of ISDS claims”.⁷¹

44. While ISDS is a powerful tool for foreign investors, it has become a catastrophe for the development, implementation and enforcement of environmental laws, regulations, policies and permitting decisions needed to address the planetary crisis. Most IIAs do not mention State obligations to implement measures to address climate change, biodiversity loss, pollution, water scarcity or land degradation. Foreign investors use ISDS claims to put States in a lose-lose position: either issue permits for environmentally destructive projects or refuse to do so and incur exorbitant liabilities in the hundreds of millions or even billions of dollars.

45. This is deeply concerning in the context of the climate emergency, as fossil fuel companies use ISDS claims and the threat of ISDS claims to aggressively block climate action or seek astronomical levels of compensation. In the Paris Agreement, States committed to making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development (art. 2.1c). Currently, however, more than 10,000 fossil fuel assets worldwide are covered by ISDS provisions, including three quarters of foreign-owned coal-fired power plants, raising the spectre that States may be reluctant to phase out coal in a timely manner.⁷² States encounter debilitating and sometimes paralysing tensions between meeting their obligations under the Paris Agreement and fulfilling obligations owed under IIAs to foreign fossil fuel investors.

46. In its Sixth Assessment Report, the Intergovernmental Panel on Climate Change recognized that IIAs, especially the Energy Charter Treaty, constrain the ability of States to adopt the ambitious policies needed to combat climate change.⁷³ The Treaty, which entered into force in 1998, provides a multilateral framework for energy cooperation for 55 States in Europe and Asia. While the 100-plus pages of the Treaty provide strong protection for foreign-owned fossil fuel investments, the Treaty makes

⁶⁸ Jonathan Bonnitcha and others, “Damages and ISDS reform: between procedure and substance”, *Journal of International Dispute Settlement*, vol. 14, No. 2 (June 2023).

⁶⁹ Matthew Hodgson, Yarik Kryvoi and Daniel Hrecka, *Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (British Institute of International and Comparative Law, June 2021).

⁷⁰ Submission from Switzerland.

⁷¹ OECD, *Investment treaties and climate change*, para. 32.

⁷² Kyla Tienhaara and Lorenzo Cotula, “Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets” (International Institute for Environment and Development, October 2020).

⁷³ Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change – Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*.

no reference to human rights. There has been an explosion of ISDS claims filed by fossil fuel investors alleging that climate measures breach their rights under the Energy Charter Treaty and other IIAs (see annex II⁷⁴). The stark prioritization of fossil fuels over climate action and human rights has generated pressure to terminate the Treaty (A/77/226, para. 90).

47. More than 50 ISDS claims, seeking compensation totalling more than \$11 billion, have been filed against Spain because of its energy transition policies. Spain expressed concern about the strong impact of ISDS on public coffers and said that ISDS “serves to discourage States from promoting energy transition policies for fear of being sued by a foreign investor”.⁷⁵

48. The growing number and magnitude of ISDS claims is delaying the clean energy transition and driving up the costs, often to the benefit of the very corporations responsible for causing the climate crisis. Compensating fossil fuel corporations for actions that exacerbate the climate emergency is perverse, particularly in the light of their immense profits and the glaring lack of compensation available to victims of the climate crisis for the devastating losses and damages they have suffered.

Regulatory chill

49. Regulatory chill occurs when a State responds to the potentially high costs associated with perceived or actual threats of ISDS arbitration by reversing, withdrawing, weakening or not enforcing legitimate regulatory measures to address the climate crisis, protect the environment or fulfil human rights. The Intergovernmental Panel on Climate Change recently confirmed that regulatory chill caused by the threat of ISDS claims was a barrier to climate action.⁷⁶ A law firm advising foreign investors observed that “for every investor-State case that goes through to completion, there were several instances where companies have used IIAs as leverage to negotiate with the host Government and cause it to change its behaviour more quickly and less expensively.”⁷⁷

50. New Zealand, Denmark and France all backed away from ambitious climate action because of ISDS fears. In 2018, New Zealand banned new offshore oil exploration but did not cancel existing offshore oil permits and left the door open to new onshore oil development. New Zealand chose not to go further because of the danger of costly ISDS claims.⁷⁸ Denmark set a deadline of 2050 for the phasing out of oil and gas production, which affected only one fossil fuel licensing agreement. Denmark did not set an earlier target of 2030 or 2040 because it could have been forced to pay “incredibly expensive” compensation to foreign fossil fuel companies through ISDS claims.⁷⁹ In 2017, after France announced bold plans to phase out all fossil fuel extraction by 2040, Vermilion, a Canadian corporation that is the largest oil producer in France, threatened the State with a billion-dollar arbitration claim. France responded by implementing weaker, much less ambitious regulations.⁸⁰

⁷⁴ Available at www.ohchr.org/en/special-procedures/sr-environment.

⁷⁵ Submission from Spain.

⁷⁶ Intergovernmental Panel on Climate Change, *Climate Change 2022: Mitigation of Climate Change*.

⁷⁷ Crowell and Moring, “How mining companies can mitigate risks and protect their investments, part I: international investment agreements” (*Mining Law Monitor*, Winter 2014).

⁷⁸ Elizabeth Meager, “COP26 targets pushed back under threat of being sued”, *Capital Monitor*, 14 January 2020. Available at <https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/>.

⁷⁹ *Ibid.*

⁸⁰ *Le Monde*, 4 September 2018. Available at https://www.lemonde.fr/accord-commercial-europe-canada-ceta/article/2018/09/04/comment-la-menace-d-arbitrage-a-permis-aux-lobbys-de-detricoter-la-loi-hulot_6005132_4998347.html.

51. Climate policies are not the only type of State action that experiences a chilling effect from ISDS claims. In Armenia, the Amulsar Gold Project, a mining operation owned by Lydian International and approved by the Government in 2019, was temporarily shut down by the State following high-profile protests regarding the project's environmental impacts, especially acid mine drainage. Lydian subsidiaries in the United Kingdom and Canada threatened ISDS proceedings.⁸¹ These threats convinced the Government to allow the mine to reopen. Similarly, when people living near the Chatree gold mine in Thailand raised alarms about high levels of arsenic and manganese in their blood, the State ordered the closure of the mine pending further studies. The Australian mining company, Kingsgate, filed an ISDS claim, leading Thailand to reverse its position and give the green light to reopening the mine.⁸² Indonesia enacted a law that restricted open-pit mining in protected forest areas because of the threat to water supplies and aquatic ecosystems.⁸³ Foreign mining companies whose activities were affected by the law threatened ISDS claims. The Government responded by allowing 13 companies to continue mining in protected forests.⁸⁴ Most recently, Serbia expressed concerns that it would face an ISDS claim by a foreign investor if it failed to approve a major lithium mine.⁸⁵

52. Related to regulatory chill is excessive compensation given to foreign investors to pre-empt ISDS claims. For example, two companies mining and burning lignite (the dirtiest type of coal) in Germany, RWE and LEAG, were given more than \$4.5 billion in compensation for ending coal-fired power generation by 2038.⁸⁶ Worse yet, if Germany accelerates the phasing out of coal, as is likely necessary to meet its Paris Agreement commitments, the level of compensation will increase. The Ministry of Finance of Germany warned the Chancellor's office in 2019 that using regulation to phase out coal would create an "increased risk of litigation, especially international litigation based on the Energy Charter Treaty".⁸⁷ A minister from the Kingdom of the Netherlands, when asked about accelerating the phasing out of coal-fired power stations, said "further intervention in the coal sector entails major legal risks".⁸⁸ Canadian government officials admitted that ISDS fears shaped government policies.⁸⁹

Human rights consequences

53. Human rights are almost completely ignored by IIAs (see A/76/238). Rights to life, health, food, water and a healthy environment, among many others, are all affected by ISDS. Dozens of ISDS claims have challenged government policies or decisions intended to respect and protect Indigenous rights, the right to health, the right to water and the right to a healthy environment. The Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and

⁸¹ See www.lydianarmenia.am/index.php?m=newsOne&lang=eng&nid=217.

⁸² "Toxic mine to re-open after Australian gold miner sues Thai Government", *Bilaterals.org*, 15 February 2022.

⁸³ Available at <https://www.ecolex.org/details/legislation/forestry-act-no-41-of-1999-lex-faoc036649/>.

⁸⁴ Kyla Tienhaara, "Regulatory chill and the threat of arbitration: a view from political science" in *Evolution in Investment Treaty Law and Arbitration*, Chester Brown and Kate Miles, eds. (Cambridge University Press, 2011).

⁸⁵ Ekapija, "Is Serbia obliged to Rio Tinto? Contradictory statements from Government confuse public", 30 December 2021. Available at www.ekapija.com/en/news/3534883/is-serbia-obliged-to-rio-tinto-contradictory-statements-from-government-confuse-public.

⁸⁶ Fabian Flues, "Coal ransom: how the Energy Charter Treaty drove up the costs of the German coal phase-out" (PowerShift and others, 22 April 2022).

⁸⁷ See <https://www.ft.com/content/b02ae9da-feae-4120-9db9-fa6341f661ab>.

⁸⁸ Baldon Avocats, 2022, *Summary Note on Regulatory Chill*, p. 25.

⁸⁹ Gus Van Harten and Dayna Nadine Scott, "Investment treaties and the internal vetting of regulatory proposals: a case study from Canada", *Journal of Investment Dispute Settlement*, vol. 7, No. 1 (March 2016).

Remedy” Framework emphasize that States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts (A/HRC/17/31, principle 9). The framework principles on human rights and the environment state that States should ensure that agreements facilitating international trade and investment support, rather than hinder, the ability of States to respect, protect and fulfil human rights and to ensure a safe, clean, healthy and sustainable environment (A/HRC/37/59, principle 13, para. 39).

54. Many of the projects subject to ISDS claims are interfering, or would interfere, with people’s ability to enjoy the right to a clean, healthy and sustainable environment, which includes clean air, safe and sufficient water, healthy and sustainably produced food, non-toxic environments, healthy biodiversity and ecosystems and a safe climate. Emissions from coal power plants are a major source of air pollution, yet Germany and the Kingdom of the Netherlands face multi-billion-dollar payments because of decisions to phase out coal-fired electricity. Doe Run, an American corporation, operated the notorious La Oroya smelter in Peru, causing massive volumes of air pollution that poisoned a community and its children. Yet instead of paying for its pollution, when Peru sought to impose stronger environmental standards, Doe Run filed two ISDS claims for alleged unfair and inequitable treatment.⁹⁰

55. Large mining projects in Africa, Asia, Europe and Latin America threaten water quality, yet State actions to ensure the safety of water have provoked ISDS claims from foreign investors, based in the global North, seeking billions of dollars in compensation. Slovakia was sued by a foreign investor in an ISDS case regarding proposed bulk water exports, which were made unlawful by a constitutional amendment.⁹¹

56. Biodiversity, already in a precipitous decline, is further jeopardized by ISDS claims seeking to advance projects that will degrade ecosystems and harm wildlife. A Swedish corporation won a \$165 million award against the United Republic of Tanzania after the State halted a proposed bioenergy plant that would have displaced thousands of people and jeopardized elephants, hippopotamuses and giraffes in a national park.⁹² Marine ecosystems are jeopardized by more than 50 ISDS claims related to ocean-based industrial activities.⁹³

57. A safe climate is jeopardized by continued operation of fossil fuel projects as well as exploration for additional coal, oil and gas and the expansion of fossil fuel infrastructure. Foreign investors have already used ISDS claims or the threat of ISDS claims to challenge government actions to limit or phase out fossil fuel exploration, production or use in Canada, Denmark, Ecuador, France, Italy, Germany, the Kingdom of the Netherlands, New Zealand, Slovakia, Slovenia and the United States. A prime example of seeking preposterous compensation is a foreign investor that spent \$20 million on exploratory oil and gas licences in Slovakia, did not complete the environmental impact assessment process, yet seeks \$2 billion in damages.⁹⁴ Fossil fuel corporations also deploy ISDS in attempts to avoid increased taxes.⁹⁵

⁹⁰ *Renco v. Peru (I)*, International Centre for Settlement of Investment Disputes, Case No. UNCT/13/1; and *Renco v. Peru II*, Permanent Court of Arbitration, Case No. 2019-46.

⁹¹ *Muszynianka v. Slovakia*, Permanent Court of Arbitration, Case No. 2017-08.

⁹² Kizito Makoye, “Villagers spared eviction as Tanzania halts \$500 million energy project to save wildlife”, Reuters, 6 June 2016.

⁹³ Submission from One Ocean Hub and the International Institute for Environment and Development.

⁹⁴ *Discovery Global v. Slovakia*, ICSID, Case No. ARB/21/51.

⁹⁵ *Burlington Resources v. Ecuador*, ICSID, Case No. ARB/08/5, Decision on liability, 14 December 2012.

58. Many foreign investors whose projects have major climate and environmental consequences ignore the rights of Indigenous communities to free, prior and informed consent, fail to consult with other affected communities, refuse to comply with environmental impact assessment laws and cause the shrinking of civic space. Environmental human rights defenders often mobilize against foreign investment projects because of the negative impacts they have on the environment, livelihoods and culture, as well as the failure of approval processes to address these impacts. Defenders often do this at considerable personal cost, facing intimidation, violence and criminalization.

59. Many United Nations experts have warned of the risks that IIAs pose to the realization of human rights.⁹⁶ Several special rapporteurs have called for the elimination of ISDS mechanisms.⁹⁷ Experts from Boston University specifically warned that “ISDS poses a considerable threat to the human right to a clean, healthy and sustainable environment”.⁹⁸ States often defend ISDS claims by explaining that their actions were necessary to respect, protect and fulfil human rights obligations. Colombia, Costa Rica, Ecuador and El Salvador all argued that their refusal to permit mines to open or continue operating was related to the States’ obligation to safeguard the right to a healthy environment. Tribunals dismissed these human rights arguments. Mexico lost an ISDS case after permits for a hazardous waste plant were cancelled due to violating the constitutional right to a healthy environment. The tribunal dismissed this rationale in awarding compensation to the foreign investor.⁹⁹

60. There are rare cases of arbitration tribunals giving serious consideration to human rights concerns. In two cases involving foreign investors with contracts to provide drinking water, tribunals determined that Argentina must respect both investment treaty and human rights obligations.¹⁰⁰ However, another case involving Argentina concluded that “the human right to water entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on part of any company providing the contractually required service.”¹⁰¹

IV. Investor-State dispute settlement reform efforts

61. The IIA system is subject to increasing criticism, especially the ISDS process. States are attempting to respond by integrating elements of sustainable development into new and renegotiated treaties through provisions that ostensibly clarify the regulatory space of States and address investor responsibilities related to the environment, climate change and human rights (A/76/238, para. 9). For example, the Australia-United Kingdom bilateral investment treaty (2021) recognizes the right of each State to “establish its own levels of domestic environmental protection and its own priorities relating to the environment, including climate change, and to establish, adopt or modify its environmental laws and policies accordingly”.¹⁰² The Georgia-Japan bilateral investment treaty of 2021 specifically articulates that

⁹⁶ E/CN.4/Sub.2/2003/9, A/HRC/19/59/Add.5, A/70/301, A/72/208, paras. 18, 19 and 47, A/77/226, paras. 5 and 90, A/77/284, para. 62, A/HRC/42/38, para. 168, A/HRC/41/39 and A/HRC/41/39/Corr.1, A/77/549 and A/HRC/EMRTD/5/CRP.2.

⁹⁷ A/77/226, para. 90, A/77/284, para. 80 (j), A/HRC/36/40, para. 91, and A/HRC/33/42.

⁹⁸ Submission from Boston University.

⁹⁹ *Abengoa y COFIDES v. Mexico*, ICSID, Case No. ARB(AF)/09/2.

¹⁰⁰ *Suez and Interagua v. Argentina*, ICSID, Case No. ARB/03/17, Decision on liability, para. 240, and *Suez and Vivendi v. Argentina (II)*, ICSID, Case No. ARB/03/19, Decision on liability, para. 262.

¹⁰¹ *Urbaser v. Argentina*, para. 1,208 (www.italaw.com/cases/1144).

¹⁰² Article 22.3.

non-discriminatory regulatory actions by a State designed to protect the environment do not constitute expropriation.¹⁰³

62. These reform efforts are unlikely to succeed in facilitating just and sustainable development. The controversial case of *Eco Oro v. Colombia* involved a second-generation agreement, the Canada-Colombia free trade agreement (which came into force in 2011). Various provisions were intended to ensure that the parties had adequate regulatory space for environmental protection.¹⁰⁴ However, when Colombia refused to grant permits for mining in an environmentally sensitive ecosystem that provides drinking water for millions of people, three Canadian mining companies filed ISDS claims. In *Eco Oro*, the tribunal found that Colombia breached the right to fair and equitable treatment.¹⁰⁵ One arbitrator's dissenting opinion concluded that "the approach taken by the majority failed to respect the text agreed by the drafters of the [free trade agreement], and is likely to undermine the protection of the environment."¹⁰⁶ According to UNCTAD, the *Eco Oro* decision "sheds doubt on the effectiveness of countries' efforts to rebalance IIAs by including explicit safeguards and exceptions to protect the State's right to regulate for the protection of the environment".¹⁰⁷

63. International IIA reform efforts are also ongoing in the context of the Energy Charter Treaty, the United Nations Commission on International Trade Law, the International Centre for Settlement of Investment Disputes and OECD, as well as proposals for multilateral investment courts (see annex III¹⁰⁸). Unfortunately, progress is slow and bedevilled by critical weaknesses, including a narrow focus on procedural reforms. The Working Group on the issue of human rights and transnational corporations and other business enterprises described the modest human rights provisions being added to IIAs as "tokenistic" (A/76/238, para. 25). A study of 65 recent IIAs that incorporated corporate social responsibility concluded that weak language created no enforceable obligations and therefore was "unlikely to have any practical impact."¹⁰⁹ None of the limited IIA reform efforts address the fundamental incompatibility of the ISDS system with climate, environmental and human rights imperatives.¹¹⁰

V. Revoking consent to investor-State dispute settlement

64. Faced with the catastrophic climate, environmental and human rights impacts of the ISDS system, what can States do? States can unilaterally withdraw consent to arbitration, a powerful step that could be taken immediately. In addition, IIAs can be unilaterally terminated, terminated by consent of the parties, renegotiated or replaced by new treaties. States can also withdraw from the multilateral mechanisms that support the ISDS regime, such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. In all circumstances, foreign investors retain the ability to pursue claims in domestic courts (on a level playing field with domestic investors) and the option of purchasing political risk insurance.

¹⁰³ Article 11 (4).

¹⁰⁴ Canada-Colombia Free Trade Agreement, annex, 811 2 (b), chap. 17, and art. 2,201.

¹⁰⁵ *Eco Oro v. Colombia*, Decision on jurisdiction, liability and directions on quantum, 9 September 2021.

¹⁰⁶ *Eco Oro v. Colombia*, Partial dissent of Professor Philippe Sands, para. 4.

¹⁰⁷ UNCTAD, "Treaty-based ISDS cases and climate action", p. 2.

¹⁰⁸ Available at www.ohchr.org/en/special-procedures/sr-environment.

¹⁰⁹ Nicolas Bueno, Anil Yilmaz Vastardis and Isidore Ngnueuleu Djeuga, "Investor human rights and environmental obligations: the need to redesign corporate social responsibility clauses", *Journal of World Investment and Trade*, vol. 24 (2023), p. 38.

¹¹⁰ UNCTAD, *World Investment Report 2023*, pp. 57 and 73–74.

65. Some States have already begun withdrawing from IIAs that constrain their ability to regulate in the public interest. Since 2017, the number of treaty terminations by States has substantially exceeded the number of new IIAs created.¹¹¹ At least 575 IIAs have been terminated, many within the past five years.¹¹² States that have taken action to reduce or eliminate their exposure to ISDS claims include Brazil, Canada, all 27 members of the European Union, India, Indonesia, Pakistan, South Africa and the United States. In some terminations, States have agreed to neutralize or limit the effects of survival clauses.

A. Unilateral declarations withdrawing consent to arbitration

66. States have the ability to make unilateral declarations withdrawing their consent to arbitration.¹¹³ Unilateral declarations would not affect pending ISDS claims but would prevent future claims, while leaving the remainder of IIA provisions intact (including State to State dispute settlement), signalling continued support for international investment law. A decade ago, this might have been a controversial action, but that should no longer be the case given the widespread and well-founded concerns about ISDS and the actions of wealthy States, including Canada, the United States and European Union member States, to reduce or eliminate their exposure to ISDS claims. It would be hypocritical for these wealthy States to oppose such declarations given their own actions. In the light of the global environmental crisis, unilateral withdrawal of consent to arbitration is the quickest way for States to address the adverse impacts of the ISDS system on climate action, environmental protection and human rights.

B. Unilateral termination of treaties

67. Under the Vienna Convention on the Law of Treaties, unilateral termination must be done in accordance with treaty provisions (art. 54 a). IIAs contain various types of clauses that allow States to terminate them: during certain windows prior to renewal; after a fixed term; or at any time. In general, the terminating party must provide notice to the other party or parties, usually of between 6 and 12 months. Survival clauses cannot be unilaterally terminated but require mutual or multilateral consent.

C. Termination by consent

68. The Vienna Convention on the Law of Treaties allows parties to terminate or withdraw from an agreement by consent of all the parties after consultation with the other contracting states (art. 54 b). Termination by consent may or may not be accompanied by the negotiation of a replacement treaty or a new multilateral instrument. For example, European Union member States agreed, via treaty, to terminate all bilateral investment treaties between members following a judgment from the Court of Justice of the European Union concluding that investor-State arbitration clauses were incompatible with European Union law. The agreement applies to all pending and future arbitration claims and clarifies that all survival clauses contained within bilateral investment treaties between European Union

¹¹¹ Ibid., p. 73.

¹¹² UNCTAD, International Investment Agreements Navigator.

¹¹³ Rob Howse, "A short cut to pulling out of investor-State arbitration under treaties: just say no", international economic law and policy blog, 9 March 2017 (<http://worldtradelaw.typepad.com>).

member States are also terminated.¹¹⁴ The agreement entered into force in 2020 and has been ratified by 23 States.

69. As discussed earlier, survival clauses present major challenges to effectively terminating IIAs, exposing States to continued liability for actions taken after termination. The only way to neutralize such a clause is by the consent of both or all parties, as in the foregoing case of the European Union bilateral investment treaties. The 1995 Argentina-Indonesia bilateral investment treaty provides another example in which both States agreed to end the treaty and terminate its survival clause.

D. Replace international investment agreements with new treaties

70. New treaties can include provisions that promote investments in climate change mitigation, adaptation and resilience, protect States' regulatory space, prioritize States' human rights obligations and facilitate global cooperation on transnational challenges. If State parties to an IIA conclude a new investment treaty, the original treaty is terminated. New treaties usually address survival clauses through transition provisions. The recent Canada-European Union Comprehensive Economic and Trade Agreement terminated eight bilateral investment treaties. A transition provision specifies that pre-existing bilateral investment treaties between Canada and various European Union member States cease to have effect and are replaced and superseded by the Agreement upon its entry into force (art. 30.8 (1)). Claims may be submitted under one of the terminated agreements only if the challenged State action predated the termination and less than three years have elapsed (art. 30.8 (2) (a) and (b)).

E. Withdraw from multilateral mechanisms

71. Withdrawal from multilateral instruments that support ISDS is another step towards dismantling this dysfunctional system.¹¹⁵ Bolivia (Plurinational State of) and Ecuador withdrew from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and terminated all of their bilateral investment treaties. Both States have constitutional provisions prohibiting governments from ceding jurisdiction to international arbitration in matters related to foreign investment.

VI. Conclusion and recommendations

72. Action to address the planetary environmental crisis and its catastrophic consequences for human rights cannot wait. Humanity has reached a now-or-never point that demands deep, rapid emission reductions, detoxification and scaled-up nature protection by 2030. Otherwise, we risk an unliveable future for ourselves and future generations. Yet as States struggle to address the climate crisis, protect the environment and safeguard human rights, they are threatened by foreign investors using ISDS claims and threats to delay, weaken or overturn these imperative actions and seek billions of dollars in compensation.

73. The ISDS system, with its roots in colonialism and extractivism, is not fit for purpose in the twenty-first century because it prioritizes the interests of foreign investors over the rights of States, human rights and the environment. ISDS claims and their crippling costs have already had enormous impacts by

¹¹⁴ Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, arts. 2 (2) and 3.

¹¹⁵ UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (2018), p. 92.

detering, delaying and watering down States' climate and environmental policy decisions. As concerning as the astronomical costs associated with ISDS arbitration are the chilling effects that threats of such proceedings have on climate and environmental action.

74. Because ISDS claims and threats impede progress on climate and environmental issues, they have enormous impacts on human rights. Participatory rights, essential to the realization of all human rights, are consistently violated, rendering affected communities invisible. The rights to life, health, food and water, cultural rights and the right to a clean, healthy and sustainable environment are being violated and will continue to be violated, and the rule of law will continue to be undermined, unless the ISDS system is eliminated. What is needed is a complete reimagining of IIAs to discourage investments that undermine climate and environmental action and human rights, eliminate the protection afforded to investors that make such investments and encourage investment in sustainable solutions. The world desperately needs a just transition to green, zero-carbon energy, which requires massive investments in renewables, energy storage and energy efficiency as well as the rapid phasing out of fossil fuels, the end of deforestation and the transformation of industrial agriculture. All of these actions must be led by, and largely financed by, the wealthy, historically high-emitting States.

75. To foster urgent and ambitious climate and environmental action and fulfil their human rights obligations, including those related to the right to a clean, healthy and sustainable environment, all States should immediately:

(a) Eliminate their exposure to future ISDS claims through some combination of the following actions:

(i) Issue unilateral declarations withdrawing their consent to arbitration under existing IIAs (leaving the remainder of treaty provisions and State-to-State dispute settlement intact) and waiving objections to treaty partners doing the same;

(ii) Negotiate the removal of ISDS mechanisms from all existing IIAs and the termination of survival clauses;

(iii) Unilaterally or jointly terminate existing IIAs that include ISDS, including the Energy Charter Treaty;

(iv) Withdraw from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States;

(b) Refuse to include ISDS procedures in new IIAs;

(c) Negotiate, with full transparency and inclusive public participation, new IIAs that protect human rights and the environment by:

(i) Safeguarding States' ability to take ambitious and effective climate and environmental actions;

(ii) Guaranteeing States' ability to take actions intended to fulfil their human rights obligations;

(iii) Incorporating clear definitions of terms, including expropriation, fair and equitable treatment and legitimate expectations;

(iv) Designating domestic courts as the appropriate forum for resolving investor-State disputes and where necessary strengthening the independence, tenure and expertise of judges;

- (v) **Precluding compensation claims in domestic courts by foreign investors that violate domestic legislation, commit human rights abuses or otherwise fail to comply with national, regional and international standards;**
- (vi) **Precluding compensation claims in domestic courts by mailbox corporations established primarily for taking advantage of IIAs;**
- (vii) **Capping any compensation at the amount the foreign investor can prove it has invested in a project and not recouped;**
- (viii) **Imposing enforceable human rights responsibilities on foreign investors, including mandatory human rights and environmental due diligence;**
- (ix) **Ensuring timely and affordable access to justice with effective remedies for communities and individuals whose human rights are threatened or affected by foreign investors;**
- (x) **Promoting the values of transparency, accountability, equality, non-discrimination, prevention and sustainable development;**
- (d) **Conduct, in line with the Guiding Principles on Business and Human Rights, impact assessments of trade and investment agreements, *ex ante* and *ex post* impact assessments of IIAs on human rights and the environment and implement all recommendations;**
- (e) **Support negotiations towards the proposed international treaty on transnational corporations and human rights, and swiftly ratify it once an agreement is reached.**
