COMMENTARY

Submission to the Organisation for Economic Co-operation and Development on Investment Agreements and Climate Change

Contributed by the Center for International Environmental Law (CIEL), ClientEarth, and the International Institute for Sustainable Development (IISD)[1]

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I. Introduction

1. On December 12, 2015, 196 parties to the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement, recognizing the need to take urgent and significant action to address the climate emergency. Under this agreement, parties promised to take swift climate action to limit global temperature increase to 1.5°C,[2] consistent with the ultimate objective of the UNFCCC to “prevent dangerous anthropogenic interference with the climate system.”[3] In its latest report, the Intergovernmental Panel on Climate Change (IPCC) issued stark new findings on how current global warming of 1.1°C is already causing severe and permanent loss and damage to natural and human systems, and surpassing 1.5°C warming would unleash further irreversible harm.[4] With every additional fraction of a degree of warming, the report found, risks accelerate and our ability to respond declines.

[1] A description of the contributing organizations and their work on investor–state dispute settlement is provided on the last page of this document.

[2] Art. 2(1)(a) of the Paris Agreement, signed February 12, 2015, entered into force November 4, 2016 (Paris Agreement).

[3] Art. 2 of the United Nations Framework Convention on Climate Change, signed June 4, 1992, entered into force March 21, 1994 (UNFCCC). https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[4] See Intergovernmental Panel on Climate Change (IPCC) Working Group II (2022). *Climate change 2022: Impacts, adaptation and vulnerability: Summary for policymakers. Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* https://report.ipcc.ch/ar6wg2/pdf/IPCC_AR6_WGII_SummaryForPolicymakers.pdf. See also, CIEL & Heinrich Böll Stiftung. (2022). *Beyond the limits: New IPCC Working Group II report highlights how gambling on overshoot is pushing the planet past a point of no return.* https://www.ciel.org/wp-content/uploads/2022/02/CIEL_HBF_IPCC-WGII-Key-Messages-28Feb2022.pdf.

2. This is a wake-up call that governments must take immediate action to meet the Paris Agreement's objectives and to avoid the catastrophic consequences of climate change. The burning of fossil fuels is the most significant source of greenhouse gases, and a rapid phase-out of coal, oil, and gas should be governments' highest priority (noting that in 2021 the "[i]ncreased use of coal was the main factor driving up global energy-related CO_2 emissions by over 2 billion tonnes, [which was the] largest ever annual rise in absolute terms").[5] By 2030, states must reduce global greenhouse gas emissions collectively by 45% and reach net-zero by mid-century.[6] This means business as usual is simply no longer an option, particularly for the fossil fuel industry. In line with this, since the Paris Agreement, the European Union (EU), and other countries have adopted emissions targets for 2030.[7]

3. Known fossil fuel reserves as well as associated infrastructure (e.g., pipelines, power plants) and other assets are increasingly at risk of becoming "stranded."[8] Globally, the value of stranded assets could be as high as USD 1.8 trillion for the power sector alone, and the estimated value of stranded assets in the upstream oil and gas industry amounts

[5] See International Energy Agency (IEA) (2022, March 8). *Global CO_2 emissions rebounded to their highest level in history in 2021* [Press release]. https://www.iea.org/news/global-co2-emissions-rebounded-to-their-highest-level-in-history-in-2021.

[6] The IPCC already issued a stark warning in its 2018 Special Report: "the world's governments have less than twelve years to take action to completely transform energy systems in order to avert catastrophic climate change," as cited in ClientEarth. (n.d.). *Potential solutions for Phase 3: Aligning the objectives of UNCITRAL Working Group III with states' international obligations to combat climate change.* https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_clientearth.pdf. To meet the goals of the Paris Agreement, according to a report by the IEA, fossil fuels need to decline from accounting for nearly 4/5 of total energy supply today to just over 1/5 in 2050. Under a 1.5°C-aligned pathway, no new oil and gas investments, coal mines, or mine expansions should be approved. See IEA. (2021). *Net zero by 2050: A roadmap for the global energy sector.* https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-AroadmapfortheGlobalEnergySector_CORR.pdf.

[7] The EU, for instance, has raised its climate targets and committed to reducing its net emissions by at least 55% by 2030—see the Communication from the Commission. (2019, December 11). *The European Green Deal.* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2019%3A640%3AFIN: "Fossil-fuel subsidies should end" (para. 2.1.5-3); "The guidelines [...] will facilitate the phasing out of fossil fuels, in particular those that are most polluting" (para. 2.2.2). Denmark and Costa Rica (joined by France, Greenland, Ireland, Quebec, Sweden, and Wales) also jointly launched the Beyond Oil & Gas Alliance (BOGA), an international alliance of governments and stakeholders working together to facilitate the phase-out of oil and gas production. Key members of BOGA commit to: (i) ending new concessions, licensing or leasing rounds for oil and gas production and exploration; and (ii) setting a Paris-aligned date for ending oil and gas production and exploration in the territory over which they have jurisdiction. For more information: https://beyondoilandgasalliance.com/.

[8] This risk is created as a result of government regulation (e.g., emissions reduction limits, carbon prices, coal phase-out, removal of fossil fuel subsidies), technological innovation (e.g., alternative sources of energy), changes in societal norms and consumer behaviour (e.g., increased use of electric vehicles), increased scrutiny and pressure from investors, as well as litigation (e.g., legal challenges resulting in court orders preventing pipeline construction in Indigenous territory). See Caldecott, B., Howarth, N., & McSharry, P. (2013). *Stranded assets in agriculture: Protecting value from environment-related risks.* Smith School of Enterprise and the Environment & University of Oxford. https://www.smithschool.ox.ac.uk/publications/reports/stranded-assets-agriculture-report-final.pdf; Caldecott, B. (2017). Introduction to Special Issue: Stranded assets and the environment. *Journal of Sustainable Finance & Investment, 7*(1), 1–13.

to at least USD 3 trillion[9]—with some estimates placing that figure as high as USD 7 trillion–17 trillion.[10]

4. This stranded asset risk is a financial risk that companies should be expected to consider when deciding to invest. However, companies have started to shift this risk onto taxpayers, using investor–state dispute settlement (ISDS) mechanisms in international investment treaties to enforce investment protection standards. Research increasingly indicates that foreign investors may also resort to ISDS as a strategic tool to challenge and delay emissions-reduction policies.[11]

II. ISDS and Climate Change

5. International investment law has become one of the fastest-growing areas of international law, with the signing of thousands of international investment agreements (IIAs). International investment law primarily aims to protect foreign investment and liberalize global investment flows.[12]

1. Unproven Benefits of ISDS and IIAs

6. Traditionally, experts have argued that ISDS is a valuable tool to facilitate inward direct investment.[13] However, more recent research demonstrates that the expected benefits

[9] International Renewable Energy Agency. (2017). *Stranded assets and renewables: How the energy transition affects the value of energy reserves, buildings and capital stock.* https://www.irena.org/publications/2017/Jul/Stranded-Assets-and-Renewables, as cited in Tienhaara, K. & Cotula, L. (2020). *Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets* (p. 11). https://pubs.iied.org/sites/default/files/pdfs/migrate/17660IIED.pdf.

[10] See Hansen, T. A. (2022). Stranded assets and reduced profits: Analyzing the economic underpinnings of the fossil fuel industry's resistance to climate stabilization. *Renewable and Sustainable Energy Reviews, 158.* https://www.sciencedirect.com/science/article/pii/S1364032122000727, which reviews the literature and estimates the magnitude and distribution of wealth losses from stranded assets for the upstream fossil fuel industry at between USD 13 trillion and USD 17 trillion. See also Mercure, J-F. et al. (2021). Reframing incentives for climate policy action, Nature Energy, 6, 1133–1143. https://www.nature.com/articles/s41560-021-00934-2.pdf, which estimates stranded fossil fuel assets at between USD 7 trillion and USD 11 trillion.

[11] See K. Tienhaara, & L. Cotula (2020), supra n. 9; Gaukrodger, D. (2017). *The balance between investor protection and the right to regulate in investment treaties: A scoping paper* (OECD Working Papers on International Investment). https://www.oecd-ilibrary.org/finance-and-investment/the-balance-between-investor-protection-and-the-right-to-regulate-in-investment-treaties_82786801-en; Pelc, K. (2016). *Does the international investment regime induce frivolous litigation?* https://ssrn.com/abstract=2778056; Brown, J. G. (2013). International Investment Agreements: Regulatory chill in the face of litigious heat. *Western Journal of Legal Studies, 3*(1). https://ir.lib.uwo.ca/uwojls/vol3/iss1/3; Tienhaara, K. (2010). Regulatory chill and the threat of arbitration: A view from political science. In C. Brown & K. Miles, (Eds.), *Evolution in investment treaty law and arbitration.* Cambridge University Press. https://ssrn.com/abstract=2065706; Van Harten, G. (2008). *Investment treaty arbitration and public law.* Oxford.

[12] Sornarajah, M. (2020). Disintegration and change in the international law on foreign investment. *Journal of International Economic Law, 23*(2), 414; Montanaro, F. & Violi, F. (2020). The remains of the day: The international economic order in the era of disintegration. *Journal of International Economic Law, 23*(2), 299.

[13] See Mirabile, M., Marchal, V., & Baron, R. (2017). *Technical note on estimates of infrastructure investment needs – Background note to the report Investing in Climate, Investing in Growth* (OECD Background Note) (p. 1). https://www.oecd.org/env/cc/g20-climate/Technical-note-estimates-of-infrastructure-investment-needs.pdf; OECD. (2017). *Investing in climate, investing in growth.* https://www.oecd.org/environment/cc/g20-climate/synthesis-investing-in-climate-investing-in-growth.pdf.

of IIAs and ISDS have not materialized, while the costs have been unexpectedly high (see point (2) below). In particular, there is a lack of evidence that: (i) treaty protections benefiting investors and investments are causing an increase of investment flows; (ii) increased flows allegedly due to the investment agreements (inward or outward) are indeed beneficial to the host country; and (iii) the treaties' benefits outweigh the costs. It is, therefore, difficult for states to justify the continuation of their investment agreements (in particular, those that include ISDS provisions), as well as the conclusion of any new similar agreements.[14]

7. This is equally true in the context of climate change, where arbitration practitioners have argued that investment agreements—and in particular the Energy Charter Treaty (ECT)—are necessary to protect and promote renewable energy investments.[15] This is, however, misleading at best, as there is no evidence of a link between the existence of IIAs, including the ECT, and an increase in foreign direct investment in the renewable energy sector among contracting states.[16] Additionally, there is significant evidence that global investment in renewable energy is mostly domestic rather than foreign,[17] and factors other than the existence of an IIA are far more decisive when companies make the decision to invest.

2. Demonstrated Costs of ISDS and Investment Agreements

8. The costs of IIAs and ISDS, on the other hand, are very clear for host states. By providing a mechanism for investors to directly challenge good faith domestic law and regulation before private arbitral tribunals, ISDS encroaches on governments' sovereignty and policy space, including in crucial areas such as the environment and public health.[18]

9. The investment protection standards typically included in IIAs are so broad and indeterminate that arbitrators can interpret them extensively. For instance, arbitral tribunals have construed compensation for expropriation at "fair market value" to include

[14] Johnson, L., Sachs, L., Güven, B., & Coleman, J. (2018). *Costs and benefits of investment treaties: Practical considerations for states* (Policy paper) (p. 15). https://ccsi.columbia.edu/sites/default/files/content/docs/publications/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf.

[15] This conclusion is frequently based on statistics that demonstrate the continuous growth of ECT-based ISDS claims brought by investors of the renewable energy sector. The ECT Secretariat, for instance, regularly highlights that a large percentage of ECT-based ISDS claims—approximately 60%—concern renewable energy investments; see Energy Charter. (2020, October 12). *Even more renewable energy investors rely on treaty protection: Updated statistics of investment arbitration cases under the Energy Charter Treaty.* https://www.energycharter.org/media/news/article/even-more-renewable-energy-investors-rely-on-treaty-protection-updated-statistics-of-investment-arb/; Vail, T. (2021). *The Energy Charter Treaty supports investment in renewables.* https://www.euractiv.com/section/energy/opinion/the-energy-charter-treaty-supports-investment-in-renewables/.

[16] Di Salvatore, L., Bernasconi-Osterwalder, N., & Schaugg, L. (2021). Despite consensus on the ECT's incompatibility with the global climate agenda, claims that it is well-suited for the clean energy transition persist. *Investment Treaty News 3*(12) (p. 19). https://www.iisd.org/system/files/2021-10/iisd-itn-october-2021-english.pdf.

[17] In the period from 2013 to 2018, an average of 75% of global investment in renewable energy was domestic rather than foreign (Ibid.).

[18] This has been the case, for example, in the context of *Philip Morris v. Uruguay,* where the states sought to mitigate the health risks and investors challenged the state action, see *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7.

potential future losses over long and entirely hypothetical operating cycles.[19] Arbitral tribunals are also not bound by precedent, giving rise to inconsistent interpretation and application of standards.[20] It is, therefore, very difficult, if not impossible, to predict whether a claim will be successful and, if so, what amount of compensation an arbitral tribunal will award (often hundreds of millions or billions of EUR), which will ultimately be paid by taxpayers.

10. Moreover, international environmental law is still considered an "outsider" element in investment law. Arbitral tribunals have treated environmental measures taken by states as protectionist and have expressed skepticism regarding their basis in international or regional law. For this reason, arbitrators have decided that foreign investment protection prevails over international and domestic environmental obligations[21] and have either disregarded environmental safeguards included in recent investment agreements or considered them insufficient to alter their prioritization.[22]

11. The prevailing arbitral jurisprudence will therefore encourage states to revoke or dilute existing environmental regulations and discourage them from introducing new rules. Due to methodological challenges and data accessibility issues, it is impossible to quantify how many regulations have been affected by actual claims or the threat thereof. However, there is a growing body of evidence demonstrating this "regulatory chill" effect of ISDS on public interest measures.[23]

12. As recognized in the report from the UN Working Group on the issue of human rights and transnational corporations and other business enterprises presented to the UN General Assembly in July 2021:

> [S]ome tribunals have interpreted the "fair and equitable treatment" clause in such agreements very broadly, which in turn may undermine States' ability to pursue legitimate public policy goals. [...] As far as the effect of arbitration claims on States' right to regulate is concerned, reference may be made to the fossil fuel companies relying on the Energy Charter Treaty to challenge government measures aimed at

[19] Bonnitcha, J. & Brewin, S. (2021). *Compensation under investment treaties: What are the problems and what can be done?* International Institute for Sustainable Development. https://www.iisd.org/publications/compensation-under-investment-treaties.

[20] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, February 9, 2022, para. 603: "International arbitral tribunals are under no obligation to rely on precedents, but also by the lack of a jurisprudence constante."

[21] Viñuales, J. (2012). *The "dormant environment clause": Assessing the impact of multilateral environmental agreements on foreign investment disputes* (Centre for International Environmental Studies Research paper 9) (p. 3). https://repository.graduateinstitute.ch/record/12752?_ga=2.13384823.1777731916.1647630227-1984829490.1647630227

[22] See Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No ARB/16/41, August 9, 2009, Decision on jurisdiction, liability and directions on quantum; attached to the decision is a partial dissenting opinion by arbitrator Horacio A. Grigera Naón and a partial dissent by arbitrator Philippe Sands.

[23] See Van Harten, G., & Nadine Scott, D. (2016). *Investment treaties and the internal vetting of regulatory proposals: A case study from Canada Osgoode Legal Studies Research Paper Series,* 12(6); Kelsey, J. (2017). Regulatory chill: Learnings from New Zealand's plain packaging tobacco law. *QUT Law Review, 17(2);* Tienhaara, K. (2018). Regulatory chill in a warming world: The threat to climate policy posed by investor-state dispute settlement. *Transnational Environmental Law,* 7(2).

> mitigating climate change.[...] Even if the States concerned had been able to justify their measures in the end, the process entailed spending unnecessary time and resources in defending claims that should not have existed in the first place. Such claims also tend to create a regulatory chill not only in States involved in such claims but also in bystander States.[24]

13. It is also undeniable that the ISDS system has given rise to an alarming number of claims against environmental measures.[25] In the context of climate change, the range of measures that will affect energy and extractive activities is wide and growing. They include, for instance, denial or revocation of permits for the exploration, development, transport, or use of coal, gas, or petroleum resources; planned phase-outs of certain energy sources; removal of fossil fuel subsidies; the introduction of carbon taxes; stricter emissions standards; and electric vehicle mandates.[26] The arbitration industry has already recognized this as an area for future growth in legal practice.[27]

14. Additionally, according to a recent report, the fossil fuel industry is the most litigious industry in the ISDS system by number of cases, accounting for almost 20% of the total known ISDS cases across all sectors. Recent cases have illustrated that investors in the

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[24] United Nations (2021). *Human rights-compatible international investment agreements* (A/76/238). https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/208/09/PDF/N2120809.pdf?OpenElement. The impact of arbitration on regulatory change has not only been explicitly acknowledged by policy-makers but also by arbitrators themselves. For example, Professor Philippe Sands stated recently in a dissenting opinion on the application for amicus curiae submission in *Odyssey v. Mexico:* "It is now well-recognised that investment treaty arbitration can have a significant impact on domestic regulatory regimes, even where compensation is the only remedy awarded. It is therefore entirely possible that a finding that the Respondent has breached the treaty could lead to regulatory changes, which directly affect the interests of the Cooperativa, either immediately or in the future. The Majority's decision fails to recognise or take account of the broader impacts of investment treaty arbitration." Odyssey Marine Exploration, Inc. (USA) v. United Mexican States, ICSID Case No UNCT/20/1, Procedural Order No. 6, Professor Sands' Dissenting Opinion, para. 2. http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8573/DS17216_En.pdf.

[25] For example, a quarter of all ISDS claims brought by Canadian investors abroad involved environmental policy. See Mertins-Kirkwood, H. (2019, May 14). Canadian investors need to stop suing foreign governments over environmental-friendly policies. *Globe and Mail.* https://www.theglobeandmail.com/business/commentary/article-canadian-investors-need-to-stop-suing-foreign-governments-over/; Public Citizen. (2021). *Table of foreign investor-state cases and claims under NAFTA and other U.S. "Trade" deals.* https://www.citizen.org/wp-content/uploads/2021.01.08-Investor-State-Chart-Jan-2021.pdf. In practice, investors have challenged environmental measures such as environmental restrictions on a coal-fired power plant (see Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No ARB/09/06), a moratorium on fracking (see Lone Pine Resources Inc. v. The Government of Canada, ICSID Case No UNCT/15/2), a ban on offshore oil drilling (Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, ICSID Case No ARB/17/14), nuclear power phase-out (see Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No ARB/12/12), and a refusal of permits relating to a cyanide-based open pit gold-mine (see Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania, ICSID Case No ARB/15/31).

[26] Güven, B. , & Johnson, L. (2016). *International investment agreements: Impact on climate change policies in India, China, and beyond.* In K. Gallagher (Ed.), *Trade in the balance: Reconciling trade and climate policy: Report of the Working Group on Trade*. The Frederick S. Pardee Center for the Study of the Longer-Range Future. https://ccsi.columbia.edu/sites/default/files/content/docs/Trade-in-the-Balance-International-Investment-Agreements-Impacts-on-Climate-Change-Policies-in-India-China-and-Beyond-Nov-2016.pdf.

[27] Neil, A. (2019). *Heating up: Climate change and investor-state arbitration*. https://riskandcompliance.freshfields.com/post/102fh51/heating-up-climate-change-and-investor-state-arbitration.

fossil fuel industry may seek to use ISDS to discourage or halt climate-friendly policies or to secure payouts as governments strive to move to a low-carbon economy.

15. For instance, in Europe, *RWE v The Netherlands and Uniper v. The Netherlands* are the most emblematic recent cases. German energy companies Uniper and RWE initiated arbitration proceedings against the Netherlands,[28] alleging that the government's plan to phase out coal by 2030 violated the ECT due to alleged de facto expropriations without adequate compensation.[29] The Dutch parliament adopted legislation in 2019 introducing a phased ban on the use of coal to generate electricity[30] in order to reduce greenhouse gas emissions by 49% from 1990s levels before 2030 and to meet targets under the Paris Agreement on climate change.[31] Both companies filed their claim despite recent rulings by the Court of Justice of the European Union that such arbitration proceedings between European investors and EU member states are illegal under EU law.[32]

16. In 2017, the Canadian oil and gas company Vermilion allegedly threatened to sue France under ISDS if it pushed ahead with a law to phase out fossil fuel extraction in all French territories drafted by the French Environment Minister.[33] In North America, a Canadian company (TransCanada) sued the United States over the Obama administration's rejection of a proposal to build the controversial Keystone XL pipeline to transport oil produced from Alberta's tar sands to various refineries on the Gulf Coast.[34] The decision to reject the pipeline is alleged to have been influenced by a significant grassroots campaign and a desire by the administration to demonstrate climate leadership in the run-up to the Paris conference in 2015. The case was discontinued following President Trump's executive order allowing construction of the pipeline project to move ahead, but

[28] See Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No ARB/21/22; RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No ARB/21/4.

[29] As demonstrated in a legal opinion by ClientEarth, this type of claim is ill-founded and Uniper and RWE should not be entitled to compensation under the ECT. See ClientEarth. (2019). *Legal opinion on Uniper's legally misconceived ISDS threat to Dutch coal phase-out* [Annex]. https://www.clientearth.org/latest/documents/clientearth-letter-and-analysis-regarding-uniper-isds-threat/.

[30] *Wet van 11 december 2019, houdende Regels voor het produceren van elektriciteit met behulp van kolen* ("Act prohibiting coal in electricity production"). https://www.eerstekamer.nl/9370000/1/j9vvkfvj6b325az/vl4kf9h8kewd/f=y.pdf.

[31] *Wet van 2 juli 2019, houdende een kader voor het ontwikkelen van beleid gericht op onomkeerbaar en stapsgewijs terugdringen van de Nederlandse emissies van broeikasgassen teneinde wereldwijde opwarming van de aarde en de verandering van het klimaat te beperken* ("Dutch Climate Act"), https://wetten.overheid.nl/BWBR0042394/2020-01-01

[32] CJEU, Judgment of the Court (Grand Chamber), Case C-741/19, Republic of Moldova v. Komstroy, September 2, 2021, https://curia.europa.eu/juris/document/document.jsf?docid=245528&doclang=EN; CJEU, Judgment of the Court (Grand Chamber), Case C-284/16, Slovak Republic v. Achmea, March 6, 2018, https://curia.europa.eu/juris/document/document.jsf?docid=199968&doclang=EN.

[33] The law was subsequently gutted, although it is not possible to determine the role that ISDS played in influencing the minister on the basis of available evidence. See Corporate Europe Observatory, the Transnational Institute, & Friends of the Earth Europe/International. (2019). *Red carpet courts: 10 stories of how the rich and powerful hijacked justice,* www.10isdsstories.org.

[34] TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America, ICSID Case No ARB/16/21 (discontinued).

later in 2021, following President Biden's cancellation of the permit, two new cases on the same pipeline began.[35]

17. Any requirement for governments to pay compensation to aggrieved investors protected by international treaties will significantly increase the cost of the energy transition by diverting huge amounts of public money and resources that could instead support a clean energy transition. Even in the case of a state victory, the cost of participating in an ISDS case can be very high and risk delaying urgently needed climate action in the host state as well as in other countries.[36]

III. Barriers to Change in the Investment Treaty Regime

1. Increased Awareness but With Limited and Uncoordinated Reforms

18. Awareness about the negative impacts of investment law on public policies, including in relation to climate change, has been growing over recent years, and states are now firmly engaged in several initiatives to reform international investment policy at the international, regional, bilateral, and national levels.

19. Despite growing consensus that reform is necessary, divergent views persist as to the scope (e.g., qualifying substantive provisions by adding exceptions vs. termination) and the nature of reform. While awareness about the inherent risks of investment agreements is growing among technical experts in national governments, the reform efforts do not yet feature prominently on the agenda of high-level political decision-makers, rendering multilateral reform efforts more difficult. That said, states have increasingly addressed outdated investment agreements by way of termination, suspension, amendment, renegotiation, or joint interpretative statements in recent years.[37] In the last 3 years, the number of treaty terminations entering into force has exceeded the number of newly concluded IIAs, and in 2021 at least 78 IIAs were terminated.[38]

[35] TC Energy Corporation and TransCanada Pipelines Limited v. United States of America, ICSID Case No ARB/21/63; Alberta Petroleum Marketing Commission v. United States of America, Notice of Intent submitted February 9, 2022.

[36] For example, in the ISDS case brought by tobacco giant Philip Morris against an Australian health policy, the government's legal fees and arbitration costs amounted to almost AUD 24 million. Although Australia won the case, Philip Morris was only required to pay 50% of these costs. Uruguay fought a similar ISDS case against the same company (and also won) but was only able to do so because it had received financial support from a philanthropic organization to cover some of its costs. See further Ranald, P. (2019, April 2). The cost of defeating Philip Morris over cigarette plain packaging. *Sydney Morning Herald.* https://www.smh.com.au/national/the-cost-of-defeating-philip-morris-over-cigarette-plain-packaging-20190327-p5182i.html; New Zealand also delayed the introduction of rules about cigarette packaging until the ISDS brought against Australia by Philip Morris was decided.

[37] See UNCTAD. (2019). Taking stock of IIA reform: Recent developments. *IIA Issues Note, 3,* 4–7. https://unctad.org/system/files/official-document/diaepcbinf2019d5_en.pdf.

[38] See UNCTAD. (2021). Recent developments in the IIA regime: Accelerating IIA reform. *IIA Issues Note, 3,* 1. https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf; for terminations in 2021, see UNCTAD's International Investment Agreements Navigator: https://investmentpolicy.unctad.org/international-investment-agreements.

20. The vast majority of old-generation[39] investment agreements nevertheless remain in force. Fair and equitable treatment (FET) is the treaty provision that has been invoked most frequently to challenge legitimate regulatory measures.[40] Almost all old-generation treaties contain broad, unqualified FET provisions, giving arbitral tribunals broad interpretive discretion.[41] In addition, more than 95% of all IIAs in force today contain a sunset clause, which in the vast majority of cases guarantees survival periods of 10 years or more.[42] In case of a termination of or withdrawal from the treaty, existing investments may continue to be protected for extensive periods, thereby further limiting states' agency for reform (see point (2) below). In the absence of the required systemic change, foreign investors will therefore continue to rely on the investment provisions in these treaties for decades to come.

21. Furthermore, the number of institutions engaging in the reform of investment policy is multiplying. Currently, efforts to reform aspects of investment policy and law are underway under the auspices of the United Nations Conference on Trade and Development (UNCTAD) (reform of IIAs), United Nations Commission on International Trade Law (UNCITRAL) Working Group III (ISDS reforms), the World Trade Organization (Joint Statement Initiative on investment facilitation), the UN Office of the High Commissioner for Human Rights, and now the Organisation for Economic Co-operation and Development (OECD). At the regional level, states renegotiate investment agreements, for instance as part of the ECT modernization or the negotiation of the African Continental Free Trade Area Investment Protocol. The multiplicity of forums poses severe challenges for streamlined and resource-efficient reform. Varying mandates and nuances in the reform focus among these forums further complicate the coordination that is required for integrated reform. For instance, the type of enforcement will determine the practical impact of substantive treaty provisions. The outcome of the reform of ISDS at UNCITRAL Working Group III therefore has significant implications for the reform of investment agreements in other forums. A lack of progress in the former therefore blocks, or at least complicates, progress in the latter.

[39] Recent scholarly research differentiates first-generation IIAs that did not contain ISDS provisions—and that were aimed at facilitating negotiated settlements between investors and host states—from more recent IIAs, mostly signed since the 1980s, that did include ISDS; see Skovgaard Poulsen, L. (2020). Beyond credible commitments: (Investment) treaties as focal points. *International Studies Quarterly, 64*(1), 26–34. For the purpose of this text, we refer to old-generation IIAs broadly to designate those treaties that were mostly signed 1980 and include ISDS but none of the reform-oriented provisions developed in more recent years.

[40] Recent developments recorded on the UNCTAD International Investment Agreements Database paint a clear picture of the status of investment treaty reform. While the recent years have seen unprecedented and growing numbers of treaty terminations, more than one third of all IIAs currently in force (2,574) were signed and entered into force before the year 2000. 95% of all IIAs in force contain FET provisions, and in more than 75% of all IIAs, these clauses are unqualified, i.e., they contain "no express reference to international law and no list of the elements of the FET obligation" (UNCTAD. [n.d.]. *IIA Mapping Project* (p. 10), https://investmentpolicy.unctad.org/uploaded-files/document/Mapping%20Project%20Description%20and%20Methodology.pdf). According to UNCTAD, despite ongoing reform efforts, "the stock of old-generation treaties is 10 times larger than the number of new, reform-oriented treaties"; see the UNCTAD Investment Agreement Navigator (as of February 17, 2022), https://investmentpolicy.unctad.org/international-investment-agreements

[41] Ibid., p. 5.

[42] UNCTAD Investment Agreement Navigator (as of February 17, 2022), https://investmentpolicy.unctad.org/international-investment-agreements.

2. Economic and Legal Barriers to Reform

22. Besides a certain persistent lack of awareness, economic competition remains one of the most significant obstacles to more widespread IIA reform. Increasingly intense competition between states in recent years, particularly among developing countries, to attract foreign investment, has sparked a global race to the bottom. This incentivizes governments to maintain a low level of investment regulation[43]—to refrain from implementing reinforced investment screening and enforcing investors' obligations—and to avoid reforming their stock of old-generation treaties, even if those treaties threaten their regulatory space. This development is diametrically opposed to urgent requirements for swift and significant regulatory measures to address the climate crisis, as enshrined in agreements at the multilateral[44] and regional levels.[45]

23. On top of those economic barriers, the legal requirements for the reform of bilateral and multilateral IIAs create several additional obstacles. Some bilateral investment treaties contain tacit renewal clauses requiring a decision to terminate the treaty occur within a certain, possibly short, period of time.[46] Not only must states be aware of temporal conditions applicable to termination, but they may also have to reach a negotiated agreement to terminate by consent where the clause so requires. Time constraints linked to termination clauses may also negatively impact the prospect of negotiating a new IIA to replace the previous treaty. Moreover, sunset clauses, which are contained in the vast majority of all IIAs, further complicate decisions to terminate. Even if the rules of public international law or the treaty itself usually allow for a neutralization of the sunset clause,[47] whether such a neutralization will indeed occur in practice often depends on a successful negotiation between the treaty parties. In cases of unilateral termination, it is less likely that treaty partners will consent to a neutralization of the sunset clause. Additionally, even if states have agreed to replace old-generation treaties, they may not

43 See Gaukrodger, D. (2021). *The future of investment treaties - possible directions.* (OECD Working Papers on International Investment 2021/3) (p. 8). https://doi.org/10.1787/946c3970-en.

44 For instance, the Paris Agreement set a temperature goal and committed states to efforts to limit global warming to 1.5°C above pre-industrial levels (Art. 2a); an increasing number of nationally determined contributions and long-term low greenhouse gas development strategies address the issue of fossil fuel production, and several countries have developed policies and/or pathways for a decline in fossil fuel production; see Stockholm Environment Institute, International Institute for Sustainable Development, Overseas Development Institute, E3G, and UN Environment Programme. (2021). *The production gap.* http://productiongap.org/2021report.

45 The EU, for instance, has raised its climate targets and committed to reducing its net emissions by at least 55% by 2030; see the Communication from the Commission, 2019, supra note 11: "Fossil-fuel subsidies should end" (para. 2.1.5-3) and "The guidelines [...] will facilitate the phasing out of fossil fuels, in particular those that are most polluting" (para. 2.2.2). Denmark and Costa Rica (joined by France, Greenland, Ireland, Quebec, Sweden and Wales) also jointly launched the Beyond Oil & Gas Alliance (BOGA), an international alliance of governments and stakeholders working together to facilitate the phase-out of oil and gas production. Key members of BOGA commit to: (i) ending new concessions, licensing or leasing rounds for oil and gas production and exploration; and (ii) setting a Paris-aligned date for ending oil and gas production and exploration in the territory over which they have jurisdiction. For more information: https://beyondoilandgasalliance.com

46 See e.g., Article 26.2 of the 2019 Dutch Model BIT.

47 See Bernasconi-Osterwalder, N., Schaugg, L., & Van den Berghe, A. (2021). *Energy Charter Treaty reform: Why withdrawal is an option.* International Institute for Sustainable Development. https://www.iisd.org/itn/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/.

have included sufficiently clear transitional provisions—or the transition periods provided may be overly long, thereby effectively locking in the status quo. Treaty replacements or amendments are also usually subject to ratification, approval, or acceptance procedures at the national level, further adding to the duration of systemic reform.

24. Legal barriers also exist at the intersection of bilateral and multilateral levels, where new regional and mega-regional treaties are added to a plethora of existing bilateral agreements without fully replacing or consolidating them. For instance, 37 IIAs that predate the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) remain in force among CPTPP member countries. The Regional Comprehensive Economic Partnership (Art. 20.2) even expressly affirmed the coexistence of existing treaties among its parties. Similarly, the ECT overlaps with several other bilateral investment treaties. Neither the ECT nor CPTPP includes sufficiently potent conflict clauses to clarify situations of overlap.

25. Regional and multilateral investment agreements often involve legal barriers to reform that are distinct from the bilateral context. Consensus and ratification by unanimity or a majority of all contracting states of an agreement are usually required to amend regional or multilateral agreements. This allows a small number of states that are opposing reform to block amendment processes. For instance, in the current modernization of the ECT, the European Union has been unable to rally the required support for its proposal on limiting the coverage of fossil fuel investments in a modernized ECT,[48] due to the resistance of a small number of non-EU states.[49]

26. While a uni- or plurilateral withdrawal will normally trigger the sunset clauses these treaties typically contain, a neutralization of this sunset clause is not as straightforward as in the bilateral context. A group of states may modify the treaty to extinguish the sunset clause *inter se*,[50] but this neutralization will not affect their relationships with other treaty parties.

3. Increased Negotiation Complexity Requires Governments to Adopt Sophisticated Strategies

27. In addition to economic and legal barriers, treaty negotiations today are significantly more complex than they were at the time of the conclusion of "first-generation" IIAs. Negotiations increasingly involve a risk of trade-offs between investment and other policy areas and quid pro quos. Recent treaties also interact significantly more with other regimes of international law, such as laws relating to climate change and biodiversity, labour law and corporate social responsibility, trade and intellectual property law, and

[48] EU. (2020). *EU text proposal for the modernisation of the Energy Charter Treaty.* https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

[49] Especially state parties that are heavily reliant on fossil fuel exports; see Taylor, K. (2021). *Leaked diplomatic cables show 'limited progress' in Energy Charter Treaty reform talks.* https://www.euractiv.com/section/energy/news/leaked-diplomatic-cables-show-limited-progress-in-energy-charter-treaty-reform-talks.

[50] Johnson, L., Sachs, L. Coleman, J., & Güven, B. (2018). *Clearing the path: Withdrawal of consent and termination as next steps for reforming international investment law* (p. 6.) (CCSI Policy paper). https://ccsi.columbia.edu/sites/default/files/content/docs/publications/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf

tax regulations, all of which need consideration in treaty renegotiations.[51] In contrast, the increasing fragmentation and specialization of international law render an integration of climate and investment policies at the treaty level more complex. Negotiations are therefore increasingly time consuming and costly and require significant human resources and specialized know-how, thereby raising additional challenges for countries—especially those in the Global South. While this new situation requires integrated negotiation strategies that take into account interdisciplinary and cross-cutting issues, such strategies presuppose a high level of interagency coordination that must first be developed.

28. The rising complexity of investment treaty-making and reform is further exacerbated by significant asymmetries in negotiating power between developing and developed countries.[52]

IV. Policy Recommendations

29. If the OECD decides to work on reform of investment agreements, it should consider the following:

1. Take a multistakeholder approach and coordinate with other ongoing reform efforts

30. Systemic changes to existing frameworks mean moving away from a strict investment protection and investment liberalization perspective toward the creation of a sustainable investment governance framework. However, this is unlikely to happen if reform and negotiations processes are led only by states' trade and investment representatives and investment arbitration experts. Redesigning investment agreements has an important prerequisite: it requires the adoption of a multistakeholder approach, allowing the effective balance of non-economic interests during the negotiations. It particularly requires relying on (i) scientific evidence, independent and multidisciplinary impact assessments, and costs and benefits analysis; (ii) involvement of relevant experts on environmental, climate, and other non-economic issues; and (iii) transparency and appropriate participation of stakeholders, in particular civil society.

31. Furthermore, the multiplicity of ongoing reform processes—at UNCTAD, UNCITRAL, the International Centre for Settlement of Investment Disputes (ICSID), WTO, regional bodies, and in the bilateral context—require far greater coordination and strategic planning to avoid inefficiency. Only by coordinating and integrating efforts will the

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[51] See Bernasconi-Osterwalder et al., 2021, supra n. 47, p. 10; see Owens, J., & Zhan, J. (2018). Trade, investment and taxation: Policy linkages. *Transnational Corporations, 25*(2), 1–8, https://www.un-ilibrary.org/content/journals/2076099x/25/2/1; See also UNCTAD. (2021). Recent developments in the IIA regime: Accelerating IIA reform. *IIA Issues Note, 3,* 11. https://unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf.

[52] States are often parties to numerous IIAs and if "a given State wants to amend its agreements to resolve an issue of scope, or reach an interpretive agreement with its treaty partners to clarify the substantive meaning of standards, it may have to do so on an individual treaty-by-treaty basis. That exercise is not only time consuming but, as anecdotal evidence indicates, often unsuccessful, due to asymmetries in power between the treaty parties or other misaligned interests" (Johnson et al., 2018, supra n. 50, p. 6.

international community be able to foster the rapid change required to give states the regulatory space they need. This could also involve coordination with the World Investment for Development Alliance[53] hosted by UNCTAD with the participation of the OECD. Such coordination would also reduce negotiation costs and time and would ensure greater certainty, transparency, and accountability.

2. Explore a wide range of alternative options

32. In order to respond to climate change in investment agreements and remove barriers to climate action, a number of creative and credible alternative options deserve to be further discussed and examined. They may be implemented individually or in parallel:

a. Multilateral termination or withdrawal of consent to ISDS

33. Any reform effort should involve consideration of the development of a multilateral "exit" agreement that allows for the coordinated termination of investment agreements and the invalidation of "sunset" or "survival" clauses.[54] As stated above, these clauses extend the life of treaties up to 20 years beyond termination, thwarting government action to keep warming well below 2°C. An exit agreement would address these concerns swiftly and systemically and would avoid a multiplication of negotiations at bilateral levels.

34. Such an option would allow states to easily move away from traditional investment agreements and develop sustainable investment governance frameworks.[55]

35. As an alternative to termination, the OECD could support the development of a multilateral instrument for states to withdraw consent to ISDS under existing investment agreements, leaving them bound by their substantive obligations and accountable by way of state-to-state dispute settlement.[56] Preferably, this would be coupled with a requirement for investors to first exhaust local remedies.

[53] See website of the World Investment Forum (UNCTAD). (2021, October 18). *Towards the establishment of the world investment for development alliance (in partnership with the World Economic Forum)*. https://worldinvestmentforum.unctad.org/session/launching-a-global-alliance-for-sustainable-investment/.

[54] See the *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union* (2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01); Bernasconi-Osterwalder, N., Brewer, S., Brauch, M. D., & Nikièma, S. (2020). *Terminating a bilateral investment treaty.* IISD Best Practices Series. International Institute for Sustainable Development. https://www.iisd.org/system/files/publications/terminating-treaty-best-practices-en.pdf; Columbia Center on Sustainable Development, IIED, & International Institute for Sustainable Development. (2019). *Draft treaty language: Withdrawal of consent to arbitrate and termination of International Investment Agreements.* Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_withdrawalconsent_0.pdf; Johnson et al., 2018, *supra* n. 50.

[55] See Brauch et al. (2018). *Treaty on sustainable investment for climate change mitigation and adaptation.* IISD Submission to the Stockholm Treaty Lab. https://www.iisd.org/publications/treaty-sustainable-investment-climate-change-mitigation-adaptation

[56] See Bernasconi-Osterwalder, N. (2014, October). *State-state dispute settlement in investment treaties.* IISD Best Practice Series. International Institute for Sustainable Development. https://www.iisd.org/system/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf.

36. From a climate perspective, the option of relying on state–state dispute settlement would reduce the litigation risk, increase home state involvement, and emphasize the shared responsibility of home and host states to take climate action. Investors would also be less likely to (successfully) challenge measures needed to achieve the goals of the Paris Agreement.

37. Whether states choose to terminate IIAs or withdraw consent to ISDS, investors would still be able to challenge the validity of climate measures at the domestic level.

b. Removal of investment treaty protections for fossil fuel investments

38. Continuing to provide generous risk insurance policies and rewarding investments that urgently need to be discouraged if the world is to avoid climate catastrophe simply does not make sense. Another option for the OECD would be to develop a multilateral instrument whereby countries would agree on a list of carbon-intensive investments (in particular, fossil fuel investments such as extraction, transport, and refining of coal, oil, and gas) that would be excluded from the scope of investment agreements' application.[57]

39. The EU has recently proposed such an approach in the context of the modernization of the ECT. According to the EU's proposal on the application of Part III of the ECT (investment protection and ISDS), existing fossil fuel investments would remain protected for another 10 years after the proposed amendment entered into force. Future investments in fossil fuels would be excluded from the scope of the ECT's investment protections, except for investments in certain gas infrastructures and power plants that could continue to be protected until 2030 (and 2040 for certain gas pipelines). Such a proposal is a step in the right direction, but the 10-year period for phasing out existing investments and the exemptions afforded to certain future gas investment risk creates a major stumbling block to achieving climate objectives. In order to align with Paris Agreement goals and avert the irreversible damage that would ensue if temperature rise surpasses 1.5°, even temporarily, the protection of all fossil fuel investments should be phased out as soon as possible.

40. This option would ensure coherency and consistency of investment agreements with the Paris Agreement. It would also substantially reduce litigation risk since the fossil fuel industry is the primary user of arbitration systems.

c. Carve-out for climate-related measures

41. Based on evidence showing that a large number of ISDS cases have been brought in relation to environmental regulations, and considering the specific threat posed by fossil fuel industries challenging efforts to address climate change,[58] it is of paramount importance to clarify that regulatory changes required to respond to the climate emergency cannot be interpreted as a breach of an investment treaty. Because of the

[57] The approach taken in the EU taxonomy for sustainable activities could inspire and inform states in determining the best approach to define what can be considered low-carbon energy investments that will benefit from treaty-based protection under a modernized ECT.

[58] See Di Salvatore, L. (2021). *Investor-state disputes in the fossil fuel industry*. International Institute for Sustainable Development. https://www.iisd.org/publications/investor-state-disputes-fossil-fuel-industry.

longstanding scientific consensus around the causes of anthropogenic climate change (fossil fuels chief among them) and its impacts, as well as international action on it (1992 UNFCCC, 1997 Kyoto Protocol, and 2015 Paris Agreement), investors can only have expected progressively more stringent national regulation in this area.

42. The OECD could also encourage its members to reach a legal agreement on how to navigate frictions between climate policies and investment law. This could first consist of the **establishment of a preliminary reference procedure and a panel of climate experts**, as developed by Ankersmit and Lawrence in 2019: "One way of preventing arbitrators from glossing over or misunderstanding obligations that result from the UNFCCC would be to involve climate experts early in the dispute settlement process. We recommend putting climate experts in the driver's seat in the application of the UNFCCC regime in the context of trade and investment agreements."[59] Such a preliminary climate reference mechanism would oblige arbitration tribunals to refer on their own motion any questions relating to the interpretation or application of the Paris Agreement (or other climate instruments) to a climate expert panel, including instances where a party invokes compliance with a UNFCCC agreement such as the Paris Agreement to justify a challenged act or measure.

43. Secondly, similar to the mechanism proposed in respect of the dismissal of frivolous claims,[60] OECD members could facilitate the conclusion of a multilateral **agreement to carve out climate measures** from the scope of ISDS. This type of agreement would demonstrate that OECD member states think that claims challenging climate measures should be dismissed. In turn, if tribunals do not dismiss such claims, the OECD or its members could commit to submitting amicus briefs to encourage the dismissal of those claims.[61]

44. The carve-out would apply to any measure linked to the objective and principles of, or commitment to, the UNFCCC. Relying on the language of UNFCCC would allow the climate carve-out to apply to a wide range of state measures relating to climate change mitigation and adaptation. In particular, this provision should clearly mention that IIA protection and ISDS would not be permitted in the context of a denial or revocation of permits for exploration and the development of fossil fuels; the planned phase-out of certain energy sources such as coal, oil, and gas; and the removal of fossil fuel subsidies. Investors would still be able to challenge the validity of these measures at the domestic level. By ruling out the possibility of ISDS cases on climate change measures, the carve-out would significantly reduce the risk of regulatory chill, including any cross-border chilling effect.

[59] Lawrence, J., & Ankersmit, L. (2019). *Making EU FTAs 'Paris Safe': Three studies with concrete proposals.* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407949; See, for example, *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL and Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No ARB/16/41.

[60] Secretariat of UNCITRAL Working Group III. (2018). *Possible reform of investor-state dispute settlement (ISDS): Note by the Secretariat* (A/CN.9WG.III/WP.149) (para. 15). https://undocs.org/en/A/CN.9/WG.III/WP.149.

[61] As an example, the European Commission has recently adopted an active and ambitious role as amicus curiae petitioner seeking annulment of intra-EU arbitration awards and uniform application of EU law. See for example, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Spain, ICSID Case No. ARB/13/36.

d. Reining in excessive awards of compensation

45. In recent years, the amounts of compensation awarded by arbitral tribunals in ISDS have been increasingly large, reaching hundreds of millions and even billions of U.S. dollars. Tribunals frequently award compensation for loss of future income across the life of a project, calculated based on a series of complex and interlocking assumptions about the future. Large awards pose serious challenges for states and have systemic implications that directly affect climate policy and exacerbate regulatory chill. Nevertheless, the issue of compensation has not received the same attention from policy-makers as other aspects of international investment law. As such, it largely remains unregulated by states' treaty practice, affording a great deal of discretion to arbitrators on this critical topic. Arbitral jurisprudence is not only inconsistent from case to case within the ISDS regime, it also increasingly departs from previously accepted principles of international law and practice in other international courts, as well as the approaches to compensation in domestic courts.[62]

46. To address this issue, states could explore ways to implement a balancing approach to the award of compensation that would oblige tribunals to take into account a range of contextual factors and public interest objectives, including climate change mitigation and adaptation. States could also decide to cap compensation at the amount actually invested by the investor, to prevent large awards based on a speculative scenario of future income streams. A third option would be to integrate into compensation principles questions of whether the host state has obtained any benefit from allowing the investment to proceed. Lastly, states could also consider requiring arbitral tribunals to follow the law of the host state when determining compensation or referring questions of quantum (the amount of compensation owing) to the domestic courts once the tribunal has found the state to be in breach of the investment treaty.[63]

e. Additional short-term options besides reform

47. Besides these options for long- and medium-term reform, states should also explore short-term options to address legal risks. With regard to ongoing cases, home states could undertake to more systematically intervene as non-disputing parties in ISDS proceedings to emphasize a treaty interpretation in line with original state intent and international climate commitments.

48. More generally, states could rein in increasingly broad arbitral treaty interpretation by issuing joint interpretive statements. Those interpretative statements should also cover the interpretation of environmental provisions, exception provisions, legality provisions, carve-outs, or other types of safeguard provisions. Such clauses could limit potential ISDS claims and secure space for domestic policy-making. Those interpretative statements shall affirm their understanding that IIAs have to be interpreted in light of/in conformity with international climate change obligations.

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[62] An example would be the fundamentally different valuation techniques used in the cases of Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Award, para. 278 and Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award, para. 596.

[63] See Bonnitcha & Brewin, 2020, supra n. 19.

49. Lastly, home states could explore the possibility of granting extraterritorial civil jurisdiction to claimants that have suffered damages from the adverse environmental and climate impact of foreign investors, thereby increasing investor accountability.[64]

[64] See Ullauri, P. (2020). Reconciling the rights of multinational companies under IIAs with the tort liability caused by their subsidiaries. *Investment Treaty News, 4*(11), 6 https://www.iisd.org/system/files/2020-12/iisd-itn-december-2020-english.pdf.

THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

CIEL is an independent, nonprofit organization with offices in Washington DC, United States, and Geneva, Switzerland. Since 1989, CIEL has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. In the context of investor–state dispute settlement (ISDS), CIEL focuses on how investment law and arbitration affect human rights and the environment, and the role of international environmental and human rights law in the resolution of investment disputes. CIEL has participated as amicus curiae in multiple investment arbitration cases, has published extensively on investment and trade law, and has worked on ISDS reform and free trade agreement negotiations.

CLIENTEARTH

ClientEarth is an independent, non-profit organization providing dedicated public interest legal capacity for the environment since 2007. ClientEarth's goal is to use the power of the law to bring about systemic change that protects the Earth for—and with—its inhabitants. We come up with practical solutions to the world's toughest environmental challenges and work with people, campaigners, governments, and industry to make those solutions a reality. ClientEarth has legal expertise in the application and enforcement of environmental law, as well as relevant knowledge and experience in supporting non-governmental organizations and communities in various legal forums, including in supporting groups submitting amicus briefs in arbitration proceedings. ClientEarth has extensively published on and actively participated in negotiations of investment and ISDS reforms.

INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD)

IISD is an award-winning independent think tank working to create a world where people and the planet thrive. IISD works with governments and civil society to develop and improve legal and policy tools focusing on the critical linkage between investment and sustainable development. IISD actively participates in the ISDS reform process at UNCITRAL Working Group III, the UN talks on a binding treaty on business and human rights, and the negotiations of several regional investment instruments in the Global South. As an integral component of its investment work, IISD is also the host and convener of the Annual Forum of Developing Country Investment Negotiators, an event that brings together officials from across world regions to discuss the latest trends in these areas, exchange experiences, design innovative approaches, and assess possible next steps.