



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND COLUMBIA CLIMATE SCHOOL

CCSI Submission to the Special Rapporteur on Human Rights and the Environment

Investor-State Dispute Settlement (ISDS) Mechanisms and the Right To a Clean, Healthy, and Sustainable Environment

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Effectively addressing the triple planetary crisis of climate change, pollution, and biodiversity loss requires swift, global, and coordinated changes across our societies, encompassing deep and systemic transformations.

Yet conflicting laws and approaches among the various national and international institutions and regulatory authorities pose significant challenges to achieving this objective. The incompatibility of the international investment law (IIL) regime, including its enforcement mechanism, investor-state dispute settlement (ISDS), with national and international environmental measures and goals has become increasingly apparent and recognized in recent years.

IIL and ISDS impact environmental governance and undermine substantive and procedural rights related to the right to a healthy environment. To begin with, ISDS considerably [increases the cost of environmental measures](#). Second, each lawsuit claims a violation of international law, thereby impacting the reputation of the respondent State and imposing a considerable political cost. Third, ISDS exacerbates the power imbalance between investors and other domestic stakeholders. It provides investors with a much more powerful tool than the minimal avenues provided to citizens or communities to access justice and remedies against investors' misconduct or against their governments' inaction on environmental matters. Investor-state arbitrations can also [create or exacerbate barriers to effective remedies for individuals and communities](#), particularly those impacted by large-scale land-based investments. Fourth, ISDS can render it legally impossible to maintain the challenged measure; in certain instances, tribunals can and have used powers of injunctive relief to order governments to do, or

not do, certain things (See, e.g., [Chevron v. Ecuador](#), 2018). Fifth, ISDS cases have norm-creating and norm-shifting effects, where investor-state arbitral awards have expanded key dimensions of the scope of investor protections over time, to the detriment of other international obligations and goals. Lastly, ISDS significantly undermines the procedural rights related to the right to a healthy environment, such as the right to access to information and the right to access to justice, as enshrined in the Aarhus Convention and the Escazú Agreement. More often than not, proceedings are not public, from the notification of the arbitration itself to the award decision. This lack of transparency considerably limits access to information for affected third parties (for further details, please refer to our response to Question 1.a.) as well as an informed discussion about reform of investment law and governance. Affected third parties have only very limited opportunities to participate in the process, [mainly as amicus curiae, and even then, their request must be accepted by the tribunal, which rarely occurs.](#)

The Dutch coal phase-out is a notable example highlighting how IIL and ISDS can undermine the right to a healthy environment. [One of the first recorded climate lawsuits was initiated by the NGO Urgenda against the Dutch Government \(in 2015\).](#) The lawsuit claimed that the government's failure to reduce emissions violated its climate commitments. In 2019, the Dutch Supreme Court upheld the District Court's decision (2015), ordering the government to take more immediate and effective action on climate change. While the landmark ruling was primarily based on the duty of care, the court relied on the European Court of Human Rights (ECtHR) interpretation of Articles 2 and 8 of the European Convention on Human Rights. Article 2, the right to life, and Article 8, the right to respect for private and family life, [have been relied upon as indirectly guaranteeing the right to a healthy environment in ECtHR jurisprudence](#), given the absence of the right to a healthy environment in the Convention.

In line with the case's outcome, the Netherlands adopted in 2019 a [law phasing out coal as an energy source](#). Following the adoption of this law, RWE and Uniper initiated investment arbitrations against the Netherlands, alleging that these measures breached the Energy Charter Treaty (ECT) and sought a significant compensation of USD 1.4 billion in total. While [Uniper](#) withdrew its claim after receiving a German bail-out, the case brought by [RWE](#) is still pending. Thus, these ISDS claims directly target climate measures adopted in conformity with international obligations and undermine the right to a healthy environment.

[Denmark and New Zealand have both indicated that the threat of ISDS claims is limiting their climate action](#), suggesting that the chilling effect of these and other ISDS cases is much deeper than documented.

Numerous investment arbitrations have been initiated in cases where environmental rights and impacts are central to the underlying dispute; in many of these cases, clear human rights violations have been reported, such as *Copper Mesa v. Ecuador* ([2011](#)). Similarly, there have been instances where investors are responsible for ecological disasters, as seen in *Chevron and TexPet v. Ecuador I & II* ([2006](#) and [2009](#)), *Shell v. Nigeria* ([2007](#) and [2020](#)), and *Eni v. Nigeria* ([2020](#)).

[In 2022, five young European citizens initiated a climate lawsuit at the European Court of Human Rights.](#)

They argued that the ECT, ratified by all twelve Respondent States, safeguards investors in the fossil fuel industry from regulatory changes and provides them with excessive compensation options through ISDS, undermining states' ability to implement climate change measures in line with the Paris Agreement. The claim is based on the right to life (Article 2) and the right to respect for private and family life (Article 8) under the European Convention on Human Rights. As mentioned above, these articles have been relied upon as indirectly guaranteeing the right to a healthy environment in ECtHR jurisprudence. This is the first recorded case where the applicants directly target an international investment agreement, contending that its protection of fossil fuel investors violates their human right to a healthy environment. The case is currently pending.

It is evident that the IIL regime needs to be aligned with international human rights law, international climate change law, and other relevant international obligations to effectively address the triple planetary crisis of climate change, pollution, and biodiversity loss.

In light of these circumstances, the Columbia Center on Sustainable Investment takes the opportunity to draw attention to the resources we have published that elaborate on the questions posted to inform the Rapporteur's report on "Investor-State Dispute Settlement (ISDS) mechanisms and the right to a clean, healthy and sustainable environment."

- 1. Has your State been the subject of ISDS arbitration claims as a result of government actions intended to address climate change, protect the environment or advance the right to a clean, healthy and sustainable environment? Please provide details, including links to settlements or decisions by international arbitration panels where possible.**

This [2019 paper](#) explains how the ISDS mechanism may influence the future of environmental justice. It revisits and builds upon discussions of how ISDS may chill legitimate and necessary regulation (or shift the costs thereof), elaborating upon theories of chill and providing examples of how ISDS has been used to challenge actions taken to address the climate crisis and protect threatened water resources. The paper then explores implications for the environmental justice dimensions of environmental regulation, describing how ISDS can undermine democratic processes and stakeholders' abilities to meaningfully participate in environmental decision-making and protect their rights. The paper concludes with recommendations on how states can address the systemic impact of ISDS on regulatory space over environmental and other matters of public interest. A [shorter version](#) of this piece was published on the Kluwer Arbitration Blog on November 13, 2019.

Existing investment treaties do not and cannot advance climate goals. There is a fundamental misalignment between the existing IIL regime—including its centerpiece: ISDS—and the actions needed to meet the objectives of the international climate regime and avoid catastrophic climate change.

This [article](#) argues that, while it has not yet received adequate attention, the possibility that the climate change-related measures States implement will be inconsistent with their obligations under their international investment agreements (IIAs) poses a potentially greater threat of liability for

governments. Although States do likely face exposure to IIA-based claims for their actions on climate change, there are strategies governments can and should pursue to minimize their potential liability.

CCSI's briefing [International Investment Governance and Achieving a Just Zero-Carbon Future](#), published in November 2022, details how attempts to "re-balance" the IIL regime by refining investment protection and arbitration provisions do not address the fundamental misalignment of investment treaties with both climate goals and the broader sustainable development agenda.

In this [blog](#) and this [blog](#), we make considerations and recommendations on how States can advance climate-aligned energy investment.

[Read CCSI's work exploring the proposals for a wholly new regime for investment governance](#), moving away from investment protection and arbitration.

a. Has the public been informed of these ISDS cases and been given an opportunity to participate?

Under the arbitration rules that commonly govern ISDS proceedings, these disputes can remain hidden from public view from their commencement through their conclusion. Committed to the belief that transparency in ISDS is fundamental for accountability, good governance, and the rule of law, elements which are, in turn, crucial for sustainable development, CCSI has [been working to advance such transparency](#). In October 2012, CCSI and partners submitted two documents to country delegations to UNCITRAL: a [background note](#) describing and analyzing the key issues involved in UNCITRAL's work to increase transparency in investor-state arbitrations, and a [proposal for specific text](#) that UNCITRAL could adopt. Based on [developments in October 2012](#), in February 2013, CCSI submitted [additional comments](#) on UNCITRAL's efforts to ensure transparency of investor-state arbitration. In March 2017, we provided [comments on transparency](#) in connection with efforts by the World Bank to reform ISDS.

Among the critical issues that arise from the interaction of human rights and investment law is whether and how the relatively greater access to justice provided to aggrieved investors by the international investment regime undermines access to justice for other individuals and communities. IIAs and ISDS together provide a unique means of access to remedy for foreign investors, which in turn may create or exacerbate barriers to effective remedy for individuals and communities, including those affected by large-scale land-based investment.

CCSI is working to: (1) [shed light on exactly how greater access to justice for investors affects individuals and communities](#); (2) [in light of those findings, assess the appropriateness of specific policy options and responses on the part of host government policymakers and home state actors](#); and (3) [support policymakers and other stakeholders in better assessing and addressing the impacts of IIAs and ISDS on access to justice for investment-affected individuals and communities](#).

3. Has your State taken any actions to protect itself from future ISDS claims that could result from government actions intended to address climate change, protect the environment or advance the right to a clean, healthy and sustainable environment? For example, withdrawing from investment and trade treaties containing ISDS mechanisms (e.g. Energy Charter Treaty), renegotiating these

treaties, or refusing to include ISDS provisions in new investment and trade treaties. What were the motivations for, and consequences of, these actions? What were the main obstacles to taking such actions?

CCSI has explored [two near-term options](#) that governments engaged in reform discussions can pursue, alongside longer-term work on substantive and procedural reform. These options, as explored in this [policy paper](#), are: (1) a joint instrument on withdrawal of consent to arbitrate; and/or (2) a joint instrument on termination. We have examined how both options could be implemented and make the case for putting a pause on ISDS to ensure that investment treaties and their dispute settlement mechanisms achieve their desired ends, produce legitimate decisions, and do not broadly undermine international economic cooperation and sustainable development.

5. Please provide any other information regarding the impacts of ISDS mechanisms on human rights and the environment, including your perspective on the wisdom of prioritizing the interests of foreign investors above the right to a clean, healthy and sustainable environment and other human rights, especially where the rights of specific groups including women and girls, children, Indigenous peoples, people of African descent, peasants and other local communities, disabled persons, migrants, persons living in poverty and other groups are involved.

Additional resources addressing the impacts of ISDS on human rights and the environment include the following research.

This Handbook [chapter](#) provides an overview of how ISDS affects human rights.

In October 2017, CCSI and the UN Working Group on Business and Human Rights co-organized a roundtable to discuss the impacts of IIL on access to justice. This [short briefing note](#) and [longer outcome document](#) summarize the key points from that discussion.

In November 2017, CCSI, LSE's Laboratory for Advanced Research on the Global Economy, and the UN Working Group on Business and Human Rights co-organized a [session](#) at the UN Forum on Business and Human Rights on the implications of the IIL regime for realizing access to remedy.

In April 2019, CCSI hosted a [meeting](#) alongside UNCITRAL Working Group III's 37th Session on the reform of ISDS to discuss investment disputes and the rights and interests of third (or non) parties. The meeting provided government delegates and other stakeholders an opportunity to explore ways in which investor-state arbitration affects the rights of third parties and to consider mechanisms that would allow investment dispute settlement processes to meaningfully consider the range of rights and interests at stake in investment disputes. The slides used for the opening presentation are accessible [here](#).

In July 2019, CCSI, along with the International Institute for Environment and Development (IIED) and the International Institute for Sustainable Development (IISD), submitted a [document to UNCITRAL outlining potential reform options concerning third-party rights and ISDS](#). The submission builds on work highlighting the impact of ISDS on access to justice for third parties; elaborates on how investor-state arbitrations can affect third parties; and offers examples of procedural tools that states could use to better safeguard those third parties' rights. It was made in response to an invitation for submissions by

states and other stakeholders on reform options (see para. 83 of document A/CN.9/970, Report of Working Group III on the 37th Session), which will inform UNCITRAL's efforts around identifying and prioritizing particular solutions that UNCITRAL will develop in the next phase of its work. Other submissions made by CCSI and partner organizations can be found [here](#).

CCSI has begun to analyze how IIAs and investor-state dispute settlement can impact the rights of human rights defenders. In particular, CCSI is considering the possibility that the IIL regime may, in a causal way, exacerbate the repression and criminalization of human rights defenders in the context of investment projects. Work on investor protections and human rights defenders has included:

In March 2018, CCSI submitted [input to the UN Working Group on Business and Human Rights](#) regarding "guidance on human rights defenders and the role of business."

In March 2018, CCSI also submitted [input to the UN Special Rapporteur on the rights of indigenous people, Ms. Victoria Tauli-Corpuz](#), on "criminalization and attacks against indigenous peoples defending their rights: proposals for actions to prevent and protect."